

Independent Economic Regulators in Belgium: Contextualising Local Resistance to a Global Trend in the Light of the Belgian Economic Constitution

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Abstract

Inspired by the American experience, the European Union has made it compulsory for Member States since the 1990s to entrust certain regulatory powers to national authorities independent from the government in several sectors of the economy. Such a development is part of a larger trend that has taken place at the global level since the 1980s. The choice for independent regulators with wide powers must ensure credible and effective regulation of the economy, away from the short-term thinking that plagues politicians. Yet, the creation of independent regulators of the economy does not fit well with the constitutional, political and economic traditions of several European states, such as Belgium. In Belgium, the creation of independent economic regulators has faced resistance. Using Belgium as a case-study, this paper seeks to contextualise this resistance and argues that it should be understood in the light of the mismatch between the (neo-liberal) view regarding the respective roles of 'experts', politicians and economic actors in the regulation of the economy that is behind the creation of independent economic regulators and the Belgian economic constitution.

I. Introduction

Originating from the United States, independent regulators of the economy are an integral part of the current arrangements of economic governance worldwide. This is also the case in the European Union, where independent regulators of the economy have been created under EU impulse in all Member States to improve the functioning of the internal market and increase the effective implementation and enforcement of EU policies. Yet, independent economic regulators challenge preexisting arrangements in many states and face resistance in some of them. This is notably the case in Belgium. Using Belgium as a case-study, this paper seeks to contextualise this resistance. It argues that independent economic regulators cannot be disentangled from the

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(neo-liberal) view regarding the respective roles of ‘experts’, politicians, and economic actors in the regulation of the economy that is behind their creation, and that this view is not always in line with historic compromises underlying distinct institutional and administrative arrangements for the regulation of the economy at the national level. This paper further argues that these differences in approaches may help to understand the resistance to the independence of economic regulators that can be observed in countries such as Belgium.

Belgium is one of the founding Member States of the EU and has an economy that relies heavily on international trade and foreign investments. At the same time, however, globalization has put pressure on some of Belgium’s historic compromises between labor and capital, and the neocorporatist arrangements that resulted from them after the Second World War. In light of this socio-economic context, Belgium is a particularly interesting case study for discussing the tensions that arise at the interface between global legal and administrative trends and local experiences, and the ways and extent to which they can be overcome. This paper first sets the scene for independent economic regulators (2); secondly, it highlights that these independent economic regulators have met with resistance in Belgium on several occasions (3); thirdly, it contextualises this resistance in the light of the principles and compromises that form the Belgian economic constitution (4). The notion of economic constitution is here understood both descriptively as the set of key state institutions that are active in the management of the economy, their interrelations and their relations with civil society and, normatively, as the set of principles underlying the status and operation of these key institutions.¹

2. Independent economic regulators: setting the scene

In 2010 Bruce Ackerman challenged the traditional distinction between legislative, executive and judicial powers as the main tool for classifying the different branches of government.² New institutional forms such as independent election commissions and independent central banks escape Montesquieu’s categorisation. Independent regulators of the economy do as well. Independent economic regulators are market regulators in charge of overseeing and regulating a limited number of specific economic sectors (usually former monopolistic markets), typically in order to encourage and promote competition.³

¹ T Prosser, *The Economic Constitution* (Oxford University Press 2014) 7-11.

² B Ackerman, ‘Good-bye, Montesquieu’ in S Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (Edward Elgar 2010) 128-133.

³ A Ottow, *Market and Competition Authorities* (Oxford University Press 2015) 27-28.

They are independent because they enjoy autonomy both in relation to private actors and to the representative institutions of the state (the government in the first place). Independent economic regulators have spread worldwide over recent decennia.⁴ Their origin is commonly attributed to the United States,⁵ although the US model of independent regulatory agencies is often misunderstood.⁶ Europe is no exception to this trend. Firstly, as D. Ritleng writes, '[o]ne of the peculiarities of the European integration process from the outset has been the granting of important powers to autonomous institutions'.⁷ Secondly, since the 1990s, and in the wake of the liberalisation of the utilities sectors that occurred in the United Kingdom in the 1980s and 1990s, European internal market law has made it compulsory for Member States to entrust certain powers to national regulators. These regulators must also exercise their powers without being subjected to the control of politically responsible institutions.⁸ This independence from the government comes on top of the independence which regulators must keep in relation to private actors. Independent regulators have had to be established under EU law for the regulation of the network industries (telecommunications, electricity, gas, railway)⁹ but also in areas such as data protection and the regulation of audiovisual services.¹⁰ Besides the EU, other international organisations, such as the Organisation for Economic Co-operation and Development (OECD), also promote regulation of the economy at arms' length from

⁴ J Jordana, D Levi-Faur and X Fernandez i Marin, 'The Global Diffusion of Regulatory Agencies' (2011) 44(10) *Comparative Political Studies* 1343, 1344.

⁵ F Gilardi and M Maggetti, 'The independence of regulatory authorities' in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 201.

⁶ M Ruffert, 'National executives and bureaucracies' in P Cane, H Hofmann, E Ip and P Lindseth (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 523-524.

⁷ D Ritleng, 'Introduction' in D Ritleng (ed), *Independence and Legitimacy in the Institutional System of the European Union* (Oxford University Press 2016) 3.

⁸ S De Somer, 'The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective' (2012) 5 *REALaw* 93, 93-96.

⁹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast) [2018] L321/36, arts 5 and 8; Directive (EC) 2009/73 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 [2009] OJ L211/94, art 39; Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 57; Directive (EU) 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area [2012] OJ L343/32, art 55.

¹⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 52; Directive (EU) 2010/13 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) (as revised in 2018) [2010] L95/1, art 30.

the government to improve the quality of regulation (i.e., its fairness and impartiality).¹¹

Although the trend towards creating independent economic regulators is a global one, the design of regulators is influenced by the local context in which the regulators operate.¹² There is notably a great diversity in the degree of autonomy and in the scope of powers and responsibilities that economic regulators possess worldwide. As colourfully put by A.G. Bobek,

Independence can hardly be understood as a unitary notion, a sort of ‘off-the-rack’ single blueprint, that would provide for a set of guarantees universally applicable to all the independent bodies in exactly the same way. Independence is more like a ladder which one can climb up or down and stop at a specific rung, depending on the distance needed from given actor(s) in order to complete one’s tasks independently.

Analytically, the independence of regulators can be assessed according to four dimensions: institutional, personnel, financial, and functional independence.¹³ Different institutions ‘score’ differently on these four dimensions. Furthermore, even ‘independent’ entities do not operate in a *vacuum*: they interact with public and private bodies, they rely on information from other actors for their operations, etc. Independence is therefore always relative.¹⁴ In the EU, however, EU law has been increasingly demanding and precise regarding the degree and scope of independence from private actors and from the government required for national regulatory authorities in sectors such as energy or electronic communications.¹⁵ In general terms, the European Court of Justice has ruled that in “relation to a public body, the term ‘independence’ normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure”.¹⁶ The details of the independence requirement applicable to national regulators are further provided

¹¹ OECD, *Recommendation of the Council on Regulatory Policy and Governance* (22 March 2012) 14; A Vauchez and B François, ‘Pour une sociologie politique de l’indépendance’ in B François and A Vauchez (eds), *Politique de l’indépendance. Formes et usages contemporains d’une technologie de gouvernement* (Presses universitaires du Septentrion 2020) 34.

¹² J Chevallier, ‘Les autorités administratives indépendantes: un produit d’importation?’ in F Bottini (ed), *Néolibéralisme et américanisation du droit* (Mare & Martin 2019) 149 (on France).

¹³ M Scholten, ‘Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive’ (2011) 4 REALaw 5, 6.

¹⁴ F Gilardi and M Maggetti, ‘The independence of regulatory authorities’ in D Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011) 202.

¹⁵ E Slautsky, *L’organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018) pt 3; N Athanasiadou, ‘Independent regulatory authorities at the EU and Member State level: towards different standards of “independence”?’ in J-B Auby (ed), *The Future of Administrative Law* (LexisNexis 2019) 201-220.

¹⁶ Case C-518/07 *Commission v Germany* EU:C:2010:125, para 18. See also Case C-530/16 *European Commission v Republic of Poland* EU:C:2018:430, para 67; Case C-378/19 *Prezident Slovenskej republiky* EU:C:2020:462, para 32.

for in sectoral instruments. In the electricity sector, for example, the European legislature has provided that regulators must not seek or take direct instructions from any government or other public or private entity when carrying out their regulatory tasks, and should be able to take autonomous decisions, independently from any political body.¹⁷ Thus, while the EU first protected the discretion of the Member States in the design of their regulators in line with national institutional autonomy, EU requirements for independent regulators at the national level became more stringent at the end of the 2000s.¹⁸ This is because the leeway previously enjoyed by Member States proved unsatisfactory for the achievements of the objectives pursued by the EU, in particular the liberalisation of several sectors of the European economy (e.g. in the energy, railway or electronic communications sectors). Its experience of problems with some Member States led the Commission to further harmonize the design of national regulators and increase their independence. In 2007 the Commission gave as an example of shortcomings the then applicable regulatory framework in the electricity sector. They stated:

*Regulators have, on occasion, been put in a position where their decisions clearly go against the objective of creating a single internal market for electricity and gas, usually due to direct or indirect influence from national governments. The clearest, although not the only, example of this is inappropriate regulated supply tariffs.*¹⁹

This is because politicians may be tempted to use their influence over the regulator to keep supply prices for energy artificially low, even though this may harm competition and interfere with the good functioning of the internal market in the longer run.

This pressure from EU law to create independent regulators at national level goes hand-in-hand with a tendency to require Member States to grant these same regulators significant powers to achieve their aims of making markets more competitive, while also taking into account other non-economic interests.²⁰ By nature, the search for an equilibrium between these different interests requires the exercise of discretion from the regulators. This is not a mere 'techni-

¹⁷ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 57.

¹⁸ T Perroud, *La fonction contentieuse des autorités de régulation en France et au Royaume-Uni* (Daloz 2013) 76-79.

¹⁹ Communication from the Commission to the Council and the European Parliament: Prospects for the internal gas and electricity market, COM(2006) 841 final, 10 January 2007, 8.

²⁰ See eg Directive (EC) 2009/73 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 [2009] OJ L211/94, art 40.

cal' exercise.²¹ As is already apparent from the example from the previous paragraph, there can e.g., be trade-offs between affordable access to basic human needs such as energy and the need to give incentives to undertakings to invest in e.g., energy production plants or networks in the longer term. More precisely, it is common for EU law to list the powers and competences that national regulators must minimally possess in sectors regulated at EU level. In the network industries, the powers that regulators must enjoy have increased over time and currently range from the making of rules applicable to the sectors that regulators oversee to the settling of disputes between regulated undertakings. They also encompass the enforcement of legislation and the enactment of sanctions.²² As a result, there is a legal core of powers and duties that national economic regulators in the EU must possess in sectors such as energy and electronic communications. This leads to the overall picture that, as a matter of EU law, national regulation of significant parts of the economy must be left to actors enjoying independence both from market actors and from the political sphere, and which exercise discretion in using these powers. However, the choice promoted at EU level for independent regulation of the economy may interfere with approaches and compromises underlying the economic constitution of some Member States, where regulation of the economy is usually mediated through ordinary political processes.

Thus, independent regulators restrict the scope of governmental intervention in the economy and allow regulatory decisions to be insulated from political influence. In the EU context the choice of independent regulators with wide powers to regulate the economy must ensure credible and effective sectoral regulation, away from the short-term electoral thinking that often plagues politicians.²³ Independent economic regulators are supposed to enhance investor confidence in the regulation of the market.²⁴ They must ensure 'market confidence in impartiality',²⁵ and 'that regulatory decisions are not affected by political and specific economic interests, thereby creating a stable and predictable

²¹ 'Yet it is empirically evident that the divide between political and non-political is flawed in an important way; we could go so far as to say it is evidently wrong', Ruffert (n7) 507.

²² See eg Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art 59 and 60.

²³ G Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions' (1996) 57 *European University Institute – Robert Schuman Centre of Advanced Studies Working Paper*.

²⁴ S Lavrijssen and A Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39 *Legal Issues of Economic Integration* 419, 424.

²⁵ European Commission, 'Impact Assessment accompanying the legislative package on the internal market for electricity and gas' (COM(2007) 528 final, COM(2007) 529 final, COM(2007) 530 final, COM(2007) 531 final, COM(2007) 532 final) para 5.2.

investment climate'²⁶ which reduces investors' risks and costs, especially in capital-intensive sectors. This is particularly important for interstate economic operators, which do not form part of the electorate and lack proper political representation in the country in which they invest.²⁷

In the EU the enhanced role played by independent regulators can further be explained by the need to improve the effectiveness of EU law in the Member States.²⁸ Regulators insulated from other national public bodies and from national interests are expected to be more focused and more committed to the goals, principles and provisions of the relevant European legislation which they need to implement and enforce, which in turn must provide for more effective implementation and enforcement of EU law. It comes, therefore, as no surprise that independent authorities are part of the European Commission strategy for better implementation and enforcement of EU law.²⁹ Overall, from an EU law perspective, 'independent bodies, owing to their insulation from politics and electoral concerns and their technical expertise, are better able to fulfil certain tasks and will gain democratic legitimacy thanks to the effectiveness of their actions'.³⁰ In addition to the 'output legitimacy' that is expected to result from the expertise of independent bodies and their ability to make decisions free from electoral concerns,³¹ the EU also seeks to increase the democratic legitimacy of these independent bodies which it requires in its Member States by promoting consultation practices with citizens and stakeholders when regulators make decisions. In doing so, the EU seeks to promote a form of 'participatory democracy' at the national level,³² thereby contributing to the 'throughput legitimacy' of the regulators and their decisions.³³ As the Belgian example will show, how-

²⁶ Commission Staff Working Paper, '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' (2010) 6.

²⁷ K Lenaerts, 'The principle of democracy in the case law of the European Court of Justice' (2013) 62 *International and Comparative Law Quarterly* 271, 297.

²⁸ M Egeberg, 'EU Administration: Centre Formation and Multilevelness' (2010) 133 *Revue française d'administration publique* 17, 26; G Dellis, 'Servant of two masters or Trojan horse? Independent regulators in EU Member States, the principal-agent problem and the attempt for an undercover federalization of the European Union' in J-B Auby (ed), *The future of administrative law* (LexisNexis 2019) 183-200.

²⁹ European Commission, 'Communication – EU law: Better results through better application' (2017/C 18/02, 19 January 2017).

³⁰ D Ritleng, 'Does the European Court of Justice Take Democracy Seriously? Some Thoughts about the Macro-Financial Assistance Case' (2016) 53 *Common Market Law Review* 11, 32 (Ritleng refers to the ECJ in particular); Vauchez and François (n11) 33.

³¹ F Scharpf, *Governing in Europe: effective and democratic?* (Oxford University Press 1999).

³² A Psygkas, *From the 'Democratic Deficit' to a 'Democratic Surplus': Constructing Administrative Democracy in Europe* (Oxford University Press 2017).

³³ V Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political studies* 2, 2-22.

ever, this view of the legitimacy of the regulators has not met with universal approval.

It must therefore be clear from the outset that the EU preference for independent economic regulators is far from being a mere “technical” question: it is a preference driven by assumptions regarding the respective roles of politicians, “experts” and economic actors in the functioning of the market economy, the conditions under which the exercise of public power is legitimate, as well as the respective weights of European (economic) objectives and national conflicting preferences. As such, independent economic regulators represent the ‘institutionalization of a new global order of regulatory capitalism’,³⁴ and they are part and parcel of the European administrative space. Yet, as already alluded to, the creation of independent economic regulators does not fit well with the constitutional, political and economic traditions of several Member States of the EU,³⁵ such as Belgium. As a matter of fact, independent European agencies also raise constitutional concerns at EU level.³⁶ At the national level, independent regulators challenge the constitutional role of the government, raise concerns about political accountability, challenge pre-existing national political economy choices and threaten vested interests. It is therefore not surprising that independent regulators of the economy have met with resistance in the Belgian context. The legislature, the executive and even the legislative section of the Council of State have all opposed or weakened the independence of the Belgian regulators at some point in recent years.³⁷ The independence requirements applicable to regulators in Belgium as a matter of EU law have, e.g., been breached on numerous occasions. From an EU perspective, such resistance is problematic as it threatens the well-functioning of the internal market and the effective implementation of EU law at the national level. In line with the overall theme of the special issue in which this paper appears, it is therefore crucial to understand the roots of this ‘Belgian difficulty’ with independent economic

³⁴ Jordana, Levi-Faur and Fernandez i Marin (n4) 1361.

³⁵ T Zgajewski and M Van Bellinghen, ‘Quelle réforme pour le régulateur des télécommunications en Belgique?’ (2000) 53 *Studia Diplomatica* 51, 60; L Hancher and P Larouche, ‘The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn Oxford University Press 2011) 773; S Rose-Ackerman, ‘The Regulatory State’ in M Rosenfeld and A Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) 676-677. Regarding the French situation, see Chevallier (n12) 143.

³⁶ J Saurer ‘EU Agencies 2.0: the new constitution of supranational administration beyond the EU Commission’ in S Rose-Ackerman, P Lindseth and B Emerson (eds), *Comparative administrative law* (2nd edn Edward Elgar 2017) 619-631.

³⁷ Besides being the highest administrative court in Belgium, the Belgian Council of State is also an advisory body in legislative and statutory matters. This advisory role is taken up by the legislative section of the Council of State. The opinions of the legislative section of the Council of State are available here: <www.raadvst-consetat.be/?page=adv_search&lang=fr> accessed 13 March 2021.

regulators and to discuss its distinctive character, in order to better appreciate the extent to which it can be overcome.

Drawing mostly on examples from the electricity sector and the electronic communications sector, this paper will first show that Belgian authorities have struggled to accept the independence of Belgian economic regulators. Secondly, it will contextualise these difficulties and highlight the role that courts and EU institutions have played in protecting the independence of the Belgian regulators. In summary, this paper argues that the observed resistance can best be understood in light of the Belgian constitutional and political context, and the threat that independent regulators pose to the vested interests of powerful (public) actors in the sectors concerned, or, in other words, in the context of the Belgian economic constitution. Nonetheless, despite this resistance, independent economic regulators now seem to have made their way into Belgium and appear to be an established part of the current Belgian institutional landscape. Belgian courts and European institutions have been instrumental in this process of acceptance. This instrumental role of Belgian courts can be linked to their general attitude of ‘European-friendliness’, which leads them to protect the integrity of EU law even against domestic constitutional principles. The constitutional position of Belgian economic regulators remains, however, partly unsettled, which leads to the observation that the acclimation of this new (by Belgian standards) institutional form is not yet fully achieved in Belgium and may require sustained attention in the future.

3. The contested independence of economic regulators in Belgium

Although Belgium's first autonomous regulators – the *Commission Bancaire* – were created as long ago as 1935,³⁸ economic regulators independent from the government have mushroomed in the Belgian institutional landscape only since the 1990s.³⁹ The Belgian regulator for telecommunications (BIPT/IBPT) was, e.g., created in 1991 and, at the federal level, the Belgian regulator for the energy sector (CREG) was created in 1999.⁴⁰ The increasing role played by independent economic regulators in Belgium is intrinsically linked to the EU-driven process of liberalisation of the network industries, the

³⁸ Royal decree no 185 of 9 July 1935 ‘sur le contrôle des banques et le régime des émissions de titres et valeurs’.

³⁹ E Slautsky, ‘Principe de légalité et attributions de pouvoirs à des autorités indépendantes: une relation équivoque’ in L. Detroux, M. El Berhoumi and B. Lombaert (eds), *La légalité: un principe de la démocratie belge en péril* (Larcier 2019) 593.

⁴⁰ V. De Schepper and E. Slautsky, ‘Decentralisering en privatisering van regelgevende bevoegdheid: naar een grondwettelijke verankering?’ in C. Behrendt, W. Pas, S. Sottiaux and J. Van Nieuwenhove (eds), *Leuvense Staatsrechtelijke Standpunten IV* (die Keure 2019) 150-170.

need to implement European secondary legislation and to foster competition in the newly liberalised markets.⁴¹ An institution commonly thought to be of American origin, independent economic regulators are therefore a relatively new phenomenon in Belgium. They correspond to Saunders' definition of a legal transplant, namely a 'deliberate movement of relatively structured legal phenomena across jurisdictional boundaries'.⁴² As such, they are a perfect example of the diffusion of administrative institutions across national borders,⁴³ which is at the core of this special issue. Given the major role played by EU law in bringing independent economic regulators to Belgium, this legal transplant is not entirely voluntary as far as Belgium is concerned. Several signs show that the political independence of economic regulators from the government has been difficult to accept in the Belgian context. As previously explained, the independence of regulators from political actors – as required under EU law – must allow them to 'act completely freely, without taking any instructions or being put under any pressure'.⁴⁴ However, Belgian economic regulators are comparatively less independent than their European counterparts,⁴⁵ and their independence has been regularly put under pressure by Belgian governments and legislatures, and even by the Belgian Council of State, as the four following examples from the electricity and the electronic communications sectors will show.⁴⁶ The first examples, from the electricity sector, highlight attempts by the Belgian legislatures to restrict the scope of the powers and discretion of the regulators or, in other words, to restrict their substantive independence. The example from the electronic communications sector illustrates attempts to restrict functional independence from the regulator through the organisation of governmental control over its decisions. In all the examples courts or EU institutions have had to step in to protect the independence of the Belgian regulators.

⁴¹ P Nihoul, 'Les autorités administratives indépendantes en Belgique' (2013) *Revue française de droit administratif* 897, 898.

⁴² C Saunders, 'Transplants in Public Law' in M Elliott, J Varuhas and S Wilson Stark (eds), *The Unity of Public Law?* (Hart 2018) 258.

⁴³ M Mota Prado, 'Diffusion, Reception, and Transplantation' in P Cane, H Hofmann, E Ip and P Lindseth (eds), *Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2021) 258-259. See also N K Dubash and B Morgan (eds) *The Rise of the Regulatory State of the South: Infrastructure and Development in Emerging Economies* (Oxford University Press 2013).

⁴⁴ *Commission v. Germany* (m16) para 18.

⁴⁵ C Henretti, P Larouche and A Reindl, 'Independence, accountability and perceived quality of regulators' (2012) CERRE Study 1-96, 34.

⁴⁶ The lack of independence of the Belgian regulators in other sectors, such as data protection, has also been highlighted. See eg É Degrave, *L'e-gouvernement et la protection de la vie privée. Légimité, transparence et contrôle* (Larcier 2014) 579-583. At the time of writing, debates still rage in Belgium regarding the independence of the Belgian Data Protection Agency, its role in the Covid-19 crisis and the compatibility of Belgian law with European requirements. See P Laloux, 'Grand format – Le casse du siècle sur la vie privée des Belges' (*Le Soir*, 11 February 2021) available at <<https://plus.lesoir.be/354333/article/2021-02-11/grand-format-le-casse-du-siecle-sur-la-vie-privee-des-belges>> accessed 13 March 2021.

In the electricity sector, Belgian governments and legislatures have attempted to curtail the powers and discretion of the Belgian energy regulators in several ways, to maintain control over the Belgian electricity market and make sure that their own political choices pertaining to the electricity sector are correctly implemented.⁴⁷ In Belgium, energy policy is the responsibility of both the national government and the regional entities. Accordingly, there are four energy regulators in Belgium, one at the national level and three at the regional level. For example, Belgian authorities initially tried to restrict the tariff powers of the federal regulator. Both the ECJ and the Belgian Constitutional Court found these attempts to be a breach of the independence requirements of the then applicable Directive 2003/54.⁴⁸ In a similar attempt at control, Belgian legislative bodies at federal and regional levels have adopted various guidelines regarding electricity transport and distribution tariffs when implementing the Third Electricity Package from 2009.⁴⁹ The guidelines must be respected by the Belgian regulators when they control and approve the tariffs charged by the operators of the transport and distribution networks of electricity. Some guidelines are rather detailed and thus substantially restrict the regulators' discretion in exercising their powers.⁵⁰ The federal legislature further restricted the powers of the national energy regulator on other accounts as well. In 2012, these attempts led the Belgian national energy regulator to take the unusual step of filing a complaint with the European Commission,⁵¹ which led the Commission to start an infringement procedure against Belgium in 2014 and, eventually, to the finding of an infringement against Belgium by the ECJ in 2020.⁵² In the

⁴⁷ European electricity law preserves the possibility of Member States developing their own electricity policy on several issues, such as the structure of energy supply or the security of supply. See Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU [2019] OJ L158/125, art. 57(4)(b)(ii), and the Consolidated Version of the Treaty on European Union [2012] OJ C 326, art. 192(2)(c), and 194(2).

⁴⁸ Directive (EC) 2003/54 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 [2003] OJ L176/37. See Case C-474/08 *Commission v. Belgium* EU:C:2009:681; Belgian Constitutional Court, 31 May 2011, no 97/2011, B.7.1-B.10. The decisions of the Belgian Constitutional Court are available at <www.const-court.be/fr/> accessed 13 March 2021.

⁴⁹ Directive (EC) No 2009/72 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 (2009) OJ L211/55.

⁵⁰ D Verhoeven, 'Régulation des tarifs de transport et de distribution d'électricité et de gaz naturel: éléments juridiques d'un jeu de quilles politico-économique' in D Renders and R Born (eds), *Actualités du droit de l'énergie. La transposition du "troisième paquet énergie" européen dans les lois "électricité" et "gaz"* (Bruylant 2013) 322-328.

⁵¹ CREG, 'Plainte à l'encontre de l'État belge pour manquement à l'obligation de transposition du troisième paquet énergie' mentioned here <www.creg.be/sites/default/files/assets/Publications/Press/2012/compress20062012fr.pdf> accessed 23 March 2021.

⁵² More precisely, on 16 October 2014, the European Commission initiated an infringement procedure against Belgium for incorrect transposition of Directive 2009/72 (2014/2189 C(2014) 7337 final). The Commission decided in 2019 to refer Belgium to the Court, notably pointing out that Belgium had not correctly transposed certain rules on the powers of the national regulator (European Commission, 'Energy: Commission refers Belgium to the Court for failing

same vein, in 2016 and, again, in 2021, the Belgian Constitutional Court annulled regional statutes restricting the discretion of the energy regulators regarding distribution tariffs, as the former violated European law requirements regarding the independence of the regulator.⁵³ In recent months, the Walloon energy regulator and the Walloon government have again disagreed on whether citizens who produce electricity through photo-voltaic modules (solar panels) should pay more for their use of the electricity network.⁵⁴ Here again, courts and the legislative section of the Belgian Council of State reasserted the exclusive competence of the regulator to take these decisions and the need to protect its independence: it was only then that the government somehow held back on its attempts to make its view prevail over the regulator.⁵⁵

An example where the functional independence of the regulator has been threatened can be drawn from the electronic communications sector. In this sector, the legislative section of the Belgian Council of State notably held positions that were detrimental to the independence of the regulator. For example, in 2002 and 2012, the legislative section of the Belgian Council of State insisted on the need to maintain some degree of governmental control over the decisions taken by the Belgian regulator for electronic communications.⁵⁶ This is because, in the Council of State's view, such control was deemed necessary to protect ministerial accountability to Parliament for the decisions adopted by the regulator. On 16 October 2014, however, the European Commission announced that it had started an infringement procedure against Belgium for lack of independence of its national electronic communications regulator.⁵⁷ The start of this in-

to comply with EU rules on electricity and gas markets' (25 July 2019)). The ECJ found Belgium to be in breach of European energy legislation in Case C-767/19 *Commission v. Belgium* EU:C:2020:984. For an earlier account of this infringement procedure, see D Verhoeven, 'Recente ontwikkelingen in het federaal energierecht: "Europe Strikes Back"' in K Deketelaere and B Delvaux (eds), *Jaarboek Energierecht 2014* (Intersentia 2015) 56-66.

⁵³ Belgian Constitutional Court, 25 May 2016, no 71/2016, B.10.3-B.12; Belgian Constitutional Court, 14 January 2021, no 5/2021, B.12.4; L De Deyne, 'Onafhankelijkheid energieregulator vereist terughoudendheid bij opstellen richtsnoeren' (2016) *Milieu- en Energierecht* 339, 339-343.

⁵⁴ CWaPE, 'Tarif prosumer: avis remis le 02/12/2019 sur un projet de décret impliquant la révision de la méthodologie tarifaire et l'adaptation des tarifs pour les utilisateurs du réseau', <www.cwape.be/?dir=7&news=1044> accessed 13 March 2021.

⁵⁵ Cass 13 December 2018, C.15.0405.F/1; Council of State, opinion no 66.747/4 of 18 December 2019 (not published); X Counasse and B Padoan, 'Photovoltaïque: le ministre Philippe Henry renonce au report de cinq ans du tarif prosumer' *Le Soir* (Brussels 27 April 2020). Decisions from the Belgian 'Cour de cassation' can be accessed at <<https://juportal.be/home/ac-cueil>> accessed 13 March 2021.

⁵⁶ Opinion no L. 33.255/4 of 5 June 2002 on a Bill 'relatif au statut du régulateur des postes et télécommunications belges', 14-15; Opinion no 50.003/4 of 4 September 2011 on a Bill 'portant des dispositions diverses en matière de communications électroniques', 17-22. For details, see Slautsky (m15) 286-299.

⁵⁷ European Commission, 'Telecoms: Commission refers Belgium to Court over independence of national regulator' (IP/14/1145 16 October 2014).

fringement procedure led to a change in Belgian law to remove the remaining governmental control over the electronic communications regulator, in line with EU law requirements.⁵⁸ This change in the law was eventually accepted by the legislative section of the Belgian Council of State, given the infringement procedure.⁵⁹ This illustrates the general tendency of Belgian courts to accept the primacy of EU law even against their own interpretation of Belgian constitutional law requirements.

These examples highlight recurring difficulties in Belgium about accepting independence from the government of its economic regulators, the existence of which is mostly due to EU law requirements. It is not uncommon for Belgian courts and EU institutions to have to step in to protect the independence of Belgian regulators and the implementation of EU law, as is their role and responsibility under EU law. Since 2000, in the electricity and electronic communications sectors alone, EU institutions (the ECJ or the Commission) have found Belgium to have breached EU law requirements regarding the status of the regulators at least four times, and the Belgian highest courts have also had to step in on at least five occasions.⁶⁰ This is without considering the discussions between the Commission and the Belgian authorities which, on other occasions, have also led to changes in the law. The status of the Belgian independent economic regulators has been marked by instability and hesitations: reforms have followed one another, governmental controls on the regulators have been removed only as a last resort, often under pressure from European bodies, and certain incompatibilities with EU law requirements remain.⁶¹

Now, the distinctive character of the Belgian difficulty with independent economic regulators could, perhaps, be doubted. Firstly, Belgium has a poor record in general when it comes to the implementation of EU law.⁶² Thus, its difficulties seem to be with the implementation of EU law in general, not only with its requirements to set up independent economic regulators. The complexity of its federal structures and the inefficiencies of its bureaucracies contribute to this poor record. Secondly, other Member States have also been found in breach of EU law by the ECJ for violating the independence of their regulators in the

⁵⁸ 'Loi du 16 mars 2015 portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges', 2015.

⁵⁹ Opinion no 56.903/4 of 17 December 2014 on a Bill 'portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges', 4-9.

⁶⁰ Besides the decisions quoted in the examples above, see Belgian Constitutional Court, 18 November 2010, no 130/2010.

⁶¹ For examples, see Slautsky (n15) 297-299 and 306.

⁶² TA Börzel and M Knoll, 'Quantifying Non-Compliance in the EU. A Database on EU Infringement Proceedings' (2012) *Berlin Working Paper on European Integration* No. 15, 14.

energy and electronic communications sectors,⁶³ which may point to a difficulty with the independent regulation of the economy beyond Belgium. For example, a comparative study has shown that the need to maintain some form of political control over non-governmental public bodies is widely recognised in Europe,⁶⁴ and, in Germany, legal scholars have claimed that the requirement to create independent regulators in the electricity sector is in breach of German constitutional identity.⁶⁵ De Somer also identifies, in general terms, conflicting approaches between EU requirements that oblige Member States to create autonomous public bodies and a counter-trend at national level to restrain the use of such public bodies because of democratic and rule of law concerns.⁶⁶

Yet, this paper argues that there is something distinctively interesting in the difficulty that Belgium experiences with independent economic regulators. First of all, Belgian hesitations over independent economic regulators are not the sole result of technical difficulties with the transposition of EU law: the roots of this resistance can be traced back to a widely held view that the regulation of the economy should remain within the realm of politics, a view that transpires in both political and constitutional discourse. As De Roy wrote in 2006, ‘the attachment to the political essence of the administration seems unwavering and no doubt explains the resistance encountered in Belgium to the spread of a genuine model of independent administrative authority’.⁶⁷ This remains true, at least partly, 15 years later. In other words, the Belgian difficulty with independent economic regulators is principled, at least in part, and the alternative view promoted at EU level according to which independent regulators of the economy can rely on output and throughput legitimacy does not seem to make good for the Belgian understanding of the requirements of representative democracy. This tension raises the broader issue of the democratic character of the EU and the possibility to accommodate diverging views of what democracy requires in the European administrative space. Secondly, even if the Belgian difficulty with independent economic regulators is not unique, it also provides an illuminating example of the tensions that result from the encounter between neo-corporatist and parliamentary arrangements, on the one hand, and one of

⁶³ Case C-274/08 *Commission v Sweden* EU:C:2009:673; Case C-424/07 *Commission v Germany* EU:C:2009:749; Case C-424/15 *Ormaetxea Garai et Lorenzo Almendros* EU:C:2016:780; Case C-560/15 *Europa Way et Persidera* EU:C:2017:593.

⁶⁴ C Jenart, ‘Uitbesteding van regelgevende bevoegdheid aan autonome agentschappen, private en hybride actoren’ (2020) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 63, 69–70.

⁶⁵ See the references in M Ruffert, ‘Public Law and the Economy: A Comparative View from the German Perspective’ (2013) 11(4) *International Journal of Constitutional Law* 925, 935. See also Ruffert (n6) 522.

⁶⁶ S De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar 2017).

⁶⁷ D De Roy, ‘Le pouvoir réglementaire des autorités administratives indépendantes en droit belge’ in *Rapports belges au Congrès de l’Académie internationale de droit comparé à Utrecht* (Bruylant 2006) 71 (our translation).

the main institutions of global regulatory capitalism on the other hand, as well as of the tensions that result from a strong involvement of the public sector in the economy, on the one hand, and the creation of an internal market in the EU, on the other hand. This tension between conflicting choices in political economy and their legal and institutional concretization is overlooked by much of the (Belgian) legal scholarship that discusses the tension between independent economic regulators and constitutional and democratic values. This paper also illustrates how these tensions between the EU push for independent regulators and the Belgian difficulty with them trigger a process of change at the national level, and discusses the scope and depth of the induced change so far. The next section unpacks these ideas further to highlight why independent economic regulators are at odds with Belgian political and economic traditions, and how this has transpired in constitutional discourse.

4. Contextualising resistance to independent economic regulators in Belgium

This paper identifies two major types of difficulties with independent regulators in Belgium: one of a legal nature, which is widely recognized by Belgian legal commentators,⁶⁸ and one of a political/economic nature, which has received much less attention in legal scholarship. This paper argues that the two aspects need to be analysed together, to demystify the traditional legal approach adopted by Belgian scholarship in this field – their approach is one guided by their own context and the values embedded therein. As such, the Constitution is far more open to interpretations than is usually accepted. Nonetheless, Belgian constitutional law has traditionally required that the regulation of the economy remain within the realm of politics. Although the text of the Constitution says little on this issue, the Constitution has been interpreted by the Council of State and by legal scholarship as allocating the responsibility for regulating the economy to the legislature or the executive (the representative institutions), and as preventing them from delegating this responsibility to third parties. However, under the pressure of EU law, Belgian constitutional law has evolved to allow wider possibilities of creating independent economic regulators. This evolution in the interpretation of constitutional principles is discussed first (4.1.). Furthermore, separating the regulation of the economy from the realm of representative institutions also challenges neo-corporatist and consociational arrangements in Belgian governance, as the second section will explain (4.2.). This is because independent economic regulators weaken the position of social partners in the regulation of the economy, and their par-

⁶⁸ Eg J Velaers, *De Grondwet. Een artikelsgewijze commentaar I* (die Keure 2019) 49-50.

ticipation has characterised Belgian political economy since the first half of the XXth century. Independent regulators also threaten powerful (public) interests resulting from a strong involvement of the Belgian state in the economy, and this leads to attempts to restrict their independence, as the third section will show (4.3.).

4.1. Independent regulators and the Belgian constitution

Belgium is a federal, parliamentary, constitutional monarchy, with a codified constitution first adopted in 1831 and amended regularly since the 1970s. Politically, the Belgian Constitution of 1831 is of liberal inspiration. Economically, the Constitution recognises a broad margin of manoeuvre for the representative institutions: the scope of economic policies and of State intervention in the economy permitted under the Constitution are quite broad.⁶⁹ At the federal level, the main representative institutions are the bicameral Parliament and the government responsible before Parliament. According to article 37 of the Constitution, the executive power belongs to the King, but the King must always exercise his powers on ministerial advice (article 106). Therefore, for all practical purposes, any reference to the King in the Belgian Constitution is a reference to the federal government. Article 108 of the Constitution gives the King the responsibility for implementing statutes, while article 105 allows the legislature to grant powers to the King that go further than the implementation of principles previously established by the legislature. These provisions give an impression that all administrative matters must be handled by the King or the administration that he presides; there is, e.g., no mention of the possibility of the King or the legislature delegating responsibilities in the regulation of the economy to other entities.

As mentioned, Belgium experiences constitutional difficulties with independent economic regulators as promoted under EU law. Legal scholarship and the Council of State, acting in an advisory capacity, have long treated with suspicion the conferral of public powers to independent authorities, particularly when the exercise of these powers entails rule-making powers and the exercise of discretion.⁷⁰ This is because, firstly, there is little recognition in the Belgian Constitution of regulation at arm's length from the government, as has just been explained.⁷¹ As powers must be exercised in the manner provided for by

⁶⁹ D Yernault, *L'État et la propriété* (Bruylant 2013) 1220.

⁷⁰ See the position of the Belgian Council of State as summarised by R Andersen, 'Les autorités administratives indépendantes en droit belge' (2008) *Annuaire européen d'administration publique* 25, 28; K Muylle, 'Het Grondwettelijk delegatieverbod en het Unierecht: welke democratisch verkozen beraadslagende vergadering?' in A Alen and J Theunis (eds), *Leuvense Staatsrechtelijke Standpunten 3. De Europese dimensie in het Belgische publiekrecht* (die Keure 2012) 324-326.

⁷¹ De Roy (n67) 712-713; De Schepper and Slaatsky (n40) 147.

the Constitution (article 33 of the Constitution), the absence of constitutional recognition of independent economic regulators raises doubts regarding the possibility of delegating the regulation of the economy to independent regulators. Secondly, conferring powers to independent regulators would breach articles 37 and 108 of the Constitution by encroaching on the powers that belong to the federal government (formally, the King) or, for that matter, to regional governments. It would also run counter to basic constitutional notions of political accountability, as it empowers an authority to take binding (discretionary) decisions without being directly accountable before Parliament. This would breach the legitimacy chain that originates in the people and runs through Parliament, the government, which in Belgium is responsible before Parliament, and public bodies, which are under the control and the responsibility of the government.⁷² As Michel Pâques, a judge in the Belgian Constitutional Court and public law professor, wrote:

*the power to direct or supervise [administrative bodies] is [...] a Belgian constitutional requirement which allows that there is always a minister able to explain and defend before Parliament what happened in the darkest of the offices of power. In contrast, the problem in Belgian law is with independent administrative authorities.*⁷³

In sum, in this interpretation of Belgian constitutional law, the regulation of the economy should remain in the hands of the representative institutions and not be delegated to independent regulators.

However, it should also be noted that other Belgian public law scholars have nuanced this interpretation, highlighting legitimate functional reasons to delegate powers to non-governmental public bodies and to protect certain decisions from political interference.⁷⁴ The legislative section of the Council of State itself has also accepted the possibility of such delegation even in the absence of a constitutional basis to do so. However, such delegations have been accepted only in so far as the scope of the delegation would remain limited, and that some degree of governmental control would be maintained with respect to the discretionary decisions of the authorities to which powers were granted. In terms of quality, the control had to be of such a nature that the responsible

⁷² Legislative section of the Council of State, opinion no L. 19.181/8 of 13 February 1990 on a Bill 'portant des mesures tendant à promouvoir l'exercice du droit d'enquête parlementaire'; Opinion no L. 33.255/4 of 5 June 2002 on a Bill 'relatif au statut du régulateur des postes et télécommunications belges', 9.

⁷³ M Pâques, 'Entre géométrie et finesse: le droit administratif réducteur et créateur d'incertitude' (2019) 80 *Annales de Droit de Louvain* 251, 261 (our translation).

⁷⁴ P Popelier and J Van Nieuwenhove, 'Decentralisering en privatisering van wetgeving' in *Liber amicorum Boudewijn Bouckaert* (die Keure 2012) 261-286; P Goffaux, *Dictionnaire de droit administratif* (2d edn Bruylant 2016) 103.

minister could be held accountable before Parliament for the decisions made by the public authority.⁷⁵

Even so nuanced, it remains fair to say that Belgian constitutional law has traditionally been quite restrictive regarding the possibility of granting powers to regulate the economy to entities autonomous from the government. This creates a tension with EU law requirements. As previously explained, EU law requirements regarding the independence of the regulators in, e.g., the network industries, go further than is traditionally admissible as a matter of Belgian constitutional law: they require that regulators be able to act completely freely, without taking any instructions or being put under any pressure. In the sectors concerned, EU law therefore excludes any governmental control over the decisions of the regulator. Yet, this is precisely what is traditionally required under Belgian constitutional law when powers are delegated outside the sphere of the representative institutions. In 2012, Van Bellinghen and Zgajewski highlighted this tension between EU law and Belgian constitutional law requirements, and argued that the main obstacles in Belgium to implementing the 2009 reform of the EU electronic communications legal framework were the division of competences at the national level and ‘the tensions between the reinforcement of the autonomy of national regulatory authorities required by the European texts and the controls required by Belgian texts’.⁷⁶ In her work, De Somer has also repeatedly highlighted the tension between Belgian constitutional law and the requirements of EU law.⁷⁷ This tension, however, has not led to unsurmountable difficulties, for two main reasons.

Firstly, Belgian courts have widely recognised the primacy of EU law since 1971,⁷⁸ even when it comes to constitutional law principles. As a result, they accept that powers can be granted to public bodies that are independent from the government when it is required by EU law, even when this would otherwise be in breach of Belgian constitutional law principles.⁷⁹ It is striking that Belgian

⁷⁵ R Andersen, P Nihoul and M Joassart, ‘Le Conseil d’État – Chronique de jurisprudence 2002’ (2004) *Revue belge de droit constitutionnel* 25, 85-88; eg legislative section of the Council of State, opinion no L. 30.527/4 of 25 Octobre 2000 on an ‘avant-projet de décret ‘relatif à l’organisation du marché régional de l’électricité’, 7.

⁷⁶ M Van Bellinghen and T Zgajewski, *Les enjeux de la transposition en Belgique des nouvelles directives européennes sur les communications électroniques* (Academia Press 2012) 4 (our translation).

⁷⁷ S De Somer, *Autonomous Public Bodies and the Law* (Edward Elgar 2017).

⁷⁸ Cass., 27 May 1971.

⁷⁹ Belgian Constitutional Court, 18 November 2010, no 130/2010, B.8.1; legislative section of the Council of State, opinion no 49.336/3 of 22 March 2011 on a Flemish Bill ‘houdende de wijziging van de wet van 10 maart 1925 op de electriciteitsvoorziening, het decreet van 20 december 1996 tot regeling van het recht op minimumlevering van elektriciteit, gas en water en het Energie-decreet van 8 mei 2009, wat betreft de omzetting van de richtlijn 2009/72/EG en de richtlijn 2009/73/EG’, 4-6; opinion no 49.491/3 of 27 April 2011 on a Brussels Bill ‘modifiant l’ordonnance du 19 juillet 2001 relative à l’organisation du marché de l’électricité en Région de Bruxelles-Capitale’, 7; opinion no 56.903 of 17 December 2014 on a Bill ‘portant modification de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges’, 8-9.

courts have done so despite a 2016 decision from the Belgian Constitutional Court which held that Belgian national identity could set a limit to the primacy of EU law.⁸⁰ This attitude of ‘Euro-friendliness’ explains why Belgian courts have stepped in against the government or the legislature when the independence of the Belgian regulators – as required under EU law – was under pressure. The absence of direct “retaliation” against the courts on the part of executive or the legislature in this context shows a degree of acceptance among the representative institutions of the need to implement EU law requirements and to respect the primacy of EU law.

Secondly, since 2010, the Belgian Constitutional Court – probably in the light of the identified tension between EU law and the Belgian Constitution and of EU law’s increasing reliance on independent regulators – has relaxed the conditions under which powers can be conferred to non-governmental bodies as a matter of Belgian constitutional law. The main limits that the Court now puts on the conferral of powers to independent authorities seem in line with EU primary law as interpreted by the ECJ;⁸¹ namely, the limited scope of the conferred powers, the technicity of the field in which the delegation takes place and the existence of parliamentary and judicial controls over the decisions of the concerned authority. The Constitutional Court no longer requires ministerial control over the decisions of an authority.⁸² Although the Constitutional Court did not initially make clear whether independent regulators were admissible only in cases where this was required under EU law,⁸³ it later clarified that independent regulators are also admissible in cases where EU law is not concerned.⁸⁴ Several legal scholars, including members of the Belgian Council of State, have strongly criticized this shift by the Belgian Constitutional Court in relaxing the aspect of ministerial and parliamentary control as a condition for delegating regulatory powers outside the realm of representative institutions.⁸⁵ Furthermore, the legislative section of the Council of State has so far only ac-

⁸⁰ Belgian Constitutional Court, 28 April 2016, no 62/2016, B.8.7. See P Gérard and W Verrijdt, ‘Belgian Constitutional Court Adopts National Identity Discourse’ (2017) 13 European Constitutional Law Review 182–205.

⁸¹ *Commission v. Germany* (n16). The Belgian Constitutional Court explicitly makes a reference to this case in Belgian Constitutional Court, 21 November 2013, no 158/2013, B.14.4 (reference to the ECJ view of the democracy principle).

⁸² Belgian Constitutional Court, 18 November 2010, no 130/2010, B.5; Belgian Constitutional Court, 21 November 2013, no 158/2013, B.14.4; Belgian Constitutional Court, 9 June 2016, no 89/2016, B.9.6.4. See also a previous decision of the Belgian Constitutional Court, no 24/98 of 10 March 1998, B.5-B.6.

⁸³ Belgian Constitutional Court, 18 November 2010, no 130/2010.

⁸⁴ Belgian Constitutional Court, 9 June 2016, no 89/2016, B.9.6.4.

⁸⁵ M Pâques, ‘Décentralisation, régulation et contrôle démocratique. L’arrêt 130/2010 en question’ in *Liber Amicorum Marc Boes* (die Keure 2011) 411–424; Muylle (n70) 319–352.

cepted the creation of independent regulators when required under EU law.⁸⁶ This testifies to its willingness to contain the effects of EU law on this issue to what is strictly required under EU law, in contrast with the strategy adopted by the Constitutional Court.

These two constitutional developments have made constitutionally possible the increasing role, independence and powers of economic regulators observed in Belgium since the 1990s. Overall, however, the multiplication of independent economic regulators has happened against a Belgian constitutional background inimical to such a development, and, even now, the constitutional position of Belgian regulators remains partly unsettled. This may lead to accountability flaws. As previously mentioned, there remains no constitutional basis for economic regulation at arm's length from the government in Belgium. There is no general legal framework applicable to independent economic regulators either. Each regulator has been created on an *ad hoc* basis, and there is no uniformity in their legal status or in their constitutional position. Some of them, such as the Flemish and Walloon energy regulators, have been directly linked to one of the Belgian parliaments, in an attempt to increase their accountability. Others, such as the national energy and electronic communications regulators, remain formally within the ambit of the executive branch.⁸⁷ This *ad hoc* approach can lead to accountability gaps. The following example of another independent Belgian regulator can illustrate this risk. Before a 2018 reform, the Belgian legislature had not provided for the possibility of judicial review for every decision of the Belgian Data Protection Authority (then called the Privacy Commission). This gap was problematic from a rule of law perspective: the Belgian Constitutional Court ruled that it was unconstitutional in May 2020.⁸⁸ This example arguably illustrates the risks of the Belgian choice to approach regulation of the economy at arm's length from the government without undertaking a comprehensive assessment of what the appropriate constitutional place of such regulation should be. Such a pragmatic approach is quite typical of Belgian administrative reforms,⁸⁹ but Belgian legal scholarship has nonetheless insisted on the need for a more comprehensive approach to regulation of the economy at arm's length from the government, and even advocated for constitutional amendment to put it on a firmer constitutional basis.⁹⁰

⁸⁶ Legislative section of the Council of State, opinion no 63.202/2 of 26 April 2018 on an 'avant-projet de loi instituant le comité de sécurité de l'information et modifiant diverses lois concernant la mise en oeuvre du Règlement (UE) 2016/679 du Parlement européen et du Conseil du 27 avril 2016 relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46/CE', 11.

⁸⁷ Slautsky (n39) 595.

⁸⁸ Belgian Constitutional Court, 28 May 2020, no 74/2020.

⁸⁹ Zgajewski and Van Bellinghen (n35) 81.

⁹⁰ Jenart (n64) 75.

4.2. Belgian consociationalism and neo-corporatism displaced: the case of the electricity sector

In addition to being at odds with traditional Belgian constitutional law principles, independent economic regulators also challenge existing decision-making models on a political and economic level. The Belgian political system is a traditional example of a consociational system. Belgian political decision-making is characterised by the making of compromises at an elite level between representatives of the main groups that compose Belgian society.⁹¹ The involvement of social partners alongside the government has also characterized the regulation of the economy in Belgium since the first half of the XXth century. Social partners have been active both in the regulation of the economy at the central level and in specific sectors.⁹² Of course, within this tradition, specific institutional arrangements that exist in different economic sectors vary, as does the degree and form of involvement of the social partners or the different groups that form the fabric of Belgian society in the decision-making processes. As the case of the electricity market shows, however, the liberalisation of this sector in the 1990s, and the creation of independent regulators, have in many instances displaced traditional modes of economic decision-making in Belgium.⁹³ The EU process of e.g., liberalising the electricity sector, has required specific institutional arrangements at the national level that differ from the institutional arrangements associated with previous organisation of the sector in Belgium. This has also been the case in other sectors of the economy. In line with the view that legal institutions are intertwined with a country's general political economy,⁹⁴ this paper argues that the Belgian difficulties with independent economic regulators must also be understood in light of the Belgian neo-corporatist tradition in political economy, and not solely from a legal perspective.

The Belgian energy sector was historically organised by a statute of March 10th, 1925.⁹⁵ Production and transport of electricity were not restricted, while a dominant role was granted to municipalities as far as the distribution

⁹¹ According to Lijphart, 'consociational democracy means government by elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy'; A Lijphart, 'Consociational Democracy' (1969) 21/2 *World Politics* 216.

⁹² E Arc (ed), *Dynamiques de la concertation sociale* (CRISP 2010) 609.

⁹³ The following developments build on Y Marique and E Slautsky, 'Die Unabhängigkeit der belgischen Energieregulierungsbehörden zwischen korporativem Erbe und deliberativem Konzept' in C Fraenkel-Haebler, K-P Sommermann and J Socher (eds), *Die Umsetzung organisations- und verfahrensrechtlicher Vorgaben des europäischen Umweltrechts in ausgewählten Mitgliedstaaten* (Duncker & Humblot 2020) 201-238.

⁹⁴ J Reitz, 'Legal Origins, Comparative Law, and Political Economy' (2009) 57 *American Journal of Comparative Law* 847, 857.

⁹⁵ 'Loi sur les distributions d'énergie électrique', 10 March 1925 <www.ejustice.just.fgov.be/eli/loi/1925/03/10/1925031050/justel> accessed 23 March 2021.

and supply of electricity were concerned.⁹⁶ The application of this 1925 statute led to a relatively anarchic and structurally incoherent system of energy production and distribution in Belgium.⁹⁷ The rationalisation of energy production and distribution in Belgium became urgent in the 1950s. This led, in 1955, to the conclusion of agreements between public authorities and private energy production and distribution undertakings for a period of ten years. The aim of these agreements was to avoid legislative intervention by the State in the electricity sector and to curb trade union demands for nationalisation of the energy sector.⁹⁸ These agreements established a “management committee” common to the thirty or so private undertakings that agreed to submit to the decisions of this “management committee” and to supervision of the sector by a “control committee”. This control committee, known as the “Electricity and Gas Control Committee” (*Comité de Contrôle de l'Électricité et du Gaz*), included representatives of social partners and of the industry, and was set up by an agreement between the association of private production and distribution undertakings, the Federation of Belgian Industries and the three ‘blue-collar’ trade unions active at the time.⁹⁹ The agreements stated that their objective was to rationalise the electricity sector in order to achieve lower energy prices. These contracts were extended in time in 1965 and expanded to the gas sector. Under the terms of these agreements, the participating companies gave up a large part of their autonomy, preferring to abide by the terms of an agreement whose binding force in private law was arguably questionable, rather than face the risks of legislative intervention.¹⁰⁰ Under this system, the management committee had the power to set, modify or propose tariffs to the public authorities in a series of cases. The control committee reviewed these tariffs annually. The signatory companies to these agreements also undertook to transmit all relevant information to the management committee. The latter could make recommendations to the parties, as well as study any technical problems and formulate improvements for both private undertakings and public authorities.¹⁰¹

These agreements setting up advisory bodies, which bring together social partners, the industry, and government representatives, is representative of the

⁹⁶ M Louveaux, ‘Énergie électrique et gaz’ in *Répertoire Pratique de Droit Belge. Complément IV* (Bruylant 1972) 214, 134; C Declercq and A Vincent, ‘L’ouverture du marché de l’électricité’ (2000) 19 *Courrier hebdomadaire du CRISP* 1, 11-12.

⁹⁷ A Jacquemin, P Maystadt and B Michaux, ‘Politiques d’intervention de l’État et administration économique’ in *Aspects juridiques de l’intervention des pouvoirs publics dans la vie économique* (Bruylant 1976) 150.

⁹⁸ R Maes, ‘Het controlecomité voor de elektriciteit en het gas en het toezicht op de inrichting van de elektriciteits- en gasvoorziening in België’ (1970) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 229, 229-243; Jacquemin, Maystadt and Michaux (197) 132.

⁹⁹ P Horion, *Notions de droit industriel belge* (Martinus Nijhoff 1967) 131-132.

¹⁰⁰ *ibid* 133.

¹⁰¹ *ibid* 135-137; Louveaux (196) 214-230.

Belgian neo-corporatist model resulting from the predominant post-war economic configuration.¹⁰² They also find favourable breeding ground in the consociational tradition that characterises Belgian democracy, and the search for consensus between the various social groups which is a dominant feature of that tradition. Following the system set up by these conventions, supervision of the energy sector was, in fact, ensured by the Electricity and Gas Control Committee: the formally competent minister would, in practice, normally follow the recommendations and opinions of this committee. In this context, the electricity sector in Belgium gradually came to be dominated by one private company – Electrabel – which owned most of the production units and the electricity transport infrastructure, and by the municipalities, where appropriate in collaboration with Electrabel in electricity distribution and supply activities.¹⁰³

The regulatory model described above was in force before the liberalisation of the Belgian energy sector started in 1999. The process of liberalising the sector initiated at European level made it progressively impossible to continue to organise the sector on a contractual basis with regulated prices for the supply of electricity. However, even after 1999, there have been attempts to protect the role of the stakeholders and organisations represented in the previous Electricity and Gas Control Committee in the regulation of the electricity market. When the national Belgian energy regulator was created in 1999, its board was placed under the supervision of a “general council” composed of representatives of the Belgian government, the trade unions and the employers’ associations, as well as of representatives from consumers and the electricity industry.¹⁰⁴ The composition of the “general council” was explicitly modelled after the composition of the former Electricity and Gas Control Committee.¹⁰⁵ The legislative section of the Council of State furthermore highlighted that the representation of the Belgian government within the “general council” was in line with constitutional law requirements.¹⁰⁶ However, over time, the powers of the “general council” were reduced,¹⁰⁷ and, in 2013, the Belgian Constitutional Court ruled that the “general council” could not be set up within the regulator itself: this

¹⁰² X Delgrange, L Detroux and H Dumont, ‘La régulation en droit public’ in B Jadot and F Ost (eds), *Élaborer la loi aujourd’hui, mission impossible ?* (Publications des Facultés universitaires Saint-Louis 1999) 47-48.

¹⁰³ P Boucquoy, ‘L’énergie: du service public aux obligations de service public’ in H Dumont et al (eds), *Le service public: passé, présent et avenir – vol. 1* (La Charte 2009) 330-331; L De Deyne, *Marktoezicht in de energiesector* (Intersentia 2017) 1-2.

¹⁰⁴ ‘Loi du 29 avril 1999 relative à l’organisation du marché de l’électricité’ <www.ejustice.just.fgov.be/mopdf/1999/05/11_2.pdf#Page1> accessed 13 March 2021, art 24.

¹⁰⁵ Exposé des motifs, *Doc. parl.*, Chambre (1998-1999) no 1933/1, 26.

¹⁰⁶ Opinion no L. 33.255/4 of 5 June 2002 on a Bill ‘relatif au statut du régulateur des postes et télécommunications belges’, 12.

¹⁰⁷ See eg ‘Loi du 20 juillet 2006 portant des dispositions diverses (1)’ <www.ejustice.just.fgov.be/cgi_loi/change_lg_2.pl?language=fr&nm=2006202314&la=F> accessed 13 March 2021, art 134.

was in violation of the independence of the regulator.¹⁰⁸ The council was replaced in 2014 by another committee with an advisory role and with the purpose of being a forum for discussion.¹⁰⁹ As a result of this evolution, the model that was applicable to the regulation of the Belgian energy market before 1999 – with a central role played by the Electricity and Gas Control Committee, a role which also reflected a broader commitment in Belgium to giving an important role to social partners in the regulation of the economy – has been for the most part displaced by the liberalisation process initiated at EU level in the 1990s and the need to create independent regulators. This change in the way the Belgian energy market is regulated can arguably shed some light on the resistance encountered by independent regulators in Belgium in the energy sector: over time, their creation has led to a weakening of the position of actors (notably, social partners) that previously played a central role in the supervision of the sector, and it seems reasonable to think that these actors have sought to retain their influence to the greatest extent possible.

4.3. Independent regulators as a threat to public financial interests

In addition to being at odds with pre-existing constitutional and political conditions, the independence of Belgian regulators may also threaten powerful (public) interests. Belgian public bodies remain active in several sectors of the Belgian economy, either directly or as shareholders. This strong involvement in the economy of the Belgian state increases the need for independent regulators in the relevant sectors to avoid conflicts of interests. However, it can also explain some of the resistance that has surfaced against the independence of regulators. Two examples can be given, drawn from the electricity and the electronic communications sectors.

In the electricity sector, the crucial role played by Belgian municipalities since 1925, as far as the distribution and supply of electricity are concerned, has already been mentioned in the previous section. Currently, Belgian municipalities still (indirectly) control most of the transport and distribution networks of electricity in Belgium through their shareholdings in the corporations that operate the networks.¹¹⁰ This means that the tariffs that network operators charge to users of the networks have a direct impact on the financial resources of many local authorities in Belgium. The national or regional regulators – depending on whether the transport or distribution networks are involved – must approve the tariffs set by the network operators, and they must do so with a view to in-

¹⁰⁸ Belgian Constitutional Court, 7 August 2013, no 117/2013.

¹⁰⁹ 'Loi du 8 mai 2014 portant des dispositions diverses en matière d'énergie' <<https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=NIM:217820>> accessed 13 March 2021, art 14.

¹¹⁰ F Collard, 'La transition énergétique' (2016) 36 *Courrier hebdomadaire du CRISP* 5, 18-21.

creasing network operational efficiency, while also allowing for their development. Transport and distribution activities are so regulated because they are monopolies. However, if the regulator decides, for example, that the network operator may not include in its tariffs some of the costs which it has incurred, or not to the requested extent, this will impact the profitability of the network operator's activities. This lower profitability may imply lower dividends for its (public) shareholders and, therefore, fewer resources for municipalities. This situation creates a strong incentive for Belgian politicians – many Belgian politicians are active at both local and regional or national levels – to maintain their grip on the tariff decisions of the regulators to the greatest extent possible. It therefore comes as no surprise that the regulators' competence in tariff matters is the area where the independence of the regulators has been most often put under pressure in Belgium by the legislatures and the executives. These challenges to the independence of the regulators in the Belgian electricity sector result, at least in part, from the fear among Belgian politicians of losing control over a source of income for municipalities, which can be significant.¹¹¹

In the electronic communications sector, as well, Belgian public bodies have significant financial interests, which may be threatened when regulation is undertaken at arm's length from the government. This is because the decisions of electronic communications regulators must be guided by the good functioning of the market, rather than by, e.g., the financial interests of the state. As a matter of fact, preventing this kind of conflict of interests is one of the main EU objectives in having independent regulators and a condition for creating a competitive and well-functioning European internal market. Three of the main operators on the Belgian electronic communications market – Proximus, Voo and Telenet – are either directly or indirectly (partially) owned by the Belgian state (Proximus) or by other Belgian public authorities (Voo and Telenet). The decisions of the Belgian electronic communications regulator may affect the position and business interests of these operators and, indirectly, the financial interests of Belgian public authorities. Such a situation is an incentive for public bodies to resist granting “too much” independence to the regulator: by keeping a grip on the regulator and its decisions, Belgian politicians remain in a position to protect the profitability of the public undertakings operating on the market and, therefore, to protect public finances. For example, it was only when the European Commission started an infringement procedure in 2001 that direct control of the Belgian electronic communications regulator by the competent minister was removed.¹¹² Before this reform, the competent minister was both a regulator of the communications sector and the main shareholder

¹¹¹ Verhoeven (n50) 366-367.

¹¹² ‘Loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et des télécommunications belges’ <www.ejustice.just.fgov.be/mopdf/2003/01/24_3.pdf#Page5> accessed 13 March 2021.

of the dominant undertaking on the market (Belgacom – now Proximus). Suspicions of conflicts of interests were widespread as a result.¹¹³

The electricity and the electronic communications sectors are not the only sectors where the involvement of Belgian public bodies in the economy has put pressure on the independence of the regulators. In the airway sector, for example, the head of the regulator was fired by the competent minister in 2011, as a follow up of a disagreement between them regarding the tariffs that Brussels Airport could charge to airline companies, and regarding the scope of the independence of the regulator.¹¹⁴ The Belgian state is a shareholder of Brussels Airport and, as a result, the decisions from the regulator impact its financial interests. In the postal sector, there are also examples of legislative reforms adopted to reverse decisions from the regulator that were damaging to the financial interests of the main public undertaking from the sector and, therefore, to the Belgian state.¹¹⁵

5. Conclusion

Inspired by the American experience, the EU has made it compulsory since the 1990s for Member States to entrust regulatory powers to national regulators independent from the government, e.g., in the energy or telecommunications sectors. Such a development is part of a larger trend that has taken place globally since the 1980s in favour of independent regulators entrusted with significant powers to regulate the economy. The choice of independent regulators with wide powers must ensure credible and effective regulation, away from the short-term thinking that often plagues politicians. Independent regulators also contribute to the effective implementation and enforcement of EU law at the national level. Yet, the creation of independent economic regulators with wide powers does not fit well with the constitutional, political, and economic traditions of several European states, such as Belgium. In Belgium, independent economic regulators have mushroomed since the 1990s. Their independence from the government has, however, been regularly put under pressure by, e.g., the legislature, the executive and the Council of State. EU law requirements for independent regulators have been regularly breached.

Drawing mainly on examples from the energy and the electronic communications sectors, this paper has highlighted how this resistance has materialised formally, before contextualising it in light of the principles and compromises

¹¹³ See Zgajewski and Van Bellinghen (n35) 68-69.

¹¹⁴ Belgian Labor Court of Appeal, 22 June 2016, no 2014/AB/560.

¹¹⁵ See 'loi du 26 janvier 2018 relative aux services postaux', arts 18 and 19 and the opinion from the regulator of 19 October 2017 'concernant le projet de loi relative aux services postaux', 5-7.

underlying the Belgian economic constitution. Regulation of the economy at arm's length from the government has challenged pre-existing Belgian constitutional and political traditions, and the relationships between economic, social and political actors that these traditions encompass. Independent economic regulators restrict the role of representative institutions in the regulation of the economy, and this is in tension with Belgian constitutional law principles that protect this role. Furthermore, independent economic regulators have led to a weakening over time of the role played by social partners in the regulation of the Belgian economy, replacing neo-corporatist arrangements with a new (neo-liberal) institutional model of regulation in sectors such as energy. Finally, in Belgium, independent economic regulators threaten vested interests of powerful (public) actors in the sectors that they regulate. This threat to public interests is a natural result of the strong involvement of the Belgian state and Belgian municipalities in several sectors of the Belgian economy.

Overall, however, this bumpy road has not prevented Belgian independent economic regulators from operating and gaining in independence over time, notably thanks to interventions from Belgian courts and EU institutions. Faithful to their reputation and history of 'Euro-friendliness', Belgian courts have stepped in whenever required to protect the integrity of EU law. As a result, the highlighted difficulties and the persisting ambiguity regarding their constitutional position have not prevented independent economic regulators from becoming an established part of the current Belgian institutional landscape. This could perhaps lead to the conclusion that resistance to independent economic regulators, while still present, may well be slowly fading away in Belgium, exemplifying how Europe shapes state structures to adapt them to the needs of European integration, effective enforcement of EU policies, and the needs of a global economy. Yet, the Belgian neo-corporatist tradition and the strong involvement of Belgian public actors in the economy may also well remain stumbling blocks for a deeper entrenchment of independent economic regulators in Belgium. Only time will tell how far the Belgian legal system will be able to accommodate independent regulators of the economy satisfactorily and, perhaps, more generally, how far European integration will lead to an alignment of national approaches in political economy, and of the legal and administrative institutions intertwined with them.