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BETWEEN AUTONOMY AND INTEGRATION:

FRAMING THE COMPLEMENTARITY OF EU AND MEMBER STATES' LAW IN THE ADMINISTRATIVE DESIGN OF NATIONAL COMPETENT AUTHORITIES

Ph.D. candidate: Pietro Mattioli

Supervisor: Pieter Van Cleynenbreugel

Co-supervisor: Julien Bois

SUMMARY

(English)

This essay builds upon five previously published and peer-reviewed contributions that together constitute the intellectual foundation of my doctoral research. It integrates and further develops the insights emerging from those contributions into a more coherent analytical framework capable of addressing the research questions and objectives.

The principal objective of this doctoral research is to delineate the normative framework governing the EU administrative design of national authorities competent to enforce EU law at the domestic level and to examine the interplay between EU integration and Member State autonomy within that framework.

In order to define such a normative framework, this essay first examines the role of national institutional autonomy in the EU administrative design of national competent authorities. In doing so, it addresses the legal status, normative force, and scope of this autonomy, which remain unsettled in both the academic literature and the case law of the Court of Justice. Thereafter, through a detailed analysis of the Court's case law, the essay assesses how national institutional autonomy is balanced against other principles, such as effectiveness and sincere cooperation. Building on this analysis, it is argued that the current normative framework is not neutral. Instead, driven by judicial interpretation, this framework incrementally aligns national administrative arrangements with EU law objectives, often at the expense of the institutional autonomy of the Member States.

Against this background, the essay assesses the tenability of the existing normative framework governing the EU administrative design of national competent authorities and explores whether and how the emerging imbalance between EU integration and Member State autonomy might be addressed as a matter of EU law. In response to the prevailing integration-oriented rationale, it proposes a stronger normative role for national institutional autonomy, complemented by the operationalisation of the principles of good administration, in order to provide a framework that is intended to better accommodate national administrative diversity.

RÉSUMÉ

(French)

Cet essai s'appuie sur une série de cinq publications, ayant subi une évaluation « peer-review », antérieures qui constituent, ensemble, le socle intellectuel de ma recherche doctorale. Il intègre et développe davantage les analyses issues de ces travaux au sein d'un cadre analytique cohérent, capable de répondre aux questions et objectifs de la recherche doctorale.

L'objectif principal de cette recherche doctorale est de délimiter le cadre normatif régissant l'organisation administrative de l'UE des autorités nationales compétentes pour l'application du droit de l'UE au niveau national, et d'examiner l'interaction entre l'intégration européenne et l'autonomie des États membres au sein de ce cadre.

Dans le but de définir un tel cadre normatif, cet essai examine d'abord le rôle de l'autonomie institutionnelle nationale dans la conception administrative des autorités nationales compétentes au sein de l'UE. Ce faisant, il aborde également le statut juridique, la force normative et le champ d'application de cette autonomie, qui demeurent incertains tant dans la doctrine juridique que dans la jurisprudence de la Cour de justice. Ensuite, à travers une analyse de la jurisprudence de la Cour de justice, cet essai étudie la manière dont l'autonomie est équilibrée par rapport à d'autres principes, tels que l'effectivité et la coopération loyale. Sur la base de cette analyse, il est soutenu que le cadre normatif actuel n'est pas neutre. Au contraire, guidé par l'interprétation judiciaire, ce cadre aligne progressivement les dispositifs administratifs nationaux sur les objectifs du droit de l'UE, souvent au détriment de l'autonomie institutionnelle des États membres.

Dans ce contexte, l'essai évalue la soutenabilité du cadre normatif existant régissant l'organisation administrative de l'UE des autorités nationales compétentes et examine si, et dans quelle mesure, le déséquilibre émergent entre intégration européenne et autonomie des États membres peut être corrigé en droit de l'Union. En réponse à la logique prédominante axée sur l'intégration, il propose un renforcement du rôle normatif de l'autonomie institutionnelle nationale, complété par l'opérationnalisation des principes de bonne administration, afin de fournir un cadre destiné à mieux accommoder la diversité administrative nationale.

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INTRODUCTION

The day-to-day operation of European Union (EU) law largely relies on various Member State administrative bodies responsible for its implementation and, *a fortiori*, for its enforcement.[1]

To refer to those bodies, this essay will use the term 'national competent authorities'.[2] This term seeks to move beyond conventional sectoral terminologies.[3] Across sectors, the EU uses various labels to refer to the domestic institutions, agencies, bodies, or authorities responsible for the enforcement of its legislation.[4] A conventional distinction is drawn between national regulators supervising network

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[1] Stéphanie De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar Publishing, 2017); and Miroslava Scholten, *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023). On the difference between implementation and enforcement, Jan Jans, et al., *Europeanisation of Public Law* (Europa Law Publishing, 2007) 13 et seq. The authors clarify that in EU law, implementation is a broad, multi-stage process that encompasses all the steps taken by Member States to give effect to obligations arising under EU regulations and directives. It begins with the transposition of EU law into national law, whereby EU norms are formally incorporated into domestic legal systems. Implementation then continues with operationalisation, which involves putting the legal framework into practice by designating competent national authorities and adopting the necessary administrative, procedural, and enforcement arrangements. A further phase of implementation consists of the application of the EU rules (or the national measures implementing them) in concrete cases, through which specific rights and obligations are determined for individuals and entities. By contrast, enforcement constitutes only the final phase of the implementation process. It concerns ensuring that the rules already transposed, operationalised, and applied are actually complied with in practice. Enforcement therefore focuses on monitoring observance of the relevant legal provisions and, where necessary, securing compliance through corrective measures or sanctions. In other words, while implementation is about giving legal and institutional effect to EU law, enforcement is about guaranteeing adherence to those rules once they are in force and operative.

[2] The academic literature has yet to provide conceptual clarity on this matter. More generally, Maher M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70[1] The Cambridge Law Journal 113; and Saskia Lavrijssen and Annetje Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39[4] Legal Issues of Economic Integration 419, 422-423.

[3] At the same time, where the context may require greater specificity, the essay will adopt the terminology most appropriate to the particular legal instrument or regulatory regime under discussion. To clarify this last point, this essay will normally use the term national competent authority to refer interchangeably to Digital Services Coordinators under the Digital Services Act, independent supervisory authorities under the General Data Protection Regulation, and competent authorities under the Plant Protection Products Regulation, among others. Instead, where the context necessitates a more precise designation, the essay will employ the specific term relevant to that context.

[4] Specifically, on the terminological variations of administrative enforcement structures in the EU founding Treaties, see Pieter Van Cleynenbreugel, Katarzyna Jancewicz Jancewicz, and Julien Bois, 'Inconsistent administrative enforcement of EU law at Member State level: the Lisbon Treaty's hidden constitutional challenge?' (2024) EUDAIMONIA Working Paper 2024/1 https://orbi.uliege.be/handle/2268/314238 accessed 9 April 2025.

industries—defined as 'national regulatory authorities' (NRAs)[5]—and competition authorities.[6] Other EU legislative instruments, however, employ other sector-specific designations, notably supervisory authorities under the General Data Protection Regulation (GDPR) and Digital Services Coordinators (DSCs) under the Digital Services Act (DSA).[7]

Confronted with this variable use of specific terminology, the essay adopts the term 'national competent authorities' as an umbrella concept encompassing that diversity. This choice, rather than relying on alternative labels found in the literature,[8] reflects the term's increasing use in EU secondary legislation to denote national administrative bodies responsible for the enforcement of sector-specific EU rules at the national level.[9] By way of example, the DSA distinguishes between DSCs—the primary authorities responsible for supervising and monitoring the DSA within each Member State—and national competent authorities, a broader term that refers to any national authority with a specific mandate or expertise relevant to the DSA.[10]

[5] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L 321/36, art. 5; and Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity [2019] OJ L 158/125, art. 57.

[6] 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, 4.1.2003/1, art. 35.

[7] Respectively, 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 (General Data Protection Regulation or GDPR) [2016] OJ L 119/1, art. 51; and 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 Act or DSA) [2022] OJ L 277/1, art. 49.

[8] Scholars across different disciplines continue to employ various labels. For example, the term 'non-majoritarian institutions' is used to underscore the delegation of public authority to national entities that are insulated from direct political control. Notably, Giandomenico Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Journal of Public Policy 139, 160; Mark Thatcher and Alec Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25[1] West European Politics 1, 2; and David Coen and Mark Thatcher, 'The New Governance of Markets and Non-Majoritarian Regulators' (2005) 18[3] Governance 329. In the literature, the term 'independent regulatory authorities (agencies/commissions)' also figures. It is used in relation to the broader context of the regulatory state to emphasise the distinctive position of independence from the governments that define these bodies. For instance, Martin Shapiro, 'The problems of independent agencies in the United States and the European Union' (1997) 4[2] Journal of European Public Policy 276; Fabrizio Gilardi, 'Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis' (2002) 9[6] Journal of European Public Policy 873; and Mark Thatcher, 'The third force? Independent regulatory agencies and elected politicians in Europe', (2005) 18[3] Governance 347; Dawid Sześciło, 'Challenging Administrative Sovereignty: Dimensions of Independence of National Regulatory Authorities Under the EU Law' (2021) 27[1] European Public Law 191. Moreover, additional labels include 'autonomous public bodies' in Stéphanie De Somer, 'Introduction' in Stéphanie De Somer (ed) *Autonomous Public Bodies and the Law* (Edward Elgar Publishing, 2017) 5-8.

[9] For example, Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market [2009] OJ L 309/1.

[10] Regulation 2022/2065 (n 7) art. 49(1).

Over the past decade, both the number and significance of national competent authorities have progressively expanded within the 'European administrative space'.[11] In parallel to the most notable ones—such as competition authorities, data supervisory authorities, market surveillance authorities in the context of the AI Act, telecommunications and energy regulators—EU sectoral legislation has also entrusted specific administrative authorities with the responsibility of enforcing EU food safety legislation,[12] including plant protection products,[13] and migration,[14] among others.[15]

The significance of those authorities can be best exemplified by looking at specific examples of how they contribute to the enforcement of major EU regulatory frameworks, ensuring compliance with the obligations and rights established by these frameworks.[16] For example, an extensive body of literature has researched the role of national competition authorities in the enforcement of EU competition law.[17] Additionally, recent activities of data supervisory authorities under the GDPR provide further examples of the significance of these authorities in guaranteeing the effective enforcement of the obligations laid down in that Regulation.[18] Moreover, the crucial role of national competent authorities also emerges within the regulatory framework governing the placing of plant protection products (often referred to as pesticides) on the market.[19] The daily enforcement of the EU pesticide regulatory framework runs through the activities carried out by national authorities. Notably, Article 75(1) of

[11] The 'European administrative space' is defined as a cooperative system characterised by multiple actors—including Member State administrations, EU institutions, agencies, and other public and semi-public bodies—which work together to achieve jointly defined EU objectives. In more detail, Herwig CH Hofmann, 'European administration: nature and developments of a legal and political space' in Carol Harlow, Päivi Leino, and Giacinto della Cananea (eds) *Research Handbook on EU Administrative Law* (Edward Elgar Publishing, 2017) 21.
[12] Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products (Official Controls Regulation) [2017] OJ L 95/1, art. 4.
[13] Regulation 1107/2009 (n 9) art. 75.
[14] Directive 2013/32/EU on common procedures for granting and withdrawing international protection [2013] OJ L 180/60, art. 2.
[15] Scholten, *Research Handbook on the Enforcement of EU Law* (n 1).
[16] Jan Jans, et al., *Europeanisation of Public Law* (n 1) 13 et seq.
[17] In the literature, O Brook and Kati Cseres, 'Member States' Interest in the Enforcement of EU Competition Law: A Case Study of Article 101 TFEU' In Marton Varju (ed.), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer, 2019) 147; and Maciej Bernatt and Laura Zoboli, 'Competition law' in Miroslava Scholten, *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023) 397
[18] Notable recent cases include the decision of the Italian Data Protection Authority to restrict the operations of DeepSeek, a Chinese artificial intelligence service, within Italy under Article 58(2)(f) GDPR. In more detail, Garante per la protezione dei dati personali, Decision of the 30 January 2025, n10098477. Furthermore, the recent fine imposed by the Irish Data Protection Commission on LinkedIn Ireland for unlawful processing of personal data contrary to Articles 6(1)(a), (f), and (b) GDPR. See, Data Protection Commission, 'Decision of the Data Protection Commission made pursuant to Section 113 of the Data Protection Act 2018 and Article 60 of the General Data Protection Regulation' (22 October 2024) DPC Case Reference: IN-18-08-3. In brief, https://www.dataprotection.ie/en/news-media/press-releases/irish-data-protection-commission-fines-linkedin-ireland-eu310-million
[19] Regulation 1107/2009 (n 9).

Regulation (EC) No 1107/2009 (Plant Protection Product Regulation or PPPR) requires each Member State to 'designate a competent authority or authorities to carry out the obligations of the Member States laid down in this Regulation.' Under the conditions laid down by the PPPR, these authorities act as key institutional actors in both the approval of active substances at Union level and, even more importantly, the authorisation of plant protection products at Member State level.[20]

In sum, the realisation of EU law obligations, rights, objectives, and expected outcomes depends in practice on the activities of various Member States' administrative authorities.[21] This functional dependence has led the EU to pay increasing attention to the institutional design of those authorities, recognising that their structure and functioning directly affect the consistent and effective realisation of Union law.[22]

Paradoxically, however, the EU does not possess a general competence to organise the administrative systems of the Member States. It should be recalled that EU legislative action is governed by the principle of conferral.[23] Under the first sentence of Article 5(1) and Article 5(2) of the Treaty on European Union (TEU), the Union is competent only to the extent that legislative powers have been conferred upon it by the Member States in the Treaties.[24] Conversely, the EU cannot unilaterally extend its powers, and all competences not conferred upon it remain with the Member States.[25] The closest approximation to a Treaty-based foundation for the EU administrative action is Article 197 of the Treaty on the Functioning of the European Union (TFEU).[26] That provision recognises that the effective

[20] ibid, arts. 8 and 28.

[21] Daniel Halberstam, 'Comparative Federalism and the Issue of Commandeering', in Kalypso Nicolaidis, and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Pres, 2001) 213, 239 et seq.

[22] Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, 'Enforcement' in Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk (eds) Administrative Law and Policy of the European Union (Oxford University Press, 2011) 690 et seq.

[23] On the principle of conferral, Jacques Ziller, 'Scope of EU law and conferral' in Jacques Ziller, *Advanced Introduction to European Union Law European Union Law* (Edward Elgar Publishing, 2020) 15.

[24] Article 5(1) and (2) TEU: '1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality; 2. 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.

[25] Marcus Klamert, 'Article 5 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019) 83.

[26] More specifically, Article 197(2): 'The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes. No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonisation of the laws and regulations of the Member States.' and (3): 'This Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission.

implementation of EU law by the Member States is essential for the proper functioning of the Union and therefore, shall be regarded as a matter of common interest.[27] On this basis, the EU 'may support the efforts of Member States to improve their administrative capacity to implement Union law'.[28] At the same time, however, Article 197 TFEU expressly excludes any harmonisation of national administrative structures and procedures.[29]

Despite the lack of a formal competence, however, the EU has progressively intervened in the administrative sphere of the Member States through the imposition of administrative/institutional design obligations,[30] thereby driving a gradual 'Europeanisation' of national administrative systems that unfolds in parallel with, and in support of, sectoral policies.[31] In this context, decisions on the organisation and functioning of national competent authorities, though formally within Member States' autonomy, simultaneously constitute key components of the EU governance system, shaping

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It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.'

[27] Article 197 TFEU, first paragraph.

[28] ibid, second paragraph.

[29] Sacha Garben, 'Article 197 TFEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (Oxford University Press, 2019) 1559, 1562. The author affirms that 'It has been regretted that the Treaty of Lisbon has not properly extended the EU legal basis for action in the area of European administrative law, particularly in order to allow the Union to codify the basic principles of European administration, pointing out that this would be desirable and much less intrusive than the extremely detailed provisions for the implementation of rules regarding specific matters, which can currently be found as an annex to the various substantial rules of secondary EU law.'

[30] The term 'administrative or institutional design obligations' is used in this essay to refer to the various obligations contained in EU secondary legislation that broadly concern the establishment (creation or designation), structural organisation, functions and powers, and *modus operandi* of national competent authorities.

[31] The term 'Europeanisation' is surrounded by conceptual ambiguity. For more details, Claudio Radaelli, 'The Europeanization of Public Policy' in Kevin Featherstone, and Claudio Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003) 30; Maria Green Cowles, James Caporaso, Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001). The term can be used to refer to a broad and complex set of phenomena. For instance, Johan Olsen, 'The many faces of Europeanization' (2002) 40 Journal of Common Market Studies 921, 923-924. The author distinguishes five different uses of Europeanisation: changes in external boundaries, developing institutions at European level, central penetration of national systems of governance, exporting forms of political organisation, and a political unification project. Given the wide reach of this concept, Europeanisation has also provided a powerful analytical framework for understanding the transformation of Member States' legal systems in the context of EU integration, and it has gained significant traction within legal scholarship, including EU administrative law. Notably, Michal Bobek, 'Europeanization of Public Law' in Armin Von Bogdandy and others (eds), *The Max Planck Handbook in European Public Law, Volume I: The Administrative State* (Oxford University Press, 2016) 631-673. In this setting, Europeanisation captures both bottom-up processes, through which national administrations and courts actively contribute to the shaping of EU administrative principles, and top-down dynamics, whereby EU law progressively restructures domestic administrative arrangements. Takis Tridimas, 'The general principles of EU law and the Europeanisation of national laws' (2020) 13 Review of European Administrative Law 5, 6. For the purposes of this essay, Europeanisation refers to how EU law reshapes the organisation, functioning, and practices of national administrations and national competent authorities more specifically. It therefore focuses on the top-down influence of EU secondary legislation and general principles of EU law on national administrations.

the uniform and effective application of Union law.[32] The concept of an 'Europeanised administrative law', often used in the legal literature and coined by Stefan Kadelbach,[33] provides a useful lens for understanding how national administrative law is shaped by EU law requirements, even in the absence of a formal competence to organise Member States' administrative systems.[34] It rests on the idea that the enforcement of EU law by national authorities remains formally governed by domestic administrative law, which is, however, progressively adapted to accommodate EU requirements. In this sense, national administrative law has become 'Europeanised' since it must accommodate EU administrative and institutional design obligations and the interpretative guidance of the Court of Justice of the European Union (Court of Justice, Court or CJEU).[35]

1. Doctoral Research Objectives and Questions

Given that the administrative design of national competent authorities rests on the interaction between EU law and the Member States' legal order, it is essential to understand what normative framework governs this interaction and what force—integrative or respective of Member State autonomy—that framework holds. By normative framework, this essay refers to the set of rules, principles, and doctrines that discipline comprehensively the way national competent authorities are organised and structured. At present, however, the articulation of such framework remains unsettled and mostly sparse across legal scholarship.

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[32] Christoph Knill, 'The analytical framework' in Christoph Knill, *The Europeanisation of National Administrations* (Cambridge University Press, 2009) 35.

[33] Jürgen Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon' (2012) 18[2] European Public Law 285, 290: 'Actually, European administrative law is developing in two different, but somehow overlapping forms: in a narrower sense as the administrative law which regulates the direct and indirect execution of European Union law and in a broader sense as the description of the process of harmonization of the legal standard for administrative action between national laws of the Member States and the European Union ('Europeanization of administrative law').

[34] Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration', in Christian Joerges, and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market, Collected Courses of the Academy of European Law* (Oxford University Press, 2002) 166. The author argues that EU administrative law has developed in three directions. The first set of rules and principles governs the execution of EU law by the institutions of the Union and, insofar as that law has direct effect, by the Member States. This constitutes EU administrative law in the strict sense of the term. The second body of administrative law governs the enforcement of EU law by national authorities and corresponds to the 'Europeanised administrative law' described in the essay. Third, the author identifies a further body of EU administrative law, consisting of national administrative rules that evolve under the influence of EU principles even in the absence of a direct legal obligation. Such changes may be voluntary or more strongly induced by EU law, and their scope varies across Member States.

[35] ibid.

Legal literature suggests that, through its gradual constitutionalisation, the EU legal order has come to resemble a federal system, whose functional scope extends far beyond the original economic objectives of the Treaties.[36] This expansion of Union competences has inevitably affected the balance between supranational authority and Member State autonomy.[37] In exercising its competences,[38] the Union has consistently prioritised effectiveness as a guiding principle,[39] relying on the loyalty of the Member States to achieve its policy objectives.[40] This essay does not seek to retrace the broader trajectory of European integration or the general relationship between EU law and Member State sovereignty, which has been extensively analysed elsewhere.[41] Rather, it specifically seeks to understand how the tension between EU integration and Member State autonomy is taking shape in the administrative design of national competent authorities.

Against this background, my doctoral research intends to answer the question whether any, and if so, what kind of, normative framework grounded in EU law applies to the EU administrative design of national competent authorities.

Confronted with this question, the essay argues that an integration-oriented rationale operates as the default normative framework guiding administrative design, whereas the institutional autonomy of the Member States—the freedom of the Member States to organise their administrative systems and procedures according to their own constitutional and institutional traditions—lacks comparable normative force. Put differently, principles such as effectiveness and sincere cooperation are firmly embedded in the case law of the Court of Justice and in legislative practice as core standards shaping

[36] Robert Schütze, From Dual to Cooperative Federalism: The Changing Structure of European Law (Oxford University Press, 2009); Amedeo Arena, 'The Twin Doctrines of Primacy and Pre-Emption' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Pres, 2018) 300, 307-311.

[37] Paul Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in Hans-Wolfgang Micklitz and Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 11.

[38] Also, in terms of institutional developments, Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, 'The Idea of European Union Administration—Its Nature and Development' in Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, *Administrative Law and Policy of the European Union* (Oxford University Press, 2011) 2, 10.

[39] Paul Craig, 'Integration, Democracy, and Legitimacy' in Paul Craig and Gráinne de Búrca (eds), The Evolution of EU Law (3rd edn Oxford University Press, 2021) 12.

[40] Marcus Klamert, 'Deconstructing Loyalty' in Marcus Klamert (ed.) *The Principle of Loyalty in EU Law* (Oxford University Press, 2014) 252.

[41] Hans-Wolfgang Micklitz and Bruno de Witte, *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012); Bruno de Witte, 'The law as tool and constraint of differentiated integration' (EUI Working Papers Vol. RSCAS 2019/47). Importantly, debates on differentiated integration, Paul Craig, 'EU Membership: Formal and Substantive Dimensions' (2020) 22 Cambridge Yearbook of European Legal Studies 1, 20-26.

the organisation and functioning of national competent authorities. By contrast, EU law does not provide a comparably systematic articulation of national institutional autonomy.[42] The legal status, meaning, and scope of this national institutional autonomy remain conceptually unsettled. It is unclear whether autonomy should be regarded as a constitutional principle of Union law, as a normative value informing the allocation of EU administrative powers, or merely as a descriptive expression of the limits of Union competence in the field of administrative organisation. Neither the Treaties nor the case law of the Court of Justice provide a definitive answer. Institutional autonomy currently operates as both an enabling and a limiting concept, without its legal status or normative force being clearly defined.[43]

2. Structure of the Essay

When developing its overall analysis, this essay builds upon the previous case studies and reflections underlying in three articles and two case notes, which have all been published following peer-review processes.[44] A brief overview of each contribution is set out below.

(1) The article '*The Quasi-Judicial Role of National Competent Authorities: an Ambiguity that the Principle of Effective Judicial Protection could help address?'* (Review of European Administrative Law, 2024) starts by highlighting how EU secondary legislation increasingly confers quasi-judicial functions to national competent authorities across various sectors.

[42] Maartje Verhoeven, *The Costanzo obligation*: *the obligations of national administrative authorities in the case of incompatibility between national law and European law* (Intersentia, 2011) 44; and Stéphanie De Somer, 'EU impulse: A European Perspective' in Stéphanie De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar Publishing, 2017) 23, 25. But also Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' (n 34) 166, 170: 'Autonomy may, therefore, be considered as a guiding principle of the European multi-level legal system. To be sure, autonomy is not a synonym for sovereignty, but the basis for the national legal orders' ability to define and produce legal norms the Union does not provide and which comply with the purposes of the administrative system of which EU policies form part'.

[43] In more detail, Chapter III.

[44] The following articles have been published in peer-reviewed journals: Pietro Mattioli, 'The Quasi-Judicial Role of National Competent Authorities: an Ambiguity that the Principle of Effective Judicial Protection could help address?' (2024) 17[2] Review of European Administrative Law 99; Pietro Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices' (2025) 8 Nordic Journal of European Law, 70; Pietro Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework: Sincere Cooperation in Action?' (2025) Utrecht Law Review 19. The following case notes have been published in peer-reviewed journals: Pietro Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? Some Clarifications from the Court of Justice' (2025) European Journal of Risk Regulation 824; and Pietro Mattioli, 'Local Community Engagement in Pesticide Regulation: A Commentary on the Italian Council of State's Judgment in the Municipality of Malles Case' (2025) 25[1] Review of European Administrative Law 161.

Despite abundant evidence of this tendency, both EU secondary legislation and the Court of Justice continue to refrain from formally recognising these bodies as quasi-judicial. As argued in the contribution, this reluctance is not a mere formality but comes at the expense of the principle of effective judicial protection.

(2) The article *'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices'* (Nordic Journal of European Law, 2025) examines the absence of EU-level requirements of independence and transparency for national competent authorities when granting plant protection product authorisations in emergency situations under Article 53 PPPR. It shows how this absence systematically undermines the Regulation's primary objective of protecting health and the environment.[45] In this context, the article explores how and to what extent the principles of good administration and the precautionary principle can be employed to strengthen transparency and independence of these authorities.

Two case notes further engage with the EU legislative framework concerning plant protection products.

(3) The first commentary, '*How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level?'* (European Journal of Risk Regulation, 2025), examines two recent judgments of the Court of Justice: Case C-308/22 *PAN Europe I* and Joined Cases C-309/22 and C-310/22 *PAN Europe II*.[46] In both judgments, the Court engaged with procedural aspects of the national authorisation processes for plant protection products. What is particularly noteworthy is that it advanced an interpretation which imposes additional layers of scrutiny on national competent authorities. This approach is justified by the objective of strengthening health and environmental protection. However, it also considerably restricts the discretion traditionally afforded to Member States in the authorisation of pesticides, intervening in an area that has conventionally been understood as a prerogative of Member States' institutional autonomy or of the EU legislator.

(4) The case note '*Local Community Engagement in Pesticide Regulation: A Commentary on the Italian Council of State's Judgment in the Municipality of Malles Case'* (Review of European

[45] Regulation 1107/2009 (n 9).
[46] Case C-308/22, *PAN Europe (Closer) [2024]* EU:C:2024:350; and Joined Cases C-309/22 and C-310/22, *PAN Europe (Evaluation of Endocrine Perturbation Properties)* [2024] EU:C:2024:356.

Administrative Law, 2025)' reflects on a recent judgment of the Italian Council of State (case 4307/2020).[47] The judgment concerns the competence of the Italian municipality Malles Venosta to impose restrictions on the use of pesticides and herbicides. In commenting on the Council's judgment, the contribution illustrates how the current framework for pesticide management, as implemented at the Member State level, risks jeopardising the interests of specific stakeholders, notably local communities and environmental organisations. This realisation calls into question the way the Member States interpret and apply their institutional autonomy, and the democratic legitimacy of the regulatory system thus established.

(5) The article '*Navigating the Complexities of the DSA's Enforcement Framework: Sincere Cooperation in Action?*' (Utrecht Law Review, 2025) examines the interplay between EU law and the institutional autonomy of Member States, focusing specifically on the implementation of the DSA. It raises concerns regarding the diverse approaches adopted by Member States in fulfilling their institutional design obligations within this legislative framework. More specifically, 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. In this regard, the article argues that the institutional fragmentation that results may jeopardise cooperation among enforcement authorities. This cooperation is critical for the effective enforcement of the DSA. In response, the article underscores the importance of the principle of sincere cooperation as a tool to facilitate cooperation among Member States in the context of the DSA.

More specifically, this essay is organised into four Chapters. Preliminarily, Chapter I explains and justifies the choice to structure the essence of my research around the doctrinal method, at the same time acknowledging the value of selective engagement with broader debates on methodology in EU legal studies.

Following this methodological part, building upon the analyses conducted in previous published articles, the following Chapters identify and revisit the contours of the normative framework that applies to, and shapes, the EU administrative design of national competent authorities. Without aiming to provide definitive answers, the essay's focus on those contours will allow to better grasp the stakes

[47] Case No. 04307/2020 Municipality of Malles / Walter Alton et al. (Council of State, 2024) ECLI:IT:CDS:2024:915SENT.

of EU law in the debate on how to design and structure Member States' administrative authorities against the backdrop of increasing enforcement responsibilities placed on those authorities.

More specifically, Chapter II traces the evolution of the regulatory state from its national foundations to its contemporary reconfiguration under EU law, with particular attention to the EU administrative design of national competent authorities. It moves from a historical account of the regulatory state to a doctrinal and institutional analysis of how EU sectoral legislation reshapes national competent authorities' structure, functions, and procedures. Building on my contribution '*The Quasi-Judicial Role of National Competent Authorities*', this Chapter also highlights that EU law has transformed national competent authorities even further, progressively entrusting them with functions and independence requirements that resemble those of national courts.

Chapter III clarifies the meaning, status, and scope of national institutional autonomy. In particular, it disentangles institutional autonomy from procedural autonomy and assesses whether institutional autonomy can be regarded as a general principle of EU law. Building on this analysis, this Chapter seeks to understand the role that national institutional autonomy currently plays in the EU administrative design of national competent authorities, while also setting the stage for the next Chapter.

Chapter IV addresses the unresolved tension at the foundation of my doctoral research. In a nutshell, the EU relies upon national administrative systems for the effective and uniform realisation of EU law obligations and rights, objectives, and expected outcomes, and therefore, it interferes with the organisation of the national authorities competent to enforce these rights and guarantee the realisation of these objectives. Yet, the EU administrative design of national competent authorities lacks a coherent normative framework that disciplines the EU-Member State relationship in the administrative design of these authorities. Against this background, Chapter IV aims to identify such a framework by examining how national institutional autonomy is balanced with other governing principles. Drawing on the Court of Justice's case law, this Chapter argues that principles like effectiveness and sincere cooperation function as integration-oriented constraints on Member State autonomy. Before turning to the essay's general conclusion, which critically reflects on this normative framework, Chapter IV further argues that the principles of good administration may offer a potential overarching structure, capable of guiding administrative action without enforcing rigid organisational models.

CHAPTER I

METHODOLOGICAL BACKGROUND

1. Introduction

In contemporary legal scholarship, the selection of a research method can no longer be treated as self-evident; it requires careful and explicit justification as part of a broader methodological reflection.[48] Therefore, this Chapter aims to define the methodological foundations of my doctoral research.

In terms of method, my doctoral research adopts a doctrinal analysis, a choice motivated by two principal reasons. Explaining those reasons will allow better to grasp my overall endevour in identifying the contours of the normative framework for Member States' autonomy when designing and structuring administrative authorities

First, the research undertaken in preparation of my articles revealed a—somewhat striking—absence of a coherent normative framework governing the EU-driven administrative design of Member State authorities. This finding prompted me to formulate my research question in doctrinal terms, as doctrinal analysis is directly aligned with the nature of that question and constitutes the most appropriate method for achieving the objectives of my doctoral research. In fact, the main objectives of my research are: first, to enhance the current understanding of the extent to which EU law has shaped the organisation of national administrative authorities; and second, to define the normative framework that governs the EU administrative design of national competent authorities.

Second, the choice of a specific method is also a strategic choice. As explained by Bartl, Cebulak, and Lawrence, 'In selecting a method, legal scholars also (whether consciously or not) take a stand on

[48] To clarify on what methodological foundations are, it must be noticed that 'methodology' and 'methods' are not synonymous. A method refers to the specific steps or procedures employed to address a particular research problem. Methodology, by contrast, encompasses a broader reflection on the rationale underlying the selection of certain methods for a given discipline. Martijn W. Hesselink, 'A European Legal Science? On European private law and scientific method Centre for the Study of European Contract Law Working Paper Series No. 2008/02, 20. Also, Marija Bartl, Pola Cebulak, and Jessica C. Lawrence, 'Introduction to The Politics of European Legal Research' in Marija Bartl, Pola Cebulak, and Jessica C. Lawrence (eds) *The Politics of European Legal Research*, (Edward Elgar Publishing, 2022) 2. As the authors observe: 'In selecting a method, legal scholars also (whether consciously or not) take a stand on important background framing questions: What are the research questions legal scholars should be posing? What is the best way to produce results and reach the answers (they want)? Which audiences should they target? To whom are they accountable? And finally, whether and how is the 'concept of law' instrumentalised in their struggles?'.

important background framing questions: […] Which audiences should they target? To whom are they accountable? And finally, whether and how is the 'concept of law' instrumentalised in their struggles?'.[49] In this light, the use of a doctrinal method is instrumental in communicating my results effectively to the EU (administrative) law literature within which my research is best embedded. EU legal scholars, typically trained within their respective national traditions, predominantly rely on doctrinal analysis. As Bruno De Witte notes, this practice is a pragmatic choice: 'the academic study of European law is still strongly fragmented along national lines, meaning that expectations of how EU law should be studied differ along those national lines. Given this fragmentation, reliance on the positivist legal tradition allows for the use of a common 'language' between those national communities and, thus, for a meaningful exchange of ideas.'[50]

That said, this Chapter also aims to place this methodological choice within broader debates on methodology in EU legal scholarship. Accordingly, following this introduction, Section 2 begins by outlining the increasing importance of methodological debates in legal scholarship more generally, while Section 3 situates these debates within EU legal studies. Section 4 puts these debates into practice, drawing on personal research experience—specifically an Actor Network Theory (ANT) analysis of the *Xylella fastidiosa* outbreak. Section 5 concludes the Chapter by recalling the centrality of doctrinal analysis in legal research, while acknowledging the value of remaining open to insights from other disciplines.

2. Methodology and Legal Research

Traditionally, legal research has displayed limited engagement with methodological questions. The prevailing method of research for legal scholars, often implicit, has been and remains the doctrinal approach, 'in which rules, principles and case law are considered from the internal perspective and in which law is looked at as being in a relatively autonomous relation to the social, economic and political reality. […] legal academia accepts the bulk of it (positive law) as given […]'.[51] Internally focused and thus, prone to obscuring the complex interactions between law and non-legal factors, doctrinal analysis has nevertheless provided a much-needed systematic description of the law. Therefore, this

[49] Bartl, Cebulak, and Lawrence, 'Introduction to The Politics of European Legal Research' (n 48) 2.
[50] Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18[4] European Constitutional Law Review 637.
[51] Jan M Smits, 'Introduction: a discipline in crisis?' in Jan M Smits (ed) *The Mind and Method of the Legal Academic* (Edward Elgar Publishing, 2012) 3.

approach has been celebrated for its role in ensuring the coherence, consistency, and clarity of legal frameworks, thereby offering legislative guidance to lawmakers, judges, and administrators on improving the system.[52]

An illustrative example of the significance of doctrinal analysis is the emergence of EU administrative law as a body of law.[53] Notably, Aldo Sandulli recalls that a significant aspect of the history of EU administrative law lies in the scholarly contributions that have facilitated the development of this new area of EU law.[54] In what Mario Chiti describes as the formative years of EU administrative law,[55] the Court of Justice delivered a series of foundational judgments that shaped the character of the EU administration and the principles governing EU administrative decision-making.[56] Among the most notable of these early cases are *Fédération Charbonnière de Belgique* (addressing misuse of powers),[57] *Algera* (concerning the revocation of administrative acts),[58] *Lachmueller* (on the application of general administrative law principles to the Commission's linguistic service),[59] and *Giuffrida* (regarding abuse of procedure).[60]

Administrative law scholars closely engaged with this Court of Justice case law.[61] In this regard, the works of Jürgen Schwarze and Jean Rivero are commonly regarded as essential to the early development of EU administrative law.[62] Schwarze showed that the Court of Justice had methodically

[52] Jan M. Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research', in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds) *Rethinking Legal Scholarship* (Cambridge University Press, 2017) 207.

[53] The term 'EU administrative law' can be used to refer to both a body of law and a scholarly discipline. In the first of the two meanings, it describes the norms and principles that regulate and limit the administrative actions of both EU institutions and agencies, as well as those of Member State administrations when enforcing EU law. EU administrative law as a scholarly discipline, by contrast, refers to the academic field predominantly focused on interpreting and delineating that normative framework. In more detail, Filipe Brito Bastos, 'Doctrinal Methodology in EU Administrative Law: Confronting the 'Touch of Stateness"' (2021) 22[4] German Law Journal 595.

[54] Notably, Aldo Sandulli, 'Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo', in Luca De Lucia and Barbara Marchetti (eds), *L'Amministrazione Europea e le Sue Regole* (Mulino 2015) 273, 289.

[55] Mario Chiti, 'Forms of European Administrative Action' (2004) 68[1] Law and Contemporary Problems 37, 39. These formative years run from the from the Treaty of Rome to the mid-1980s. These years were dominated by an 'administrative atmosphere', in which the focus was primarily on the establishment and functioning of Community administration.

[56] Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon' (n 33) 285, 292.

[57] Case 8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* [1956] ECLI:EU:C:1956:7

[58] Joined Cases C-7/56 and 3-7/57*, Algera v Common Assembly* [1957] ECLI:EU:C:1957:7.

[59] Joined Cases C-43/59, 45/59, 48/59, *Von Lachmuiller v. Commission* [1960] ECLI:EU:C:1960:37

[60] Case 105/75, *Giuffrida v. Council of the European Communities* [1976] ECLI:EU:C:1976:128

[61] Sandulli, 'Il Ruolo della Scienza Giuridica nella Costruzione del Diritto Amministrativo Europeo', (n 54) 273, 289.

[62] Joana Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field: Functional Comparison, Normativism and Integration' (2022) 18[4] European Constitutional Law Review 706.

compared the general principles commonly recognised in the legal systems of the Member States to identify and articulate general principles at the EU level.[63] As Joana Mendes recalls, Schwarze's objective was fundamentally doctrinal since he sought to determine 'the extent to which a European administrative law can now be said to exist and what possibilities and limits condition its further evolution'.[64] By examining the case law of the Court, Schwarze and other similarly trained scholars found in comparative law a tool for the doctrinal construction of the EU administrative legal framework, including both administrative principles and later, legal norms.[65] In this context, functional comparative administrative law enabled the EU administrative law doctrine to achieve its doctrinal objective—namely, the systematic elaboration and organisation of the rules and principles constituting the body of positive law.[66]

Notwithstanding the importance of doctrinal analysis, only recently has legal scholarship begun to make explicit its method. In this regard, Jan Smits highlights how doctrinal analysis is itself constituted by a series of deliberate methodological choices. These choices include the selection of legal sources, techniques for interpreting and systematising the law, and underlying conceptions of what constitutes a legal system.[67] In other words, methodological reflections have started to occupy a prominent place in legal research.[68] This prominence can be attributed to multiple factors.

The increasing relevance of methodology within legal scholarship primarily arises from external disciplinary pressures to articulate and justify methods, objectives, and results.[69] These expectations

[63] Jürgen Schwarze, *European Administrative Law* (2nd eds, Sweet & Maxwell 1992[2006]); and Jürgen Schwarze, 'The Convergence of the Administrative Laws of the EU Member States; (1998) 4[2] European Public Law 191. Rivero had earlier employed comparative law to overcome national differences and promote convergence in EU administrative law. Jean Rivero, 'Vers un Droit Commun Européen: Nouvelles Perspectives en Droit Administratif' in Mauro Cappelletti (ed.) *New Perspectives for a Common Law of Europe/Nouvelles perspectives d'un droit commun de l'Europe* (Brill, 1978).

[64] Schwarze, *European Administrative Law* (n 63) 6. In Joana Mendes, 'The Foundations of EU Administrative Law as a Scholarly Field' (n 62) 706, 719.

[65] Joana Mendes, 'Comparative administrative law in the EU: the integration function and its limits' in Marija Bartl and Jessica C. Lawrence (eds) *The Politics of European Legal Research* (Edward Elgar Publishing, 2022) 181-182.

[66] Schwarze, *European Administrative Law* (n 63) 3-4.

[67] Smits, 'What Is Legal Doctrine? (n 52) 223-226. Also, on the methods to conduct doctrinal analysis, Mark Van Hoecke and François Ost, 'Legal Doctrine in Crisis: Towards a European Legal Science' (1998) 18[2] Legal Studies 197.

[68] Notably, Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds.) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press, 2017); and Robin Gadbled and Elise Muir, 'Actors and Roles in EU Law: Asking 'Who Does What?' In the European Union Legal System' (2022) 18[4] European Constitutional Law Review 621.

[69] Mathias Siems and Daithi Mac Sithigh, 'Mapping Legal Research' (2012) 71[3] Cambridge Law Journal 651; Rob van Gestel and Hans-W. Micklitz 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2011) EUI Working Papers Law 2011/05. For a general perspective, Smits, 'Introduction: a discipline in crisis?' (n 51) 3-10.

arise in part from the increasing interaction between legal scholarship and other social science disciplines, which are more advanced in terms of methodological awareness.[70] As explained by Richard Posner, 'the perspective from which academic legal scholars conducted their research and wrote up their findings was an internal perspective […]. The scholars used the same assumptions, vocabulary, and methods of argument and proof as found in judicial opinions. They identified with the legal profession rather than with their colleagues in other departments of their university.'[71] This perspective, while valuable for ensuring coherence and consistency within the legal system, has isolated legal analysis from the contexts that give law its practical significance and from the insights of other disciplines. Furthermore, there is also a political battle fought under the flag of methodological debates in legal research. Scholars look for recognition, influence, and a lasting voice within the broader scientific community. The question of methods becomes intimately tied to issues of academic legitimacy and authority. Legal scholars often feel comparatively disadvantaged, perceived as less capable of offering definitive answers to complex societal problems. This sense of methodological inadequacy has re-energised interest in the conceptual underpinnings of legal research.[72]

3. EU Legal Studies: A Fertile Ground for Methodological Reflections

EU legal studies provide a compelling example of the centrality that methodological inquiries have acquired in legal research.[73] That centrality derives from the field's enduring reflexivity and self-criticism.

For a long time, the paradigm of integration through law has governed the way in which legal scholars think of Europe. It was born of the pioneering work of Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, who presented law as an agent—as well as an object—of the EU process of integration.[74] In this instrumental role, law is assumed to lead to the gradual emergence of a common

[70] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632.
[71] Richard A. Posner, 'Legal Scholarship Today' (2001) 115 Harvard Law Review 1314, 1315.
[72] Bartl, Cebulak, and Lawrence, 'Introduction to The Politics of European Legal Research' (n 48) 6-7.
[73] For example, Ulla Neergaard and Ruth Nielsen (eds), *European Legal Method in a Multi-level Legal Order* (DJØF Publishing 2012); Karl Riesenhuber (ed), *European Legal Methodology* (2nd eds, Intersentia 2021); and Rossana Deplano, et al., (eds.) *Interdisciplinary Research Methods in EU Law*, (Edward Elgar Publishing, 2024). In the field of comparative administrative law: Mariolina Eliantonio and Yseult Marique, 'Comparative administrative law in Europe: State-of-the-art overview and research agenda' (2024) 30[6] Maastricht Journal of European and Comparative Law 689.
[74] As an object, law constitutes a distinct domain within the broader framework of European integration, alongside other spheres such as politics, economics, and culture. Legal integration, understood in this sense, refers to the reciprocal adjustment and harmonization of national legal systems in relation to a supranational

European identity. In other words, integration through law essentially capitalised on the instrumental role of positive law to integrate modern societies and overcome complex political, economic, and cultural differences.[75]

Recently, this paradigm has been challenged. The confident endorsement of law's integrative capacity can no longer be taken for granted.[76] Some critics have argued that the conditions under which that paradigm was conceived have changed. Rather than the incremental consolidation of a European legal order, the current context is marked by recurring crises, new methods of governance, and a lack of judicial control that cast doubt on the integrative potential of law. Law, once envisaged as a driver of social, political, and economic progress, now appears more limited in scope, increasingly subject to contestation, and exposed to the tensions and divisions that characterise European societies.[77] To continue to invoke integration through law is thus to invoke a 'conjunctural concept', one bound to the historical context of its own time.[78]

The positivist doctrinal underpinnings of this project are therefore questioned and the integration through law has progressively transformed in a critical project.[79] This is the message that emerges from Joseph Weiler's Epilogue, in the volume 'Integration through Law Revisited': 'The Achilles' heel of the Project was in its normativity. Essentially, Integration was good. Convergence was good – the more the better. The Project (though to a much lesser extent the Department) was enthralled by the Messianic message of European integration. Fundamental (rather than instrumental) critique of the European Project is, thus, muted, elliptic, concealed (quaere, is that not the case – regarding fundamental critique – 30 years later in the current volume?)'.[80]

European legal order, with the aim of progressively eliminating differential treatment among Member States. Mauro Cappelletti, Monica Seccombe, and Joseph Weiler, 'Integration Through Law: Europe and the American Federal Experience. A General Introduction' (De Gruyter, 1986).

[75] Cormac S. Mac Amhlaigh, 'Concepts of Law in Integration Through Law' in Daniel Augenstein (ed.), 'Integration through Law' Revisited: The Making of the European Polity (Ashgate Publishing, 2011) 69.

[76] Daniel Augenstein (ed.), 'Integration through Law' Revisited: The Making of the European Polity (Ashgate Publishing, 2011); Jo Hunt and Jo Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in David Phinnemore, Alex Warleigh-Lack (eds) Reflections on European Integration. Palgrave Macmillan, 2009) 93

[77] Loïc Azoulai, '"Integration through law" and us' (2016) 14[2] International Journal of Constitutional Law 449.

[78] ibid, 450.

[79] ibid, 460-463.

[80] Joseph Weiler, 'Epilogue' in in Daniel Augenstein (ed.), 'Integration through Law' Revisited: The Making of the European Polity (Ashgate Publishing, 2011) 259, 264.

The rising critical turn in EU legal studies, which has been briefly described as 'a growing current of thought which considers the model of integration through law a failure',[81] in reality holds a much stronger analytical value. Essentially, an increasing number of EU legal scholars now highlight a profound disconnect between EU law and society.[82] As Loïc Azoulai, an authoritative voice within this academic discourse, has observed, much EU legal scholarship has treated law as a 'quasi-transcendental' system. This approach has produced a simplified normative universe that is largely detached from the complex, dynamic, and conflictual conditions of European society.[83] The tendency of EU law scholarship to maintain a supportive role that consolidates rather than questions the European integration process has led to a disconnection between legal theory and the sociological realities in Europe. This disconnection has treated law more as an abstract, quasi-autonomous discipline than as a dynamic, socially embedded practice subject to contestation and conflict.[84]

Within this framework, if 'Europe has largely become a sociological reality' as Azoulai suggests,[85] it is necessary that its law also reflects this by embracing a socially embedded methodological practice. In this respect, the EU legal order has been portrayed as possessing a distinctive advantage: its inherently social dimension, its capacity for integration beyond the confines of law, and its role in institution-building beyond the nation-state. These characteristics position the EU within what can be described as a postclassical legal order—one that challenges conventional understandings of law rooted in national contexts.[86] This new legal order calls for a reimagined approach to European legal scholarship, including a new 'legal methodology that allows the postclassical lawyer to bring down big theories to concrete cases, rules, and regulations'.[87] Rather than adhering to traditional conceptions of law as defined within individual Member States, European legal scholarship must strive to articulate and foster a distinctively European legal identity. This endeavour requires a new 'legal methodology that allows the postclassical lawyer to bring down big theories to concrete cases, rules, and regulations'.[88]

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[81] Editorial Comments, 'The Critical Turn in EU Legal Studies' 52(4) (2015) Common Market Law Review 881, 883.
[82] In EU law scholarship there are different expressions of critical approaches to EU law. Michelle Everson and Christian Joerges, 'Facticity as validity: the misplaced revolutionary praxis of European law' in Emilios Christodoulidis, Ruth Dukes, and Marco Goldoni (eds), Research Handbook on Critical Legal Theory (Edward Elgar 2019) 407; Päivi Johanna Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' (2022) 1 European Law Open 60; Ivana Isailović, 'Introduction: Critical Legal Approaches in EU Law—Reflections on New Research Directions' (20240 15[4] Transnational Legal Theory 493.
[83] Loïc Azoulai, 'Reconnecting EU Legal Studies to European Societies', (2024) VerfBlog https://verfassungsblog.de/reconnecting-eu-legal-studies-to-european-societies/. Accessed 1 September 2025.
[84] Loïc Azoulai, 'Solitude, désoeuvrement et conscience critique. Les ressorts d'une recomposition des études juridiques européennes' (2015) 4 Politique européenne 82-98,
[85] Loïc Azoulai, 'The law of European society' (2022) 59 Common Market Law Review 203, 210.
[86] Hans-W Micklitz, 'A European Advantage in Legal Scholarship?' in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, 262, 263
[87] ibid, 274.
[88] ibid, 264-266.

Consequently, EU legal scholarship has shifted its focus. Rather than reaffirming the integrative force of law, it increasingly looks at the ways in which law is experienced, contested, and unsettled. To approach law in this manner is to recognise that it cannot be studied in isolation but needs to be better entangled with social, political, and institutional contexts, among others.

In light of these reflections, EU legal studies have attached much more importance to methodological aspects, particularly through interdisciplinary approaches that offer new ways to investigate the interactions between law and its broader context.[89] In this regard, for example, Floris de Witte's legal geography delineates a promising new area of research within EU legal studies focused on the reciprocal relationship between law and its spatial and temporal contexts.[90] Similarly, as argued by Julien Bois, Actor Network Theory (ANT) can offer a valuable methodological and theoretical framework for EU legal studies as well. Its ontological stance rejects fixed, hierarchical conceptions of law, emphasising instead a plurality of ontologies shaped by the interactions of contextual actors.[91] This perspective provides a framework for rethinking (EU) law in its contemporary context, challenging fundamental assumptions about the European legal order.

Nevertheless, the interdisciplinary turn in EU legal studies remains as much a possibility as it is a challenge. On the one hand, interdisciplinarity can offer significant benefits to EU law research, specifically when understood not solely as a methodological approach but also as a fundamental epistemological endeavour. Engaging with the insights and theoretical frameworks of other disciplines is instrumental in cultivating the critical stance necessary to interrogate and challenge entrenched normative assumptions within existing legal frameworks. Importantly, interdisciplinarity can strengthen EU critical studies by addressing the field's long-standing methodological underdevelopment. As Päivi Johanna Neuvonen highlights, critical scholarship needs to deepen its methodological foundations, and interdisciplinarity offers a promising way to do so.[92]

More generally, as articulated by the authors of the 'Introduction to Interdisciplinary Research Methods in EU Law', there are at least three principal reasons for pursuing interdisciplinary research

[89] By way of example, Mikael Rask Madsen, Fernanda Nicola, and Antoine Vauchez, (eds.) *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness of Studies on International Courts and Tribunals* (Cambridge University Press, 2022); Marija Bartl, Pola Cebulak, and Jessica C. Lawrence (eds) The Politics of European Legal Research (Edward Elgar Publishing, 2022); and Carol Harlow (ed) *A Research Agenda for Administrative Law* (Edward Elgar Publishing, 2023).
[90] Floris de Witte, 'Here Be Dragons: Legal Geography and EU Law' (2022) 1[1] European Law Open 1113.
[91] Julien Bois, 'Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law' (2024) ORBi-University of Liège. https://orbi.uliege.be/handle/2268/317536, 38.
[92] Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' (n 82) 60.

in the study of EU law. First, interdisciplinarity illuminates an object of legal scholarship that is often hidden or otherwise lost: social behaviour. Legal rules cannot be adequately understood simply as textual propositions or doctrinal constructs. They acquire meaning through practices, in the reciprocal interaction between individuals, administrations, and institutions. An interdisciplinary perspective makes visible these dynamics and the ways in which they shape the application, development, and societal effects of EU law. Second, interdisciplinarity allows the context in which law operates to come into sharper focus. Textual and theoretical analysis remains indispensable for assessing the institutional structure of the EU, its distribution of powers, and its procedural guarantees. Yet, doctrines and institutional arrangements can be fully grasped only when situated within the broader social, political, and economic realities within which they arise and to which they respond. Third, interdisciplinary approaches underscore the inherently subjective element underpinning both the development of EU law and the scholarly analysis of it. Law is not only normatively structured but also continuously produced by individual and institutional choices, strategies, and contestations. Yet legal scholarship has often bracketed or downplayed the relevance of such choices, as though they were incidental or extrinsic to the law's own rationality.[93]

On the other hand, the actual integration of other disciplines into legal scholarship remains difficult, partial, and at times fragile.[94] In particular, it is often challenging for legal scholars to identify the most appropriate methods beyond doctrinal analysis and to apply them correctly.[95] Consequently, methodological debates have largely remained abstract, resulting in relatively few successful practical applications and strong scepticism. As Mathias Siems observes, even Richard Posner—one of the most influential figures in challenging the strict formalism of legal research—ultimately acknowledges that the synthesis and organisation of the often-fragmented outputs of judges and legislators require a degree of technical expertise and methodological rigor that only doctrinal analysis can provide.[96]

[93] Rossana Deplano et al., 'Introduction to Interdisciplinary Research Methods in EU Law' in Rossana Deplano, et al. (eds) *Interdisciplinary Research Methods in EU Law* (Edward Elgar Publishing, 2024) 1, 2-3.
[94] Christian Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' European Law Journal (1996) 2[2] 105; Julien Bois, 'Interdisciplinary Research Methods in EU Law: A Handbook edited by Rossana Deplano, Giulia Gentile, Luigi Lonardo and Tobias Nowak (Edward Elgar, 2024) (2025) 62[6] Common Market Law Review, 1912.
[95] Nils Jansen, 'Making Doctrine for European Law' in Rob van Gestel, Hans-W. Micklitz, and Edward L. Rubin (eds) *Rethinking Legal Scholarship* (Cambridge University Press, 2017) 229, 231.
[96] Mathias Siems, 'Legal Originality' (2008) 28[1] Oxford Journal of Legal Studies, 147, 153. The author refers to: 'Richard A. Posner, 'In Memoriam: Bernard D. Meltzer (1914-2007)' (2007) 74 University of Chicago Law Review 435, 437.

4. Putting the Methodological Debate into Practice

My personal experience with interdisciplinary research, intended as the recourse to other disciplines methods and/or theories, encapsulates particularly well these methodological considerations developed thus far, including the challenges of this approach. During my doctoral research, I conducted an Actor-Network-Theory analysis of the *Xylella fastidiosa* outbreak—an invasive plant pathogen that has spread across Europe, severely affecting the health of numerous plant species.[97]

ANT is both a theory and a method.[98] As a stand-alone theory, it seeks to provide a new understanding of society, which, from its point of view, is not composed solely of humans but also of non-human actants, to use Latour's terminology.[99] From this perspective, law is relational in the sense that it is made up of continuously changing networks among these actants. At the same time, methodologically, as Emilie Cloatre suggests, ANT 'invites us to return to careful ethnographic engagements with the manifestations of these (uncertain) modes of heterogeneous legal ordering in everyday life.'[100] In practice, this method requires nuanced documentary analysis and qualitative research to examine how relevant actors interact. From this perspective, ANT becomes a valuable tool for understanding how law operates in context, contributing increasingly to interdisciplinary legal scholarship.[101]

My research combines ANT with a doctrinal examination of the EU plant health framework.[102] The objective of this research is to gain a more informed understanding of the role of scientific expertise in the decision-making processes of national authorities. It also examines the consequences that the

[97] In more detail, https://food.ec.europa.eu/plants/plant-health-and-biosecurity/planthealth-rules/control-measures/xylella-fastidiosa_en accessed 1 September 2025.

[98] Michel Callon, 'Some Elements of a Sociology of Translation: Domestication of the Scallops and the Fishermen of St Brieuc Bay' (1984) 32 The Sociological Review 196; and Bruno Latour, 'On Actor-Network Theory: A Few Clarifications' (1996) 47 Soziale Welt 369; and Bois, 'Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law' (n 223).

[99] Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005) 54.

[100] Emilie Cloatre, 'Law and ANT (and its Kin): Possibilities, Challenges, and Ways Forward Source' (2018) 45[4] Journal of Law and Society 646, 659.

[101] Julien Bois, 'Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law' (2024) ORBi-University of Liège. https://orbi.uliege.be/handle/2268/317536 accessed 1 September 2025.

[102] Regulation (EU) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants [2016] OJ L 317/4. This research also includes a semi-structured interview with a scientific expert. Additional interviews were initially planned with specific members of the EFSA Plant Health Panel's working groups. However, they ultimately redirected me to the official Q&A section of the EFSA website.

integration of scientific expertise has for the democratic legitimacy of their decisions.[103] The outcomes of this work are available online.[104]

In brief, drawing on the ANT analysis of the *Xylella* outbreak, my analysis highlights that scientific actors have been able to leverage their expertise to shift the institutional balance in emergency situations. This shift often occurs at the expense of scientific pluralism and diminishes democratic participation in the decision-making processes. By tracing the development of the events throughout the *Xylella fastidiosa* outbreak, my analysis also reveals deep tensions surrounding the enforcement of EU plant health legislation. Notably, there exists a pronounced disconnect between this regulatory framework and the social realities in which it is applied—an issue explicitly confirmed by the testimony of an interviewed expert.

That said, I have also noticed that the application of ANT is not without its limitations. In my own experience, the ANT analysis illuminates the dynamics of exclusion in decision-making processes of national competent authorities, the marginalisation of smaller realities in favour of prevailing scientific opinions, and how the tensions embedded in the framework translate into ineffective policy enforcement. However, ANT may lack the authority to guide how legal institutions could adapt or reform to better address these problems and improve legitimacy. Here, building on the insights of ANT, a doctrinal approach remains essential, as it is the responsibility of doctrinal scholars to interpret the legal order and ensure that these conditions of legitimacy are met.

In those circumstances, the added value of combining ANT with doctrinal analysis lies in highlighting the significant relationship between formal legal frameworks and the broader socio-political context in which EU administrative action operates. Moreover, this research further suggests that legal scholarship can achieve greater originality by engaging with the methods and theories of other disciplines—not as substitutes for doctrinal analysis, but as valuable complements to it.[105]

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[103] Council Directive 2000/29/EC of 8 May 2000 on protective measures against the introduction into the Community of organisms harmful to plants or plant products and against their spread within the Community [2000] OJ L 169/1; and Regulation 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants [2016] OJ L 317/4.

[104] The outcomes of my research have been discussed in different venues and can be tracked online: Pietro Mattioli, 'The role of science in the EU plant health regime: insights from the Xylella fastidiosa outbreak' (2024) draft paper for the Enforcement of European Union Law: New Horizons conference at the King's College, available at https://jmn-eulen.nl/papers/conference-eulen-sept/; and Pietro Mattioli, 'Balancing Expertise and Democracy: The Role of Scientific Knowledge in EU Plant Health Emergency Measures' (2025) draft paper presented at the EUSA Conference, available at https://eustudies.org/conference/papers?page=4 accessed 1 September 2025.

[105] Siems, 'Legal Originality' (n 96) 147; and Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research' (n 52) 226-227.

5. Conclusion

Legal scholars, and EU law scholars in particular, have increasingly engaged in methodological debates that emphasise the potential value of a richer interaction with other disciplines and their research methods for the development of legal analysis.[106] Yet, in this context, legal research continues to justify a certain preference for doctrinal approaches. Notably, Smits suggests that alternative approaches to law are valuable as long as they take the doctrinal description of existing law as their point of departure. In other words, any analysis that treats law as its object, whether in a general or sector-specific context, should remain structurally dependent on legal doctrine.[107]

That said, the above methodological discussions and reflections have provided an important point of orientation for my own doctoral research. They address the need for a fundamental methodological self-positioning within an increasingly competitive academic environment, which to some extent presupposes a critical awareness of the limits of one's analytical tools.

At the same time, this engagement has sharpened my understanding of the necessity to remain open, even within what remains clearly and openly a doctrinal legal analysis, to approaches that do not operate exclusively in strictly doctrinal terms. This openness should not necessarily be understood as an endorsement of interdisciplinarity in the sense of a systematic or method-driven adoption of tools from other disciplines. Instead, in line with the arguments advanced in the literature discussed above, it points to the importance of a certain methodological flexibility. Such flexibility allows doctrinal analysis to engage meaningfully with insights—rather than methods alone—developed beyond the boundaries of legal dogmatics, thereby facilitating a more productive interaction with other fields of inquiry. This approach may be best reflected in what Siems has described as basic interdisciplinary research.[108]

Against this background, it is, however, important to explain why a doctrinal approach is central to my doctoral research and how it informs the subsequent analysis. The research object—national

[106] Luigi Lonardo and Tobias Nowak, 'Reflections on methods and interdisciplinarity' Rossana Deplano, et al., (eds.) *Interdisciplinary Research Methods in EU Law*, (Edward Elgar Publishing, 2024) 6.
[107] Smits, 'What Is Legal Doctrine?: On The Aims and Methods of Legal-Dogmatic Research' (n 52) 227
[108] Mathias Siems, 'The Taxonomy of Interdisciplinary Legal Research: Finding The Way Out Of The Desert' (2009) 7[1] Journal of Commonwealth Law and Legal Education 1, 5.

competent authorities within the EU legal system—operates within a complex, multi-layered legal framework encompassing both EU and Member State law. As will be shown in the next Chapter, while political science and public administration scholarship have mostly studied these authorities, legal analysis has remained often limited, fragmented, and largely sectoral. Consequently, many fundamental legal questions regarding these authorities' organisation, powers, and functioning remain unresolved, leaving the normative and legal framework governing these authorities underdeveloped.

A doctrinal approach was therefore necessary to systematically define this framework. By identifying relevant legal norms alongside the Court of Justice's interpretative techniques and reasoning, this research clarifies the overarching normative structures within which these authorities operate. At the same time, it exposes significant shortcomings in existing conceptualisations of EU administrative design, notably the absence of a formally recognised principle of national institutional autonomy and the tendency to rely on EU integration-oriented techniques by default. By making this tension explicit, the doctrinal analysis not only addresses a clear gap in legal scholarship but also provides a foundation for future cross-disciplinary research. In particular, it establishes a normative framework that can serve as a basis for further research aimed at making it more responsive to social, political, and contextual realities.

CHAPTER II

NATIONAL COMPETENT AUTHORITIES

1. Introduction

This Chapter focuses on national competent authorities by tracing their evolution from an institutional byproduct of the regulatory state to their contemporary configuration under EU law.

This evolution reflects a broader phenomenon of administrative convergence under the influence of EU law, which is also referred to as the 'Europeanisation of the Member State administrative systems'.[109] For much of European history, public administrations and administrative law were embedded in a nation-state-centred paradigm. Within this framework, administrative authority was conceived as an expression of state power, exercised through nationally bounded institutions.[110] European integration has profoundly altered this model. National administrations—and, in particular, regulatory authorities—now operate within, and are increasingly shaped by, the EU legal and institutional order.

A clear illustration of the impact of European integration on national administrative systems is the evolution of the regulatory state as a model of governance. Originally, the regulatory state developed as a technocratic system based on sector-specific, specialised authorities exercising delegated powers in liberalised markets.[111] This model was firmly rooted in national sovereignty. Member States established regulatory authorities tailored to their domestic economic structures, political priorities,

[109] In light of what discussed above, more specifically footnote 31, the expression 'Europeanisation of the Member State administrative systems' is used here to refer to impact of the EU legal order on the Member State administrative systems and specifically, national competent authorities. Similarly, Hussein Kassim, 'Meeting the Demands of EU Membership: The Europeanization of National Administrative Systems' in Kevin Featherstone, and Claudio M. Radaelli (eds), *The Politics of Europeanization* (Oxford University Press, 2003) 83. In this regard, the author uses 'the term in its broadest sense', examining 'the administrative response on the part of member states to the demands of EU membership and considers the institutional arrangements they have put in place to manage their participation in EU decision making. European integration subjects national governments to unique and exacting pressures and imposes strict requirements on their participation in processes of EU decision making.' Also, Knill, 'Introduction' in Christoph Knill, *The Europeanisation of National Administrations* (Cambridge University Press, 2009) 1, 1-2: 'Europeanisation of national administrations, i.e., the crucial question of how European integration affects domestic administrative practices and structures.' More generally, on the multitude of terminologies of this term, Yseult Marique and Emmanuel Slautsky 'Resistance to Transplants in the European Administrative Space: An Open-Ended Reading of Legal Changes' (2021) 14 [1] Review of European Administrative Law 7, 11-12.

[110] Sabino Cassese, *Il diritto amministrative storie e prospettive* (Giuffre' editore, 2010); and Matthias Ruffert, *Administrative Law in Europe: Between Common Principles and National Traditions* (Europa law publishing, 2013).

[111] Majone, 'From the Positive to the Regulatory State' (n 8) 139, 159.

and administrative traditions.[112] Over time, however, EU integration has set a distinct trajectory.[113] Regulatory authorities are no longer only national institutions but are progressively embedded in a supranational legal framework that reshapes their organisation, functions, and procedures.[114] This process marked the 'Europeanisation of the regulatory state'.[115]

This Chapter is divided in into five Sections following this introduction that retrace the emergence and evolution of the regulatory state's governance model before and after the EU influence.

Section 2 revisits the intellectual and institutional foundations of the regulatory state. It traces the emergence of regulation as a distinct mode of public intervention, first in the United States (US) during the New Deal and subsequently in Europe. For this analysis, this Section draws primarily on the work of Giandomenico Majone and scholars operating within a similar analytical paradigm.[116] Majone's account, which is strongly influenced by the US' regulatory experience, has been central to shaping early conceptualisations of national competent authorities in Europe. Within this framework, these authorities have been typically justified in principal-agent terms, characterised by institutional independence from political control, and marked by limited democratic accountability, explained on the basis of these authorities' technical expertise and policy credibility. This model has exerted a lasting influence on both academic and policy understandings of regulatory governance.[117]

At the same time, a closer examination of regulatory developments in Europe reveals significant limitations in this framework as a general theory of the regulatory state. For example, Majone's account struggles to explain the diversity of regulatory arrangements observed across countries and policy sectors. In particular, the author underestimates the extent to which regulatory design is shaped

[112] Mark Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9[6] Journal of European Public Policy 954.
[113] David Levi-Faur, 'The Odyssey of the Regulatory State: From a "Thin" Monomorphic Concept to a "Thick" and Polymorphic Concept' (2013) 35 Law & Policy 29.
[114] Martin Lodge, 'Varieties of Europeanisation and the National Regulatory State' (2002) 17[2] Public Policy and Administration, 43.
[115] Christoph Knill and Dirk Lehmkuhl, 'The national impact of European Union regulatory policy: Three Europeanization mechanisms' (2002) 41[2] 255.
[116] Majone, 'From the Positive to the Regulatory State' (n 8) 139, 159; Colin Scott, 'The regulatory state and beyond' in Peter Drahos, *Regulatory Theory: Foundations and applications* (Australian National University Press, 2017) 267.
[117] Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar Publishing 2004) 145; and Lola Avril, 'The EU post-regulatory state and its deregulation agenda' (2025) 4[2] European Law Open 157.

by contextual, political, and sector-specific factors rather than functional imperatives alone.[118] Moreover, later scholarship has paid increasing attention to the tension between regulatory independence and adaptability, highlighting the need for regulators not only to ensure credibility and stability, but also to respond to changing economic and societal conditions. Just as elected governments should be able to respond to demands expressed through electoral processes, so too regulators may be required to adapt to changing circumstances. As a result, flexibility is also required.[119]

Section 3 turns to the EU as a regulator and to the Europeanisation of the regulatory state, where specialised administrative bodies operate within a supranational legal framework that aims to reshape and constrain their structures, functions, and procedures.

Within this framework, Sections 4 and 5 examine how EU law has transformed national administrative systems through the systematic mobilisation of national competent authorities for the enforcement of EU legislation. More specifically, Section 4 explores how EU sectoral legislation increasingly requires Member States to designate or establish specific authorities responsible for enforcing regulatory obligations, while simultaneously prescribing key elements of their institutional design. Building on these developments, Section 5 explores an emerging and particularly significant dimension of this transformation: the quasi-judicial role of national competent authorities under EU law. Drawing on the insights from the article '*The Quasi-Judicial Role of National Competent Authorities'*, this Section demonstrates that EU legislation increasingly entrusts these authorities with powers traditionally associated with national courts, including dispute resolution, rights protection, and the adoption of binding decisions following procedurally structured proceedings.

Finally, Section 6 addresses the limitations of the EU's administrative design of national competent authorities. It highlights how persistent sectoral variation and fragmented regulatory choices hinder the emergence of a coherent and uniform organisational model. Section 7 concludes.

[118] Mark Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' (2002) 25[1] West European Politics 125, 134-138.
[119] Robert Baldwin, Martin Cave, and Martin Lodge, 'Regulation and Development' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press, 2011) 409, 412.

2. The Regulatory State: Its Foundations

Majone pioneered the study of the regulatory state in Europe, grounding much of his analysis in the interpretation of the earlier academic work in the US, which both preceded and anticipated analogous developments on the European continent.[120] In the US, the regulatory state emerged most decisively in the 1930s, when the unprecedented economic collapse of the Great Depression prompted the launch of the New Deal. This period marked a substantial expansion of federal administrative capacity and a fundamental redefinition of the role of the state in economic governance.[121]

Building on the US experience, European Western states adopted a series of key economic reforms, marking the first step toward a distinct European regulatory state. They increasingly moved away from direct market participation—no longer owning enterprises or providing goods and services themselves—and assumed the role of regulators.[122] In this capacity, the state positioned itself, metaphorically, above the market, controlling and overseeing the behaviour of economic actors rather than directly intervening in production.[123]

In this context, Majone advocated a comparable conceptualisation of the regulatory state in Europe, starting from the definition of 'regulation' as 'the sustained and focused control exercised by a public authority over activities valued by the community'.[124] Subsequent debates have criticised this view for being overly state-centric and too closely linked to nationally bounded understandings of public authority, and have therefore moved towards more encompassing formulations.[125] For present

[120] Majone's early work was largely grounded in comparisons with the United States. Giandomenico Majone, *Deregulation or Re-regulation? Regulatory Reform in Europe and the United States* (Pinter Publishers, 1990); Giandomenico Majone, 'Regulating Europe: Problems and Prospects' (1989) EUI Working papers No. 89/405, 6-7. Also, Mark Pollack, 'Learning from the Americanists (Again): Theory and Method in the Study of Delegation' (2002) 25[1] West European Politics 200.

[121] Literature often refers to 'new Deal Agencies', Cass R. Sunstein, 'Constitutionalism after the New Deal' (1987) 101 Harvard Law Review 421.

[122] De Somer, 'EU impulse' (n 42) 23, 31.

[123] David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Addison-Wesley, 1992), chapter 1. This approach was described by Osborne and Gaebler through the 'steering, not rowing' metaphor. The authors argue that in an interventionist state, governments normally 'row' by directly providing goods or services, managing enterprises, and intervening in markets through ownership or operational control. Instead, they suggest that states should steers, by that referring to setting the rules, monitors compliance, and ensures the market functions according to policy objectives, without directly producing or supplying the services itself.

[124] Giandomenico Majone, 'The rise of the regulatory state in Europe' (1994) 17[3] West European Politics 77, 81. The author refers to Philip Selznick, 'Focusing Organizational Research on Regulation' in Roger G. Noll (ed.) *Regulatory Policy and the Social Sciences* (University of California Press, 1985) 363. Regulation is referred to 'a sustained and focused control exercised by a public agency over activities that are socially valued'.

[125] Robert Baldwin, Martin Cave, and Martin Lodge, 'Introduction' in Robert Baldwin, Martin Cave, and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (2nd edn, Oxford University Press, 2011) 1, 2;

purposes, it is more helpful to understand regulation, in institutional terms, as the deployment of public agencies to shape the behaviour of other actors in line with specified standards.[126] This approach recognises that regulation entails detailed knowledge of, and ongoing engagement with, the regulated activities, typically leading to the establishment of specialised agencies tasked with enforcement responsibilities.[127]

A key feature of the regulatory state is the establishment of regulatory agencies that, through supervision, monitoring, and institutionalised intervention, aim to restore public confidence and stabilise market volatility.[128] From the beginning, building on the US experience, these agencies became also an essential component of the regulatory state in Europe, where nation-states established their own partly independent, specialised agencies, operating alongside—yet distinct from—Weberian-style centralised bureaucracies.[129] Each country adopted distinct legal and institutional designs and terminology to refer to those bodies, in line with its own legal traditions and culture. By way of example, in France and Italy, these entities were structured as independent administrative authorities—collegial bodies created by parliamentary statute. Germany adopted a hybrid model, deploying both public-law agencies and private-law entities for specialised regulatory tasks, as well as federal and Land agencies, with most falling under ministerial purview. The United Kingdom diverged by establishing non-ministerial government departments—legally separate from parent ministries but accountable through parliamentary scrutiny mechanisms.[130]

Until then, public administrations in nation-states in continental Europe had largely developed according to the Weberian model of bureaucracy: a formalised, professionalised, hierarchically

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Robert Baldwin, Martin Cave, and Martin Lodge, 'Introduction: Regulation—the Field and the Developing Agenda' in Robert Baldwin, Martin Cave, and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 3, 6.

[126] Martino Maggetti, 'Concepts and approaches for the study of regulation and governance' in Martino Maggetti, *Introduction to Regulation and Governance* (Edward Elgar Publishing, 2025) 1, 2.

[127] Majone, 'The rise of the regulatory state in Europe' (n 124) 78. Regulation has evolved into a multidisciplinary field, attracting substantial scholarly contributions from political scientists, legal scholars, sociologists, anthropologists, and other disciplines. The importance of this regulatory scholarship is reflected in the wide range of academic publication outlets that address regulatory issues, for instance, Robert Baldwin, Colin Scott, and Christopher Hood, *A Reader on Regulation* (Oxford University Press, 1998) 2-3; Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation. Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004); and more recently, Karen Yeung and Sofia Ranchordás, *An Introduction to Law and Regulation: Text and Materials* (2nd edn, Cambridge University Press, 2024).

[128] David Kennedy, 'What the New Deal Did' (2009) 124[2] Political Science Quarterly 251.

[129] Fritz Sager and Christian Rosser, 'Weberian bureaucracy' in William Thompson (ed.) *Oxford Research Encyclopedia of Politics* (Oxford University Press, 2011)

[130] Mark Thatcher, 'Regulation After Delegation: Independent Regulatory Agencies in Europe' (2002) 9[6] Journal of European Public Policy 954; and Thatcher, 'Delegation to Independent Regulatory Agencies' (n 118) 126-130.

organised, and meritocratic system of public administration.[131] However, in the late twentieth century, this type of bureaucracy was not fully equipped to address the new challenges raised by the regulatory state.[132] These challenges included the need for sector-specific technical expertise, credible long-term regulatory commitments beyond electoral cycles, and independence to manage competing interests.[133] In response to these evolving governance demands, many nation-states began to establish a new generation of specialised independent agencies.

Borrowing from the principal-agent theory, the mainstream view regarding the delegation of public powers to specialised agencies, partly independent from ministries, is that elected politicians (principals) delegate specific powers to agencies (agents) because they believe that these entities would fulfil important functions on their behalf.[134] Staffed with neutral experts, these authorities possess the technical expertise to carry out policies with a higher level of efficiency and effectiveness than politicians.[135] In other words, the existence of these authorities is justified by their technical expertise, which neither traditional bureaucrats nor legislators and courts are presumed to possess.[136]

An additional common reason for the delegation of powers to independent and specialised bodies is linked to the tension between the *pro tempore* nature of democratic governance and the long-term commitments necessary to deal effectively with market regulation as well as contemporary societal risks. In other words, governments delegate powers to enhance the credibility of their policies.[137] For instance, democratically elected governments may discretionarily adjust their policies to align with evolving economic and societal conditions. Moreover, the inability of one legislature to bind its

[131] ibid; and Donald F Kettl, 'Weberian Bureaucracy and Contemporary Governance' (2022) 5[2] Perspectives on Public Management and Governance 111, 113. Each nation-state however maintained its specificities, such as the UK.

[132] Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' (2011) 59[4] The American Journal of Comparative Law 859; Fabrizio Gilardi, 'Principal-Agent Models Go to Europe: Independent Regulatory Agencies as Ultimate Step of Delegation' (Paper presented at the ECPR General Conference, Canterbury (UK), 6–8 September 2001) 1, 3.

[133] For example, on the theoretical frameworks behind the establishment of non-majoritarian institutions, Thatcher and Stone Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (n 8) 1; and Fabrizio Gilardi, 'The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe' (2005) 598[1] The ANNALS of the American Academy of Political and Social Science 84.

[134] In more detail, Thatcher, 'Delegation to Independent Regulatory Agencies: (n 118) 125.

[135] Majone, 'From the Positive to the Regulatory State' (n 8) 152; Giandomenico Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) European University Institute, Working Paper RSC No 96/57, 3.

[136] Saskia Lavrijssen, 'Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU' (2018) TILEC Discussion Paper 14

[137] Fabrizio, 'Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis' (n 8) 873; Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (n 135) 3.

successors to a specific policy strategy might undermine the coherence and consistency of that policy over time. These changes can compromise policy consistency, as they may inadvertently enable market actors to disregard regulations without consequence. To address this situation, politicians have delegated public authority to non-elected independent regulators to increase the stability and credibility of their policies.[138]

To recapitulate, in the context of the regulatory states, many European countries have established independent regulatory agencies designed to fulfil technical functions.[139] Unlike traditional bureaucracies, those public agencies were structurally separated from ministerial departments and enjoyed varying degrees of statutory independence that insulated their decision-making processes from direct political control.[140] While traditional administrative systems continued to handle routine administrative functions through a conventional bureaucratic apparatus, specialised agencies began to fulfil specific regulatory roles requiring technical expertise and independence from elected politicians.

3. The EU Turn in the Regulatory State's Paradigm

Administrative law and administrative systems, once anchored primarily within the boundaries of the nation-state, have been substantially transformed by European integration.[141] A pivotal moment in this transformation is the emergence of the EU regulatory state. [142] The EU played a key role in the shift

[138] Giandomenico Majone, 'Independent Agencies and the Delegation Problem: Theoretical and Normative Dimensions' in Bernard Steunenberg and Frans van Vught (eds) *Political Institutions and Public Policy: Perspectives on European Decision Making* (Springer, 1997) 139; and Gilardi, 'Policy credibility and delegation to independent regulatory agencies' (n 8) 875.

[139] Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (n 112) 954. The author describes these authorities as the 'third force', in addition to governments and regulates.

[140] Scott, 'The regulatory state and beyond' (n 116) 265. In more detail, see Fabrizio Gilardi and Martino Maggetti, 'The independence of regulatory authorities' in David Levi-Faur (ed.) *Handbook on the politics of regulation* (Edward Elgar, 2011) 203.

[141] Sabino Cassese, 'New paths for administrative law: A manifesto' (2012) 10[3] International Journal of Constitutional Law 603, 605.

[142] Burkard Eberlein and Edgar Grande, 'Beyond delegation: transnational regulatory regimes and the EU regulatory state' (2005) 12[1] Journal of European Public Policy 89, 92. The authors interpret the regulatory state as applying primarily to the EU rather than individual nation-states. This contrasts with what they refer to as the 'nationalization thesis' which emphasises decentralised regulatory authority at the national level.

from the interventionist nation-state toward a regulatory state through various waves of EU liberalisation legislation aiming at completing the internal market.[143]

Majone's examination of the rise of the regulatory state in Europe offers a first conceptual foundation for understanding the EU as a regulator.[144] Lacking the fiscal resources and administrative capacity of a fully developed state, the EU has relied on regulation as its primary means of exercising authority. By pursuing regulatory policies, the European Commission was able to expand its influence while shifting implementation costs on Member States, making regulation an effective and sustainable strategy of supranational governance. Central to his argument is the structural distinction between regulatory policies and policies that depend upon direct public expenditure. Regulation allows the EU to exert significant influence through rulemaking without budgetary commitments. According to Majone, the Commission strategically pursued regulatory programmes precisely because they operated largely outside the constraints of the EU budget.[145] Furthermore, the growth of regulation within the EU was largely propelled by the interests of multinational and export-oriented industries, which sought to mitigate the challenges and costs arising from inconsistent and increasingly stringent regulations among Member States. In response, the Commission advanced harmonising regulatory initiatives at the Union level to reduce the risks of regulatory fragmentation, lower compliance costs, and created a more predictable business environment for these industries.[146]

Once again, Majone's framework offers only one explanatory model. The 'European regulatory state is at least partly coming about differently than was to be expected'.[147] Majone's conception of the regulatory state places market integration, efficiency, and competitiveness at its core, potentially prioritising economic objectives over social protection and redistributive goals. Within this framework, regulation is framed as a technocratic response to market failures, which critics argue may marginalise broader social and political considerations.[148] In addition, the model of delegating authority to

[143] Paul Magnette, 'The Politics of Regulation in the European Union' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar Publishing 2005) 3, 4-6.
[144] Notably, Majone, 'From the Positive to the Regulatory State' (n 8) 139; Giandomenico Majone, 'The Rise of the Regulatory State in Europe' in Robert Baldwin, Colin Scott, and Christopher Hood (eds), *A Reader on Regulation, Oxford Readings in Socio-Legal Studies* (Oxford University Press, 1998) 192; and Francis McGowan, and Helen Wallace, 'Towards a European regulatory state' (1996) 3[4] Journal of European Public Policy 560
[145] Majone, 'The Rise of the Regulatory State in Europe' (n 144) 192 et seq.; Claudio Radaelli, 'Steering the Community Regulatory System: The Challenges Ahead' (1999) 77[4] Public Administration 855, 856.
[146] Majone, 'The Rise of the Regulatory State in Europe' (n 144) 192 et seq.
[147] Eberlein and Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' (n 142) 89, 112.
[148] Karen Yeung, 'The Regulatory State' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press, 2010) 64, 82-84.

regulatory agencies based on the principal-agent logic is also called into question. This model presupposes a clear delegation chain, an assumption that sits uneasily with the EU's fragmented, multi-principal governance structure.[149]

Leaving these debates aside, it is important to emphasise the EU has shaped a new trajectory for the regulatory state.[150] Almost in parallel to the market-liberalisation reforms,[151] EU regulatory governance moved towards a model centred on the prevention of risks and the protection of collective welfare.[152] This phase is primarily led by the EU's social and risk regulation, particularly in areas such as environmental protection, public health, and food safety.[153] The EU's stricter regulatory approach in areas such as health and environmental protection also marks a departure from the US's regulatory model.[154] This difference best emerges by looking at how the EU and the US currently regulate the authorisation of plant protection products. As Leonelli observes, the EU and US systems embody fundamentally different approaches to scientific uncertainty, levels of regulatory protection, and the role of non-scientific considerations in decision-making. EU regulation is characterised by a preventive orientation, grounded in the precautionary principle and reflected in the use of hazard-based cut-off criteria for the approval of active substances. This framework is designed to minimise exposure and to pursue enhanced levels of protection, even in the presence of scientific uncertainty. By contrast, the US regulatory model privileges the identification of a cost-benefit effective baseline level of protection, permitting market access where risks are deemed not 'unreasonable' in light of the economic and social benefits associated with pesticide use.[155] These substantive differences are reinforced by distinct

[149] Renaud Dehousse, 'Delegation of Powers in the European Union: The Need for a Multi-Principals Model' (2008) 31[4] West European Politics 789.

[150] Claudio Radaelli, Anne CM Meuwese, 'How the regulatory state differs. The constitutional dimensions of rulemaking in the European Union and the United States' (2012) 2 Rivista italiana di scienza politica 177.

[151] The first EU regulation in the utility sectors started in the 1990s. In more details, for energy market, see Commission of the European Communities, 'Final Report on the State of Liberalisation of The Energy Markets' Brussels, 07.04.1998 Com (1998) 212. Moreover, Peter Alexiadis, and Martin Cave, 'Regulation and Competition Law in Telecommunications and Other Network Industries' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 500, 505-506.

[152] Literature also emphasises the role of risk in regulation as both an object of regulation and a reason to regulate. Julia Black, 'The Role of Risk in Regulatory Processes', in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 302.

[153] Academic commentaries also claim that risk and safety have been one of the major drivers of contemporary regulatory growth from the outset, especially at EU level. Christopher Hood, Henry Rothstein, and Robert Baldwin, 'What Are Risk Regulation Regimes? Why Do They Matter?' in Christopher Hood, Henry Rothstein, and Robert Baldwin (eds) *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford University Press, 2001) 3.

[154] In more detail, Mitchell P. Smith, 'Divergent Regulatory Trajectories' in Mitchell P. Smith (ed) *Environmental and Health Regulation in the United States and the European Union* (Palgrave Macmillan, 2012) 1.

[155] Giulia Claudia Leonelli, 'Transatlantic Divergencies in the Regulation of Uncertain Risks: Co-Production, Normative Frames and Ideal Evidence-Based and Socially Acceptable Risk Approaches' (2022) 23[5] German Law Journal 769.

enforcement and governance structures that reflect the constitutional arrangements of the two systems. In the United States, regulatory authority is federally centralised at the authorisation stage: plant protection products must be registered by the Environmental Protection Agency (EPA) before they may be placed on the market. In the EU, while the approval of active substances is centralised at Union level, the authorisation of specific plant protection products remains the responsibility of the Member States, within a multi-level regulatory framework.[156] Taken together, and viewed against the backdrop of markedly different political, constitutional, and agricultural contexts, these structural and normative divergences result in a significantly higher safety threshold for pesticide approval in the EU than in other major agricultural producers, including the US.[157]

Moreover, the literature also tends to refer to a third phase of regulation in the EU. This phase started with the regulation of data.[158] However, it has strongly intensified over recent decades marked by new sociotechnical challenges arising from digitalisation and new technologies. Digital governance initiatives, such as data protection legislation, the Digital Markets Act (DMA), the DSA, and the emerging regulation on AI, represent new examples of how the EU seeks to address risks emerging from these new technologies.[159]

4. The EU Administrative Design of National Competent Authorities

The EU's growing prominence as a regulator has defined a new trajectory for the regulatory state's governance model.[160] This trajectory has increased the significance of Member State administrative systems,[161] most clearly reflected in the proliferation of what this essay refers to as national competent authorities. In particular, EU sectoral legislation has increasingly asked Member States to establish or

[156] ibid, 777.
[157] David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press, 2012) 266-271.
[158] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [2995] OJ L 281/31.
[159] These three waves are taken from: Martino Maggetti, Fabrizio Di Mascio and Alessandro Natalini, 'Introduction to the Handbook of Regulatory Authorities' in Martino Maggetti, Fabrizio Di Mascio and Alessandro Natalini (eds) *Handbook of Regulatory Authorities* (1st edn Edward Elgar Publishing, 2022) 3.
[160] David Levi-Faur and Sharon Gilad, 'The Rise of the British Regulatory State: Transcending the Privatization Debate' (2004) 37[1] Comparative Politics 105; Lodge, 'Regulation, the Regulatory State and European Politics' (n 45) 286; Yeung, 'The Regulatory State' (n 148) 76.
[161] Giandomenico Majone, 'The transformations of the regulatory State' (2001) Osservatorio sull'Analisi d'Impatto della Regolazione, 8; Fabio Franchino, 'Delegating Powers in the European Community' (2004) 34[2] British Journal of Political Science 269, 291.

appoint specific bodies, either newly established or pre-existing, as national authorities entrusted with the enforcement of EU regulatory obligations. Stéphanie De Somer, one of the leading legal scholars in this field, uses the notion of an 'EU impulse' to capture the growing influence of EU law on the establishment of autonomous public bodies at the domestic level.[162] One of the latest examples in this regard is Article 49(1) DSA, read in conjunction with Recital 109 DSA, which requires the Member States 'to designate at least one authority with the task to supervise the application and enforce this Regulation, without prejudice to the possibility to designate an existing authority and to its legal form in accordance with national law […].'

Moreover, depending on the sector, EU legislation has also empowered national competent authorities with specific tasks. In network industries, for example, national competent authorities normally perform administrative enforcement tasks, i.e., monitoring, investigating, and sanctioning. More specifically, monitoring involves the continuous supervision of individuals or entities. Its objective is to promote voluntary compliance with legal requirements, based on the assumption that regular oversight encourages adherence to the law. The second task is investigation, which is initiated when there is an indication or suspicion of a legal violation. Investigations in the administrative context aim to collect information and evidence to determine whether a breach has occurred and to inform subsequent enforcement decisions. The third enforcement action is the imposition of administrative sanctions. When a violation is confirmed, the competent administrative authority may impose a sanction as a formal response.[163] Moreover, depending on the sector, national authorities have a set of powers to carry out their tasks.[164]

While these administrative enforcement tasks remain a constant, the responsibilities of national competent authorities have become more detailed or sophisticated with the new generations of EU regulation. Technical knowledge and expertise have justified the progressive empowerment of these authorities with new types of responsibilities, albeit still in varying forms depending on the sector.[165] Importantly, a general remarkable evolution can be observed in the institutional role of national competent authorities within the EU framework. Whereas these bodies were once confined largely to administrative enforcement, they now actively participate in the full policy lifecycle, including agenda-

[162] De Somer, 'EU impulse' (n 42) 23, 26.
[163] In more detail on this division, see Ton Duijkersloot and Rob Widdershoven, 'Administrative Law Enforcement of EU Law' in Miroslava Scholten (ed) *Research Handbook on the Enforcement of EU Law* (Edward Elgar Publishing, 2023) 38.
[164] For example, Directive 2019/944 (n 5) art. 59
[165] In more detail, Stéphanie De Somer, 'The powers of national regulatory authorities as agents of EU law' (2018) 18[4] ERA-forum: scripta iuris europaei 581.

setting and policy-making.[166] This shift has resulted from the development of multiple systems of collaboration between Member State administrations and EU institutions, commonly referred to as 'integrated administration'.[167] A notable example of integrated administrative action is found in EU Agencies in which national authorities' representatives are called to participate in the policy-making phase.[168]

The introduction of obligations within EU law concerning the institutional structure of national competent authorities—such as budgetary rules, as well as conditions and standards governing the appointment of their members—has become progressively common across sectors.[169] The objective of these structural requirements is ultimately to safeguard the independence of national competent authorities.

The independence of this authority warrants preliminary reflections at this stage.[170] While EU law has taken measures in specific domains—such as network industries, competition, data protection, and the DSA—to strengthen the guarantees of independence for national competent authorities, these interventions have also raised several questions.[171] In particular, the compatibility of such independence with democratic principles—only briefly considered at this stage—remains a key concern.[172] Specifically, the emergence of administrative authorities insulated from political oversight, whose existence is justified primarily by the effectiveness of their outputs,[173] raises questions about

[166] Herwig Hofmann and Alexander Türk, 'The Development of Integrated Administration in the EU and its Consequences' (2007) 13 European Law Journal 253.
[167] In literature, other terms are employed, such as 'composite administration', Armin von Bogdandy and Philipp Dann, 'International Composite Administration: Conceptualizing Multi-Level and Network Aspects in the Exercise of International Public Authority' (2008) 9[11] German Law Journal 2013.
[168] Herwig Hofmann, 'Mapping the European administrative space' (2008) 31[4] West European Politics 662; and Elen Vos, 'EU agencies on the move: challenges ahead' (2018) 1 SIEPS, 12. Literature often discusses also composite procedures, Mariolina Eliantonio, 'Judicial review in an integrated administration: the case of 'composite procedures' (2014) 7[2] Review of European Administrative Law 65.
[169] For example, Regulation 2016/679 (n 7) art. 52(6): 'Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget.' The DSA also provides a clear illustration of the type of institutional requirements that EU law may impose in this regard. Article 50(1): 'Member States shall ensure that their Digital Services Coordinators have all necessary resources to carry out their tasks, including sufficient technical, financial and human resources […] sufficient autonomy in managing its budget within the budget's overall limits, in order not to adversely affect the independence of the Digital Services Coordinator'.
[170] Independence is also discussed in the following Section and in Section 2 of Chapter IV.
[171] Vincent Lamanda, 'Avant-propos' (2010) 5 Revue française de droit administratif 873; and more generally the other contributions in that issue.
[172] Giandomenico Majone, 'The Regulatory State and Its Legitimacy Problems' (1999) 22[1] West European Politics.
[173] Fritz Scharpf, 'Political Democracy in a Capitalist Economy' in Fritz Scharpf (ed) Governing in Europe: Effective and Democratic? (Oxford University Press, 1999) 6-9. Scharpf distinguishes an input- and output-oriented

the alignment of such a model with democratic values.[174] These authorities lack the democratic legitimacy that other administrative bodies normally derive from their connection to elected institutions. While this concern remains unresolved,[175] scholarly literature continues to propose mechanisms for enhancing the democratic legitimacy of these authorities.[176]

To sum up, at present, the academic discourse on the Europeanisation of national competent authorities stands at a crossroads. On the one hand, legal scholarship increasingly recognises the profound influence of EU law on the organisation and structuring of these authorities. On the other hand, the debate remains fragmented and inconclusive, often generating more questions than answers. Among the most pressing unresolved issues are the extent to which the delegation of tasks and powers by EU law has expanded beyond traditional administrative enforcement functions to encompass broader responsibilities, and whether discernible patterns can be identified in the EU's approach across different policy sectors.

5. The Integrative Force of EU law: The Quasi-Judicial Role of National Competent Authorities

In response to the fragmented debate on the Europeanisation of national competent authorities, my research has investigated the emerging quasi-judicial role of these authorities, with the aim of uncovering broader patterns in EU-driven institutional developments. This line of research can be

democratic legitimacy. The motto 'government by the people' characterizes an input legitimacy where political choices are legitimate if and because they reflect the will of the people. By contrast, an output-oriented legitimacy centres on an idea of 'government for the people'. Political choices are legitimate if and because they promote effectiveness and quality of policy outcomes.

[174] Giandomenico Majone, 'Regulatory Legitimacy in the United States and the European Union', in Kalypso Nicolaidis, and Robert Howse (eds) *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 252; and Martino Maggetti, 'Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review' (2010) 2 Living Reviews in Democracy; and

[175] Andreas Follesdal and Simon Hix, 'Why there is democratic deficit in the EU: response to Majone and moravcsik' (2006) 44[3] Journal of Common Market Studies 533

[176] For example, a large body of scholarship has turned to the concept of accountability as a more flexible and suitable framework. Roberto Caranta, 'Democracy, Legitimacy and Accountability–is there a Common European Theoretical Framework?' in Matthias Ruffert, *Legitimacy in European Administrative Law* (Europa Law Publishing, 2011) 178, 187; Giorgia Nesti, 'Strengthening the Accountability of Independent Regulatory Agencies: From Performance Back to Democracy' (2016) Comparative European Politics 1, 12; and Stéphanie De Somer, 'Reconciliation' in Stéphanie De Somer, Autonomous Public Bodies and Law (Edward Elgar Publishing, 2017) 251. Moreover, Vivien Schmidt has theorised a throughput legitimacy, where legitimacy is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultation with the people. Vivien Schmidt, Matthew Wood, 'Conceptualizing throughput legitimacy: Procedural mechanisms of accountability, transparency, inclusiveness and openness in EU governance' (2019) 97[4] Public Administration 727.

found in the article '*The Quasi-Judicial Role of National Competent Authorities'*.[177] In brief, the article discusses the emerging quasi-judicial role of Member States' authorities competent for the enforcement of EU law at the national level. In various sectors,[178] EU secondary legislation endows national competent authorities with a range of quasi-judicial responsibilities, such as dispute settlement, enforcement and protection of individuals' rights and interests, while subjecting them to independence safeguards comparable to those of national courts. This contribution claims that these elements together highlight that national competent authorities are called to perform a quasi-judicial role when acting within the scope of EU law.

More specifically, core safeguards of independence have appeared consistently across the sectors examined. These include independence from market actors, political authorities, and other external influences, helping to ensure that national competent authorities can operate free from any internal or external pressure. Procedural safeguards further reinforce this independence, including rules on budgetary autonomy, transparent and secure procedures for the appointment and dismissal of key officials, and mechanisms that guarantee the integrity of decision-making processes. These safeguards are then systematically compared to judicial independence as developed by the Court of Justice.[179] This comparison reveals striking parallels. Just as judicial authorities must exercise their functions 'autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever' (external independence) and impartiality, referring to objectivity and the absence of any interest in the outcome of the proceedings (external),[180] national competent authorities are increasingly structured to maintain a comparable degree of autonomy and impartiality.[181]

[177] Mattioli, 'The Quasi-Judicial Role of National Competent Authorities' (n 44) 99, 103

[178] The sectors analysed are: competition, data protection, digital services, energy, telecommunications, and railways.

[179] Mattioli, 'The Quasi-Judicial Role of National Competent Authorities' (n 44) 99, 107. In relation to the judicial systems of the Member States, it is evident that there is considerable diversity in the organisation and structure of national judiciaries. Nevertheless, certain fundamental guarantees—most notably the requirement of judicial independence—are generally recognised as essential to the proper administration of justice. The Court of Justice has played a pivotal role in articulating and refining these guarantees through its jurisprudence. Notably, the Court distinguishes between two dimensions of judicial independence: external and internal. Over the past years, it has developed a standard of judicial independence, which is an expression of the rule of law and the principle of effective judicial protection and thereby, is rooted in Articles 2 and 19 TEU, and Article 47 CFR. For instance, Case C-216/18, *PPU v Minister for Justice and Equality* [2018] ECLI :EU:C:2018:586, paras 48-50; Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI :EU:C:2018:117, paras 35-38 ; and Case C-619/18 *Commission v Poland* [2019] ECLI :EU:C:2019:615, paras 50-57.

[180] Case C-274/14, *Banco de Santander SA* [2020] ECLI:EU:C:2020:17, para 57.

[181] Mattioli, 'The Quasi-Judicial Role of National Competent Authorities' (n 44) 99, 105-107.

Moreover, it is noted that EU law has progressively endowed national authorities with responsibilities and powers that closely resemble those traditionally exercised by national courts. These quasi-judicial functions encompass the authority to adjudicate disputes, enforce compliance with legal norms, and issue decisions that carry binding legal effects.[182] By way of example, the DSA empowers enforcement authorities, especially DSCs, with a range of quasi-judicial tasks. Article 53 DSA states as follows: 'recipients of the service and any body, organisation or association mandated to exercise the rights conferred by this Regulation on their behalf shall have the right to lodge a complaint against providers of intermediary services alleging an infringement of this Regulation with the Digital Services Coordinator of the Member State where the recipient of the service is located or established'. The DSC is therefore entrusted with the authority to protect the rights of individuals under the DSA. Among these rights, Article 54 DSA, specifically, mentions 'the right to seek, in accordance with Union and national law, compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under this Regulation'. To allow the DSC to carry out this task, the DSA attributes to these authorities several powers currently listed in Article 51 DSA. Remarkably, among these powers, this provision mentions powers of investigation as well as specific enforcement powers, such as the power to order the cessation of infringements and, where appropriate, to impose remedies, including the power to impose fines and periodic penalty payments.[183] Moreover, quite similarly to a judicial proceeding before courts, the DSA also includes some procedural rights of the parties, such as the right to be informed, submit observations, participate in the proceeding and that the measures taken are effective, dissuasive and proportionate.[184]

The emergence of independence safeguards and judicial powers conferred on national authorities helps to reveal that, in several sectors, EU law entrusts these bodies with quasi-judicial roles. A central element in developing this argument lies in the methodological approach adopted in the contribution. Rather than examining individual policy fields in isolation, the analysis relies on a functional comparative method of legal inquiry. Instead of addressing each policy field in isolation, this article adopts a functional comparative method of legal analysis, adopting a cross-sectoral perspective that examines major instruments of EU secondary legislation across different regulatory domains. In this context, the article conceptualises the attribution of independence safeguards and functions as a neutral intermediary (*tertium comparationis*), allowing comparison of different sets of rules across

[182] ibid, 110-113.
[183] Regulation 2022/2065 (n 7) art. 51.
[184] Ibid, art. 51(3).

sectors.[185] This approach has enabled a systematic examination of how various EU legislative regimes—competition, data protection, digital services, energy, telecommunications, and railways—design national authorities with independence safeguards and invest them with tasks resembling those typically exercised by the judiciary.[186] At the same time, both the methodological approach and the criteria developed in this article are capable of replication beyond the sectors analysed here. As such, they provide a transferable analytical framework for identifying and assessing quasi-judicial authorities in other areas of EU regulation, thereby contributing to a broader and more systematic understanding of the evolving role of national authorities within the European administrative space.

That said, the article continues to highlight how the EU legislator and the Court of Justice have not explicitly acknowledged the quasi-judicial role that these authorities are called to perform. EU secondary legislation has not made explicit and direct recognition of that role. In addition, the Court of Justice case law emphasises the administrative—rather than judicial—nature of the functions carried out by national competent authorities. Under these circumstances, the quasi-judicial role is indirectly grasped from a series of structural and functional administrative design obligations.[187]

These implications related to a possible formal recognition of national competent authorities as quasi-judicial entities within the EU administrative landscape raise additional reflections, which will be only briefly flagged here.[188] This quasi-judicial role blurs the distinction between administrative and judicial functions. The concentration of quasi-judicial powers—alongside policy-making authority—within a single administrative body departs from constitutional traditions of many Member States that emphasise a functional differentiation between legislative, executive, and judicial tasks.[189] Under these circumstances, it becomes easier to understand why both EU legislation and the Court of Justice have,

[185] More generally, Julie De Coninck, 'The functional method of comparative law: "Quo vadis"?, 74 Rabels Zeitschrift für ausländisches und internationales Privatrecht, 318-350. In more detail, Pieter Van Cleynenbreugel, ERC Starting Grant 2020, B2, 7.

[186] Mattioli, 'The Quasi-Judicial Role of National Competent Authorities' (n 44) 99, 103. By applying the same comparative criteria to emerging regulatory domains, the analysis conducted within that article shows the heuristic utility of the functional method in uncovering broader trends and previously unrecognised patterns in the evolution of EU administrative law. In this context, the analysis focuses on specific sectors, as these are the areas in which the attribution of quasi-judicial tasks to national competent authorities is most clearly observable. However, the framework developed here is not confined to these sectors. By applying the criteria established in this article, similar quasi-judicial developments may also be identified in other emerging regulatory fields, such as the AI Act, which had not yet been formally adopted at the time this article was written.

[187] Mattioli, 'The Quasi-Judicial Role of National Competent Authorities' (n 44) 99, 114-116.

[188] In more detail, Chapter III, Section 5.

[189] De Somer, 'The powers of national regulatory authorities as agents of EU law' (n 44) 585. Member States' constitutional systems vary, and many operate (for various reasons) under constitutional models that do not strictly respect this separation of powers. Carol Harlow and Richard Rawlings. Law and Administration (3rd edn, Cambridge University Press, 2009) 7; and Armin von Bogdandy, 'Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States' (2020) 57[3] Common Market Law Review 705, 707.

at times, shown reluctance to explicitly and formally acknowledge the quasi-judicial status of national competent authorities. Moreover, this hesitation is certainly related to questions of constitutional identity. In fact, pursuant to Article 4(2) TEU, the Union is obliged to 'respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional'.[190] Recognising national administrative bodies as quasi-judicial authorities could, therefore, be perceived as interfering with the Member States' constitutional prerogatives as well as their institutional autonomy.

6. EU Administrative Design: Sectoral Variations and the Limits to a Unified Model

In nearly all regulated sectors, EU legislation relies on national bodies for its implementation and enforcement, entrusting them with key responsibilities. In parallel, it also imposes a range of administrative design obligations encompassing structural and procedural aspects to make the exercise of those responsibilities coherent and effective.[191] A comprehensive overview of the administrative design obligations across diverse policy sectors can be found on the website of the EUDAIMONIA project more broadly and more specifically, within the analysis presented in my contributions.[192]

This overview shows that EU administrative obligations are not confined to specific policy areas but permeate virtually all policy areas subject to Union legislative intervention. However, by looking at this background comparatively, it emerges that the intensity, content, and scope of the administrative design obligations vary. Some regulatory regimes exhibit detailed prescriptions regarding the internal configuration, procedures, and functions of national competent authorities, whereas others adopt a limited approach, leaving significant room for Member State autonomy to organise and structure their EU enforcement systems.

In this context, a clear illustration of sectoral differences in administrative design can be drawn from two of the main policy fields that I have examined in my research: digital services and plant protection

[190] Article 4(2) TEU. In more detail, Chapter III.
[191] Pieter Van Cleynenbreugel, 'Independent administrative authorities and the sectoral 'Europeanisation' of national administrative law: a European Union law perspective' (2023) ORBi-University of Liège. https://orbi.uliege.be/handle/2268/313933 accessed 1 September 2025.
[192] In more detail, https://www.eulegalstudies.uliege.be/cms/c_8012264/en/eulegalstudies-eudaimonia accessed 1 September 2025.

products. As will be shown in more detail in Table 1, at one extreme, the DSA reflects a deliberate aspiration towards administrative convergence and (apparent) greater uniformity in the institutional configuration of national enforcement systems.[193] At the other end, regulatory instruments like those governing plant protection products exemplify a more restrained legislative stance, in which the organisation of national enforcement systems remains largely undefined.[194]

Table 1: Comparison between the DSA and PPPR administrative design obligations

	DSA	**PPPR**
Establishment	Article 49(1): Member States shall designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and enforcement of this Regulation ('competent authorities'). (2): Member States shall designate one of the competent authorities as their Digital Services Coordinator.	Article 75(1): Each Member State shall designate a competent authority or authorities to carry out the obligations of the Member States laid down in this Regulation. (2): Each Member State shall designate a coordinating national authority to coordinate and ensure all the necessary contacts with applicants, other Member States, the Commission and the Authority.
Internal organisation	Article 50(1): Member States shall ensure that their Digital Services Coordinators have all necessary resources to carry out their tasks, including sufficient technical, financial and human resources […]. Each Member State shall ensure that its Digital Services Coordinator has sufficient autonomy in managing its budget within the budget's overall limits.	Article 75(3): Member States shall ensure that competent authorities have a sufficient number of suitably qualified and experienced staff so that the obligations laid down in this Regulation shall be carried out efficiently and effectively.

[193] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework' (n 44) 19, 21-22.
[194] Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations' (n 44) 70, 75.

	(2) […] the Digital Services Coordinators shall act with complete independence. They shall remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.	
Tasks and Powers	Article 51(1): […] Digital Services Coordinators shall have the following powers of investigation (2): Digital Services Coordinators shall have the following enforcement powers […] (3): Additional powers.	Chapter II lists several tasks in the process of approval of active substances and authorisation of plant protection products.
Modus operandi	Article 50(1): Member States shall ensure that their Digital Services Coordinators perform their tasks under this Regulation in an impartial, transparent and timely manner.	36(1): The Member State examining the application (for authorisation) shall make an independent, objective and transparent assessment in the light of current scientific and technical knowledge using guidance documents available at the time of application.

Debates concerning the independence of national competent authorities best illustrate the struggle to impose a single and uniform model of administrative design across sectors.[195] While EU legislation often imposes requirements of independence on national competent authorities, it remains unclear and debated what the concept of independence truly entails within EU law. Despite EU legislation being an important variable influencing the independence of national competent authorities,[196]

[195] In more detail, Chapter IV, Section X.

[196] See, for example, in competition law, Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.

uniform standards of independence across sectors have yet to be established.[197] By way of comparison, Article 50(2) DSA asks for the complete independence of DSC, meaning that the DSCs must 'remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.' The same conditions of independence do not apply to national competent authorities appointed to perform official controls to ensure the application of food and feed law under Regulation (EU) 2017/625.[198] A comprehensive, cross-sectoral legal definition of independence—one that establishes uniformly applicable requirements to safeguard independence—is therefore absent at the EU level. This absence has prevented the independence principle from attaining the status of a general principle of EU law, thus limiting its reach and legal effectiveness across the broader spectrum of EU governance.[199]

7. Conclusion

This Chapter has traced the evolution of national competent authorities from their national foundations within the framework of the regulatory state to their current configuration under EU law. By following this analysis, this Chapter offers at least three key insights.

First, the EU has set national competent authorities apart from national administrative systems in the strict sense. While these authorities remain formally embedded within the Member States' administrative apparatus, their functional orientation, institutional design, and now also their role within the Member States' constitutional orders reflect logics that are no longer exclusively national.[200] EU regulatory regimes frequently presuppose a level of technical capacity that exceeds the traditional remit of generalist bureaucracies.

A second insight is that the EU's administrative design of national competent authorities may have conferred upon these authorities a distinctive constitutional and functional position within their respective national legal systems. Through the imposition of stringent safeguards of independence and

[197] For an overview of the difference independence requirements, see EUDAIMONIA website, https://www.eulegalstudies.uliege.be/cms/c_8012264/en/eulegalstudies-eudaimonia accessed 1 September 2025.
[198] Regulation 2017/625 (n 12) art. 4.
[199] Chris J. Hanretty, Pierre Larouche, Andreas P. Reindl, 'Independence, Accountability and Perceived Quality of Regulators' (2012) Centre on Regulation in Europe (CERRE) (2012) https://cerre.eu/publications/independence-accountability-and-perceived-quality-regulators/ accessed 10 June 2025, 14.
[200] Mark Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 52 International Organization 99.

attribution of adjudicatory powers, national competent authorities increasingly occupy a hybrid space that blurs the traditional distinction between administration and adjudication. This observation, however, must be treated with caution and cannot be generalised across all sectors. In specific policy areas—such as data protection, competition, or digital services—national competent authorities may *de facto* operate with a degree of autonomy and powers that approach those of national courts. By contrast, in other areas, such as food safety or medicinal products among others, enforcement responsibilities typically remain embedded within traditional ministerial structures, limiting the authorities' independence and functional distinctiveness.

This consideration also leads to the final insight from this Chapter. Although the EU administrative design has driven significant transformations across sectors, these changes remain incomplete and uneven, and sectoral variation prevents the establishment of a uniform model of EU administrative design of national competent authorities.

CHAPTER III

NATIONAL INSTITUTIONAL AUTONOMY

1. Introduction

The previous Chapter revealed that EU secondary legislation plays a key role in structuring and organising Member States' authorities responsible for rendering EU law substantive obligations and rights fully operative. However, for the administrative design obligations contained in this legislation to become operative, it is necessary for the Member States to interpret and implement these obligations within their legal orders. In this process of implementation, a determining factor is the institutional autonomy of the Member States.[201]

The autonomy of the Member States has been characterised as 'a guiding principle of the European multi-level legal system',[202] embodying a residual sovereignty in response to the EU's increasing integrative force.[203] This autonomy has been employed to define the prerogative of the Member States to organise their EU law administrative and judicial enforcement systems according to their own constitutional and administrative traditions.[204] In particular, national autonomy has been used to refer to at least two different things. Where the Union has not laid down detailed substantive, procedural, or institutional rules, Member States remain free to organise their judicial and administrative systems. Conversely, where EU law establishes binding rules or objectives, national arrangements must be designed and applied in a manner that is compatible with the rules and the objectives of EU law. This understanding of autonomy suggests that the Member States enjoy autonomy only by default—as long as EU law has not intervened to harmonise these rules.[205] The principle of national procedural autonomy has been commonly associated with this idea of autonomy.[206]

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[201] De Somer, 'EU Impulse' (n 42) 23, 24-26.
[202] Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' (n 34) 167.
[203] Pieter Van Cleynenbreugel, 'National Procedural Choices before the Court of Justice of the European Union' in Lukasz Gruszczynski and Wouter Werner (eds) Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation (Oxford University Press, 2014) 175.
[204] Verhoeven, *The Costanzo obligation* (n 42) 44-45
[205] Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach' (2012) 23 Cambridge Yearbook of European Legal Studies 128.
[206] Pieter Van Cleynenbreugel, 'Judge-Made Standards of. National Procedure in the Post-Lisbon Constitutional Framework' (2012) 37(1) European Law Review 90.

Against that background, the parallel concept of national institutional autonomy has remained largely under-theorised. It is commonly invoked to describe the autonomy of the Member States in determining the administrative arrangements for the enforcement of EU law and has become a decisive factor in shaping national responses to EU demands concerning the institutional design of competent authorities.[207] However, its legal nature, scope, and limits remain unclear. There is almost no reference to institutional autonomy in EU secondary legislation,[208] and the EU Treaties contain no express provision to that effect. Scholarly literature has therefore sought to derive a principle of institutional autonomy from Article 4(2) TEU on the protection of national identity. To date, the CJEU has provided the most developed analysis of national institutional autonomy, yet its case law has not resolved all ambiguities. In particular, the Court has frequently addressed institutional and procedural autonomy together, while consistently refraining from explicitly recognising a standalone principle of national institutional autonomy. Academic scholarship has largely reflected this ambiguity.[209]

A central objective of this Chapter is therefore to revisit the persistent ambiguity surrounding the nature, scope, and limits of national institutional autonomy. Lacking a clear understanding of what national institutional autonomy is and what its limits are, it becomes difficult to determine whether national administrative choices fall within the legitimate sphere of the Member States' autonomy or conversely, they unlawfully affect the objectives and obligations of EU law.

Moreover, clarifying the legal status of national institutional autonomy is equally necessary in order to determine its normative force within the EU legal order. If autonomy is understood as a general principle of EU law, it should operate as a substantive constraint on EU legislation and inform judicial review by the Court of Justice.[210] If, by contrast, it is merely a descriptive expression of the absence of

[207] Verhoeven, *The Costanzo obligation* (n 42) 44.
[208] Exceptionally, Directive 2018/1972 (n 5) Recital 34 'In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory and other competent authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 345 TFEU'
[209] Among the most notable efforts to address the meaning of this concept: Jans, *Europeanisation of Public Law* (n 1) 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; Sébastien Platon, 'L'autonomie institutionelle des États membres de l'Union européenne – parent pauvre ou branche forte du principe d'autonomie institutionnelle et procédurale?' in Laurence Potvin-Solis (ed.), *Le statut d'Etat membre de l'Union européenne* (Bruylant, 2018) 461.
[210] De Somer, 'EU Impulse' (n 42) 23. 25.

EU competence in matters of administrative organisation, its capacity to limit EU intervention is significantly weaker.[211]

In sum, identifying the nature and limits of national institutional autonomy makes it possible to delineate how Member States' administrative choices are to be reconciled with the requirements and objectives of Union law. Most importantly, such an understanding is essential to the principal objective of my doctoral research, namely, to determine the normative framework that ultimately governs the EU-Member State relationship in the administrative design of national competent authorities.

Within this framework, this Chapter is divided in six sections following this introduction, each addressing a distinct but interrelated aspect of national institutional autonomy in EU law. Taken together, these sections intend to progressively clarify the meaning, legal status, and limits of national institutional autonomy by looking at the Court of Justice case law and relevant literature commentaries, as well as assess the role that this autonomy has in the EU's administrative design of national competent authorities.

Preliminarily, Section 2 lays the conceptual foundations of the analysis by examining the notion of general principles of EU law. It clarifies what distinguishes principles from rules, identifies the functions performed by general principles in the EU legal order, and explains the methods through which they are recognised. This Section is not concerned with national institutional autonomy as such, but rather provides the analytical framework necessary to assess whether that concept can plausibly be characterised as a general principle of EU law.

Section 3 turns to the concept of Member State autonomy and distinguishes its two commonly invoked dimensions: procedural autonomy and institutional autonomy. It reconstructs the emergence and scope of the principle of national procedural autonomy as developed by the Court of Justice, together with its judicially defined limits, notably equivalence and effectiveness. Against this background, the Section introduces the notion of national institutional autonomy and highlights the persistent uncertainty surrounding its relationship with procedural autonomy. The Section thus frames one of the main questions of the Chapter: whether national institutional autonomy constitutes an autonomous legal concept within EU law or merely a derivative expression of procedural autonomy.

[211] Jacques Ziller, 'Les autorités administratives indépendantes entre droit interne et droit de l'Union européenne' (2010) 5 Revue française de droit administratif 901.

Section 4 examines the tendency, in the case law of the Court of Justice, the Opinions of the Advocates General, and academic literature, to treat procedural and institutional autonomy as a single, undifferentiated concept. Through an analysis of selected case law and Opinions, the Section shows how references to 'institutional and procedural autonomy' often result in the implicit prioritisation of procedural autonomy. At the same time, this Section contests the idea of bringing these two forms of autonomy under a single concept, arguing that it risks obscuring the specific issues raised by the administrative organisation and design of national competent authorities.

Section 5 reviews the argument advanced in academic literature that national institutional autonomy may find a normative foundation in Article 4(2) TEU, which requires the Union to respect the national identities of the Member States. This Section highlights the limits of this approach, showing that confining institutional autonomy to Article 4(2) TEU excludes most EU administrative design obligations from its scope and does not reflect the Court of Justice's broader practice. It concludes arguing that Article 4(2) TEU offers only a partial and insufficient foundation for a principle of national institutional autonomy.

Section 6 focuses specifically on national institutional autonomy as it emerges from the Court of Justice's case law when examined independently of procedural autonomy. It analyses how the Court has invoked institutional autonomy in cases concerning the organisation and structuring of national authorities responsible for enforcing EU law. While showing that the Court has consistently refrained from recognising institutional autonomy as a general principle of EU law, this Section identifies the substantive content and practical limits that the Court has nonetheless attached to the concept.

Section 7 concludes by drawing together the findings of the Chapter. By doing so, it clarifies the legal nature of national institutional autonomy. It argues that institutional autonomy is neither a general principle of EU law nor based on Article 4(2) TEU, but rather a background rule governing the allocation of organisational discretion to the Member States. As such, 'national institutional autonomy' grounded in EU law rather operates as a residual rule, shaping the margin of sovereignty available to Member States when organising their administrative structures, but only insofar as this sovereignty remains compatible with EU law obligations and objectives.

2. General Principles of EU Law

Before engaging with the question of whether national institutional autonomy is a general principle of EU law, this Section clarifies what is meant by a general principle of EU law, how general principles differ from legal rules, what functions they perform in the EU legal order, and how they are recognised.

A useful starting point of this analysis is the distinction between general principles and rules. As Takis Tridimas suggests, a principle may be defined as a general proposition of law of particular importance from which more concrete legal rules are derived. Two constituent elements follow from this definition. First, a principle is general. It operates at a higher level of abstraction than specific legal rules. This generality may manifest in different ways. A principle may be general because it transcends specific branches of law and underpins the legal system as a whole, or because it enjoys a particularly high degree of recognition and acceptance within that system. Secondly, a principle carries normative weight: it expresses values or requirements that are regarded as foundational for a given area of law or for the legal order as a whole.[212]

Despite this conceptual clarification, general principles in EU law are not uniformly framed. The terminology is inconsistent in both the case law of the Court of Justice and legal literature. There are differences in the choice of words by the Court of Justice and the Advocates General. These actors refer to 'principle generally accepted',[213] a 'basic principle of law',[214] and 'general principles of EU law',[215] among others. This diversity is mirrored in academic literature, where scholars have proposed different taxonomies.[216] For example, Päivi Neuvonen and Katja Ziegler observe that general principles of EU law are commonly grouped according to their origin, functions, or subject matter, with a basic distinction drawn between: first, principles primarily governing the relationship between individuals and public authorities, and second, structural principles underpinning the constitutional architecture of the Union.[217] A quite idiomatic division is proposed by Tridimas, who distinguishes between, on the one hand, principles deriving from the rule of law, and, on the other, systemic or structural principles that define the constitutional framework of the EU. The first category encompasses principles such as

[212] Takis Tridimas, *The General Principles of EU Law*, (2nd edn, 2006) 1-2.
[213] Case C-352/13, *CDC Hydrogen Peroxide* [2014] ECLI:EU:C:2014:2443, Opinion AG Jääskinen para 70.
[214] Case C-89/08, *P - Commission v Ireland and Others* [2009] ECLI:EU:C:2009:742 para 52.
[215] Case T-161/24, *NTT Data Belgique and Others v EIB* [2025] ECLI:EU:T:2025:950, para 72.
[216] Bruno de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law' in Ulf Bernitz and Joakim Nergelius (eds) *General Principles of European Community Law* (Kluwer 2000) 143; Xavier Groussot and Hans Henrik Lidgard, 'Are There General Principles of Community Law Affecting Private Law?' in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds) *General Principles of EC Law in a Process of Development* (Wolters Kluwer 2008) 155. And more broadly, Constanze Semmelmann, 'General Principles of EU Law: The Ghost in the Platonic Heaven in Need of Conceptual Clarification' (2013) 2 Pittsburgh Papers on the European Union 1
[217] Päivi J. Neuvonen, and Katja S. Ziegler 'General principles in the EU legal order: past, present and future directions' in Katja S. Ziegler, Päivi J. Neuvonen, and Violeta Moreno-Lax (eds) *Research Handbook on General Principles in EU Law* (Edward Elgar Publishing, 2022) 7, 10.

fundamental rights, equality, proportionality, legal certainty, the protection of legitimate expectations, and the rights of defence. These principles are rooted in the premise that the EU legal order is based on the rule of law and have been developed by the Court of Justice primarily by reference to the common constitutional traditions of the Member States. They function predominantly as principles of public law and regulate, above all, the relationship between individuals and public authorities, whether EU or national. The second category concerns principles that structure the relationship between the Union and the Member States and organise the EU legal system itself. These include, inter alia, the principles of primacy, conferral of competences, subsidiarity, loyal cooperation, and institutional balance. Unlike rule-of-law principles, these systemic principles do not primarily protect individual interests but instead define the distribution and exercise of public power within the EU's constitutional framework.[218]

Engaging comprehensively with scholarly debates concerning the possible taxonomies and meaning of general principles in the EU legal order would exceed the scope of the present analysis. What is essential for present purposes is to clarify the functions and methods of recognition of general principles, as these elements are central to assessing whether national institutional autonomy can plausibly be regarded as one of them.

The significance of the general principles of EU law is intrinsically connected to the dynamic character of European integration. The fast-evolving character of the EU legal system frequently exceeds the capacity of both the EU legislator and the Treaties to adapt promptly to new challenges and complexities. Therefore, general principles play a crucial role in preserving the legitimacy, coherence, and effectiveness of the EU legal framework.

In particular, general principles of EU law are a formal source of EU law.[219] Their significance lies not merely in their symbolic or interpretative value, but in their capacity to generate concrete legal effects.[220] In this regard, general principles perform a triple function. First, they fulfil a gap-filling function. General principles enable the Court of Justice to address gaps in the Treaties or in secondary legislation, thereby ensuring the coherence and autonomy of the EU legal system. This function has

[218] Tridimas, *The General Principles of EU Law* (n 212) 4.
[219] ibid 5 et seq.; Neuvonen and Ziegler 'General principles in the EU legal order: past, present and future directions' (n 217) 7 et seq.
[220] Tridimas, *The General Principles of EU Law* (n 212) 29 et seq. Case C-101/08, *Audiolux and Others* [2009] ECLI:EU:C:2009:410, Opinion of AG Trstenjak, para 68: 'There is agreement in any case that the general principles have considerable importance in the case-law in filling gaps and as an aid to interpretation, (23) not least because the Community legal order is a developing legal order which inevitably has gaps and requires interpretation on account of its openness in respect of integrational development.'

been particularly important in a legal order characterised by rapid evolution and incomplete codification. Secondly, general principles serve as interpretative tools. Both EU law and national law falling within the scope of EU law must be interpreted in conformity with general principles. In this sense, principles guide the meaning and application of written norms and constrain discretionary decision-making by public authorities. Thirdly, general principles operate as standards of judicial review. EU legislative acts that infringe a general principle may be declared void, while national measures implementing or applying EU law must be set aside if they contravene such principles. Through this function, general principles acquire constitutional significance within the EU legal order.[221]

In the context of EU administrative law, the relevance of general principles is clearly underscored.[222] These principles bind both EU institutions in exercising their legislative and administrative competences and the Member States when they implement and enforce EU law.[223] Such a scope ensures that administrative actions across the Union—whether at the national or supranational level—comply with a coherent and shared set of standards. This importance becomes even more pronounced with regard to national administrations, particularly given the absence of a comprehensive Union administrative policy explicitly regulating the organisation and functioning of domestic administrations. In this context, general principles of EU administrative law operate as unifying standards, requiring national authorities to respect fundamental values and procedural guarantees whenever they apply EU law, even in the absence of clear legislative norms. This compensates for the lack of harmonised administrative legislation and enhances both the consistency and legitimacy of the broader European administrative space. Moreover, even where domestic administrative rules are already in place, general principles serve as essential benchmarks for assessing the effectiveness of those rules, ensuring that similar standards are upheld at both the EU and Member State levels as well as among Member States.[224]

Once it is clarified what general principles of EU law practically entail, an important additional clarification concerns the method of recognition of these principles. Tridimas recalls that 'the process

[221] This distinction is specifically taken from Koen Lenaerts and José A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 Common Market Law Review 1629
[222] Giacinto della Cananea, 'Introduction - Principes généraux du droit administratif européen : sources et effets' in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds) *Traité de droit administratif européen* (3rd edn. Bruylant, 2022) 409, 410.
[223] Case C-5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECLI:EU:C:1989:321.
[224] Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk, 'General Principles Framing European Union Administrative Law in Herwig C.H. Hofmann, Gerard C. Rowe, and Alexander H. Türk (eds) Administrative Law and Policy of the European Union (Oxford University Press, 2011) 143.

of discovery of a general principle is *par excellence* a creative exercise and may involve an inductive process.'[225] In this light, for what concerns the emergence of general principles of EU law, there is broad consensus in legal scholarship that the Court of Justice plays a central role in this process.[226] More controversial, however, is the methodological basis on which particular principles are recognised.[227] The provenance of general principles from the common constitutional traditions of the Member States may be relatively uncontroversial. By contrast, the recognition of principles that are internally constructed within the EU legal order—such as effectiveness, supremacy, national procedural autonomy, or institutional balance—may be more contested. These principles are not always traceable to equivalent concepts in national legal systems and may instead be inferred inductively from existing EU norms or deductively from the underlying rationale or structural logic of the EU Treaties.[228]

This methodological distinction is of particular relevance for the analysis of national institutional autonomy. Whether this autonomy may be regarded as a general principle of EU law—more specifically what Tridimas categorises as principles that structure the relationship between the Union and the Member States and organise the EU legal system itself or what other scholars would more simply define as a constitutional principle of the EU–[229] depends not only on its normative content but also on the manner in which it has been articulated and applied by the Court of Justice.

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[225] Tridimas, *The General Principles of EU Law* (n 212) 2.

[226] Matthias Herdegen, 'The Origins and Development of the General Principles of Community Law' in Ulf Bernitz and Joakim Nergelius (eds) *General Principles of European Community Law* (Kluwer Law International, 2000) 17; Neuvonen and Ziegler 'General principles in the EU legal order: past, present and future directions' (n 217) 7. For instance, Diana-Urania Galetta, et al, 'The General Principles of EU Administrative Procedural Law: In-Depth Analysis' (European Parliament, 2015) 6. The authors argue that general principles of EU law are principles recognised as such by the CJEU. 'Not all principles of EU administrative procedural law have the status of 'general principles of EU law'. A principle that has been established in secondary law but has not been explicitly declared to be a 'general principle of EU law' by the CJEU may be overridden by the EU legislature. Furthermore, while the scope of 'general principles of EU law' coincides with the scope of EU law, the scope of a principle that has been established only in secondary law is limited to the scope of the relevant piece of legislation.'

[227] As general guidance, Takis Tridimas declares that a precept to be recognised as a general principle must satisfy three conditions. First, it must incorporate a minimum ascertainable legally binding content— a minimum core content which cannot be interfered with or altered by the legislature or, at least, which is capable of being judicially enforced in the absence of legislation. Second, it must be general in its application. Third, it must be awarded constitutional status by the CJEU. In more detail, Tridimas, 'The general principles of EU law and the Europeanisation of national laws' (n 31) 9.

[228] Neuvonen and Ziegler 'General principles in the EU legal order: past, present and future directions' (n 217) 7, 15-16.

[229] Olov Wiklund and Joxerramon Bengoetxea, 'General Constitutional Principles of Community Law' in Ulf Bernitz and Joakim Nergelius (eds) *General principles of European Community Law* (Kluwer Law International, 2000) 119; and Samantha Besson, 'General Principles and Customary Law in the EU Legal Order' in Stefan Vogenauer and Stephen Weatherill, *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) 105, 110.

With a view to clarifying the status, content, and limits of national institutional autonomy, the following section examines the relevant case law of the Court of Justice, discussed against the broader academic debate on national institutional autonomy.

3. The Two Dimensions of the Member State Autonomy

In EU law, the specific legal concept of Member State autonomy manifests itself in the context of procedural law. It is indeed in that context that the Court of Justice has carved out a well-known – albeit contested–[230] principle of procedural autonomy. That principle is generally grounded in the *Rewe* judgment, where the Court of Justice declared that 'in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law.'[231] Nowadays, the Court itself and literature connect this statement explicitly to the principle of procedural autonomy.[232] In sum, the *Rewe* case traces what appears to be the judicial boundaries of this principle,[233] as confirmed by subsequent case law.[234] In this light, the principle of national procedural autonomy guarantees the liberty of the Member States to designate the courts responsible for enforcing EU law at the national level and to determine the procedural rules governing such application.[235]

The exact scope and role of this principle of national procedural autonomy has only become clear by virtue of this principle's judicially defined limits. Consistent CJEU case law has in that regard confirmed that national procedural autonomy can only be relied on subject to respect for the principles of

[230] Constantinos Kakouris, 'Do the Member States Possess Judicial Procedural Autonomy?', (1997) 34 Common Market Law Review 1389; Sacha Prechal, 'Community Law in National Courts: The Lessons from Van Schijndel' (1998) 35[3] Common Market Law Review 681; Walter van Gerven, 'Of Rights, Remedies and Procedures' (2000), 37[3] Common Market Law Review 501. More generally, about procedural autonomy, see Diana-Urania Galetta, Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States (Springer, 2010) 9 et seq.

[231] Case C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECLI:EU:C:1976:188, p. 1997.

[232] Case C-234/17 *XC and Others v Generalprokuratur* [2018] ECLI:EU:C:2018:853. With some resistance, also Takis Tridimas, General Principles of EU Law (Oxford University Press, 2006) 419-420.

[233] Case C-33/76, *Rewe* (n 231) p. 1990-1991. In more detail, on the judicial nature of procedural autonomy, Kakouris, 'Do the Member States Possess Judicial Procedural "autonomy"' (n 230) 1389.

[234] Case C-439/08, *Vlaamse federatie van verenigingen van Brood-en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW* [2010] ECLI:EU:C:2010:739 paras 24-30; and Case C-792/22 *Criminal proceedings against MG* [2024] ECLI:EU:C:2024:788, para 15-25.

[235] Koen Lenaerts, 'Federalism and the rule of law: Perspectives from the European Court of Justice' (2009) 33 Fordham International Law Journal 1338, 1375-1376.

equivalence and effectiveness. According to the equivalence principle, national procedural rules cannot be less favourable than those governing similar domestic actions. In addition, in accordance with the principle of effectiveness these rules cannot render virtually impossible or excessively difficult the exercise of the rights or obligations conferred or imposed by EU law.[236] Moreover, literature also discusses the role of effective judicial protection and sincere cooperation as additional limits to national procedural autonomy.[237]

Beyond the principle of national procedural autonomy, academic literature, the case law of the Court of Justice, and, albeit more sporadically, EU legislation also invoke (a principle of) national institutional autonomy.

Within this framework, uncertainty persists as to whether procedural and institutional autonomy represent one single dimension of the Member State autonomy, or national institutional autonomy is nothing else than an expression of the principle of procedural autonomy, or whether procedural and institutional autonomy represent two different dimensions of the Member State autonomy, or even national institutional autonomy represents something else.

Clarifying this relationship and even more importantly, what national institutional autonomy entails within the EU legal order is important for at least two reasons. First, a clearer understanding of the meaning, status, and content of national institutional autonomy is indispensable for assessing the extent to which EU law may legitimately shape, constrain, or reorganise domestic administrative systems. If procedural and institutional autonomy were to be treated as a single and undifferentiated concept, the limits developed by the Court of Justice in relation to procedural autonomy—most notably those stemming from the principles of equivalence and effectiveness—would automatically extend to the institutional sphere. This would significantly narrow the margin of discretion traditionally

[236] Case C-33/76, *Rewe* (n 231) on the grounds, para 5: '[…] in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature' (first *Rewe* criterion) and that the conditions laid down by the domestic norms should not make it 'impossible in practice to exercise the rights which the national courts are obliged to protect (second *Rewe* criterion).'

[237] Literature also discusses whether effective judicial protection represents an additional limit to national procedural autonomy. In this regard, Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 2 Review of European Administrative Law 5, 15-18. There is, however, less agreement as to whether the principle of sincere cooperation, enshrined in Article 4(3) TEU, also functions as a limit on Member State procedural autonomy alongside effectiveness and equivalence. In this regard, Anna Wallerman, 'Towards an EU law doctrine on the exercise of discretion in national courts? The Member States' self-imposed limits on national procedural autonomy' (2016), 53[2] Common Market Law Review 339.

enjoyed by the Member States in organising their administrative structures and allocating competences, even in the absence of explicit EU harmonisation.

Second, this clarification is also a matter of doctrinal coherence. Academic commentaries on the nature and scope of institutional autonomy remain fragmented, often contradictory, and largely inconclusive. The concept is frequently invoked without a stable definition, oscillating between being treated as an autonomous principle of EU law, a corollary of procedural autonomy, or a descriptive label for residual national discretion in administrative organisation. This lack of conceptual clarity jeopardises the possible normative foundations of the principle.

4. Institutional Autonomy in the Shadow of Procedural Autonomy

There are numerous instances in which the Court of Justice,[238] the Advocates General,[239] and legal scholarship have referred to the (principle of) national institutional and procedural autonomy or, more simply, to procedural autonomy in a manner that encompasses what others would classify as merely national institutional autonomy.[240]

By way of example, institutional and procedural autonomy are considered as one single concept in the Opinion of AG Rantos in the *Commission v Denmark (Transports de cabotage)* case.[241] The controversy at issue concerns the European Commission's claim that Denmark violated EU law by failing to fulfil its obligations under Article 15(b) of Regulation No 1073/2009, which lays down common rules for access to the international market for coach and bus service,[242] by not authorising cabotage operations by

[238] Case C-574/15, *Scialdone* [2018] ECLI:EU:C:2018:295, para 29: 'their procedural and institutional autonomy, that autonomy is nevertheless limited by, first, the principle of equivalence, which means that those penalties must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests, and, second, the principle of effectiveness, which requires that such penalties be effective and dissuasive, in addition to the principle of proportionality, the application of which is not in point in the present case.'

[239] For example, Case C-323/18 *Tesco-Global* [2019] ECLI:EU:C:2019:567, Opinion of AG Kokott, para 176: 'The administrative rules relating to procedural law fall within the procedural and institutional autonomy of the Member States, which is nevertheless limited by the principles of effectiveness and equivalence.'

[240] Verhoeven, 'The 'Costanzo Obligation' and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?' (n 209), 24; and Andrea Biondi and Giulia Gentile, 'National Procedural Autonomy' in Fabri H Ruiz (ed) *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019); Duijkersloot and Widdershoven, 'Administrative Law Enforcement of EU Law' (n 163) 38–55.

[241] Case C-482/23, *Commission v Denmark (Transports de cabotage)* [2025] ECLI:EU:C:2025:150, Opinion of AG Rantos.

[242] Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services [2009] OJ L 300/88.

coach and bus in the context of occasional services, unless the operations are carried out within a period of seven consecutive days in one calendar month.[243] The case raises the question of the Member States' discretion concerning the concept of cabotage operations carried out 'on a temporary basis' within the meaning of Regulation 1073/2009.[244] In this respect, AG Rantos argues that the Member States are not generally denied the right to adopt procedural rules governing the implementation of directly applicable rules of EU law. However, EU law prohibits them from imposing additional conditions on the implementation of a provision of a regulation a regulation or from adopting supplementary measures affecting its substance. In his words: 'In this context, the institutional and procedural autonomy of Member States is limited, in accordance with the principle of sincere cooperation, by the need to ensure that EU law is effective and applied uniformly across Member States. Accordingly, insofar as the implementation of certain provisions of a regulation so requires, Member States may adopt implementing measures provided that (i) they do not obstruct its direct applicability or obscure its nature as an act of EU law, (ii) they act within the discretion conferred on them by the regulation, and (iii) they respect the parameters established therein.'[245]

In a similar fashion, one could notice an almost similar reference to institutional and procedural autonomy by the fourth chamber of the Court of Justice in the *Bankia* case. This case originates from Bankia's public share offer, which had two tranches: one for retail investors and employees, and another for qualified investors, with a prospectus published for the retail tranche. UMAS, a qualified investor, purchased shares under the institutional tranche, which later collapsed in value after Bankia revised its financial statements, prompting UMAS to seek annulment or, alternatively, damages for a misleading prospectus. In this context, the Spanish Supreme Court referred questions to the CJEU on whether qualified investors can claim damages and whether national courts may consider their prior knowledge of the issuer's financial situation.[246] The Court held that Article 6(2) of Directive 2003/71 leaves it to the Member States to determine, through their national laws, how actions for damages based on a prospectus are assessed and adjudicated. To put it differently, while qualified investors are entitled under EU law to bring an action for damages when a prospectus is misleading, national law can decide the specific conditions for doing so. Nevertheless, in this context, the Court clarifies that 'though the Member States have a broad discretion in relation to the rules for the bringing of the action for damages provided for in Article 6 of that directive, in accordance with the principle of institutional and procedural autonomy, that principle must nevertheless be applied in compliance with

[243] Case C-482/23, *Commission v Denmark (Transports de cabotage)* [2025] ECLI:EU:C:2025:789 para 1.
[244] Case C-482/23, Commission v Denmark (n 241), Opinion of AG Rantos, para 2.
[245] ibid, paras 23-24.
[246] Case C-910/19, *Bankia* [2021] ECLI:EU:C:2021:433, para 20

the principles of equivalence and effectiveness, in order to preserve the effectiveness of the applicable provisions of EU law'.[247]

In sum, both the AG and the Court's ruling refer to institutional autonomy together with procedural autonomy, suggesting that institutional autonomy is essentially a reflection of procedural autonomy.

Academic commentary has also tended to bring procedural and institutional autonomy together. For example, Saskia Lavrijssen and Annetje Ottow note that EU liberalisation directives have required Member States to establish independent authorities and grant them minimum powers. More specifically, they argue that the principles of institutional and procedural autonomy play an important role in this context. These principles apply in accordance with the doctrines of equivalence and effectiveness. Accordingly, national authorities should be embedded within national legal systems in line with constitutional and administrative traditions, provided that national law ensures the effective application of EU law and does not place it at a disadvantage compared with the application of national law in comparable cases.[248] Similarly, Thomas Eilmansberger discusses the 'institutional and procedural autonomy in the enforcement of EU rights', recalling the limits imposed on that autonomy by the principle of equivalence and effectiveness.[249]

Another perspective advanced in the literature is to conceive procedural autonomy as a single, overarching principle that encompasses administrative enforcement and the institutional design questions that come with it. This approach is articulated by Rob Widdershoven, who observes that 'the principle of procedural autonomy and the *Rewe* principles limiting the autonomy apply to both, national procedures for administrative decision-making and to adjudicatory procedures before the national courts'.[250] To put it differently, limiting procedural autonomy to the administration of justice would not reflect reality, since EU law is enforced both by courts and national administrations. Various directives and regulations lay down rules of procedural nature outside the scope of the administration of justice. It is for this reason that procedural autonomy should apply to both national procedures for administrative decision-making and to adjudicatory procedures before the national courts.[251]

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[247] ibid, para 45.

[248] Saskia Lavrijssen and Annetje Ottow, 'The Legality of Independent Regulatory Authorities' in Leonard Besselink, Frans Pennings and Sasha Prechal (eds) *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International, 2011) 73-74.

[249] Thomas Eilmansberger, 'The relationship between rights and remedies in EC law: In search of the missing link' (2004) 41[5] Common Market Law Review 1199.

[250] Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (n 237) 8.

[251] Pieter Van Cleynenbreugel, 'Structuring 'procedural fairness' through the principle of effectiveness: a promising starting point for a more uniform legal protection in EU digital law and beyond?' in Pieter Van

Against that background, I believe there are valid reasons to challenge the idea of a single principle of national institutional and procedural autonomy or even a principle of national procedural autonomy that also encompasses national institutional autonomy. At least two arguments can be submitted here. First, when the Court of Justice has invoked institutional and procedural autonomy together, it has implicitly prioritised the meaning of one concept over the other. For example, the few references to 'the principle of institutional and procedural autonomy' in the Court's case law or the Opinions of the Advocates General tend to highlight procedural autonomy, which the Court frequently treats as a fully established principle.[252]

Second, for what concerns the rare occasions where the Court of Justice has invoked the principle of procedural autonomy in contexts that might initially appear to concern the administrative enforcement of EU law, a closer examination reveals that these matters are essentially quasi-judicial in nature. In other words, the procedural autonomy referenced by the Court typically applies to procedural rules governing decision-making processes that resemble judicial functions.[253]

An example can help clarify this aspect. The *Trenialia S.p.a.* case arose from a proceeding before the Italian competition authority (Autorità Garante della Concorrenza e del Mercato or AGCM), which determined that Trenitalia had engaged in an unfair commercial practice related to the online sale of train tickets.[254] The referring court asked whether it was compatible with EU law—specifically Article 11 of Directive 2005/29, interpreted in light of consumer protection principles and the need for effective administrative action—to apply Article 14 of Italian Law No 689/81 to AGCM proceedings. The national provision requires the AGCM to begin the *inter partes* (adversarial) phase of its investigation by issuing a statement of objections within 90 days from the date it becomes aware of the essential facts of the alleged infringement. If this deadline is not met, the authority loses its power to impose penalties.[255] In this regard, the Court of Justice held that EU law precludes extending such a national rule to proceedings in which a national authority, like the AGCM, investigates and establishes

Cleynenbreugel and Ljupcho Grozdanovski (eds) The Standards of Fairness in Digital Law (Edward Elgar Publishing, 2025) 313.

[252] Case C-910/19, *Bankia SA* (n 246) para 45: 'However, although the Member States have a broad discretion in relation to the rules for the bringing of the action for damages provided for in Article 6 of that directive, in accordance with the principle of institutional and procedural autonomy, that principle must nevertheless be applied in compliance with the principles of equivalence and effectiveness, in order to preserve the effectiveness of the applicable provisions of EU law'

[253] Case C-294/20, *GE Auto Service* [2021] ECLI:EU:C:2021:723, para 59; Case C-347/20, *SIA* [2022] ECLI:EU:C:2022:59, paras 58-60; and Case C-510/23, *Trenitalia SpA* [2025] ECLI:EU:C:2025:41, para 54.

[254] Case C-510/23, *Trenitalia SpA* (n 253)

[255] ibid, paras 15-21.

the existence of an unfair commercial practice under consumer protection legislation.[256] The Court's reasoning relied on the principle of procedural autonomy, which allows Member States to determine their own procedural rules, provided these do not undermine the effectiveness of EU law and the rights it seeks to protect.[257] Within this framework, however, it is important to note that the proceeding before the national authority was not purely administrative in the traditional sense. The AGCM's decision can be considered quasi-judicial since it did not merely involve regulatory oversight but culminated in the imposition of significant financial penalties on private entities. It is significant that: 'the referring court observes in this connection that the penalties imposed by the AGCM, in respect of infringements of both competition law and consumer protection law, are of a 'quasi-criminal' nature'.[258] Furthermore, in the context of that proceeding, the parties have the same procedural rights as those in judicial proceedings.[259] All these elements suggest that the AGCM's role goes beyond typical administrative action and closely resembles a judicial one.[260]

5. Article 4(2) TEU as a Foundation for a Principle of National Institutional Autonomy

Legal scholars frequently refer to a principle of institutional autonomy, and the same can be said of the Advocates General in their Opinions.

For example, in one of the first influential contributions on the Europeanisation of public law, the authors state that: 'unless (secondary) Community law provides otherwise, it is for the Member States themselves to determine how they fulfil their Community obligations, which organs will be made responsible for the implementation and application of Community law (directly or otherwise), and what procedures will be followed.'[261]

They conclude by suggesting the 'under the principle of institutional autonomy, Community law respects the basic structures of the various national legal orders. In essence, Community law leaves

[256] ibid, para 71.
[257] ibid, paras 36 and 54.
[258] Case C-510/23, *Trenitalia SpA* [2025] ECLI:EU:C:2024:705 Opinion of AG Pikamäe, para 47.
[259] Case C-510/23, *Trenitalia SpA* (n 253) paras 13-14.
[260] Similar arguments have been raised by Van Cleynenbreugel, 'Structuring 'procedural fairness' through the principle of effectiveness' (n 251) 313.
[261] Jans, *Europeanisation of Public Law* (n 1) 18.

the national legal orders sufficient room to determine the structure of the national administrative law systems themselves.'[262]

Bringing this understanding further, Maartje Verhoeven also makes a remarkable effort to conceptually frame the institutional autonomy of the Member States. The author grounds her analysis in the political, legal, and practical considerations that have led to a preference for a decentralised application of EU law. These considerations include the EU's lack of practical means to implement and enforce its measures, as well as the principle of subsidiarity, which favours decision-making as close as possible to the citizens. In this context, Verhoeven argues that, although the EU relies on Member States' institutional infrastructures for the enforcement of EU law, the design and organisation of these infrastructures are not dictated solely by EU law. Instead, in the absence of specific EU provisions, the Member States retain primary responsibility for determining how these infrastructures are structured. Where EU administrative design obligations exist, national institutional autonomy refers to the capacity of the Member States to implement these obligations in accordance with their domestic constitutional, institutional, and legal traditions.

Occasional references to the principle of national institutional autonomy may also appear in the arguments raised by the Member States before the CJEU. Notably, in the *Commission v Belgium* case,[263] the European Commission brought an infringement proceeding before the Court linked to Belgian legislation transposing Directive 2002/22. That legislation entrusted the legislature itself as the national regulatory authority responsible for considering the nature of the burden that the provision of universal service entails for operators designated to provide that service.[264] To defend its choice of empowering the Belgian Parliament as regulatory authority, Belgium invokes the principle of institutional autonomy to maintain that, 'under its constitutional arrangements, there is nothing to prevent the Belgian Parliament from acting as national regulatory authority for the purpose of making a finding that an unfair burden exists as a result of the provision of universal service.'[265]

Moreover, scholars have examined whether the principle of national institutional autonomy can be connected to the EU Treaties. Some have argued that Article 4(2) TEU embodies this principle.

[262] ibid, 367
[263] Case C-222/08 *Commission v Belgium* [2010] ECLI:EU:C:2010:583.
[264] ibid, para 18.
[265] ibid, para 30.

Several EU Treaty provisions clarify how Member States must act to ensure the effective implementation of Union policies and laws. Among those provisions,[266] the relationship between the Union and its Member States has been shaped through the principle of sincere cooperation laid down in Article 4(3) TEU.[267] In this regard, Rui Tavares Lanceiro recalls that the principle of sincere cooperation has a function similar to, and indeed comparable with, the principles that, in a federation, regulate the relationship between federal law and state law (ensuring the prevalence of the former over the latter).[268] This obligation of the Member States to implement EU law is further operationalised in Article 291(1) TFEU, which states that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. The importance of the Member States in the execution of Union law is also emphasised by the principle of subsidiarity, as enshrined in Article 5(3) TEU, which—although originally formulated to guide the division of legislative competences—is interpreted as having an executive dimension as well.[269] Within this framework, no EU Treaty provision explicitly articulates a concept or principle of institutional autonomy of the Member States.

Against this background, quite convincingly some legal scholars suggest that Article 4(2) TEU—which safeguards the national identities of the Member States, 'inherent in their fundamental structures, political and constitutional', against the progressive deepening of European integration—establishes a principle of institutional autonomy.[270]

Article 4(2) TEU reads as follow: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and

[266] More generally, Schwarze, 'European Administrative Law in the Light of the Treaty of Lisbon' (n 33) 285, 292-296.

[267] Article 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The 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 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.' In this regard, Case C-129/00 *Commission v Italy* [2003] ECLI:EU:C:2003:319, Opinion of Advocate General Geelhoed, para 55.

[268] Lanceiro Rui Tavares, 'The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation' (2018) 10[1] Centre for Studies on Federalism 71, 77.

[269] Michael Schneider, 'Europe must deliver at the level closest to the citizens Subsidiarity: Past, present and future' (2019) 18[1] European View, 16.

[270] This provision states: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.'

safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

When arguing that Article 4(2) TEU may entail a principle of institutional autonomy, this part of the literature underscores two elements.

First, in its capacity as a principle of national institutional autonomy, this Treaty provision serves two objectives: on the one hand, to prevent EU law from altering the essential political and constitutional characteristics that define each Member State, and on the other, to prevent the mandatory creation of specific institutions or bodies within Member States for the enforcement of EU law if such requirements would fundamentally alter national organisational structures.[271]

Second, the conceptual scope of this autonomy is subject to a key limitation. As De Witte aptly argues, it is important that Article 4(2) TEU serve primarily, if not exclusively, as a safeguard of the specific constitutional and institutional arrangements of each Member State.[272] Therefore, this provision should not become 'a *passe-partout* argument for national governments or courts whenever they have misgivings about the concrete policy implications of EU membership'.[273] In this light, the insertion of the national identity clause into the EU Treaties should be understood as an attempt to give explicit normative expression to the Union's commitment to respect Member State institutional autonomy.[274] However, the autonomy safeguarded here is not a generalised freedom to resist the effects of Union law, but rather a targeted protection of those specific institutional configurations which form part of the constitutional core of each Member State.[275]

Under these circumstances, a key distinction must be drawn. The EU rules affecting the very core of a Member State's constitutional and institutional identity, falling within the ambit of Article 4(2) TEU, are differentiated from those that have an incidental impact on the organisation of the national

[271] In more detail, Sacha Garben, 'Collective Identity as a Legal Limit to European Integration in Areas of Core State Powers' (2020) 58[1] Journal of Common Market Studies 41, 49; Rostane Mehdi, 'Le principe d'autonomie institutionnelle et procédurale et le droit administratif' in Jean-Bernard Auby et Jacqueline Dutheil de La Rochère (eds), *Traité de droit administratif européen* (3rd edn Bruylant, 2022) 887; and Olivier Dubos and Clémentine Mazille, 'Acte national de mise en oeuvre du droit de l'UE' in Jean-Bernard Auby et Jacqueline Dutheil de La Rochère (eds), *Traité de droit administratif européen* (3rd edn Bruylant, 2022) 711

[272] Bruno De Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (2021) 27[3] European Public Law 559, 560.

[273] ibid, 570

[274] For on overview of the current academic discourse concerning Article 4(2) TEU, Diane Fromage and Bruno De Witte, 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27[3] European Public Law 411; and more specifically the other contributions of this special issue.

[275] De Witte, 'Article 4(2) TEU as a Protection of the Institutional Diversity of the Member States' (n 272) 563.

administrative system and national competent authorities more specifically, which fall outside the scope of this provision, and therefore, of national institutional autonomy.

An example of EU intervention that might affect the very core of the Member States' constitutional and institutional identity is described in the article '*The Quasi-Judicial Role of National Competent Authorities'*. This contribution essentially highlights the *de facto* attribution of a quasi-judicial role to national competent authorities. At the same time, it also highlights the resistance of EU legislation and the CJEU in openly recognising this role. In fact, such a recognition would likely represent an inadmissible interference with the constitutional identity of the Member States. Most countries in fact distinguish executive, judicial and legislative powers. This perspective is confirmed by AG Ruiz-Jarabo Colomer in his opinion in *Umweltanwalt von Kärnten* case. In paragraph 47, the AG declares that: 'If a Member State allocates judicial duties to quasi-judicial bodies and confirms that allocation when such a body is established, that is an expression of will closely linked to national identity and national constitutional autonomy which the Court must respect. Accordingly, Article 234 EC provides for a communication channel with national authorities that constitutionally have the power to dispense justice. In some Member States that role is entrusted exclusively to the judiciary while in others it is divided between a number of bodies, in a lawful configuration of institutional organisation which Community law does not question.'[276]

The analysis of the DSA within the article '*Navigating the complexities of the DSA'* offers another example of the recognition of EU rules that are capable of affecting the national identity of the Member States. The enforcement of this Regulation is entrusted to specific authorities within the Member States. While the establishment or designation of these authorities is specifically required by EU legislation, the actual choice of the specific body lies with the Member States, which make their determination in accordance with their constitutional traditions, institutional identities, and prevailing administrative frameworks. Recital 109 of the DSA states as follows: 'Member States should, however, be able to entrust more than one competent authority, with specific supervisory or enforcement tasks and competences concerning the application of this Regulation, for example for specific sectors where existing authorities may also be empowered, such as electronic communications' regulators, media regulators or consumer protection authorities, reflecting their domestic constitutional, organisational and administrative structure.'

[276] Case C-205/08, *Umweltanwalt von Kärnten* [2009] ECLI:EU:C:2009:397, Opinion of AG Ruiz-Jarabo Colomer, para 47.

Conversely, with respect to EU rules that have an incidental impact on the Member States' administrative organisation, it can be recalled what was already mentioned in Chapter III. In a nutshell, EU secondary legislation imposes several administrative design obligations concerning the internal organisation, functions, and *modus operandi* of national authorities acting within the scope of EU law. These administrative design obligations, however, do not affect the core identity of the Member States. In this context, from the perspective of those who interpret the principle of national institutional autonomy as limited to Article 4(2) TEU, Member States cannot invoke their institutional autonomy in these circumstances.

Against this background, the argument that national institutional autonomy applies only to the first category of rules raises significant concerns. Such a limitation would leave numerous structural and operational administrative design obligations outside the scope of Member States' institutional autonomy. This, in turn, prompts the question of whether Member States retain any form of autonomy in these circumstances, and if so, what the nature of that autonomy might be. Moreover, and perhaps even more importantly, the Court of Justice has not established an explicit connection between national institutional autonomy and Article 4(2) TEU. The prevailing approach, instead, links national institutional autonomy more broadly to various types of EU administrative design obligations, regardless of whether they have a primary or merely incidental impact on the institutional identity of the Member States (discussed in more detail in the next Section).[277]

6. The Judicial Construction of National Institutional Autonomy

The Court of Justice, as well as AGs' Opinions and academic literature alike, have also referred to national institutional autonomy, independently of the principle of procedural autonomy.

[277] See, Case C-279/12, *Fish Legal* [2013] ECLI:EU:C:2013:539, Opinion of AG Cruz Villalón, para 70: 'in accordance with the principle of institutional autonomy, EU law cannot determine which persons or institutions actually perform those functions in each Member State. That and no other, therefore, is the reason why Article 2(2)(b) of Directive 2003/4 provides that it is to be national law which determines, where this is called for, who performs public administrative functions other than 'the public authorities' in the strict and formal sense of the term (in other words, outside the case envisaged in Article 2(2)(a) of the directive), while it is for EU law alone, of course, to establish what those functions are and in what they consist. That being so, since certain functions are defined under EU law as 'public administrative functions', it will then be necessary to determine, in accordance with national law, which bodies – in addition to the public authorities in the strict sense – may perform such functions and are therefore covered by Article 2(2)(b) of Directive 2003/4'. In this paragraph, the AG does not refer to national identity but rather to institutional autonomy to justify the capacity of the Member States to determine which persons or institutions will perform EU-driven administrative enforcement functions in each Member State.

Part of the literature claims that the Court of Justice has the merit of laying the foundations of a possible articulation of the principle of national institutional autonomy. In the *International Fruit company* case,[278] the Court of Justice ruled that: 'Although under article 5 of the Treaty the Member States are obliged to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty, it is for them to determine which institutions within the national system shall be empowered to adopt the said measures'.[279] In this context, national institutional autonomy may essentially be restricted to the discretion of the Member States to decide which national institutions enforce EU obligations at domestic level.

Nevertheless, subsequent case law has rendered improbable the consolidation of a principle of institutional autonomy. The Court of Justice case law has often mentioned 'institutional autonomy',[280] but it has not explicitly referred to a 'principle of institutional autonomy'.[281] In other words, the Court has not exercised its traditional authoritative role to clarify the meaning of this concept.

In the current case law of the Court of Justice, the meaning of national institutional autonomy is best reflected in the following formulation: Member States enjoy institutional autonomy as regards the organisation and structuring of their national competent authorities, which must, however, be exercised in accordance with the objectives and obligations laid down by EU law.

The case gives a clear illustration of this approach.[282] This case concerns a legislative reform in Spain that created a single body for the supervision and regulation of the markets and competition, merging a number of national regulatory authorities that had been responsible for different sectors. As part of this institutional reform, the director and a counsellor of one of these authorities were dismissed before the expiry of their mandates without grounds provided under national law, which gave rise to the controversy before the national court.[283]

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[278] Maartje Verhoeven, *The Costanzo obligation* (n 42) 46.
[279] Joined Cases C-51 to 54/71 I*nternational Fruit Company NV and others v Produktschap voor groenten en fruit* [1971] ECLI:EU:C:1971:128, para 3.
[280] Case C-378/19, *Prezident Slovenskej republiky* [2020] ECLI:EU:C:2020:462 para 38.
[281] Case C-796/19, *Commission v Austria* [2020] ECLI:EU:C:2020:920, para 60.
[282] Case C-424/15, *Xabier Ormaetxea Garai and Bernardo Lorenzo Almendros v Administración del Estado* [2016] ECLI:EU:C:2016:780. In literature, Alin Orgoan, 'L'appréciation du principe d'autonomie institutionnelle à l'aune des exigences d'indepéndance des Agences de règlementation nationales' (2016) Journal d'actualité du Droit International et Européen 23 https://revue-jadie.eu/article/view/1707
[283] Case C-424/15, Ormaetxea Garai (n 282), paras 22-25.

The main issue at stake was the compatibility of that Spanish law with the Framework Directive 2002/21/EC, which establishes a common regulatory framework for electronic communications networks and services.[284] Within this framework, the Court rules that the while 'Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs within the meaning of Article 2(g) of the Framework Directive, that autonomy may be exercised only in accordance with the objectives and obligations laid down in that directive'.[285] This formulation is then recalled in other case law.[286]

In the *Ormaetxea Garai* case, the Court of Justice also develops in more detail what it means for autonomy to be exercised only in accordance with the objectives and obligations laid down in that directive. In this respect, the Court clarifies that 'in the context of an institutional reform such as that at issue in the main proceedings, a Member State may assign to a multisectoral regulatory body the tasks incumbent on NRAs under the Framework Directive and the Specific Directives only if that body, in the performance of those tasks, meets the organisational and operational requirements to which those directives subject NRAs.'[287] These requirements are competence, independence, impartiality, and transparency laid down by EU law as well as 'that an effective right of appeal is available against its decisions to a body independent of the parties involved, which is a matter to be determined by the national court'.[288] Moreover, within the specific circumstances of the case, the Court held that, although Member States retain institutional autonomy with regard to the organisation and restructuring of national authorities, that autonomy remain however limited by the independence guarantees laid down in Article 3(3a) of the Framework Directive. An institutional reform, such as the merger of an NRA into a multisectoral authority, cannot in itself justify the premature dismissal of the members of the NRA's governing body. In the absence of rules ensuring that such dismissals do not jeopardise their independence and impartiality, early termination of their mandates is precluded by EU law.[289]

To conclude, the Court of Justice's case law demonstrates a cautious approach toward recognising a general principle of national institutional autonomy. Unlike procedural autonomy, for example, which

[284] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L 108/33. Now replaced by Directive 2018/1972 (n 5).
[285] Case C-424/15, *Ormaetxea Garai* (n 282), para 30.
[286] For example, Case C-796/19, *Commission v Austria* (n 281) para 61; and Case C-378/19, *Prezident Slovenskej republiky* (n 280) para 38.
[287] Case C-424/15, *Ormaetxea Garai* (n 282) para 31.
[288] ibid, para 38.
[289] ibid, paras 52-53

the Court has developed even in the absence of an explicit Treaty provision, the Court has refrained from establishing national institutional autonomy as a fully-fledged general principle. Nevertheless, the case law of the Court still defines the contours of this autonomy: Member States retain the autonomy to organise and structure their national competent authorities, which must be exercised in accordance with the objectives and obligations imposed by EU law.

7. Conclusion

This Chapter aims to clarify the meaning, legal status, and scope of national institutional autonomy within the EU legal order with a view to better understanding its role in the EU administrative design of national competent authorities.

Considering the multitude of hypotheses, arguments, and definitions concerning national institutional autonomy, it becomes easier to identify what national institutional autonomy is not rather than what this autonomy is. National institutional autonomy is not a general principle of EU law nor does Article 4(2) TEU provide a stable Treaty basis for a general principle. Moreover, institutional autonomy cannot be reduced to a mere extension of procedural autonomy, nor can it be meaningfully constrained by the same doctrinal limits.

Nevertheless, the analysis of the Court's case law confirms that national institutional autonomy is not an empty concept. It plays a role in the administrative design of national competent authorities, functioning as a background rule that operates when Member States interpret and apply EU administrative obligations, and linking that implementation to the objectives and obligations laid down by EU law. According to the Court, Member States enjoy institutional autonomy with respect to the organisation and structuring of their administrative authorities, but such autonomy must be exercised in accordance with the objectives and obligations set forth by EU law.[290]

The Court's approach effectively subjects national institutional autonomy to continuous scrutiny, requiring its exercise to be assessed in light of the objectives of EU law. This raises a fundamental question as to whether national institutional autonomy constitutes a form of residual sovereignty preserved for the Member States in the face of the Union's increasing integrative force, or whether,

[290] Case C-378/19, *Prezident Slovenskej republiky* (n 280) para 38.

conversely, that integrative force ultimately prevails over national autonomy. Building on the insights from my contribution, the next Chapter examines how these competing considerations have been balanced. In doing so, it seeks to clarify the normative framework governing the EU-Member State relationship in the administrative design of national competent authorities.

CHAPTER IV

BETWEEN AUTONOMY AND INTEGRATION

1. Introduction

The objective of this Chapter is to identify and assess whether, and to what extent, the EU administrative design of national competent authorities develops within a normative framework that ultimately favours integration over national autonomy and sovereignty.

As outlined in the previous Chapters, it is a precondition for the functioning of EU law that the rights and obligations it establishes are applied uniformly and effectively throughout the Union. However, EU law is not interpreted and enforced exclusively at the EU level by Union institutions. On the contrary, its enforcement is predominantly entrusted to Member States' administrative (and judicial) authorities. In enforcing EU law, these authorities operate within an institutional and procedural framework that is shaped, first, by EU law and, ultimately, by the legal order of their respective Member State. To put it differently, national competent authorities derive their rules of organisation and functioning not directly from EU law but primarily from legislative provisions at Member State level, which must nevertheless adapt to EU requirements, as applicable. In this process of adaptation, the institutional autonomy of the Member States plays a role.

Building on the previous Chapter's conclusion that national institutional autonomy operates as a conditional and residual concept rather than a constitutional guarantee, this Chapter examines how that autonomy is balanced—and, in practice, constrained—through the case law of the Court of Justice. To that end, the Chapter analyses two interrelated doctrinal mechanisms by which the Court shapes this balance.

Section 2 examines the role of the principle of effectiveness (*effet utile*) as a limit on national institutional autonomy. It shows that, where national administrative arrangements risk undermining the effective application of EU substantive law, the Court is willing to displace Member State choices concerning the organisation, powers, and independence of national competent authorities.

Section 3 analyses the principle of sincere cooperation as a normative tool that both guides and disciplines the exercise of national institutional autonomy. It illustrates how the Court relies on Article

4(3) TEU to promote effective EU law enforcement particularly in contexts characterised by decentralised enforcement. In doing so, the Chapter shows that sincere cooperation operates as an integrative mechanism capable of shaping national administrative systems even where EU legislation deliberately leaves room for national autonomy.

Against this background, Section 4 discusses the broader role of the Court of Justice in advancing administrative integration beyond the express content of EU legislation. It demonstrates how judicial interpretation compensates for the absence of express legislative rules by translating abstract principles—such as effectiveness and sincere cooperation—into concrete organisational and procedural requirements for national authorities. While this jurisprudence safeguards the uniform and effective application of EU law, the Chapter also highlights its implications.

Taken together, these three Sections show that the EU administrative design of national competent authorities is increasingly structured around EU law objectives. In this context, national institutional autonomy no longer serves as a counterbalance to integration, but persists only in a limited form, continuously shaped and constrained by the principles of effectiveness, sincere cooperation, and judicially guided administrative harmonisation.

By contrast, Section 5 examines the principles of good administration as a potential overarching framework for the administrative design of national competent authorities. It shows that, as binding general principles of EU law, good administration can structure national administrative authorities through procedural standards, while also preserving a degree of institutional autonomy. At the same time, the Chapter highlights the limits of relying on abstract principles alone, stressing the need for their further operationalisation through legislative instruments, soft law, and administrative cooperation.

The Conclusion brings together the findings of the four Chapters addressing the unresolved tension between EU integration and national administrative autonomy. They show that EU administrative design increasingly prioritises the effectiveness and coherence of EU law, with national institutional autonomy operating as a residual and functional margin rather than a constitutional guarantee.

2. *Effet utile*

The Member States' interpretation of secondary EU legislation and its implementation is subject to the principle of effectiveness, also referred to as the doctrine of *effet utile*.[291] The principle of effectiveness has been described as an expression of the hierarchy of legal norms in the EU, as well as of the principle of sincere cooperation.[292] It essentially requires that when the Member States implement EU law, they must avoid jeopardising or undermining its objectives.[293] Under these circumstances, it applies in all measures undertaken or required to be undertaken by the Member States in giving effect to EU primary and secondary law, ensuring that EU law delivers its intended rights and objectives.[294] Under these circumstances, effectiveness can be a limit to autonomy.

Two of my contributions substantiate this argument. The article '*Navigating the Complexities of the DSA'* provides a first illustration. Although the DSA sets out specific requirements for the organisation of Member States' enforcement systems, several crucial aspects—such as the designation of the DSC and other competent authorities, the allocation of enforcement responsibilities, and the adoption of procedural rules—are left to the discretion of individual Member States.[295] In this regard, as noted in the article, many Member States failed in this task—either by not designating their respective DSCs on time, or by appointing them without granting the necessary powers.[296] Moreover, since there is no preferred model for which authority should enforce the DSA, choices have also been discordant across Member States.[297] Against this background, the European Commission has launched various infringement procedures targeting several Member States' failures to designate and empower DSCs in line with DSA obligations.[298] The underlying reason of this action is the recognition that such shortcomings undermine the DSA's functioning by compromising effective enforcement and weakening the rights the DSA seeks to protect.[299]

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[291] Hofmann, Rowe, and Türk, 'General Principles Framing European Union Administrative Law' (n 224) 143.
[292] José Luis da Cruz Vilaça, 'Le principe de l'effet utile du droit de l'Union dans la jurisprudence de la Cour' in Allan Rosas, Egils Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser 2012) 279: 'Le principe de l'effet utile peut être considéré, avant tout, comme le garant de l'intégrité de l'ordre juridique de l'Union européenne. Il se projette dans les rapports avec les ordres juridiques nationaux au même titre que l'effet direct et la primauté et est indissociable du devoir de coopération loyale qui s'impose aux Etats membres et à leurs autorités, ainsi qu'aux institutions, en vertu de l'article 4, paragraphe 3, TUE'
[293] Hofmann, Rowe, and Türk, 'General Principles Framing European Union Administrative Law' (n 224) 143, 154.
[294] ibid, 154 et seq.
[295] Regulation 2022/2065 (n 7) recital 109 and Art 49(1), art 51(6).
[296] Mattioli, 'Navigating the complexities of the DSA's enforcement framework' (n 44) 19, 30-31.
[297] ibid.
[298] In more detail, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1081 accessed 1 September 2025.
[299] For example, in the reasoned opinion where the European Commission calls on Bulgaria to comply with the DSA, one can read that 'Full implementation of the DSA is key to ensuring the full benefit for users and service providers within the Member States, for instance to ensure users can lodge complaints against platforms.' In more detail, https://ec.europa.eu/commission/presscorner/detail/en/inf_25_982 accessed 1 September 2025.

Another illustration of how *effet utile* may come at the expense of autonomy emerges from the judgment of the Italian Council of State in the case 4307/2020 concerning the competence of the municipality of Malles Venosta to impose restrictions on the use of pesticides and herbicides within its municipal territory. This judgment has been commented in the case note '*Local Community Engagement in Pesticide* Regulation'.[300] The controversy brought before the Italian administrative court concerned whether the municipality had the authority under Italian and EU law to impose undifferentiated, binding, and indefinite restrictions on plant protection products and herbicides. When conducting this analysis, the Italian court held that a hypothetical municipal authority to introduce specific prohibitions on the use of certain plant protection products would conflict with EU legislation, more precisely the PPPR. In particular, the Italian Court states that 'the right of producers to use authorised active substances for the manufacture of plant protection products and to place them on the market is conferred by unconditional, clear and precise provisions of Union law, which leave no margin of discretion to the Member States. Consequently, the right to use active substances has direct applicability and direct effect in all Member States (including all internal areas such as the municipal territory of Malles), without the need for national transposition or implementing measures.'[301] In other words, it recalls that in light of the primacy of EU law, the Member States are prohibited from adopting or maintaining legislative or administrative provisions, or even administrative practices, that conflict with prevailing EU law.[302] Allowing municipalities to regulate pesticide use would create legislative or administrative practices inconsistent with the PPPR's procedures for placing plant protection products on the market. As a result, the Italian Council of State concludes that national law cannot establish administrative arrangements that undermine EU law-derived rights. In this light, by emphasising that Member State bodies may not maintain conflicting legislation or practices, the tribunal highlights that national autonomy cannot be exercised in a manner that frustrates EU objectives, thereby giving effect to the principle of effectiveness.[303]

Important insights on the *effet utile'*s impact on autonomy emerge from the case law of the Court of Justice on the independence of national competent authorities.

The independence of national competent authorities occupies a central place in academic debate, where scholars attempt to clarify the fragile concept of independence, but with limited success.[304]

[300] Mattioli, 'Local Community Engagement in Pesticide Regulation' (n 44) 161.
[301] Case No. 04307/2020 Municipality of Malles / Walter Alton et al. (n 47) para 34.
[302] ibid.
[303] Mattioli, 'Local Community Engagement in Pesticide Regulation' (n 44) 161, 172-271.
[304] Lavrijssen and Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (n 2) 419, 426.

Scholars across disciplines have been prompted by the question of whether independence accurately describes national authorities. The prevailing view in the literature is that the conventional understanding of national competent authorities as independent is, to some extent, misleading. These bodies cannot be fully detached from their institutional and political environment; their preferences and behaviour are inevitably shaped by interactions with other public and private actors.[305] For this reason, it has been argued that national competent authorities are better described as autonomous rather than independent.[306]

Importantly, this academic critique has been closely linked to the principle of legality,[307] and more broadly, to democratic accountability.[308] Independence cannot entail insulation from law enacted by democratically legitimised institutions. This position is also reflected in the case law of the Court of Justice, which considered the absence of any parliamentary influence over national competent authorities as inconceivable.[309] It is therefore permissible for the legislature to define the powers of supervisory authorities, to provide for the appointment of their management by parliament or government, and to require them to report on their activities. Put differently, national competent authorities cannot be fully detached from the political sphere.[310]

Despite these reservations, and notwithstanding sustained academic criticism, the term independence continues to be used both in EU legislation and by scholars who question its conceptual accuracy. In this context, it can be noted that EU legislation has progressively reinforced the requirement of independence of national competent authorities, particularly in certain regulatory sectors. This development is especially visible in network industries. For example, Directive 2003/54/EC on the internal electricity market required Member States to designate regulatory authorities that were 'wholly independent from the interests of the electricity industry'.[311] That directive was subsequently

[305] Gilardi and Maggetti, 'The independence of regulatory authorities' (n 140) 201.
[306] Lavrijssen and Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (n 2) 419, 420; Miroslava Scholten, 'Independence vs. Accountability: Dilemma or misperception', (2011) 4[1] Review of European administrative law. Autonomy is also used to refer to public agencies' independence. For instance, Koen Verhoest et al. 'The study of organisational autonomy: a conceptual review' (2004) 24 Public Administration and Development 101. On the distinction between autonomy and independence, see Miroslava Scholten, 'Independent, Hence Unaccountable'? - The Need for a Broader Debate on Accountability of the Executive (2011) 4[2] Review of European Administrative Law 5, 7.
[307] On the different meanings of legality, Pierre Delvolvé, 'Le principe de légalité en droit comparé: essai de synthèse' Revue française de droit administratif 247
[308] Case C-518/07, Commission v Germany [2010] ECLI:EU:C:2010:125, para 41-42.
[309] ibid, paras 43-44.
[310] Sześciło, 'Challenging Administrative Sovereignty' (n 8) 191, 196.
[311] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC - Statements made with regard to decommissioning and waste management activities [2003] OJ L 176/37, art. 23(1).

replaced by Directive 2019/944, which now sets out in considerably greater detail the conditions under which national regulatory authorities must operate independently.[312] Similar developments can be observed beyond network industries. In this regard, a prominent example is the GDPR, which establishes a comprehensive set of safeguards designed to ensure that data supervisory authorities can act independently of both government ministries and private actors.[313]

While EU legislation thus increasingly emphasises the independence of national authorities when acting within the scope of EU law, it also formulates these requirements in broad and abstract terms. As a result, the precise meaning and scope of independence is often open to interpretation, allowing for divergent national approaches. It is precisely in this context that the Court of Justice has played a decisive role. Within this case law, the Court seems to rely on the doctrine of *effet utile* to constrain the interpretation of EU legislation and its implementation by the Member States.[314]

Two landmark judgments first illustrate this approach. In *Commission v Germany*, the European Commission argued that Germany had failed to correctly transpose the requirement of 'complete independence' of data protection supervisory authorities under the second subparagraph of Article 28(1) of Directive 95/46/EC.[315] The Court adopted a stringent interpretation of this requirement, holding that supervisory authorities must act objectively and impartially and must therefore remain free from any external influence, whether direct or indirect, including influence from the state.[316]

In this case law, despite not explicitly invoking national institutional autonomy, the Court is essentially ensuring that in implementing independence requirements the Member States do not undermine the effectiveness and uniform application of EU law. In fact, the Court underscores that: 'the guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard

[312] Directive 2019/944 (n 5) art. 57(4) and (5).
[313] Regulation 2016/679 (n 7) art. 52.
[314] For example, Case C-327/02 *Lili Georgieva Panayotova and ors v Minister voor Vreemdelingenzaken en Integratie* [2004] ECLI:EU:C:2004:718, Opinion of AG Maduro, para 81: 'The Court has consistently recognised that whenever a rule is open to more than one interpretation, preference should be given to the interpretation which is conform to Community law. The Court has affirmed this possibility with regard to Community rules of different rank: when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty. The same principle has also been repeatedly stated with regard to the interpretation of national law. It is a rule that maximises the useful effect of Community law and minimises potential conflicts with national law. It must not however prejudice legal certainty and it must respect the autonomy of national courts in the interpretation of national law.'
[315] Case C-518/07, *Commission v Germany* (n 308() para 1.
[316] ibid, para 30.

to the processing of personal data and must be interpreted in the light of that aim. It was established not to grant a special status to those authorities themselves as well as their agents, but in order to strengthen the protection of individuals and bodies affected by their decisions.'[317]

In *Commission v Austria*, the Court was again called upon to assess compliance with the requirement of complete independence under the same provision.[318] It confirmed its earlier reasoning, reiterating that data protection supervisory authorities must be shielded from all external influence capable of affecting their decision-making.[319] This line of case law has since been codified in Article 52 GDPR, which lays down detailed conditions of independence reflecting the Court's jurisprudence.[320]

Another example is the reasoning of the Court in *Ormaetxea Garai* case.[321] In this context, the Court essentially acknowledges that the independence of national regulatory authorities is a functional requirement directly linked to the effective application of EU law. While Member States retain institutional autonomy in organising and restructuring their administrative bodies, that autonomy is circumscribed where EU law imposes specific guarantees designed to safeguard regulatory independence. The Court recalls that Article 3(3a) of the Framework Directive for electronic communications networks and services was introduced to strengthen the independence of NRAs precisely in order to enhance the effectiveness and predictability of EU regulatory enforcement.[322] From this perspective, the Court considers that allowing the premature dismissal of members of an NRA solely on the basis of an institutional reform would undermine that effectiveness.[323]

More recent case law further confirms the Court's central role in clarifying independence requirements that remain insufficiently specified in EU legislation. A particularly instructive example concerns a dispute in *Alajärven Sähkö* case between the Finnish Energy Authority, acting as a national regulatory authority, and several electricity system operators challenging its regulatory decisions. The Energy Authority had established tariff monitoring methods for fixed regulatory periods covering the years 2016 to 2023. In 2021, Finland adopted Law 730/2021 with the objective of curbing the rise of electricity distribution prices. Following the entry into force of that law, the Energy Authority amended

[317] ibid, para 25.
[318] Case C-614/10, *Commission v Austria* [2012] ECLI:EU:C:2012:631, para 1.
[319] ibid, para 41.
[320] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' COM/2012/011 final – 2012/0011 (COD), pt 3.4.6.
[321] Case C-424/15, Ormaetxea Garai (n 282).
[322] ibid, para 45.
[323] ibid, paras 39-52.

the existing monitoring methods during the ongoing regulatory period, affecting the determination of operators' returns. The system operators contested these amendments, arguing that the Energy Authority had not acted autonomously, but had instead implemented the will of the national legislature.[324]

The core legal issue in this case concerned the scope of the Finnish institutional autonomy under Directive 2019/944 laying common rules for the internal market for electricity.[325] Under that Directive, national regulatory authorities are required to act independently when exercising their core regulatory powers, including the setting of tariffs and the methodologies used to calculate them.[326] Although the Finnish Law 730/2021 did not formally prescribe specific tariffs or calculation methods, this instrument indirectly expressed an intention to lower electricity prices and anticipated that the Energy Authority would adjust its regulatory approach accordingly. In this context, the Court of Justice was asked to determine whether such indirect legislative influence was compatible with the requirement of regulatory independence.[327]

The Court observed that the concept of independence is not explicitly defined in Directive 2019/944. However, drawing on its settled case law, it recalled that, in relation to 'public bodies, the term refers in its usual meaning to a status that ensures that the body in question is able to act completely freely in relation to those bodies in respect of which its independence is to be ensured, shielded from any instructions or external influence. That independence in decision-making implies that, within the sphere of the regulatory duties and powers, national regulatory bodies take their own decisions autonomously and solely in the public interest, so as to ensure compliance with the objectives pursued by Directive 2009/72, without being subject to external instructions from other public or private entities.'[328]

To conclude, the analysis shows that *effet utile* operates as a key constraint on Member State autonomy. Practical illustrations, like DSA enforcement shortcomings and the Italian Council of State pesticide ruling, demonstrate how national administrative arrangements must first and foremost guarantee the effectiveness of EU objectives. The CJEU case law on the independence of national authorities reinforces this idea, showing that the Court will intervene whenever Member States' organisational or administrative choices risk compromising the effective enforcement of EU law.

[324] Case C-48/23, Alajärven Sähkö and Others [2025] ECLI:EU:C:2025:144, paras 15-22.
[325] Directive 2019/944 (n 5).
[326] ibid, art. 57(4) and (5).
[327] Case C-48/23, Alajärven Sähkö and Others (n 324) para 29.
[328] ibid, para 34.

3. Sincere cooperation

The principle of sincere (loyal) cooperation has been described as the 'constitutional frame' governing the national implementation, and *a fortiori* enforcement, of EU law.[329] It is closely linked to the decentralised enforcement of EU law and, in this regard, is crucial for the federal balance of the EU, since the EU legal order ultimately depends on the voluntary compliance and loyalty of its Member States.[330]

This principle is now enshrined in Article 4(3) TEU.[331] Under this provision, the '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'.[332] Furthermore, the final subparagraph of this provision establishes a negative obligation on the Member States to refrain from any measure that may jeopardise the attainment of the EU's objectives, while facilitating the achievement of the Union's tasks. Both the positive and negative duties to cooperate apply to the Member States, including their judicial and administrative authorities.[333]

Within this framework, sincere cooperation is described as holding the potential to operate as a tool to evaluate the loyalty of both the implementation and enforcement actions of the Member States, while also bearing the potential to constrain Member States' autonomy.[334] In this light, sincere cooperation has also been described as having the effect of advancing the integration of the Member States within the EU and even more importantly, of bringing the legal regimes of the Member States closer to the Union.[335]

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[329] Robert Schütze, European Constitutional Law (Cambridge University Press, 2016), 334; and Barbara Guastaferro, 'Sincere Cooperation and Respect for National Identities' in Robert Schütze and Takis Tridimas (eds.) *Oxford Principles of European Union Law: The European Union Legal Order, Volume I* (Oxford University Press, 2018), 351

[330] Klamert, 'Loyalty and the Constitutionalization of EU Law' in Marcus Klamert (ed) *The Principle of Loyalty in EU Law* (Oxford University Pres, 2014) 63, 70.

[331] On the evolution of the principle of sincere cooperation, more generally Marcus Klamert, 'Loyalty in the EU Treaties' in Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014) 9 et seq.

[332] Article 4(3) second subparagraph.

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

[334] Case C-772/21, *Brink's Lithuania* [2022] ECLI:EU:C:2022:1005, Opinion of AG Medina, para 71; and Case C-482/23, Commission v Denmark (n 241), Opinion of AG Rantos, para 23; and Rui Tavares, 'The implementation of EU law by national administrations: Executive federalism and the principle of sincere cooperation' (n 268) 71, 77.

[335] Guastaferro, 'Sincere Cooperation and Respect for National Identities' (n 329) 351

The integrative force of the positive duty to cooperate is expressed by the Court of Justice in the *Facebook* and *Meta Platforms* cases. These two judgements are analysed in the context of the article '*Navigating the Complexities of the DSA's Enforcement Framework'*.[336]

In the *Facebook* case, the Court was asked to clarify the allocation of enforcement responsibilities between data protection authorities within the GDPR's one-stop shop mechanism.[337] The dispute in the main proceedings arose from an action brought by the Belgian data protection authority against Facebook, alleging infringements of the GDPR in connection with the tracking of internet users' browsing behaviour. A Belgian court initially upheld the authority's action and ordered Facebook to cease certain data collection practices. On appeal, however, Facebook challenged the jurisdiction of the Belgian authority, raising complex questions regarding the operation of the GDPR's enforcement architecture in cases of cross-border data processing. These questions were referred to the Court of Justice for a preliminary ruling.[338]

At the heart of the dispute was the question of whether a supervisory authority, which is not the lead supervisory authority, may initiate legal proceedings in respect of cross-border processing activities.[339] In addressing this issue, the Court emphasised that the GDPR establishes a comprehensive framework of cooperation among supervisory authorities. In particular, the one-stop shop mechanism regulates the relationship between the lead supervisory authority and other concerned supervisory authorities, requiring them to cooperate closely in order to ensure consistent enforcement.[340] The Court underlined that these cooperation obligations must be implemented in a manner consistent with the principle of sincere cooperation, which requires authorities to act in good faith and with due regard for the objectives of the GDPR.[341] The Court held that a supervisory authority of a Member State that is not the lead supervisory authority is not, in principle, deprived of the power to bring legal proceedings. However, the exercise of that power is strictly circumscribed. Such proceedings may be initiated only in situations expressly permitted by the GDPR and must respect the cooperation and consistency mechanisms laid down therein.[342] In this way, the Court reconciled the need to preserve

[336] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework' (n 44) 19, 28-30.
[337] Case C-645/19, *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit* [2021] ECLI:EU:C:2021:483.
[338] ibid, paras 29-4.
[339] ibid, para 43.
[340] ibid, para 51-53.
[341] ibid, paras 60-65.
[342] ibid, para 75.

the effectiveness of national enforcement powers with the requirement of coordinated and coherent application of the GDPR.

The *Meta Platforms* case further illustrates how the Court has relied on the principle of sincere cooperation to address regulatory gaps.[343] In that case, the referring court asked whether a national competition authority is entitled to assess compliance with the GDPR when examining a potential abuse of a dominant position under Article 102 TFEU. The dispute arose from proceedings brought by the German competition authority, which found that Meta's data processing practices infringed both competition law and the GDPR. At the same time, those practices were also being examined by the competent data protection supervisory authority under the GDPR's enforcement procedures.[344]

The preliminary questions raised before the Court concerned, first, the extent to which a competition authority may assess GDPR compliance within the scope of its own investigations and, second, whether such assessments are compatible with the principle of sincere cooperation enshrined in Article 4(3) TEU, particularly where a lead supervisory authority is already investigating the same conduct pursuant to Article 56(1) GDPR.[345] These questions highlighted the risk of conflicting decisions and fragmented enforcement in a regulatory landscape characterised by overlapping competences and incomplete legislative coordination.

In its judgment, the Court stressed that both competition authorities and data protection supervisory authorities, when involved in the enforcement of EU law, are bound by the duty of sincere cooperation.[346] In the specific circumstances of the case, this duty required national competition authorities to consult and cooperate genuinely with the relevant data protection authorities when assessing whether an undertaking's conduct complied with the GDPR.[347]

The Court further clarified that, in light of the principle of sincere cooperation, a national competition authority may find that conduct under investigation infringes the GDPR in the context of an abuse of dominance inquiry, provided that several conditions are met. In particular, the competition authority must consult the competent supervisory authority, take due account of its decisions, and ensure that

[343] Case C-252/21, *Meta Platforms and others v Bundeskartellamt* [2023] ECLI:EU:C:2023:537.
[344] ibid, paras 28-34.
[345] ibid, para 36.
[346] ibid, para 53.
[347] ibid, para 54.

any finding of non-compliance with the GDPR is strictly necessary for the purposes of establishing an abuse under Article 102 TFEU.[348]

The *Facebook* and *Meta Platforms* cases first highlight how the Court invokes the principle of sincere cooperation in distinct yet complementary ways. In *Facebook*, the Court focused on ensuring that existing cooperation mechanisms established by EU legislation operate effectively and in accordance with that principle. In *Meta Platforms*, by contrast, the Court relied directly on Article 4(3) TEU to fill normative gaps by articulating procedural duties designed to manage overlapping competences.[349] Despite these differences, both judgments reflect a common underlying logic. Sincere cooperation functions as a tool of integration, enabling the Court to promote regulatory coherence and safeguard the effectiveness of EU law, even in contexts characterised by limited legislative guidance and a high degree of national autonomy.

While ensuring the effectiveness and coherence of the EU legal order, the principle of sincere cooperation does not have a neutral role. For example, by inviting Member States to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties, the second paragraph of Article 4(3) TEU requires Member States to ensure the effectiveness of EU law. Its integrationist force favours EU law's objectives at the expense of the Member States' autonomy. It is in this respect that the literature has referred to this principle as a sort of reverse subsidiarity.[350]

It is also in light of this integrative force that the article '*Navigating the Complexities of the DSA's Enforcement Framework'* highlights the potential of the principle of sincere cooperation to guide the activities of national competent authorities under the DSA, in accordance with EU law obligations and objectives. Although the DSA sets out specific requirements for the organisation of Member States' enforcement systems, several key aspects—such as the designation of the DSC and other competent authorities, the allocation of enforcement responsibilities, and the adoption of procedural rules—are left to the autonomy of individual Member States. This autonomy has produced a fragmented institutional landscape and inconsistent enforcement mechanisms across the EU, which may undermine cross-border cooperation among authorities. As a result, enforcement practices under the DSA risk becoming fragmented, potentially weakening the uniform application of EU law in an area

[348] ibid, paras 62-63.
[349] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework' (n 44) 29.
[350] Robert Schütze, *European Constitutional Law* (Cambridge University Press, 2012) 218 in Guastaferro, 'Sincere Cooperation and Respect for National Identities' (n 329) 351, 374.

characterised by inherently transnational digital activities.[351] In this context, the principle of sincere cooperation can help address structural gaps in the implementation of the DSA. Where EU legislation grants broad autonomy to Member States, the principle provides a normative standard to guide national administrative choices and actions, ensuring that national discretion does not compromise the effectiveness of EU law.[352]

4. The Court of Justice and the Shaping of Administrative Integration beyond Legislation

The Court of Justice has assumed a central role in clarifying EU administrative arrangements,[353] particularly by addressing deficiencies in institutional design where EU legislation is underdeveloped or conceptually ambiguous. This judicial intervention has been particularly significant in areas where EU legislation formulates broad requirements but leaves their concrete meaning largely open. For example, the independence of national competent authorities and the organisation of cooperation between authorities in the GDPR illustrate the Court's judicial activism in shaping the administrative design of national competent authorities.

An additional example of the Court of Justice's role in clarifying administrative (procedural) arrangements is illustrated in the case note '*How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level?'*.[354] This case note comments on two Court's judgments in *PAN Europe (Closer)* and *PAN Europe (endocrine disrupting properties*),[355] concerning the authorisation of plant protection products under the PPPR. These two cases exemplify how judicial interpretation addresses unresolved questions regarding the discretion of national competent authorities in technically complex regulatory procedures. More specifically, in this context, the Court of Justice was asked to determine how national authorities must respond to new and evolving scientific and technical evidence in situations where a prior risk assessment has already been carried out by another Member State or at EU level.[356]

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[351] ibid, 30-32.
[352] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework' (n 44) 19, 32.
[353] Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13 The Columbia Journal of European Law 565.
[354] Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level?; (n 44).
[355] Case C-308/22, *PAN Europe (Closer)* (n 46); and Joined Cases C-309/22 and C-310/22, *PAN Europe (Evaluation of Endocrine Perturbation Properties)* (n 46).
[356] Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? (n 44) 824.

In particular, in *PAN Europe (Closer)* case, the Court was asked to clarify whether, and under what conditions, a Member State deciding on an authorisation may depart from the scientific assessment conducted by another Member State within the framework of the zonal authorisation system.[357] Under that system, an applicant seeking authorisation for a plant protection product submits applications to all Member States in which it intends to place the product on the market.[358] However, the substantive scientific evaluation is entrusted to a single Member State acting as zonal Rapporteur Member State (zRMS).[359] The assessment produced by that Member State serves as the scientific basis for authorisation decisions taken by the other Member States within the same zone. While each Member State remains formally responsible for granting or refusing authorisation, the PPPR requires that national decisions be grounded in the assessment carried out by the reference Member State, subject to limited possibilities for imposing additional national conditions or risk-mitigation measures.[360]

The framework outlined here reflects a delicate balance between harmonisation and national discretion. On the one hand, the zonal system seeks to promote efficiency, consistency, and mutual trust by avoiding duplicative assessments. On the other hand, Member States retain responsibility for protecting health and the environment within their territories.[361] The PPPR, however, does not clearly specify how this balance is to be struck where new scientific or technical evidence emerges after the reference assessment has been completed. It is precisely this gap that the Court of Justice addresses. By interpreting Article 36 PPPR, the Court held that a Member State concerned may deviate from the scientific risk assessment conducted by the reference Member State where the most reliable scientific and technical data, which were not taken into account in that assessment, indicate that the product poses an unacceptable risk to human or animal health or to the environment. In such circumstances, national authorities are not merely permitted, but required, to take those new data into consideration when deciding on authorisation.[362]

Through this interpretation, the Court clarified the scope of national discretion within a harmonised authorisation framework. It confirmed that harmonisation does not entail blind reliance on prior assessments, particularly where new scientific evidence casts doubt on their validity. At the same time,

[357] Case C-308/22, *PAN Europe (Closer)* (n 46) para 51.
[358] Regulation 1107/2009 (n 9) art. 33(1).
[359] ibid, art. 35.
[360] ibid, art. 36.
[361] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market' (COM/2006/0388 final - COD 2006/0136).
[362] Case C-308/22, *PAN Europe (Closer)* (n 46) para 70

the Court imposed a demanding evidentiary threshold, thereby preventing arbitrary departures from the reference assessment and preserving the coherence of the zonal system. In doing so, the Court ensured that administrative practices across Member States remain aligned with the overarching objective of the PPPR, namely the effective protection of health and the environment, while maintaining the integrity of the harmonised authorisation procedure.[363]

From a broader perspective, this case law, like that discussed in the preceding sections, reflects an integration-oriented approach to the administrative design of national systems. When EU legislation is silent or ambiguous on aspects of national administrative design—leaving them to the discretion of Member States—the Court has relied on a series of principles to ensure that national arrangements do not undermine the effective implementation and enforcement of EU law. While this is not the place to discuss the judicial activism of the Court of Justice conclusively, it must however be mentioned that the integrative approach of the Court's case law raises important concerns, to the extent that it may render this judicial intervention controversial or problematic.[364] For example, the concerns discussed here are similar to debates over the Court's interpretation and application of the principles of subsidiarity and proportionality.

The EU principle of subsidiarity and proportionality respectively determine whether and to what extent the EU legislature may intervene.[365] In particular, while the principle of conferral governs the limits of the EU's competence,[366] the subsidiarity and proportionality principles define whether and how this competence can be exercised. 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.[367]

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[363] Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? (n 44) 70.

[364] In more detail, Jan Blockx, 'Effet utile Reasoning by the Court of Justice is Mostly Indirect: Evidence and Consequences', (2022) 14 European Journal of Legal Studies 148, 166-168.

[365] Article 5 (3) and (4) TEU: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. […]. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties […]'.

[366] Article 5(2) TEU.

[367] 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 and Takis Tridimas (eds.) Oxford Principles Of European Union Law: The European Union Legal Order, Volume I (Oxford University Press, 2018) 224.

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. 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.[368]

Essentially, these principles determine the scope of the EU intervention and therefore, they can potentially expand but also restrict the EU impact on the Member States' legal order more generally, and the administrative one, more specifically. As highlighted in the article '*Navigating the Complexities of the DSA*', contrary to these expectations, these principles have proved limited in their ability to constrain the EU's regulatory ambitions.[369] The increasing EU influence over institutional and procedural matters, combined with the Court's limited review of the legality of that influence through the lens of these principles, has been criticised for failing to protect Member States against undue centralisation, harmonisation, and erosion of sovereignty.[370]

Against this background, while the Court's interventions and the principles it invokes have been essential for safeguarding the effectiveness and coherence of EU law, their integrative force raises significant concerns.[371] By translating abstract principles into detailed procedural and organisational requirements for national competent authorities, the Court effectively shapes national administrative systems in areas that would otherwise fall within Member State autonomy. However, in doing so, it defines a normative framework for administrative design that is primarily oriented toward EU law objectives, often limiting the discretion that EU legislators intended to leave to Member States. Moreover, the Court's approach increases reliance on judicial law-making to fill gaps in legislative frameworks, risking the normalisation of judicial intervention as a substitute for legislative action.

5. Good Administration: An Alternative Overarching Framework for National Administrative Design

[368] Takis Tridimas, 'The Principle of Proportionality' in Robert Schütze and Takis Tridimas (eds.) *Oxford Principles of European Union Law: The European Union Legal Order, Volume I* (Oxford University Press, 2018), 244.
[369] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework' (n 44) 19, 26-29.
[370] Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (n 237) 13–14; and Xavier Groussot and 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.
[371] Klamert, 'Deconstructing Loyalty' (n 40) 252 et seq.

In the EU legal order, good administration encompasses both a series of fundamental rights and general principles in the EU legal order.[372] Article 41 CFR establishes the right to good administration and enumerates several subjective rights, including the right to have one's affairs handled impartially, fairly, and within a reasonable time, as well as the obligation for the administration to give reasons for its decisions.[373] However, good administration is not exhausted by Article 41 CFR. The case law of the Court of Justice has previously underlined certain principles of good administration. These principles are also individual general principles of EU law.[374]

Prior to the formal codification of the rights of good administration, the Court had already relied on various principles of good administration to assess the legality of EU administrative action.[375] Procedural guarantees such as the right to access to the file,[376] and the obligation to state reasons were well established in the Court case law.[377] While Article 41 CFR, which mostly reflects that case law, is formally addressed to EU institutions, bodies, offices, and agencies, the CJEU has nevertheless consistently held that the principles of good administration, as general principles of EU law, bind Member State administrative authorities when they act within the scope of EU law.[378]

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[372] Herwig C.H. Hofmann, 'General Principles of EU law and EU administrative law' in Catherine Barnard and Steve Peers (eds.) *European Union Law* (Oxford University Press, 2014) 212

[373] Article 41 CFR '1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. 2. This right includes: (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; (b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; (c) the obligation of the administration to give reasons for its decisions. 3. Every person has the right to have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

[374] Koen Lenaerts and Alex Brenninkmeijer 'General Principles of EU Law and Audit Practice of EU Funds' (2016) 28[3] European Review of Public Law 815, 819 et seq.

[375] Hanns Peter Nehl, 'Good Administration as Procedural Right and/or General Principle?' in Herwig C H Hofmann and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar Publishing, 2009) 322, 322-323.

[376] Remarkably, Case C-623/22, *Belgian Association of Tax Lawyers and Others* [2024] ECLI:EU:C:2024:189, Opinion of AG Emiliou, para 181: 'It is my firm belief that the principles of good administration and proportionality limit the public administration's ability to request that natural and legal persons provide information that, for example, is irrelevant or unnecessary for the administration, is already in the possession of the administration or may create an intolerable workload and excessive costs to be collected, organised and communicated by the persons concerned'

[377] Case C-230/18, *PI v Landespolizeidirektion Tirol* [2019] ECLI:EU:C:2019:383, para 57 and case law cited: 'that provision [Article 41 CFR] reflects a general principle of EU law to the effect that the right to good administration encompasses the obligation of the administration to give reasons for its decisions. The obligation of the administration to state reasons for a decision which are sufficiently specific and concrete to allow the person concerned to understand the grounds of the individual measure adversely affecting him is thus a corollary of the principle of respect for the rights of the defence, which is a general principle of EU law'

[378] Case C-604/12, *N.* [2014] ECLI:EU:C:2014:302, paras 49-50: 'As regards the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law. Accordingly, where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good

In sum, good administration can be understood as 'a framework concept drawing together a range of rights, rules, and principles guiding administrative procedures with the aim of ensuring procedural justice, public administrative adherence to the rule of law, and sound outcomes from administrative procedures'.[379]

The Court has relied extensively on these principles to establish procedural safeguards that limit the discretionary powers of Member States' administrative authorities and ensure that the discretion conferred by EU law to these authorities is exercised in accordance with public interests and the objectives of EU legislation.

For example, in *Agrobet* case, the Court states that: 'the principle of good administration requires administrative authorities, such as the tax authority in question in the main proceedings, when carrying out their inspection duties, to conduct a diligent and impartial examination of all the relevant matters so that they can be sure that, when they adopt a decision, they have at their disposal the most complete and reliable information possible for that purpose'.[380] This argument is then recalled by AG Kokott in *PAN Europe (emergency authorisations)* case, to assess how national competent authorities must evaluate the scientific information in the context of emergency pesticide authorisation requests.[381] The AG states that: 'the principle of good administration, which Member States must observe in the application of EU law, requires the competent authorities to conduct a diligent and impartial examination of all the relevant factors and to ensure that, when they adopt a decision, they have at their disposal the most complete and reliable information. This means, in particular, that they must not simply accept information provided by the applicant without checking it but must evaluate it critically and also take into account relevant information from other sources'.[382]

The principles of good administration also encompass the obligation to provide adequate reasons for administrative decisions. The duty to state reasons allows affected parties to understand the basis of a decision and to challenge it before the competent courts, while simultaneously enabling those courts to assess the legality of the administrative action. As clarified by the Court of Justice in *Eco Advocacy*

administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities.'

[379] Hofmann, Rowe, and Türk, 'General Principles Framing European Union Administrative Law' (n 224) 143, 190.

[380] Case C-446/18, *AGROBET CZ* [2020] ECLI:EU:C:2020:369, para 44.

[381] Case C-162/21, *Pesticide Action Network Europe and Others* [2022] ECLI:EU:C:2022:650, Opinion of AG Kokott.

[382] ibid, paras 39-40.

case, 'the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressees in a position to defend their rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions'.[383] Moreover, the duty to state reasons enhances transparency and accountability and enables effective judicial review.[384] This link is expressly confirmed in the *Food Standards Agency* case, where the Court recalls that the obligation to state reasons for decisions adopted by the national authorities is particularly important not only because it puts their addressees in a position to defend their rights but also because it enables the courts to review the lawfulness of those decisions. Under these circumstances, the duty to state reasons becomes a condition for an effective judicial review under Article 47 CFR.[385]

In light of this case law, the article '*Member States' Discretion in Emergency Pesticide Authorisations'* argues that that the principles of good administration have the potential to establish procedural standards of impartiality and transparency for national competent authorities acting within the scope of the PPPR, particularly when granting emergency authorisations under Article 53 of the PPPR.[386]

The article starts from the recognition that inadequate EU law requirements for independence and transparency for national competent authorities render these authorities susceptible to industry influence when deciding on plant protection product authorisations. In such circumstances, authorisation decisions frequently bypass rigorous scientific assessment, improperly subordinating the protection of health and the environment to agricultural production interests.[387] Against this backdrop,

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[383] Case C-721/21, *Eco Advocacy CLG v An Bord Pleanála and others* [2023] ECLI:EU:C:2023:477, para 33 and case law cited.

[384] Ellen Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' in Damien Geradin, Rodolphe Muñoz, and Nicolas Petit (eds), *Regulation through agencies: A new Paradigm of European Governance* (Edward Elgar Publishing 2005) 120, 125.

[385] Case C-579/19*, Food Standards Agency* [2021] ECLI:EU:C:2021:665, para 89.

[386] Regulation 1107/2009 (n 9) art. 53. This provision allows plant protection products to be placed on the market under significantly less stringent conditions and safeguards than those prescribed above. Designed as a rapid, temporary, and last resort procedure for emergency situations, Article 53 essentially allows national competent authorities to authorise products for up to 120 days when there is a risk that cannot be contained by other reasonable means. If approved, the use of the product must remain limited and controlled. The national authority must also immediately inform the other Member States and the Commission, providing detailed information on the measures taken and the considerations relating to consumer safety. At this stage, the Commission may request an opinion, or scientific or technical assistance from EFSA, which must respond within one month. On the basis of this opinion, the Commission may decide whether the Member State may extend, withdraw or amend the measure. In more detail, Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations (n 44) 70, 74.

[387] Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations (n 44) 70-71. Moreover, European Parliamentary Research Service (EPRS), 'Regulation (EC) 1107/2009 on the Placing of Plant Protection Products

the article explores how the administrative design of these authorities can be strengthened to ensure closer alignment of their practices with the objectives of the PPPR. In this context, it argues that this challenge can be addressed through the systematic application of the principles of good administration as binding standards for decision-making, thereby enhancing independence, transparency, and accountability.[388]

As already argued elsewhere, the general principles of good administration may potentially lead to a certain harmonisation of the legal orders of the Member States, having the potential to become relevant for the entire range of administrative actions of all administrative authorities.[389] The added value of these principles is that they are deeply rooted in Europe's collective historical experience, notably serving to impose legal and ethical boundaries on administrative conduct. They aim to prevent arbitrariness and abuses of authority, while simultaneously enhancing the legitimacy, transparency, and accountability of administrative action. Under these circumstances, the principles serve as a protective and corrective toolbox. They help ensure that administrative decision-making remains lawful, reasoned, and fair even where public authorities enjoy wide discretion, safeguarding individual rights.[390] Importantly, compared to *effet utile* and sincere cooperation, the principles of good administration are not primarily aimed at achieving EU objectives. Instead, they are intrinsically oriented toward the quality of administrative action itself, focusing on ensuring that public authorities act fairly, transparently, proportionately, and accountably. While this approach can indirectly support the objectives of EU law, these objectives are not its primary focus.

Notwithstanding the formal validity of this argument, some additional considerations must be raised here. Almost every legal system among EU Member States contains general principles similar to those of good administration. These include, more or less explicitly, wide-encompassing principles such as

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on the Market: European Implementation Assessment' (European Parliament 2018) https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2018)615668 accessed 1 September 2025, Annex I-9.

[388] Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations (n 44) 70, 81 et seq.

[389] By confronting the objects of this book with its conclusion, it emerges that this objective is only achieved in part. Ulrich Stelkens and Agnė Andrijauskaitė, 'Introduction: Setting the Scene for a 'True European Administrative Law'' in Ulrich Stelkens, and Agnė Andrijauskaitė (eds), *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020) 1; and Ulrich Stelkens, Agnė Andrijauskaitė, and Yseult Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration: Overall Assessment' in Ulrich Stelkens, and Agnė Andrijauskaitė (eds) *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020) 757 et seq.

[390] Stelkens and Andrijauskaitė, 'Introduction: Setting the Scene for a 'True European Administrative Law'' (n 389) 1, 12-14.

transparency, impartiality, access to documents.[391] These principles are thought to operate as normative benchmarks that limit discretion, structure procedural choices, and impose obligations of impartiality, transparency, and reason-giving on administrative actors. In a growing number of legal systems, these principles are also supplemented by a general law, which may likely operationalise these general principles in practice.[392]

At the same time, however, framing this argument predominantly in terms of principles of good administration raises some more or less evident shortcomings. The very idea of the general principles of EU law seems 'to promise a systematic structuring of a legal system beyond the intricacies of individual and detailed rules'.[393] It appears to be a legal solution to ensure coherence of the system, by offering the opportunity to fill gaps. Yet, this premise is demonstrably flawed.[394] Most prominent of all the shortcomings of the principles of EU law is the fact that these principles require a purely legal and judicial approach, leaving practical questions unaddressed.

For what concerns the application of EU principles of good administration by national competent authorities, the reality is that these authorities may refrain or not necessarily feel obliged to apply general abstract principles, if specific legislation does not lay down specific norms guiding their practice. An additional obstacle is the different conception of good administrative principles and practices across Member States.[395] While it is true that the Member States' legal systems may contain general principles similar to those of good administration, national competent authorities may interpret them differently or fail to implement them without specific legislative backing.

Under these circumstances, to render the administrative design of national competent authorities aligned with good administration principles, these principles and the practices they enshrine should

[391] Generally, Ulrich Stelkens and Agnė Andrijauskaitė (eds), *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020).

[392] Statskontoret, 'Good administration in European countries' (Statskontoret, 2023) https://www.statskontoret.se/en/publications/publikationer/publikationer-2023/good-administration-in-european-countries/ accessed 1 September 2025.

[393] Stefan Vogenauer and Stephen Weatherill, General Principles of Law: European and Comparative Perspectives (Hart Publishing, 2017) 1-2.

[394] Another concern is the different understandings of the general principles across countries. For example, literature highlights different perspectives of the principle of legality, for example, between the UK and France. Respectively, Yseult Marique, 'Le principe de légalité en droit administratif anglais - Un concept "flou" face aux transformations de l'action administrative' (2022) 2[5] Revue Française de Droit Administratif 241 (2022) ; and Benoît Plessix, 'Le principe de légalité en droit administratif français' (2022) 2[5] Revue Française de Droit Administratif 206. More generally, on the obstacles to convergence in European administrative law, Marique and Slautsky, 'Resistance to Transplants in the European Administrative Space' (n 109) 7.

[395] See, Stelkens, Andrijauskaitė, and Marique, 'Mapping, Explaining, and Constructing the Effectiveness of the Pan-European Principles of Good Administration' (n 389) 757.

be operationalised in the daily work of these authorities. As demonstrated in my contributions, there are different ways to operationalise these principles.[396] For example, one possible solution is that of resorting to soft law instruments.[397] This approach would provide greater clarity and coherence regarding the manner in which the national competent authorities must act in the scope of EU law.[398] In fact, where such standards are clearly embedded in different types of legal texts directly addressed to administrative authorities, they are more easily applicable by these authorities, thus enhancing the consistency and predictability of administrative practices across Member States. Additional and compatible with that approach is the necessity of providing a better understanding of EU requirements through specific training of civil servants and the participation of these authorities and their staff in supranational cooperation mechanisms, which scholars have shown to benefit these authorities in terms of the dissemination of best practices, mutual learning, harmonisation, and the promotion of policy implementation.[399]

6. Conclusion

This Chapter highlights that the role national institutional autonomy in the EU's administrative design of national competent authorities is not that of a constitutional safeguard protecting Member States' sovereignty, autonomy, and ultimately diversity. Rather, autonomy exists as a residual margin, often interpreted and enforced by the Court of Justice in light of the EU objectives. The Court of Justice plays a central role in this process, determining whether national administrative arrangements align with EU law's objectives and obligations, frequently through the principles of effectiveness (*effet utile*) and sincere cooperation.

[396] Mattioli, 'Navigating the Complexities of the DSA's Enforcement Framework (n 44) 20, 32-34.
[397] Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations (n 44) 70, 90-92. In this regard, however, obstacles remain. See, for example, the case of Belgium, Yseult Marique, 'Belgian Pluralism and Pragmatism: Shared Principles in a Strained Relationship', in Ulrich Stelkens, and Agnė Andrijauskaitė (eds), Good Administration and the Council of Europe: Law, Principles, and Effectiveness (Oxford University Press, 2020) 123, 150-153.
[398] Elise Muir, 'The fundamental rights implications of EU legislation: Some constitutional challenges' (2014) 51[1] Common Market Law Review 219, 245. Similarly, Elise Muir suggests that 'legislation may have significant implications for the protection of fundamental rights in the EU. It may be specifically designed to give expression to a fundamental right, "incidentally" set fundamental rights standards and create mechanisms for their protection or the mere existence of EU legislation can mark the presence of EU law, thereby creating a duty for the Member States to comply with EU fundamental rights law in the relevant field'.
[399] 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 this framework, the doctrine of *effet utile* primarily operates as a negative constraint on national institutional autonomy. It delineates the boundaries of what Member States must not do when implementing EU law, i.e., obstruct or compromise its objectives and effectiveness. *Effet utile* is often used as a corrective mechanism—by the Court primarily, but also in other circumstances, as evidenced in my contributions—to invalidate national choices that, although formally within the State's institutional competence, risk undermining the realisation of EU rules in practice. By contrast, the principle of sincere cooperation imposes a positive duty, prescribing the measures that Member States must actively take to fulfil their EU obligations. Together, *effet utile* and sincere cooperation delimit national institutional autonomy.

Against this integration by default, in light of what already argued in the article '*Member States' Discretion in Emergency Pesticide Authorisations'*, this Chapter explores the role of the principles of good administration as a possible alternative or complementary normative framework for the administrative design of national competent authorities. Unlike the principles of effectiveness and sincere cooperation, good administration functions not only as an instrument of integration but also as a set of guarantees designed to ensure legality, impartiality, transparency, and accountability. In this light, as binding general principles of EU law, the principles of good administration apply to national authorities when acting within the scope of EU law and can structure administrative discretion without necessarily affecting the autonomy of the Member States.

CONCLUSION

Although no uniform organisational model applies across all policy sectors, the EU legal order significantly shapes the structure and functioning of national competent authorities acting within the scope of EU law. In certain contexts, EU law may even bring national competent authorities functionally close to national courts, insofar as they are required to operate under independence safeguards and to exercise powers typically associated with judicial bodies, as examined in the contribution '*The Quasi-Judicial Role of National Competent Authorities*'.

In light of the far-reaching influence of EU law on national administrative systems—exerted through the administrative design of national competent authorities across policy sectors—this research has sought to clarify the normative framework governing their EU administrative design and to assess how that framework mediates the relationship between EU integration and Member State autonomy. The analysis concludes that an integration-oriented rationale operates as the default framework guiding such administrative design, often at the expense of national institutional autonomy.

This conclusion emerges first from an examination of national institutional autonomy within the EU administrative order. The essay has analysed the meaning, legal nature, and limits of this autonomy on the basis of both academic literature and the case law of the Court of Justice. The analysis has demonstrated that existing doctrinal and judicial accounts are marked by inconsistency and conceptual ambiguity. The status and scope of national institutional autonomy remain unsettled. It is unclear whether autonomy should be regarded as a constitutional principle of Union law, as a normative value informing the allocation of EU administrative powers, or merely as a descriptive expression of the limits of Union competence in the field of administrative organisation. Neither the Treaties nor the case law of the Court of Justice provide a definitive answer.

In response to this lack of clarity, the essay has advanced a more precise conceptualisation: national institutional autonomy operates as a residual rule, the scope of which is conditioned by the requirements of EU law. It does not function as an autonomous constitutional counterweight to integration. Rather, it persists only to the extent that national organisational choices do not compromise the effectiveness and uniform application of Union law. Autonomy is therefore structured and limited by the objectives and obligations stemming from EU law itself.

This normative asymmetry is reflected in the Court's reliance on *effet utile* and the principle of sincere cooperation. Through *effet utile*, the Court scrutinises national institutional arrangements and requires

their adjustment where they risk undermining the effectiveness of EU law, even if they fall within domestic organisational competence. Moreover, through Article 4(3) TEU, Member States are under a positive obligation to adopt the legislative, administrative, and institutional measures necessary to ensure compliance with Union law.

In sum, these elements reveal a model of administrative integration that is not institutionally neutral but safeguards uniform and effective enforcement at the expense of Member States' institutional autonomy.

This realisation however raises at least one essential consideration: whether to prioritise greater harmonisation of national administrative systems or to allow Member States to respond differentially to the pressures of European integration in ways that reflect their domestic institutional cultures, practices, and needs.

The challenge of balancing national diversity with European integration is a recurring theme in EU legal scholarship.[400] Achieving this equilibrium is particularly complex in practice. Unresolved tensions between EU requirements and national administrative structures can negatively affect the functioning of EU legislation. The analysis of the PPPR in the article '*Member States' Discretion in Emergency Pesticide Authorisations*' illustrates how tensions between EU requirements and national administrative structures can negatively affect the functioning of EU legislation. Similarly, the article '*Navigating the Complexities of the DSA's Enforcement Framework'* demonstrates both the importance the Union attaches to institutional diversity and the frustration generated by Member States' difficulties in designating competent authorities. In these contexts, it cannot be denied the added value of a normative framework that ultimately renders EU law effective.

Despite these observations, I believe that the current framework remains inherently unbalanced, as it fails to formally recognise a principle of national institutional autonomy. EU law presently prioritises effectiveness, uniformity, and coherence, often without fully engaging with the constitutional and

[400] Robert Schutze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (2008) 33[5] European Law Review 709; Kenneth A Armstrong, '(Br)Exit From the European Union—Control, Autonomy, and the Evolution of EU Law' in Paul Craig and Gráinne de Búrca (eds) The Evolution of EU Law, (3rd edn Oxford University Press, 2021) 399; Giacinto della Cananea, and Jean-Bernard Auby (eds), *General Principles and Sector-Specific Rules in European Administrative Laws, The Common Core of European Administrative Law (*Oxford University Press, 2024); Ulrich Stelkens and Agnė Andrijauskaitė (eds) *Good Administration and the Council of Europe: Law, Principles, and Effectiveness* (Oxford University Press, 2020); Miguel Maduro, Kaarlo Tuori, and Suvi Sankari, 'European Law' in Miguel Maduro, Kaarlo Tuori, and Suvi Sankari, (eds) Transnational Law: Rethinking European Law and Legal Thinking, (Cambridge University Press, 2014) 143.

administrative particularities of the Member States. Within this approach, institutional autonomy is treated primarily as a potential obstacle to integration and harmonisation. However, by neglecting this autonomy at the normative level, the existing framework risks disregarding a normative reality that persists in practice. Institutional autonomy continues to shape the implementation of EU objectives, regardless of its limited formal recognition. Ignoring this dimension may ultimately generate structural imbalances between integration-driven objectives and domestic administrative configurations, potentially undermining the very uniformity and effectiveness that EU law seeks to secure.

Against this background, establishing a clearer constitutional principle of national institutional autonomy could contribute to a more coherent and predictable framework for administrative enforcement. Such a principle would recognise the legitimacy of national administrative structures while ensuring their effective operation within EU law. The Court of Justice could play a central role in defining and enforcing this principle, bridging the gap between EU integration objectives and national administrative diversity.[401]

Simultaneously, this essay argues that the administrative design of national competent authorities could be framed more effectively by recourse to the principles of good administration. Properly operationalised, these principles provide a legitimate, flexible, and coherent framework that respects national administrative diversity while ensuring compliance with EU law.

[401] Xavier Groussot and Jörgen Hettne and Gunnar Thor Petursson, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Stefan Vogenauer and Stephen Weatherill, *General Principles of Law: European and Comparative Perspectives* (Hart Publishing, 2017) 77; and Urška Šadl and Joxerramon Bengoetxea, 'Theorising general principles of EU law in perspective: high expectations, modest means and the Court of Justice' in Stefan Vogenauer and Stephen Weatherill, General Principles of Law: European and Comparative Perspectives (Hart Publishing, 2017) 41, 50-51.

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The Quasi-Judicial Role of National Competent Authorities: an Ambiguity that the Principle of Effective Judicial Protection could help address?

Pietro Mattioli*

PhD Researcher at the University of Liège, Belgium

Abstract

The article discusses the emerging quasi-judicial role of Member States' authorities competent for the enforcement of EU law at the national level. In various sectors, EU legislation entrusts these entities with tasks of dispute settlement, enforcement and protection of individuals' rights and interests, along with investigative and corrective powers, and safeguards of independence akin to those of national courts. At the same time, however, the EU legislator and the Court of Justice have not explicitly acknowledged the quasi-judicial role that these authorities are called to perform. In this view, the article argues that the absence of explicit recognition of that role undermines the effective judicial protection of individuals' rights under EU law. It calls for a clear and direct acknowledgment of this role to improve the procedural guarantees for individuals seeking remedies from these entities.

To develop that argument, Section 2 starts by exploring how Member States' competent authorities have acquired quasi-judicial features through an analysis of EU sectoral legislation, emphasising the increasing alignment with judicial bodies in terms of independence and responsibilities. Subsequently, Section 3 examines the reasons impeding the formal recognition of the quasi-judicial status of these authorities within EU legislation. It addresses the Court of Justice's cautious stance on the nature of their functions. This section concludes by calling for the recognition of their quasi-judicial role based on the principle of effective judicial protection, aiming to address the ambiguity surrounding their role and enhance legal certainty within the EU legal framework.

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1. Introduction

The enforcement and protection of rights and interests originating in EU law are going through a fundamental transformation. At the heart of this transformation lies the conferral of quasi-judicial functions to Member States' authorities competent for the implementation of EU law at the national level (national competent authorities).[1] The alignment with functions commonly performed by judicial bodies can be observed in various sectors, most notably in competition, data protection, digital services, energy, telecommunications, and railways.[2] In these areas, national competent authorities are responsible for settling disputes and enforcing and protecting individuals' rights and interests originating from EU law. Additionally, for the exercise of these activities, EU legislation entrusts these entities with powers of investigation, corrective powers and sanctions, such as ordering the cessation of infringements and issuing temporary measures and fines, while also ensuring they maintain the same level of independence and impartiality as a judicial body.

As a result of this, national competent authorities acquire a quasi-judicial role, serving as an extra mechanism within the EU system of legal remedies for individuals to uphold and safeguard their rights stemming from EU law.[3] Despite this evidence, however, the EU legislator has refrained from openly acknowledging that role within any piece of EU legislation. Within this framework, the Court of Justice of the European Union (Court of Justice Court or CJEU) openly discusses—strictly interpreting—the judicial nature of the functions exercised by national competent authorities. This article claims that the ambiguity surrounding the recognition of national competent authorities' quasi-judicial role undermines the effective judicial protection of individuals' rights and interests originating from EU law. To solve this ambiguity, it calls for an explicit recognition of that role. To that end, it investigates to what extent

1 The article aims to offer a cross-sectoral perspective—hence, the decision to use the term 'national competent authorities', which goes beyond the conventional distinction among sectoral economic regulators supervising network industries, defined as 'national regulatory authorities' (NRAs), competition authorities, and other supervisory authorities, such as data protection authorities. M Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70 The Cambridge Law Journal 113; and S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39 Legal Issues of Economic Integration 419, 422-423. Literature employs additional connotations, S De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar, 2017) 5-8.

2 The analysis in this article will concentrate on these policy fields, as they are the areas where the attribution of quasi-judicial tasks most prominently comes to light.

3 By adopting the term 'quasi-judicial', this article intends to refer to a *de iure* administrative body which does not belong to the judicial system of the Member States but still performs functions commonly conferred on judicial actors, hence providing an additional mechanism for the effective judicial protection of individuals' rights.

the principle of effective judicial protection could represent a sufficient basis for claiming a shift in the approach of the EU legislator and the CJEU.

To develop this argument, this article will proceed in two sections beyond this introduction. Section 2 will revisit how the quasi-judicial role of national competent authorities has come to be. The analysis of some pieces of EU sectoral legislation will outline how an important component of the EU institutional design of these authorities is the attribution of quasi-judicial features. In more detail, EU law increasingly enforces stricter independence requirements akin to those mandated for national courts. As well, it assigns quasi-judicial responsibilities to national competent authorities across various sectors.

Section 3 contrasts these findings, outlining the reasons that still prevent the recognition of national competent authorities' quasi-judicial role. First, it explores the factors that might hinder the EU legislator from acknowledging that status within EU secondary legislation. Within this framework, it also highlights how, in the case law on the admissibility of preliminary references originating from national competent authorities, the Court pays particular, some might even say excessive, attention to national competent authorities' status as administrative bodies detached from Member States' judiciary, eventually denying them access to Article 267 TFEU's procedure. Those findings allow to emphasise the ambivalent approach towards the role of these entities and its consequences. In this view, Section 3 concludes by arguing for the recognition of national competent authorities' quasi-judicial role in the light of the principle of effective judicial protection.

2. Features of national competent authorities confirming their quasi-judicial role

In recent decades, there has been a rise in the number and type of Member States' bodies responsible for implementing EU norms at the national level. Although these entities' primary role is to regulate and oversee a particular policy area governed by EU legislation, this agency-based model of governance precedes the EU intervention, being associated with the creation of the 'regulatory state' in Europe.[4]

The establishment of national authorities largely coincides with the liberalisation of public services and transferring of regulatory duties for those liberalised sectors to new institutions—typically set up within the Member

4 G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17 West European Politics 77; G Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance' (1997) 17 Journal of Public Policy 139; M Lodge, 'Regulation, the Regulatory State and European Politics (2008) 31 West European Politics 280; and De Somer (n 1) 30-33.

States' administration while maintaining a level of independence from it.[5] National governments envisage multiple advantages in conferring regulatory tasks upon national specialised bodies. Most commonly, these entities remain, to a great extent, separate from political influences and possess technical expertise. They are in the position to perform specific tasks that may not be well-suited for conventional bureaucracies. Additionally, they guarantee time consistency in the sense that they offer stability and continuity of regulatory policies compared to normal political entities.[6] Under these circumstances, in most network industries, such as telecommunications, energy, and railways, specialised agencies are established.[7]

From the outset, the EU has supported the transition towards liberalised markets.[8] At the same time, the 'EU impulse' has also extended beyond network industries.[9] In that sense, for instance, Directive 95/46/EC (now replaced by Regulation (EU) 2016/679) required that each Member State provides for one or more public authorities responsible for monitoring the application of the EU data protection rules.[10] At present, EU legislation mandates the designation or establishment of national competent authorities to regulate or oversee the implementation of EU norms in different policy areas, also laying down administrative provisions regulating the structure and functions of these authorities. EU administrative regulation plays a crucial role in addressing the 'paradox of institutional autonomy', which is a defining feature of EU law enforcement.[11] Due to its limited formal authority in regulating matters related

5 M Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 52 International Organization 99; M Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9 Journal of European Public Policy 954; M Thatcher, 'Independent Regulatory Agencies and Elected Politicians in Europe' in D Geradin, R Muñoz and N Petit (eds), *Regulation through agencies in the EU : a new paradigm of European governance* (Edward Elgar 2005) 48-50.

6 Majone (n 4).

7 Thatcher (n 5) 51-52.

8 L Hancher and P Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in P Craig en G de de Búrca (eds), *The evolution of EU law* (2nd ed, Oxford University Press 2011) 743-781; and D Geradin and C Humpe, 'The Liberalisation of Postal Services in the European Union: An Analysis of Directive 97/67' in D Geradin (eds), *The liberalisation of postal services in the European Union* (Kluwer Law International 2002), 95.

9 De Somer (n 1) 23. The author uses the term 'EU impulse' to refer to how EU law has progressively required Member States to entrust the implementation of EU legislation to national authorities.

10 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 28(1).

11 JH Jans, R de Lange, A Prechal and R Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2007) 18. The authors employ the concept of 'paradox of institutional autonomy' to describe the traditional tendency of EU law of not interfering with questions of administrative organisation of the Member States, despite depending on them for the implementation of EU law and policies.

to the administrative organisation of Member States, EU law has historically aimed to respect the national institutional autonomy by refraining from interference. Over time, however, it has become evident to EU lawmakers that Member States need guidance in structuring key bodies responsible for implementing EU policies at the national level. Therefore, despite its limited capacity to act in that sense, EU law has intervened to design the structure and functions of national competent authorities.[12]

Against this background, the next two sub-sections will analyse some emerging characteristics of the EU institutional design of national competent authorities. They will describe how the conditions of independence as well as the responsibilities and powers of national competent authorities substantially align with those of national courts. By highlighting these similarities, this article intends to emphasise that EU legislation assigns structural and functional characteristics resembling those of national courts to national competent authorities, suggesting that these authorities perform a quasi-judicial role.

2.1. Independence

Prior to EU involvement, independence represented a key feature of national specialised authorities. Within liberalised markets, the autonomy of these bodies was deemed essential for enhancing expertise, safeguarding against short-term political influences on long-term market operations, fostering collaboration among regulators and enhancing the quality of their decisions.[13] Within this framework, the EU's standards of independence have gradually developed as an integral aspect of the EU institutional design of national authorities responsible for enforcing EU law.[14] In fact, there is a direct correlation between the achievement of policy objectives, the correct function-

12 H Hofmann, GC Rowe, and A Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011); S 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; P Van Cleynenbreugel, *Market Supervision in the European Union: Integrated Administration in Constitutional Context* (Brill Nijhoff 2015); and P Craig, *EU Administrative Law* (3rd ed, Oxford University Press 2019).

13 LS Bressman and RB Thompson, 'The Future of Agency Independence' (2010) 63 Vanderbilt Law Review 672. Literature also adopts the term 'organisational depoliticitisation' to refer to the independence of non-majoritarian institutions originating from political delegations. In that sense, see M Flinders and J Buller, 'Depoliticization, Democracy and Arena Shifting' in T Christensen and P Lægreid (eds), *Autonomy and Regulation: Coping with Agencies in the Modern State* (Elgar Publishing, 2006) 58-59.

14 In relation to national competent authorities' independence, literature distinguishes two sides of that independence – formal and *de facto*. Whereas the former refers to the independence as prescribed in the text of the law, the latter measures the independence that an authority enjoys in practice. M Maggetti, 'De facto independence after delegation: A fuzzy-set analysis' (2007) 4 Regulation & Governance 271; and F Gilardi and M Maggetti, 'The independence of regulatory authorities' in D Levi-Faur (ed), *Handbook of Regulation* (Edward Elgar 2010).

ing of national competent authorities and their independence.[15] In this context, for instance, in relation to national authorities within network industries, EU legislation has sought to enhance and harmonise their independence from market parties to prevent conflicts of interests. Illustrative of this is Directive 2003/54/EC (now replaced by Directive (EU) 2019/944) on common rules for the internal market in electricity, which required the establishment of authorities which had to be 'wholly independent from the interests of the electricity industry'.[16] Likewise, in the railway sector, Directive 2012/34 lays down similar conditions, requiring that the members of the executive body of the railway regulatory authorities have no interest or business relationship with any of the regulated undertakings or entities.[17]

At the same time, EU administrative intervention safeguards the independence of these authorities from political influence and other external entities. Even before EU intervention, political independence has been an essential feature of national competent authorities' design. Especially within liberalised market, politically independent authorities increased the credibility of the liberalised process and attracted private investments.[18] However, in the beginning, the independence of these authorities was limited. From a principal-agent perspective, elected politicians delegated to non-majoritarian institutions autonomy sufficient to carry out their tasks while maintaining some formal controls to prevent 'agency losses'.[19] In that regard, the EU intervention also represents an attempt to harmonise and reinforce pre-existing standards of independence.[20]

Within this framework, the Court of Justice also plays a relevant role. Called to clarify the meaning of partly undefined independence criteria contained in

15 C Koop and C Hanretty, 'Political Independence, Accountability, and the Quality of Regulatory Decision-Making' (2018) 51 Comparative Political Studies 38; and M Cappello, 'The independence of media regulatory authorities in Europe' (European Audiovisual Observatory 2019) IRIS Special 2019/1, 4.

16 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC – Statements made with regard to decommissioning and waste management activities [2003] OJ L176/37, art 23.

17 Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L343/32, art 55(3).

18 D Szescilo, 'Challenging Administrative Sovereignty: Dimensions of Independence of National Regulatory Authorities Under the EU Law' (2021) 27 European Public Law 191, 194.

19 Thatcher (n 5) 48-49.

20 A Ottow, 'The Different Levels of Protection of National Supervisors' Independence in the European Landscape' in S Comtois and KJ de Graaf (eds), *On Judicial and Quasi-Judicial Independence* (Eleven International Publishing 2013) 140-142; De Somer (n 1) 38-39. Literature also discusses the impact of interdependence on national authorities' design. For instance, Maggetti (n 14); G Monti, 'Independence, Interdependence, and Legitimacy: The EU Commission, National Competition Authorities, and the European Competition Network' in D Ritleng (eds), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 194.

EU secondary legislation, it has provided a stringent interpretation of them. Most notably, in *Commission v Germany*, the Court was called to assess whether Germany had incorrectly transposed the requirement of 'complete independence' in relation to the supervisory authority responsible for ensuring the protection of data, failing to fulfil its obligation under Article 28(1) of Directive 95/46.[21] In that context, the Court delivers a stringent interpretation of that condition. It declares that in the exercise of their duties, data supervisory authorities must act objectively and impartially and, therefore, remain free from any external influence, including the direct or indirect influence of the state.[22] Afterwards, in *Commission v Austria*, the Court was again called to assess the transposition of the condition of 'complete independence' under Article 28(1) of Directive 95/46.[23] It confirmed its previous stringent interpretation, reiterating that supervisory authorities for the protection of personal data must be shielded from any external influence.[24] At present, Article 52 of Regulation 2016/679 (General Data Protection Regulation or GDPR),[25] which repeals Directive 95/46/EC, lays down conditions of independence implementing the above Court's case law.[26]

Therefore, EU legislators and the Court of Justice have played a significant role in setting strict and harmonised requirements for the independence of national competent authorities. This tendency can now be observed across different policy sectors. By way of example, in the electricity sector,[27] Directive 2019/44 expressly guarantees the independence of energy regulatory authorities and the impartiality and transparency of their actions. To that end, it envisages specific arrangements: legal and functional independence from other public or private entities, independence of staff actions (who should not

21 Case C-518/07 *European Commission v Federal Republic of Germany* [2010] ECLI:EU:C:2010:125, paras 14-16.

22 ibid, para 25.

23 Case C-614/10 *European Commission v Republic of Austria* [2012] ECLI:EU:C:2012:631.

24 ibid, paras 41-43.

25 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 L119/1.

26 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' COM/2012/011 final – 2012/0011 (COD), pt 3.4.6. Moreover, for a discussion on the CJEU's broad interpretation of the conditions of independence for regulatory authorities in network industries, S Lavrijssen, 'Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator' (2022) 16 Carbon & Climate Law Review 25, 33-34.

27 In the energy sector, quite influential is also the Commission, 'Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas' (Commission Staff Working Ppaer, 22 January 2010). This document extensively clarifies how to interpret the provisions of the 2009 electricity and gas Directives.

take any direct instructions from any government or other public or private entity), sufficient human and financial resources, a separate annual budget allocation and rules for authority's top management.[28] Quite similarly, in telecommunications, Directive 2018/1972 (European Electronic Communication Code or EECD) covers various aspects of national authorities' independence.[29] It ensures the independence of these authorities in both market and political spheres, emphasising impartiality, transparency and timely decision-making.[30] Consequently, national telecommunications regulators are expected not to seek or take instructions from any external entity.[31] Additionally, the EECD establishes rules regarding the selection and removal of the authorities' members, budget allocation and management of financial and human resources.[32] Moreover, within competition law, Directive 2019/1 devotes Articles 4 and 5 to independence and resources of national competition authorities.[33] Now, these authorities are required to perform their duties and exercise their powers impartially, free from political and other external influence, refraining from seeking or taking any instructions from the government or any other public or private entity.[34] Directive 2019/1 further establishes rules concerning the appointment of decision-making body members and guarantees against their dismissal.[35]

Within this framework, it must be taken into account that variations still persist among sectors, preventing from agreeing on a common definition of independence applied to national competent authorities.[36] However, certain key features of national competent authorities' independence that are consistent across various sectors include the independence of these authorities from other institutional actors (market entities, political bodies, and other external actors), impartiality and additional guarantees, such as rules on budget, ap-

28 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 57(4) and (5).

29 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

30 ibid, art 6(1) and (3).

31 ibid, art 8(2).

32 ibid, art 9(1) and (2).

33 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L11/3, arts 4 and 5. Regulation 2003/1 does not contain similar guarantees.

34 ibid, art 4(1) and (2).

35 ibid, art 4(3) and (4).

36 Literature distinguishes different dimensions of independence, K Verhoest, G Peters, G Bouckaert and B Verschuere, 'The study of organisational autonomy: a conceptual review' (2004) 24 Public Administration and Development 101; Szescilo (n 18); and O Batura and M Kozak, 'Study on the NRA independence: Final Report' (2022) BoR (22) 189 <https://www.berec.europa.eu/en/document-categories/berec/reports/study-on-the-nra-independence-final-report> accessed 6 May 2024, 24.

pointment and dismissal of key officials, and on their decision-making. Under these circumstances, this section suggests that the EU legislator has aligned, to a large extent, the independence of national competent authorities with that of the judiciary.[37]

As regards the judicial system of the Member States, the organisation of their judiciaries varies significantly. Despite this diversity, there are certain fundamental guarantees that national courts are expected to uphold. The condition of independence is one of those elements.[38] In this context, the Court of Justice appears to be establishing basic standards of judicial independence through its case law.[39] It now distinguishes between two spheres of judicial independence—external and internal.[40] The external sphere implies that the judicial body exercises its functions 'autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever'.[41] The internal sphere is linked to impartiality, referring to objectivity and the absence of any interest in the outcome of the proceedings.[42] Those guarantees necessitate specific rules concerning the composition of the body, appointment procedures, length of service and grounds for abstention, rejection and dismissal of its members.[43]

In this view, it is possible to highlight certain parallelisms between judicial independence and the independence of national competent authorities while acknowledging that differences between the two spheres remain. Table 1 offers a perspective on the similarities, indicating that the independence framework of national competent authorities is comparable to that of national courts.

37 In this perspective, the alignment of judicial independence and independence of national competent authorities can be justified by the necessity of building mutual trust among authorities called to perform judicial activities. B Van Rompuy, 'Independence as a Prerequisite for Mutual Trust between EU Competition Enforcers: Case T-791/19, Sped-Pro v Commission' (2022) 13 Journal of European Competition Law & Practice 413.

38 The CJEU emphasises how the condition of independence is inherent in the tasks of adjudication. As a result, a national body to be judicial must be independent. Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311, 51; and C Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 European Constitutional Law Review 26.

39 Over the past years, the CJEU has developed a standard of judicial independence, which is an expression of the rule of law and the principle of effective judicial protection and thereby, rooted in Articles 2 and 19 TEU, and Article 47 CFR. For instance, C-216/18 *PPU – Minister for Justice and Equality* [2018] ECLI :EU:C:2018:586, paras 48-50; Case C-619/18 *Commission v Poland* [2019] ECLI :EU:C:2019:615, paras 50-57; and Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI :EU:C:2018:117, paras 35-38.

40 Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECLI:EU:C:2006:587, paras 49-52; C-216/18 *PPU – Minister for Justice and Equality* [2018] ECLI :EU:C:2018:586, para 63.

41 Case C-274/14, *Banco de Santander SA* [2020] ECLI:EU:C:2020:17, para 57.

42 ibid, para 61.

43 ibid, para 63.

Table 1: Comparative table of the conditions of judicial independence and independence of national competent authorities.

Judicial independence.	EU conditions of independence for national competent authorities.
External independence: – Exercise of functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever.	– Regulation 2022/2065: Digital Services Coordinators and other competent authorities – remain free from any external influence, whether direct or indirect, and shall neither seek nor take instructions from any other public authority or any private party.[44] – Directive 2019/1: national competition authorities – exercise their powers independently from political and other external influence. They should not seek or take any instructions from government or any other public or private entity.[45] – Directive 2019/944: national regulatory authorities for the energy sector – must be legally distinct and functionally independent from other public or private entities and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks.[46] – Directive 2018/1972: telecommunications national regulatory authorities – independent both from the sector and from any external intervention or political pressure.[47] – Regulation 2016/679: data supervisory authorities – be completely independent. The members of the authorities shall, in the performance of their tasks and exercise of their powers, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody.[48] – Directive 2012/34: the regulatory body for the railway sector – be a stand-alone authority that is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity.[49] Members should not seek or take instructions from any government or other public or private entity when carrying out the functions of the regulatory body.[50]

44 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 Act) [2022] OJ L277/1, art 50(2).
45 Directive (EU) 2019/1 (n 33) art 4(2)(a) and (b).
46 Directive (EU) 2019/944 (n 28), art 57(4)(a) and (b). In addition, Case C-378/19 *Prezident Slovenskej republiky* [2020] ECLI:EU:C:2020:462, para 35.
47 Directive (EU) 2018/1972 (n 29) arts 6(1) and 8.
48 Regulation (EU) 2016/679 (n 25), art 52(1) and (2); Case C-518/07 (n 21); and Regulation (EU) 2022/2065 (n 44), art 50(2).
49 Directive 2012/34/EU (n 17), art 55(1).
50 ibid, Article 53(3)(4).

Judicial independence.	**EU conditions of independence for national competent authorities.**
Internal independence: – Impartiality (the absence of any interest in the outcome of the proceedings).	– Regulation 2022/2065: perform tasks impartially.[51] – Directive 2019/1: perform duties and exercise powers impartially and in the interests of the effective and uniform application of those provisions.[52] – Directive 2019/944: exercise powers impartially.[53] – Directive 2018/1972: exercise powers impartially.[54] – Regulation 2016/679: exercise powers impartially.[55] – Directive 2012/34: independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.[56]
Internal and external independence require rules: – Composition of the body. – Appointment, length of service and grounds for abstention, rejection, and dismissal of its members.	– Regulation 2022/2065: necessary resources to carry out tasks, including sufficient technical, financial and human resources and sufficient autonomy in managing the budget.[57] – Directive 2019/1: Member States should ensure clear and transparent rules and procedures for the selection, recruitment or appointment dismissal of the persons who take decisions. Rules should be laid down in advance in national law.[58] – Directive 2019/944: Member States should ensure sufficient human and financial resources, independent annual budget, and norms on appointment, duration and dismissal of members of the board.[59] – Directive 2018/1972: budget independence,[60] and rules for appointment and dismissal of members.[61] – Regulation 2016/679: rules for appointment and dismissal of members and other guarantees of independence and impartiality.[62] – Directive 2012/34: staffed and managed in a way that guarantees its independence—norms on appointment, duration, and dismissal of members of its executive board.[63]

51 Regulation (EU) 2022/2065 (n 44), art 50(1).
52 Directive (EU) 2019/1 (n 33), art 4(1).
53 Directive (EU) 2019/944 (n 28), art 57(4).
54 Directive (EU) 2018/1972 (n 29), recital 34 and art 6(2).
55 Regulation (EU) 2016/679 (n 25), recital 129.
56 Directive 2012/34/EU (n 17), art 55(1).
57 Regulation (EU) 2022/2065 (n 44), art 50(1).
58 Directive (EU) 2019/1 (n 33), recital 17 and art 4(3) and (4).
59 Directive (EU) 2019/944 (n 28), art 57(4) and (5).
60 Directive (EU) 2018/1972 (n 29), recital 37.
61 ibid, art 7.
62 Regulation (EU) 2016/679 (n 25), arts 53 and 54.
63 Directive 2012/34/EU (n 17), art 55(3).

The next section will describe how—besides an alignment in terms of independence—the EU institutional design of national competent authorities also encompasses the attribution of quasi-judicial tasks and powers to these bodies.

2.2. Functions

National competent authorities have multiple duties and powers that vary depending on the specific sector they oversee. For instance, authorities within network industries, such as energy and telecommunications authorities, are commonly entrusted with market regulatory tasks.[64] This is not primarily the case for national authorities competent in the field of data protection and digital services. At the same time, there are certain similarities across sectors in terms of duties and powers conferred upon national authorities.[65] For instance, energy regulators and data supervisory authorities are both responsible for resolving disputes, exercising powers of investigation, issuing binding decisions and imposing fines.[66]

Within this framework, the EU legislator has also progressively entrusted these authorities with tasks and powers similar to those of national courts. This attribution has passed almost unchecked.[67] This section aims to rectify this by analysing different pieces of EU secondary legislation and demonstrating that, besides enhancing national competent authorities' independence—aligning it with that of national courts—the EU legislator has also expanded the responsibilities of these authorities, which now encompass quasi-judicial tasks and powers.

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64 There are also some distinctions between sector regulation of regulatory authorities and competition authorities' intervention. The former operates *ex ante* and focuses on a single sector, whereas competition authorities operate *ex post* and horizontally across all economic sectors. A de Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' [2008] Reflets et perspectives de la vie économique 55; and OECD, 'Interactions between competition authorities and sector regulators – Contribution from the European Union' (2022) DAF/COMP/GF/WD(2022)13, 2.

65 S De Somer, 'The powers of national regulatory authorities as agents of EU law' (2017) 18 ERA Forum 581. The author refers to the powers of national regulatory authorities as a combination of normative, adjudicatory and enforcement powers. For a debate on the adjudicatory and policy-making powers, M Maggetti, 'The Role of Independent Regulatory Agencies in Policy-Making: A Comparative Analysis' (2009) 16 Journal of European Public Policy 445; and L Kaschny and S Lavrijssen, 'The independence of national regulatory authorities and the European Union energy transition' (2023) 72 International and Comparative Law Quarterly 715.

66 Respectively, Regulation (EU) 2016/679 (n 25), art58; and Directive (EU) 2019/944 (n 28), art 59.

67 At present, some—albeit scarce—references alluding to the judicial nature of the functions exercised by national competent authorities can be found in literature, where the powers of enforcement, such as issuing binding decisions in order to resolve disputes and imposing penalties, are labelled as quasi-judicial. In that sense, De Somer (n 65), 586; and De Somer (n 1) 123.

Data protection is perhaps one of the most illustrative examples of this tendency. Data supervisory authorities are established to protect and enforce individuals' rights arising from the GDPR, akin to the role of national courts.[68] The GDPR attributes to these entities the responsibility to handle complaints lodged by individuals concerning the protection of their rights and freedoms in regard to the processing of personal data.[69] In that context, these authorities can conduct investigations, and for that purpose, inter alia, order requests of information, obtain access to premises and exercise corrective powers, such as issue warnings and order to comply.[70]

Additional factors contribute to endorsing the quasi-judicial role of data supervisory authorities. The initial proposal for the GDPR recognises that the tasks attributed to enforcement authorities in the context of data protection could lead to a potential overlap of responsibilities with national courts. As a result, it is suggested that national competent authorities should not have jurisdiction over personal data processing when courts are performing their judicial duties.[71] However, the proposal presents this situation as exceptional applying to 'genuine judicial activities in court cases' but not to 'other activities where judges might be involved in'.[72] Moreover, the EU legislator seems to be intentioned to provide the parties involved in cases before a data supervisory authority with equivalent guarantees to those they would have in a conventional court setting. In that sense, the preamble to the GDPR declares that in the exercise of their functions, supervisory authorities are required to apply the same procedural guarantees that normally apply in judicial proceedings before national courts, such as acting impartially, fairly and within a reasonable time, taking appropriate, necessary and proportionate measures, taking into account the circumstances of each individual case and respecting the right of every person to be heard before any individual measure which would affect him or her. In other words, in the exercise of investigatory powers, data supervisory authorities should respect national procedural law requirements. Additional requirements apply to the binding decisions of these authorities, such as being written, clear and unambiguous, indicating the supervisory authority which has issued the measure, the date of issue of the measure, bearing the signature of the head, or a member of the supervisory authority authorised by him or her, giving the reasons for the measure and refering to the right to an effective remedy.[73] Building on this, the Commission's proposal for a Regulation laying

68 Regulation (EU) 2016/679 (n 25), art 51(1).
69 ibid, arts 56 (1) and 77.
70 ibid, art 58 (1) and (2).
71 Proposal General Data Protection Regulation (n 26), para 99.
72 ibid.
73 Regulation (EU) 2016/679 (n 25), recital 129.

down additional rules for the enforcement of the GDPR suggests to enhance the procedural rights of parties under investigation.[74]

Regulation 2022/2065 (Digital Services Act or DSA) is an additional example of EU legislation that empowers enforcement authorities with quasi-judicial tasks. Individuals have the right to lodge a complaint and seek compensation for any damage or loss suffered with a national competent authority.[75] To that end, the DSA attributes to these authorities powers of investigation (requiring information, carrying out inspections and asking for explanations) and enforcement, most importantly, the power to accept a commitment offered by a provider and make this commitment binding, the power to order the cessation of infringements and impose proportionate and necessary remedies, the power to impose interim measures and to impose fines.[76] The DSA includes some procedural rights of the parties, such as the right to be informed, submit observations, participate in the proceeding and that the measures taken are effective, dissuasive and proportionate.[77]

The dispositions of the DSA granting enforcement powers to national competent authorities also empower them to alternatively seek assistance from a judicial authority to enforce their powers. In that sense, Article 51(2)(b) DSA refers to the competent authority's ability to issue orders to cease or 'request a judicial authority in their Member State to do so'.[78]

In the field of telecommunications, national authorities have the power to resolve disputes through binding decisions and issue penalties.[79] Given their independence both from the sector and from any external intervention or political pressure, the legislator explicitly considers these bodies the best-suited actors to resolve disputes, highlighting how this is a task to 'be undertaken only (emphasis added) by national regulatory authorities, namely, bodies which are independent both from the sector and from any external intervention or political pressure.'[80] Furthermore, Article 25 EECD states that Member States may appoint telecommunications authorities as out-of-court dispute resolution entities in order to resolve disputes between providers and consumers arising from that Directive.[81] In that sense, in the Review of the Electronic Communications Regulatory Framework, it is suggested that some minimum tasks, which include dispute resolution between undertakings and between

74 Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU)' 2016/679 COM/2023/348 final.
75 Regulation (EU) 2022/2065 (n 44), arts 53 and 54.
76 ibid, art 51(1) and (2).
77 ibid, art 51(3), (4) and (5).
78 ibid, art 51(2) and (b).
79 Directive (EU) 2018/1972 (n 29), arts 5(1) and (b), 26, and 29.
80 ibid, recital 35.
81 ibid, art 25

undertakings and consumers, should be attributed only to impartially and politically independent national regulatory authorities. Whereas other competent authorities, which are not politically independent, should be required to carry out other tasks.[82]

Quite similarly, in the energy sector, regulatory authorities can act as out-of-court dispute settlement bodies as regards customers' rights and obligations,[83] and as dispute settlement authority in relation to complaints against a transmission or distribution system operator.[84] In their role as dispute settlement bodies, these authorities are empowered to adopt fully reasoned and justified decisions, which can be appealed against to a body independent from the parties involved.[85]

Moreover, in the railway sector, Directive 2012/34 calls for the creation of national regulatory body that is responsible for receiving and deciding on complaints.[86] In that context, it can take actions to remedy the situation, adopt binding decisions (not subject to other control of administrative instance) and enforce its decisions with appropriate penalties.[87] In addition, this authority can conduct investigations on its own initiative.[88]

Regarding competition law, Regulation 1/2003 attributes to competition authorities the responsibility to investigate either on their initiative or based on a complaint. In that context, these authorities can issue decisions to bring the infringement to an end, order interim measures, impose fines, periodic penalty payments or any other penalty provided for in their national law. However, there has been a realisation that the powers granted to these authorities vary significantly across Member States. Directive 2019/1 addresses this issue by harmonising the exercise of specific powers of national competition authorities, such as conducting business premises inspections and requesting information.[89]

Following this analysis, it is possible to argue that national competent authorities are now responsible for deciding on disputes and complaints, and to that end, exercise various investigative and enforcement powers (see Table 2).[90]

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82 Commission, 'Review of the Electronic Communications Regulatory Framework – Executive Summaries'(*Commission,* 2016) <https://digital-strategy.ec.europa.eu/en/library/review-electronic-communications-regulatory-framework-executive-summaries> accessed 6 May 2024.

83 Directive (EU) 2019/944 (n 28), art 26.

84 ibid, art 60(2).

85 ibid, art 60.

86 Directive 2012/34/EU (n 17), art 56.

87 ibid, art 56(1) and (9).

88 ibid, art 57(5).

89 Commission, 'Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market' COM/2017/0142 final – 2017/063 (COD); and Directive (EU) 2019/1 (n 33), ch 4.

90 This list is not exhaustive but is limited to the policy sectors analysed above.

Table 2: Quasi-judicial tasks and powers of national competent authorities.

Quasi-judicial tasks.	Powers.
Tasks of dispute settlements and handling complaints: – Between operators in a market. – Protect and enforce individuals' rights.	For the exercise of these tasks: Powers of investigations: – Request for information. – Inspections. Corrective powers: – Binding decisions (for instance, order the cessation of the infringement). – Impose fines. – Interim measures.

In this view, and keeping in mind the differences that persist among sectors, this article claims that tasks and powers generally performed by national courts are now also carried out by national competent authorities. In conjunction with safeguards of independence similar to those of judicial independence, these features lead to the conclusion that national competent authorities effectively function as quasi-judicial entities. Against this background, however, the EU legislator has chosen not to formally address the issue, with no direct recognition of that status or role in EU secondary legislation. Conversely, the Court of Justice has examined the issue, as the next section will show, but its interpretation complicates rather than simplifies the recognition of that status. The following section will thus analyse the obstacles that still prevent the formal acknowledgment of the quasi-judicial role of national competent authorities. Subsequently, it will explore the problems that the uncertainty surrounding the role of these entities generates and put forward a solution to address them.

3. Impediments to the Recognition of National Competent Authorities' Quasi-Judicial Role: what Role does Effective Judicial Protection play in that regard?

The previous section highlighted an emerging feature of the EU institutional design, which involves granting to Member States' authorities tasked with enforcing EU law in various policy areas a level of independence and responsibilities akin to those of national courts. Despite these developments, obstacles persist to the recognition of a quasi-judicial role of these entities. That is due mainly to the EU legislator not directly recognising that role within the text of EU secondary legislation or in other sources of EU law. In addition, the Court of Justice emphasises the administrative nature of the functions carried out by these entities. In this context, the role of national

competent authorities in a quasi-judicial capacity remains unclear. This uncertainty comes at the expense of the principle of effective judicial protection, as these authorities cannot provide the same level of procedural guarantees and protection as a judicial body.

The following analysis delves into the obstacles to recognising national competent authorities' quasi-judicial role. Subsequently, it emphasises the risks associated with the present ambiguity. The analysis concludes by suggesting that the recognition of that role is the most effective solution to enable individuals to obtain effective judicial protection vis-à-vis national competent authorities when enforcing and protecting their rights arising from EU law.

3.1. Is it Time for the EU Legislator and the CJEU to catch up with Reality?

The quasi-judicial role of national competent authorities remains contested as the EU legislator and the CJEU jeopardise the full recognition of that role. There might be various justifications for the lack of explicit recognition within EU secondary legislation. One reason is that the Member States have established national competent authorities as part of the government's branch while also maintaining a degree of independence from it. Therefore, these entities are structurally part of Member States' administrations and not of the judicial system.[91] An additional reason for the lack of recognition of the quasi-judicial status of national competent authorities might be constitutional. Being traditionally the result of a delegation of powers from the executive, the attribution of any sort of quasi-judicial tasks to these authorities might result in a breach of the classical separation of powers doctrines.[92] Another objection to recognising Member States' competent authorities as quasi-judicial entities is the EU's lack of competence in that regard. This recognition might be contested as an excessive and unnecessary violation of the institutional autonomy of the Member States. At the same time, in the absence of EU legislation defining the institutional nature of these bodies, in principle, Member States might freely attribute a quasi-judicial status to national competent authorities.

In addition, the Court of Justice has been called to discuss the institutional role of national competent authorities, confirming that an ambiguity exists in that regard. However, in addressing this ambiguity, the Court decides to em-

91 F Gilardi, *Delegation in the Regulatory State* (Edward Elgar Publishing 2008).

92 C Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D Oliver, T Prosser and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010) 18; S Lavrijssen, 'What Role for Administrative Courts in Granting Effective Legal Protection in the Energy Sector?' (2014) 23 European Energy and Environmental Law Review 219, 220.

phasise the administrative role of these entities over their potential quasi-judicial role. In fact, over the past few years, the Court has received an increasing number of requests for preliminary references from administrative bodies, including national competent authorities.[93] When discussing the admissibility of preliminary ruling requests originating from these entities, the position of the Court has been that of excluding national competent authorities from engaging in the judicial dialogue,[94] only exceptionally acknowledging their status of court or tribunal for the purpose of Article 267 TFEU.[95]

Most recently, illustrative of this restrictive approach is the *Cityrail* case—a preliminary ruling request originating from the Czech transport infrastructure access authority, which is the Czech regulatory body for the railway sector established according to Article 55 of Directive 2012/34.[96] In that context, the Court denies the status of court or tribunal in the meaning of Article 267 TFEU of the referring authority. To that end, it explains that reviewing whether a statement on railways complies with the Czech law and the possibility that the Czech regulatory body could pursue, on its own initiative, any irregularity that it discovers during this procedure are administrative functions and not judicial. Second, administrative courts have jurisdiction to hear an action against a decision of the Czech transport infrastructure access authority. In such proceedings, this authority has the status of defendant and so it is not a third party in relation to the authority that adopted the decision.[97]

Through its case law, the Court of Justice has also drawn a line of distinction between administrative and judicial functions of an authority—not belonging to the judiciary—competent for the enforcement of EU law in a specific sector.[98] It acknowledges that the exercise of powers of scrutiny in a sector, to supervise markets,[99] the power to adopt a position for the first time on a complaint against whose decisions there is a judicial remedy, to initiate proceedings, also *ex officio,* and investigate irregularities are administrative functions.[100] Conversely, the power to review the legality of decisions and be a third party in relation to the authority which adopted the decision forming

93 M Broberg and N Fenger, 'The European Court of Justice's Transformation of Its Approach Towards Preliminary References from Member State Administrative Bodies' (2022) 24 Cambridge Yearbook of European Legal Studies 169.

94 Case C-53/03 *Syfait* [2005] ECLI:EU:C:2005:333; Case C-517/09 *RTL Belgium SA* [2010] ECLI:EU:C:2010:821; Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* [2013] ECLI:EU:C:2013:48; and Case C-462/19 *Asociación Nacional de Empresas Estibadoras y Consignatarios de Buques (Anesco) and Others* [2020] ECLI:EU:C:2020:715.

95 Case C-136/11 *Westbahn Management GmbH v ÖBB-Infrastruktur AG* [2012] ECLI:EU:C:2012:740, para 27; and C-246/05 *Armin Häupl v Lidl Stiftung & Co. KG*. [2007] ECLI:EU:C:2007:340, para 16.

96 Case C-453/20 *CityRail a.s. v Správa železnic, státní organizace* [2022] ECLI:EU:2022:341.

97 ibid, paras 67-70.

98 ibid, para 70.

99 ibid, para 45.

100 ibid, para 48.

the subject matter of the proceedings are indications that indicate that the body is performing judicial functions.[101] This division by the Court suggests, in principle, an acceptance of the potential judicial role of national competent authorities. At the same time, the Court's interpretation fails to adequately capture the complex reality of how these authorities function in practice. Indeed, the strict respect for these conditions would ultimately jeopardise any potential acknowledgment of the quasi-judicial role of these authorities and create challenges for these bodies in successfully accessing the preliminary ruling procedure.

This disconnect with the reality of the Court of Justice and the absence of explicit action by the EU legislator carry significant implications. In that sense, this article argues that these elements create an ambiguity that comes at the expense of effective judicial protection.[102] After being recognised as a principle by the CJEU,[103] effective judicial protection has been codified in Article 47 of the EU Charter of Fundamental Rights (CFR) and Article 19 TEU.[104] In this context, Article 47 CFR is recognised as the source of a fundamental right to effective judicial protection, whereas Article 19 TEU is the basis for an EU system of judicial remedies.[105] Nevertheless, the basic nature of effective judicial protection is that of enabling individuals to uphold rights granted to them by EU law through appropriate procedures and remedies.[106]

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101 ibid, para 52.

102 Article 47(1) CFR 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.' In addition, Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:811, paras 31-33.

103 Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECLI:EU:C:1986:206.

104 M Bonelli, 'Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature' (2019) 12 Review of European Administrative Law 35; Case C-64/16 (n 39), para 35.

105 Effective judicial protection has been largely employed by the CJEU. For instance, the Court relies on Article 47 CFR to evaluate whether the procedures and remedies available before national courts correspond to the guarantees laid down by that article. At the same time, the Court makes use of Article 19 TEU. Most recently, following the *Associação Sindical dos Juízes Portugueses'* judgment, the very deep existence of Article 19 TEU has been linked to Article 2 TEU, giving concrete expression to the rule of law. For more details, K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2006) 44 Common Market Law Review 1625; S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen, T Takacs, V Lazić and B Van Rompuy (eds), *Fundamental Rights in International and European Law* (Asser Press 2016); L Pech and S Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' (2018) 55 Common Market Law Review 1827; and M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses' (2018) 14 European Constitutional Law Review 622, 632.

106 Case C-432/05 *Unibet* [2007] ECLI:EU:C:2007:163, para 38; and A Arnull, 'The Principle of Effective Judicial Protection in EU Law: An Unruly Horse?' (2011) 36 European Law Review 51, 51-52.

Within this framework, the exclusive administrative status of national competent authorities has two fundamental implications. First, individuals seeking for a remedy before these entities are not entitled to the same guarantees as before national courts belonging to the judiciary.[107] In fact, Article 47 CFR does not simply guarantee a right to an effective remedy and to a fair trial as the title might suggest, but it is also connected to other rights and guarantees.[108] Additionally, it could be questioned whether there could be effective legal protection when the body protecting and enforcing individuals' rights and interests originating from EU law is in practice excluded from referring preliminary questions to the CJEU.[109] In that sense, national competent authorities possess the technical and specialised knowledge to identify—better than a normal court—the relevant questions within their area of expertise that must be clarified by the Court.[110] Besides, the possibility for judicially structured national competent authorities to refer questions to the Court represents an additional safeguard for the uniformity of EU law.

While there are valid arguments to claim recognition of national competent authorities' quasi-judicial role in light of effective judicial protection, there are also factors pointing towards alternative solutions. In that sense, a broad interpretation of Article 41 CFR, along with the right to good administration that it upholds, could offer individuals an alternative tool to ensure that their procedural rights are upheld by national authorities when implement-

107 K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 German Law Journal 884. In addition, Case T-791/19 *Sped-Pro S.A. v European Commission* [2022] ECLI:EU:T:2022:67, 75. In this case, Poland contests the application of a fundamental right to a fair trial as enshrined in the second paragraph of Article 47 CFR before the Polish competition authority, given the administrative nature of that body.

108 For instance, as part of the right to fair trial, the parties have the right to be heard. Case C-530/12 P – *OHIM v National Lottery Commission* [2014] ECLI:EU:C:2014:186, paras 53-54. Additionally, the Court helds that the parties have a right to examine all documents or observations, Case C-300/11 *ZZ v Secretary of State for the Home Department* [2013] ECLI:EU:C:2013:363, para 55. Moreover, Case C-358/16 *UBS Europe SE and Alain Hondequin and Others v DV and Others* [2017] ECLI:EU:C:2017:606, Opinion of AG Kokott, paras 78-79; and Case C-348/16 *Moussa Sacko v Commissione Territoriale per il riconoscimento della Protezione internazionale di Milano* [2017] ECLI:EU:C:2017:591, para 32.

109 A specific body of literature foresees a connection between the right to effective judicial protection and preliminary references. Building on Lacchi's argument that Member States have an obligation originating in the principle of effective judicial protection to not obstruct the right of courts to submit preliminary rulings to the Court of Justice, Gentile sustains that national authorities should have a role of facilitator in the dialogue between the EU and national courts through the procedure of Article 267 TFEU. For more details, C Lacchi, 'Multilevel Judicial Protection in the EU and Preliminary References' (2016) 53 Common Market Law Review 679, 686; and G Gentile, 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law' (2022) 2 European Law Open 128.

110 In that sense, Case C-53/03 *Syfait* [2004] ECLI:EU:C:2004:673, Opinion of AG Jacobs, para 45. AG Jacobs argues that 'a specialised competition authority having judicial characteristics might be better placed to identify the relevant issues of Community competition law than a generalist court charged with reviewing the decisions of the former body'.

ing EU law.[111] Additionally, one might object that the procedural guarantees of Article 47 CFR could potentially be equally safeguarded by the judicial body handling appeals of the decisions of national competent authorities. These contrasting views lead to the question of why the EU legislator and the CJEU should recognise the quasi-judicial role of national competent authorities and why this recognition arises from effective judicial protection.

To answer these questions, specific considerations highlight the importance of recognising the quasi-judicial role of national competent authorities over alternative options. This particular solution would facilitate access of national competent authorities to preliminary ruling procedures. Additionally, while judicial bodies handling appeals of decisions of national competent authorities may provide procedural safeguards, the organisation of judicial remedies against these decisions is often left to the Member States, resulting in inconsistencies.[112] In these circumstances, there are no guarantees that national procedures, as defined by each Member State, ensure that appeal courts or tribunals offer the necessary procedural safeguards of effective judicial protection.[113]

Under these circumstances, this article calls on the CJEU to reconsider its restrictive interpretation of the nature of national competent authorities' functions and urges the EU legislator to recognise the quasi-judicial role of these entities within EU secondary legislation. These claims are rooted in the fundamental right to effective judicial protection linked with Article 19(1)(2) TEU, which could serve as basis for prompting institutional developments in

111 Generally, the scope of Article 41 CFR is limited to EU institutions, bodies, and agencies, excluding Member States. In that sense, L Tobias, 'Article 41 CFR Right to good administration' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford Academic 2019), 3; and Prechal (n 105) 149-150. At the same time, a body of literature argues for a broader application of good administration. For instance, H Hofmann and C Mihaescu. 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 European Constitutional Law Review 73; MV Kristjánsdóttir, 'Good Administration as a Fundamental Right' (2013) 9 Icelandic Review of Politics and Administration 237; and De Somer (n 65), 588-589.

112 P Larouche and X Taton, 'Enforcement and Judicial Review of Decisions of National Regulatory Authorities' (2011) <https://ssrn.com/abstract=2063747> accessed 6 May 2024; and M Szydło, 'Judicial review of decisions made by national regulatory authorities: Towards a more coherent application of EU sector-specific regulation' (2014) 12 International Journal of Constitutional Law 930.

113 Lavrijssen (n 92). The author highlights how the administrative court for energy cases in the Netherlands (the Trade and Industry Appeals Tribunal) does not fully respect the requirements for effective legal protection. Moreover, Case T-791/19 *Sped-Pro S.A. v European Commission* [2022] ECLI:EU:T:2022:67, paras 67 and 91.

the system of EU remedies.[114] The recognition of national competent authorities' quasi-judicial role is an essential condition for establishing a comprehensive and consistent system for judicial protection within the EU, ensuring that individuals have the possibility to seek legal remedies without facing unfair discriminations in the enforcement of their rights among the remedies at their disposal.

4. Conclusions

This article uncovers the quasi-judicial role of national competent authorities. It shows how EU legislation in different policy sectors designs the Member States' authorities competent for the implementation of EU law at the national level with structural and functional features commonly belonging to national courts. In more detail, this article draws a parallel between the independence imposed on national competent authorities and judicial independence. Additionally, it demonstrates that national competent authorities perform tasks and powers akin to those of national courts. At the same time, there are still some obstacles that persist to the recognition of a quasi-judicial status of national competent authorities. In that sense, this article highlights the lack of direct recognition of that status within EU secondary legislation and the Court of Justice's restrictive interpretation of the condition to 'exercise judicial functions' within the framework of the preliminary ruling procedure. As a result, this contribution emphasises the ambiguity surrounding the recognition of the quasi-judicial role of national competent authorities. This ambiguity is, however, problematic in terms of judicial protection of individuals' rights originating from EU law. Therefore, to conclude, this article argues that this ambiguity can be solved by recognising the quasi-judicial role of national competent authorities in light of the principle of effective judicial protection.

114 K Lenaert, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3; K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 German Law Journal 884, 897; and S Prechal, 'Article 19 TEU and national courts: A new role for the principle of effective judicial protection?' (*REALaw Blog*, 22 November 2022) <https://wp.me/pcQ0x2-wL> accessed 6 May 2024.

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

ARTICLE

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.

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.

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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]

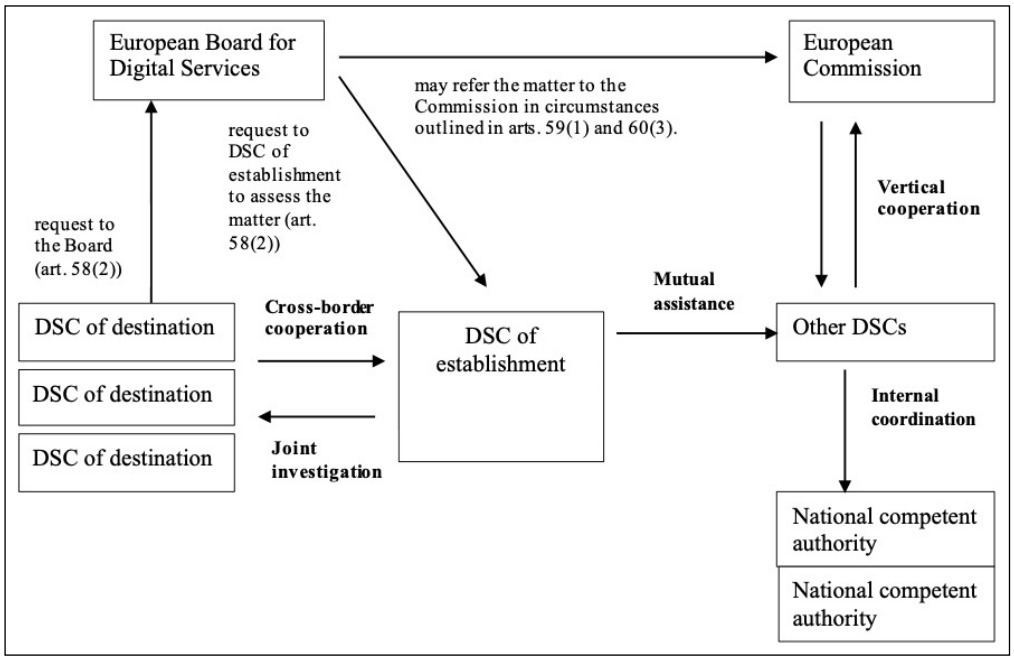

Figure 1 Overview of the DSA cooperation mechanisms.

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

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.

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.

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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.

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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MEMBER STATES' DISCRETION IN EMERGENCY PESTICIDE AUTHORISATIONS: THE ROLE OF THE EU PRINCIPLES OF GOOD ADMINISTRATION AND THE PRECAUTIONARY PRINCIPLE IN SHAPING BETTER NATIONAL ADMINISTRATIVE PRACTICES

PIETRO MATTIOLI*

The misuse of emergency pesticide authorisations under Article 53 of Regulation 1107/2009 by EU Member States systematically undermines the Regulation's core objective of prioritising health and environmental protection over improving plant production. The Member State authorities competent to decide on these authorisations lack independence and transparency safeguards and thereby frequently succumb to industry pressure, authorising pesticides without rigorous scientific scrutiny. With the intent to analyse how Article 53 can be realigned with the objective of Regulation 1107/2009, this article proposes leveraging the principles of good administration and the precautionary principle. To that end, it examines how the Court of Justice has interpreted and applied good administration principles to impose obligations of impartiality and transparency on Member States' authorities when acting within the scope of EU law. Additionally, it examines how the Court has resorted to the precautionary principle to guide the discretion of national competent authorities towards higher health and environmental standards in the context of pesticide authorisation procedures. However, recognising the uneven application of these principles across national administrative systems, this article ultimately argues that the EU should translate these principles into specific measures.

1 INTRODUCTION

In the *Pesticide Action Network Europe and Others* (*PAN Europe*) case, the Court of Justice of the European Union (CJEU) was asked whether Article 53 of Regulation 1107/2009 (the Plant Protection Products Regulation or PPPR) allows the controversial practice of granting emergency authorisations for plant protection products, commonly referred to as pesticides, containing active substances that are expressly prohibited under EU law.[1] The Court concluded that this practice is incompatible with the objectives of the Regulation, emphasising that even emergency authorisations under Article 53 should be consistent with the precautionary principle and the Regulation's objective of giving priority to the protection of health and the environment over the improvement of plant production.[2]

One of the merits of this judgment is that it draws attention to Article 53 of Regulation 1107/2009. Originally conceived as a mechanism to allow Member States to place

* PhD researcher at the Department of European law of the University of Liège, Belgium. The article relies on research being conducted in the framework of the ERC Starting Grant EUDAIMONIA. This project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement n° 948473).

[1] Case C-162/21 *Pesticide Action Network Europe and Others* EU:C:2023:30.

[2] ibid paras 47-48.

plant protection products on the market for limited and controlled use in emergency situations, by way of derogation from the ordinary approval procedure, Article 53 has gradually become a routine unlawful procedure.[3] This provision has been used to repeatedly authorise the same products year after year, or to introduce products containing active substances that are still not approved or banned at the EU level.[4] In other words, emergency authorisations have evolved into a mechanism for bypassing standard EU regulatory procedures and placing pesticides on the market without the crucial safeguards that ordinary procedures provide. Nevertheless, the European Commission and the Member States have maintained an ambiguous stance toward reforming Article 53's implementation.[5] This paralysis stems from various factors, especially political and economic constraints. Notably, under the current system, agricultural lobbies can easily influence emergency authorisation procedures. Therefore, they have exerted pressure to maintain the current flexibility of the derogation regime.[6]

Against this backdrop, this article argues that the EU legal framework provides the necessary tools to reconcile Article 53 with the overarching objectives of Regulation 1107/2009. To this end, it illustrates that, according to the EU principles of good administration and the precautionary principle, as interpreted by the CJEU, national competent authorities are required to implement essential procedural safeguards and ensure that pesticide authorisations are consistent with the public interest in protecting health and the environment. At the same time, considering the limits of a consistent and effective application of these principles across the administrative systems of the Member States, this article suggests proceduralising these principles within EU law.

To develop this argument, section 2 begins with an overview of the procedures for placing pesticides on the market under Regulation 1107/2009. Subsequently, section 3 examines the factors that have allowed for the use of Article 53 emergency authorisations in ways that conflict with both the provision's intended scope and the objective of Regulation 1107/2009. Specifically, this section illustrates that the Member States' authorities responsible for deciding on these authorisations lack the safeguards of independence and

[3] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1, recital 2 and Art 53. The list of emergency authorisations can be accessed at the following link: <https://ec.europa.eu/food/plant/pesticides/eu-pesticides-database/ppp/screen/home> accessed 30 October 2024.

[4] European Parliamentary Research Service (EPRS), 'Regulation (EC) 1107/2009 on the Placing of Plant Protection Products on the Market: European Implementation Assessment' (European Parliament 2018) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2018)615668> accessed 30 October 2024, Annex I-9.

[5] In response to a question from a Member of the European Parliament, the Commission has stated that it is following up with Member States regarding authorisations granted after the Court's ruling. Additionally, the Commission has reminded Member States that authorisations granted before the ruling should be withdrawn in accordance with their national legal procedures. European Parliament, 'Derogations for the use of pesticides that were banned for health and environmental reasons' (Question for written answer E-003023/2023, 12 October 2023) <https://www.europarl.europa.eu/doceo/document/E-9-2023-003023_EN.html#def2> accessed 30 October 2024. However, following the Court's ruling, the Commission has not yet adopted a formal position. European Commission, 'Summary report of the Informal Technical Meeting on emergency authorisations after the Judgment of 19 January 2023 in case C -162/21 (Pesticide Action Network Europe and Others vs. Belgium)' (13 February 2023).

[6] Banned pesticides still in use in the EU, 'Report: Banned pesticides still in use in the EU' (*Pesticide Action Network*, 2023) <https://www.pan-europe.info/resources/reports/2023/01/banned-pesticides-still-use-eu> accessed 12 February 2025.

transparency necessary to check and balance the pesticide industry's control over emergency procedures. To address these deficiencies, section 4 examines how the EU principles of good administration can create positive obligations for Member States' authorities when enforcing EU law, especially in terms of impartiality and transparency. This section also analyses how the precautionary principle has been successfully applied by the Court of Justice to increase health and environmental standards in the context of pesticide authorisation procedures. Against this background, section 5 concludes by highlighting that while these EU legal principles can recalibrate national administrative practices in pesticide authorisations, possible deficiencies in their implementation across Member States' administrative systems risk undermining the effectiveness of this approach. Therefore, the last section suggests operationalising the measures required by these principles within EU law.

2 PLACING PESTICIDES ON THE MARKET: FROM NORMAL TO EMERGENCY SITUATIONS

Pesticides are important for agriculture to protect plants and their products from harmful organisms and are therefore an essential component of food and agricultural production systems.[7] At the same time, their use creates some externalities. While the use of pesticides increases agricultural productivity, pesticides also pose significant risks to human and animal health, the environment and ecosystems.[8] For these reasons, it is crucial to establish a regulatory framework that balances these competing interests in the use of pesticides.

Considering these elements, the EU has established a legislative framework to regulate the use of pesticides.[9] At a time when EU lawmaking was influenced by the 'Better Regulation' initiative, which aimed to simplify legislation and administration,[10] the EU developed its pesticide regulatory framework guided by the precautionary principle.[11] Based on the Sixth Community Environment Action Programme, this framework aims to increase

[7] European Commission, 'Report from the Commission to the European Parliament and the Council. Evaluation of Regulation (EC) No 1107/2009 on the placing of plant protection products on the market and of Regulation (EC) No 396/2005 on maximum residue levels of pesticides' [2020] COM/2020/208 final; and European Commission, 'Commission staff working document: Drivers of food security' SWD (2023) 4 final, 67.

[8] European Environmental Agency (EEA), 'How pesticides impact human health and ecosystems in Europe' (2023) <https://www.eea.europa.eu/publications/how-pesticides-impact-human-health> accessed 30 October 2024; Luca Carisio, Noa Simon Delso, and Simone Tosi, 'Beyond the urgency: pesticide Emergency Authorisations' exposure, toxicity, and risk for humans, bees, and the environment' (2024) 947 Science of the Total Environment 174217; and Commission, 'Drivers of food security' (n 7) 67.

[9] The current EU legislative framework on pesticides consists of four key legislations: Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC [2005] OJ L70/1; Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides [2009] OJ L309/71; Regulation 1107/2009 (n 3) governing the placing of plant protection products on the market (PPPR); and Regulation (EC) No 1185/2009 of the European Parliament and of the Council of 25 November 2009 concerning statistics on pesticides [2009] OJ L324/1. In literature, Emanuela Bozzini, *Pesticide Policy and Politics in the European Union: Regulatory Assessment, Implementation and Enforcement* (Palgrave Macmillan 2017) 5-8.

[10] Interinstitutional agreement on better law-making [2003] OJ C321/1; and European Commission, 'Communication from the Commission to the Council and the European Parliament: Better Regulation for Growth and Jobs in the European Union' COM (2005) 0097 final.

[11] David Vogel, *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States* (Princeton University Press, 2012) 274-275.

the level of protection of human and animal health and the environment, while enhancing the competitiveness of the EU internal market and ensuring food safety.[12] In this context, Regulation 1107/2009 lays down the main rules for the placing of plant protection products on the market, including rules for the approval of active substances (components that control harmful organisms), safeners (substances that reduce the effects of active substances) and synergists (substances that enhance the activity of the active substance) which plant protection products contain or consist of.[13]

Under normal circumstances, for plant protection products' market placement, Regulation 1107/2009 establishes a dual authorisation procedure: to be finally authorised at the Member State level, a product must contain active substances that have previously been approved at the EU level.

This ordinary procedure starts with the submission of a dossier by an applicant seeking approval for an active substance to the national competent authority of the designated Rapporteur Member State (RMS).[14] This dossier must contain extensive documentation demonstrating the safety of the substance for humans, animals and the environment. In particular, Regulation 1107/2009 imposes on the producer of these substances the responsibility to prove that these substances do not cause any hazard.[15] As an interim note, it is relevant to highlight that Regulation 1107/2009 applies a hazard-based approach to the authorisation of active substances.[16] This means that, when a substance meets one of the cut-off criteria set out in Article 4 of that Regulation, the evaluation stops at the hazard identification stage and the assessment does not proceed to the further steps of the risk assessment, which typically include exposure assessment and risk characterisation.[17]

Once the dossier has been submitted, the approval process for the active substance continues with the authority of the RMS assessing the admissibility of the application. This evaluation starts with a completeness check of the dossier, followed by a preliminary assessment.[18] The authority then prepares a draft assessment report (DAR), which is submitted to both the Commission and the European Food Safety Authority (EFSA).[19] At this stage, EFSA carries out the risk assessment of the active substance, in collaboration with the RMS. At the end of this evaluation phase, EFSA forwards its conclusions to the Commission, which acts as a risk manager.[20] The Commission prepares a review report, including a draft Regulation for either approval or non-approval of the substance. This draft is discussed in the Standing Committee on Plants, Animals, Food and Feed (PAFF

[12] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [2002] OJ L242/1, Art 7.
[13] Regulation 1107/2009 (n 3) Arts 1(1) and 1(2).
[14] ibid Art 7.
[15] ibid Art 8(1).
[16] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex II-22. The authors emphasise that strong public sentiments against pesticides, especially the fact that they are man-made hazards with severe health implications, have led to the adoption of strict standards based on a strong interpretation of the precautionary principle. This approach is different from the one typically employed in other food-related policy areas.
[17] Hazard identification represents the first phase of the scientific risk analysis process. Case T-13/99 *Pfizer Animal Health SA v Council of the European Union* EU:T:2002:209 para 156; and Ragnar E Lofstedt, 'Risk versus Hazard – How to Regulate in the 21st Century' (2011) 2 European Journal of Risk Regulation 149, 153-154.
[18] Regulation 1107/2009 (n 3) Art 9.
[19] ibid Art 11.
[20] ibid Art 12.

Committee). If the Committee gives a favourable opinion, the Commission can then proceed to formally adopt the Regulation listing the approved substance.[21]

The list of approved substances contained in the Commission's Regulation allows pesticide manufacturers or other applicants to register plant protection products containing the approved essential substances for their placement on the market. This second phase takes place mainly at Member State level and is carried out by national competent authorities.[22] Generally, an applicant seeking to place a pesticide on the market must apply for authorisation in each Member State where the pesticide is intended to be placed.[23] The dossier must contain all the data required by the Implementing Regulation 284/2013.[24] The respective national competent authorities then evaluate the dossier. At the same time, companies wishing to place their product on the markets of multiple EU countries can apply for national authorisation in one Member State and then apply for mutual recognition in other Member States. Applications for mutual recognition can be made either in parallel or in sequence.[25] To facilitate mutual recognition and to avoid duplication of work and reduce administrative burden, Regulation 1107/2009 establishes three geographical zones (North, Centre and South) based on comparable agricultural, plant health and environmental conditions.[26] In this context, each Member State can still establish its own procedures for product authorisation while respecting the essential conditions and criteria set in the Regulation.[27]

By way of derogation from this two-stage ordinary procedure, Article 53 of Regulation 1107/2009 also allows plant protection products to be placed on the market under significantly less stringent conditions and safeguards than those prescribed above. Designed as a rapid, temporary, and last resort procedure for emergency situations, Article 53 essentially allows national competent authorities to authorise products for up to 120 days when there is a risk that cannot be contained by other reasonable means. If approved, the use of the product must remain limited and controlled.[28] The national authority must also immediately inform the other Member States and the Commission, providing detailed information on the measures taken and the considerations relating to consumer safety.[29] At this stage, the Commission may request an opinion, or scientific or technical assistance from EFSA, which must respond within one month. On the basis of this opinion, the Commission may decide whether the Member State may extend, withdraw or amend the measure.[30]

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[21] Regulation 1107/2009 (n 3) Art 13.
[22] A list of the Member States' competent authorities is available at the following link: <https://food.ec.europa.eu/plants/pesticides/approval-active-substances-safeners-and-synergists_en> accessed 30 October 2024.
[23] Regulation 1107/2009 (n 3) Art 33(1).
[24] Commission Regulation (EU) No 284/2013 of 1 March 2013 setting out the data requirements for plant protection products, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market [2013] OJ L93/85.
[25] Regulation 1107/2009 (n 3) Arts 40(1) and 40(2).
[26] ibid Annex I.
[27] ibid Arts 29, 36 and 37.
[28] ibid Art 53(1).
[29] ibid Art 53(2).
[30] ibid Art 53(3)

While Regulation 1107/2009 establishes separate procedures for normal and emergency circumstances for pesticide authorisation, the practical implementation of this Regulation suggests that this distinction has become increasingly blurred. The next Section illustrates how Article 53 has become almost a routine procedure, often used in breach of the conditions set out in the provision.

3 HOW THE EXCEPTION HAS BECOME ROUTINE

Regulation 1107/2009 fully harmonises the approval of active substances while leaving the Member States the responsibility to authorise plant protection products according to national conditions, in light of harmonised criteria.[31] In this context, Member States can also exercise their autonomy by resorting to emergency authorisations under Article 53 in response to specific national circumstances such as environmental threats to plant production and ecosystems that cannot be mitigated by other reasonable means. However, contrary to both the explicit wording of the provision and the underlying objectives of Regulation 1107/2009, evidence suggests that Article 53 has become a routine practice, extending beyond its intended application to emergency circumstances.[32]

A major concern is the prevalence of repeated authorisations of the same product through emergency authorisation requests rather than through ordinary procedures.[33] Many derogations are renewed year after year, transforming *de facto* what should be a short-term emergency measure into a long-term solution.[34] Yet, many approvals concern products containing EU-approved active substances.[35] However, contrary to the spirit of Article 53, emergency authorisation requests do not relate to special circumstances, do not mention alternative products that may be used to contain the danger[36] and do not contain specific risk mitigation measures that would limit and control the use.[37] Furthermore, in clear contrast with the Commission's guidance document on Article 53, these authorisations are not replaced by either minor use extensions under Article 51 or standard authorisations.[38] Lastly, resorting to Article 53, pesticide manufacturers have unlawfully placed pesticides containing substances prohibited at EU level on the market.[39]

These misapplications of Article 53 are due to a complex interplay of economic, political and regulatory factors. In the current pesticide-dependent agricultural production system, national emergency authorisation procedures have become a reliable alternative to

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[31] Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market [2006] COM/2006/0388 final, points 331-332.
[32] A detailed analysis of Article 53 can be found in study conducted by Milieu Ltd and IEEP in Annex I to EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4).
[33] ibid Annex I-36 and 37.
[34] ibid 56, 57 and Annex I-9.
[35] ibid Annex I-28 and 29.
[36] ibid Annex I-33. One can read that 'less than one-third of derogations granted in 2017 (27%) referred explicitly to special circumstances in the text of the notification form. Around 18% of the derogations referred specifically to the control of a new or growing pest'.
[37] ibid Annex I-34.
[38] European Commission, 'Guidance on Emergency Authorisations According to Article 53 of Regulation (EC) No 1107/2009' (SANCO/10087/2013 rev 1, 2021) 6.
[39] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) 59; and European Parliament, 'European Parliament resolution of 16 January 2019 on the Union's authorisation procedure for pesticides' (2018/2153(INI)).

time-consuming and cumbersome ordinary pesticide authorisation procedures.[40] Moreover, the inadequate or ineffective EU oversight of national practices likely contributes to the misuse of emergency procedures beyond the scope of Article 53. While the Commission has the possibility under Article 53(2) and (3) of Regulation 1107/2009 to request an opinion from EFSA and to decide on the extension, amendment, or withdrawal of emergency authorisations, this supervisory capacity has so far been little used.

Parallel to these considerations, this section specifically illustrates that the misapplications of Article 53 are the result of two key factors: firstly, the absence of independence requirements for national competent authorities within Regulation 1107/2009; and secondly, the lack of transparent procedures.

These two factors are largely linked to the complex trade-off between the Member States' autonomy and the necessity to achieve the EU policy objectives in the system of decentralised administrative enforcement of EU law. On the one hand, the principle of institutional autonomy gives the Member States the flexibility to fulfil their EU membership obligations in accordance with their individual constitutional and administrative frameworks.[41] As a result, when implementing EU law, each Member State determines which national bodies are competent to enforce EU law and which procedures apply to the enforcement of that law at the national level.[42] This approach is deliberately designed to accommodate the domestic organisational and administrative structures of each individual Member State.[43] On the other hand, this autonomy might represent an obstacle for the EU to reach its policy objectives, as Member States might establish enforcement structures that do not necessarily allow for an effective implementation of EU policies.[44] In response, the EU legislator may lay down structural and procedural arrangements related to the decentralised enforcement of EU legislation by Member States' administrations.[45] As an intermediate note, it should be recalled that although these interventions are currently

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[40] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex I-36 and 37. The authors highlight that 'the large number of derogations for PPPs undergoing an authorisation procedure, together with a large number of repeated derogations, suggests that Article 53 derogations are also used to fix structural problems occurring in authorisation procedures'.

[40] ibid 56 and 57.

[41] The precise content and scope of institutional autonomy under EU law remain unclear. However, references to institutional autonomy can be found in the Court of Justice's case law. For instance, most recently, Case C-796/19 *European Commission v Republic of Austria* EU:C:2020:920 paras 60-61; and Case C-378/19 *Prezident Slovenskej republiky* EU:C:2020:462 para 38. Furthermore, literature also refers to institutional autonomy, often together with the more well-developed concept of procedural autonomy. Annetje Ottow, 'The different levels of protection of national supervisors' independence in the European landscape' in Suzanne Comtois and Kars de Graaf (eds), *On judicial and quasi-judicial Independence* (Eleven International Publishing, 2013) 139; and Andrea Biondi and Giulia Gentile, 'National Procedural Autonomy' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019).

[42] On the difference between implementation and enforcement of EU law, see Jan Jans, Roel de Lange, Sacha Prechal, and Rob Widdershoven, *Europeanisation of Public Law* (1st edn, Europa Law Publishing 2007) 13.

[43] Dionyssis G Dimitrakopoulos, 'The Transposition of EU Law: 'PostDecisional Politics' and Institutional Autonomy' (2001) 7 European Law Journal 442, 444.

[44] Robert Schütze, *European Constitutional Law* (2nd edn, Cambridge University Press 2016) 334.

[45] Stefan Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market, Collected Courses of the Academy of European Law* (Oxford University Press 2002) 169-170; and 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.

widespread in many policy areas, they remain an interference with the autonomy of the Member States and therefore, are allowed under certain conditions. More specifically, once it has been established that the EU has the competence to act under the principle of conferral,[46] the exercise of that competence is governed by the principles of subsidiarity and proportionality.[47] Despite their questionable effectiveness in limiting EU regulatory intervention,[48] both principles are meant to act as safeguards to protect the autonomy of the Member States against overly expansive and intrusive EU regulatory initiatives.[49]

Considering this framework, it can be noticed that the enforcement of Regulation 1107/2009 is also delegated to national competent authorities; yet this Regulation imposes only minimal structural requirements on these authorities compared to other sectors.[50] Article 75 of that Regulation concerning competent authorities prescribes the appointment of a sufficient number of suitably qualified and experienced staff,[51] but it does not impose any formal condition to ensure the independence of these authorities.[52] In terms of independence, Article 36(1) regarding the examination of applications in the context of the ordinary authorisation procedure simply declares that Member States must carry out 'an independent, objective and transparent assessment in the light of current scientific and technical knowledge'.[53]

The omission of detailed independence requirements for national competent authorities when acting within the scope of Regulation 1107/2009 not only deviates from other EU sectoral regulatory interventions but also highlights inconsistencies across different levels of governance within the same policy domain. National administrative bodies entrusted with the enforcement of EU law have historically been granted varying degrees of independence across different sectors as an essential condition for fostering their specialised expertise, protecting their decision-making processes from short-term political and market

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[46] Article 5(2) TEU.

[47] Article 5(3) and (4) TEU. In literature, 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> accessed 7 November 2024, 3-5.

[48] Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12(2) Review of European Administrative Law 5, 13-14. Specifically, on the limited judicial application of subsidiarity compared to proportionality, Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism?' (2009) 68(3) The Cambridge Law Journal 525, 532-534; Paul Craig, 'Subsidiarity, a Political and Legal Analysis' (2012) 50(1) Journal of Common Market Studies 72, 75-77; Xavier Groussot and 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

[49] In more detail, Koen Lenaerts and José A Gutiérrez-Fons, 'A Constitutional Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018) 115-117.

[50] For an overview on the evolution of EU law's interference on Member State authorities competent to enforce EU law, Stéphanie De Somer, 'EU impulse' in Stéphanie De Somer (ed), *Autonomous Public Bodies and the Law* (Edward Elgar, 2017) 23; 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(2) Review of European Administrative Law 99.

[51] Regulation 1107/2009 (n 3) Art. 75(3).

[52] ibid Art 75. In more detail on the independence of national competent authorities, EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex III-81-85.

[53] Regulation 1107/2009 (n 3) Art 36(1).

pressures and enhancing the overall quality and impartiality of their decisions.[54] In this regard, the growing scope of EU integration has usually led to the gradual embedding of stricter degrees of independence for national administrative entities within the EU legislative framework.[55]

At the same time, the omission of independence safeguards in the context of Regulation 1107/2009 highlights an inconsistency between the limited independence of national authorities competent to authorise pesticides and the heightened independence scrutiny applied in the context of EFSA. In particular, this claim is illustrated by the recent debate regarding the independence and conflicts of interest of the members of 'Article 36 organisations',[56] which are specific organisations designated by Member States to assist EFSA in carrying out scientific tasks.[57] Considering that these organisations perform activities that typically fall within EFSA's competence but are executed at the national level, concerns were raised about whether these organisations operate with the same level of independence as EFSA's members when performing the same tasks. For instance, criticism has been directed at EFSA for the insufficient screening of potential conflicts of interest within these organisations, as well as the lack of clarity and consistency in the criteria used by Member States to designate them.[58] In response to these concerns, the EFSA 2024 Independence Policy recently extended the same transparency and independence requirements to individuals from Article 36 organisations as those applicable to EFSA's own scientific Working Groups when performing equivalent tasks.[59]

Another factor significantly contributing to the misuse of emergency authorisations is the limited transparency of the Member States' emergency authorisation procedures. Far from being an issue restricted to Article 53's procedures, concerns over the transparency of decision-making processes can be considered a common problem underpinning EU risk regulation.[60]

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[54] Mark Thatcher, 'Regulation after delegation: independent regulatory agencies in Europe' (2002) 9(6) Journal of European Public Policy 954; Matthew Flinders and Jim Buller, 'Depoliticization, Democracy and Arena Shifting' in Tom Christensen and Per Laegreid (eds), *Autonomy and Regulation: Coping with Agencies in the Modern State* (Elgar Publishing 2006) 58-59; and Christel Koop and Chris Hanretty, 'Political Independence, Accountability, and the Quality of Regulatory Decision-Making' (2018) 51(1) Comparative Political Studies 38.

[55] In relation to national competent authorities' independence, literature distinguishes different forms of independence. On the difference between formal and de facto independence: Martino Maggetti, 'De facto independence after delegation: A fuzzy-set analysis' (2007) 1(4) Regulation & Governance 271, 271-272; and Fabrizio Gilardi and Martino Maggetti, 'The independence of regulatory authorities' in David Levi-Faur (ed), *Handbook of Regulation* (Edward Elgar 2010) 202-204. On the difference between independence from market parties, political independence and complete independence: Ottow (n 41) 140-142.

[56] The term 'Article 36 organisations' originates from Article 36 of Regulation 178/2002, which is entitled 'Networking of organisations operating in the fields within the Authority's mission'. More information is available at <https://www.efsa.europa.eu/en/partnersnetworks/scorg> accessed 10 February 2025.,

[57] Economisti Associati, 'Review of the Decision of the Executive Director of the European Food Safety Authority on Competing Interest Management – Executive Summary Report' (22 April 2021) 9. The authors of the report highlight how EFSA aims to increasingly rely on Article 36 organisations to act as working groups.

[58] Ellen Vos, Annalisa Volpato, and Guido Bellenghi, 'Independence and transparency policies of the European Food Safety Authority (EFSA)' (2023) PE 740.080, 22-23.

[59] EFSA, 'EFSA's policy on independence' (2024) <https://www.efsa.europa.eu/en/corporate-pubs/efsas-independence-policy#documents> accessed 10 February 2025.

[60] Alie de Boer, Marta Morvillo, and Sabrina Röttger-Wirtz, 'Fragmented Transparency: The Visibility of Agency Science in European Union Risk Regulation' (2023) 14(2) European Journal of Risk Regulation 313, 314.

The recent glyphosate saga has illustrated the public's struggle to access scientific data and information related to EU level active substance authorisations.[61] In that context, in response to mounting public pressure, the EU has taken specific measures to enhance transparency in food chain risk assessment through the adoption of Regulation 2019/1381.[62] However, while this Regulation introduces more rigorous disclosure requirements and public engagement mechanisms at the EU level, these heightened transparency standards do not affect Member States when they implement EU law.[63] Again, this gap involuntarily creates a two-tiered system of accountability, where EU level procedures face increased scrutiny, whereas national authorities retain considerable discretion in their decision-making processes.

Nevertheless, Article 53's procedural design choices might appear in line with the inherently urgent and nationally specific nature of emergency authorisations, which resist the establishment of detailed harmonised procedures. At the same time, Member States' emergency pesticide authorisation procedures exhibit transparency deficiencies that cannot be ignored. Decisions often lack clear and comprehensive justification and public access to relevant technical information remains limited. More precisely, national emergency authorisations are normally published, but applications, their evaluations, and the scientific risk assessments contained therein are not always publicly available.[64] When interested parties gain access to these decisions, they nevertheless find that the information provided is not sufficiently detailed. The documentation submitted and the reasons provided by the authorities, such as evidence of exceptional circumstances and lack of alternatives to mitigate risk, as well as the scientific data underlying the risk assessment, are poorly justified or non-existent.[65] Furthermore, there is insufficient openness in the decision-making process, coupled with inadequate stakeholder participation. This is particularly evident in the absence of robust third-party consultation procedures.[66]

The limited transparency of national emergency procedures, coupled with the lack of independence of national authorities, contributes to the creation of an institutional environment that is vulnerable to two important issues. Firstly, these elements foster conditions that allow undue industry influence over the decision-making processes of national authorities.[67] The affected ability of national competent authorities to correctly

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[61] Marta Morvillo, 'The General Court Orders Disclosure of Glyphosate-related Scientific Studies: Tweedale, Hautala, and the Concept of Environmental Information in the Context of Plant Protection Products' (2019) 10(2) European Journal of Risk Regulation 419, 425-426.

[62] Regulation (EU) 2019/1381 of the European Parliament and of the Council of 20 June 2019 on the transparency and sustainability of the EU risk assessment in the food chain [2019] OJ L231/1.

[63] Regarding the potential implications of Regulation (EU) 2019/1381, see Claire Robinson et al, 'Achieving a High Level of Protection from Pesticides in Europe: Problems with the Current Risk Assessment Procedure and Solutions' (2020) 11(3) European Journal of Risk Regulation 450; and de Boer, Morvillo, and Röttger-Wirtz (n 60) 323.

[64] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex I-53. The research conducted shows that 'none of the selected Member States publish the applications and related evaluations (e.g. assessment of alternatives and justifications) or any other documents. The representative of one CA stated that they provided such information on request (e.g. the application, evaluation), except where it relates to confidential information on the composition of the product'.

[65] ibid Annex I-59.

[66] ibid Annex I-54 and Annex III-23 and 25; and Robinson et al (n 63) 470-472.

[67] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex I-62: 'A large share of the Article 53 authorisations granted in 2017 (38%) were requested by agricultural or forestry companies and associations, 31% were requested by PPP manufacturers or the seed industry, 23% were

balance industry interests with public ones is generally referred to as 'regulatory capture'.[68] This phenomenon is a common concern for national competent authorities operating in the framework of Regulation 1107/2009.[69] For example, when applying for an authorisation to place plant protection products on the market under the ordinary procedure, the applicant submits a dossier containing a range of data and studies on the product. Pesticide manufacturers often possess significant detailed knowledge about the products that they intend to place on the market. Conversely, national authorities often face constraints, such as limited budgets and resources and insufficient technical expertise, making them rely on industry-provided data. Other interested parties, including farmers, typically have the least access to technical information about pesticides. The result of this process is that the industry can easily gain control over pesticide authorisation procedures.[70] In the context of Article 53's procedures, the even more limited access to information intensifies information asymmetries between the industry and national authorities, on the one side, and the public, on the other side. Coupled with a lack of independence, the 'black box' in which these procedures take place allows the industry to submit insufficient scientific data and to influence the authorities' outcomes without adequate public scrutiny.[71]

Secondly, the lack of transparency in decision-making of Member State authorities is also problematic because it undermines the very democratic foundations of public authorities' decisions. Access to information and stakeholders' participation, which are at the foundations of transparency, are meant to ensure public participation in the decision-making, legitimacy of public actions, and accountability of those decisions.[72]

To conclude, this section seeks to reveal that the misapplication of Article 53 stems from a critical gap in the institutional design of national competent authorities when acting within the scope of Regulation 1107/2009. The absence of independence and transparency safeguards exemplifies the ongoing tension between Member State autonomy and the need for EU harmonised administrative arrangements for the domestic enforcement of EU law, which is a key condition for the EU to see its policy objectives fully achieved. As a result, this article asks: what legal tools can the EU leverage to address systemic shortcomings in the implementation of Article 53 of Regulation 1107/2009? The following section addresses this inquiry by looking at the EU principles of good administration and the precautionary principle.

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requested by authorities, and a small number by other types of applicants, such as agricultural and agronomy research institutes and consultants (6%) or producers of animal health products or feed (1%)'.

[68] This article defines regulatory capture as a phenomenon in which national competent authorities responsible for authorising plant protection products are influenced by the pesticide industry's interests. This undue influence compromises the authorities' ability to maintain an appropriate balance between industry interests and the imperative to protect public health and the environment. More generally, Richard A Posner, 'The Concept of Regulatory Capture: A Short, Inglorious History' in Daniel Carpenter and David A Moss (eds), *Preventing Regulatory Capture Special Interest Influence and How to Limit It* (Cambridge University Press 2013) 49-50; and EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex III-18.

[69] EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 4) Annex III-23.

[70] ibid Annex III-18-20.

[71] Bruno Latour, *Science in Action. How to Follow Scientists and Engineers through Society* (Harvard University Press 1988); and Julien Bois, 'Taking the law seriously while acknowledging its social embeddedness: an Actor-Network Theory approach of EU law' (2024) ORBi-University of Liège <https://hdl.handle.net/2268/317536> accessed 30 October 2024.

[72] Case T-716/14 *Antony C. Tweedale v European Food Safety Authority* EU:T:2019:14 paras 54 and 91; Martino Maggetti, 'Legitimacy and accountability of independent regulatory agencies: A critical review' (2010) Living Reviews in Democracy 1, 4; and de Boer, Morvillo, and Röttger-Wirtz (n 60) 317.

4 THE PRINCIPLES OF GOOD ADMINISTRATION AND THE PRECAUTIONARY PRINCIPLE AS TOOLS OF EU ADMINISTRATIVE DESIGN: INSIGHTS FROM THE COURT OF JUSTICE CASE LAW

This section first examines the role of the EU principles of good administration in setting procedural standards, in particular impartiality and transparency, for Member States' administrations when enforcing EU law. Subsequently, it explores how the Court of Justice has leveraged the precautionary principle to impose higher standards of health and environmental protection within pesticide authorisation procedures. Ultimately, this section concludes by showing how the good administration and precautionary principles might together account for a possible solution to address the misapplications of Article 53 of Regulation 1107/2009.

4.1 GOOD ADMINISTRATION

Good administration is primarily recognised as a fundamental right within the EU legal framework.[73] Article 41 of the EU Charter of Fundamental Rights (CFR) establishes the right to good administration, encompassing several subjective individual rights.[74] These include, inter alia, the obligation to give reasons and the right for individuals to have their matters handled impartially, fairly and within a reasonable time. At the same time, this provision highlights certain principles of good administration, which are instead primarily reflected in the case law of the Court of Justice.[75]

Prior to the formal codification of this right, the Court had already invoked various principles of good administration to assess the legality of EU administrative actions. Some procedural rights, such as the right to be heard, to have access to files and the obligation of the administration to give reasons, were already well established before their codification in Article 41 CFR.[76] In this context, it is important to note that the rights under Article 41 CFR are not formally binding on Member State administrations. This provision is explicitly framed

[73] On the notion of good administration, Päivi Leino, 'Efficiency, Citizens and Administrative Culture. The Politics of Good Administration in the EU' (2014) 20(4) European Public Law 681; Hanns Peter Nehl, 'Good Administration as Procedural Right and/or General Principle?' in Herwig C H Hofmann and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2009) 322-323; and Takis Tridimas, 'The general principles of EU law and the Europeanisation of national laws' (2020) 13(2) Review of European Administrative Law 5.

[74] Jürgen Schwarze, 'European administrative law in the light of the Treaty of Lisbon: introductory remarks' (European Parliament, Directorate General for Internal Policies 2011) <https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_NT(2011)432777> accessed 20 October 2024, 15-18.

[75] Herwig CH Hofmann and Bucura C Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9(1) European Constitutional Law Review 73; Herwig C H Hofmann, Gerard C Rowe, and Alexander H Türk, 'General Principles Framing European Union Administrative Law' in Herwig C H Hofmann, Gerard C Rowe, and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 190 et seq.

[76] For an overview of the CJEU's case law on good administration, see HP Nehl, 'Good Administration as Procedural Right and/or General Principle?' (n 73) 323

in terms of EU institutions, bodies, offices and agencies.[77] However, national administrations must apply the principles of good administration when they act within the scope of EU law, including those principles now codified in Article 41 CFR.[78] Moreover, the Court has also declared that the right to good administration itself, as enshrined in Article 41 of the Charter, reflects a general principle of EU law.[79] Therefore, when enforcing EU law, national authorities must now generally respect the rights of individuals under Article 41 CFR.[80]

Against this background, to fully understand how good administration may impact national competent authorities when enforcing EU law, it is essential to delve into the CJEU's case law. The Court has extensively relied on the principles of good administration to establish and reinforce procedural safeguards that would limit the discretionary powers of public authorities, ensuring that these powers conferred on them by EU law are exercised in a manner consistent with public interests and EU law's objectives.[81] In this regard, the case law of the Court has referred to the impartiality, transparency and accountability of national administrative actions.[82] For instance, one can first notice that good administration requires Member State administrations 'to conduct a diligent and impartial examination of all the relevant matters' using the most complete and reliable information possible for that purpose, including scientific knowledge.[83] Furthermore, the principles of good administration also include the obligation to provide adequate reasons.[84] In this regard, the Court often refers to the duty to state reasons to highlight the transparency and accountability of decision-making, and the Court therefore facilitates judicial review of administrative decisions.[85] The duty to

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[77] Tobias Lock, 'Article 41 CFR Right to good administration' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford Academic, 2019) 2205. In this regard, also the Court: 'it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union'. See, Case C-249/13 *Khaled Boudjlida contro Préfet des Pyrénées-Atlantiques* EU:C:2014:2431 para 32 and case law cited.

[78] Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law* (Hart Publishing 1999) 15; and Steve Peers et al, 'Article 41; in *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) 1125, 1126; and Case C-249/13 *Khaled Boudjlida* (n 77) paras 32-34 and case law cited.

[79] For instance, Case C-604/12 *H.N v Minister for Justice, Equality and Law Reform* EU:C:2014:302 para 49.

[80] Joined Cases C-141/12 and C-372/12 *YS v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v M and S* EU:C:2014:2081 para 68. The Court has clarified that the fact that Article 41 CFR represents a general principle of EU law does not imply that individuals can derive directly a national right from it.

[81] Or Brook and Katalin J Cseres, 'Priority Setting as the Blind Spot of Administrative Law Enforcement: A Theoretical, Conceptual, and Empirical Study of Competition Authorities in Europe (2024) 87(5) The Modern Law Review 1209, 1237.

[82] Joana Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', (2009) 9 EUI LAW <https://hdl.handle.net/1814/12101> accessed 30 October 2024, 5.

[83] Case C-446/18 *AGROBET CZ, s.r.o. v Finanční úřad pro Středočeský kraj* EU:C:2020:369 para 44; and Opinion of Advocate General Kokott in Case C-162/21 *Pesticide Action Network Europe and Others* EU:C:2022:650 para 39. On the use of scientific knowledge, Case T-13/99 *Pfizer Animal Health SA* (n 17) para 172. The Court states that 'It follows that a scientific risk assessment carried out as thoroughly as possible on the basis of scientific advice founded on the principles of excellence, transparency and independence is an important procedural guarantee whose purpose is to ensure the scientific objectivity of the measures adopted and preclude any arbitrary measures'.

[84] Hofmann and Mihaescu (n 75) 84; Ingrid Opdebeek and Stéphanie de Somer, 'The Duty to Give Reasons in the European Legal Area: a Mechanism for Transparent and Accountable Administrative Decision-Making? A Comparison of Belgian, Dutch, French and EU Administrative Law' (2016) 2 Rocznik Administracji Publicznej 97, 102.

[85] Ellen Vos, 'Independence, Accountability and Transparency of European Regulatory Agencies' in Damien Geradin, Rodolphe Muñoz, and Nicolas Petit (eds), *Regulation through agencies: A new Paradigm of European*

state reasons allows interested parties to have access to the reasons that led the authority to adopt a particular measure, enabling them to challenge that decision before the competent court, but also to enable the courts to review the legality of those decisions.[86] In this regard, it is quite usual that the Court connects the duty to state reasons to other fundamental principles. For instance, the Court has explained 'the obligation of the administration to state reasons for a decision which are sufficiently specific and concrete' is a corollary of the principle of respect for the rights of the defence.[87] Furthermore, the Court has also clarified that if the judicial review guaranteed by Article 47 CFR is to be effective, the person concerned must be able to ascertain, either by direct examination or request, the reasons upon which the decision is taken.[88]

4.2 THE PRECAUTIONARY PRINCIPLE

The EU has incorporated the precautionary principle into various EU policy areas, including environment, food safety, public health and consumer protection.[89] Regulation 1107/2009 also declares that the precautionary principle applies across the entire regulatory framework.[90]

Generally, scholars agree that the risk-averse approach of food-related policies represents a regulatory response to food safety crises, such as the bovine spongiform encephalopathy (BSE or mad cow disease) outbreak and to other public concerns about potential hazards associated with contemporary farming methods, among other factors.[91] In these areas of high scientific uncertainty, where 'there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the available data preclude a detailed risk evaluation',[92] the precautionary principle operates as a risk management tool for decision-making at both the EU and Member State levels.[93] Precaution allows risk managers to take protective

Governance (Edward Elgar Publishing 2005) 120, 125; Opdebeek and de Somer (n 84) 97; Melanie Fink and Giulia Gentile, 'Article 41: the right to good administration' in Alexandra Giannopoulou (ed) *Digital rights are charter rights (*Amsterdam: Digital Freedom Fund 2023).

[86] Case C-46/16 *Valsts ieņēmumu dienests v 'LS Customs Services', SIA* EU:C:2017:839 paras 39 and 40; and Case C-721/21 *Eco Advocacy CLG v An Bord Pleanála and others* EU:C:2023:477 para 33 and case law cited. The Court recalls that 'the obligation to state reasons for decisions adopted by the national authorities is particularly important, since it puts their addressees in a position to defend their rights under the best possible conditions and decide in full knowledge of the circumstances whether it is worthwhile to bring an action against those decisions. It is also necessary in order to enable the courts to review the legality of those decisions'. Moreover, it must be mentioned that transparency is by itself a principle of EU law. In this regard, Koen Lenaerts, "'In the Union We Trust": Trust Enhancing Principles of Community Law' (2004) 41(2) Common Market Law Review 317, 320-321; and Paul Craig, 'Transparency' in Paul Craig, *EU Administrative Law* (Oxford University Press 2018) 400.

[87] Case C-230/18 *PI v Landespolizeidirektion Tirol* EU:C:2019:383 para 57 and case law cited.

[88] Case C-300/11 *ZZ v Secretary of State for the Home Department* EU:C:2013:363 para 53.

[89] Joanne Scott, *Legal Aspects of the Precautionary Principle: A British Academy Brexit Briefing* (The British Academy 2018) 9.

[90] Regulation 1107/2009 (n 3) recital 8 and Art 1(4).

[91] Joakim Zander, The Application of the Precautionary Principle in Practice: Comparative Dimensions (Cambridge University Press 2010) 77; Vogel (n 11) 63-66.

[92] Communication from the Commission on the precautionary principle, COMM(2000), 8.

[93] Nicolas de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12(2) European Law Journal 139, 140-141; Zander (n 91) 79-92; Nicolas de Sadeleer, 'Precautionary principle in EU Law' (2010) AV&S, 173; and Didier Bourguignon, 'The Precautionary Principle—Definitions, Applications and Governance' (European Parliament Think Tank 2015)

measures when faced with plausible risks to human health or the environment, even in the absence of definitive scientific evidence.[94]

However, despite its widespread use as a regulatory tool in EU risk-oriented policies, the precautionary principle lacks a unified EU-wide definition. Furthermore, legal texts generally provide only a limited understanding of how the precautionary principle should be applied by risk managers.[95] Regulation 1107/2009 does not make an exception to that.

Against this background, the Court has provided considerable clarification on the application of the precautionary principle, including in the context of pesticide authorisations.[96] For instance, the *PAN Europe* case provides a relevant example of how the Court leverages the precautionary principle to enhance the standards of health and environmental protection in the context of Article 53's emergency authorisations.[97] More specifically, this case originates from a dispute over Belgium's temporary emergency approval of two pesticides containing the substances clothianidin and thiamethoxam for sugar beet seed protection. PAN Europe, the applicant in this case, argued that the use of these neonicotinoid insecticides has shifted towards a preventive approach known as seed coating or seed treatment. This method involves applying the insecticides to seeds before planting, rather than spraying crops after they have grown. Consequently, the applicant contended that this practice leads farmers to use treated seeds regardless of whether there is a demonstrated need or emergency for insect control in their fields. In addition, PAN Europe also noted that since 2013 the Commission has progressively restricted the use of the two insecticides due to their potential risks to bee populations. Under these circumstances, the Court unequivocally concludes that Article 53(1) must be interpreted as not permitting a Member State to authorise the placing on the market of plant protection products containing substances that have been expressly prohibited by an EU implementing regulation.[98] In its reasoning, the Court firmly embeds the precautionary principle as a fundamental basis for interpreting Regulation 1107/2009, emphasising its role in ensuring a high level of protection for human and animal health and the environment. By invoking this principle, it conclusively rejects any reading of the provisions of Regulation 1107/2009 that would undermine its objectives, i.e. authorising the placing on the market and use of products that have been expressly prohibited, and establishes a hierarchy of objectives where health and environmental protection takes precedence over improving plant production.[99] With this judgment, the Court underlines the importance of maintaining coherence between emergency measures and the broader regulatory framework for pesticides, underscoring that

<https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)573876> accessed 30 October 2024.

[94] Case C-236/01 *Monsanto Agricoltura Italia and Others* EU:C:2003:431 para 111; and Case C-487/17 *Criminal proceedings against Alfonso Verlezza and Other* EU:C:2019:270 para 57 and case law cited.

[95] Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 211-212; and Maria Weimer and Gaia Pisani, 'Expertise as Justification: The Contested Legitimation of the EU "Risk Administration"' in Maria Weimer and Anniek de Ruijter (eds), *Regulating Risks in the European Union* (Hart Publishing 2017).

[96] Kristel De Smedt and Ellen Vos, 'The Application of the Precautionary Principle in the EU' in Harald A Mieg (ed), *The Responsibility of Science. Studies in History and Philosophy of Science* (Springer, 2022) 175-176.

[97] Case C-162/21 *Pesticide Action Network Europe* (n 1).

[98] ibid paras 50 and 54.

[99] ibid paras 48 and 50.

emergency authorisations under Article 53 must not undermine the core principles of EU pesticide legislation.

The Court's application of the precautionary principle not only underscores the obligation of national authorities to prioritise health and environmental concerns but also extends to other crucial aspects.

Together with using this principle as a substantive legal standard to interpret Regulation 1107/2009,[100] there is various evidence of how the Court has also used the precautionary principle as a procedural principle for guiding risk managers' decision-making.[101] The *Sweden v Commission (Paraquat)* case has served as an important reference point in this regard.[102] Asked to review the Commission's decision to include the active substance paraquat in Annex I to Directive 91/414 (now replaced by Regulation 1107/2009),[103] the Court declared that 'the existence of solid evidence which, while not resolving scientific uncertainty, may reasonably raise doubts as to the safety of a substance, justifies, in principle, the refusal to include that substance in Annex I'.[104] Furthermore, the Court, again invoking the precautionary principle, highlighted that before a substance can be included in Annex I, 'it must be established beyond a reasonable doubt that the restrictions on the use of the substance involved make it possible to ensure that use of that substance will be in accordance with the requirements' laid down in EU law.[105] Through its case law, the Court has subsequently further clarified that the application of the precautionary principle under Regulation 1107/2009 requires two key steps: first, identifying potential health risks associated with active substances and plant protection products; and second, conducting a thorough health risk assessment based on the most reliable and up-to-date scientific data available.[106] If and when one of these conditions is met, the precautionary principle allows protective measures to be taken without waiting for the reality and seriousness of the risks

[100] In this sense, see also Case C-616/17 *Blaise and Others* EU:C:2019:800.

[101] Emiliano Frediani, 'The Administrative Precautionary Approach at the Time of Covid-19: The Law of Uncertain Science and the Italian Answer to Emergency' (2021) 17(3) Utrecht Law Review 6. In this regard, evidence suggests strong similarities between the principle of good administration and the precautionary principle. For instance, European Ombudsman, 'Decision in case 12/2013/MDC on the practices of the European Commission regarding the authorisation and placing on the market of plant protection products (pesticides)' (2016) <https://www.ombudsman.europa.eu/en/decision/en/64069> accessed 30 October 2024. The Ombudsman was called to review the Commission's procedures for approving active substances in pesticides, particularly the 'confirmatory data procedure', which allows substances to be approved while additional data is requested to verify their safety. In this context, it asserts that the precautionary principle, being a principle of good administration, prevents the Commission from approving active substances in cases where there is a potential risk to public health or the environment. Furthermore, Opinion of Advocate General Kokott in Case C-436/22 *Asociación para la Conservación y Estudio del Lobo Ibérico (ASCEL) v Administración de la Comunidad Autónoma de Castilla y León* EU:C:2024:83 paras 79-82.

[102] Case T-229/04 *Kingdom of Sweden v Commission of the European Communities* EU:T:2007:217; Giulia Claudia Leonelli, 'Judicial Review of Compliance with the Precautionary Principle from Paraquat to Blaise: "Quantitative Thresholds," Risk Assessment, and the Gap Between Regulation and Regulatory Implementation' (2021) 22(2) German Law Journal 184, 195-96.

[103] Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market [1991] OJ L230/1, Art. 5(1). This provision laid down the conditions for an active substance to be included in Annex I. A similar provision can now be found in Article 4 of Regulation 1107/2009.

[104] Case T-229/04 *Sweden v Commission* (n 102) para 161.

[105] ibid para 170.

[106] Case C-616/17 *Blaise* (n 100) para 46 and case law cited.

to become fully apparent.[107] In addition, these measures must be applied in accordance with the principle of proportionality.[108]

Most recently, in two judgments, *PAN Europe (Closer)* and *PAN Europe (Evaluation of Endocrine Perturbation Properties)*, the Court has also emphasised the importance of a scientifically rigorous approach to the authorisation of pesticides at the Member State level, with reference to the precautionary principle. Notably, it has pointed to the need to rely on the most relevant and reliable scientific and technical knowledge available at the time of the examination.[109] This position is maintained even in situations where such reliance might necessitate deviating either from the scientific risk assessment of a plant protection product conducted by another Member State, or from the EU level assessment of an active substance.[110] At the same time, in the *PAN Europe (Closer)* case, the Court has also used the precautionary principle in a manner that strengthens the capacity of individuals to challenge national competent authorities' plant protection product authorisations. In its ruling, the Court clarified that the most reliable scientific and technical data available constitutes admissible evidence for challenging the adequacy of plant protection product examinations. It declares that this possibility would be in line with the precautionary principle since it would allow for the attainment of the objective of Regulation 1107/2009, i.e. ensuring a high level of health and environmental protection.[111]

In conclusion, this section has illustrated, by reference to the Court of Justice case law on the principles of good administration and the precautionary principle, how both principles provide the conditions for realigning the application of Article 53 with the scope of the norm and the objective of Regulation 1107/2009. Firstly, drawing on the principles of good administration, the previous analysis has elucidated a series of obligations for the administrations of the Member States when enforcing EU law. These measures include the duty of national administrations to conduct a diligent and impartial examination of all the relevant matters using the most complete and reliable information, including scientific knowledge, to state the reasons for their decisions, and to provide access to information. Subsequently, the analysis has turned to the Court of Justice's application of the precautionary principle as both a condition to interpret the provisions of Regulation 1107/2009 and as a procedural principle to guide national competent authorities' discretion when authorising plant protection products, ultimately upholding high standards of health and environmental protection. In this respect, it is highlighted how the Court requires national competent authorities to conduct a thorough health risk assessment relying

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[107] Opinion of Advocate General Sharpston in Case C-616/17 *Blaise and Others* EU:C:2019:190 para 48.
[108] ibid; and Pavel Ondřejek and Filip Horák, 'Proportionality during Times of Crisis: Precautionary Application of Proportionality Analysis in the Judicial Review of Emergency Measures' (2024) 20 European Constitutional Law Review 27, 45-49.
[109] Case C-308/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:350 para 70; and Joined Cases C-309/22 and C-310/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* EU:C:2024:356 para 100.
[110] Joined Cases C-309/22 and C-310/22 *PAN Europe (Evaluation of Endocrine Perturbation Properties)* (n 109) para 97.
[111] Case C-308/22 *PAN Europe (Closer)* (n 109) paras 88 and 103. In more detail, Pietro Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? Some Clarifications from the Court of Justice' [2025] European Journal of Risk Regulation 1, 3.

on the most relevant and reliable scientific knowledge available at the time of the examination.

However, the potential of these principles to function as EU tools for the institutional design of Member States' administrations when operating within the scope of EU law still faces significant limitations. The following section will specifically discuss how a persistently fragmented administrative law landscape across Member States jeopardises the effectiveness of these principles.

5 THE PRINCIPLES OF GOOD ADMINISTRATION AND THE PRECAUTIONARY PRINCIPLE IN ACTION

This section builds upon the previous analysis, which has highlighted that the principles of good administration and the precautionary principle, as interpreted and applied by the Court of Justice, mandate specific measures for national authorities in their enforcement of EU law. If effectively applied, these measures have the potential to realign the use of Article 53 with the scope and objectives of Regulation 1107/2009. Against this backdrop, this section first outlines the limitations of an approach that relies on these principles to effect changes in the administrative practices of the Member States. Subsequently, it suggests possible pathways to operationalise these principles.

5.1 MEMBER STATES' ADMINISTRATION AND EU LAW

The main problem with an approach that simply relies on the principles of good administration and the precautionary principle as EU tools of institutional design for national administrations enforcing EU law is related to the still diversified administrative systems of the Member States. The development of the Member States' administrations and administrative law reflects the distinct historical trajectories of each country, shaped by their unique state structures and tailored to address specific societal needs.[112] Under these circumstances, the administrations of the Member States generally follow their own administrative practices, which might not necessarily correspond to EU standards of good administration.[113]

At the same time, while Member States' administrative systems have developed as products of the nation-state, European integration has certainly contributed to their evolution.[114] For instance, the expansion in the number of interventions falling within the scope of the EU as 'a regulatory state', an idea first introduced by Giandomenico Majone,

[112] Sabino Cassese, *Il diritto amministrative: storie e prospettive* (Giuffre' editore 2010) 6-8; European Commission, Enora Palaric, Nick Thijs, and Gerhard Hammerschmid, 'A comparative overview of public administration characteristics and performance in EU28' (2018) <https://data.europa.eu/doi/10.2767/13319> accessed 30 October 2024, 36; and B Guy Peters, 'The Administrative Tradition Approach to Public Bureaucracy' in B Guy Peters, *Administrative Traditions: Understanding the Roots of Contemporary Administrative Behavior* (Oxford University Press 2021) 23.

[113] In more detail, Statskontoret, 'Good administration in European countries' (Statskontoret, 2023) <https://www.statskontoret.se/en/publications/publikationer/publikationer-2023/good-administration-in-european-countries/> accessed 15 October 2024.

[114] Sabino Cassese, 'New paths for administrative law: A manifesto' (2012) 10 International Journal of Constitutional Law 603, 605.

has had a significant impact on the role of the Member States' administrations.[115] While at the very beginning of its regulatory intervention, the EU started simply borrowing national independent agencies for the implementation of its market liberalisation policies, contemporary EU legislation routinely impacts the administrative organisation of the Member States.[116] Through expanding policy competences, the Union increasingly permeates sectors traditionally governed by domestic administrative law, necessitating structural, functional, and procedural adaptations at the national level.[117]

Considering this evolution, scholars generally agree that a body of administrative law in Europe has developed.[118] European administrative law is considered to encompass three main components. First, it includes rules and principles governing the execution of EU law by EU institutions. Second, it comprises the 'Europeanised' administrative law of the Member States, which involves national rules governing the enforcement of European law by national authorities. These rules are adapted to meet the requirements stipulated in EU law. Third, it includes rules that apply to cases even when they have no direct relation to EU law.[119] However, despite these significant developments, European administrative law does not yet encompass the entirety of the administrative law of the Member States. A comprehensive and uniform body of EU administrative law that applies to national administrations when enforcing EU law remains absent.[120] As a result, in the absence of Union law, Member States retain autonomy in determining the regulatory framework for implementing and enforcing EU law.[121]

Within this framework, one can assume that without EU law binding and uniform standards reflecting good administration principles applicable to national administrations in their execution of EU law, national administrations continue to follow their own practices

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115 Giandomenico Majone, 'The rise of statutory regulation in Europe' in Giandomenico Majone (ed), *Regulating Europe* (Routledge 1966) 40; Giandomenico Majone, 'Regulating Europe: Problems and Prospects' (1989) EUI Working papers No. 89/405, 8.

116 De Somer, 'EU impulse' (n 50); and Mattioli, 'The Quasi-Judicial Role of National Competent Authorities: (n 50).

117 Herwig C H Hofmann, Gerard C Rowe, and Alexander H Türk, 'The Idea of European Union Administration – Its Nature and Development' in Herwig C H Hofmann, Gerard C Rowe, and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011).

118 Kadelbach (n 45); Edoardo Chiti and Joana Mendes, 'The Evolution of EU Administrative Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021) 339; and Joana Mendes, 'Administrative law in the EU: the liberal constitutional paradigm and institutionalism as an imperfect alternative' in Carol Harlow, *A Research Agenda for Administrative Law* (Edward Elgar Publishing 2023) 283.

119 Kadelbach (n 45) 167.

120 To address the lack of a coherent legal framework governing administrative procedures in EU law, scholars have advocated for harmonised administrative procedural rules binding both EU institutions and Member State authorities when implementing EU law. In particular, Herwig C H Hofmann and Alexander H Türk, 'Legal Challenges in EU Administrative Law by the Move to an Integrated Administration' in Herwig C H Hofmann and Alexander H Türk (eds), *Legal Challenges in EU Administrative Law* (Edward Elgar Publishing 2009) 378. This call aligns with a broader academic proposal for the codification of rules on administrative procedures concerning the implementation of EU law. Paul Craig et al, *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017). More generally, on the codification of EU administrative law, Carol Harlow 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot' (1996) 2(1) European Law Journal 3, 19-22; Sabino Cassese, 'Shrimps, Turtles and Procedure: Global Standards for National Administrations' (2004) NYU IILJ Working Paper No. 2004/4.

121 Kadelbach (n 45) 169-170. On the relationship between institutional autonomy and EU administrative intervention, see Section 3.

and standards, which might not necessarily be aligned with the EU standards of good administration. In this regard, the EU sources of good administration primarily include Article 41 CFR and the European Code of Good Administrative Behaviour.[122] However, both sources formally apply to EU institutions and bodies, extending to national administrations only when they reflect general principles of EU law.[123] While national authorities are bound by the EU principles of good administration when acting in the scope of EU law,[124] this is not sufficient to harmonise administrative practices across the Member States. Therefore, it is not surprising that significant variations persist among Member States in areas such as impartiality, transparency and democratic participation with respect to the decentralised administrative enforcement of EU law, as well as in the application of the precautionary principle.[125] For instance, the misapplications of Article 53 illustrate how national authorities normally act irrespective of the good administration and precautionary principles as interpreted by the Court.[126] In this regard, despite the Court's efforts to clarify the scope of the precautionary principle, the threshold of scientific uncertainty for precaution continues to be decided on a case-by-case basis by the competent authorities.[127]

Nevertheless, while obstacles persist to a coherent application of the good administration and the precautionary principles, it has also been illustrated that the EU possesses the capacity to influence the administrative practices of the Member States.[128] Considering these circumstances, the next subsection argues for proceduralising these principles within EU law. This approach could address their inconsistent application across national pesticide authorisation procedures and thereby the persistent misuse of Article 53. Ultimately, this section concludes by underlining how the Court of Justice has also provided the foundations for increased scrutiny by interested parties of the pesticide authorisations of national competent authorities.

5.2 OPERATIONALISING EU PRINCIPLES

The principles of good administration and the precautionary principle, as emerging from the Court of Justice case law, require national authorities to implement specific measures when operating within the scope of EU law. However, obstacles still impede the effective and uniform application of these principles across Member States, consequently affecting the

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122 European Parliament, 'European Code of Good Administrative Behaviour' [2001]. For a broader overview of the role of the Code, see Mendes, 'Good Administration in EU Law' (n 82) 5-6.
123 Statskontoret, 'Good administration in European countries' (n 113) 15-18.
124 Sacha Prechal, 'Competence Creep and General Principles of Law' (2010) 3(1) Review of European Administrative Law 5, 11.
125 In particular, Statskontoret, 'Good administration in European countries' (n 113) 31. More generally, regarding national administrations' variations across the EU, see European Commission, Palaric, Thijs, and Hammerschmid (n 112).
126 The current uses of Article 53 stand in direct contradiction to the Court of Justice's jurisprudence, which affirms that 'when granting authorisations of plant protection products, the objective of protecting human and animal health and the environment should 'take priority' over the objective of improving plant production'. For instance, Case C-308/22 *PAN Europe (Closer)* (n 109) para 68.
127 Case T-13/99 *Pfizer Animal Health SA* (n 17) para 151.
128 In more details, on the limits of the EU regulatory intervention, i.e. national institutional autonomy, subsidiarity and proportionality, see Section 3. In this regard, the Court of Justice has also clarified that institutional autonomy as regards the organisation and the structuring of regulatory authorities must be exercised in accordance with the objectives and obligations laid down by EU law. Case C-424/15 *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780 para 30 and the case-law cited.

implementation of these measures by national administrative authorities. To address this issue, this section argues that these principles should be codified in EU law, particularly through soft law instruments.[129] This codification should also be accompanied by increased oversight by the Commission. Additionally, this section considers a complementary approach. It emphasises the potential role of interested parties in challenging national competent authorities' pesticide authorisations. This claim is grounded in the most recent Court of Justice case law, which may provide new avenues for stakeholders' ability to challenge pesticide authorisations.

Regarding the first possibility, there are various ways for the EU to proceduralise the measures required by the principles of good administration and the precautionary principle. The most direct approach to addressing inconsistencies in the application of these EU principles would be through an amendment of Regulation 1107/2009, which would directly incorporate the necessary administrative rules into the Regulation.[130] Specifically, this could be achieved by utilising the second paragraph of Article 78 of Regulation 1107/2009, which pertains to amendments and implementing measures, thereby avoiding an overhaul of the entire existing framework of Regulation 1107/2009. While such legislative intervention might successfully pass the proportionality test[131] and the scrutiny of the Court, which in areas such as health and agricultural policy often affords a wide margin of discretion to the EU legislator,[132] this approach might be unrealistic in the near future. The EU's political agenda has witnessed a clear shift away from its previously robust green ambitions, suggesting a diminished commitment to environmental regulatory reforms, particularly in areas such as pesticide regulation.[133] Additionally, a deregulatory trend has gained prominence across the entire EU policy landscape.[134]

Considering these circumstances, this article proposes resorting to soft law instruments to introduce the necessary measures: for instance, the Commission's ongoing revision of the guidance document concerning emergency authorisations under Article 53 of Regulation

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[129] The term soft law is generally employed to denote non-binding instruments like recommendations, opinions, communications, guidelines, and other quasi-legal tools that lack formal binding nature and are not subject to judicial enforcement. For more details, see Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 55-56.

[130] Regulation 1107/2009 (n 3) Art 78(2). This provision states that 'any further measures necessary for the implementation of this Regulation may be adopted in accordance with the regulatory procedure referred to in Article 79(3)'.

[131] Takis Tridimas, 'The Principle of Proportionality: Review of Community Measures' in Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 136.

[132] The Court has affirmed that measures adopted in policy areas like environment, health, and consumer protection are in breach of the proportionality principle only if the measure is 'manifestly inappropriate' having regard to the objective which the competent institution is seeking to pursue. For instance, Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* EU:C:1990:391 para 14.

[133] For instance, the European Commission officially withdrew the Sustainable Use of Pesticides Regulation (SUR) proposal after its rejection by the European Parliament and a lack of consensus in the Council. European Commission, Withdrawal of Commission proposals PUB/2024/302 [2024] OJ C, C/2024/3117. Furthermore, the new agriculture Commissioner Christophe Hansen affirmed that there is no intention of reviving pesticide reduction targets. More information – <https://www.euronews.com/my-europe/2025/02/20/pesticide-cuts-are-off-the-table-says-eu-agriculture-commissioner> accessed 20 February 2025.

[134] European Commission, 'A simpler and faster Europe: Communication on implementation and simplification' (2025) <https://commission.europa.eu/law/law-making-process/better-regulation/simplification-and-implementation_en> accessed 20 February 2025.

1107/2009.[135] In terms of necessary intervention, a crucial measure would be to establish a systematic requirement for uploading all supporting materials to the E-Submission Food Chain (ESFC) Platform.[136] While the current ESFC Platform requires applicants to submit basic information, such as type of danger and justification for necessity, it does not mandate the inclusion of supporting documents such as risk assessments, scientific studies or product-specific analyses,[137] limiting the possibility for interested parties to access relevant information concerning authorisations. This proposed intervention holds significant potential to enhance the transparency of national competent authorities' decision-making processes, which is widely recognised as a crucial counterweight to industry influence in regulatory procedures. It also serves as a fundamental element in reinforcing the democratic legitimacy of these processes by providing increased visibility and accountability.[138] Moreover, it is crucial that the Commission intensifies its efforts to ensure that Member States comply with Article 53's notification requirements. For instance, considering that informing the Commission and the other Member States is an obligation directly stemming from Article 53, the Commission could establish automated alerts for delayed submissions and periodic compliance reviews. Such measures would address the current practice of retroactive notifications.

At the same time, the Commission should develop binding templates for conflict-of-interest statements for the members of national authorities involved in authorisation decisions. This requirement could be operationalised by integrating these standardised declarations into the existing ESFC Platform. Such a measure would address the absence of explicit independence safeguards under Regulation 1107/2009 and counterbalance the disproportionate industry influence over pesticide authorisation procedures.[139]

In addition to these much-needed reforms, this Section also brings attention to the fact that the Court of Justice has recently established a possible pathway for stakeholders to contest insufficiently reasoned risk assessments under Regulation 1107/2009. In the *PAN Europe (Closer)* case, the Court has affirmed that interested parties have the possibility of raising any new scientific or technical knowledge that is relevant and reliable before the authorities and courts of the Member State concerned in order to challenge the authorisation

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[135] European Commission, 'Guidance on Emergency Authorisations According to Article 53 of Regulation (EC) No 1107/2009' (SANCO/10087/2013 rev 1, 2021).

[136] The ESFC has replaced the Plant Protection Products Application Management System (PPPAMS) since January 2023. However, the current guidance document does not acknowledge the replacement of the PPPAMS with the ESFC. More information on the ESFC system is available at <http://food.ec.europa.eu/plants/pesticides/authorisation-plant-protection-products/pppams_en> accessed 12 February 2025.

[137] More information on the guidance for applicants is available at <http://food.ec.europa.eu/plants/pesticides/authorisation-plant-protection-products/pppams_en> accessed 12 February 2025.

[138] Juli Ponce, 'Good Administration and Administrative Procedures' (2005) 12 Indiana Journal of Global Legal Studies 551, 554; Deirdre Curtin and Joana Mendes, 'Transparence et participation : des principes démocratiques pour l'administration de l'union européenne' (2011) 137 Revue française d'administration publique 101; and Craig, 'Transparency' (n 86) 356.

[139] Similarly, the European Ombudsman has recommended that if the Commission continues to rely on the European and Mediterranean Plant Protection Organization (EPPO), it should advocate for more rigorous conflict of interest policies and broader stakeholder participation beyond the pesticide industry. European Ombudsman, 'Decision on how the European Commission adopted a guidance document on comparative assessment in the context of the substitution of hazardous substances in pesticides' (case 177/2023/VB).

of a plant protection product in the territory of that Member State.[140] This approach, which is in line with the precautionary principle, contributes to the attainment of the objectives of Regulation 1107/2009.[141] With this ruling, the Court has not only underlined an obligation for national authorities to demonstrate they have evaluated all available most reliable scientific and technical data before granting authorisations but also highlighted a possible right for stakeholders to leverage scientific knowledge to demand an administrative or judicial review of pesticide authorisations.[142] By allowing stakeholders to introduce new evidence, the Court makes authorisations contingent on continuous scientific scrutiny, rather than one-time evaluations. Yet, the effectiveness of this pathway might also depend on improved transparency in national authorities' decision-making processes.[143]

6 CONCLUSIONS

This article has two objectives. Firstly, it intends to raise awareness of the use of emergency authorisations against the scope and objectives of Regulation 1107/2009. To that end, the first two sections are essentially focused on describing the procedures for placing plant protection products on the market as prescribed by Regulation 1107/2009 (section 2) and exposing systemic weaknesses in the current framework that have led to various misapplications of Article 53's emergency authorisation procedures (section 3).

Secondly, this article discusses legal solutions to address these misapplications of Article 53. As this article demonstrates, the EU legal order possesses the necessary tools to address the lack of independence and transparency safeguards under Article 53 of Regulation 1107/2009, notably the principles of good administration and precaution. By imposing obligations of conducting a diligent and impartial examination of all the relevant matters using the most complete and reliable information, including the most updated scientific knowledge, stating reasons for the decisions, providing access to information, and prioritising health and environmental protection, these principles have the potential to recalibrate the practices of national authorities competent to authorise pesticides.

At the same time, section 5 has also shown that simply formulating principles of good administration does not guarantee their uniform application across Member States. Therefore, the last section of this article argues that to ensure compliance with these principles, the EU must translate and proceduralise them into specific obligations. To that end, specific regulatory interventions are proposed in order to reinforce the independence and transparency of the Member States' pesticide emergency authorisation process. Ultimately, it is also highlighted how the Court of Justice has opened an important new avenue for challenging inadequately justified pesticide authorisations under Regulation 1107/2009. However, while this development represents a crucial advancement in ensuring the proper implementation of EU pesticide legislation, efforts are still needed to enhance transparency in pesticide authorisations across the Member States, ensuring that the

[140] Case C-308/22 *PAN Europe (Closer)* (n 109) para 110.
[141] ibid para 103.
[142] ibid paras 90 and 110.
[143] Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level?' (n 111) 7.

interested parties can access the necessary information to scrutinise and, when appropriate, challenge pesticide authorisations.

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Local Community Engagement in Pesticide Regulation: A Commentary on the Italian Council of State's Judgment in the Municipality of Malles Case

Pietro Mattioli*

PhD candidate at the University of Liège, Belgium

Abstract

In resolving the controversy over the competence of the municipality of Malles to impose restrictions on the use of pesticides and herbicides within its municipal territory, Judgment 4307/2020 of the Italian Council of State clarifies that municipalities do not have such competence under the Italian legislative framework governing pesticide use. Simultaneously, the Council further emphasises that, even if such authority were granted, it would conflict with Regulation 1107/2009 on the placement of pesticides on the market and therefore, any national provisions that might confer this competence should be disregarded in accordance with the principle of the primacy of EU law. This case note contests the Council's arguments for two essential reasons. First, the Italian administrative court's interpretation is inconsistent with recent jurisprudence from the Court of Justice of the European Union. Second, it fails to consider the institutional autonomy of the Member States. Against this background, this case note argues that in accordance with the principle of institutional autonomy, Member States should establish a regulatory framework for pesticides that actively involves local communities in the decision-making process.

1. Introduction

Pesticides are crucial for agriculture as they protect plants and their products from harmful organisms. However, their use also generates significant risks to health, biodiversity, and the environment.[1] To recon-

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cile these competing interests, the EU has adopted a regulatory framework for pesticides that seeks to strengthen health and environmental protection while enhancing the competitiveness of the EU internal market.[2] This framework is primarily guided by the precautionary principle and the principle of substitution, which respectively encourage preventive actions and the replacement of hazardous substances with safer alternatives.[3] Furthermore, the EU has committed to the principles of subsidiarity and proportionality, recognising that the necessary implementing measures must be appropriate to the Member States' specific geographic, agricultural, and climatic situations.[4]

Although this framework sets a relatively high safety threshold for pesticide use, especially when compared to other major agricultural producers such as the United States,[5] it has attracted various criticisms.[6] Significant shortcomings concern the transparency and the organisation of the decision-making process.[7] In this regard, local communities and environmental groups, who are commonly marginalised in official regulatory processes, are now playing a more active role in advocating for reduced pesticide use to safeguard health and the environment. This growing engagement is reflected in heightened

2 In more detail on the EU legislative framework on pesticides, E Bozzini, Pesticide Policy and Politics in the European Union: Regulatory Assessment, Implementation and Enforcement (2017) 5-8.

3 European Parliamentary Research Service (EPRS), 'Regulation (EC) 1107/2009 on the Placing of Plant Protection Products on the Market: European Implementation Assessment' (Study, European Parliament, 2018) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2018)615668> date accessed 15 December 2024, Annex III-30-37.

4 European Commission, 'Proposal for a Directive of the European Parliament and of the Council establishing a framework for Community action to achieve a sustainable use of pesticides' COM (2006) 373 final 8-9; and European Commission, 'Proposal for a Regulation of the European Parliament and of the Council concerning the placing of plant protection products on the market' COM (2006) 388 final 9.

5 D Vogel, The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States (Princeton University Press 2012) 266-271.

6 EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 3); and European Court of Auditors, 'Special Report: Sustainable use of plant protection products: limited progress in measuring and reducing risks' (2000) <https://www.eca.europa.eu/en/publications?did=53001> date accessed 4 April 2025.

7 In more detail, C Robinson et al 'Achieving a High Level of Protection from Pesticides in Europe: Problems with the Current Risk Assessment Procedure and Solutions' (2020) 11[3] European Journal of Risk Regulation 450, 470-471; J Zeitlin et al, 'Reforming EU Pesticides Regulation, Rebuilding Public Support: Evidence from Survey Experiments in Six Member States' (2021) Amsterdam Centre for European Studies Research Paper No. 2021/03 <https://ssrn.com/abstract=3862421> date accessed 10 April 2025 9-12; E Hickey and M Weimer, 'The transparency of EU agency science: Towards a new proactive approach' (2022) 59[3] Common Market Law Review 673, 674-675; and P Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations: The Role of the EU Principles of Good Administration and the Precautionary Principle in Shaping Better National Administrative Practices' (2025) 8[1] Nordic Journal of European Law 70, 78-80.

public scrutiny of regulatory processes related to pesticides.[8] As a result, in recent years, the Court of Justice of the European Union (Court of Justice or CJEU) has been asked to address numerous preliminary references concerning inconsistencies and deficiencies in the procedures for authorising pesticides at both the EU and Member State levels.[9]

Within this framework, in January 2024, the Italian Council of State (*Consiglio di Stato*), which serves as Italy's highest administrative court, delivered a judgment in case 4307/2020 concerning the competence of the municipality of Malles Venosta, located in the autonomous province of Bolzano in the Trentino-Alto Adige Region, to impose restrictions on the use of pesticides and herbicides within the municipal territory.[10] The Council upheld the earlier decision No. 236/2019 of the Regional Administrative Court, autonomous section of Bolzano (*Tribunale Regionale di Giustizia Amministrativa, sezione Autonoma di Bolzano* or T.R.G.A.), and concluded that municipalities do not possess the competence to regulate pesticide use.[11]

The Council of State's judgment, and more generally the controversy on which the Italian administrative courts have ruled, warrants a review of the institutional framework for pesticide management at the Member State level. In this respect, this case note argues for an institutional model that allows for broader stakeholder participation in the pesticide regulatory mechanisms and decision-making processes.

To develop this argument, the note is structured into five sections following this introduction. Section 2 describes the facts from which the controversy originates. Section 3 outlines the Italian and European legislative frameworks that underpin this controversy. Section 4 analyses the Council's judgment. Section 5 comments on this judgment in light of the most recent CJEU case law concerning plant protection products' authorisation. Additionally, it discusses the interplay between national institutional autonomy and the primacy of EU

8 Notably the reauthorisation of glyphosate has triggered much public attention. For instance, in 2017, more than one million EU citizens signed the European Citizens' Initiative entitled 'Ban glyphosate and protect people and the environment from toxic pesticides', calling for a ban on glyphosate and a reform of the EU pesticide approval process. For more information on the implications of the glyphosate saga, M Morvillo, 'Glyphosate Effect: Has the Glyphosate Controversy Affected the EU's Regulatory Epistemology?' (2020) 11[3] European Journal of Risk Regulation 422; and M Morvillo, 'From contestation to accountability in EU pesticides regulation? The case of glyphosate' in A Arcuri and F Coman-Kund, *Technocracy and the Law* (Routledge 2021) 207-209.

9 In more detail, M Morvillo, 'The General Court Orders Disclosure of Glyphosate-related Scientific Studies: Tweedale, Hautala, and the Concept of Environmental Information in the Context of Plant Protection Products' (2019) 10[2] European Journal of Risk Regulation 419, 426-427

10 Case No. 04307/2020 Municipality of Malles / Walter Alton et al. (Council of State, 2024) ECLI:IT:CDS:2024:915SENT (Italy).

11 Case No 236/2019 Municipality of Malles (Regional Administrative Court, autonomous section of Bolzano, 2019) ECLI:IT:TRGABZ:2019:236SENT (Italy)

law. Section 6 concludes by arguing that in accordance with their institutional autonomy, Member States should establish pesticide management frameworks that acknowledge a defined role for municipalities and other stakeholders.

2. Facts

In 2014, the municipality of Malles held a referendum to determine whether, in accordance with the precautionary principle, it should implement specific measures to restrict pesticide use within its territory.[12] The results of the referendum indicated that around 75% of Malles' residents supported the introduction of stricter limitations on pesticide use.[13] In response to the referendum outcome, the municipality enacted three measures: first, Resolution No. 34 of 19 August 2014 establishing that a referendum can be used to determine topics on the municipal political agenda and bring them to a binding decision, second, Resolution No. 37 of 16 July 2015, which amended the municipal statute to empower the local authorities of the municipality of Malles to regulate the promotion of ecological and organic plant protection products, including prohibitions on certain chemical-synthetic substances and herbicides, and third, Regulation No. 2 of 29 March 2016, which established a ban on products classified as 'very toxic (T+)' and 'toxic (T)', while also mandating safety distances for the use of other plant protection products.[14]

The initiative of the municipality of Malles, which has become a model for grassroots democratic actions within small communities around Europe,[15] was met with strong opposition from agricultural groups, particularly apple producers, given the Trentino Alto-Adige Region's status as one of Europe's leading apple-producing areas. Consequently, a coalition of local farmers filed an appeal with the regional administrative court of first instance challenging the three measures adopted by the municipal council.

By judgment No. 236/2019, the T.R.G.A. of Bolzano partially upheld the appeal brought by the producers, annulling two municipal council measures (Resolution No. 37 of 16 July 2015 and Regulation No. 2 of 29 March 2016) which had introduced significant restrictions on the use of certain plant protection products and herbicides.[16] In response, the municipality of Malles appealed the T.R.G.A.'s decision to the Council of State, seeking to overturn the lower court's ruling.

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12 The text of the referendum is available at <https://www.comune.malles.bz.it/it/Progetti_e_tema/Consultazioni_referendarie/Impiego_di_fitofarmaci> date accessed 15 December 2024.
13 ibid.
14 Case No. 04307/2020 (n 10), paras 2.2. and 2.3
15 More information: <https://www.pesticide-free-towns.info/news> date accessed 10 April 2025.
16 Case No 236/2019 (n 11).

3. Relevant National and EU Legislation.

The controversy brought before the Italian administrative courts essentially required an assessment of whether, under Italian and EU legal systems, the municipality of Malles had the competence to introduce undifferentiated, binding, and indefinite restrictions on the use of plant protection products and herbicides within its territory.[17]

More precisely, the Malles municipality based its claimed competence on various pieces of state and regional legislation. These include, primarily, National Law No. 131/2003, which adapts the Italian legal system to Constitutional Law No. 3/2001 and defines the relationships between legislative competences of the state, regions, and local authorities,[18] as well as the Regional Decree of the President of the Region (D.P.Reg.) No. 3/L of 1 February 2005, which establishes the fundamental principles for the organisation and functioning of municipalities and territorial communities in the Trentino Region.[19]

At the same time, this controversy calls into question whether the municipal competence could be found in the EU legal framework. The municipality specifically referred to the precautionary principle under Article 191 TFEU.[20] In addition, two pieces of EU legislation are relevant to this controversy: Regulation 1107/2009 and Directive 2009/128.[21]

On the one hand, Regulation 1107/2009 sets out the essential rules governing the placement of plant protection products on the market, establishing a two-step authorisation process.[22] Active substances, which are the components that control harmful organisms, must be approved at the EU level before plant protection products containing these substances can be authorised by indi-

17 Case No. 04307/2020 (n 10), para 1.

18 Law No. 131/2003, Disposizioni per l'adeguamento dell'ordinamento della Repubblica alla legge costituzionale 18 ottobre 2001 (2003) Gazzetta Ufficiale n. 132 (Italy).

19 Regional Decree of the President of the Region (D.P.Reg.) of 1 February 2005 No. 3/L, Testo unico delle leggi regionali sull'ordinamento dei comuni della Regione Autonoma Trentino-Alto Adige (Italy).

20 On the nature and effects of the precautionary principle, see N de Sadeleer, 'The Precautionary Principle in EC Health and Environmental Law' (2006) 12 [2] European Law Journal 139, 141-143; and A Donati, *Le principe de précaution en droit de l'Union européenne* (Bruylant 2021) 199-200.

21 Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market [2009] OJ L 309/1; and Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides [2009] OJ L 309/71.

22 Regulation 1107/2009 (n 21), art 1(1) and (2).

vidual Member States.[23] In a nutshell, the active substance approval procedure consists of three main stages. First, after receiving the applicant's dossier, the competent authority of the designated Rapporteur Member State (RMS) checks whether the applicant has provided the necessary documentation, such as tests and study reports, and prepares a draft assessment report (DAR).[24] Second, the DAR undergoes a scientific risk assessment, conducted by the national competent authority and the European Food Safety Authority (EFSA).[25] Third, the European Commission acts as risk manager and decides whether or not to approve a specific substance, following discussions in the Standing Committee on Plants, Animals, Food and Feed (PAFF Committee).[26] If the committee issues a favourable opinion, the Commission can then proceed to formally adopt the regulation listing the approved substance.[27]

The list of approved substances contained in the Commission's regulation allows pesticide manufacturers or other applicants to register plant protection products containing the approved active ingredients for market placement. This second phase takes place predominantly at the Member State level and is carried out by national competent authorities.[28] In this regard, each Member State can establish its own procedures for product authorisation while respecting the essential conditions and criteria set out in the Regulation.[29]

On the other hand, Directive 2009/128/EC on the sustainable use of pesticides (SUD) provides for a range of actions to achieve sustainable use of pesticides.[30] One of the SUD's key elements is the implementation of National Action Plans (NAPs), which set forth quantifiable objectives, measurable targets, risk-reduction measures, and specific timelines to mitigate the adverse impacts of pesticide use on human health and the environment. These plans must also outline mechanisms for the systematic implementation of integrated pest management (IPM) principles.[31]

23 EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 3) 19-23.
24 Regulation 1107/2009 (n 21), arts 7, 9, and 11.
25 ibid, art 12.
26 ibid, art 13 (1).
27 ibid, art 13(4).
28 A list of the Member States' competent authorities is available at the following link: <https://food.ec.europa.eu/document/download/7c32875b-720e-4c48-a463ae5b0f3fde2d_en?filename=pesticides_legis_national-authorities.pdf>
29 Regulation 1107/2009 (n 21), arts 29, 36 and 37.
30 Directive 2009/128/EC (n 21).
31 ibid, arts 4 and 14(4).

4. Judgment

Within the framework outlined in the previous section, the Council of State was called upon to adjudicate the appeal brought by the municipality of Malles against the decision of the T.R.G.A.

In the first instance, the T.R.G.A. partially upheld the local farmers' claims, annulling two measures adopted by the municipality—Resolution No. 37 of 16 July 2015, and Regulation No. 2 of 29 March 2016.[32] The tribunal's decision was based on three key arguments. First, it rejected the municipality's assertion that its regulatory authority stemmed from the precautionary principle under Article 191 TFEU. It also emphasised that the municipal regulatory authority under Article 4(4) of Law No. 131/2003 is subject to statutory, regional, and provincial constraints. Second, the tribunal affirmed that only regions or provinces may introduce restrictions on pesticide use in specific areas, as outlined in the Italian NAP. Third, through constitutional analysis, the tribunal held that administrative authorities cannot impose general prohibitions without explicit legislative authorisation. Even when pursuing high-ranking rights (health protection), administrative powers must operate within the bounds of legislative acts or equivalent instruments to ensure compliance with the principle of legality.[33]

Against this backdrop, the municipality of Malles contested the T.R.G.A.'s ruling for not recognising the municipal competence to regulate pesticides. The appellant argued that such authority derives from specific constitutional and legislative frameworks, including Article 4(1) of Law No. 131/2003, Article 2(1) and (2) of the D.P.Reg. No. 3/L of 1 February 2005, and point 5.6. of the Italian NAP.[34] Additionally, the municipality contended that the precautionary principle also represents a source of competence for the municipality to restrict pesticide use in its territory.[35]

In response to these arguments, the Council examined whether state, regional, or provincial laws permit this practice. The ruling began with an analysis of Italian legislation, including regional and provincial provisions, to determine whether municipalities possess the competence to implement measures that prohibit or restrict the use of certain pesticides within their territorial jurisdictions.[36] In this regard, Italy's highest administrative court concurred with the

32 Case No. 04307/2020 (n 10), para 3.
33 ibid, para 4.
34 ibid, para 13.
35 ibid, para 14.
36 ibid, paras 18-25.

interpretation of the court of first instance that municipal intervention to regulate pesticides must be exhaustively enumerated by legislative frameworks and remain confined to residual aspects.[37] Upon analysis and comparison of the relevant legislation, the Council found it unequivocally clear that there is no basis in positive law from which one could infer the competence of municipalities to limit the use of plant protection products.[38]

Nevertheless, although the analysis ultimately results in a negative assessment, it appears that the Italian legal system might allow for some degree of regulatory authority for municipalities.[39] Municipal powers must be explicitly listed within existing legislative frameworks and confined to residual aspects of pesticide use.

Moreover, contrary to the appellant's claims, the Council declared that municipal competence to enact secondary legislation imposing a general prohibition on pesticides within its territorial jurisdiction is not encompassed by point A.5.6 of the Italian NAP.[40] This point allows local authorities to oppose the reduction of the distance to 10 meters from certain areas in the use of plant protection products, but it does not allow a municipality to impose general bans such as the one at issue in this case.[41] The Council highlighted that Legislative Decree 150/2012, which transposes Directive 2009/128 into the Italian legal framework, explicitly designates the national administration, the regions and the autonomous provinces of Trento and Bolzano—not municipal bodies—as the competent authorities for enforcing the legislative decree and the NAP.[42]

The Council also rejected the appellant's claim that a municipality's competence to act can be based on the precautionary principle.[43] The Council stated that it is not possible to interpret Article 191 TFEU as granting such competence since the literal content of this provision requires regulatory intervention within the scope of Union policies. In that regard, Regulation 1107/2009 and the European Commission Communication on the precautionary principle

37 ibid, para 19 third subparagraph.
38 ibid, para 19.
39 ibid, paras 19 third subparagraph and 34 first sentence.
40 ibid, paras 21-22.
41 Ministero delle Politiche Agricole Alimentari e Forestali, Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Ministero della Salute, *Piano di Azione Nazionale per l'uso sostenibile dei prodotti fitosanitari* (30 January 2014) <https://www.mase.gov.it/pagina/piano-dazione-nazionale-pan-luso-sostenibile-dei-prodotti-fitosanitari≥ date accessed 15 December 2024, point A.5.6 (Italy); and Consiglio di Stato, Judgment No 04307/2020 (n 8), para 30.
42 Legislative Decree 14 August 2012 No. 150, Attuazione della direttiva 2009/128/CE che istituisce un quadro per l'azione comunitaria ai fini dell'utilizzo sostenibile dei pesticidi (GU n 202 del 30 agosto 2012, Suppl. Ordinario n 177), arts 4 and 15 (Italy).
43 Case No. 04307/2020 (n 10), para 31.

of 2 February 2002, which implemented the precautionary principle, do not attribute any general competence to entities such as local administrative authorities.[44]

Ultimately, the Council argued that a hypothetical municipal authority to introduce specific prohibitions on the use of certain plant protection products would conflict with EU legislation, more precisely Regulation 1107/2009.[45] To develop this argument, the Italian administrative court referred to the principle of primacy of EU law. Quoting the relevant decisions of the Court of Justice, notably *Van Gend en Loos* on the direct effect of EU law,[46] *Costa v ENEL* on the primacy of EU law over national law,[47] and *Simmenthal II* regarding the scope of the primacy doctrine,[48] the Council recalled that Member States are prohibited from adopting or maintaining legislative or administrative provisions, or even administrative practices, that conflict with prevailing EU law. Consequently, all authorities responsible for applying national law are obligated to disregard these conflicting laws or administrative practices.[49]

In the context of this controversy, according to the Council's interpretation of the EU legal framework for pesticide authorisation, Regulation 1107/2009 leaves no room for manoeuvre for Member States once an active substance is approved. The EU approval process already guarantees high health and environmental standards, which do not need to be re-evaluated. In this context, allowing municipalities to regulate pesticide use would specifically introduce legislative or administrative practices that conflict with Regulation 1107/2009's procedures for placing plant protection products on the market. In particular, the Council asserts that municipal measures prohibiting or restricting the use of certain products could potentially infringe upon the rights of pesticide manufacturers to use approved active substances, a right directly derived from Regulation 1107/2009. Consequently, such municipal measures may be in conflict with prevailing EU law.[50]

44 ibid, para 29.
45 Case No. 04307/2020 (n 10), para 34; and Regulation 1107/2009 (n 21).
46 Case C-26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963] ECLI:EU:C:1963:1.
47 Case C-6-64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66.
48 Case C-106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA. [1978] ECLI:EU:C:1978:49.
49 Case No. 04307/2020 (n 10), para 34.
50 ibid, para 34.

5. Comments

This section comments on the Council's judgment. First, it argues that by claiming that Regulation 1107/2009 leaves no margin of discretion for the Member States for the authorisation of plant protection products containing approved active substances, the Council inadvertently suggests that Member States cannot impose stricter health and environmental standards than those set by EU law. This approach is not aligned with the most recent case law of the Court of Justice. Moreover, this section underscores how the line of reasoning proposed by the Council does not consider the institutional autonomy of the Member States.

5.1. Contextualising the Council's Decision in Light of the Recent Developments from the Court of Justice Regarding the Member States' Discretion Under Regulation 1107/2009

The active substance approval procedure is fully harmonised across the EU. In contrast, the authorisation of plant protection products allows Member States to exercise discretion based on their specific national circumstances, thereby accommodating variations in agricultural practices and environmental conditions. Against this background, the Council of State asserts that the procedure to approve active substances at the EU level guarantees a high level of health and environmental protection which does not require additional scrutiny by Member States. Furthermore, Regulation 1107/2009 grants pesticide manufacturers the legal right to use approved active substances in their products. This right would be compromised if municipalities were permitted to impose restrictions or prohibitions on specific plant protection products.[51]

The Council's interpretation of Regulation 1107/2009 does not fully reflect the regulatory framework as interpreted by the Court of Justice. In two recent rulings—Case C-308/22 and Joined Cases C-309/22 and C-310/22 (hereafter, *PAN Europe I* and *PAN Europe II*)—the Court has emphasised the possibility for each Member State's competent authority responsible for the authorisation of plant protection products to conduct its own independent assessments, provided that the most reliable scientific and technical data are available at the time of the evaluation.

51 ibid, para 34 second paragraph.

In the *PAN Europe II* case, the Court clarifies that in conducting this evaluation, national competent authorities should 'take into account the adverse effects that the endocrine disrupting properties of an active substance contained in that product may cause for human beings' provided that relevant and reliable scientific or technical knowledge is available, even if an assessment has already been made at the EU level.[52] More specifically, the Court states that while Member States do not have the competence to reassess the European Commission's approval of an active substance, national authorisations of plant protection products cannot be reduced to a mere automatic extension of the EU approval of the active substance that these products contain.[53] Consequently, Member States are not legally obliged to authorise the placing on the market of a plant protection product containing only approved active substances, 'if there is scientific or technical knowledge that identifies an unacceptable risk to human or animal health or the environment from the use of that product'.[54] In that respect, by also stating that any applicant seeking authorisation of a plant protection product 'can expect that scientific or technical knowledge should change during the authorisation procedure or over the course of the period for which an active substance is approved or a plant protection product is authorised',[55] the Court conclusively adopts a perspective that prioritises health and environmental protection over other interests, such as legal certainty and mutual recognition.[56]

Moreover, in the *PAN Europe I* case, the Court equally underlines that when new scientific information becomes available and ~~was~~ not taken into account, the Member State deciding on the market authorisation of a plant protection product under Article 36(2) and (3) of Regulation 1107/2009 (the Member State concerned) should conduct its own evaluations independently of those carried out by the Member State responsible for making the initial assessment of the same product (the reference Member State).[57] In support of this argument, the Court recalls that Article 36(3) of Regulation 1107/2009 allows Member States

52 Joined Cases C-309/22 and C-310/22 Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden [2024] ECLI:EU:C:2024:356, para 100.

53 ibid, paras 82-83.

54 ibid, 83. Same considerations are made by the Advocate General in Joined Cases C-309/22 and C-310/22 *Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden* [2023] ECLI:EU:C:2023:717, opinion of AG Medina, para 58.

55 Joined Cases C-309/22 and C-310/22 (n 52), para 98.

56 P Mattioli, 'How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? Some Clarifications from the Court of Justice' (2025) European Journal of Risk Regulation 1.

57 Case 308/22 Pesticide Action Network Europe (PAN Europe) v College voor de toelating van gewasbeschermingsmiddelen en biociden [2024] ECLI:EU:C:2024:350, para 70.

to impose specific conditions and risk mitigation measures, and if these measures are insufficient to address concerns regarding human or animal health or environmental safety, the Member States may refuse authorisation if the product poses an unacceptable risk due to its specific environmental or agricultural circumstances.[58] Similar powers are also conferred by Article 44(1) and (3) of Regulation 1107/2009, particularly if current scientific knowledge indicates that a plant protection product poses harmful effects on human or animal health or unacceptable environmental impacts.[59]

The two rulings of the CJEU elucidate, albeit to different degrees, that Regulation 1107/2009 confers substantial discretionary power on individual Member States in their decision-making processes, allowing for the introduction of national measures that align with the specific health and environmental priorities of each country. The Court's position stands in contrast to the arguments of the Council of State, which acknowledges the producers' entitlement to use EU-approved active substances in the manufacture of plant protection products and to market them without any scope for Member State intervention.[60] While the Italian administrative court's interpretation of the EU pesticide framework for market placement undoubtedly advances EU centralisation efforts and legal certainty, it simultaneously undermines Italy's ability to conduct new evaluations of products when reliable technical and scientific information is available, and to decide according to its specific environmental or agricultural circumstances as well as the precautionary principle.

5.2. Primacy Versus Autonomy

The principle of primacy of EU law stands as a fundamental pillar of European integration, established through landmark rulings by the Court of Justice.[61] The primacy doctrine essentially requires Member States to give immediate effect to EU law and to set aside those provisions of national law—including constitutional law—and administrative practices that could impede the correct application of EU law. Notwithstanding the important role of this principle in governing the relationship between the EU and Member

58 ibid, paras 58-61.
59 ibid, paras 65-66.
60 Case No. 04307/2020 (n 10), para 34.
61 For an overview of the development of the primacy doctrine by the Court of Justice, see D Chalmers and A Tomkins, *European Union Public Law: Text and Materials* (Cambridge University Press 2007) 183-188.

State legal orders,[62] this section asserts that the Council of State's judgment has oversimplified the complex interplay between EU law and Member States' autonomy. More specifically, while the Italian administrative court refers to the principle of primacy of EU law to support its argument, it overlooks other fundamental principles that shape the relationship between EU regulatory actions and Member States' legal orders, particularly the (principle) of institutional autonomy.[63]

The origin of the principle of institutional autonomy is commonly grounded in the Court of Justice's *International Fruit Company* case, where the Court declared that it is 'solely a matter for the constitutional system of each state' the question of how to organise the exercise of the implementation powers attributed by EU law to the Member States.[64] Developed further in the case law of the CJEU—which has referred to institutional autonomy, though not explicitly as a principle—and by legal scholars, there is consensus that institutional autonomy essentially seeks to maintain the capacity of Member States to organise the implementation of EU law in accordance with their domestic constitutional, organisational, and administrative structures.[65]

62 ME Vergara and G Villalta Puig, 'The Quiet Architect Finds its Voice: The Primacy of the Law of the European Union after Press Release No 58/20 of the Court of Justice of the European Union' (2021) 27[4] European Public Law 673, 679. The interplay between the primacy of EU law and the constitutional law of the Member States remains a subject of significant scholarly debate. In this regard, D Sarmiento, 'Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law' (2013) 50[3] Common Market Law Review 875; and M Claes, 'The Primacy of EU Law in European and National Law' in D Chalmers and A Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2017).

63 While the exact nature and scope of the principle of institutional autonomy of the Member States 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, J Jans et al, *Europeanisation of Public Law* (Europa Law Publishing 2007) 18; M Verhoeven, 'The "Costanzo Obligation" and the Principle of National Institutional Autonomy: Supervision as a Bridge to Close the Gap?' (2010) 3[1] Review of European Administrative Law 23, 24; S Lavrijssen and A Ottow, 'The Legality of Independent Regulatory Authorities' in L Besselink, F Pennings and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer 2011) 73, 74; A Biondi and G Gentile, 'National Procedural Autonomy' in Ruiz Fabri H (ed), *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019). References can also be found 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 AG 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.

64 Joined Cases C-51 to 54/71 International Fruit Company NV and others v Produktschap voor groenten en fruit [1971] ECLI:EU:C:1971:128, para. 4.

65 For instance, Jans et al (n 63) 18. In the CJUE case law, most recently, Case C-796/19 *European Commission v Republic of Austria* [2020] ECLI:EU:C:2020:920, paras 60-61.

As an additional remark, the EU Treaties remain silent concerning the possibility for the EU to promote changes to the institutional administrative designs of Member States. As a result, administrative arrangements remain formally a prerogative of the Member States, which can choose the level of governance entrusted to enforce EU obligations (local, regional, or central).[66] Yet, this autonomy inevitably leads to variations in enforcement practices across the EU, which have posed challenges for consistency, uniformity, and cooperation in the application of EU law.[67] In response, while the EU has increasingly delegated public authority for policymaking and policy enforcement to different types of national administrators, it has also bound them to specific structural, functional, and procedural standards.[68] Although these interventions are now widespread in many policy areas, they should be considered exceptions to the principle of institutional autonomy and, to some extent, contestable given the lack of EU competence over the organisation of Member States' administrative structures.[69]

In this light, it is important to recall the significance of the principle of institutional autonomy for the controversy discussed in this case note. The Council's perspective fails to acknowledge that Member States have the autonomy to confer defined regulatory powers upon municipalities and if Italy were to grant municipalities some form of competence to regulate pesticides, this allocation would not constitute a legislative or administrative practice that contravenes EU law; instead, it would represent a legitimate exercise of the principle of institutional autonomy.

6. Recommendations and Conclusions

This section concludes by arguing for the establishment of a more participatory pesticide management framework that provides a more active role for local communities and other stakeholders, such as environmen-

66 D Dimitrakopoulos, 'The Transposition of EU Law: "PostDecisional Politics" and Institutional Autonomy' (2001) 7[4] European Law Journal 442, 444.

67 R Schütze, *European Constitutional Law* (2nd ed, Cambridge University Press, 2016) 334.

68 S De Somer, 'The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective' (2102) 5[2] Review of European Administrative Law 93; and P Mattioli, 'The Quasi-Judicial Role of National Competent Authorities: an Ambiguity that the Principle of Effective Judicial Protection could help address?' (2024) 17[2] Review of European Administrative Law 99, 101-105.

69 S Kadelbach, 'European Administrative Law and the Law of a Europeanized Administration' in C Joerges and R Dehousse (eds), *Good Governance in Europe's Integrated Market, Collected Courses of the Academy of European Law* (Oxford University Press, 2002) 171.

tal organisations.[70] The existing institutional framework governing pesticide use is problematic because it largely excludes local communities and other stakeholders from meaningful participation in the decision-making process.[71] At present, the interests of local communities depend on EU and national regulatory systems, which often prioritise the needs of large-scale agricultural producers over the specific health and environmental concerns of local populations.[72] The lack of a legal basis in the Italian legal system for municipal authorities to impose restrictions on pesticide use within their territories is a clear manifestation of this broader institutional shortcoming.

This institutional gap has significant consequences. It restricts the ability to conduct targeted assessments of health and environmental risks associated with pesticide use at the local level. Furthermore, it undermines the democratic legitimacy of regulatory decisions, as those most directly affected by pesticide policies are deprived of a voice in the decision-making process. To address these deficiencies, this case note argues for the necessity of reforming the regulatory framework to ensure that local communities and other stakeholders are actively involved in shaping pesticide governance at the Member State level.

In this respect, this case note recalls that Member States retain the autonomy to implement EU law in accordance with their own constitutional traditions. This autonomy extends to their ability to determine the appropriate level of

70 This discussion intersects with broader cross-disciplinary debates on how public participation in decision-making could enhance the legitimacy of non-majoritarian institutions at both the national and EU levels. G Majone, 'The regulatory state and its legitimacy problems' (1999) 22[1] West European Politics 1, 10; J Mendes, 'Participation and participation rights in EU law and governance' in H Hofmann and A Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration* (Edward Elgar Publishing 2009) 258-262; C Braun and M Busuioc, 'Stakeholder engagement as a conduit for regulatory legitimacy?' (2020) 27[11] Journal of European Public Policy 1599; and A Volpato and M Eliantonio, 'The participation of civil society in ETSI from the perspective of throughput legitimacy' (2024) 37[5] Innovation: The European Journal of Social Science Research 1375.

71 Literature emphasises how specific reforms to decision-making procedures could impact public support for EU pesticide regulation. For instance, Zeitlin et al, 'Reforming EU Pesticides Regulation, Rebuilding Public Support' (n 7).

72 M Morvillo and M Weimer, 'Who shapes the CJEU regulatory jurisprudence? On the epistemic power of economic actors and ways to counter it' (2022) 1[3] European Law Open 510, 514-516. Literature also discusses the regulatory capture of national authorities, ie, national competent authorities responsible for authorising plant protection products are influenced by the pesticide industry's interests, compromising their ability to maintain an appropriate balance between industry interests and the imperative to protect public health and the environment. For instance, EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 3) Annex III-18-20; J Beyers and S Arras, 'Who Feeds Information to Regulators? Stakeholder Diversity in European Union Regulatory Agency Consultations' (2019) 40[4] Journal of Public Policy 573; and Mattioli, 'Member States' Discretion in Emergency Pesticide Authorisations' (n 7) 80

governance responsible for enforcing EU rules. As previously discussed, the principle of institutional autonomy is intentionally designed to allow Member States to establish their administrative arrangements in the manner they consider most suitable for fulfilling EU law requirements.[73] In this view, Member States can establish regulatory mechanisms that facilitate the participation of all relevant stakeholders in the pesticide management process, with particular attention to incorporating the perspectives of local communities and environmental organisations.

Drawing from the controversy discussed in this case note, a crucial step to enhance public engagement would be the introduction of mandatory consultations with affected communities.[74] For example, national authorities should establish structured and ongoing dialogues with interested stakeholders both before and after granting authorisations. This process would allow authorities to adapt their decisions in response to new scientific evidence presented by these stakeholders, as well as to address specific local needs and concerns. This approach would also align with the recent CJEU case law.[75]

By establishing a more participatory framework for pesticide governance, Member States would significantly strengthen the legitimacy and effectiveness of their measures. As well documented in the literature, enhanced citizen involvement not only reinforces legitimacy but also increases acceptance of regulatory outcomes.[76]

73 D Dimitrakopoulos, 'The Transposition of EU Law' (n 66) 444.

74 Similarly, EPRS, 'Regulation (EC) 1107/2009: European Implementation Assessment' (n 3) Annex-III 100.

75 Joined Cases C-309/22 and C-310/22 (n 52).

76 On how the involvement of individuals directly impacted by policy outcomes in the decision-making process can enhance both compliance and the democratic legitimacy of the resulting decisions, see M Morvillo, 'Why Should Citizens Trust EU Regulatory Expertise? Legal Warrants, Science and Politics in EU Food Governance' in R Barradas de Freitas and S Lo Iacono (eds), *Trust Matters – Cross-Disciplinary Essays* (Cheltenham, Hart 2021) 229; A Volpato and A Offermans, 'Lessons for Participation from an Interdisciplinary Law and Sustainability Science Approach: The Reform of the Sustainable Use of Pesticides Directive' (2023) 14[2] European Journal of Risk Regulation 253, 255; and J Zeitlin et al, 'Governance reforms and public acceptance of regulatory decisions: Cross-national evidence from linked survey experiments on pesticides authorization in the European Union' (2023) 17 Regulation & Governance 980.

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CASE NOTES

How Can New Scientific and Technical Knowledge Affect the Authorisation of Plant Protection Products at Member State Level? Some Clarifications from the Court of Justice

Pietro Mattioli

Faculty of Law, Political Science and Criminology, Department of European law, University of Liège, Belgium
Email: pietro.mattioli@uliege.be

Most reliable scientific knowledge and Member State authorisation of plant protection products (area of discussion)

Case C-308/22, PAN Europe (Closer) [2024] EU:C:2024:350.

Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 1107/2009 – Authorisation for placing plant protection products on the market – Examination for authorisation – Article 36 – Discretion of the Member State concerned, for the purposes of Article 36(2), with regard to the scientific risk assessment carried out by the Member State examining the application for authorisation under Article 36(1) – Article 44 – Withdrawal or amendment of an authorisation – Precautionary principle – Effective judicial remedy – Current scientific and technical knowledge.

Joined Cases C-309/22 and C-310/22, PAN Europe (Evaluation of Endocrine Perturbation Properties) [2024] EU:C:2024:356.

Reference for a preliminary ruling – Approximation of laws – Regulation (EC) No 1107/2009 – Authorisation for placing plant protection products on the market – Examination for authorisation – Article 4 – Article 29 – Conditions – No harmful effect – Criteria – Endocrine disrupting properties – Regulation (EU) 2018/605 – Precautionary principle – Current scientific and technical knowledge.

Articles 4(1), 29(1)(a) and (e), and 36(1), (2), and (3) of Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market OJ L 309 of 24.11.2009, pp 1–50.

I. Facts

The disputes in the main proceedings stem from three separate complaints filed by Pesticide Action Network Europe (PAN Europe) against the authorisation by the Dutch national authority competent to enforce Regulation 1107/2009, the Plant Protection

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Products and Biocides Approval Board (CTGB),[1] of three plant protection products (pesticides): Closer, Dagonis and Pitcher.

Case C-308/22 (Closer) refers to the extension by the Netherlands of the authorisation of the plant protection product Closer, which contains the approved active substance sulfoxaflor.[2] In 2015, the pesticide company Dow AgroScience BV applied for an extension of the authorisation of Closer in multiple countries belonging to the centre zone, including the Netherlands.[3] Ireland, as the designated Member State for the examination of the application under Article 36(1) of Regulation 1107/2009, conducted the risk assessment of the product and the evaluation of the dossier. The assessment was based on the 2002 Guidance Document on Terrestrial Ecotoxicology and not on the more recent 2013 EFSA Guidance Document on risks to bees.[4] Yet, the CTGB decided to extend Closer's authorisation in 2019 on the basis of Ireland's assessment.

Case C-309/22 relates to the authorisation by the CTGB of the fungicide crop protection product Pitcher containing the active substances fludioxonil and folpet, among others.[5] In 2015, the pesticide company Adama Registrations BV applied for marketing authorisation of Pitcher in the Netherlands. In 2019, the CTGB granted the authorisation for this product until 2021, without however assessing the endocrine disrupting properties of the substance fludioxonil in light of the new scientific criteria of Regulation 2018/605.[6]

Lastly, Case C-310/22 concerns the authorisation by the CTGB of the fungicide Dagonis, which contains the active substances difenoconazole and fluxapyroxad.[7] In 2016, the pesticide company BASF Nederland BV applied for marketing authorisation of Dagonis in various Member States, including the Netherlands. The United Kingdom, as the Member State designated to examine the application for the centre zone, carried out the scientific risk assessment of the fungicide. Considering the positive results of this assessment, the CTGB in 2019 authorised Dagonis for certain crops until December 2020. However, the Dutch authority did not examine the endocrine disrupting properties of that product in light of new criteria, such as Regulation 2018/605 and the EFSA guidance document for the identification of endocrine disruptors in the context of Regulation 1107/2009.[8]

Three separate references for a preliminary ruling were made by the Administrative Court of Appeal for Trade and Industry in the Netherlands, where PAN Europe had sought the annulment of the CTGB's decisions. The Court of Justice of the European Union (CJEU) joined the Cases C-309/22 and C-310/22 (Evaluation of Endocrine Perturbation Properties).

[1] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L 309/1, Art 75.

[2] Case C-308/22, *PAN Europe (Closer)* [2024] EU:C:2024:350; and Commission Implementing Regulation (EU) 2015/1295 of 27 July 2015 approving the active substance sulfoxaflor [2015] OJ L 199/8.

[3] Regulation 1107/2009 (n 1), Annex I.

[4] European Commission, "Guidance Document on Terrestrial Ecotoxicology" SANCO/10329/2002 (17 October 2002); and European Food Safety Authority, "Guidance on the risk assessment of plant protection products on bees (Apis mellifera, Bombus spp. and solitary bees" (2013) 11 EFSA Journal 3295.

[5] Joined Cases C-309/22 and C-310/22, *PAN Europe (Evaluation of Endocrine Perturbation Properties)* [2024] EU:C:2024:356. At the time of the application, the validity of the approval of the two active substances was already extended. Commission Implementing Regulation 2021/1449 extended the validity of fludioxonil until 31 October 2022, and Commission Implementing Regulation (EU) 2021/745 extended the validity of folpet until 31 July 2022.

[6] Commission Regulation (EU) 2018/605 of 19 April 2018 amending Annex II to Regulation (EC) No 1107/2009 by setting out scientific criteria for the determination of endocrine disrupting properties [2018] C/2018/2229/33.

[7] Joined Cases C-309/22 and C-310/22 (n 5). Commission Implementing Regulation (EU) No 540/2011 of 25 May 2011 implementing Regulation (EC) No 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances [2011] OJ L 153/1.

[8] Commission Regulation 2018/605 (n 6); and European Chemicals Agency et al., "Guidance for the identification of endocrine disruptors in the context of Regulations (EU) No 528/2012 and (EC) No 1107/2009" (2018) 16 EFSA Journal 5311.

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II. Judgments

In the three preliminary references to the Court of Justice, the central issue is the impact that new scientific and technical knowledge could have on the authorisation of a plant protection product at the Member States' level.

In the *Closer* case, the Court is initially asked whether Article 36 of Regulation 1107/2009 permits the Member State deciding on the authorisation for placing a plant protection product on the market (Member State concerned) under Article 36(2) and (3) to deviate from the scientific risk assessment of that product conducted by the Member State examining the application for such authorisation (reference Member State) under Article 36(1).[9] The Court clarifies that Regulation 1107/2009 allows for this possibility. A new assessment is specifically possible when the Member State concerned has access to "the most reliable scientific and technical data" not considered by the Member State examining the application for such authorisation under Article 36(1).[10] These data must indicate an unacceptable risk to human or animal health, or to the environment.

Another question is how to settle differences of opinion between Member States, specifically when one Member State believes that the scientific risk assessment conducted by the reference Member State does not adequately address its concerns regarding health or environmental issues specific to its territory. The Court clarifies that the concerned Member State may conduct a new risk assessment without the need to involve the Member State that carried out the initial examination of the product under Article 36(1).[11]

Finally, in the *Closer* case, the Court addresses two other additional elements. With the second question, the Court is specifically asked whether the national court of the Member State concerned reviewing the lawfulness of an authorisation decision made by that Member State can also evaluate the scientific assessment conducted by another Member State under Article 36(1), when this assessment is used for authorisation purposes in the concerned Member State. The Court examines this inquiry in light of the principle of effective judicial protection. It affirms that the national court has indeed the authority to review pesticide authorisations made under Article 36(2) and (3) of Regulation 1107/2009.[12] For that purpose, the national court can evaluate if these decisions comply with the substantive and procedural conditions outlined in that Regulation. It can also consider the conclusions of the evaluation carried out by the reference Member State under Article 36(1), subject to an important limitation: a national court cannot substitute its own assessment to the scientific assessment of a national competent authority.[13] Finally, the fourth and fifth questions concern the possibility of challenging pesticide authorisations through national courts or authorities. In this regard, the Court declares that Articles 29(1)(e) and 36(2) of Regulation 1107/2009 permit to submit the most reliable scientific and technical data available before these bodies in order to demonstrate that the scientific risk assessment of a plant protection product, conducted by the Member State evaluating the application under Article 36(1), may lack sufficient reasoning or justification.[14] This approach aligns with the precautionary principle that is at the foundation of Regulation 1107/2009.[15]

In the *Evaluation of Endocrine Perturbation Properties* case, the Court is called upon to clarify whether under Article 29(1)(a) and (e), and the second and third subparagraphs of

[9] Case C-308/22 (n 2), para 51.

[10] Ibid, 70. The Court follows the Advocate General's reasoning. Case C-308/22, *PAN Europe (Closer)* [2024] EU:C:2023:716, Opinion of Advocate General Medina, paras 55–57.

[11] Case C-308/22 (n 2), para 84.

[12] Ibid, para 76.

[13] Ibid, paras 75–76.

[14] Ibid, paras 88 and 110.

[15] Ibid, paras 103–107.

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Article 4(1) of Regulation 1107/2009, read in conjunction with point 3.6.5 of Annex II to that Regulation, a national competent authority is required to conduct its own evaluation of the potential health risks associated with the endocrine disruptors of an approved active substance during the product authorisation process, even though this assessment has already been performed at the EU level. In that regard, the Court explains that while the Member States cannot reassess the Commission's approval of an active substance when evaluating an application for a product containing that substance, the authorisation of such a product cannot be reduced to a mere automatic extension of the EU approval of the active substance it contains.[16] The Court clarifies that Article 29(1)(a) and (e), read in conjunction with Article 4(1), must be interpreted as requiring national competent authorities when assessing an application for authorisation to place a plant protection product on the market, to take into account the adverse effects of the endocrine disrupting properties of an active substance.[17] This interpretation aligns with both the literal text of these provisions and the precautionary principle.[18]

III. Comments

The *Closer* and *Evaluation of Endocrine Perturbation Properties* cases represent important additions to the Court of Justice's case law regarding the procedures to place pesticides on the market. However, unlike earlier cases that have primarily concerned the authorisation of active substances at the EU level,[19] the very specificity of the cases commented on here is that they relate to the Member State level authorisation of plant protection products after the risk assessment of the products has been already done in another Member State and the active substances have been already approved at EU level. In this regard, a similar parallel development is the *PAN Europe v État belge* case, where the main dispute refers to national emergency authorisations under Article 53 of Regulation 1107/2009 of plant protection products containing active substances prohibited at EU level.[20] In this context, the Court clarifies that these national practices contradict the Regulation's primary objective of prioritising health and environmental protection over enhancing plant production.

Despite their specificity, the *Closer* and *Evaluation of Endocrine Perturbation Properties* cases should not be viewed in isolation from the previous Court's case law on pesticide authorisation. In this regard, an important common denominator is the reference to the precautionary principle and the interest in health and environmental protection.

While Regulation 1107/2009 declares to be underpinned by the precautionary principle in its entirety,[21] the practical application of this principle by risk managers at both EU and

[16] Joined Cases C-309/22 and C-310/22 (n 5) 82. Also, Case T-600/15, *PAN Europe and Others v Commission* [2016] EU:T:2016:601, para 33.

[17] Joined Cases C-309/22 and C-310/22 (n 5), para 100. The Court follows the reasoning of AG Medina. Joined Cases C-309/22 and C-310/22, *PAN Europe (Evaluation of Endocrine Perturbation Properties)* [2024] EU:C:2023:717, Opinion of Advocate General Medina, paras 68–75.

[18] Joined Cases C-309/22 and C-310/22 (n 5), para 88–93.

[19] Case T-229/04, *Kingdom of Sweden v Commission of the European Communities* [2007] ECR II-02437; Case C-499/18 P, *Bayer CropScience AG and Bayer AG v European Commission* [2021] EU:C:2021:367; and Case C-374/20 P, *Agrochem-Maks d.o.o. v European Commission* [2021] EU:C:2021:990.

[20] Case C-162/21, *Pesticide Action Network Europe ASBL and Others v État belge* [2023] EU:C:2023:30.

[21] Regulation 1107/2009 (n 1) Art 1(4). The EU has also integrated the precautionary principle into other EU policies. Again, the Court has helped to clarify how the principle operates. K De Smedt, and E Vos, "The Application of the Precautionary Principle in the EU" in HA Mieg (eds) The Responsibility of Science. Studies in History and Philosophy of Science, (Springer, 2022) 175–176.

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Member State levels remains largely undefined within the framework of that Regulation.[22] The role of the Court in clarifying this ambiguity has been crucial so far.[23]

Fundamentally, the Court has established that before an active substance can be approved or a product can be authorised, it must be established beyond reasonable doubt that their use does not present any hazard or risk to health and the environment.[24] In that regard, the existence of evidence that casts doubt on the safety of a substance or product justifies, in principle, the refusal to authorise them.[25] However, this precautionary measure cannot be based on hypotheses that have not been scientifically proven. Instead, this measure should be based on an evaluation of the potential health risks associated with the substance and product as well as on a rigorous health risk assessment based on the most reliable and up-to-date scientific evidence.[26] Once one of these criteria is met, the precautionary principle allows protective measures to be taken without waiting for the full extent of the risks to be understood.[27] Moreover, the Court has also clarified that any such measures must align with the principle of proportionality, ensuring that the response is proportionate to the identified level of risk.[28]

The Court has essentially referred to the precautionary principle as a mechanism to guide the discretion of both the Commission and national competent authorities and ground their decisions in comprehensive scientific analyses. The two rulings commented in this note represent an important development in this area. The Court explains that in compliance with the precautionary principle, national competent authorities are required to withdraw the authorisation of a plant protection product in the event that new data should emerge demonstrating that the product has a harmful effect on health or the environment.[29] For that purpose, new scientific evidence may also be brought before the authorities or courts of the Member States making the final evaluation of the product under Article 36(2) to prove the existence of risks that were not considered by the previous risk assessment conducted by the Member States under article 36(1).[30] Moreover, the Court also establishes that national authorities must conduct their own independent assessments when making decisions on pesticide approvals, taking into account the most reliable scientific and technical data available. This requirement goes beyond automatically relying on the EU level active substance approvals or evaluations from other Member States.[31]

Under these circumstances, the Court introduces additional layers of scrutiny for pesticides in the interest of health and environmental protection. However, the trade-off for this increased protection is the potential erosion of other established legal principles.

[22] E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing 2007) 211–212; and M Weimer and G. Pisani, "Expertise as Justification: The Contested Legitimation of the EU 'Risk Administration'" in M Weimer and A de Ruijter (eds) *Regulating Risks in the European Union* (Hart Publishing 2017).

[23] Most recently, the Court has also confirmed the compatibility of Regulation 1107/2009 with the precautionary principle in Case C-616/17, *Criminal Proceedings against Mathieu Blaise and Others* [2020] EU:C:2019:800. Leonelli, "Judicial Review of Compliance with the Precautionary Principle from Paraquat to Blaise: 'Quantitative Thresholds,' Risk Assessment, and the Gap Between Regulation and Regulatory Implementation" (2021) 22 German Law Journal 184, 195–196.

[24] Case T-229/04 (n 18), paras 161 and 170.

[25] Case C-333/08, *European Commission v French Republic* [2010] ECR-I-00757, para 91 and case law mentioned.

[26] Case C-616/17 (n 23) para 46 and case law mentioned.

[27] Case C-616/17 Blaise and Others [2019] EU:C:2019:190, Opinion of Advocate General Sharpston, para 48.

[28] Joined Cases C-78/16 and C-79/16, Giovanni Pesce and Others v Presidenza del Consiglio dei Ministri – Dipartimento della Protezione Civile and Others [2016] EU:C:2016:428, para 48.

[29] Case C-308/22 (n 2) 107; and Joined Cases C-309/22 and C-310/22 (n 3), para 97.

[30] Case C-308/22 (n 2) para 110.

[31] Ibid, paras 68–70. Case C-308/22 (n 2) 107. To a certain degree, the Court extends the boundaries beyond what was previously established in Case C-313/19 P, *Associazione Nazionale GranoSalus – Liberi Cerealicoltori & Consumatori (Associazione GranoSalus) v European Commission* [2020] EU:C:2020:869, para 55.

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These rulings highlight the complex interplay between safeguarding health and environmental protection through the application of the precautionary principle, on the one hand, and improving the functioning of the internal market through the principle of mutual recognition, on the other hand. Regulation 1107/2009 tries to balance these competing interests. In this regard, Article 40 of this Regulation introduces a mutual recognition procedure. This system enables the holder of an authorisation for a product in one Member State to apply for authorisation for the same product in another Member States.[32] To facilitate this process, Regulation 1107/2009 also identifies three geographical zones (North, Centre, and South) based on similar agricultural and environmental conditions.[33] The zonal procedure generally enables applicants to submit multiple applications across Member States within the same zone while designating one country for dossier evaluation.[34] When deciding, the Member States concerned must base their decision on the conclusions of the assessment by the reference Member State under Article 36(1).[35] While these procedures intend to streamline the authorisation process, they also cautiously balance this interest with that of health and environmental protection allowing concerned Member States to take mitigation measures or refuse to grant authorisation under specific circumstances.[36]

However, mutual recognition has not achieved its intended success in improving the functioning of the internal market, as many Member States have shown reluctance to cooperate within this framework.[37] In this respect, the Court's judgment in the *Closer* case has the potential to further undermine the principle of mutual recognition, since it allows Member States to conduct independent risk assessments when new scientific knowledge is available, going beyond the evaluation of the reference Member State.

Moreover, the Court seems to reduce the legal certainty of substance and product authorisations by warning the applicants that they "may expect that the state of scientific and technical knowledge will change during the authorisation procedure or during the period for which an active substance is approved or a plant protection product is authorised."[38] As already mentioned, the Court not only allows national competent authorities to review the assessment of the endocrine disrupting properties of an active substance, even if an assessment has already been made at EU level but also allows them to withdraw a product authorisation or take emergency measures in the light of new scientific evidence.

While jeopardising mutual recognition and legal certainty, these recent judgments have the potential to lead to an enhanced evaluation and scrutiny of decisions taken by national competent authorities, ensuring higher health and environmental protection standards for when plant protection products enter the market. However, in order to effectively implement the Court's vision of more rigorous scientific assessment, it is crucial that national competent authorities carry out objective and impartial assessments, taking concrete account of new scientific data, and that they make transparent decisions

[32] Regulation 1107/2009 (n 1), Art 40(1).
[33] Ibid, Annex I.
[34] Ibid, Arts 33(1) and 35.
[35] Ibid, Art 36(2).
[36] Ibid, Art 36(3).
[37] European Parliamentary Research Service (EPRS), European Implementation Assessment: Regulation (EC) 1107/2009 on the placing of plant protection products on the market' (2018) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2018)615668> accessed 20 November 2024, 26; and W de Braal, "National responses to great uncertainty in EU authorisation of pesticides and industrial chemicals" (2023) 3 Review of European Administrative Law 33, 46–47.
[38] Case C-308/22 (n 2) 108; and Joined Cases C-309/22 and C-310/22 (n 5) para 98.

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throughout the authorisation process, allowing for public scrutiny and potential review.[39] These conditions are essential to guarantee that national authorities act in the public interest and an essential condition for the legitimacy of their action.[40] However, national competent authorities have demonstrated serious deficiencies in terms of independence and transparency when authorising plant protection products,[41] making it very unlikely that the Court's judgments will be effectively implemented. Under these circumstances, the effectiveness of these rulings depends on the EU, or alternatively each Member State, taking action. Therefore, as already suggested elsewhere,[42] the EU should intervene to strengthen the transparency and independence requirements of these authorities when acting under Regulation 1107/2009.

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[39] In this regard, the glyphosate saga has highlighted the limited access to information and the possibility to scrutiny in relation to the procedures to approve active substances. Case T-716/14, *Anthony C Tweedale v European Food Safety Authority* [2019] EU:T:2019:141; and Case T-329/17, *Heidi Hautala and Others v European Food Safety Authority* [2019] EU:T:2019:142. In more detail, M Morvillo, "The General Court Orders Disclosure of Glyphosate-related Scientific Studies: Tweedale, Hautala, and the Concept of Environmental Information in the Context of Plant Protection Products" (2019) 10 European Journal of Risk Regulation 419, 426–427; and M Morvillo, "Glyphosate Effect: Has the Glyphosate Controversy Affected the EU's Regulatory Epistemology?" (2020) 11 European Journal of Risk Regulation 422.

[40] Case C-616/17 (n 23) para 102; and A de Boer, M Morvillo, and S Röttger-Wirtz, "Fragmented Transparency: The Visibility of Agency Science in European Union Risk Regulation" (2023) 14 European Journal of Risk Regulation (2023) 313, 317–319.

[41] EPRS (n 37), 55–56 and Annex III-79 et seq. Case C-442/14, *Bayer CropScience SA-NV and Stichting De Bijenstichting v Board for the Authorisation of Plant Protection Products and Biocides* [2016] EU:C:2016:890.

[42] EPRS (n 367), Annex III-79 et seq.; Morvillo, "The General Court Orders Disclosure of Glyphosate-related Scientific Studies" (n 39) 426–427.

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