Chapter 10

Structuring 'procedural fairness' through the principle of effectiveness: a promising starting point for a more uniform legal protection in EU digital law and beyond?

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In addition to substantive fairness dimensions, the new EU digital law instruments also increasingly pay attention to procedural fairness conditions. Those conditions have to be respected in both administrative and judicial enforcement contexts, the contours of which have been regulated to a different extent in the different new legislative instruments. This chapter questions to what extent the EU law principle of effectiveness could serve as an instrument to streamline those requirements. More particularly, it revisits the potential for the principle of effectiveness to play such a structural role, prior to identifying key areas in which its application may be triggered in the near future.

Key words: procedural autonomy – effectiveness – fair trial – institutional design – digital services - enforcement

1 Introduction

In addition to important substantive law obligations, the new EU digital law instruments have given rise to increased administrative enforcement obligations. Per those obligations, Member States have to set up or designate administrative authorities, provide for effective enforcement procedures and ensure, more generally, that EU legal norms are complied with. The various Regulations in that regard impose minimum requirements and procedures tailored to the specificities of each instrument.[2] As such, the EU legislator set out the basic features of how Member States should contribute to the effective administrative enforcement of the new EU digital rules.[3]

Considering the growing attention to effective administrative enforcement structures, it has been

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[2] See Articles 49-60 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 Act) [2022] OJ L277/1 (hereafter : DSA) ; Articles 26-28 of Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) [2022] OJ L152/1 (hereafter DGA) ; Articles 37-41 of Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) [2023] OJ L2854 (hereafter DA) ; Articles 28-37, 70 and 85-87 of Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L1689 (hereafter AIA) ; Articles 37-38 of Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (hereafter DMA).

[3] Recital 109 DSA ; recital 69 DA; recital 9 AIA ; recitals 65 and 86 DMA.

argued that the EU legislature paid comparatively less attention to the coherence and constitutional underpinnings of such enforcement frameworks.[4] As a result, it will likely fall upon the EU Courts to address that issue, at least in part. Against that background, this chapter questions whether the general EU law principle of effectiveness could be relied upon additionally to enhance those structures' overall procedural fairness. That question is not purely theoretical, as the principle of effectiveness has been instrumental in supporting procedural fairness requirements in the setup and implementation of administrative enforcement frameworks in areas like competition and personal data protection. In those fields, the EU Courts have, indeed, relied on the principle of effectiveness to enhance the setup and structuring of a procedurally fair administrative enforcement framework.

In its general meaning, procedural fairness the framework through which public decision-making can be structured in such a way that key values such as factual and legal accuracy, transparency, the balancing of all (public) interests involved and the consultation of all relevant parties are considered.[5] The concept requires social planners to pay attention to, on the one hand, individual procedural rights accompanying administrative decision-making and judicial review procedures and, on the other hand, structural features through which those decision-making procedures take place, such as independent and impartial and expertise-based decision-making bodies.[6] In essence, a fair procedure is one that is embedded in an institutional framework that allows for factually and legally correct decision-making in a sufficiently transparent, timely and organised manner, and allowing the exercise of the rights of those involved in the decision-making processes.[7]

Although key elements of procedural fairness have been addressed by the EU legislature, the latter has done so in a haphazard and often implicit manner.[8] Questions can therefore be raised on whether the tools relied upon by the EU Courts to streamline Member States' enforcement structures may play a role in rendering enforcement frameworks procedurally fair and thus, rule of law-compliant. This chapter revisits the potential for the EU general principle of effectiveness to support this.

Section 2 will revisit the role of the principle of effectiveness in the setup of enforcement structures in EU law. Starting from an overview of the principle's key role in the design and fine-tuning of judicial remedies and procedural rules, it will revisit the principle's more recent extrapolation to the design and structuring of administrative enforcement mechanisms. The latter development can

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4 See Simona Demková and Giovanni De Gregorio, 'The Looming Enforcement Crisis in European Digital Policy – A rule-of-law centered path forward', (2025) *Verfassungsblog* https://verfassungsblog.de/the-looming-enforcement-crisis-ai-dsa-eu/ last accessed 12 February 2025.

5 In common law systems, procedural fairness sometimes rather narrowly refers to the rights of defence during the judicial stage only, see by way of example, https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-alrc-report-129/14-procedural-fairness-2/procedural-fairness-the-duty-and-its-content/ last accessed 12 February 2025. However, theoretically, the concept is broader. On what could constitute procedural fairness, see Derek McKee, 'The Standard of Review for Questions of Procedural Fairness' (2016) 41 *Queen's Law Journal* 355-408 See for a bottom-up perspective, Tom Tyler, 'What is procedural justice? Criteria used by citizens to assess the fairness of legal procedures' (1988) 22 *Law and Society Review* (1988), 103-135.

6 Tom Tyler ' Procedural Justice and the Courts' (2007) 44 *Court Review: The Journal of the American Judges Association* 27.

7 That conclusion also transpires from John Rawls, *A Theory of Justice* (Harvard University Press 1999) 74. Fairness in the procedural setup also links in with the (perceived) legitimacy of procedures, see also the chapter by Ljupcho Grozdanovski in this volume and Denis J. Galligan, *Due Process and Fair Procedures. A Study of Administrative Procedures* (OUP 1997) 57.

8 This is not only the case in digital law, but in other fields as well. For an overview of the legislator's ventures into imposing administrative procedural and design obligations across 18 fields of EU law, see https://www.eulegalstudies.uliege.be/cms/c_8012264/en/eulegalstudies-eudaimonia?id=c_8012264 last accessed 12 February 2025.

be found most notably in the fields of EU competition law and data protection law. However, the reliance on the principle of effectiveness is not without limits. Effectiveness cannot be considered a panacea to correct every legislative failure to fully meet the requirements of procedural fairness. Having revisited the potential for and drawbacks of the principle of effectiveness in the context of administrative enforcement allows to better chart the potential that principle may have in the context of EU digital law. To that extent, section 3 will zoom in on the institutional enforcement designs underlying the Digital Services Act, Digital Markets Act, Data and Data Governance Acts as well as the Artificial Intelligence Act. That overview allows to observe that the new EU digital legislation, at the very least, creates room for the further extension of the judge-made 'procedural fairness' benchmarks implemented through the principle of effectiveness.

The chapter distinguishes three enforcement elements that, in the short term, will be the most likely candidates for the development of case law in that direction, without losing track of the inherent limits attached to the use of the principle of effectiveness in this context.

2 The principle of effectiveness as an instrument to enhance procedural fairness?

Although the concept of effectiveness is longstanding and well-established in EU legal jargon, its actual scope and significance are not as self-evident. The Court of Justice has recognised effectiveness clearly among the general principles of EU law.[9] At the same time, however, the Court's reliance on effectiveness has not always been coherent and has additionally been limited to cases involving access to justice and judicially offered remedies (2.1). More recently, the EU Courts have also relied on the same principle to identify more specific obligations Member States should comply with in the framework of EU-influenced administrative decision-making. Such obligations often flow from the adoption of secondary legislation imposing organisational and cooperation obligations on Member States' authorities. The fields of competition law and personal data protection are clear examples in that regard (2.2).

2.1 The traditional application of the principle of effectiveness in EU law

Effectiveness is an attribute associated with the application of any legal rule.[10] In EU law, the concept has been given a specific legal meaning as a general principle of law.[11] The Court of Justice of the European Union (CJEU) has repeatedly referred to the effective implementation and application of EU law as justification for imposing on Member States new obligations, often of a procedural or remedial nature.[12] Distinct from its general meaning[13], effectiveness as a legal principle can require that Member States take on additional obligations next to those explicitly stated in legislative texts.[14] Those obligations have particularly arisen in relation to judicial

[9] Takis Tridimas *The General Principles of EU law* (OUP 2007, 2nd edition) 418-476.

[10] According to Pescatore, it is the soul of legal rules, see Pierre Pescatore, 'The Doctrine of Direct Effect : An Infant Disease of Community Law' (1983) 8 *ELRev* 135.

[11] For a more general appraisal, see Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law : a difficult concept in legal scholarship', (2021) 11 *Juridical Tribune* 5-29.

[12] Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law : a difficult concept in legal scholarship', 14-15 ; for the evolution of the principle see Francesca Episcopo, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Paul Craig and Grainné De Búrca (ed.), *The Evolution of EU law* (OUP, 3rd edition, 2021).

[13] In general terms, effectiveness refers to the capacity of chosen legislative patterns in obtaining results that are as close as possible to realising the ideal expressed by the political actors, considering the context of operation, see Mauro Zamboni, 'Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory' (2018) 9 *EJRR* 420. See on the emergence of the legal principle, Malcolm Ross, 'Effectiveness in the European Union Legal Order(s): Beyond Supremacy to Constitutional Proportionality?', (2006) 33 *ELRev* 476–498.

[14] Elvira Mendez-Pinedo, 'The principle of effectiveness of EU law : a difficult concept in legal scholarship', 17. See also Rob Widdershoven, 'National Procedural Autonomy and EU law limits' (2019) 12 *REALaw* 5-34. For

protection and access to remedies. In that constellation, the principle of effectiveness, in essence, serves as a constraint on Member States' so-called procedural (and institutional) autonomy.[15]

According to the EU Courts' well-known dictum, 'in the absence of [Union] rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law'.[16] Clearly, the Member States' procedural autonomy is not absolute.[17] Even in the absence of legislation laying out EU procedural rules, Member States are required under Article 4(3) TEU not to compromise EU law's substantive effectiveness and the protection of rights individuals derive from EU law.[18] Rooted in the principle of sincere cooperation, the twin principles of equivalence and effectiveness are typically used by the CJEU to frame national procedural autonomy in a field covered, but not fully harmonised by Union law.

The principle of equivalence requires from the Member States that their 'detailed procedural rules governing actions for safeguarding an individual's rights under EU law be no less favourable than those governing similar domestic actions'.[19] The principle of effectiveness, for its part, aims to ensure that Member States' procedural rules, even when applying equally to similar EU and domestic actions, do not 'make it impossible in practice or excessively difficult to exercise the rights conferred by EU law'.[20]

If procedural rules make practice impossible (e.g. by not allowing EU law-based claims from being

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a similar framing in the context of judicial remedies, see Mariolina Eliantonio and Elise Muir, 'The Principle of Effectiveness : under strain ?' (2019) 2 *REAlaw* 265.

15 For a general overview, see Walter van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *CMLRev* 501-536.Officially speaking, the CJEU only explicitly referred to the concept of 'procedural autonomy' since 2004 in CJEU, Case C-201/02 *Wells* EU:C:2004:12, para 67; see already Opinion of AG Jacobs in Joined Cases C-430/93 and C-431/93 *van Schijndel and van Vee,* EU:C:1995:185, para 18.

16 CJEU, Case 33/76 Rewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland EU:C:1976:188, para 5; Case 45/76 Comet v Produktschap Siergewassen EU:C:1976:191, para 13; see also already implicitly Case 13/68 SpA Salgoil v Italian Ministry of Foreign Trade, Rome EU:C:1968:54, p. 463. More recently, see also CJEU, Case C-432/05 Unibet EU:C:2007:163, para 39; Case C-40/08 Asturcom EU:C:2009 :615, para 41; Joined Cases C-317/08 to C-320/08 Alassini and Others EU:C:2010:146, para 49; Case C-676/17 Călin EU:C:2019:700, para 30 ; Case C-497/20 Randstad Italia EU:C:2021:1037, para 58.

17 As such, it is not a principle of EU law, see Pekka Haapaniemi, 'Procedural Autonomy: A Misnomer?' in Laura Ervo, Minna Gräns and Antti Jokela (ed.), *The Europeanization of Procedural Law and New Challenges to a Fair Trial* (Europa Law Publishing 2009) 33 ; Michal Bobek, 'Why there is no principle of 'procedural autonomy' of the Member States' in Bruno De Witte and Hans Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 320 and Rob Widdershoven, 'National Procedural Autonomy and EU law limits' 13.

18 CJEU, Case 45/76 *Comet v Produktschap Siergewassen* para 12; see also Markus Klamert *The principle of loyalty in EU law* (OUP 2014) 262 and Katri Havu 'EU Law in Member State Courts: "Adequate Judicial Protection" and Effective Application - Ambiguities and Nonsequiturs in Guidance by the Court of Justice?' (2016) 8 *Contemp Readings L & Soc Just* 159.

19 CJEU, Case C-93/12 *Agrokonsulting-04* EU:C:2013:43*,* para 36). The principle of equivalence comprises a non-discrimination rule (Case C-3/16 *Aquino* EU:C:2017:209, para 50; Case C-591/10 *Littlewoods Retail and Others* EU:C:2012:478, para 31. To the extent that a procedure exists under national law which can be considered to protect rights similar to the ones recognised at EU level in terms of purpose and characteristics (Case C-326/96 *Levez* EU:C:1998:577, para 43-44), that procedure cannot be more favourable to claimants than the one applying to the enforcement of a similar EU right (Case C-261/21 *Hoffmann-La Roche* EU:C:2022:534, para 45. See also Louis Feilhès *Le principe d'équivalence en droit de l'Union européenne* (Bruylant 2023).

20 CJEU Case C-453/99 *Courage and Crehan* EU:C:2001:181 para 29; Case C-432/05 *Unibet,* para 43; Case C-561/19 *Consorzio Italian management* EU:C:2021:799, para 61.

invoked within a reasonable time frame[21]) or excessively difficult (e.g. by imposing extremely short time-limits[22]), Member States' discretion in the field of procedure is considered to be exercised to the detriment of the effective application of EU law. According to the Court, 'each case which raises the question whether a national procedural provision renders application of [EU] law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.'.[23]

The principle of effectiveness operates in an essentially negative manner. When a national procedural rule makes impossible or excessively difficult the exercise of a subjective right afforded by EU law, that national rule should be disapplied.[24] In such cases, the CJEU typically stops at declaring that a rule is ineffective, without providing any specific guideline on what EU law requires for a national procedural measure to meet the desired effectiveness level.

This kind of apagogic reasoning has been criticised, as it obscures what is actually required from Member States in order to make their rules or remedial frameworks comply with the principle of effectiveness.[25] The lack of indication in that regard is unlikely to contribute to a uniform interpretation of EU law, as the CJEU does not indicate what is exactly required in order for national law to be effective. In that setup, no explicit link is *prima facie* established between effectiveness and procedural fairness.

The Court has, nevertheless, hinted at procedural fairness being a referent for assessing the effectiveness of a national procedural provision, by highlighting that such a provision should be made '[i]n the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.'[26]

In some cases dealing with the scope and extent of national procedural autonomy, the Court of Justice has been more explicit in specifying what was required from Member States. In doing so, the Court defined positive obligations on Member States to modify their legal frameworks in compliance with the requirements of EU law. In those instances, the Court specified more straightforwardly how the principle of effectiveness should be understood and highlighted how Member States can ensure that their legal systems are effectively ensuring the correct and full application of EU law.[27] In recent years, the Court has increasingly also relied on the principle of effective judicial protection and the fundamental right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union to impose positive remedial

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21 CJEU, Case C-312/93 *Peterbroeck* EU:C:1995:437, para 16-20.

22 CJEU, Case 33/76 R*ewe-Zentralfinanz eG et Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* para 5.

23 CJEU, Joined Cases C-430/93 and C-431/93 van Schijndel and van Veen EU:C:1995:441, para 19.

24 See by way of example, CJEU, Case C-312/93 Peterbroeck para 21. On those negative obligations, see also Jasper Krommendijk, 'Is there light on the horizon? The distinction between "Rewe effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte' (2016) 53 CMLRev 1395-1418.

25 Jan Blockx, 'Effet utile Reasoning by the Court of Justice is Mostly Indirect : Evidence and Consequences', (2022) 14 European Journal of Legal Studies 148.

26 CJEU, Case C-312/93 Peterbroeck EU:C:1995:437, para 14.

27 CJEU, Case C-268/06 *Impact* EU:C:2008:223, para 51 ; see on that matter also Pieter Van Cleynenbreugel, 'Judge-made standards of national procedure in the post-Lisbon constitutional framework' (2012) 39 ELRev 90-100

obligations on Member States.[28]

In practice, the distinction between positive and negative procedural obligations is thin and nuanced. It is thin because the CJEU has sometimes defined both negative and positive obligations in the same case. In *Factortame* for instance, the Court emphasised that national rules making EU law ineffective had to be disapplied. Calling for the disapplication of national law is essentially a negative obligation ('an obligation not to' - apply a national provision). However, in the same case, the Court also held that the granting of interim relief should always be possible when rights derived from EU law are at stake. As a result, access to a remedy providing interim relief had to be made possible under national law. This implies a positive obligation ('an obligation to' - extend the scope of their remedial frameworks) that frames the scope and use of the negative obligation.

In the same way, the *DEB* judgment highlights that access to legal aid is to be opened to legal persons claiming the benefit from rights afforded by EU law.[29] The Court therefore imposed a positive obligation on Member States to provide for accessible legal aid mechanisms - again - when rights derived from EU law were at stake. To do so, national legal provisions impeding such a system to be accessible to legal persons need to be disapplied. In practice, the Court thus framed a specific positive obligation in conjunction with a negative obligation.

The distinction between negative and positive obligations should also be nuanced, because in practice, the Court generally refrains itself from clearly framing or formulating a positive procedural obligation, unless no other solution could be found. The *Unibet* case is an illustration of this trend.[30] In essence, the Court only relies on this type of reasoning when negative obligations in themselves do not suffice. As a result, the instances in which positive procedural obligations can be clearly deduced remain rather limited. To the extent, however, that EU secondary legislation already contains broadly defined positive obligations, the Court feels less constrained to specify or clarify the scope of such a positive obligation.[31] Even when that is the case, the Court tends to frame the positive obligation in negative obligation terms, essentially requiring the national courts to disapply provisions of national law that do not conform with those positive obligations. Absent secondary legislation, the possibility for the principle of effectiveness to play a uniformizing role in the organisation of Member States' remedial and procedural frameworks thus remains limited.

2.2 Procedural fairness through effectiveness: a frame of reference for structuring Member States' enforcement systems?

The Court's focus regarding the scope and features of the principle of effectiveness has mainly been on access to justice and judicial remedies. The principle is often connected to the concept of *effet utile* in EU law. That concept has been relied on occasionally by the CJEU to emphasise that national law must, in a given situation, give way to legal obligations agreed on at EU level.[32] Those

[28] On the role of Article 47, see Anthony Arnull, 'Article 47 CFR and national procedural autonomy' (2020) 45 E.L.Rev. 681-693. On those developments, see the contributions of Kathleen 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 884–903 ; Matteo Bonelli, 'Effective judicial protection in EU law: an evolving principle of a constitutional nature' (2019) 12 REALaw 35–62 and Giulia Gentile, 'Effective judicial protection: enforcement, judicial federalism and the politics of EU law' (2023) 2 European Law Open 128–143.

[29] CJEU, Case C-213/89 *Factortame* EU:C:1990:257, para 23.

[30] CJEU, Case C-279/09 *DEB* EU:C:2010:811.

[31] Rob Widdershoven, 'National Procedural Autonomy and EU law limits' 33.

[32] Although the concept remains open for interpretation, see in that regard Urska Sadl, 'The role of Effet Utile in preserving the continuity and authority of European Union law : evidence from the citation web of the pre-accession case law of the Court of Justice of the EU' (2015) 8 *European Journal of Legal Studies* 22-24. Jan

obligations may require national courts to accept that the *application of a* specific legal framework imposes obligations that extend, in certain cases, beyond what is strictly laid down in the provisions of the TFEU or of EU secondary legislation.[33] When referred to by the EU courts, *effet utile* is generally meant to require that a Member State court or tribunal disapplies, on the basis of principles such as direct effect or primacy, national provisions that hinder the effective application of EU law.[34] To that extent, *effet utile* is closely related with the principle of effectiveness as interpreted by the EU Courts. Under that understanding, the concept of *effet utile* highlights, above all, that the principle of effectiveness applies in all situations covered by EU law and not only in the context of judicial remedies or procedural rules. That finding is relevant for analysing the issue of whether the principle of effectiveness can also play a role in the context of administrative enforcement procedures coordinated by EU law.

Understood in connection with the *effet utile* notion, the principle of effectiveness could also be, and has indeed been, relied upon to impose – implicit – procedural or remedial obligations on Member States in a non-judicial setting. Although the CJEU can be the principal source of such obligations, the EU legislator plays an equally important role in that respect. In practice, the Court's instigation to read procedural fairness obligations into the principle of effectiveness results from the EU legislator already having taken steps to determine more specifically how such effectiveness can be achieved through procedural fairness. That, in turn, allows the CJEU to interpret and, if necessary, refine or apply the harmonised enforcement obligations in the light of what it considers to be the effective application of EU law.[35] This section provides an overview of how the reliance on the principle of effectiveness in EU competition law (2.2.1) and EU personal data protection law (2.2.2) has come to play out. Based on that analysis, it is possible to clarify how the principle of effectiveness serves as an analytical tool to gain a better understanding of what procedural fairness is to be, although there are limits and shortcomings inherent to this approach (2.2.3).

2.2.1 Procedural fairness as effectiveness in EU competition law: from Regulation 1/2003 to Directive 2019/1 and beyond

The enforcement framework accompanying the application of Articles 101 (the cartel prohibition) and 102 (the abuse of a dominant position prohibition) TFEU in EU competition law constitutes a primary illustration of how the principle of effectiveness has been relied upon to enhance the features of a procedurally fair decision-making framework.

Council Regulation No 1/2003 obliges Member States' competition authorities to apply both Articles 101 and 102 TFEU to any case involving behaviour affecting trade between the Member States.[36] Given the need for competition authorities to apply EU law and collaborate with each other in the framework of a Commission-structured European Competition Network[37], Article 35

Blockx, '*Effet utile* Reasoning by the Court of Justice is Mostly Indirect : Evidence and Consequences', *supra*, 149.

[33] See Alenka Berger Skrk, 'Effet utile and national practice : is there a room for improvement ?', 2014 (1) *InterEULawEast : Journal for the international and european law, economics and market integrations* 116-118.

[34] Markus Klamert The Principle of Loyalty in EU law, supra, 262.

[35] As also confirmed by Mariolina Eliantonio and Elise Muir, 'The Principle of Effectiveness : under strain ?' (2019) 2 Realaw 257.

[36] Article 3 of 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 L1/1 (hereafter Regulation 1/2003). On this framework in general, see James Venit, 'Brave New World: The Modernization and Decentralization of Enforcement under Articles 81 and 82 of the EC Treaty' (2003) 40 *CMLRev* 545-580.

[37] For the specifics of the ECN, see https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-

of Regulation No 1/2003 required the Member States to designate the competition authorities in such a way that the provisions of this regulation are effectively complied with. The Regulation did not, however, impose more detailed requirements on how those authorities had to be organised in practice. In 2004, it was argued that this should be left to Member States' procedural and institutional autonomy.[38]In the absence of specification on how Member States' competition authorities were to contribute to the effective application of Articles 101 and 102 TFEU, the CJEU has had to provide useful clarifications in that regard, in its 2010 *Vebic* judgment.

In the case at hand, a fine for a violation of Article 101 TFEU had been imposed by the Belgian competition authority. An appeal was lodged against that decision before the competent courts. However, the competition authority, which had taken the first instance decision, was not a party to the proceedings. As the authority itself was set up as an administrative jurisdictional body, it could not take part in the appellate review against its own decisions. Belgium maintained that this organisation made sense, as a first instance court is not itself a party to appellate proceedings against decisions rendered by it. According to Vebic, however, this impossibility to take part in appellate proceedings would have a detrimental impact on the effective application and enforcement of EU law required by Article 35 of the Regulation.[39]

The Court of Justice agreed with that argument and framed it in terms of the principle of effectiveness.[40] Relying on that principle, it imposed the obligation on Member States to make sure competition authorities could take part in the appellate review against their own decisions, even when those authorities had the status of an administrative court under national law. It would fall upon those Member States to determine just how this is to be organised and to make sure that this is possible in practice.[41]

The *Vebic* judgment presents a first example of the Court relying on the principle of effectiveness beyond the traditional scope of access to justice and remedies. In the case at hand, a remedy was available to litigants; the Court nevertheless felt that the administrative procedure had to be structured in such a way as to allow, at the stage of judicial review, a more adversarial judicial review procedure to be possible. Member States excluding such participation would violate the principle of effectiveness. As a result, in order to be effective, enforcement procedures had to be structured in such a manner as to allow an administrative authority to represent the general interest both at first instance and on appeal. In practice, this implies that competition authorities have to be structured as administrative decision-makers capable of defending their own decisions before review courts.[42]

In response to the CJEU judgment, the EU legislator has taken steps to adopt a more streamlined administrative decision-making framework.[43] Directive 2019/1 now indeed requires Member States' competition authorities to be structured at least in part as independent administrative

competition-network_en last accessed 12 February 2025.

38 Recital 35 Regulation 1/2003.

39 CJEU, Case C-439/08, *Vebic*, EU:C:2010:739 para 38.

40 CJEU, Case C-439/08, *Vebic*, para 63.

41 CJEU, Case C-439/08, *Vebic*, para 60-61.

42 For a classification of this judgment as reflecting an effectiveness through fairness approach, Pieter Van Cleynenbreugel, 'Effectiveness through fairness ? Due process as an institutional precondition for effective decentralized EU competition law enforcement' in Paul Nihoul and Tadeusz Skoczny (ed.), *Procedural fairness in competition proceedings* (Elgar 2014) 44-88.

43 See for an overview of the steps taken in that regard, Wouter Wils, 'The European Commission's "'ECN+' Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers"', [2017] Concurrences 60–80.

authorities that can take part in appellate proceedings against their own decisions.[44] More specifically, 'to guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that such authorities perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of those provisions, subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network'.[45] Against that background, the EU Courts have unsurprisingly further interpreted the principle of effectiveness in light of procedural fairness obligations specified in EU secondary legislation. The General Court's judgment in the *Sped-pro* case offers an illustration of that willingness.

In that case, the European Commission had rejected a complaint by a Polish business to investigate a competition law case, arguing that the Polish competition authority was best placed to address the complaint and take an infringement decision in the case at hand.[46] However, before the General Court, the complaining business argued that the Polish competition authority and its reviewing courts were not insufficiently independent and impartial and could therefore not contribute to the effective application of Articles 101 and 102 TFEU.

The General Court was receptive to this argument. It held that 'when the effects of the infringements alleged in a complaint are, essentially, felt only in the territory of a single Member State and when disputes relating to those infringements have been brought by the complainant before the competent courts or administrative authorities in that Member State, the Commission is entitled to reject the complaint for lack of EU interest, provided, however, that the complainant's rights are adequately safeguarded by the national courts'.[47] In other words, leaving a case to an authority not complying with EU procedural fairness requirements in the widest sense would be considered a violation of the principle of effectiveness.

The Court of Justice, for its part, also relied on the principle of effectiveness when confronted with Member States' administrative decision-making practices and rules. In the 2021 *Whiteland Import* case, the Court held that the principle of effectiveness requires Member States' administrative procedures to make use of limitation periods that do not of themselves render the correct application of Articles 101 and 102 TFEU difficult or impossible.[48]

The Court adopted a similar reasoning in its *Caronte & Tourist* judgment of 30 January 2025. In that case, the Court was confronted with a rule of Italian (administrative) law, which required the competent authority to adopt a formal statement of objections and start the inter partes proceedings with the economic operators concerned within 90 days, starting from the time the essential elements of the alleged infringement are established.[49] The justification offered for this strict rule had been the safeguarding of the rights of defence of undertakings during infringement proceedings against them by informing them in good time of the objections raised against them.[50] The Court of Justice nevertheless held that 'the application of the period at issue entails the risk that the [Italian competition authority] may have to treat all infringement proceedings before it without any differentiation, taking into consideration not the circumstances specific to each

[44] Article 30(2) of Directive 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.
[45] Article 4(1) Directive 2019/1.
[46] General Court, Case T-791/19, *Sped-pro v Commission*, EU:T:2022:67, para 89.
[47] General Court, Case T-791/19, *Sped-pro v Commission*, EU:T:2022:67, para 90.
[48] CJEU, Case C-308/19, *Whiteland Import Export SRL*, para 55-56.
[49] CJEU, Case C-511/23, *Caronte & Tourist SpA*, EU:C:2025:42, para 16.
[50] CJEU, Case C-511/23, *Caronte & Tourist SpA*, para 24.

procedure, but by following only a chronological order, thus preventing it from establishing and implementing priorities for proceedings for the enforcement of Articles 101 and 102 TFEU. That authority could thus be forced to initiate investigative procedures on uncertain factual and legal bases or give priority to certain categories of cases which its available resources allow it to handle after the preliminary investigation stage, where appropriate, to the detriment of cases which are particularly complex and harmful to free competition on the internal market. Such a prejudice to the [authority's] operational independence is all the more likely in a situation in which the starting point of the period, whereby, moreover, the mechanism to start the period running appears not to be very precise, clear or foreseeable either for that authority or for the undertaking concerned, coincides with the first report of the alleged infringement to that authority, which is then obliged to investigate the case immediately'.[51] Additionally, this requirement did not guarantee that rights of the defence would be safeguarded all the time.[52] For that reason, the Court held that the principle of effectiveness was also violated in this case.[53]

In both judgments, the Court implicitly stated that a competition law infringement procedure requires a thorough investigation, in which investigative measures can be taken, but in which an adversarial debate with the economic operators concerned must take place. Procedural fairness is thus interpreted in a broader, more structural sense than guaranteeing fair decision-making procedures for economic operators. The concept relied on by the Court in this judgment focuses on the ways in which administrative decision-making procedures are structured. In order to allow factually and legally correct decisions to be adopted and to safeguard economic operators' rights to express their opinion on the alleged infringement, procedures need to be organised in a way that balances operators' rights of defence and authorities' powers of investigation. Procedures need to be structured in such a way as to arrive at this balanced approach. A fair procedure is therefore a balanced procedure. Only such balanced procedures comply with the principle of effectiveness in its various aspects, i.e. effectiveness of investigation and effectiveness of the procedural rights accompanying investigations.

2.2.2 Procedural fairness as effectiveness in personal data protection law

A similar picture to competition law has emerged in the context of EU personal data protection law as well. In the 1995 personal data protection Directive, Member States were required to set up independent data protection supervisory authorities.[54] Those authorities had to act in complete independence and provide for effective supervision and enforcement procedures.[55] The Directive itself linked the requirement of independence with the need for effective enforcement, in such a way as to consider the presence of independent authorities as a key element of effective EU personal data protection law enforcement. The Court of Justice confirmed that position in its *Commission/Germany* judgment where it held 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 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. It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they

[51] CJEU, Case C-511/23, *Caronte & Tourist SpA*, para 67.
[52] CJEU, C-511/23, Case *Caronte & Tourist SpA*, para71.
[53] CJEU, C-511/23, Case *Caronte & Tourist SpA*, para 81.
[54] Article 28(1) of 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 L281/38.
[55] Article 28(3) of Directive 95/46/EC.

must remain free from any external influence, including the direct or indirect influence of the State or the *Länder*, and not of the influence only of the supervised bodies'.[56] Those independent authorities each have the possibility to enforce personal data protection law against controllers or processors falling within their jurisdiction.[57]

The General Data Protection Regulation (GDPR) has confirmed and upgraded the cooperation system between fully independent personal data protection supervisory authorities.[58] It has not only determined the minimum powers independent supervisory authorities should have at their disposal, but also set up a regulatory coordination and mutual assistance mechanism, coordinated by a European Data Protection Board[59], that requires national authorities to collaborate intensively.[60] In that framework, a binding decision can be imposed on a national authority to investigate certain personal data processing activities.[61] The mechanism thus set up presupposes that participating authorities would comply with the independence requirements imposed by EU law. The pre-GDPR *Commission v Germany* and *Commission v Austria* judgments show that the Court is willing to take this step if necessary.[62] In that context, failure to meet the necessary independence or other procedural fairness requirements may be considered a violation of the principle of effectiveness as applied under the Union's data protection legislation.

By contrast, however, whenever an authority is complying with the independence requirements, it also has to accept the role it is assigned within a shared European administrative space.[63] Taking part in such a shared space implies that decision-making processes can made subject to EU-structured coordination procedures. In the field of personal data protection, this would imply that the European Data Protection Board (EDPB) can adopt a binding decision, forcing a national supervisory authority to extend the scope of its investigation or adopt a newly investigated decision.[64] A recent example of the structural implications of that framework can be found in the General Court's judgment in the *Data Protection Commission v. EDPB* case. According to said Court, such a decision by may be necessary to ensure the effectiveness of the administrative enforcement accompanying personal data protection law. In the words of the General Court, 'an EDPB binding decision, adopted under Article 65(1)(a) of Regulation 2016/679, requiring the applicant to broaden its analysis and its investigation does not affect the independence of national authorities. According to the Court, the monitoring of compliance 'entrusted to independent authorities, […] in no way precludes a system of mutual scrutiny between independent authorities, such as the cooperation and consistency mechanisms provided for in Regulation 2016/679, or, of course, judicial review of the decisions adopted by the various authorities involved. What is important is that the bodies scrutinising the supervisory bodies should themselves be independent.

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56 CJEU Case C-518/07 *Commission v Germany* EU:C:2010:125, para 25. See also Case C-614/10 *Commission v Austria* EU:C:2012:631 for a similar reasoning.

57 CJEU Case C-210/16 *Wirtschaftsakademie Schleswig-Holstein* EU:C:2018:388, para 64.

58 Articles 60-62 of 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 (hereafter GDPR). On the unconditional independence considered in this context, see Article 52 GDPR.

59 Article 68-70 GDPR

60 See Article 62 GDPR which develops the framework for joint supervisory operations in the context of personal data protection.

61 Article 66(3) GDPR includes the adoption of binding decisions by the EDPB in that regard.

62 However, on the limits of the independence notion, see also Saskia Lavrijssen and Annetje Ottow, 'Independent Supervisory Authorities: A Fragile Concept', (2012) 39 *LIEI* 419-446.

63 See on that issue, Pieter Van Cleynenbreugel, 'Les enjeux de droit administratif européen du DSA' in Brunessen Bertrand (ed.) *La Régulation juridique des plateformes* (Mare & Marin 2025) 193-198.

64 Article 66(3) GDPR ; see also General Court, joined cases T-70/23, T-84/23 and T-111/23, *Data Protection Commission v European Data Protection Board* EU:T:2025:116.

This is the case with the EDPB, as it is composed of the supervisory authorities of the Member States and the European Data Protection Supervisor, which is itself an independent authority vis-à-vis the EU institutions and other entities under its supervision'.[65]

It follows from those observations that, apart from being independent, effective enforcement also presupposes sincere cooperation within the EDBP. By doing so, data subjects' rights are safeguarded in the most effective way. Cooperation in a shared administrative space therefore constitutes part of what is considered an administrative enforcement framework contributing to the effective enforcement of EU data protection law. Although the General Court did not refer explicitly to the principle of effectiveness in this case, its reasoning is structured in a manner similar to the cases in EU competition law analysed in the previous section.

2.2.3 Procedural fairness as effectiveness: a driver for uniform legal protection in administrative decision-making?

The EU Courts have been somewhat receptive to structural procedural fairness arguments as part of their interpretation and application of the EU law principle of effectiveness in the administrative stage of decision-making. At the same time, the Court's willingness to consider procedural fairness requirements as forming part of the principle of effectiveness is limited for three reasons.

First, the Courts take a piece-meal approach towards uncovering the use and potential of effectiveness claims. The concept of effectiveness can mean many things and lacks a clear definition in EU law, the Court typically relying on a negative understanding thereof. The relevant case law is more informative on what is not effective, rather than on a positive standard against which the Member States' exercise of discretion can be assessed.[66] While it is true that the case law in competition law and data protection law reveal that structural elements guaranteeing the respect of procedural fairness requirements (including independence, factually and legally correct decision-making, adversarial procedures) can be a part of the principle of effectiveness, the latter's scope is much broader than purely procedural fairness issues. As a result, the case law does not offer clear limits on how, where and when procedural fairness claims can be included within the scope of the principle of effectiveness.

Second, the notion of procedural fairness as a structural feature itself remains open-ended and undefined. The Court, for its part, does not refer to it, but rather chooses, depending on the context of the case, to refer to values or principles traditionally associated with it in legal theory and doctrine (such as independence, equality of arms, factually and legally correct decision-making processes, regulatory cooperation as part of the setup of a European administrative enforcement space). It follows that a pre-established, explicit framework on the kind of structural procedural fairness covered by the principle of effectiveness remains difficult to predict and define. The only conclusion to be made from the abovementioned case law is that the EU Courts may be receptive to those arguments when particular case-specific yet structural procedural fairness defects are present. From the previously discussed case law, it could at least be inferred that a procedurally fair administrative decision-making framework is a framework in which both subjects and decision-makers can trust each other and operate in accordance with streamlined procedural rights' guarantees.

It could be argued that the Charter's rights and principles of good administration (Art. 41) and

[65] General Court, joined cases T-70/23, T-84/23 and T-111/23, *Data Protection Commission v European Data Protection Board* para 79, 80 and 82.

[66] This has been confirmed by Jan Blockx, '*Effet utile* Reasoning by the Court of Justice is Mostly Indirect : Evidence and Consequences', *supra*, 156 which applies by analogy to the case law on the principle of effectiveness.

effective judicial protection (Art. 47) constitute the starting point, violations thereof being considered to result in ineffective application of EU law. However, the case law does not equate a violation of the Charter provisions with a violation of the principle of effectiveness. By contrast even, the principle of effectiveness is relied on precisely when the violation of an operator's or data subject's individual procedural rights cannot offer redress, but the authority concerned may be impeded from conducting a procedure in the most adequate manner, as foreseen by instruments of secondary legislation. As a result, the idea of procedural fairness that underlies the Court's effectiveness case law is one distinct from the safeguarding of individual procedural rights only. The exact contours of the notion and its relationship with individual procedural rights are not fully established yet.

Third and related to the previous observation, the case law in which effectiveness and structural procedural fairness have been linked focus on Member States' authorities and procedures and have so far disregarded EU-level enforcement procedures. That is remarkable, as the European Commission's competition law enforcement powers have been the subject of much criticism in light of the right to a fair trial.[67] The Commission has been reproached to have procedures in place that are incompatible with the right to a fair trial requirements flowing from Article 6 ECHR or Article 47 of the Charter of Fundamental Rights.[68] The key element invoked in that regard has been linked to the fact that the prosecution/investigative stages and decision-making stages during the administrative procedure are not sufficiently separated so as to guarantee an independent and impartial review of the case at hand.[69] Nevertheless, the Court of Justice never accepted this claim, arguing that its review of administrative decisions rendered by the European Commission could compensate for potential lack of independence or impartiality at the administrative procedure stage.[70] As a consequence, arguments relating to the lack of structural procedural fairness at EU level have not been developed under the banner of the principle of effectiveness in the context of Commission-led EU law enforcement, at this stage.

In practice, the occasions where invoking an effectiveness-structured procedural fairness argument could be useful for litigants remain difficult to define, as the Court has developed such frame only in limited and highly specific cases. The intensity with which an effectiveness evaluation can be relied on also depends on the specific nature of the case and is difficult to predict in advance.

It is against the background of those observations that the next section will analyse whether the new EU digital law is likely to contribute to the further development of effectiveness through procedural fairness as a means to enhance uniform enforcement of those new rules.

3 Room for structural procedural fairness by means of the principle of effectiveness in EU digital law?

The previous section acknowledged the potential for the principle of effectiveness to impose more uniform procedural or institutional requirements on Member States' administrative enforcement structures and decision-making procedures. In the context of the new EU digital law framework,

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[67] See for a summary and a proposal for a European Cartel Office instead, See Stephen Wilks and Lee McGowan, 'Disarming the Commission: the Debate over a European Cartel Office', (1995) 32 *JCMS* 270 and Claus-Dieter Ehlermann, 'Reflections on a European Cartel Office', (1995) 32 *CMLRev* 474 and Alan Riley, 'The European Cartel Office: a Guardian without Weapons?', (1997) 18 *ECLR* 3-16.

[68] Pieter Van Cleynenbreugel, 'Due Process in EU Commission Competition Law Proceedings. What Lessons (not) to Learn for Structuring the Rights of Defense at the National Level?' in Csongor Nagy (ed.) *The Procedural Aspects of the Application of Competition law – European Frameworks, Central-European Perspectives* (Europa Law Publishing 2016) 36-55.

[69] Advocates General have also pointed at this difficulty, see among others CJEU, Opinion of AG Sharpston in Case C-272/09 P, *KME Germany,* EU:C:2011:63, para 68.

[70] CJEU, Case C-501/11 P, *Schindler Holding and Others* v *Commission* EU:C:2013:522, para 38.

the Digital Services Act (DSA), the Data and Data Governance Acts (DA/DGA), the Artificial Intelligence Act (AIA)) and, to a lesser extent, the Digital Markets Act (DMA) contain important procedural requirements (3.1). This section questions whether effectiveness-related procedural fairness claims may arise from those frameworks as well (3.2).

3.1 The new EU digital law

The new EU digital law instruments each encompass a series of procedural requirements aimed at streamlining administrative enforcement at Member State, and to a lesser extent, EU level. Although it would be an exaggeration to identify a common template underlying those instruments, some key administrative enforcement similarities can be detected. This section provides a brief overview of those enforcement structures in the DSA (3.1.1), the DA/DGA (3.1.2), the AIA (3.1.3) and the DMA (3.1.4).

3.1.1 The Digital Services Act

The DSA contains a four-layered framework of obligations[71] aimed at online intermediary or search engine services providers offered to recipients within the EU.[72] With the exception of very large online platforms and search engines[73], national authorities are principally tasked with the implementation and enforcement of the Regulation.[74] Those national authorities need to be structured as independent authorities[75], with procedures in place to allow for the performance of their tasks in an impartial, transparent and timely manner.[76]

Although Member States may establish multiple competent authorities[77], one of them is to be designated as the Digital Services Coordinator, the preferred point of contact for the European Commission.[78] The Commission remains responsible for the enforcement of DSA obligations vis-à-vis very large online platforms and search engines.[79] At Member State level, both Digital Services Coordinators and other competent authorities need to be entrusted with minimum enforcement powers and the power to impose fines.[80] In addition, Digital Services Coordinators need to accept complaints. According to Article 53 of the DSA, '[r]ecipients 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 Digital Services

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71 See 4-47 Articles DSA.

72 Article 1(1) DSA. Online intermediary services providers are defined as information society services consisting in mere conduit, caching or hosting services, see Article 3(a) and (g) DSA. Online platforms and online search engines are a subcategory of hosting services providers, see Article 3(i) and (j).

73 Article 33 DSA : very large online platforms and search engines have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and are designated as such by the European Commission, see also https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses last accessed 12 February 2025.

74 Article 49(1) DSA.

75 Articles 49(4) and 50 DSA.

76 Article 50(1) DSA.

77 For coordination difficulties in that regard, see also Pieter Van Cleynenbreugel and Pietro Mattioli, 'Digital Services Coordinators and other competent authorities in the Digital Services Act : streamlined enforcement coordination lost ?' (2024) *European Law Blog* https://www.europeanlawblog.eu/pub/digital-services-coordinators-and-other-competent-authorities-in-the-digital-services-act-streamlined-enforcement-coordination-lost/release/1 accessed 12 February 2025.

78 Article 49(2) DSA.

79 Articles 65-82 DSA.

80 Articles 51 and 52 DSA.

Coordinator shall assess the complaint and, where appropriate, transmit it to the Digital Services Coordinator of establishment, accompanied, where considered appropriate, by an opinion. Where the complaint falls under the responsibility of another competent authority in its Member State, the Digital Services Coordinator receiving the complaint shall transmit it to that authority. During these proceedings, both parties shall have the right to be heard and receive appropriate information about the status of the complaint, in accordance with national law'.[81]

The Digital Services Coordinator, as well as other competent authorities designated under this Regulation, play a crucial role in ensuring the effectiveness of the rights and obligations laid down in this Regulation and the achievement of its objectives.[82] For its part, the Digital Services Coordinators unite in the European Digital Services Board, an institutionalised network to streamline exchanges of information and enforcement coordination.[83] The European Commission is responsible for chairing the Board.[84]

3.1.2 The Data and Data Governance Acts

Similar to the DSA, the DA/DGA also require Member States to have in place authorities responsible for data altruism and data access. Those authorities can be the existing personal data protection supervisory authorities or can be newly created ones.[85] In case there is more than one authority designated by a Member State, one of them is to be appointed as data coordinator in the framework of the Data Act.[86] Under both Acts, the authorities have to operate in an impartial, transparent, consistent and timely manner.[87] The Data Governance Act additionally requires competent authorities to be functionally distinct from any data intermediation services provider.[88] The minimum powers they need to be entrusted with have been mentioned explicitly in the Regulations.[89] Data coordinators, together with representatives of other competent authorities, will convene in a European Data Innovation Board.[90] The purpose of the Board will be to facilitate information exchanges and advise the European Commission, should more harmonised standards be necessary.[91]

Both regulations require national authorities to implement a complaint mechanism[92] and Member States to provide for effective judicial review against those authorities' decisions.[93] As far as complaint mechanisms are concerned, '[t] competent authority with which the complaint has been lodged shall inform the complainant, in accordance with national law, of the progress of the proceedings and of the decision taken'.[94] Authorities will have to exchange information in that regard in order to treat complaints in an appropriate manner.[95] In addition, '[w]here a competent authority fails to act on a complaint, any affected natural and legal person shall, in accordance with national law, either have the right to an effective judicial remedy or access to review by an

[81] Article 53 DSA.
[82] Recital 111 DSA.
[83] Article 63 DSA. See also Articles 58-60 on mutual assistance and joint investigations.
[84] Article 62(2) DSA.
[85] Article 26(1) DGA and Article 37(1) DA.
[86] Article 37(2) DA.
[87] Article 26(2) DGA and Article 37(8) DA.
[88] Article 26(1) DGA.
[89] Articles 14, 24 and 26 DGA and Article 38 DA.
[90] Article 29 DGA.
[91] Article 30 DGA and Article 42 DA.
[92] Article 27 DGA and Article 38 DA.
[93] Article 28 DGA and Article 39 DA.
[94] Article 27(2) DGA and Article 38(2) DA.
[95] Article 38(3) DA.

impartial body with the appropriate expertise'.[96] That requirement does not feature in the same explicit manner in any of the other EU digital law Acts.

3.1.3 The Artificial Intelligence Act

The objective of the EU's 2024 Artificial Intelligence Act (AIA) is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.[97] To make that happen, the AIA requires Member States to set up competent authorities in the form of at least one notifying authority and one market surveillance authority.[98] Those authorities have to 'exercise their powers independently, impartially and without bias so as to safeguard the objectivity of their activities and tasks, and to ensure the application and implementation of the AI Act.'[99] In practice, this implies that the authorities play a key role in designating notifying bodies for certifying high-risk artificial intelligence technologies and in overseeing the use and applications of those high-risk AI-technologies in practice.[100] National authorities will convene in a European Artificial Intelligence Board, which contrary to other EU digital law instruments, mainly has a supporting role.[101] For general purpose generative AI, the European Commission additionally takes on a more direct surveillance and enforcement role, supported by its AI Office.[102]

Like the DSA and DA/DGA, the AIA includes specific provisions on the right to file a complaint and the right to effective judicial protection. First, any natural or legal person having grounds to consider that there has been an infringement of the provisions of this Regulation may submit complaints to the relevant market surveillance authority. Those complaints have to be handled in line with the dedicated procedures established therefor by the market surveillance authorities.[103] Second, national authorities must be entrusted with the power to impose penalties for the infringement of the Regulation. Such powers shall be subject to appropriate procedural safeguards in accordance with Union and national law, including effective judicial remedies and due process.[104] The AIA does not further specify how those procedures have to be organised. Within the framework of AI governance, this is largely left to the Member States' administrative and judicial design choices.

3.1.4 The Digital Markets Act

Compared to the legal instruments discussed above, the DMA presents a somewhat exceptional framework. The objective of the DMA is to specifically target major digital operators (so-called gatekeepers).[105] As a result, its administrative enforcement is also more centralised at the level of the European Commission.[106] It is the Commission that designates gatekeepers and takes regulatory action against them. Those gatekeepers have been offered procedural safeguards

96 Article 28(3) DGA and Article 39(2) DA.
97 Article 1(1) AIA. The Act applies to providers and deployers of Artificial intelligence, the results of which are available in the European Union. Articles 2 and 3 define the scope more specifically, see also the chapter by Jérôme De Cooman in this volume.
98 Article 3(48) AIA.
99 Article 70(1) AIA.
100 Article 70(2) AIA.
101 Article 66 AIA.
102 Article 88 AIA.
103 Article 85 AIA.
104 Article 99 AIA.
105 Article 3 DMA, see also the chapter by Juliane Mendelsohn in this volume.
106 Recital 85 DMA.

throughout those procedures[107] and can have Commission decisions reviewed by the EU Courts.[108]

In addition, the DMA also provides for a cooperation mechanism between the European Commission and national authorities. In that context, the DMA requires, in general terms, that the Commission and Member States shall work in close cooperation and coordinate their enforcement actions to ensure coherent, effective and complementary enforcement of available legal instruments applied to gatekeepers.[109] In addition, the Commission and national authorities shall cooperate with each other and inform each other about their respective enforcement actions through the European Competition Network (ECN). They shall have the power to provide one another with any information regarding a matter of fact or of law, including confidential information.[110] A national competent authority may, on its own initiative, investigate a case of possible non-compliance with the DMA in a Member State's territory. Before taking a first formal investigative measure, that authority shall inform the Commission in writing.[111] Nonetheless, the opening of proceedings by the Commission shall relieve the national competent authorities of the possibility to conduct such an investigation or end it where it is already ongoing. In addition, those authorities have to report to the Commission on the findings of such investigation in order to support the Commission in its role as sole enforcer of the DMA.[112] National authorities in this framework play a subsidiary and rather subordinate role.[113]

3.2 Towards more uniform legal protection in EU digital law administrative decision-making?

It follows from the overview in the previous section that the new EU digital law instruments have been accompanied by more or less detailed requirements on how to set up and operate administrative enforcement structures. Although each legal instrument is characterised by its own administrative structures and features[114], EU law in essence requires Member States' authorities to be set up and to function in an independent and impartial manner. A right to lodge complaints with those authorities also forms part of newly streamlined procedural minimum requirements. In addition, those authorities have to cooperate in the framework of an EU-institutionalised network, the powers of which can range from exchanging information to coordinating enforcement activities. More generally, all those Regulations indicate that the streamlined administrative enforcement setup is to contribute to the effective implementation of the newly adopted substantive law obligations.[115]

Against that background, questions can be raised, first, on whether the principle of effectiveness could serve as an interpretative standard to fine-tune or streamline Member States' enforcement structures. It is submitted that effectiveness questions will only arise in case where no violation of individual procedural rights guaranteed by the Charter or general principles of EU law can be invoked by a litigating party. To the extent that this is the case, questions can be asked, second, on

[107] Article 34 DMA.
[108] Article 45 DMA.
[109] Article 37(1) DMA.
[110] Article 38(7), first paragraph DMA.
[111] Article 38(3) DMA.
[112] Article 38(7), 2nd paragraph DMA.
[113] A similar finding can also be made with regard to the European Competition Network in the framework of EU competition law, see to that extent Marco Amorese 'The Primacy of the European Commission in the European Competition Network as a Safeguard against national competition policies and the rejection of the '*primus inter pares'* doctrine, (2011) 18 *Columbia Journal of European Law* 177-196.
[114] The problematic nature of such policy diversity appears from a coherence and rule of law perspective as highlighted by Simona Denková and Giovanni De Gregorio, The Looming Enforcement Crisis in European Digital Policy – A rule-of-law centered path forward', (2025) *Verfassuingsblog,* supra.
[115] Recital 109 DSA; recital 69 DA; recital 9 AIA ; recitals 65 and 86 DMA.

whether procedural fairness guarantees can form part of the judicial interpretation of the principle of effectiveness. In the absence of case law on the matter, answers to those questions remain speculative. However, given the emerging case law in the fields of EU competition and personal data protection law, it would seem very likely that both questions can be answered positively. In that context, the setup of the newly streamlined EU digital law administrative enforcement frameworks makes that the principle of effectiveness could be relied upon to further specify the operations of those frameworks. In doing so, the principle could be relied on to clarify and impose streamlined procedural fairness requirements, both on the level of individual legal protection as on a more structural level. At this stage, at least four elements characterising the new administrative enforcement frameworks could be candidates for further streamlining by means of the principle of effectiveness.

First, all EU digital law frameworks except for the DMA have introduced a right to complaint mechanism. Per that mechanism, individuals can lodge a complaint with the competent authority. That authority subsequently has to be transparent and inform the complainant about the status of the complaint. Such information is to be ensured in compliance with national law. The current legal frameworks introduce some differences. In the framework of the Data Act, an individual remedy must be available against decisions rejecting complaints. In the context of the AIA, complaints are taken into account in the development of market surveillance activities as well.[116] It goes without saying that the right to lodge a complaint is a fundamental element of procedural protection and may contribute to the overall effectiveness of the new EU digital law obligations. At the same time, however, the ways in which the complaint mechanisms will be implemented and shaped at Member State level will likely diverge. As a result, it is possible that some Member States entertain a stricter or more lenient attitude towards complaints. It is not excluded, therefore, that an argument will be made that the setup or organisation of complaint mechanisms in one Member State violates the principle of effectiveness. The EU Courts will eventually have to address that issue. In doing so, it may very well be that the Court relies on a specific understanding of procedural fairness (in terms of the time it takes to respond to complaints, in terms of the debate with the competent authority that needs to accompany them) that would shape the conclusion on a possible violation (or non-violation) of the principle of effectiveness.

Second, the new EU digital law enforcement frameworks do not prohibit and even seem to encourage the implementation of administrative review mechanisms in addition to more traditional judicial remedies. Again, Member States are likely going to adopt different practices in the setup or structuring of such mechanisms. Once more, the principle of effectiveness may come into play. By relying on that principle, the EU Courts may structure the organisation and operations of such review mechanisms under the banner of effectiveness. In doing so, the EU Courts will once again rely on an implicit understanding of how procedural fairness is to take shape at that stage. The question of the right to be heard, the degree of transparency and timeliness required, as well as the specifics of how to organise such a review are likely candidates for additional judicial clarifications in that regard.

Third, the Regulations discussed do not, as such, contain a coherent framework on limitation periods governing administrative enforcement actions. The DSA and DMA contain references to the limitation periods, but only or mostly in relation to Commission-led enforcement, where a 5-year period, which could be interrupted without being longer than twice the limitation period has been imposed.[117] For Digital Services Coordinators, the DSA does not seem to impose the same

[116] See Articles 28(2) DGA and 39(2) DA as well as Article 85, 2nd paragraph AIA.
[117] Article 77 DSA and Article 32 DMA.

period, but requires that Coordinators' inspections or other enforcement actions have an interrupting effect.[118] Other competent Member States' authorities equally responsible for the enforcement of the DSA do not seemingly have to abide by those same requirements.[119] The other digital law instruments only contain references to the need for reasonable limitation periods for Commission-led enforcement[120] (AIA) or no references at all (DA/DGA). As a result, member States retain the possibility to keep in place their own limitation periods and the administrative or procedural rules governing their application. It is to be expected therefore that the application of those rules at a Member State level may give rise to litigation. As has been the case in competition law, the EU Courts may be asked to determine whether Member States' limitation periods comply with the principle of effectiveness. It may be that the CJEU develops a more coherent effectiveness-based approach to those limitation periods, should such cases arrive in its docket.

Fourth and on a more structural level, the EU Courts may have to pronounce themselves on the preconditions for effective regulatory cooperation preconditions between Member States' authorities. In competition law, the lack of independence or impartiality of a national authority is a critical point to consider in priority-setting and actions to be undertaken by other authorities. Although the General Court required the Commission to step in when national authorities failed, nothing would seem to impede that EU law requires other national authorities to take on a more leading enforcement role in cases where their involvement would normally only be subordinate. The differently structured regulatory cooperation mechanisms put in place by the DSA, DA/DGA and AIA may constitute a starting point for the EU Courts to rely on the principle of effectiveness to further identify and refine such obligations and their links to structural procedural fairness requirements (such as the right to a sufficiently motivated factually and legally correct decision, even when all fundamental rights of defence or participation have been respected formally). The case law in both EU competition and personal data protection law will undoubtedly be guiding should such a case arrive at the Court.

The four hypotheses developed here remain at this stage speculative. However, they demonstrate above all that the principle of effectiveness can be mobilised to streamline minimum enforcement requirements even more. The emerging case law in the fields of EU competition and personal data protection law demonstrates that the Court may be willing to do so in the framework of EU digital law as well. At the very least, the EU Courts may be receptive to such arguments. However, as highlighted in section 2, the Courts are unlikely to provide a clear and ex-ante established procedural fairness framework themselves. They will only interpret the principle of effectiveness in the light of what they consider to be key tenets of the streamlined enforcement framework. It therefore remains to be seen whether and to what extent the CJEU will rely on the principle of effectiveness in this setting.

4 Conclusion

The purpose of this chapter has been to analyse to what extent the principle of effectiveness could play a role as a benchmark for enhancing procedural fairness in the new EU digital law. Said principle has been interpreted predominantly in the context of access to judicial remedies in the absence of harmonised EU procedural rules. Nonetheless, emerging case law in the fields of EU competition and personal data protection law demonstrates that the principle also serves as a

[118] Article 77(3) DSA.

[119] As Article 77(3) only refers to Digital Services Coordinators. By contrast, Article 49 DSA allows Member States also to designate other competent authorities. See on difficulties associated with that designation, Julian Jaursch, 'Platform oversight – Here is what a strong Digital Services Coordinator should look like' in Joris van Hoboken et al. (ed.) *Putting the DSA into practice – Enforcement, Access to Justice and Global Implications* (Verfassungsbooks 2022) 94.

[120] Recital 169 AIA.

standard against which the setup of administrative procedures and enforcement frameworks can be reviewed. The EU Courts have been willing to consider the lack of certain procedural fairness features to constitute violations of the principle of effectiveness. More specifically, Member States' enforcement systems have to be structured so as to enable a correct and effective application of EU substantive law, to allow for adversarial debates at both administrative and judicial stages and to enable regulatory cooperation between different Member States' authorities. Seen from that perspective, this principle has the potential of becoming a key driver for streamlining or uniformising Member States' administrative procedures, the minimum requirements of which have already been harmonised by EU law.

The specific attention granted to the setup and operations of those procedures in the new EU digital law hint at the potential relevance of the principle of effectiveness in this context as well. At the same time, however, reliance on the principle of effectiveness as a driver for more enhanced procedural fairness remains imperfect and structured in a piece-meal manner. In addition, case law on the principle of effectiveness seems to operate without a clear vision of the different tenets of what procedural fairness should encompass. As the case law developments in competition and personal data protection law demonstrate, the contours of how the Courts will interpret and apply the principle of effectiveness in a procedural fairness context remain vague and unpredictable. A similar picture emerges in the context of the new EU digital law. In practice, it remains to be seen, therefore, whether and to what extent the EU Courts will be able and willing to interpret the effectiveness principle as a benchmark for evaluating the presence of administrative and judicial procedural fairness safeguards, in that context. This chapter nevertheless identified four features accompanying EU digital law in which those arguments may prove relevant in future litigation. Time will tell if those arguments will be relied on in practice.