View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by Research Papers in Economics

ECONSTOR

WWW.ECONSTOR.EU

Der Open-Access-Publikationsserver der ZBW – Leibniz-Informationszentrum Wirtschaft
The Open Access Publication Server of the ZBW – Leibniz Information Centre for Economics

Stevens, David

Conference Paper

Regulatory authorities in the EU information and communications technology sectors: The role of trust and transparency in watching the watchdog

22nd European Regional Conference of the International Telecommunications Society (ITS2011), Budapest, 18 - 21 September, 2011: Innovative ICT Applications - Emerging Regulatory, Economic and Policy Issues

Provided in cooperation with:
International Telecommunications Society (ITS)

Suggested citation: Stevens, David (2011) : Regulatory authorities in the EU information and communications technology sectors: The role of trust and transparency in watching the watchdog, 22nd European Regional Conference of the International Telecommunications Society (ITS2011), Budapest, 18 - 21 September, 2011: Innovative ICT Applications - Emerging Regulatory, Economic and Policy Issues, http://hdl.handle.net/10419/52192

Nutzungsbedingungen:
Die ZBW räumt Ihnen als Nutzerin/Nutzer das unentgeltliche, räumlich unbeschränkte und zeitlich auf die Dauer des Schutzrechts beschränkte einfache Recht ein, das ausgewählte Werk im Rahmen der unter
→ http://www.econstor.eu/dspace/Nutzungsbedingungen
nachzulesenden vollständigen Nutzungsbedingungen zu vervielfältigen, mit denen die Nutzerin/der Nutzer sich durch die erste Nutzung einverstanden erklärt.

Terms of use:
The ZBW grants you, the user, the non-exclusive right to use the selected work free of charge, territorially unrestricted and within the time limit of the term of the property rights according to the terms specified at
→ http://www.econstor.eu/dspace/Nutzungsbedingungen
By the first use of the selected work the user agrees and declares to comply with these terms of use.

ZBW Leibniz-Informationszentrum Wirtschaft
Leibniz Information Centre for Economics

Mitglied der Leibniz-Gemeinschaft

22nd European Regional ITS Conference

Budapest, 18-21 September, 2011

David STEVENS

Regulatory authorities in the EU information and communications technology sectors. The role of trust and transparency in watching the watchdog.

Abstract: Our research starts from the general observation that everywhere around the globe, an increasing number of regulatory tasks, traditionally falling under the responsibility of government, are being transferred to so-called independent regulatory authorities (i.e. independent from market actors, but quite often, also from political actors). This is, for instance, the case in the recently liberalized network industries (e.g. energy, railways), but also in the financial or the audiovisual media sector. In some cases (e.g. the electronic communications sector in the European Union), powers attributed to these regulatory authorities even prevent other, more democratically legitimate, institutions, like governments or parliaments, to interfere with the regulatory policy (cf. Judgment 424/07 of the Court of Justice in the German 'regulatory holidays' case of December 3rd, 2009). Especially in that case, the question becomes: who's watching the watchdog?

JEL codes: K23 ("Regulated Industries and Administrative Law") , **K21** ("Antitrust Law").

Keywords Independent regulatory bodies, regulation, media and communications law

Authors' affiliation and corresponding author's e-mail address
dr. David Stevens (david.stevens@law.kuleuven.be) is senior researcher in media and communications law and research director at the Interdisciplinary Centre for Law and ICT (www.icri.be) of the Faculty of Law of the Katholieke Universiteit Leuven, Belgium. ICRI is also part of the Leuven Center on Information and Communication Technology (http://www.kuleuven.be/LICT) and the Institute for Broadband Technology (www.ibbt.be). David is also chairman of policy advisory bodies such as the "Sectorraad Media" of the "Strategische Adviesraad Cultuur, Jeugd, Sport en Media" and the "Raadgevend Comite voor Telecommunicatie".

Regulatory authorities in the EU information and communications technology sectors. The role of trust and transparency in watching the watchdog.

D. Stevens*

Context and objective

Everywhere around the globe, an increasing number of regulatory tasks, traditionally falling under the responsibility of governments, are being transferred to so-called independent regulatory authorities (i.e. independent from market actors, but quite often, also from political actors)[1]. Today, it seems like independent regulatory authorities have almost become a natural institutional form for regulatory governance. Regulation, powers of regulatory authorities and their autonomy are all increasing[2]. Independent regulatory authorities not only play a crucial role in a number of utility or network based sectors (e.g. rail, water, energy, electronic communications, ...)[3], but also in other economic (e.g. banking and financing, audiovisual media) or non-economic (e.g. the protection of fundamental rights and independent privacy commissions) areas. In some cases (e.g. the EU electronic communications sector), powers attributed to these regulatory authorities even prevent other, more democratically legitimate, institutions, like governments or parliaments, to interfere with the regulatory policy[4]. Especially in that case, the question becomes: who's watching the watchdog? Are new accountability procedures and instruments (e.g. public consultation of draft decisions, collaboration between national and European regulatory authorities, veto-powers of the European Commission, …) sufficient to result in independent, accountable and trustworthy regulatory authorities?

---

* dr. David Stevens is senior researcher in media and communications law and research manager at the Interdisciplinary Centre for Law and ICT (www.icri.be) of the Faculty of Law of the Katholieke Universiteit Leuven, also part of the Instituut voor Breedband Technologie (IBBT), Belgium. He is also chairman of policy advisory bodies such as the "Sectorraad Media" of the "Strategische Adviesraad Cultuur, Jeugd, Sport en Media" and the "Raadgevend Comité voor Telecommunicatie". This paper is mainly based on work performed in the context of a study for the European Commission: Wolfgang SCHULZ, Jannes BEESKOW, Stephan DREYER, Regine SPRENGER, Peggy VALCKE, David STEVENS, Eva LIEVENS, Kristina IRION, Szabolcs KOPPANYI, Sara SVENSSON, Philippe DEFRAIGNE, Michèle LEDGER, Valerie WILLEMS, Nathalie VEREECKE, Tim SUTER, INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study commissioned by the European Commission. Final Report, Brussels, February 2011, 417 p.

[1] Note that some have indicated that the term "independent agency" is an oxymoron: Majone, G. (2005b): Strategy and structure: The political economy of agency independence and accountability. In: OECD: Designing Independent and Accountable Regulatory Authorities for High Quality Regulation, London, Proceedings of an Expert Meeting in London, United Kingdom, 10-11 January, p. 126.

[2] This trend towards "independent regulatory authorities" is part of a broader phenomenon which M. Thatcher already in 1994 denominated as the "rise of the regulatory state in Europe", M. Thatcher, "Regulatory Reform in Britain and France: Organisational Structure and the Extension of Competition", Journal of European Public Policy 1994, 1 (3), pp. 441-464.

[3] Magnette, P. (2005): The politics of regulation in the European Union. In: Geradin, D. / Muñoz, R. / Petit, N. (eds.), Regulation through Agencies in the EU – A New Paradigm of European Governance. Edward Elgar Publishing Inc., Cheltenham and Northampton.

[4] See: judgement of the Court of Justice in case 424/07 (German 'regulatory holidays') of December 3rd, 2009.

In this paper, we will examine existing legal requirements on the institutional framework of regulatory authorities in the media, information and communications sectors at international and EU level (e.g. recommendations and declarations of the Council of Europe, relevant EU directives and guidelines, and recent jurisprudence of the Court of Justice). We will also identify a number of 'dimensions' and 'criteria' of independence and accountability (e.g. regulatory context, institutional design, resources, appeal, …) of regulatory authorities. We conclude our paper with some critical reflections on the specific aspect of political independence of regulatory authorities and argue that more transparency should also be envisaged at that level.

Normative arguments and sector-specific policy objectives

The growing importance of independent regulatory authorities in different sectors clearly has similar economic and political roots, and corresponds to the increasingly refined questions of conflicts of interest between the public and private interest, as well as between different private interests. There are numerous normative arguments for creating independent regulatory authorities put forward in the economic, social science and legal literature, but at an abstract level they - at least in the European information and communications technology sectors - seem to relate mainly to two different objectives: ensuring a fair market regulation (e.g. in the EU electronic communications sector) and the guarantee of human rights (e.g. in the EU audiovisual media sector and data protection)[5].

Although the core requirements of independence are in most of these sectors related, the actual shaping (or organisation) differs significantly, according to the state of liberalisation and harmonisation in the different sectors. Therefore, in order truly to understand the concept, it is important to understand that the specific characteristics and dynamics of the regulated sector, and the objective of the independence of the regulatory body, are important determinants of the actual level and shaping of their independence. When looking at the related sectors in more detail it has become clear that the notion of independence has to be interpreted within the context of the regulatory system is has been designed for. For this interpretation, the underlying concepts of the regulation, the aim and objectives of the specific regulatory system, and the characteristics and particularities of the regulated sector, have to be taken into account.

At least in the early stages of liberalisation of the electronic communications sector, some national governments considered it in their interest to protect their incumbent operator. Therefore, the independence of regulators is obviously relevant to the implementation of Directives intended to create a level playing field. In the media sector another, more important, concern also applies. It is mainly the fundamental right to freedom of expression that calls for independence of regulators[6]. In broadcasting, the need for independent regulatory oversight was deemed vital against a background of the perceived pervasiveness and opinion forming powers of this particular mass medium and its delicate relationship with government or politics. In this context, Salomon argued that "in order to preserve broadcasting as part of the democratic process, governments should aim to create independent

[5] Wolfgang SCHULZ, Jannes BEESKOW, Stephan DREYER, Regine SPRENGER, Peggy VALCKE, David STEVENS, Eva LIEVENS, Kristina IRION, Szabolcs KOPPANYI, Sara SVENSSON, Philippe DEFRAIGNE, Michèle LEDGER, Valerie WILLEMS, Nathalie VEREECKE, Tim SUTER, INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study commissioned by the European Commission. Final Report, Brussels, February 2011, 12-16.

[6] See: The European Convention on Human Rights (adopted 4 November1950 Council of Europe Convention no. 005) art 10; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 19.

regulators for broadcasting."[7] The 2009 Communication of the European Commission on the application of state aid rules in Public Service Broadcasting[8] formulates it as follows: "Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1) and Article 10 of the European Convention of Human Rights, a general principle of law the respect of which is ensured by the European Courts (Judgement in case C-260/89 ERT, [1991] ECR I-2925.)."

EU audiovisual media sector

The legal framework for the independence and efficient functioning of audiovisual media regulatory bodies is complex and made up of a number of different legal and regulatory sources, including broader policy documents and instruments, such as infringement procedures, case law, and Commission studies and reports. In the following paragraphs, we will examine the most important of these sector-specific provisions. Although relevant for the issue at stake, requirements which could follow from other legal provisions (such as the obligation to implement EU directives[9], or the general provision on the protection of the freedom of speech[10]) are in this paper not considered.

A. Independence of regulatory bodies: article 30 AVMS

The main starting point for the analysis of the regulatory framework on independence and efficient functioning of regulatory bodies in the audiovisual media sector is the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, as it was recently consolidated[11]. The core requirements for independence and efficient functioning of national regulatory bodies are mainly to be found in its article 30 of chapter XI ("Cooperation between regulatory bodies of the Member States"), which states: "Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 3 and 4 hereof, in particular through their competent independent regulatory bodies.". The scope and impact of this provision is further explained in two specific recitals of the directive[12].

---

[7] Salomon, E. (2006): Guidelines for Broadcasting Regulation. Paris: UNESCO and CBA.

[8] Communication from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257 , 27 October 2009, paragraph 10.

[9] Art. 288 para. 3 TFEU.

[10] Art. 10 ECHR

[11] Official Journal 15 April 2010, L. 95, 1 – 24. Hereafter referred to as "AVMS Directive".

[12] "(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.
(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States

The current text of Art. 30 AVMS Directive reflects a sensitive compromise between the visions of the European Parliament and the Commission and the Council[13]. On the finally adopted version, the European Commission stated: "With regard to the independence of regulatory authorities the Presidency proposed a reference in a recital referring to the faculty for Member States to create independent national regulatory bodies. These should be independent from national governments as well as from operators. […].

Particularly relevant for the correct interpretation of the concept of independence as it is mentioned in article 30 AVMS Directive is the existing academic literature, which, however, consists almost entirely of the work done by Castendyk, Dommering and Scheuer. On the issue of independence, and referring to a number of policy documents of the European Commission, these authors write that Art. 30 AVMS Directive should be interpreted in such a way that "Member States have to guarantee that an existing regulatory body is independent (i) from State interference as well as (ii) from the industry "[14].

Regarding the actual means of guaranteeing the independence of the regulatory bodies, Castendyk, Dommering and Scheuer write: "It is not said by which means the Member States should ensure independence of the regulator. Obviously, the choice of the respective mechanisms shall lie in the responsibility of each Member State; thus, different experiences and cultural factors can be taken into account. This is underlined by rec. [94]."

B. Recommendation and declaration of the Council of Europe

During the last decade, the issue of the independence of audiovisual media regulatory authorities has also been high on the political agenda of the Council of Europe. In 2000, the Committee of Ministers of the Council of Europe adopted its Recommendation to Member States on the independence and functions of regulatory authorities for the broadcasting sector (Rec (2000)23)647, which was later followed by a declaration in 2008. Although, from a strictly legal perspective, neither of these documents is binding on Member States, they nevertheless contain indications on matters for which the Committee has agreed a common policy[15]. The recommendation and declaration are however particularly relevant for developing factual dimensions and indicators of independence and efficient functioning.

The recommendation starts by recognising that there is a diversity with regard to the means by which – and the extent to which – independence, effective powers and transparency are achieved by the Member States. Nevertheless, it considers that it is important that Member States should guarantee genuine independence for the regulatory authorities in the

---

and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive."

[13] Castendyk, O., Dommering, E. and Scheuer, A. (2008): European media law. Alphen aan den Rijn: Kluwer Law International, 996.

[14] Castendyk, O., Dommering, E. and Scheuer, A. (2008): European media law. Alphen aan den Rijn: Kluwer Law International, 997.

[15] Moreover, the impact of these documents has also been suggested by the European Court of Human Rights in a number of cases, see: Wolfgang SCHULZ, Jannes BEESKOW, Stephan DREYER, Regine SPRENGER, Peggy VALCKE, David STEVENS, Eva LIEVENS, Kristina IRION, Szabolcs KOPPANYI, Sara SVENSSON, Philippe DEFRAIGNE, Michèle LEDGER, Valerie WILLEMS, Nathalie VEREECKE, Tim SUTER, INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study commissioned by the European Commission. Final Report, Brussels, February 2011, 310-315.

broadcasting sector, in particular, through a set of rules covering all aspects of their work, and through measures enabling them to perform their functions effectively and efficiently. The actual recommendations of the Committee of Ministers are then to:

- *"establish, if they have not already done so, independent regulatory authorities for the broadcasting sector;*
- *include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers that enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation;*
- *bring these guidelines to the attention of the regulatory authorities for the broadcasting sector, public authorities and professional groups concerned, as well as of the general public, while ensuring effective respect to the independence of the regulatory authorities with regard to any interference in their activities."*

The appendix to the recommendation contains more precise guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector, which are grouped into the five following dimensions: 1. General legislative framework; 2. Appointment, composition and functioning; 3. Financial independence; 4. Powers and competence; 5. Accountability. For each of these dimensions, the appendix to the recommendation lists more precise criteria of the required level and organisation of independence.

Pursuant to its Recommendation, the Committee of Ministers on 26 March 2008 adopted a declaration on the independence and functions of regulatory authorities for the broadcasting sector[16], in which the Committee of Ministers inter alia declares its firm attachment to the objectives of the independent functioning of broadcasting regulatory authorities in Member States. Interesting in the explanatory memorandum to the declaration is a relatively new concept, the "culture of independence". The basic elements of such a culture of independence relate to the fact that first, members of regulatory authorities in the broadcasting sector affirm and exercise their independence; and that second, all members of society, public authorities and other relevant players including the media, respect the independence of the regulatory authorities. A culture of independence is put forward as essential to independent broadcasting regulation and should therefore according to the actual declaration be preserved by all Member States. Moreover, where they are in place, independent broadcasting regulatory authorities in Member States need to be effective, transparent and accountable[17]. Specifically for the independent broadcasting regulatory authorities, the explanatory memorandum to the declaration states that they can only function in an environment of transparency, accountability, clear separation of powers and due respect for the legal framework in force.

Institutional aspects in the EU Electronic communications sector

Contrary to the audiovisual media sector, the EU framework for the electronic communications sector provide for a wide range of powers, responsibilities and tasks to be vested in national regulatory authorities (NRAs) in order to ensure effective competition between market players. The NRAs play a central role in effectively implementing the

[16] Committee of Ministers, Council of Europe, declaration of 26th March 2008 on the independence and functions of regulatory authorities for the broadcasting sector, available at: https://wcd.coe.int/, Further referred to as: "Declaration 2008".

[17] Declaration 2008, paragraph I.

regulatory framework, since many relevant powers and tasks are directly assigned to them[18]. Under the existing electronic communications framework, NRAs are required to deal with important and complex issues such as determining relevant markets, conducting market analyses and imposing obligations on identified SMP-operators. They enjoy a significant level of independence, based on the "principle of separation of regulatory and operational functions". Recently, the 2009 directives even further increased the formal requirements of independence to such an extent one can ask whether the requirements in this sector should be considered as best practice. In the electronic communications sector, the national regulatory authorities' role as merely policy advisory bodies has been revised as a result of their obligation to implement the EU liberalisation, and to achieve harmonisation of the regulatory frameworks. Today, national regulatory authorities in this sector have to comply with a strict number of requirements for independence and collaboration, while having wide discretionary powers in their decision-making processes[19]. The electronic communications sector is without any doubt one of the sectors in which the institutional design is most developed (e.g. provisions on the formal level of independence of the regulatory authorities, on the regulatory objectives to be applied, on transparency, on appeal, on collaboration with other institutions, both at national and at European level). Finally, the institutional design in the electronic communications sector has also been highly debated in civil society (both at European and national level) and in the academic literature[20].

A. Independence

Article 3 Framework directive

The actual requirement for independence of the regulatory authorities is imposed by article 3 of the Framework Directive[21]. As indicated in the relevant recitals, the objective of the obligation to be independent is mainly to avoid the risk of conflicts of interests between the regulation of the sector and operational (or financial) interests[22] and to ensure the impartiality

---

[18] Stevens, D. / Valcke, P. (2003): NRAs (and NCAs?): Cornerstones for the Application of the New Electronic Communications Regulatory Framework. In: Communications & Strategies 50, pp. 159-189.

[19] See: Court of Justice: case C-424/07 (European Commission v Germany), paragraph 61: "In carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis (see, to that effect, Case C-55/06 Arcor [2008] ECR I-2931, paragraphs 153 to 156)".

[20] For example: De Streel, A. (2008a): The current and future European regulation of electronic communications: A critical assessment. In: Telecommunications Policy 32 (11), pp. 722-734; De Streel, A. (2005): A First Assessment of the New European Regulatory Framework for Electronic Communications. In: Communications & Strategies 58 (2), pp. 148-158; Stevens, D. / Valcke, P. (2003): NRAs (and NCAs?): Cornerstones for the Application of the New Electronic Communications Regulatory Framework. In: Communications & Strategies 50, pp. 159-189; Geradin, D. (2000): Institutional Aspects of EU Regulatory Reforms in the Telecommunications sector: Analysis of the Role of National Regulatory Authorities. In: Journal of Network Industries 1, pp. 5-32; Melody, William H. (1999): Telecom reform: progress and prospects. In: Telecommunications Policy 23, pp. 7-34; Melody, W. H. (1997a): On the meaning and importance of independence in telecoms reform. In: Telecommunications Policy (21) 3, pp. 195-199.

[21] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (short: "Framework Directive"), OJ. L. 24 April 2002, 108, 33, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (short: Better Regulation Directive"), OJ. L. 18 December 2009, 337, 37.

[22] As it is also the case in the WTO Agreement on Basic Telecommunications, where many countries commit, among other things, to establish a regulator that is separate from the incumbent operator.

and transparency of the decisions of the NRAs[23], referred to in the recitals to directive as the "principle of separation of regulatory and operational functions"[24].

The precise requirements are formulated by article 3, al. 2 of the Framework Directive. The first sentence of this provision applies to all Member States. They must all ensure that their NRAs are legally distinct from, and functionally independent of, market players. In practice, Member States must ensure at least two separate things. First of all, they must make sure that every NRA is a legal person separate from any undertaking providing electronic communications networks or services. Assigning the least part of the regulatory tasks to an undertaking would constitute a breach of this requirement. Furthermore, beside a strictly legal separation, this sentence also requires a "functional independence" of the NRA in its relationship with market players. Market players should not be able to interfere with or to influence the decisions of the regulatory body[25].

Where a Member State retains ownership or control of a market player, it is obliged to ensure an effective structural separation of the regulatory function from activities associated with ownership or control (article 3, 2. second sentence Framework Directive). This article reflects the (legitimate) concern that Member States which retain part of the operational task are subject to an increased risk of conflicts of interest. The obligation to ensure such effective structural separation is stronger, because it imposes on Member States the obligation to realise this stricter separation between the regulatory function (defined in a very general way) and the activities associated with ownership or control. In practice, Member States are obliged to avoid as much as possible every conflict of interests between those different functions at every level of their administration[26]. Some lack of clarity still persists about the precise scope of the supervision of the NRAs. While some authors seem to defend the thesis that the directives do not require more than assigning the supervision over the NRA to another minister then the minister managing the State's share in its incumbent operator[27], others stay closer to the text of the Commission's communication of 1995[28], indicating that the control

---

[23] Court of Justice, case C-424/07 (European Commission v Germany), paragraph 59: "In carrying out their tasks, the NRAs are required, pursuant to Article 7(1) of the Framework Directive, to take the utmost account of Article 8 thereof. In accordance with Article 8(1) of that directive, Member States must ensure that the NRAs take all reasonable measures which are aimed at achieving the objectives set out in Article 8. Furthermore, that provision states that the measures taken by the NRA must be proportionate to those objectives.".

[24] Recital 11 of the Framework Directive: "In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.". See also Court of Justice, case C-424/07 (European Commission v Germany), paragraph 54: "Pursuant to Article 3(2) and (3) of the Framework Directive and recital 11 in its preamble, in accordance with the principle of the separation of regulatory and operational functions, Member States must guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality and transparency of their decisions."

[25] Stevens, D. / Valcke, P. (2003): NRAs (and NCAs?): Cornerstones for the Application of the New Electronic Communications Regulatory Framework. In: Communications & Strategies 50, pp. 166.

[26] Schütz, R. / Attendorn, T (2002): Das neue Kommunikationsrecht der Europäischen Union – Was muss Deutschland änderen?. In: MMR Beilage (4), pp. 25; Bender, G. (2001): Regulierungsbehörde quo vadis?. In: Kommunikation und Recht 10, pp. 509.

[27] Scherer, J. (2002): 279-280 and Geradin, D. (2000): 18-20.

[28] Communication of the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, OJ. C. 20 October 1995, 275, 2.

over both the regulatory and operational function can remain the competence of the one minister, as long as he cannot control more than the accounts and the legality of the decisions of NRAs. On this issue, particularly relevant is the European Commission practice, since it recently closed a case before the Court of Justice since Latvia now *"ensured a clear separation between the bodies which make telecoms rules and those which provide telecoms services by transferring telecoms regulatory functions regarding radio frequencies and numbering from the Ministry of Transport to the Ministry of Environmental Protection and Regional Development. This separation, also known as structural separation, is essential to preserve the impartiality of national telecoms regulators, guaranteeing fair regulation for consumers and businesses and maintaining competition"*[29].

Recently, even more stringent requirements for independence were put into place in the context of the 2009 amendments of the regulatory framework (which in principle had to be implemented by Member States before June 2011). First, Member States will be obliged to ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. According to this new paragraph, Member States will also have to ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them, and that that NRAs have separate annual budgets, which have to be made public. A number of other requirements are also added to Art. 3 of the Framework Directive. The newly added paragraph 3a of the Framework Directive obliges NRAs responsible for ex-ante market regulation or for the resolution of disputes between undertakings to act independently and prohibits them seeking or taking instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. The text however explicitly mentions that these obligations shall not prevent supervision in accordance with national constitutional law. In fact, this obligation should be understood in such a way that only the appeal bodies set up in accordance with the provisions of the directive should have the power to suspend or overturn decisions by the national regulatory authorities.

Another new requirement relates to the dismissal of the head(s) of the regulatory body. In this respect, Member States have to ensure that the head(s) of a national regulatory authority may only be dismissed if they no longer fulfil the conditions required for the performance of their duties. The decision to dismiss the head(s) has to be made public at the time of dismissal. The dismissed head(s) has to receive a statement of reasons and shall have the right to require its publication, where this would not otherwise take place, in which case it shall be published.

Ministries as NRAs?

For quite some time, one of the most problematic issues in the electronic communications sector had been the question of whether the concept of "national regulatory authorities" only refers to the authorities that are competent for "rule application", or also those that are competent for "rule making". In a recent judgement of the Court of Justice, it has become clear that a national regulatory authority is not necessarily limited to strict rule application[30]. However, a ministry can only serve as national regulatory authority if it is able to comply with all the institutional requirements that are applicable to national regulatory authorities (e.g. independence, policy objectives, appeal)[31].

---

[29] European Commission, press reléase IP/11/412, April 6th, 2011.

[30] Case C-82/07 Comisión del Mercado de las Telecomunicaciones v Administración del Estado [2008] ECJ, 6 March 2008.

[31] Court of Justice, case C-82/07 (Comisión del Mercado de las Telecomunicaciones v Administración del Estado), paragraph 26: "As a consequence, where those functions are to be discharged, even partially, by

The Court of Justice thereby clarified one of the limits to the concept of independence, as already explicitly mentioned in the recitals to the Framework directive, which state that the concept of independence is without prejudice to the institutional autonomy and the constitutional obligations of the Member States, or to the principle of neutrality with regard to the property ownership[32]. Therefore the obligation to avoid possible conflicts of interest does not require Member States to disregard their own constitutional or administrative framework and does not require Member States to privatise their incumbent operator further.

Legislators as NRAs?

In its judgement in case C-424/07 (European Commission v Germany) it seems the Court of Justice is following another approach. In this case, the European Commission acted against a provision in the German Telecom act which stated that “new markets” (according to the act defined as “a market for services or products which are significantly different from currently available services or products in terms of their effectiveness, their range, their availability for a large number of users (mass-market capacity), their price or their quality from the point of view of a knowledgeable buyer, and which do not simply replace those products…”) would, in principle, not be subject to regulation by the national regulatory authority. In its judgement, the Court did not turn to the functional definition of the national regulatory authority, but instead followed the interpretation of the European Commission, by concluding that this provision encroaches on the wide powers of the NRA, preventing it from adopting regulatory measures appropriate to each particular case[33]. Moreover, the Court not only concluded that the legislator cannot serve as an (independent) national regulatory authority, but also ruled that the strict institutional procedures for market definition, market analysis and the imposing of obligations were not applied correctly[34].

However, in its judgement in case C-389/08 (Base NV and others vs. Ministerraad) from 6 October 2010[35] the Court ruled that the Framework Directive “does not in principle preclude, by itself, the national legislature from acting as national regulatory authority within the meaning of the Framework Directive” provided that, in the exercise of that function, it meets the requirements of its article 3. Therefore “Member States must, in particular, ensure that each of the tasks assigned to national regulatory authorities be undertaken by a competent body, guarantee the independence of those authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services and ensure that they exercise their powers impartially and transparently.”

B. Transparency

The transparent and efficient functioning of the NRA has always been central to the concerns of market players. In the early stages of the liberalisation process, market players often complained of confusion about which authority exercised which power and especially about the distribution of powers and responsibilities between the independent regulatory bodies and

---

ministerial authorities, each Member State must ensure that those authorities are neither directly nor indirectly involved in ‘operational functions’ within the meaning of the Framework Directive”.

[32] Recital 11 Framework Directive.

[33] Court of Justice, case C-424/07 (European Commission v Germany), paragraph 78.

[34] Court of Justice, case C-424/07 (European Commission v Germany), paragraph 106.

[35] In this case the Belgian Constitutional Court asked the Court of Justice for a preliminary ruling about the question whether the legislator can evaluate the reasonableness of the cost of universal service, whereas the directives impose this task on the regulatory authority.

the relevant ministries. In the view of new entrants this confusion has undoubtedly had a negative impact on the liberalisation process. In order to avoid such confusion and provide for more transparency, the article 3, 4 of Framework Directive requires the publication of the tasks to be undertaken by NRAs in the electronic communications sector in an easily accessible form, in particular where those tasks are assigned to more than one body[36]. However, as Nicolaïdes indicates, the obligation of transparency does not contain for the Member States the obligation to evaluate the organisation or functioning of their NRAs[37].

C. Regulatory objectives and principles

Besides requirements for independence and transparency, the Framework Directive also requires Member States to ensure that all decisions of the NRAs are aimed at achieving a limited number of policy objectives. In practice, every decision of a NRA should aim at realising at least one of the stated objectives. Member States are in principle not allowed to impose other objectives or principles on their NRAs. Imposing such a harmonised set of objectives and principles to underpin the tasks of the NRAs was considered to be an essential tool to ensure that the increased flexibility of the material rules of the framework (e.g. in the area of market regulation) would not hamper the harmonisation of market conditions throughout the European Union. Supported in this interpretation by the jurisprudence of the Court of Justice[38], the European Commission therefore attaches great value to these objectives and principles and to their correct implementation into national law.

The objectives that were imposed on the NRAs by article 8 of the Framework Directive mainly fell into three main categories: 1° promoting competition in the provision of networks, services and associated facilities and services; 2° contributing to the development of the internal EU market; 3° promoting the interests of the citizens of the EU. Further, national regulatory authorities also have to apply objective, transparent, non-discriminatory and proportionate regulatory principles in their pursuit of these policy objectives. For all those high-level objectives, the directive gives extensive lists of more specific ways in which the NRAs should pursue them. Beside those three general principles, the directives also require the NRAs to make their decisions (especially those aiming at ensuring effective competition) as technologically neutral as possible. In practice, when taking a decision, NRAs should in principle not discriminate in favour or disfavour of the use of a particular type of technology.

D. Broader institutional framework

The electronic communications directives not only prescribe in detail the requirements regarding the legal position and the powers of the regulatory authorities. Besides this, they also contain provisions and requirements about the broader institutional framework (e.g. issues such as information, consultation, collaboration and harmonisation procedures) in the

---

[36] See also: Court of Justice, case C-82/07 Comisión del Mercado de las Telecomunicaciones v Administración del Estado [2008] ECJ 6 March 2008, paragraph 25.

[37] Nicolaïdes, P. (2005): Regulation of Liberalised Markets: A New Role for the State? In: D. Geradin, D. / Muñoz, R. / Petit, N. (eds.), Regulation through Agencies in the EU – A New Paradigm of European Governance. Cheltenham and Northampton: Edward Elgar Publishing Inc, pp. 33-36.

[38] See, most recently: Court of Justice, case C-424/07 (European Commission v Germany), paragraph 92: "In that context, the Court has interpreted Article 8 of the Framework Directive as placing on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (see, Case C-380/05 Centro Europa 7 [2008] ECR I-349, paragraph 81, and Case C-227/07 Commission v Poland [2008] ECR I-0000, paragraph 63)".

electronic communications sector[39]. The impact of these procedures has been perceived by some scholars as significant in that they describe the current regulatory model in the electronic communications sector as a model of "managed decentralisation, or decentralisation with EU cooperation (or networking) mechanisms"[40].

In practice, the different instruments relate to:

- obligations to publish certain information and/or notify concerned parties;
- obligations to consult other regulatory authorities;
- harmonisation or cooperation procedures;
- requirements on collaboration with competition law authorities;
- the obligation to collaborate with the Body of European Regulators for Electronic Communications (BEREC).

E. Appeal

Finally, article 4 of the Framework Directive assigns to any user and undertaking providing electronic communications networks and/or services, which is affected by a decision of an NRA, a right of appeal to a body that is independent of the parties involved. This body, which may be a court, must have the appropriate expertise available for functioning effectively and has to be competent to take the merits of the case duly into account. Pending the outcome of any such appeal, the decision of the NRA should stand, unless interim measures are granted in accordance with national law. Furthermore, Member States must collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. After reasoned request of the European Commission or BEREC, Member States must provide them with such information[41].

"Complete independence": the EU data protection authorities

The independence of regulatory agencies has also been highly debated in the field of data protection law. At first sight, the study of this domain can produce interesting insights for the media and communications sector since both involve fundamental rights (e.g. the right to freedom of expression in the media sector). Contrary to most of the other sectors, article 28 para. 1 sent. 2 of Directive 95/46/EG requires a "complete independence" of the supervisory authorities in the data protection area, stating: "Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive. [al] These authorities shall act with complete independence in exercising the functions entrusted to them". Before the Court of Justice, the European Commission claimed that Germany had not correctly implemented this provision. For defining "complete independence" the Commission i.a. referred to the criteria stated in policy documents of the Council of Europe[42], such as: the

---

[39] Larouche, P. (2002): A closer look at some assumptions underlying EC Regulation of Electronic Communications. In: Journal of Network Industries 3, pp. 145-148.

[40] Geradin, D. / Petit, N. (2004): The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform. New York University: School of Law, 15.

[41] Nihoul, P. / Rodford, P. (2004): EC Electronic Communications Law. Competition and Regulation in the European Telecommunications Market. Oxford: Oxford University Press, 629-641; Lasok, K. (2005): Appeals under the new regulatory framework in the Electronic Communications Sector. In: European Business Law Review 16 (4), pp. 787-801.

[42] Council of Europe (EC) ETS 181 of 28 November 2001 Additional Protocol to the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data Regarding Supervisory

composition of the authority, the method for appointing its members, the duration of exercise and conditions of cessation of their functions, the allocation of sufficient resources to the authority, the adoption of decisions without being subject to external orders or injunctions.

In its judgement of March 9 2010, the Court of Justice to a large extent follows the thesis of the European Commission, considering independence as necessary to create an equal level of protection of personal data and thereby to contribute to the free movement of data, which is necessary for the establishment and functioning of the internal market[43].

The Court's main argument revolves around two different lines, of which the first one relates to the actual wording of aricle 28 of the directive. On this issue, the Court concludes that, because the words 'with complete independence' are not defined by the directive, it is necessary to take their usual meaning into account. The Court continues by stating that "in relation to a public body, the term 'independence' normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure". Furthermore, it dismisses all the arguments of the German Republic by explicitly stating that "there is nothing to indicate that the requirement of independence concerns exclusively the relationship between the supervisory authorities and the bodies subject to that supervision. On the contrary, the concept of 'independence' is complemented by the adjective 'complete', which implies a decision-making power independent of any direct or indirect external influence on the supervisory authority."[44]

The second argument of the Court is built around its interpretation of the objectives and the context of the data protection directive, and of the requirement of independence. On the latter, the Court states 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. […] It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they 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".[45]

The Court of Justice then turns to the analysis of whether the German state scrutiny over the data protection supervisory authorities is consistent with the requirement of complete independence. Although it recognises that the state scrutiny *a priori* only seeks to guarantee that decisions of the authorities comply with the national and European legislation, and therefore does not aim to oblige those authorities potentially to pursue political objectives inconsistent with the protection of individuals with regard to the processing of personal data and with fundamental rights, the Court nevertheless concludes that the current organisation of state scrutiny does not exclude the possibility that the scrutinising authorities, which are part of the general administration and therefore under the control of the government of their respective Land, are not able to act objectively when they interpret and apply the provisions

---

Authorities and Transborder Data Flows, http://conventions.coe.int/Treaty/EN/Reports/Html/181.htm> accessed July 7th, 2011.

[43] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 50.

[44] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 18-19.

[45] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 25.

relating to the processing of personal data[46]. Furthermore, the Court also rules that the mere risk that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter authorities' independent performance of their tasks. To support this finding, the Court refers to the possibility that there could be 'prior compliance' on the part of the data protection authorities, and to the necessity for the decisions of the regulatory authorities, and therefore for the authorities themselves, to remain above any suspicion of partiality[47].

Concluding, the Court also dismisses the argument that a broad interpretation of the requirement of independence would be contrary to various principles of European Community law and to the principle of democracy, by stating in paragraph 42: *"That principle [of democracy] does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. That is precisely the case with regard to the tasks of the supervisory authorities relating to the protection of data."*

The Court however rules that the required balance between the requirement for independence and the principle of democracy does not oblige Member States to abolish every possible form of state scrutiny. In this respect, the Court explicitly states that the management of the supervisory authorities may be appointed by the parliament or by the government, and that the legislator may define the powers of those authorities. Furthermore, the legislator may impose also an obligation on the supervisory authorities to report their activities to the parliament.[48;]

However, because of a much wider state scrutiny in Germany, the Court declares that, by making the authorities responsible for monitoring the processing of personal data by non-public bodies and undertakings governed by public law which compete on the market (öffentlichrechtliche Wettbewerbsunternehmen) in the different Länder subject to State scrutiny, Germany has not correctly transposed the requirement that those authorities perform their functions 'with complete independence'.

The direct impact of this judgement on the requirement of independence applicable to the audiovisual media or electronic communications regulatory authorities will most likely remain limited because, in most cases, the data protection regulatory authority will be separate legal entities. Moreover, the data protection situation is also particular because the directive explicitly requires a "complete independence". The judgement nevertheless contains useful information on the dimensions and indicators that are used to judge the independence of the regulatory authority in its relationship with the government and/or state.

---

[46] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 34.

[47] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 36.

[48] Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 43-45.

Concluding observations

In this paper, we developed and compared the legal frameworks with regard to the independence of regulatory bodies in the European audiovisual media sector, in the electronic communications sector and in the area of data protection.

Regarding the audiovisual media sector, our analysis has shown that the independence and pluralism of the media and the principle of the freedom of speech are universally accepted fundamental values and rights, which to some extent require Member States to ensure that their audiovisual media regulatory bodies carry out their duties in an impartial manner. The obligation of impartiality is not only relevant in the relationship between the public and the private sector, but also needs to take into account the delicate relationship between the media and politics (i.e. when shaping the relationship between the regulatory body and the government). The obligation of impartiality is further elaborated in the AVMS-directive, of which article 30 contains a minimum requirement of independence for existing regulatory bodies. When a specific regulatory body is established in the Member States, this body should be organised sufficiently independent from market players and government (e.g. requirements at the level of status and powers, financial autonomy, autonomy of decision makers, knowledge, accountability and transparency mechanisms) and dispose of the necessary powers to effectively implement the aims of the AVMS Directive. This conclusion is supported by the wording of the Directive, as well as the underlying long-term objective to establish a network of information exchange and cooperation among the main regulatory bodies in the field of AVMS regulators. However, if an independent regulatory body has not been established in the Member State, an obligation to establish such a body does not follow from article 30 AVMS Directive.

In the electronic communications sector, increasing competition, promoting harmonisation, coherence and consistency were the crucial aims of the 2002 regulatory framework. In general, the framework sets clear policy objectives and clarifies the respective roles between sector specific and competition law. According to this framework, ex ante regulation is only foreseen in the case of high and non-transitory entry barriers, when market structures may not result in effective competition and when competition law instruments are not sufficient. The framework also contains specific institutional requirements concerning the independence of national regulatory authorities from market players, the transfer of effective powers and resources, and the need for transparency and timeliness in decision making. Finally it also sets procedural requirements which should foster consistency through legislative recommendations, promote monitoring and coordinated approaches. In the electronic communications sector, it seems fair to state that these provisions are slowly but surely leading towards a “common regulatory culture” across Member-States. The institutional design in the electronic communications sector is also important in order to establish good practices, common principles and values that could guide countries when designing or redesigning the governance of their regulatory authorities.

Without any doubt, the above mentioned legal and regulatory developments will in the future have a considerable impact on the design of independent regulatory authorities in the European information and communications technology sectors, also because of the strict interpretation of the European Court of Justice of the concept of ‘complete independence’ in the data protection area. It remains however to be seen whether the evolution towards ever more strict requirements regarding the autonomy or institutional design of independent regulatory authorities and ever wider regulatory powers or remits for these institutions will lead to a more efficient functioning of the regulatory bodies, or to an increased impartiality of their decisions. Instead of focusing on the illusion of “political” of “complete” independence

of regulatory authorities, transparency of regulatory processes and decisions should therefore in our opinion receive a much more prominent place.