

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

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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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I. 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 and G 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 depoliticisation' 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 Rittleng (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 Paper, 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 Reynolds, ‘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 Juizes 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.	<ul style="list-style-type: none"> – 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.
<p>Internal independence:</p> <ul style="list-style-type: none"> – Impartiality (the absence of any interest in the outcome of the proceedings). 	<ul style="list-style-type: none"> – 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
<p>Internal and external independence require rules:</p> <ul style="list-style-type: none"> – Composition of the body. – Appointment, length of service and grounds for abstention, rejection, and dismissal of its members. 	<ul style="list-style-type: none"> – 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.

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 Streeel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' [2008] *Reflète 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 referring 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 EEC Directive 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

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: <ul style="list-style-type: none"> – Between operators in a market. – Protect and enforce individuals' rights. 	For the exercise of these tasks: Powers of investigations: <ul style="list-style-type: none"> – Request for information. – Inspections. Corrective powers: <ul style="list-style-type: none"> – 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 Bulgaria 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

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 Juizes 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 Juizes 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 Arnall, '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 holds 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/pcQox2-wL>> accessed 6 May 2024.