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The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective

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Abstract

A model of organisation that nowadays appears in the administration of nearly all European states is that of 'autonomous government'. Increasingly, international and supranational law oblige or encourage states to create autonomous public bodies. Requirements regarding the independence of national regulatory authorities anchored in EU directives on the liberalisation of the utilities sectors are the clearest examples of this trend. This contribution aims to place the Europeanisation of the law on independent regulatory authorities in a broader perspective. The process is mostly analysed from a top-down approach, discussing the requisites in EU legislation and their implementation. To a lesser extent, lawyers have been wondering how national practice had 'shaped' a European concept of an independent regulator before this was adopted by EU law (the bottom-up approach). This contribution aims to highlight a third dimension in the process of Europeanisation: the impact of horizontal processes on the law regarding independent regulators.

1 Introduction: Autonomous Public Bodies in Europe *anno* 2012 – National Restraint Meeting International Impulse

A model of organisation that nowadays appears in the administration of nearly all European states is that of 'autonomous government'.[1] The

[1] I prefer the term 'autonomous' to the term 'independent'. In a previous article in this review, M. Stolen defended the same terminological shift, albeit for different reasons (M. Scholten, 'Independent, hence unaccountable? – The need for a broader debate on accountability of the executive' [2011/1] *REALaw* 5-22). According to Scholten, the term 'independent' is misleading, as, primarily taking into account the criteria for independence developed in literature, no governmental agency is truly independent. The term 'independent' is said to be 'an overarching notion implying a complete absence of any constraints, and there are a number of constraints that, in one way or another, affect each discussed element of agencies' independence'. To my opinion, the adjective 'independent' in the sense of 'independent agency' can however also have a different meaning than the far reaching one Scholten preconceives (i.e. the highest possible degree of autonomy, implying that there is no element of dependence left). Independent decision making is one of the main motives for establishing autonomous agencies (or, to use a more general term, autonomous public bodies) in many jurisdictions. See e.g. article 3.1.a of the Dutch framework regulation (Kaderwet Zelfstandige Bestuursorganen) and article 11, § 3, second branch, 1° of the Flemish framework regulation (Kaderdecreet bestuurlijk beleid). The

concept of 'autonomous government' does not as such figure in contemporary international literature. It is introduced here as an umbrella term that covers various entities or institutions that all have in common the fact that they are part of the government's organisational structure, but nevertheless function at a certain distance from the central core administration. The term does not correspond to a specific, fixed legal set of rules or principles, since it is intended to be used in the context of comparative or multinational legal research, rather than research which is confined to a single legal system. In international literature, specific terminology has been developed to refer to (specific types of) autonomous public bodies. The notions 'agency', 'quango' and 'autonomous administrative authority' are widespread in literature in both political and legal science.

However, it remains difficult to formulate a single (legal) definition for the concept. To simplify, one could say that in Europe, creating autonomous government implies *entrusting entities distinct from the core administration with government tasks and allowing them to execute these tasks with a certain degree of autonomy in relation to the politically responsible institutions*. This is, in any case, the working definition that is preconceived for the delimitation of the subject of this contribution and the broader research project of the author *ratione materiae*. An elaboration and defence of its different constitutive elements is beyond the scope of the present article. Two brief clarifications could, however, be made. First, 'entrusting an entity with government tasks' in the abovementioned working definition refers to the delegation of management and/or decision-making powers regarding a specific area of the government task package, and therefore the genuine transfer of a competence. This excludes e.g. advisory bodies, whose tasks are not the result of a process of delegation of competence. Advisory bodies are not invested with powers in order to take over the responsibility for the execution of a public task. Their products (advices) support the managerial or decision-making process, which is executed by the public body which they advise. Second, the meaning of the notion 'politically responsible institutions' requires further explanation. Who should autonomous public bodies be autonomous from? In Europe, the answer seems to be central government, both in the emanation of the executive as well as the emanation of parliament. Traditionally, only the first relationship is mentioned. However, having an autonomous status *vis-à-vis* the executive in most European states seems to

notion 'independent agency' could therefore also be reserved for those autonomous agencies which have been created for specifically that purpose (and not for other purposes, such as participatory goals). The independent agency can thus be considered as a *species* of the *genus* autonomous agency. In this meaning, 'independent' does not have a connotation of a total lack of control or accountability. It merely signifies 'established for reasons of independent, i.e. non-political, decision making', a motive that can correlate with different degrees of autonomy. IRAs in the utilities sectors, that form the subject of this contribution, are an example of autonomous public bodies that have been created for this very reason (*infra*).

imply upholding that same autonomous position in one's relationship to parliament, especially where the executive can rely on a majority in parliament to support its decisions.

In almost all of (western) Europe, the 1980s and 90s were characterised by a trend towards *more* autonomous government. Under the impulse of the theories of New Public Management and, above all, inspired by Neo-liberalist thought, administrations were decentralised on a large scale. *Anno* 2012, the law on the creation of autonomous public bodies in the administrative organisation of European states seems to be characterised by two predominant contemporary trends, which appear to be developing in opposite directions.[2]

On the one hand, one notices an attempt on the national level in European democracies to *restrain* the evolution towards autonomous government. The *quasi* unlimited establishment of autonomous public bodies in the recent past has been vehemently criticised from a democratic point of view. Increasingly, the question arises whether and to what extent the model of autonomous government can be reconciled with fundamental (often constitutional) principles, governing administrative organisation. In some states, constitutional courts have been asked to judge on aspects of this matter[3] and/or parliamentary assemblies have been striving to keep a firmer grip on their establishment and functioning.[4] Attempting to put a brake on the unlimited rise of autonomous public

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2 These trends and their relationship are further studied in the author's current Ph.D. research: *The Creation of Autonomous Public Bodies from a European Comparative Legal Perspective: International Impulse, National Restraint and how to reconcile these trends.*

3 See e.g. Belgian Constitutional Court 18 November 2010, no. 130/2010, discussed later in this contribution. The French Conseil Constitutionnel knows quite a long tradition on judgments on the matter of (the constitutional validity of) *autorités administratives indépendantes.* An overview can be found in 'Jurisprudence du Conseil constitutionnel, Tables d'analyses', containing the case law since 1959, which can be consulted via www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-themes-tables-/tables-analytiques.25838.html. Title 15 contains an overview of the case law on independent administrative authorities.

4 In the United Kingdom, so called quangos (quasi-autonomous non-governmental organisations, being entities which function at a certain distance from central administration) are being abolished on a large scale. Although limiting expenses and thus saving money is an important *ratio* in this process, restoring governmental accountability and thereby democratic control is the most important ratio behind what is called the 'bonfire of the quangos'. See e.g. BBC News 14 October 2010, 'Quango list shows 192 to be axed' at www.bbc.co.uk/news/uk-politics-11538534: 'The government has announced a huge cull of quangos in a move it says will improve accountability and cut costs. It will axe 192 of the public bodies...'; The Guardian 7 January 2011, 'MPs condemn coalition's bonfire of the quangos as botched' at www.guardian.co.uk/politics/2011/jan/07/mps-committee-bonfire-quangos-botched?INTCMP=SRCH, demonstrating that the parliamentary discussion is still very much alive. In France, traditionally a centralised country, parliament has been reflecting on the reorganisation of the so called *autorités administratives indépendantes* from a democratic viewpoint. See e.g. Assemblée Nationale 11 mai 2011, n° 3405, Rapport d'Information par la commission des lois constitutionnelles, de la législation et de l'administration générale de la République, sur la mise en œuvre des recommandations du rapport du Comité d'évaluation et de contrôle des politiques publiques sur les autorités administratives indépendantes (following previous reports and studies). This can be consulted via www.assemblee-nationale.fr/13/pdf/rap-info/i3405.pdf.

bodies, some states have enacted framework regulations,[5] determining the conditions for the establishment of autonomous public bodies. Consequently, one could say that, at present, (the law on) autonomous government is being 'reinvented'.[6]

On the other hand, however, international and supranational law obligeor encouragestates to create autonomous public bodies. In the field of human rights law, there is an international impulse towards establishing autonomous controlling and monitoring bodies, which are part of the governmental organisation scheme, but are nevertheless to a certain extent independent from that same government.[7] Requirements regarding the independence of National Regulatory Authorities (NRAs), which find a legal basis in different directives of the European Union on the liberalisation of utilities or network sectors, are undoubtedly the most evident examples of this trend towards the internationalisation of the law on autonomous government. These entities constitute the very subject of this contribution.

2 Studying the Europeanisation of the Law on IRAs in the Utilities Sectors from a Broader Perspective: Background and Context

Over the last few decades of the 20th century, the role of the state as an economic actor in Western-Europe has been subject to radical changes. The markets of the so-called 'utilities sectors' (electricity and gas, telecommunications, postal services, transport and – as far as one wishes to consider this a 'utility' – audiovisual media) were gradually liberalised. The European Union played an important role in this process: EU legislation was enacted, spread over different 'generations' or 'packages', and enforced.[8] The institutional landscape in these sectors was, little by little, transformed. The

5 The most advanced examples of this trend are the Netherlands, that dispose of a Kaderwet Zelfstandige Bestuursorganen and Flanders, that has enacted the Kaderdecreet bestuurlijk beleid.

6 Or should one say 'invented'? Autonomous public bodies have, since their rise, frequently been an object of study in political sciences. However, initially and until recently, they received very little attention from lawyers and have only become a topic for genuine legal research since becoming subject to serious criticism from a democratic viewpoint.

7 See e.g. the UN Paris Principles, adopted by General Assembly resolution 48/134 of 20 December 1993, encouraging states to establish an independent national human rights institution.

8 For a recent overview of the history and state of the art of liberalisation and regulation of network industries in the EU, with a focus on electronic communications and energy: see L. Hancher & P. Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in: P. Craig en G. de Búrca (eds), *The evolution of EU law* (Oxford 2011) 743-781.

government would no longer be intervening in the market through ownership of the market player(s), directly providing the goods or services concerned, but would henceforth be 'regulating' the market.[9] As a regulator, the government positions itself 'above' the market, controlling and monitoring the activities of the market players. Although government companies are still operating in many of these markets in most European countries, government monopolies have more or less disappeared. This contribution does not aim to elaborate on the substantive aspects of regulation, but rather to highlight a specific feature of the administrative organisation or institutional aspects of this phenomenon: regulation through *independent* NRAs (*I*RAs).

The EU liberalisation directives that are currently in force, entrust NRAs with the implementation of EU legislation in the different Member States.[10] In 2008, Coen and Thatcherwrote that:

'EU regulation has said relatively little about the institutional framework for the implementation of regulation within member states. It has not insisted that NRAs be IRAs and hence independent from government, nor has it laid down rules for the institutional form or powers of NRAs. Instead, it has confined itself to insisting that regulatory organisations be separate from suppliers, that they follow certain decision-making principles such as 'fairness' and transparency and that they have adequate resources to fulfil their EU-created legal duties.'[11]

Anno 2008, an obligation to establish IRAs for the telecoms market *did* however exist, at least for Member States that retained ownership or control of undertakings providing electronic networks and/or services.[12] A general independence requirement appeared in telecoms legislation later, in 2009.[13] Also in 2009, the European Union enhanced the obligations on the independence of national energy regulatory authorities, extending them to the relationship

9 See F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 1 and 18-20.

10 In regulatory matters, the model of 'shared administration' is applied: P. Craig, 'Shared administration, disbursement of community funds and the regulatory state' in: H.C.H. Hofmann & A.H. Türk (eds), *Legal Challenges in EU Administrative Law. Towards an Integrated Administration* (Cheltenham 2009) 34-62.

11 D. Coen & M. Thatcher, 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' [2008/28] *Journal of Public Policy* 54.

12 This obligation was imposed by Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* L 108 (2002), 33-50. See *infra*.

13 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, *OJ* L 337 (2009), 37-69.

with the government.[14] As will be demonstrated further on, in the sector of audiovisual media services as well, it could be argued that since 2007 EU law contains an obligation to set up an independent national regulator. EU law thus has its impact on the systems of administrative organisation of the Member States, as it obliges them to establish autonomous public bodies, functioning at a certain distance from the government's core administration, to regulate certain industries.

This contribution aims to place the Europeanisation of the law on IRAs in a broader perspective, not merely presenting it as the result of one-way traffic from the EU level to the national level. In the field of political science, the existence of 'diffusion' or horizontal influence between states and their administrations regarding the establishment and design of IRAs has recently been demonstrated (*infra*, Gilardi's work). In contributions in the field of administrative *law*, phenomena like these are seldom addressed. The Europeanisation of the law on IRAs is mostly analysed from a top-down approach, discussing the requirements that flow from European law and the way in which these should be implemented at the national level. To a lesser extent, lawyers have been wondering how national practice had 'shaped' a European concept of an independent regulator before this was adopted by EU law, *i.e.* the bottom-upapproach. On the third dimension, which a pluralistic view on the development of law takes into account, *i.e.* the horizontal perspective, hardly any awareness seems to exist.

In a judgment of November 2010,[15] the Belgian Constitutional Court was asked to rule on the conformity of the independence of the Belgian national energy regulator (the CREG[16]), anchored in a national act,[17] with the Belgian Constitution. Article 37 of the Constitution – the provision at stake[18] – contains the principle that the federal executive power, as regulated by the Constitution, rests with the King. It follows from this provision that all administration should be, in principle, executed by or under the direct control of the executive. While decentralisation can be necessary for reasons of good administration, some

14 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* L 211 (2009), 55-93.

15 Belgian Constitutional Court 18 November 2010, no. 130/2010. This judgment can be consulted via www.constitutionalcourt.be. A more comprehensive commentary on this judgment can be found in S. De Somer, 'Internationale impuls en nationale beheersingsdrang inzake bestuurlijke verzelfstandiging: het Grondwettelijk Hof en de casus van de energieregulator' [2012/4] *Tijdschrift voor bestuurswetenschappen en publiekrecht* 214-228.

16 Abbreviation for: Commissie voor de Regulering van de Elektriciteit en het Gas.

17 Act of 29 April 1999 considering the organisation of the electricity market, *Belgian State Gazette* 11 May 1999.

18 The judgment also involved article 33 of the Constitution, which states that all powers have to be executed in the way that the Constitution determines. Article 37 should be read in the light of this provision.

form of control remains necessary. The politically responsible institutions should be able to supervise and influence institutions occupied with governmental tasks in order for the parliament to usefully interrogate them and thus make them accountable. A minister who has no control whatsoever over a governmental institution cannot reasonably be expected to take responsibility and thus to be accountable for the acts and decisions of this institution. Parliamentary control will therefore weaken when the strings between minister and administration are cut loose.[19]

According to the Constitutional Court however, the independence of the CREG did not constitute a violation of the abovementioned provision, despite the limited direct control from central government over the decisions of the CREG. The Court was of the opinion that article 37 of the Constitution does not prevent the legislator from attributing specific executive tasks in a certain technical matter to an autonomous administrative authority, as long as this authority remains subject to both judicial and parliamentary control. The decisions of the CREG are subject to judicial control and the legislator approves the regulator's budget, the Court ascertained. The CREG has to report to the competent minister on an annual basis regarding the execution of its tasks, and the minister sends this report to the federal parliament and the governments of the regions. According to the Court, the parliament moreover enjoys the possibility of interrogating the competent minister or the federal government, using the (classic) means of control that are at its disposal. Consequently, in the view of the Court, (sufficient) parliamentary control did exist.

Almost as though the Court were not really convinced by its reasoning on this point, it also developed an alternative argument, referring to article 34 of the Belgian Constitution.[20] Although there is no real consensus amongst courts and authors about the meaning and scope of this article, it is mostly regarded as an article anchoring the supremacy of supranational law with direct effect in relation to national law.[21] Consequently, the Court's reasoning was the following: even if the independence of the energy regulator is not in accordance with the constitutional principle laid down in article 37 of the Belgian Constitu-

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19 For Belgium, see e.g. Y. Sacreas, 'De politieke ministeriële verantwoordelijkheid' [2001/9] *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 624-633; J. Velaers, 'Over de politieke verantwoordelijkheid van ministers' in: A. Adams, R. Barbaix, H. Braeckmans *et al.* (eds), *Verantwoordelijkheid en recht: eerste facultair congres Faculteit Rechten Universiteit Antwerpen, 14 november 2008* (Mechelen 2008) 361 e.v.

20 'The performance of specific powers can be assigned by a treaty or by an act of parliament to institutions of public international law.'

21 See e.g. J. Velaers, *De Grondwet en de Raad van State Afdeling wetgeving* (Antwerp 1999) 238 (the discussion on the relevant case law of the Council of State); A. Alen, 'De grondwet, hoogste rechtsnorm?', P. Popelier, 'De verhouding tussen de Belgische Grondwet en het internationale recht' and P. Vandernoot, 'Regards du Conseil d'Etat sur une disposition orpheline: l'article 34 de la Constitution', all three in X. (ed.), *En hommage à Francis Delpérée. Itinéraires d'un constitutionnaliste* (Brussel 2007) respectively 105-113, 1231-1254 and 1599-1630.

tion, it still does not violate the Constitution thanks to Article 34, on the basis of which supranational law is supreme, *even* to the national constitution.

In a brief annotation,[22] an author made the remark that the Court's judgment contains a clear anachronism. The Court overlooked the fact that, at the time of the question formulated by the Council of State, the third energy liberalisation package (*infra*) did not yet exist. Therefore, at the relevant time, there was no obligation in European law to establish a regulatory authority that was independent from the central government. The only obligation that existed was the one flowing from the second directive, namely that all Member States had to make sure that their NRA would be sufficiently independent from the market industry (*infra*).

However, if EU law did not contain an obligation to establish an autonomous regulator, independent from the central government at the relevant time, why was such independence anchored in Belgian legislation? Initially, it seemed logical to assume that the different regulatory bodies in Europe had increasingly been made independent from the government *because* this was required by the EU directives on market liberalisation – *i.e.* a top-down approach of Europeanisation. *Quod non*, obviously. Realising this, one could be inclined to investigate the probability of the almost opposite hypothesis: is it possible that the obligation laid down in European legislation was merely a sort of 'codification' of a phenomenon occurring in the majority of the Member States for some years – *i.e.* a bottom-up approach of Europeanisation? A phenomenon that was, in its turn, the result of a horizontal process of influence between the Member States, developing common ideas on the institutional design of the bodies responsible for regulating the liberalised markets subject to EU legislation? Was it the Member States themselves that, perhaps even in a process of mutual influence, laid the foundations for the concept of the IRA that today figures in the most recent (versions of the) EU liberalisation directives?

This contribution briefly describes the Europeanisation of the law on IRAs from a vertical perspective (including both the top-down and bottom-up approach) and then complements this analysis with a more comprehensive record of the horizontal dimension, including direct influence in the inter-state-relationship (as studied in the field of political science), the influence of (consultative) organs operating within the structure of international organisations, and the influence of European networks of regulators. The broader aim is to demonstrate how legal pluralism also determines the law on administrative organisation. This research on the horizontal dimension in the Europeanisation of the law on autonomous government gives but a foretaste; many interesting aspects could still be examined. A discussion of the developments in all utilities

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22 A.-S. Renson, 'L'indépendance des autorités de régulation: la fin d'une controverse' [2011/17] *Journal des Tribunaux* 349-351.

sectors would exceed the scope of this contribution. For this reason, this contribution will focus on the sectors of energy (electricity and gas), telecoms and audiovisual media. This is justified because the liberalisation process has been initiated quite early in these areas and EU legislation hence has a longer tradition in the area, compared to the other utilities sectors.

3 Europeanisation of the Law on IRAs from a Vertical Perspective: Bottom-up and Top-down Approach

Today, the three sectors on which this contribution focusses are subject to provisions in EU law concerning their administrative organisation and more precisely their NRAs. This in itself may come as a surprise to those who are familiar with the basic assumptions of EU administrative law and, more precisely, with the principle of national institutional autonomy. According to the latter,

'unless (secondary) Community law provides otherwise, it is for the Member States themselves to determine how they fulfil their Community obligations, which organs will be made responsible for the implementation and application of Community law (directly or otherwise), and what procedures will be followed.'[23]

The obligations regarding the establishment and design of NRAs imposed by the EU seem to constitute an important exception to this principle. As the analysis of EU legislation is still done using the traditional way of examining the Europeanisation of (administrative) law, the relevant provisions are briefly discussed, before examining a broader perspective on the Europeanisation of the law on IRAs.

3.1 TOP-DOWN: EU Legislation Regarding the Independence of NRAs

As far as the *sector of telecoms or electronic communications* is concerned, article 3 of the Framework Directive[24] provides that Member States shall ensure that each of the tasks assigned to national regulatory authorities in the Directive itself and the Specific Directives is undertaken by a competent body (paragraph 1). Member States must guarantee the independence of NRAs

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23 J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 18; S. Lavrijssen & A. Ottow, 'The legality of Independent Regulatory Authorities' in: L. Besselink, F. Pennings & A. Prechal (eds), *The eclipse of the legality principle in the European Union* (Alphen aan den Rijn 2011) 74.

24 Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), *OJ* L 108 (2002), 33-50.

by ensuring that they are legally distinct from, and functionally independent of, all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services are under the obligation to ensure effective structural separation of the regulatory function from activities associated with ownership or control (paragraph 2). Member States furthermore have to ensure that national regulatory authorities exercise their powers impartially and transparently and that they have adequate financial and human resources to carry out the task assigned to them (paragraph 3).

Since its revision in 2009,[25] article 3 of the Framework Directive contains a paragraph, 3a., anchoring specific requirements for the independence of NRAs in their relationship to the government (*i.e.* their political independence). The article states that, without prejudice to the provisions of paragraphs 4 and 5, NRAs responsible for *ex ante* market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of the Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law.[26] Furthermore, only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities. Specific guarantees regarding the dismissal of the head of an NRA or, where applicable, members of the collegiate body fulfilling that function within the NRAs or their replacements are provided. Member States are furthermore obliged to ensure that national regulatory authorities referred to in the first subparagraph have separate annual budgets that shall be made public. Member States also have to ensure that national regulatory authorities have adequate financial and human resources to enable them to actively participate in and contribute to the Body of European Regulators for Electronic Communications (BEREC).

For the *energy market*, article 35 of Directive 2009/72[27] provides that each Member State shall designate a single NRA at national level and shall guarantee the independence of the regulatory authority, as well as ensure that it exercises its powers impartially and transparently (paragraphs 1 and 4). For that purpose, Member States have to ensure that the regulatory authority is legally distinct

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25 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, *OJ* L 337 (2009), 37-69.

26 This does however not prevent supervision in accordance with national constitutional law, whatever this may mean.

27 See article 35 of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ* L 211 (2009), 55-93.

and functionally independent from any other public or private entity, that it ensures that its staff and the persons responsible for its management act independently from any market interest and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks (paragraph 4). In order to protect the independence of the regulatory authority, Member States in particular, have to ensure that the regulatory authority can take autonomous decisions independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties. The members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management, have to be appointed for a fixed term of five up to seven years, renewable once (paragraph 5).[28] Article 39 of Directive 2009/73[29] contains identical obligations for the gas sector.

The *Audiovisual Media Services* (AVMS) Directive[30] still does not as such contain a separate provision requiring that Member States should set up a(n) (independent) national media regulator. However, the existence of an IRA seems to be 'presumed' in article 30 of the Directive, requiring that Member States take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of the directive, in particular articles 2, 3 and 4, i*n particular through their competent independent regulatory bodies* (emphasis added). The preamble moreover states that Member States are free to choose the form of their competent *independent* regulatory bodies and that close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of the directive (recitals 94 en 95; emphasis added).

Some authors derive from these formulations the principle that Member States are free to choose whether they want to create regulatory bodies or not, but that if they do the NRA has to be independent by definition.[31] According to

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28 Member States have to ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in the article or have been guilty of misconduct under national law.

29 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* L 211 (2009), 94-136.

30 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), *OJ* L 95 (2010), 1-24.

31 See K. Jakubowicz, Keynote Speech Prepared for delivery at the Plenary Session: 'The Independence Regulatory Authorities', 25th Meeting of the European Platform of Regulatory Authorities (EPRA), Prague, 16-19 May 2007. The speech can be consulted via www.epra.org/content/english/index2.html.

the INDIREG study,[32] the AVMS Directive does not contain a strict formal obligation for the Member States to create an independent regulatory body if one does not already exist.[33] However, it does not seem improbable that recital 94 does imply an obligation to establish an IRA, leaving only its concrete form subject to the discretion of the Member States. In any case, even if one cannot speak of a clear-cut obligation to establish an NRA/IRA, the recitals at least suggest 'that regulatory bodies are most capable of enforcing the aims of the directive in an efficient and impartial manner.'[34]

Two things can be concluded from the forgoing. First, the liberalisation directives concerning energy, telecoms and audiovisual media that are currently in force all contain provisions on NRAs and consequently, to a greater or lesser extent, interfere in the administrative organisation of the Member States.[35] Second, the provisions differ as to their content and impact on national law. While the provisions in the energy and telecoms sector contain qualified, and more or less clearly described obligations on the independence of the national regulators *vis-à-vis* both the market players andthe central government, the AVMS Directive does not seem to contain an actual obligation to establish an independent regulator at all, although it assumes or at least strongly suggests that Member States should have one and that its independence should also in-

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32 Full title: 'Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive'. See the website: www.indireg.eu. The INDIREG study, ordered by the European Commission, pursued three general objectives: a detailed legal description and analysis of the audiovisual media services regulatory bodies in the Member States, in candidate and potential candidate countries to the European Union and in the EFTA countries as well as four non-European countries (1), an analysis of the effective implementation of the legal framework in these countries (2) and the identification of key characteristics constituting an 'independent regulatory body' in the light of the AVMS Directive (3). In February 2011, the final report became available. It can be consulted via http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf.

33 See page 7 of the final report. The report does however suggest that the basic requirement of independence of AVMS-regulatory bodies could find a broader legal basis in article 10 ECHR and article 288, para. 3 TFEU, especially when read in connection with the objectives of the AVMS Directive.

34 See the paper 'Effective functioning of Regulatory Authorities: Focus on the issues of Independence and Governance of Regulatory Authorities as a follow-up of the INDIREG study', Introduction & Objectives of the Session for the Second Plenary Session of the 33rd EPRA Meeting in Ohrid, 26 May-27 May by M. Ćulahović, which can be consulted via www.epra.org/content/english/press/papers/Ohrid/Plenary2_Introduction_Objectives_final.pdf.

35 The influence of EU law on national administrative law is increasingly studied, but the focus almost always lies on substantive administrative law. Hardly any research has been executed as to the law that governs administrative organisation. To date, there has only been minimal awareness of the impact of EU law in this area and little view on its extent. See nevertheless J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 22. The authors are aware of the European Union sometimes requiring administrative authorities to be independent, thereby deviating from the principle of institutional autonomy (idem: S. Lavrijssen & A. Ottow, 'The legality of Independent Regulatory Authorities' in: L. Besselink, F. Pennings & A. Prechal (eds), *The eclipse of the legality principle in the European Union* (Alphen aan den Rijn 2011) 73-96).

clude the relationship with the government.[36] The requirements in the telecoms and energy sector are furthermore similarly, though not identically, formulated, which leaves one wondering whether and to what extent they should be interpreted in different ways.

Various reasons could be given for these differences. Every new liberalisation directive originates from an independent legislative and thus negotiating process, in which different results can be reached. Moreover, not all utilities sectors that are liberalised under the direction of European law are harmonised to the same extent. The sector of audiovisual media has not yet experienced the degree of harmonisation that the sectors of electricity and gas are currently subject to. Furthermore, the qualified obligations in the energy and telecoms sector have evolved overtime. As far as energy is concerned, Directives 96/92/EC (electricity) and 98/30/EC (gas)[37] did not as such contain a separate provision on the establishment of an NRA, although one could probably argue that some provisions presumed their existence. The obligation to establish a national regulator was only incorporated into secondary European law by Directives 2003/54/EG (electricity) and 2003/55/EG (gas).[38] By virtue of articles 23 and 25 respectively of these directives, the NRA moreover had to be independent from the players operating in the relevant market. This specific obligation, laid down in these so-called second generation liberalisation directives, was however hardly qualified: the directives did not contain any further specific institutional requirements; they did not explain what had to be understood by the term 'independent'. In the directives of the third generation, the EU truly intensified its grip on the concept of the national energy regulator. As demonstrated, directives 2009/72/EC and 2009/73/EG introduce the obligation of political independence and contain relatively detailed (considering that the instrument is a directive) provisions on the independence of the NRA. For the telecoms sector, it had already been explained that the requirement of independence mentioned in the original Framework Directive concerned only those Member States that retained ownership or control of undertakings providing electronic communi-

36 This can be derived from the original Commission proposal COM (2005) 646, discussed *infra*. From recital 47 of the proposal, one can derive that the notion of independence referred to both the audiovisual media providers and the national governments. There is no reason why the current reference in the preamble to the 'independent' NRAs would not concern both relationships as well.

37 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, *OJ* L 27 (1997), 20-29; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, *OJ* L 204 (1998), 1-12.

38 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, *OJ* L 176 (2003), 37-56; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, *OJ* L 176 (2003), 57-78.

cations networks and/or services. The current obligations concerning the political independence of the NRA were only introduced in 2009 (*supra*).

3.2 BOTTOM-UP: How National Law and Practice Inspired EU Legislation on IRAs

When introducing the concept of the IRA in the EU liberalisation directives, the European legislator was by no means creating a new type of national institution, designed to implement and give effect to EU law. The concept of the IRA did not originate from the creative brain of the European legislator. Rather than inventing a new institution, EU law gratefully 'adopted' a concept already known in most Member States, as most Member States had already created an independent national regulator in one or more of the liberalised sectors.

As Thatcher points out, on some issues IRAs 'have allied themselves with their domestic governments in seeking to 'export' national models of regulation to the EU level'.[39] This seems to have been the case not only for the substantive aspects of liberalisation: it applies to the institutional aspects as well. Gilardi concludes that the independent regulators 'have exploded since the end of the 1980's and have now become a common institutional model in all European countries.'[40] IRAs in telecoms, gas and electricity were already operating in many European countries at the time the relevant directives were adopted.[41] In 2005, a representative of the OECD Secretariat ascertained that, as far as institutional design of NRAs was concerned, significant institutional differences remained across countries and sectors and that some countries had chosen the alternatives of ministerial oversight and self-regulation. However,the conclusion was that 'the recent trends show that a growing number of countries has established independent regulatory authorities, first in the financial sector, then in the telecommunication sector and more recently in the energy sector'.[42]

As far as gas and electricity are concerned, the bottom-up effect indeed seems obvious if one considers previous studies, pointing out that before the directives were enacted, most countries on an EU level, had inserted the require-

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39 M. Thatcher, 'Independent Regulatory Agencies and Elected Politicians in Europe' in: D. Geradin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 61.

40 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 2.

41 E.g. A. Geveke, 'Improving Implementation by National Regulatory Authorities', [2003/3] *Eipascope* 28 *(www.eipa.nl)*.

42 OECD, working party on regulatory management and reform, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Expert Meeting in London, United Kingdom, 10-11 January 2005, www.oecd.org/dataoecd/15/28/35028836.pdf (p. 7 of the conference document, the summary of Mr. Jacobzone's contribution to one of the discussions).

ment of regulatory independence in their energy legislation.[43] This is also the case for the telecoms sector.[44] For the AVMS Directive, in which the existence of independent regulatory authorities seems to be 'presumed' in Article 30, as well as in the preamble (*supra*), the bottom-up effect seems quite obvious. Avoiding the incorporation of a real obligation to set up an independent NRA, which had – at the relevant time (in 2007) – proven to be politically too sensitive, the directive nevertheless refers to the IRAs, thereby suggesting that this model of organisation is already common to all European Member States. A study concerning the status, functioning and powers of regulatory bodies in the sector of television in 35 European countries, executed in 1995, led to the same conclusion.

'One of the main findings of the study is in fact that there is an organisational uniformity between the countries examined: with only rare exceptions, all have conferred the key areas of regulating the broadcasting sector on so-called independent authorities.'[45]

It is this process of convergence that now inspires and enables the EU to adopt the concept of the *independent* NRA (the IRA) in community law: *l'acquis commun* of the different Member States has become part of *l'acquis communautaire*.

The existence of IRAs in utilities sectors before the incorporation of an obligation to establish one in EU law did not mean that one uniform concept of an independent regulator existed within Europe. On the contrary, various 'types' of IRAs circulated within the different Member States.[46] Although institutional design differed widely, the necessity of political independence, as such, was increasingly accepted across Europe. It was the existence of this common feature in the law and practice of the European states that inspired the European legislator to incorporate this obligation into secondary European law. EU legislation may have further developed and harmonised the concept, enhancing and refining the independence requirements (top-down), but the basic idea of regulation through IRAs was already widespread in the European legal order before the concept occurred in the directives. This most likely explains why the intrusion in Member States' institutional autonomy by EU legislation did not meet sub-

43 See e.g. Energy Regulators Regional Association (ERRA), Legal Regulation Working Group, *Issue Paper Regulatory Independence* (prepared by KEMA International B.V.), November 2008. The paper can be consulted via www.erranet.org/Library/ERRA_Issue_Papers (see page 20 of the issue paper).

44 See e.g. C. Spyrelli, 'Regulating the regulators? An assessment of institutional structures and procedural rules of national regulatory authorities' [2003-04/8] *International Journal of Communications Law and Policy* 1-65.

45 S. Robillard, *Television in Europe: Regulatory Bodies. Status, Functions and Powers in 35 European Countries* (London 1995) 267.

46 For the telecom sector, this is clearly illustrated in C. Spyrelli, 'Regulating the regulators? An assessment of institutional structures and procedural rules of national regulatory authorities' [2003-04/8] *International Journal of Communications Law and Policy* 1-65, in particular 22 *et seqq.*

stantial political resistance as the EU was to a large extent codifying an existing common practice.

The *ratio* behind requirements of independence of the NRAs *vis-à-vis* the *market players* is clear, one cannot control and monitor a market in a credible and useful manner if one is not independent from those who are subject to the control. Why then have national governments by their own free will chosen to set up NRAs that are independent from those same governments, thereby relinquishing a part of their decision-making authority? This issue has received considerable attention from scholars in the field of political science. Briefly worded, research has demonstrated that a crucial reason for entrusting regulatory tasks to independent NRAs lies in the fact that these authorities can give the market players that are subject to regulation, the necessary confidence. The execution of regulatory tasks by an institution whose decisions are based on expertise instead of on merely political considerations, leads to greater credibility, as well as consistency.[47] These motives convinced many EU Member States to set up independent regulators on their own initiative. Recently, the motives also convinced the EU legislator to anchor regulatory independence in EU law. However, it should be pointed out that in the EU, 'the potential conflict of interest arising when the state both conducts the regulation of the sector and holds a significant interest in one of the players (the incumbent)'[48] was the main reason for the insertion of independence requirements in the directives. 'In that sense, the independence of the NRA from the legislature and the executive was an extension of the separation of regulatory and operational functions,' Hancher and Larouche point out, referring to telecoms legislation, where the independence requirement has for a long time been exclusively linked to ownership of or control on the market players. Nevertheless, even if Member States have no direct interest in any of the market players,'regulatory decisions still have to be made in an environment which is shielded from undue influence as much as possible', the authors conclude in their analysis.[49]This explains why the independence requirements that are imposed by the most recent directives are not exclusively directed towards Member States that are still – in the quality

47 See e.g. S. Lavrijssen & A. Ottow, 'The legality of Independent Regulatory Authorities' in: L. Besselink, F. Pennings & A. Prechal (eds), *The eclipse of the legality principle in the European Union* (Alphen aan den Rijn 2011) 80; F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 28 *et seqq.*; P. Nicolaïdes, 'Regulation of Liberalised Markets: A New Role for the State?' in: D. Geradin, R. Muñoz & N. Petit (ed.), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 29.

48 L. Hancher & P. Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in: P. Craig & G. de Búrca (eds), *The evolution of EU law* (Oxford 2011) 773.

49 *Ibid.*, 773-774 with reference to e.g. ECJ case law mentioning this very justification the independence of NRAs in their relationship with the government or legislator.

of governmental enterprise – operating as a market player in the relevant sector themselves.

4 Europeanisation of the Law on IRAs from a Horizontal Perspective: How Cross-fertilisation between European States in Various Fora has been and is still 'Shaping' a Notion of an IRA

Current obligations in EU legislation concerning the establishment of an IRA are at least partly the result of, in simplified terms, a copy and paste operation by the EU legislator. This bottom-up process could only take place after the institutional model of the IRA had become accepted in a substantial amount of European states (for the reasons or motives mentioned in the previous paragraph) and had thus become a common European feature. It is here that horizontal aspects of the development of law, leading to cross-fertilisation between European states, have played a significant role. Hence, using the same metaphor once more, Member States have been copying and pasting *each other's* law and practices before the European legislator copy-pastedcopied and pasted those of the Member States. The concept of the independent NRA has not developed in 'splendid isolation' within each Member State separately.

The importance of cross-fertilisation in administrative law in Europe was recently demonstrated by della Cananea, who convincingly defends the use of comparative research in this field of law by referring to the role it can play in fostering these transplants.[50] As the author points out, 'studies have shown that "borrowings", "importations" and "transplants" have been detectable in the public sphere, too [...]'.[51]

For insights into the process of horizontal influence and cross-fertilisation specifically in the field of NRAs, political science once again proves to be quite useful for the administrative lawyer. In the discipline of political science, it is mainly Gilardi who has made a considerable contribution to the development of this thesis. In his book, *Delegation in the Regulatory State*, published in 2008, Gilardi demonstrates both theoretically and empirically how states within Europe have influenced one another when it comes to the establishment and institu-

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50 G. della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' [2010/2] *Online Italian Journal of Public Law* 162-211, in particular 169-170.

51 *Ibid.*, 169. See also J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 368-369: 'Thanks to community law, lawyers have increasingly been confronted with rules, institutions, courts, tribunals, principles and concepts which have a common essence. In such an environment it is predictable consequence that there will be interaction between rules from the various national systems. This provides a comparative law stimulus which also operates in fields of law which are not – or not yet – affected by Community law.'

tional design of independent regulatory authorities.[52] Independent NRAs 'have not been invented autonomously in each country, the model of the independent regulator has diffused internationally.'[53]According to Gilardi, independent regulators have spread in an interdependent diffusion process.[54] 'The establishment of an independent regulatory agency in a given country and sector is in part influenced by previous decisions in other countries and sectors.'[55]Referring to previous research, the author points out that independent regulators in the telecoms and electricity sector have spread to 71 countries between 1977 and 1999 and that diffusion in an interdependent process has played a considerable role in this.[56] Before Gilardi, Thatcher more generally emphasised the importance that policy learning and 'institutional mimetism' have played in the spread of the agentificationtrend in the whole of Europe.[57]

Today, the principle of regulatory independence is present in the liberalisation directives of at least two, but perhaps even all three of the sectors discussed (*supra*). It was after a process of horizontal influence that it evolved towards a European principle and was eventually anchored in EU law. EU law is however still developing when it comes to the requirements of independence for NRAs. Each new generation of directives is accompanied by a new attempt to introduce more qualified or sophisticated obligations. Currently, both the telecoms and the energy liberalisation directives have translated the independence requirement into detailed rules on the form and organisation of the NRA. These rules require interpretation and evaluation that might perhaps lead to future alterations. Cross-fertilisation in the field of regulatory authorities will not stop now that EU legislation is willingly adopting the concept. Legal pluralism and, more specifically, the horizontal development of law, will continue to play a role in this ongoing process.

The horizontal influence does not however entail national governments having to look over the border now and then to examine how their neighbours have conceptualised their IRAs. Cross fertilisation in this area also takes the form of *deliberate consultation* concerning IRAs in sectors liberalised by European

52 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 1-186.

53 *Ibid.*, 4.

54 See also F. Gilardi & M. Maggetti, 'The independence of regulatory authorities' in D. Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Cheltenham, 2011) 206-207, with reference to *inter alia* previous work by Levi-Faur.

55 *Ibid.*, 7.

56 *Ibid.*, 100 referring to W.J. Henisz, A. Bennet, A. Zelner & M.F. Guillén, 'The worldwide diffusion of market-oriented infrastructure reform, 1977-1999' [70/6] *American Sociological Review* 871-97 (2005).

57 M. Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation' [25/1] *West European Politics* 125-147 (2002); P. Magnette, 'The Politics of Regulation in the European Union' in: D. Geradin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 6.

directives in international fora. The relevant actors in the Member States seek the opportunity to consult each other on how to implement European obligations. According to Article 288 of the TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Member States can seek support from one another on how to achieve 'the result' of an independent regulator, as intended by EU legislation. The question of what legal or non-legal requirements[58] have to be fulfilled for a regulatory authority to be sufficiently independent from both the market players and from central government is consequently, and to an important extent, answered in horizontal processes. Interpreting the *status quo* is however not the only contribution these horizontal processes make to European legal requirements on IRAs. They have been and can still be of considerable importance for the further development of the provisions laid down in the directives themselves and consequently for the enactment of new legislation.

Various international fora have played and are still playing a role in this horizontal development process. This contribution will discuss the three most important or influential players: the Council of Europe (A), the OECD (B) and the networks of national regulators (C).

4.1 Horizontal Influence through the Institutions of the Council of Europe

In the field of audiovisual media, the Council of Europe serves as a forum for Member States to exchange ideas on e.g. the institutional aspects of liberalisation in the sector. The Council has taken an interest in this subject, as it is linked to article 10 of the European Convention on Human Rights (the freedom of expression, which includes the freedom to receive and impart information). This exchange has even led to the adoption of Recommendation N° R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector,[59] prepared by the Intergovernmental Group of Specialists on Media in a Pan-European Perspective (MM-S-EP). The preamble of this recommendation recognises that Member States of the Council of Europe have established regulatory authorities in different ways, according to their legal systems and democratic and cultural traditions. Consequently, there is diversity with regard to the means by which, and the extent to which, independence, effective powers and trans-

58 As far as these are not described sufficiently clear in the directives themselves.

59 Recommendation No. R (2000) 23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 20 December 2000 (the recommendation can be consulted via www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)023&expmem_EN.asp).

parency are achieved. The Committee of Ministers regards it as important that Member States guarantee the genuine independence of the regulatory authorities for the broadcasting sector and therefore recommends Member States, if they have not already done so, to establish independent regulatory authorities for the broadcasting sector. The Recommendation contains concrete guidelines concerning the independence and functions of regulatory authorities. They concern the devise of a general legislative framework, the appointment, composition and functioning of the NRAs, their financial independence, their powers and competence, and their accountability. An extensive explanatory memorandum elaborates on the different guidelines.

As mentioned above, EU law (the AVMS Directive) does not yet incorporate a genuine obligation to set up an independent regulatory body for the sector of audiovisual media at the national level. However, it nevertheless seems to presume (in article 30, as well as in the preamble, see *supra*) the existence of one in each Member State. This ambiguous situation is the result of a sensitive political compromise between the EU institutions. While the original Commission proposal for Directive 2007/65 contained a separate provision dedicated to the national regulators, explicitly requiring the Member States to guarantee their independence, impartiality and transparency,[60] this provision did not make it to the final version. The proposal did, however, concern an obligation to be independent from both the audiovisual media providers and the national governments (see recital 47). The amendment of the provision resulted in the ambiguous formulations that now occur in the AVMS Directive (see *supra*), representing a rather weak compromise that perhaps deliberately leaves it as an open question whether there is indeed an obligation to establish an independent regulatory authority. Clearly, not all Member States were convinced that the EU could or should impose requirements concerning the institutional organisation of regulation in the audiovisual media sector. The reluctance of some to accept the incorporation of an obligation to set up an independent media regulator in EU legislation, has however not stopped European states from exchanging ideas about this very form of organisation, attempting to learn from each other's experience and deliberating on best practices.

The Council of Europe might play an important role in this process in the future. Within the framework of the Council, the Commission of Venice (European Commission of Democracy through Law) has already made a contribution. The Commission of Venice advises the Council of Europe on constitutional matters and describes itself on its website as 'an internationally recognised independent legal think-tank' that 'contributes to the dissemination of the

60 See the proposal to insert an 23*b* in Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM (2005) 646, *OJ* C 49 (2006), 37-56.

European constitutional heritage, based on the continent's fundamental legal values [...].'[61] The Commission meets four times a year[62] and is composed of independent experts, such as senior academics, supreme or constitutional court judges or members of the national parliaments. They are appointed by the participating countries.[63] The European Commission participates in the plenary sessions as well.

In 2008, the Commission produced a report on the independence of regulatory authorities in the media sector. The report (only available in French)[64] confirms the importance of independent media regulators, mainly emphasizing the need for professional expertise when it comes to regulating a market that is both economically and technically complex. The fact that most media regulators do not only have administrative tasks, but also a judicial function, gives rise to an even greater need for independence. The report makes reference to both Recommendation N° R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector (mentioned above) and Proposal 2005/646 of the European Commission, mentioned above, and explains the requirements incorporated in these documents. It then offers a comparison between the characteristics of independent national regulators in Germany and Austria, also including information from other countries which already have an independent media regulator. The document gives an idea of how the independence of regulatory agencies can be reinforced; by anchoring the procedure for the appointment of the members of the regulator; by providing a minimum duration for the mandates; by giving the regulator sufficient powers (including the power to impose sanctions) etcetera. Last, the document dedicates a few paragraphs to the problem of legitimacy and control of national independent regulatory bodies.

Recommendations like these, originating from an institution composed of experts from different European states, appointed by these states, can be of great value to the pluralistic development of law. Convinced that there is sufficient common European ground to come to shared principles on the institutional status of independent regulatory bodies, but nevertheless taking into account the different backgrounds of the Member States as to their constitutional law and administrative organisation, expert think-tanks like the Commission of Venice have the capacity to prepare future desirable developments in law in an informal way, in an environment free from time and political pressures. Reports

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61 Consult www.venice.coe.int/site/main/Presentation_E.asp, where the statute of the commission (Committee of Ministers, Resolution (2002)3 of 21 February 2002) can also be found.

62 Article 4.3 of the Statute.

63 Article 2 of the Statute.

64 Commission Européenne pour la Démocratie par le Droit (Commission de Venise), *Rapport sur l'indépendance des organes de régulation des médias* de 7 Avril 2008, Etude n° 416/2006, CDL(2008)040, par C. Grabenwarter. The report can be consulted via www.venice.coe.int/docs/2008/CDL(2008)040-f.pdf.

like that of the Commission, with the aim of providing information on the *modus operandi* in different states that is exchanged between the Member States and can be used as a basis for further study and deliberation, might lead to a greater acceptance of the model of the independent regulator within Europe. They can undoubtedly inspire states who are yet to establish an independent regulator or who wish to amplify the independence of their existing regulator. Today, they can already serve as an inspiration for states that have to implement the AVMS Directive and are insecure about the implementation of the 'implicit expectation' that EU Member States must have independent media regulators. The more or less informal development of common European basic assumptions on how media regulation should be institutionalised,might eventually facilitate a *genuine* anchorage of the figure of the independent regulator and its requisites into secondary EU law.

In 2007 moreover, the Council of Europe organised a conference on convergent regulators, these being regulators that evolved from separate broadcasting and telecommunications regulatory authorities into one single 'converged' regulator.[65] In many Western European states, convergent regulators are already operating. As many Southern European states have expressed similar intentions, the conference aimed at an analysis of the implications of the convergence of regulators, taking into account Council of Europe standards concerning freedom of expression and the independence of broadcasting regulators. According to the foreword of the document booklet[66] published after the conference, 'an open discussion placed in the specific context of South-eastern Europe and of the individual countries and an exchange of practical experience among regulators and policy-makers are essential before taking decisions.'Participants in the conference were policy-makers, members of parliaments, representatives of broadcasting and telecommunications regulatory authorities and of relevant governmental bodies and representatives from the industry, as well as from the European Commission, the Organisation for Security and Co-operation in Europe (OSCE) and the European Platform of Regulatory Authorities (EPRA, see *infra*). The foreword mentions that representatives of converged regulators and of the industry shared their experience, their concerns and lessons learned in the process of merging and the subsequent functioning of regulatory authorities. The conference was organised with the support of the EPRA (*infra*).

The issue of convergent regulators raises questions regarding the independence of (converged) NRAs. Three presentations were organised concerning European standards on the independence and functioning of broadcasting

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65 *Converging media – convergent regulators? The future of broadcasting regulatory authorities in South-Eastern*, Conference organised by the Council of Europe and the OSCE Mission to Skopje on 1-2 October 2007, Skopje.

66 www.coe.int/t/dghl/standardsetting/media/doc/Converging%20media%20-%20converging%20regulators_en.pdf.

regulatory bodies.[67] They represented the perspective of three European inter/supra-governmental organisations, the Council of Europe, the European Union and the Organisation for Security and Cooperation in Europe (OSCE), in relation to standards of independence and functioning of regulatory bodies and the work being carried out by these organisations in this area. Particularly interesting was the presentation by the representative of the European Commission, DG Information Society and Media. In her presentation, the representative stressed that for the Commission, guarding the independence of the regulatory authorities was of crucial importance. She furthermore noted that 'although the European Union focuses on internal market developments, in the context of the enlargement process the Council of Europe standards in this are as important as the acquis of the European Union and that all these principles and standards play an equal role.'[68] The Commission representative consequently seemed to confirm that the instruments of the Council of Europe on the independence of media regulators is relevant to the EU instruments on the audiovisual media market and its regulation, and should therefore be taken into account when interpreting and applying EU law.

4.2 The OECD as an Actor in the Process of Horizontal Development of the Law on IRAs

An organisation that offers a permanent forum for governments to exchange information and ideas about, amongst other issues, their own administrative organisation, is the OECD (Organisation for Economic Co-operation and Development). The OECD describes itself on its website[69] as 'a forum in which governments can work together to share experiences and seek solutions to common problems.'

In his analysis on 'interdependent delegation' or diffusion of independent regulatory agencies, Gilardi states that 'the OECD agenda has [thus] contributed to making independent regulators legitimate, appropriate and maybe even taken-for-granted institutions for regulatory policy making.'[70] Not all the work of the OECD on regulatory institutions in general, or regulatory independence

67 See the presentations of I. Nikoltchev (Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe), M-L Fernandez Esteban (European Commission DG Informatio Society and Media) and Christian Möller (OSCE Office of the Representative on Freedom of the Media).

68 The documentation bundle can be consulted via www.coe.int/t/dghl/standardsetting/media/doc/Converging%20media%20-%20converging%20regulators_en.pdf. The presentation of Commission representative M-L Fernández Esteban is discussed at pages 34 and further.

69 www.oecd.org.

70 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 1 and 102.

in particular, can be mentioned. This contribution will limit itself to the most recent contribution made by the organisation.

In 2005, the working party on regulatory management and reform of the OECD organised an expert meeting on the design of independent and accountable regulatory authorities for high quality regulation.[71] Speakers as well as participants were representatives of governments and regulatory authorities, as well as academics and representatives from the private sector. The need for cross-country studies and the mutual learning process which comparative analysis and the OECD can provide, was highlighted in the summary report of the meeting. According to the organisers, the discussions highlighted the value of learning from different approaches and models. The importance of exchange between experts and government officials, of a process of mutual learning when it comes to regulation and the value of policy dialogue, were mentioned by the two introductory speakers representing respectively the United Kingdom and the OECD Secretariat itself. Although OECD membership is not limited to European countries, the discussions often referred to EU legislation and the issue of the independence of NRAs was often linked to existing EU requirements and how these could further develop. The description of the meeting's objectives explicitly referred to the direct influence on European NRAs by recent directives, particularly in the field of communications (at the relevant time there were no independence requirements in relation to government for the energy sector). Due to this influence, the organisers of the meeting considered it important to establish good practices, common principles and values that could guide countries when designing or redesigning the governance of their regulatory authorities. The focus of the discussions concerned the issue of how to balance independence with accountability.[72] The organisation of the meeting was consequently, to an important extent, inspired by the existence of the common EU framework under which many OECD countries nowadays have to operate when it comes to the regulation of liberalised markets.

During the meeting, Nicolaïdes discussed the general trend of establishing independent NRAs to ensure long-term commitment, impartiality and enforcement and pointed out that this trend was in compliance with EU requirements demanding that regulatory functions be separated from industry interests. He emphasised that, nevertheless, specific mechanisms are needed to foster the credibility of regulators in relation to governments and investors.[73] How the

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71 OECD, working party on regulatory management and reform, *Designing Independent and Accountable Regulatory Authorities for High Quality Regulation*, Expert Meeting in London, United Kingdom, 10-11 January 2005. A document containing a summary report, the agenda of the meeting, a list of contributions, papers and a list of participants can be consulted via www.oecd.org/dataoecd/15/28/35028836.pdf.

72 P. 23 of the conference document (the agenda).

73 P. 6 of the conference document.

different OECD countries face that challenge by making choices concerning the institutional design of their regulators, by e.g. introducing provisions ensuring independence and accountability of NRAs, was discussed by a representative of the OECD Secretariat, who presented the results of a comparative overview of regulatory authorities across OECD countries.[74]

The discussions concerning the formal and practical aspects of establishing a framework for independence were of particular value for the further development of ideas about the independence of NRAs. The need for legal guarantees to preserve the independence and status of NRAs was discussed during this session. Both formal and practical dimensions of agency independence were taken into account.[75] Precisely these types of requirements occur in the EU directives for telecoms and energy today.

The discussions dedicated to questions of accountability of NRAs that naturally arise in a context of independence, were of equal relevance and importance.[76] Another topic that was highly relevant for the further development of EU law was the one addressed during the fourth session, concerning 'multilevel challenges'. During this session the relationship between regulatory authorities operating at a local and central level was discussed. One of two relationships that was particularly addressed in this context was that between national (telecommunications) regulatory authorities and the European Commission. The speaker for this last theme was a representative from the Commission itself.[77]

Although it is, of course, far from possible to prove any direct or indirect influence of these deliberations on the provisions in the EU directives, let alone on their concrete implementation, the conference, of which the results were widespread and are well known amongst scholars, most likely at least contributed to the growth of a common European understanding on regulatory independence and might therefore have facilitated the legislative process. The involvement of the European Commission undoubtedly reinforced this effect.

4.3 Cross-fertilisation trough Networks and other Fora for NRAs

A trend that has recently received considerable attention in the literature on European NRAs is the one towards the establishment of *networks* of NRAs. The role that these networks play in the further development of EU law, through a process of debate between the regulators operating in the field

74 P. 7-8 and 24 of the conference document.
75 P. 26 of the conference document (the agenda).
76 P. 27-28 of the conference document (the agenda).
77 P. 27 of the conference document (the agenda).

themselves, has already been frequently discussed.[78] Thatcher and Coen have described, analysed and evaluated the rise, the functions and the powers of these networks, stating that their establishment was justified by the need for greater co-ordination in implementing EU regulation.[79] Cross-fertilisation through networks of regulators moreover seems to be a worldwide phenomenon, not just limited to Europe or the European Union.

'In developed and developing countries, the telecommunications, energy and water sectors have been re-structured (frequently liberalised) and reformed over the past two decades. [...] regulatory leaders at newly created commissions sought to learn from neighboring countries. Regional networks provided vehicles for sharing data and best-practice techniques, developing studies, providing training, distributing regulatory materials, and organizing meetings.[...] Once nations created agencies, the new sector regulators sought arenas for sharing information with neighboring countries – the beginning of inter-country collaboration to create RPG's [Regional Public Goods].'[80]

Specialised literature has more specifically observed that networks of European national regulators nowadays play an important role in the development of guidelines for implementing EU directives.[81] Thatcher points out that the networks allow not only policy leaning across countries, but also influence on EC (EU) legislation at an early stage.[82]

Research on cooperation and cross fertilisation through networks of NRAs does however often focus on technical or substantive issues,[83] involving the day-to-day practice of the regulators and not so much their institutional organisation. The role that these networks play in the development of organisational or institutional requirements regarding NRAs is in turn slightly disregarded.[84]

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78 See e.g. S. Lavrijssen & L. Hancher, 'Networks on Track: From European Regulatory Networks to European Regulatory "Network Agencies"' [2009/1] *LIEI* 23-55; A.T. Ottow, 'Europeanisering van het markttoezicht' [2011/1] *SEW* 3-17, in particular 8-11; L. Rodrigue, *Les aspects juridiques de la regulation européenne des réseaux* (Brussels 2012) 75 ff.

79 D. Coen & M. Thatcher, 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' [2008/28] *Journal of Public Policy* 49-71 and in particular 66.

80 S.V. Berg & J. Horrall, 'Networks of Regulatory Agencies as Regional Public Goods: Improving Infrastructure Performance' [2008/2] *The Review of International Organizations* 179 resp. 195.

81 See e.g. S.V. Berg & J. Horrall, 'Networks of Regulatory Agencies as Regional Public Goods: Improving Infrastructure Performance' [2008/2] *TheReview of International Organizations* 183-184 about the ERG, now BEREC, the Body of European Regulators for Electronic Communications, with reference to research by Coen and Thatcher.

82 M. Thatcher, 'Independent Regulatory Agencies and Elected Politicians in Europe' in: D. Geradin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 60.

83 See e.g. P. Larouche, 'Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects', in: D. Geradin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 164-179.

84 Berg and Horrall however mention the development of best practice laws, procedures and rules that address (both) institutional and policy issues: S.V. Berg & J. Horrall, 'Networks of Regulatory Agencies as Regional Public Goods: Improving Infrastructure Performance' [2008/2] *The Review of International Organizations* 193.

However, authors in the field of political science have demonstrated that cross-national and cross-sectoral channels of diffusion explain the spread of independent regulators. 'Their arguments rest on the idea that diffusion is driven by professional networks through which 'agents of knowledge' construct and spread ideas about best practices.'[85] Especially relevant for this contribution is what Gilardi calls the 'within-sector' channel, referring to international networks at the sectoral level, contributing to the spread of independent regulators across the countries within the same sector.[86]

Some of the networks of NRAs operating at the regional level have been established by the European Commission and anchored in EU legislation. For telecommunications, the Commission first set up the ERG (European Regulators Group) 'to provide a suitable mechanism for encouraging cooperation and co-ordination between NRAs and the Commission, in order to promote the development of the internal market for electronic communications networks and services'.[87] Recently, the ERG was replaced by the BEREC (the Body of European Regulators for Electronic Communications).[88] For the energy sector, a similar process has taken place, the original network established by the Commission, the ERGEG (European Regulators' Group for Electricity and Gas), was recently replaced by the ACER (Agency for the Cooperation of Energy Regulators).[89] One of the purposes for which these official networks were established is advising the European Commission on new legislative initiatives.

The telecoms sector, as well as the energy sector, both have 'informal' networks of regulators, not established by the Commission, as well. The IRG (Independent Regulators Group) serves as an 'unofficial' forum for the NRAs in the telecoms sector, while the CEER (Council of European Energy Regulators) is a similar organisation for the energy sector. These networks were set up in the early years of liberalisation by the NRAs themselves. The IRG and the CEER nevertheless have close relationships with the BEREC and the ACER respectively. According to its website, the CEER works closely together with and supports the work of the ACER, as it deals with many complementary issues to the ACER's work.[90] Most of the recent information and documents on the IRG

85 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 101 referring to research by Jordana, Levi-Faur and others (all political science).

86 *Ibid*., 101.

87 Consultation via http://erg.eu.int.

88 Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, *OJ* L 337 (2009), 1-10.

89 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, *OJ* L 211 (2009), 1-14.

90 Consultation via www.energy-regulators.eu.

website[91] originated with the ERG or the BEREC. Unlike the CEER, this informal network hardly seems to develop much autonomous activity anymore.

As far as the sector of audiovisual media is concerned, there has not yet been a Commission's initiative comparable to the BEREC or the ACER. An entity that has nevertheless put considerable effort into making horizontal consultation and debate on the topic of independent regulatory agencies possible, is the EPRA, the European Platform of Regulatory Agencies. Despite what one might assume on the basis of the name, the EPRA is not a general network of all European regulators (in utilities sectors). Its membership is specifically limited to regulatory authorities in the broadcasting field. The EPRA was set up in 1995, on the initiative of the NRAs in the field of audio-visual media themselves. Its existence is not officially recognised by or anchored in EU law, although the AVMS Directive promotes a strengthening of the cooperation between the regulatory authorities.[92] According to the general information on its website, the EPRA aims to provide a forum for informal discussion and exchange of views between regulatory authorities in the broadcasting field, for exchange of information about common issues of national and European broadcasting regulation and for discussion of practical solutions to legal problems regarding the interpretation and application of broadcasting regulation. The last objective mentioned is specifically relevant for this contribution. Currently, 53 regulatory authorities are members of the EPRA. The European Commission is one of the so-called 'standing observers'. The Platform organises two meetings a year.[93]

The items discussed during the EPRA's meetings concern various subjects relevant to the practice of national broadcasting regulators. These subjects however, do not only concern material media law, applied on a daily basis by the regulators, but also institutional law and more precisely, the very status of autonomy and independence of the regulatory authorities themselves. In the above mentioned Recommendation N° R (2000) 23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, the explanatory memorandum refers to the EPRA when promoting an exchange of information and co-operation between regulatory authorities on the subject of effective independent broadcasting regulatory authorities. Various members of the EPRA itself have in return endorsed (some of the provisions of) the Recommendation, by means of a joint statement on the Independence of Broadcasting Regulators.[94]

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91 Consultation via www.irg.eu.

92 See article 30 and recital 95 of the preamble.

93 Consultation via www.epra.org/content/english/index2.html.

94 Statement on the Independence of Broadcasting regulators, as suggested by the EPRA Executive Board and amended by the Naples Meeting, 9 May 2003. The statement can be consulted via www.epra.org/content/english/index2.html.

As recently as May 2011, one of the two plenary sessions of the 33rd EPRA meeting was dedicated to the effective functioning of regulatory agencies, with a focus on issues of independence and governance of regulatory agencies. It was meant as a follow-up to the above-mentioned INDIREG study ordered by the European Commission. The results of the study can help national regulators to evaluate whether they are sufficiently independent or not. They answer the question of what it takes to be an independent NRA, capable of effectively implementing and ensuring the correct application of the rules of the AVMS Directive. The EPRA has fulfilled its role as a forum for discussion on the results of the report. This may lead to a more or less general acceptance of the best practicessuggested in the final report, which in turn may provide a basis for a possible later incorporation of concrete obligations on regulatory independence in the AVMS Directive.

The 15th EPRA Meeting, in May 2002, addressed the topic of the independence of media regulators for the first time in a plenary session on 'The Influence of Politics on Broadcasting'. During the 25th meeting, in May 2007, the first plenary session was solely dedicated to the independence of regulatory agencies from a legal and administrative perspective. The introduction of the concept of an independent NRA in the draft of the next generation liberalisation directive seems to have been the immediate reason for this session, as it is mentioned in all background documents. This demonstrates the role that the EPRA wishes to play in the interpretation and implementation of the EU obligations concerning the (independence of the) national regulators. The topic of transparency and accountability of regulators, issues that are closely related to their independence, was addressed during a plenary session during the 29th meeting in May 2009. A comparison was made between NRAs in different European states. One of the 'avenues for discussion' suggested by the background paper was the issue of how to ensure the right balance in practice between accountability, transparency and independence.[95]

One of the background documents, used for the 25th meeting, included a comparative analysis of the legal requirements concerning the independence of the NRAs for broadcasting in 27 countries in which the NRA is a member of the EPRA.[96] Discussing the results of this kind of analysis in plenary session gives the NRAs the opportunity to compare themselves to peers and to find out what legal requirements other countries provide for their NRAs. This might give them an incentive to lobby for similar guarantees with their governments or at least to keep their governments informed about the developments in other

95 An overview of the meetings, as well as some of the background papers providing a basis for the discussions can be found via www.epra.org/content/english/index2.html.

96 See E. Machet, The Independence of Regulatory Agencies, EPRA/2007/002 25Th , Meeting of the European Platform of Regulatory Authorities (EPRA), Prague, 16-19 May 2007. The paper can be consulted via www.epra.org/content/english/index2.html.

European countries. In the end, this may lead to a broader acceptance of joint independence requirements and guarantees, and this might even provide a basis for an incorporation into supranational law. The fact that the Commission is a permanent observer in the EPRA's meetings ensures that the document and discussions also reach the European level. Therefore, networks of NRAs have great potential as catalysts for the development of rules on independent NRAs in EU legislation.

As mentioned, the EPRA was set up on the initiative of the NRAs and is not officially recognised by EU legislation, although this may change in the future. The current provision in the AVMS Directive, promoting cooperation between NRAs, might eventually evolve into the establishment of a European network of NRAs.[97] The advantage of a forum that is officially anchored in EU law is, of course, that its activities will be more likely to have an actual impact on the development of EU law. A possible disadvantage may be the loss of the informal atmosphere that is often key for an open discussion.

At the time of finishing this contribution, the BEREC nor its predecessor, the ERG, had addressed many institutional matters during their meetings or in their reports. The same is true of the IRG, the informal network. In 2008, the I/ERG did however issue a statement on the progress of the legislative framework for electronic communications. It particularly emphasised the need for further development of some institutional aspects of telecoms regulation. The I/ERG expressed its belief that NRAs' independence is of fundamental importance for the proper and effective functioning of the new regulatory framework. It therefore warmly welcomed the Report of the European Parliament endorsing the Commission's proposed amendments to the Framework Directive aimed at strengthening NRA independence with explicit provisions to this effect.[98] The statement clearly encourages the Commission to take further steps toward the enhancement of the independence of national telecoms regulators. In a statement made in 2009, the IRG called for the fast adoption of the telecoms package, once more expressing its appreciation for the new institutional and regulatory design based on, amongst other things, the strengthening of NRAs independence. The network encourages the Commission to adopt the new legislative package 'at the earliest possible opportunity'.[99] In a report on

97 A recognition of EPRA itself seems less likely, as states that are not part of the EU also participate in it.

98 I/ERG Statement of 10 October 2008, ERG (08) 52, on the progress of the European legislative framework for electronic communications, which can be consulted via www.irg.eu/streaming/ERG%20%2808%29%2052%20I_ERG%20Statement%20regarding%20FR%20081017.pdf?contentId=545403&field=ATTACHED_FILE.

99 IRG statement (date not mentioned), IRG (09) 12, 'NRAs call for a fast adoption of the telecoms package', which can be consulted via https://mail.ua.ac.be/owa/redir.aspx?C=e49403c1f2934b6380605a3bfb9cfe59&URL=http%3a%2f%2fwww.irg.eu%2fstreaming%2fIRG%2520%252809%2529%252012%2520Statement_Review.pdf%3fcontentId%3d546123%26field%3dATTACHED_FILE.

the achievements of the ERG in 2008, the organisation refers to the advisory role it has played in the review of the EU's telecommunications regulatory framework, especially with regard to the proposed new European institutional design of telecommunications regulation. According to the organisation, its 'proportionate reasonable and evolutionary approach based on the principle of independence has clearly been successful and has received an open ear in Brussels.' Although no public documents are available that allow assessment of the precise input of ERG in the legislative process that resulted in the directive of 2009, the organisation itself at least indicates that it was able to play a decisive role in it.[100]

The ERGEG, the ACER's predecessor, *did* however play an important role in the realisation of the energy directives of the third generation (also referred to as 'the third legislative package'). The ERGEG advised the Commission on desirable institutional changes concerning the regulation of the sectors of electricity and gas in general, as well as on new requirements concerning the powers and (enhanced) independence of national regulators.[101] ERGEG suggested that the President or Chair and the members of the Board of each NRA shall have a standard duration for the term of office and that the President and the members of the Board of a NRA may be relieved from office only if they no longer fulfil the conditions required for the performance of their duties of if they have been guilty of serious misconduct. Examining the present requirements regarding regulatory independence in the 2009 directives, it becomes clear that ERGEG's recommendations were undoubtedly taken into account when drafting the relevant provisions.

The Energy Regulators Regional Association (ERRA) is another network of energy regulators, of which the membership is however not exclusively confined to the EU. The ERRA describes itself as a voluntary organisation comprised of independent energy regulatory bodies primarily from the Central European and Eurasian region, with Affiliates from Africa, Asia the Middle East and the USA. ERRA consists of 23 full, three associate and six affiliate members. The purpose of ERRA is to improve national energy regulation in member countries, to foster development of stable energy regulators with autonomy and authority and to improve cooperation among energy regulators, as well as to increase communication and the exchange of information, research and experience among members, and increase access to energy regulatory information and

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100 The 2008 I/ERG Achievements (December 2008), 'Striking the right balance in a rapidly evolving European electronic communication sector'(by Daniel Pataki, 2008 I/ERG Chairman). These can be consulted via www.irg.eu/streaming/I-ERG%202008%20Achievements%20081211.pdf?contentId=545648&field=ATTACHED_FILE.

101 See respectively papers 2 ('Legal and regulatory framework for a European system of energy regulation'; Ref. C07-SER-13-06-02-PD) and 5 ('Powers and Independence of National Regulators'; Ref. C07-SER-13-06-5-PD) of the 3rd Legislative Package Input by ERGEG, both of 5 June 2007,

experience around the world and promote opportunities for training.[102] In 2008, the ERRA issued a paper on regulatory independence.[103] The paper first gave a brief theoretical overview of the concept of independent regulation, explaining the different types of independence. The importance of regulatory independence was emphasised, referring to e.g. the fact that national approaches to sector-specific regulation are often linked to international agreements and legislation. The paper then referred to the abovementioned advice of the EGREG on the 3rd legislative package and summarised the additional requirements suggested. The rest of the paper summarises the results of a questionnaire, sent to the members of ERRA. The main findings of the study demonstrated that issues regarding the independence of NRAs have been dealt with using the same solutions in many, mainly Western (American and European), countries. Common features of NRAs are e.g. that there is a fixed term appointment of regulators and staff that usually varies between four and six years, that the government cannot overrule or revoke decisions of the regulator, that the independence of the regulator is formally stated in legislation or statute in almost all countries and that they are required to report to another body etc. Although studies like this do not directly have an impact on the EU legislative process, nor on the implementation of it in Member States, they undoubtedly give states a clear insight into what they have in common and therefore create a basis for an agreement for supranational legislative requirements (as enacted for the energy sector on 13 July 2009 in Directives 2009/72 and 2009/73).

Also in the field of energy regulation, the World Forum on Energy Regulation has contributed to the development of principles concerning the independence of energy regulatory authorities. 'The World Forum on Energy Regulation is the world's foremost conference in energy regulation. It was created as a cooperative effort by the world's main regional regulatory associations. It aims at providing a venue where energy regulators and other energy market stakeholders may discuss issues and experiences of common interest.'[104] The first forum, organised in the year 2000, already dedicated a discussion to the subject of the independence of energy regulators.[105] During the second forum in 2003, one of the conference days was exclusively dedicated to regulatory independence. Professor Capros presented an inspiring paper on new challenges concerning

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102 Consultation via www.erranet.org/AboutUs/History and www.erranet.org/AboutUs/Purpose.

103 See Energy Regulators Regional Association (ERRA), Legal Regulation Working Group, *Issue Paper Regulatory Independence* (prepared by KEMA International B.V.), November 2008, which can be consulted via www.erranet.org/Library/ERRA_Issue_Papers.

104 Consultation via www.iern.net/portal/page/portal/IERN_HOME/WORLD_FORUM. The conference documents to which this contribution refers, are published here.

105 See 'Concurrent panels 1: Policy-makers and regulation: motivations and objectives, providing for independent regulation while retaining control'. The conference document draws the outline of the discussion.

the independence of energy regulators.[106] The conference resulted in the issuance of 'Draft Guidelines for Energy Regulation and Regulatory Practice', containing 'principles or conducts that regulators of different states and regions can share'. The guidelines were 'intended to stimulate the debate and promote further effort'.[107] The guidelines concerned, amongst other issues, the independence, the impartiality, the transparency and the simplicity of regulators. In 2009, the fourth plenary session was to a large extent dedicated to the subject of independent regulators as well. Presentations concerned the value of an independent and impartial regulator, the legal and institutional requirements on the independence and powers of regulators, presented by a representative of the European Commission, and the subject of regulatory capture in the context of intensified public energy policy.[108] The programme of the fifth forum, that took place in May 2012, contained a session with the title 'Balancing the new power paradigm – regulators, utilities and governments'. According to the abstract, this session was to include a 'vital discussion' of how to maintain the independence of the regulator *vis-à-vis* governments, industry and public opinion. The moderator was a representative of the European network CEER.[109]

The foregoing suggests that regulatory agencies organised in networks have been and clearly still are 'inventing' their own (independent) institutional position and status.

5 Legal Requirements on Regulator's Accountability: a Different Dynamic?

This study has shown that EU legislative requirements on the independence of NRAs have been the result of a bottom-up-process, which has been and still is influenced by horizontal mechanisms. However, one could argue that to date, the EU legislator's search for a 'common denominator'[110] regarding the administrative organisation of regulation in the utilities sectors has been rather one-sided. The EU has embraced the common idea of the need for regulatory independence in the sectors discussed, but has refused to adopt,

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106 P. Capros, 'Independence of energy regulators: new challenges', consultation via www.rae.gr/old/K2/ER-independence.pdf.

107 Consultation via www.iern.net/portal/page/portal/IERN_HOME/WORLD_FORUM/Rome%202003/draft%20guidelines%22for%20energy%20regulation.pdf.

108 The abstracts of these presentations can be consulted via www.iern.net/portal/page/portal/IERN_HOME/WORLD_FORUM/Athens%202009/AbstractBook.pdf.

109 The preliminary programme, as presented on the website, can be consulted via www.worldforumv.org/cms/data/uploads/wferv_programme_eng_c.pdf.

110 Referring to the expression to refer to the bottom-up effect used in J.H. Jans, R. de Lange, S. Prechal & R.J.G.M. Widdershoven, *Europeanisation of Public Law* (Groningen 2007) 366.

implement or take into account those fundamental rules, principles and mechanisms, also common to European democracies, which govern administrative organisation and make it democratically legitimate. The principles of responsible government and democratic control, acknowledged and therefore common to all European democracies, are the most important to mention here.[111] A certain degree of independence may be important for a credible regulatory state; a democracy requires other values to be upheld as well when designing the scheme of governmental organisation.[112]

The EU directives of the third generation, which seem to exclude any form of direct control from the executive or the national parliaments on the acts and decisions of the NRAs, are to a certain extent detrimental to these principles. Traditional forms of *ex post* control developed by the member states, which are designed to respect the independence of autonomous public bodies and to strike a fair balance between autonomy and democratic control,[113] are, according to the European Commission, no longer in accordance with the level of independence required by the directives.[114] That the maintenance of these forms of control is essential for the democratic process to function properly, since they are nec-

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111 But other fundamental principles could be at stake as well. See e.g. S. Lavrijssen & A. Ottow, 'The legality of Independent Regulatory Authorities' in: L. Besselink, F. Pennings & A. Prechal (eds), *The eclipse of the legality principle in the European Union* (Alphen aan den Rijn 2011) 73-96 (on the principle of legality).

112 See the trend towards national restraint, described in the introduction. A growing attention for rationalisation and democratisation of the law on autonomous public bodies, with a restoration of the principles mentioned, is noticed in many European democracies nowadays. The conflict between this trend and the current European obligations regarding the independence of NRA's was described and examined in S. De Somer, 'Internationale impuls en nationale beheersingsdrang inzake bestuurlijke verzelfstandiging: het Grondwettelijk Hof en de casus van de energieregulator' [2012/4] *Tijdschrift voor bestuurswetenschappen en publiekrecht* 214-228, with a focus on the case of the Belgian energy regulator.

113 For instance: according to the Dutch and Flemish framework regulation regarding autonomous public bodies, entities established (under public law) for reasons of independent decision making are in principle no longer subject to hierarchical control, but to so called 'administrative supervision'. This implies that the competent minister has the power to suspend and/or annul its decisions, without replacing them by his own. See respectively article 22 Kaderwet Zelfstandige Bestuursorganen and article 23 Kaderdecreet bestuurlijk beleid. Although this article is frequently deviated from by specific legislation in both jurisdictions, this respective frameworks still upholds this type of ministerial control as the principle.

114 At least not as far as the energy sector is concerned. See Commission Staff Working Paper 22 January 2010 – Interpretative note on Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas: The Regulatory Authorities, to be consulted via http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_regulatory_authorities.pdf. If follows from this document that any interference *ex ante* or *ex post* by the government or other public authorities is excluded. The decisions of the NRA can therefore not be subject to review, suspension or veto by the government or the Ministry (see p. 9). It is contested whether this interpretative note has any actual legal value at all. Whether the directives indeed exclude every form of hierarchical as well as non-hierarchical control, might eventually be an issue for the European Courts to judge.

essary to preserve democratic feedback to the electorate via parliament,[115] the very essence of (indirect) democracy seems to have been disregarded entirely. When it comes to control and supervision of independent regulatory authorities, the European Commission seems to more or less disregard Member States' traditions at present.

With the bottom-up approach having been applied to such a limited extent, one could go so far as to state that the EU has lifted a concept, that of the independent regulator, out of its broader and original context and surroundings, the constitutional and democratic foundations of administrative organisation. On the other hand, the argument that market regulation requires a different view on democratic legitimacy and justifies the EU's requirements on IRAs is gaining popularity.[116] Do the procedural obligations that are imposed upon the regulators in the directives[117] and their legal accountability[118] indeed suffice to compensate for their far-reaching independence and make them sufficiently accountable and legitimate in the eyes of the incumbents? Or should these in any case be seen as a regrettable refusal of the EU legislator to take into account classic Member State principles on democratic administrative organisation? These are pertinent questions that nevertheless fall beyond the scope of this contribution.[119]

For the issue of accountability as well, horizontal processes such as those described in this contribution may play a crucial role. In these horizontal processes, ideas on the (legal) requirements necessary to make regulators more independent are exchanged, while at the same time issues of how to make these regulators sufficiently accountable, despite their necessary independence, are addressed (see *supra*, e.g. the OECD meeting in 2005 and the 29th EPRA meeting in 2009). The far-reaching institutional demands of the liberalisation directives of the third generation entail serious concerns regarding the NRAs' accountability. Given the trend towards national restraint in the field of autonomous government at the national level in many European Member States, it seems likely that future discussions will focus on how to strike a proper and, compared to the current European legislation and the way this is interpreted

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115 Sometimes referred to as the 'chain of delegation'. See e.g. P. Magnette, 'The Politics of Regulation in the European Union' in: D. Geradin, R. Muñoz & N. Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Cheltenham 2005) 11.

116 See e.g. C. Spyrelli, 'Regulating the regulators? An assessment of institutional structures and procedural rules of national regulatory authorities' [2003-04/8] *International Journal of Communications Law and Policy* 1-65, in particular 113 *et seqq.*

117 Obligations regarding transparency in decision-making, duties to report. See the Commission's interpretative note, cited in footnote 111, p. 19-20.

118 The fact that they are subject to judicial control.

119 These questions fall within the scope of the author's Ph.D. research. A foretaste can be found in S. De Somer, 'Internationale impuls en nationale beheersingsdrang inzake bestuurlijke verzelfstandiging: het Grondwettelijk Hof en de casus van de energieregulator' [2012/4] *Tijdschrift voor bestuurswetenschappen en publiekrecht* 214-228.

by the European Commission, better balance between the requirement of independence on the one hand and the values regarding the democratic design of administrative organisation which Member States uphold on the other hand. Perhaps deliberation on horizontal schemes can lead to a balanced European common understanding as well, which the European Commission might be willing to take into account when altering or interpreting the present legislative framework.

6 Conclusion

The pluralistic development of European administrative law is not confined to its substantive aspects. EU rules and principles on national administrative organisation are not exclusively developed in a top-down or a bottom-up scheme either. This contribution aimed to demonstrate how horizontal processes have also played and are still playing a role in the development of the law on IRAs in the utilities sectors, namely in the sectors of energy, telecoms (or electronic communications) and audiovisual media.[120] It argued that these processes have been and will be of vital importance for the interpretation, implementation and further development of EU law. Research in the field of political science has already demonstrated the role of 'diffusion' in the spread of the concept of the independent national regulator. This contribution argued that cross fertilisation often takes the form of *deliberate* consultation concerning the independent regulatory authorities in sectors liberalised by European directives in international fora. A common idea of the features of an independent national utilities regulator and/or a common core of requirements that are necessary to mould the independence requirement have evolved in the framework of these horizontal structures. The role of three influential (types of) organisations, the Council of Europe, the OECD and the networks of national regulators themselves, was discussed.

European rules on the administrative organisation of regulation in liberalised utilities sectors are still developing. Deliberations in horizontal settings, among peers, can contribute to the future development of EU law. If a common basis of principles can be agreed upon, a future harmonisation of the requisites is in any case far more likely to find support in the Member States of the European Union. Moreover, these horizontal settings also have a role to play once

120 As pointed out in the introduction, another field which is subject to international impulses for establishing autonomous public bodies, is that of human rights law. Here as well, the role of 'diffusion' mechanisms and horizontal networks in the spread of independent national human rights institutions has recently received some attention. See G. de Beco, 'National Human Rights Institutions in Europe' [7/2] *Human Rights Law Review*, 331-370 and especially 367; T. Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' [32] *HRQ*, 729-760.

European legislation has been enacted, in the phase of the interpretation and of EU law.

It should furthermore be noted that the different fora also influence each other. In its Declaration on the independence and functions of regulatory authorities for the broadcasting sector[121] (a follow-up of Recommendation N° R (2000) 23), the Committee of Ministers for instance, refers to information provided by the EPRA. As mentioned above, the EPRA in return uses the Recommendation as a framework for its own activities. The involvement of the European institutions (mainly the Commission) in many of the fora mentioned, guarantees that the results of the exchanges between the national actors reach the EU level and consequently ensures interaction in this relationship as well.

The impact that horizontal processes have had on the administrative organisation of the regulatory state through IRAs cannot be underestimated. In the field of political science, there seems to be no real agreement on the precise role which *the EU itself* has played in the further development of the concept of the independent national regulator. Opinions range from a *'*net impact*'* that is *'*close to zero*'* to *'*an important catalyst in the social construction of independent agencies as appropriate regulatory institutions*'*.[122] Gilardi points out that Europeanisation is not a diffusion mechanism, as it has nothing to do with horizontal interdependence in itself, but is a common international pressure for Member States. 'This is especially the case for the more formal aspects of Europeanisation, namely the fact that the EU passes legislation that member states must apply. By contrast, the role of the EU as a forum where common norms are developed and where certain policies are promoted as appropriate models can be linked to emulation. The latter point is certainly relevant but exceedingly difficult to operationalise empirically in a quantitative analysis [...].'[123] The debates that take place in the 'official' networks of national regulators, established by the Commission, nevertheless illustrate how the EU institutions themselves create settings for a more horizontal approach on the development of law.

This contribution has made a modest attempt at unravelling the web of the interdependence between the various institutions and fora that play a role in

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121 Adopted by the Committee of Ministers of the Council of Europe on 26 March 2008 at the 1022nd meeting of the Minister's Deputies. Consultation via https://wcd.coe.int/ViewDoc.jsp?id=1266737&Site=CM.

122 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 1 and 108 with reference to respectively D. Levi-Faur, 'On the "net impact" of Europeanization. The EU's telecoms and electricity regimes between the global and the national' [37/1] *Comparative Political Studies* 3-29 (2004) and L.H. Pedersen, 'Transfer and transformation in the processes of Europeanization' [45/6] *European Journal of Political Research* 985-1021 (2006).

123 F. Gilardi, *Delegation in the Regulatory State, Independent Regulatory Agencies in Western Europe* (Cheltenham 2008) 108.

the development of EU legislation on the subject of NRAs. Approaching the process of the development of EU law from this viewpoint offers a fresh perspective on an oft-debated phenomenon in the law on administrative organisation, a field which is often still perceived as an exclusively national *enclave*,[124] free of any international or supranational influence. This knowledge can enhance our understanding of the complexity of the development of EU administrative law in general and those aspects governing administrative organisation in particular. The law on administrative organisation is increasingly 'Europeanised' and this Europeanisation does not only reveal itself in a classical vertical relationship, but also operates through various, probably less visible, but all the more influential, horizontal channels operating in the European administrative legal order.

These venues have the potential of rendering the Europeanisation of administrative law a more organic process, allowing thoughts to ripen before rules are imposed unilaterally as well as leaving room for national theses and antitheses to evolve towards a broadly accepted European synthesis.

124 To use the wording of G. della Cananea, 'Administrative Law in Europe: A Historical and Comparative Perspective' [2010/2] *Online Italian Journal of Public Law* 167.