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INTERNATIONAL AND EUROPEAN IMPULSE WITH REGARD TO THE CREATION OF AUTONOMOUS PUBLIC BODIES: AN EMERGING TREND

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Abstract: This paper aims to raise awareness about the role of international and European law in the creation of administrative bodies that enjoy political independence. To that end, it gives an overview of the most important sources of this trend of 'international impulse'. It furthermore aims to critically assess the validity of the arguments underpinning these initiatives. It distinguishes between three main motives that are generally believed to inspire these provisions: ensuring credibility in the implementation and monitoring of substantive obligations of international and European law, allowing for expertise to play a role in the decision-making process and avoiding conflicts of interest. It then argues that these rationales are often insufficient as justifications for the degree of political independence that is being required. Consequently, these requirements fail to meet the test of striking a proper balance between the principle of (representative) democracy and the benefits of political autonomy.

A. INTRODUCTION

When the establishment of Autonomous Public Bodies (APBs) first became an epidemic in European democracies somewhere around the 1980s, it was to an important extent inspired by the theories of New Public Management (NPM) and was essentially about political choice. Elected politicians, i.e. parliaments and governments, deliberately delegated government tasks and powers to autonomous or independent agencies. Not all of these decisions were equally informed or thought-out. This lack of rationality is one of the most pressing critiques underlying many of the calls to reform arm's length bodies in the UK and elsewhere in Europe.[1] Creating APBs indeed soon became something of a fashion; agencies were regarded as 'must-haves' for modern state administrations. This is not to say that all valid motives for the creation of APBs were lacking. They were, however, seldom made explicit and it is assumed that behind many 'official' reasons given to create APBs, such as a need for

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[1] See, for instance, on reforms with such an aim of rationalisation in the devolved regions of the UK: Derek Birrell, 'Devolution and quangos in the United Kingdom: the implementation of principles and policies for rationalization and democratization' (2008) 29(1) Policy Studies 35; Matthew Flinders, 'Devolution, delegation and the Westminster Model: a comparative analysis of developments within the UK, 1998-2009' (2011) 4(1) Commonwealth & Comparative Politics 1, 22. Van Thiel points out that other legal systems have engaged in similar reforms: Sandra Van Thiel, 'Debate: From Trendsetter to laggard? Quango reform in the UK' (2012) 32(6) Public Money & Management 399.

expertise or impartial judgment, less acceptable or elevated motivations were hidden, such as blame shifting for difficult or unpopular decisions.[2]

The tendency to entrust government powers to entities outside the hierarchical structure of central state departments occurred in many European states at about the same time. While the UK is often referred to as the mother land of NPM as far as Europe is concerned, other European administrations followed relatively quickly in adopting the modes of governance promoted by NPM. Recent studies have demonstrated that these states did not operate in isolation from each other and that the role of inter-state influence in the rising popularity of APBs during the last decades of the 20th century should not be underestimated. Gilardi's work on delegation in the regulatory state convincingly demonstrates both theoretically and empirically that the concept of the independent regulator has gained popularity and has spread in the European legal sphere through an interdependent "diffusion process".[3]

In recent years, however, many European states have engaged in a process of what is here labelled "national restraint" in their attitude towards (the creation of) APBs. This attitude is reflected in a wide range of reform initiatives that aim to rationalize choices regarding the establishment and governance of APBs. The trend is inspired by considerations of political and democratic accountability, the restoration of transparency in the administrative landscape and – although governments may not be keen on admitting this – savings in public expenditure. The key element that seems to distinguish these reforms from previous attempts and initiatives to (re)gain a grip on agencies and consorts in various European legal systems is the degree to which law plays a distinct role. This is not just the case in the rhetoric surrounding the reforms (often referring to constitutional legal principles such as political ministerial responsibility, separation of powers, legal certainty etc.) but also in the instruments used to implement them. Perhaps the most remarkable symptom of this phenomenon is the rise of so-called "framework regulation" for APBs. On one hand, Flanders and the Netherlands enacted a framework for (specific types of) APBs in 2003[4] and 2006[5]

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[2] Mark Thatcher, 'Delegation to Independent Regulatory Agencies' (2002) 25(1) West European Politics, 125, 131; Richard Mulgan, *Holding power to account: accountability in modern democracies* (Palgrave Macmillan 2003) 176; Paul Magnette, 'The Politics of Regulation in the European Union' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005) 3, 6.

[3] Fabrizio Gilardi, *Delegation in the Regulatory State. Independent Regulatory Agencies in Western Europe* (Edward Elgar 2008). For my own modest contribution to this debate, please consult Stéphanie De Somer, 'The Europeanisation of the law on national independent regulatory authorities from a vertical and horizontal perspective' (2012) 2 Review of European Administrative Law 93.

[4] Kaderdecreet bestuurlijk beleid 18 July 2003, BS 22 August 2003.

respectively, focusing on the process of set-up, institutional design and supervision of APBs. On the other hand, the UK has opted for legislation enabling the government to reform the public bodies landscape by giving it powers to abolish or merge public bodies, to modify the constitutional arrangements applicable to them or their funding arrangements or to modify or transfer their functions.[6]

Whereas Europe's 21st century has consequently been characterised by a degree of reluctance to engage any further in initiatives of "autonomisation" of the administration so far, it has also witnessed the emergence of a new source of APBs: international and European (both EU and other) law. Increasingly, states find themselves being subject to clear-cut obligations to establish APBs originating from legislation or even case law issued at the international or European level. Alternatively, international or European institutions issue soft law instruments strongly encouraging states to entrust the implementation of their substantive obligations under international/European law to APBs. What was once a matter of political choice has now, in some instances, become a legal requirement.

This contribution focuses on the two main fields in which such impulses can be found at present: economic regulation and human rights monitoring or supervision. It begins with an overview of the requirements that can currently be derived from the relevant legislation, case law and policy documents. Subsequently, it offers a critical appreciation of this trend, which revolves around the validity of the motives inspiring the requirements regarding political independence. Firstly, however, the notion of APBs itself should be defined.

B. DEFINING AUTONOMOUS PUBLIC BODIES

APBs are entities distinct from the core administration, but with an institutional tie with the government apparatus, that are entrusted with government tasks of executive nature but that perform these tasks with a certain degree of autonomy in relation to elected politicians. APB is here used as an umbrella term that is meant to cover a wide range of arm's length bodies, both departmental and non-departmental. The only requirement for a qualification as an APB is a degree of operational autonomy and the disposal of a proper, distinct responsibility for an aspect of the public task, irrespective of whether (even day-to-day) decisions embedded in that task are subject to a requirement of prior approval, veto powers, guidance, directions or other supervisory powers of whatever type. Consequently, the concept of APBs covers

[5] Kaderwet zelfstandige bestuursorganen 2 November 2006

[6] Public Bodies Act 2011.

executive (departmental) agencies as well as independent regulators for instance. Naturally, and particularly from a constitutional law perspective, the latter are more controversial and give rise to more questions amongst legal scholars than the former. Nevertheless, this contribution aims to analyse the impact of international and European law on the phenomenon of arm's length bodies as a whole. Therefore, a broad definition of APBs is required since the obligations concerned vary from moderate and sometimes vague requirements of political autonomy to radical demands implying almost complete immunity from political influence.

C. (TOP-DOWN) INTERNATIONAL OR EUROPEAN INFLUENCE ON THE CREATION OF APBS: AN OVERVIEW

1. Economic Regulators

In the course of the 1980s and 1990s, many Western European economies gradually became subject to a wave of liberalisation initiatives that resulted in a radical change in the role of the state, especially in the utilities industries. More specifically, a shift took place from the paradigm of public ownership[7] to that of regulation.[8] As a regulator, the government in a figurative sense positions itself 'above' the market, controlling and monitoring the activities of the market players. The basic idea behind regulation is that competitive markets suffer from market failures,[9] and thus are imperfect.[10] So-called public interest theory regards regulation as necessary in order to secure the public interest, which is threatened by the possibility of the liberalised market not generating the desired results.[11]

The EU has played an important role in the "'paradigm shift' from the Keynesian to the regulatory state."[12] EU liberalisation legislation was enacted – often spread over different

[7] Public ownership became the norm soon after World War II. For the UK, see e.g. Dawn Oliver, 'Regulation, democracy and democratic oversight in the UK' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010), 247-248.
[8] Giandomenico Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1997) 3 Eipascope 1, 1.
[9] Marc Allen Eisner, 'Beyond the logic of the market: toward an institutional analysis of regulatory reforms' in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar 2011), 130; Tony Prosser, 'Models of Economic and Social Regulation' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010), 37.
[10] Matthias Finger, 'Towards a European model of regulatory governance?' in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar 2011), 529.
[11] E.g. Fabrizio Gilardi, *Delegation in the Regulatory State. Independent Regulatory Agencies in Western Europe* (Edward Elgar 2008) 16 with references, pointing out that market failures arise when a competitive market does not lead to a Pareto-efficient allocation of resources, and are caused by several factors.
[12] After Paul Magnette, 'The Politics of Regulation in the European Union' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005), 4. The term 'regulatory state' was first introduced by Majone in his article

"generations" or "packages" – and enforced, with the aim of completing the internal market.[13] However, as far as sector specific regulation is concerned (as opposed to general competition law), the EU largely depends on the Member States to implement the legislation. Institutionally, the regulatory state in the EU is consequently governed by means of a system of so-called "shared administration".[14] Years before the first EU legislation made any reference to them, however, the practice of entrusting separate, specialised administrative entities with regulatory tasks was already well established in many Member States. These national regulatory authorities (NRAs) had been set up in various European countries at about the same time, often inspired by the British example.[15] NRAs were typically designed as APBs, enjoying various degrees of political independence. Gradually, EU law began to formulate requirements on the legal status of NRAs, eventually obliging Member States to grant considerable autonomy to their NRAs and to insulate them as much as possible from (day-to-day) political input and supervision.

The development of these institutional requirements has been characterised by asymmetry: for each sector, they have evolved at a different pace, implying that some industries are currently subject to far-reaching, fully developed rules on NRA independence, whereas others are not. Nevertheless, what all sectors seem to have in common is that obligations regarding political independence are typically preceded by requirements of sector independence, i.e. a sufficient institutional and operational distance from the regulated parties. The following overview will not discuss these requirements, nor the historical developments for each sector, but will limit itself to a status quaestionis and focus exclusively on NRAs' political independence.

a) *Energy (gas and electricity)*

Article 35 of Directive 2009/72,[16] containing the current framework for the liberalisation of the electricity sector, provides that each Member State shall designate a single national

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Giandomenico Majone, 'The Rise of the Regulatory State in Europe' [1994] West European Politics 77, 101, which has become a basic contribution to the literature on regulation.

[13] For an overview of the history and state of the art of liberalisation and regulation of network industries in the EU until 2011, with a focus on electronic communications and energy: see Leigh Hancher and Pierre Larouche, 'The coming of age of EU regulation of network industries and services of general economic interest' in Paul Craig and Gráinne de Búrca (eds), *The evolution of EU law* (OUP 2011), 743-781.

[14] Also referred to as 'mixed administration': Jan Jans, Roel de Lange, Sacha Prechal and Rob Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing 2007) 29, 32.

[15] Tony Prosser, 'Models of Economic and Social Regulation' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010) 34, 34.

[16] See art 35 Directive of the European Parliament and of the Council 2009/72/EC of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

regulatory authority at national level and shall guarantee the independence of the regulatory authority, as well as ensure that it exercises its powers impartially and transparently. For that purpose, Member States have to ensure that the regulatory authority is legally distinct and functionally independent from any other public or private entity and 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. In order to protect the independence of the regulatory authority, Member States in particular have to ensure that the regulatory authority can make autonomous decisions, independently from any political body. Other safeguards that have to protect the body's independence concern its budget, human and financial resources as well as the appointment, tenure and dismissal of its board members. Article 39 of Directive 2009/73[17] contains identical obligations for the gas sector.

b) Electronic communications

In its current version, Article 3 of the Framework Directive,[18] governing the liberalisation of the electronic communications sector, 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. Member States have to guarantee the independence of NRAs 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.[19]

Since its revision in 2009,[20] Article 3 of the Framework Directive contains a new paragraph 3a anchoring specific requirements for the independence of NRAs in their

[17] Directive of the European Parliament and of the Council 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, [2009] OJ L211/94.
[18] Directive of the European Parliament and of the Council 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), [2002] OJ L108/33.
[19] Arjan Geveke, 'Improving Implementation by National Regulatory Authorities' (2003) 3 Eipascope 26, 28-29.
[20] Directive of the European Parliament and of the Council 2009/140/EC 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, [2009] OJ L337/37.

relationship to the government. 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 the tasks assigned to them under national law implementing Community law. However, the article adds, this does not prevent supervision in accordance with national constitutional law. Nonetheless, only appeal bodies set up in accordance with Article 4 shall have the power to suspend or overturn decisions by the national regulatory authorities. Additional safeguards, comparable to those provided for the energy NRAs (supra) apply.

Directives 2009/72 and 2009/73 anchor the NRAs' independence vis-à-vis the government more explicitly and specifically than the Framework Directive. However, the prohibition to receive instructions in the latter is formulated in such general wording that it is likely to apply to the relationship with public institutions as well. Moreover, the preamble of Directive 2009/140 (the most recent directive to revise the Framework Directive) states that:

> "[E]xpress provision should be made in national law to ensure that, in the exercise of its tasks, a national regulatory authority responsible for ex-ante market regulation or for resolution of disputes between undertakings is protected against external intervention or political pressure liable to jeopardise its independent assessment of matters coming before it."[21]

c) *Railway Transport*

As far as railway transport is concerned, it follows from Article 30(1) of Directive 2001/14/EC[22] that the regulatory body, which Member States are obliged to establish, can be the Ministry responsible for transport matters or any other body, but shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. Independence vis-à-vis elected politicians or the government is consequently not explicitly required. Recently, however, Directive 2009/34/EU[23] has introduced an enhanced independence requirement also targeting the regulator's relationship with political or public bodies. Pursuant to article 55(1),

[21] Ibid, Recital 13. Italics added.

[22] Directive of the European Parliament and of the Council 2001/14/EC of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification, [2001] OJ L75/29.

[23] Directive of the European Parliament and of the Council 2012/34/EU of 21 November 2012 establishing a single European railway area, [2012] OJ L343/32.

the national regulatory body for the railway sector shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity. It shall also be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant. It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract. The staff is prohibited from seeking or taking instructions from any government or other public or private entity when carrying out the functions of the regulatory body. Supporting safeguards, again similar to those figuring in the Directives for energy and electronic communications, are required. At present, the Directive is still being transposed in the Member States.[24]

d) *Audiovisual media and postal services*

Today, the Audiovisual Media Services (AVMS) Directive[25] does not (yet) contain an explicit provision obliging Member States to set up an independent national media regulator. However, political[26] independence seems to be "presumed" by Article 30 of the Directive. The article requires 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, *in particular through their competent independent regulatory bodies* (italics added). Pursuant to the preamble, Member States are moreover 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.[27] Some authors interpret this to mean that Member States are free to choose whether they want to create regulatory bodies or

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[24] The transposition should be finalised by 16 June 2015 (arti 64). There are traces in the case law of the European Court of Justice that even under the regime of Directive 2001/14, the railway regulators had to enjoy a certain degree of political independence, more specifically when there was a risk of conflicts of interest. Compare Case C-369/11 *Commission v Italy* (ECJ, 3 October 2013), paras 49-70 and Case C-545/10 *Commission v Czech Republic* (ECJ, 11 July 2013), paras 89-105.

[25] Directive of the European Parliament and of the Council 2010/13/EU 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), [2010] OJ L95/1.

[26] See the original Commission proposal COM (2005) 646. From recital 47 of the explanatory memorandum of the proposal, one can derive that the notion of independence referred to concerns 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.

[27] Recitals 94 en 95. Italics added.

not, but that – if they do – the NRA has to be independent by definition.[28] According to the INDIREG study,[29] 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.[30]

For the postal sector, Directive 2008/6/EC[31] inserted a new Article 22 in Directive 97/67/EC[32], requiring Member States to designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. Member States that retain ownership or control of postal service providers shall ensure effective structural separation of the regulatory functions from activities associated with ownership or control. This obligation clearly aims to create a level playing field and to avoid bias in favour of one or more of the incumbents.[33] Political independence as such is not yet required for postal regulators.

2. Human Rights Monitoring Bodies or Supervisors

If legal scholarship is only marginally aware of the increasing influence of international and European law on matters of administrative organization in general and ABPs in particular, this is a fortiori the case for those occurring in human rights law. As Cardenas points out, "… we need a much better understanding of how international actors like the UN, which has been at the forefront of these human rights activities, actually engage in national institution

[28] See Karol Jakubowicz, Keynote Speech (Plenary Session: 'The Independence Regulatory Authorities', 25th Meeting of the European Platform of Regulatory Authorities (EPRA), Prague, 16-19 May 2007). <epra3-production.s3.amazonaws.com/attachments/files/1380/original/EPRA_keynote_KJ.pdf?1323685662> accessed 2 August 2014.

[29] 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: <http://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. See <http://ec.europa.eu/avpolicy/docs/library/studies/regulators/final_report.pdf>.

[30] 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 art 288, para 3 TFEU, especially when read in connection with the objectives of the AVMS Directive; Saskia Lavrijssen and Annetje Ottow, 'Independent Supervisory Authorities: A Fragile Concept' (2012) 39(4) Legal Issues of Economic Integration 419, 434 with reference to the INDIREG report.

[31] Directive of the European Parliament and of the Council 2008/6/EC of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services [2008] OJ L52/3.

[32] Directive of the European Parliament and of the Council 97/67/EC of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service [1998] OJ L15/14.

[33] See recital 47 of the preamble of Directive 2008/6/EC: 'In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions.'

building."[34] Typically, APBs operating in the field of human rights do not possess coercive powers similar to those invested in economic regulators (i.e. rule-making, the power to impose fines, to grant or refuse licenses etc.), although there are important exceptions to that rule, such as data protection authorities. These APBs can furthermore have a general remit or one that is rights-specific (monitoring exclusively, for instance, the right not to be discriminated against).

In this particular field, impulses to establish APBs directed to European states originate from four different sources or institutions: the United Nations, the EU, the political organs of the Council of Europe and the European Court of Human Rights.

a) United Nations

i) Paris Principles

The "mother document" of human rights institutions as a phenomenon *an sich* is undoubtedly the UN General Assembly Resolution 48/134, containing the so-called "Paris Principles".[35] Despite their non-binding nature, these principles have been quite influential, if only because the standards that they introduce have stood as a model for many other instruments requiring the set-up of human rights monitoring bodies.

The Paris Principles recommend that states establish a national institution with a competence to promote and protect human rights. They encourage them to give this institution as broad a mandate as possible and to anchor its composition and sphere of competence in a text with constitutional or legislative value. This national institution should be entrusted with a list of responsibilities, enumerated in the text of the Principles. That these institutions should be established as APBs follows from the provisions on the guarantees that states have to provide regarding the independence of their national human rights institution, which includes independence from government.

The Paris Principles do not require human rights institutions to be invested with binding decision-making powers. However, they do suggest that institutions with quasi-jurisdictional competences could be entrusted with such a power, exercised within the limits prescribed by the law, instead of (merely) having the possibility to seek amicable settlement through conciliation.

[34] Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 Global Governance 23, 23.
[35] General Assembly resolution 48/134 of 20 December 1993 encouraging states to establish independent national human rights institutions.

ii) Other UN instruments

In terms of treaty provisions, two important texts requiring Member States to set up (politically) independent implementing institutions are worth mentioning.

Article 33.2 of the Convention on the Rights of Persons with Disabilities[36] obliges contracting states to maintain, strengthen, designate or establish, in accordance with their legal and administrative systems, a framework, including one or more independent mechanisms as appropriate, to promote, protect and monitor implementation of the Convention. When designating or establishing such a mechanism, State Parties have to take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights (i.e. the Paris Principles).

Pursuant to Article 17 of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[37] each party shall maintain, designate or establish one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Article 18 requires State Parties to guarantee the functional independence of the national preventive mechanism as well as the independence of their personnel. When establishing national preventive mechanisms, States Parties will have to give due consideration to the Principles relating to the status of national institutions for the promotion and protection of human rights (again: the Paris Principles).

b) EU

i) The Data Protection Directive

Article 28 of Directive 95/46/EC,[38] the so-called Data Protection Directive, obliges Member States to provide that one or more public authorities are responsible for monitoring the application within their territory of the provisions adopted by the Member States pursuant to the Directive. These authorities shall act with complete independence in exercising the functions entrusted to them. Apart from advising their respective governments whenever new legislation regarding data protection is drafted, these entities have an important supervisory task, for which they are invested with specific powers, such as investigative powers, effective

[36] Convention on the Rights of Persons with Disabilities, adopted by the General Assembly of the United Nations on 13 December 2006 by resolution A/RES/61/106

[37] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 18 December by resolution A/RES/57/199.

[38] Directive of the European Parliament and of the Council 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281/31.

powers of intervention (entailing the power of ordering the blocking, erasure or destruction of data, imposing a temporary or definitive ban on processing, of warning or admonishing the controller etc.) and the power to engage in legal proceedings.

In 2012, the European Commission launched a proposal for a new Data Protection Directive.[39] Some of the proposed amendments concern the further definition of the independence concept that currently figures in Article 28; the new proposal dedicates a separate section to the independence of the national supervisory authorities. Pursuant to Article 40 of the proposal, Member States for instance have to ensure that the supervisory authority acts with complete independence in exercising the duties and powers entrusted to it (paragraph 1). Each Member State shall moreover provide that the members of the supervisory authority, in the performance of their duties, neither seek nor take instructions from anybody (paragraph 2). Member States are under the obligation to ensure that the supervisory authority is subject to financial control which shall not affect its independence.[40] In the explanatory memorandum, the Commission confirms that Article 40 "clarifies the conditions for the independence of supervisory authorities, implementing case law of the Court of Justice of the EU."[41] This case law is discussed infra.

ii) Anti-discrimination law

The current EU Directives on equality and non-discrimination contain provisions regarding the set-up of supervisors as well. Pursuant to Article 13 of Directive 2000/43/EC[42] (racial discrimination), Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human

[39] Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, 24 January 2012, COM/2012/010 final – 2012/0010 (COD).

[40] Article 41 furthermore anchors some general conditions with regard to the members of the supervisory authority. Member States for instance have to provide that the members of the supervisory authority must be appointed either by the parliament or the government of the Member State concerned (para 1). The members furthermore have to be chosen from persons whose independence is beyond doubt and whose experience and skills required to perform their duties are demonstrated (para 2). The article furthermore contains some provisions on the expiry of the term of office (paras 3-5). Dismissal of a member for instance is only possible if the member no longer fulfills the conditions required for the performance of the duties or is guilty of serious misconduct. Pursuant to art 42, the establishment and status of the supervisory authority in accordance with arts 39 and 40 have to be provided by law.

[41] See 11 of the proposal. In the Netherlands, Kranenborg predicted that this case law would play a role in the revision of the directive: HR Kranenborg, '*Commission v Germany*' [2010] SEW 419.

[42] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

rights or the safeguarding of individuals' rights. Their status is not further elaborated on, but the Article does require that Member States ensure that the body can perform its competences (providing assistance to victims, conducting surveys, and publishing reports and making recommendations) independently. Political independence is not specifically required, but given the lack of further qualification or limitation of the independence requirement, it is likely that it is, at least to some extent, expected. Similar provisions are found in Article 12 of Directive 2004/113/EC[43] and Article 20 of Directive 2006/54/EC[44] (gender discrimination).

c) Council of Europe

As a political organ, the Council of Europe has firstly contributed to the spread of human rights institutions with a general mandate, as envisaged by the UN Paris Principles, via Recommendation No. R (97) 14 of the Committee of Ministers to Member States on the establishment of independent national institutions for the promotion and protection of human rights.[45] This regional recognition or ratification of the principles has not remained unnoticed.[46] As de Beco points out, the Council of Europe “built on already agreed principles regarding NHRIs, which it decided to promote in its Member States.”[47] The Recommendation refers to the UN Paris Principles and recommends the establishment of “independent institutions, established according to law for the promotion and protection of human rights […], to be responsible for, inter alia, drawing the public authorities’ attention to, and advising them on, human rights matters and promoting the provision of human rights information and education for the public.”

i) Media regulation

The Council promoted the creation of the independent media regulator, the first more specific type of institution. Media regulators are regarded as indispensable for the protection of the freedom of expression, enshrined in Article 10 of the European Convention on Human

[43] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.
[44] Directive of the European Parliament and of the Council 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L204/23.
[45] Recommendation No. R (1997) 14 of the Committee of Ministers to Member States on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997.
[46] e.g. Linda Reif, ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’ (2000) 13 Harvard Human Rights Journal 1, 5.
[47] Gauthier de Beco, ‘National Human Rights Institutions in Europe’ (2007) 7 Human Rights Law Review 331, 336 with reference to the Paris Principles and other initiatives.

Rights, which includes the freedom to receive and impart information. The Council has acted as a forum for European states to exchange ideas on regulatory independence of media regulators. Its main role in this process has been to provide a forum for cross-fertilisation between contracting states (e.g. from Western and Eastern European legal traditions).[48] This particular role is closely linked to a more vertical process of encouragement, reflected in the adoption of Recommendation No. 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,[49] 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 transparency are achieved. The Committee of Ministers recommends Member States, if they have not already done so, establish independent regulatory authorities for the broadcasting sector. The Recommendation contains specific guidelines regarding the independence and functions of regulatory authorities. They concern the devising of a general legislative framework, the appointment, composition and functioning of the NRAs, their financial independence, powers and competence and accountability. An extensive explanatory memorandum elaborates the different guidelines.

ii) Anti-discrimination law

In 1997, the ECRI, the European Commission against Racism and Intolerance – institutionally embedded in the Council of Europe – produced General Policy Recommendation No. 2. This document provided for the creation of specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at the national level.[50] Referring to – amongst other instruments – the Paris Principles, the ECRI recommends states “to consider carefully the possibility of setting up a speciali[s]ed body to combat racism, xenophobia, anti-Semitism and intolerance at national level, if such a body does not already

[48] This dynamic was discussed in Stéphanie De Somer, ‘The Europeanisation of the law on national independent regulatory authorities from a vertical and horizontal perspective’ (2012) 2 Review of European Administrative Law 93.
[49] 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.
[50] General Policy Recommendation No. 2 on specialized bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, adopted on 13 June 1997.

exist."[51] In the appendix to the recommendation, basic principles concerning these specialised bodies are set out. Specialised bodies should for instance function without interference from the state and with all the guarantees necessary for their independence including the freedom to appoint their own staff, to manage their resources as they think fit and to express their views publicly.[52] They should also ensure that they operate in a way which is clearly politically independent.[53] In the 2002 General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination,[54] the Commission re-emphasised the need for a national specialised body.[55]

d) European Court of Human Rights

Quite recently, the criterion of institutional or political independence for bodies involved in the implementation of specific human rights obligations has also made its appearance in the case law of the European Court of Human Rights. This subtle evolution has not yet seen any systematic development, but should nonetheless be noted. So far, the Court has identified what seems an obligation to establish an APB in at least four cases.

In *AA v Greece,*[56] a decisive consideration for the Court to decide whether the applicant had access to effective remedies under domestic law was the lack, in Greece, of an independent mechanism to control detention premises and to investigate complaints against police officers.[57] In a related case, *Dulaş v Turkey*[58], concerning Article 13 of the Convention (which provides that everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority), the Court ruled that the Turkish Administrative Council (made up of civil servants hierarchically dependent on the governor, an executive officer linked to the security forces which were under investigation), could not be regarded as independent.[59]

In the case of *Tysiąc v Poland*[60], the applicant's claim was at least partly based on a violation of her right to respect for her private life. The Court pointed out that "while Article

[51] ibid, 4.
[52] Principle 5.2 of the Appendix, 7.
[53] Principle 7.3 of the Appendix, 7.
[54] General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on 13 December 2002.
[55] ibid, 8.
[56] *AA v Greece*, App no 12186/08 (ECtHR, 22 July 2010).
[57] ibid, para 45.
[58] *Dulaş v Turkey*, App no 25801/94 (ECtHR, 30 January 2001).
[59] ibid, para 14 with reference to *Güleç v Turkey*, App no 21593/93 (ECtHR 27 July 1998), paras 77-82; *Oğur v Turkey*, App no 21594/93 (ECtHR 20 May 1999) paras 85-93.
[60] *Tysiąc v Poland*, App no 5410/03 (ECtHR 20 March 2007).

8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it."[61] Subsequently, the Court made reference to its previous case law,[62] from which it could be derived that "the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence."[63]

Perhaps, though, the most notorious case in which the Court identified an obligation to establish an APB is that of *Odièvre v France,*[64] also involving Article 8 of the Convention. The case concerned a woman who had been abandoned by her biological mother that applied to the French administration for information to identify her mother. The mother herself, however, had requested at the time of the abandonment that the birth remain a secret. After an assessment of all the interests at stake, the Court did not find a violation of Article 8. It ascertained that French legislation had recently established the National Council for Access to Information about Personal Origins, "an independent body composed of members of the national legal service, representatives of associations having an interest in the subject matter of the law and professional people with good practical knowledge on the issues"[65] and regarded this as an important guarantee for persons in the applicant's position. In the previous judgment *Mikulić,*[66] case cited by the Court in *Odièvre,*[67] it was found that an independent authority had to be established to speedily determine paternity claims, for the situation in which an alleged father would not want to follow a court order to have a DNA test.

In all the cases discussed, the European Court suggested that certain public decisions which interfere with a person's individual rights should be made by an independent organ. The Court speaks of independent "mechanisms", "organs" "bodies", or "authorities". It is not quite clear, especially in those cases where the decision to be taken has to do with a

[61] ibid, para 113.

[62] *Rotaru v Romania*, App no 28341/95 (ECtHR 4 May 2000) paras 55-63. In this case, the Court states that "the rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure" (para 59). In the *Tysiąc* however, the Court seems to point in the direction of independent bodies composed of (*in casu* medical) specialists, rather than to courts or tribunals.

[63] ibid, para 117.

[64] *Odièvre v France*, App no 42326/98 (ECtHR 13 February 2013).

[65] ibid, para 49.

[66] *Mikulić v Croatia*, App no 53176/99 (ECtHR 7 February 2002).

[67] ibid, para 42.

complaint filed by an applicant (the cases regarding exhaustion of domestic remedies and the availability of an effective remedy), whether these bodies – according to the Court – should be considered part of the executive or should have the characteristics of judicial bodies. Nevertheless, in none of the cases is reference made to the independence requirement of Article 6 of the Convention (which moreover only applies to civil rights and criminal proceedings). Hence, the Court does not seem to oblige Member States to entrust these tasks to the judiciary. It moreover seems likely that at least controlling detention premises (*AA*), reviewing medical evidence on the basis of which an abortion decision should be taken (*Tysiąc*) and making decisions on the release of data on a person's birth and origin (*Odièvre*) are tasks which would typically, at least at first instance, be entrusted to bodies of the executive. In *Odièvre*, the Court itself referred to the French National Council for Access to Information about Personal Origins, consisting of representatives of interest groups and professionals with practical knowledge. Such a composition, allowing for practical expertise and interest representation, is typical of many APBs.

D. APPRECIATION AND EVALUATION

1. Towards an Increased Scrutiny of the Motives Inspiring the Creation of APBs

The influence of international and European law on matters of administrative organisation has not been recognised and studied in depth in legal literature. It is, however, an ongoing evolution with important legal implications. Far from being a neutral or value-free trend, some of the hard and soft law obligations outlined in this contribution raise serious concerns. Apart from possible questions regarding the institutional autonomy of Member States or contracting states in inter- or supranational law, a principle closely linked to that of state sovereignty and one that used to be upheld fiercely in EU law especially,[68] these provisions touch upon more fundamental legal principles as well. The most glaring issues concern the democratic legitimacy of APBs.

Most of the literature that has recognised and addressed the tension between APB status and the need for democratic accountability, whether in international, European or purely domestic contexts, has subsequently attempted to formulate alternatives for political supervision. The most common of candidates to perform this function have been an increased focus on outputs or outcomes, a reinforcement of APBs' procedural legitimacy, as well as

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[68] See e.g. Koen Lenaerts and Piet Van Nuffel, *Constitutional Law of the European Union* (Sweet & Maxwell 2005) 530.

their legal accountability, and ensuring some form of network accountability (either separately or combined).[69] Although many of these suggestions are laudable, this author would argue that they are often looking for substitutes where none are needed. In other words: where there is a lot of focus on finding a proper replacement for political input, there is only little contemplation of the preceding question, i.e. whether and to what extent the motives inspiring the legislature or government to establish a particular APB justify the degree of political independence attributed. The actual decision to create an APB and – more importantly – to give it either a limited or a substantial autonomy vis-à-vis elected politicians seems to deserve more scrutiny from parliaments, governments and legal scholarship than it has up until now received.

Reflections on why certain parts of the administration should enjoy autonomy from political principals, i.e. the motives behind the creation of APBs, have traditionally been developed in the discipline of political science or public administration. The question arises whether and to what extent these should become topics of interest for legal academia as well. This author argues that this is the case because such initiatives always to a certain extent constitute deviations from a basic constitutional premise of administrative organisation that democracies in the European legal sphere share: its subordination to political authority, which ultimately ensures compliance with the will of the elected representative(s) of the people.[70] Whereas it is fully recognised that the hierarchical subordination of the administration in a Weberian sense is no longer achievable for the totality of the government's radius of action, it remains *the rule*; a rule that is deeply embedded in the democratic configuration of European societies. Therefore, the decision to entrust government tasks to arm's length bodies,

[69] Examples of contributions on this subject are numerous. See e.g. Christina 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; Martino Maggetti, 'Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review' [2010] 2 Living Reviews in Democracy <http://www.livingreviews.org/lrd-2010-4> accessed 2 August 2014; Paul Magnette, 'The Politics of Regulation in the European Union' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005), 13; Tony Prosser, 'Regulation and legitimacy' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (OUP 2011), 321; Richard Mulgan, *Holding power to account: accountability in modern democracies* (Palgrave Macmillan 2003) 170; Saskia Lavrijssen and Annetje Ottow, 'The Legality of Independent Regulatory Authorities' in Leonard Besselink, Frans Pennings en Sacha Prechal (eds), *The eclipse of the legality principle in the European Union* (Kluwer 2011), 94-95; Yannis Papadopoulos, 'Problems of Democratic Accountability in Network and Multilevel Governance' (2007) 13(4) European Law Journal 469, 477; Colin Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010), 33; Carol Harlow and Richard Rawlings, 'Promoting Accountability in Multilevel Governance: A Network Approach' (2007) 13(4) European Law Journal 542, 545-546.

[70] Some constitutional texts enshrine this principle quite explicitly. Article 20 French 1958 Constitution for instance states that the government 'disposes' of the administration, while immediately adding that the government is responsible before Parliament.

distancing them from elected representatives, constituting *the exception*, should be subject to careful consideration and rigorous justification. Only when it is established that distancing the administration from politics is expedient in the light of a particular (valid) motive, does reflection on guarantees and mechanisms that compensate for the loss of democratic legitimation via political input become relevant.

Above, reference was made to the recent phenomenon of framework legislation regarding APBs. Despite the differences in scope and approach between the Flemish, Dutch and UK frameworks, they share at least one common goal: restoring the primacy of politics in public administration as well as political ministerial responsibility for executive acts. All three statutory instruments aim to rationalise the decision of creating (or – for the Public Bodies Act – abolishing or reforming) autonomous public bodies, offering a framework for assessment in which the benefits of political autonomy have to be weighed against the risks for democratic accountability. One of the main ideas behind the trend of "national restraint" in general, and behind the framework regulation enacted in particular, is consequently that creating APBs, an act that logically detracts from the principle of representative democracy, is only justified if sufficiently valid reasons underlie the initiative. APBs are increasingly regarded as institutions that have to remain exceptions to the rule that the administration functions under the hierarchic command of ministers that are either elected, or directly controlled by an elected assembly.

2. *A Critical Appreciation of the Motives Underlying the Trend of "International and European Impulse"*

This plea for close scrutiny definitely applies to the instruments or sources discussed above. Many of these seem to have the intention of isolating APBs from political influence and supervision to such an extent that they severely hollow the role of representative democracy in the fields concerned. This is especially so for the current EU provisions on the political independence of national economic regulators. The most far-reaching example is currently found in the energy sector, where the European Commission has issued an interpretative note on NRAs and the requirements surrounding their status in Directives 2009/72 and 2009/73.[71] This interpretative note is not legally binding; as the Commission itself indicates, it "aims to

[71] 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.

enhance legal certainty but does not create any new legislative rules".[72] Nevertheless, it has been regarded (both by lawyers and national parliaments having to implement the Directives) as an important and authoritative source in determining the scope and precise meaning of the current obligations regarding NRAs. Possible infringement procedures initiated by the Commission will undoubtedly be based on arguments relying on the interpretative note. In this document, the Commission gives a far-reaching interpretation to the provisions regarding NRAs' political independence, suggesting among other things that all supervisory powers for ministers, both ex ante and ex post, on their day-to-day decision-making should be excluded.

The European Court of Justice (ECJ) has adopted a similar stance in the field of data protection, where the notion of "complete independence" has been the subject of interpretative case law. In *Commission v Germany,*[73] the Grand Chamber of the Court argued that this requirement did not only preclude any influence exercised by the supervised bodies, as Germany had attempted to argue,[74] but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities, of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data.[75] According to the Court, the German system of state scrutiny, with regard to the body supervising data protection in the private sector, was irreconcilable with this broad concept of independence. In a second judgment, *Commission v Austria,*[76] the Court, referring to *Commission v Germany*, ruled that functional independence (in Austria's case signifying that the law guarantees that the authority's members are not bound by instructions of any kind in the performance of their duties) is essential, but "is not by itself sufficient to protect that supervisory authority from all external influence."[77] According to the Court, the notion of "complete independence" "is intended to preclude not only direct influence, in the form of instructions, but also […] any indirect influence which is liable to have an effect on the supervisory authority's decision".[78] For that reason, the fact that the managing member of the data protection authority – responsible for managing its day-to-day business – was supervised by a hierarchical superior of the department to which he belonged was deemed contrary to Article 28 of the Data

[72] ibid, 3.
[73] Case C-518/07 *Commission v Germany* [2010] ECR I-1885; Annetje Ottow and Margot Aelen, 'Commission v Germany' (2010) 11(6) European Human Rights Cases 679.
[74] *Commission v Germany* (n 73), para 19.
[75] ibid, para 30.
[76] Case C-614/10 *Commission v Austria* (ECJ, 16 October 2012).
[77] ibid, para 42.
[78] ibid, para 43.

Protection Directive.[79] Other violations identified by the Court concerned the integration of the office of the Austrian *Datenschutzkommission* with the departments of the Federal Chancellery (which was itself subject to the supervision of the authority)[80] and the unconditional right to information given to the Federal Chancellor as to the work of the authority.[81]

The question now arises whether the obligations and encouragements outlined above share a common rationale. Why is it that they all, albeit to a different extent, regard political independence as a desirable feature of governance for the accomplishment of their objectives at national state level? And – most importantly – do these reasons suffice as justifications that outweigh the detriment that is done to the political foundation of the administration and, thus, to its embedding in the system of representative democracy?

It has often been suggested that the independence requirements for economic regulators have their own quite specific raison d'être, somewhat distinct from that characterising other types of APBs. This is only true to a limited extent. An argument often heard in literature about independent regulators in particular is that these entities are expected to yield more "credibility" than politically steered or controlled regulatory entities.[82] More specifically, market players' belief in the time-consistency of policies would increase once they have been entrusted to an independent regulator. Unlike politicians, it is argued, independent NRAs (IRAs) are not subject to short-term considerations regarding re-election. These theories have primarily been inspired by the work of Majone, who is often regarded as the founding father (in a theoretical sense) of the European regulatory state. Majone was among the first to point out that IRAs promote stability and continuity.[83] Other authors have adopted and elaborated his ideas, suggesting that predictability is essential to foster investments.[84] Pursuant to the preamble of Directive 2009/140, amending the Framework

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[79] ibid, paras 48-49.

[80] ibid, see in particular paras 57 and 61.

[81] ibid, para 63.

[82] See e.g. Paul Magnette, 'The Politics of Regulation in the European Union' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005) 3, 5.

[83] e.g. Giandomenico Majone, 'Temporal Consistency and Policy Credibility: Why Democracies Need Non-Majoritarian Institutions', EUI Working Paper RSC No. 96/57 (European University Institute, Robert Schuman Centre 1996); Giandomenico Majone, 'The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union' (1997) 3 Eipascope, 1, 2: "[...] independent agencies enjoy two significant advantages: specialised knowledge and the possibility (because of independence from partisan considerations) of making credible policy commitments."

[84] Phedon Nicolaïdes, 'Regulation of Liberalised Markets: A New Role for the State?' in Damien Geradin, Rodolphe Muñoz and Nicolas Petit (eds), *Regulation through Agencies in the EU. A New Paradigm of European Governance* (Edward Elgar 2005), 30. See also Fabrizio Gilardi, *Delegation in the Regulatory State.*

Directive for electronic communications, "[t]he independence of the national regulatory authorities should be strengthened in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions."[85] The European Commission as well, recognised expressis verbis that credible commitment was the main ratio behind the obligations regarding NRAs' independence in the liberalisation directives.[86]

How should we evaluate this argument? Time consistency may be a desirable characteristic of regulatory policy from the viewpoint of law and economics or even public administration. However, it could be argued that its validity is doubtful from a legal point of view. The argument aims to insulate one particular sector and thus a particular policy field from the possibility of politicians changing their minds about the policies to be followed, even when the public interest would require them to do so. One of the basic principles of public law in European democracies, however, is precisely that the government's duty to promote the public interest requires it to be able to change its policies at all times when it believes that this is necessary. In French-inspired systems this rule is enshrined in the legal principle (one of the so called '*lois du service public*') of *adaptabilité* or *mutabilité*.[87]

All legal subjects have to endure changes in policy, precisely because the government should constantly evaluate its policies and assess whether these still serve the public interest in the best way possible. No individual or group of individuals should hence enjoy a guarantee that the policies that are valid in the sector in which he or they operate will be consistent for a certain period. Giving such a guarantee to one or more sectors creates unjustifiable inequalities and disturbs the basis of the relationship between government and citizen in public law. Adapting policies to contemporary needs is the core business of politics and politicians. Political principals are therefore not entitled to renounce all influence in a given public sector for the advantage of a specific group of citizens, since they are

Independent Regulatory Agencies in Western Europe (Edward Elgar 2008) 44; Fabrizio Gilardi and Martino Maggetti, 'The independence of regulatory authorities' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar 2011), 205; Mark Thatcher, 'Delegation to Independent Regulatory Agencies' (2002) 25(1) West European Politics 125, 130-131.

[85] Directive 2009/140 (n 20) Recital 13.

[86] 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, 6: "These provisions on the independence of the NRA's staff and persons responsible for their management are key requirements because they are aimed at ensuring that regulatory decisions are not affected by political and specific economic interests, thereby creating a stable and predictable investment climate."

[87] For France, see e.g. Patrice Chrétien and Nicolas Chifflot, *Droit Administratif* (Sirey 2012) 602. For Belgium, see David D'Hooghe and Philip De Keyser, 'Het continuïteitsbeginsel en het veranderlijkheidsbeginsel' in Ingrid Opdebeek and Marnix Van Damme (eds), *Beginselen van behoorlijk bestuur* (die Keure 2006).

responsible for the entire public sector and vis-à-vis the entire population. Social or economic considerations which concern the public as a whole, can make it necessary, at a given moment, to adapt the policy that has been followed up until then. When this situation occurs, the government must be able to take action. Consequently, the consistency argument is based on an invalid claim.

Moreover, the time consistency argument rests on the belief that market players prefer independent regulators because they see politicians as constantly focused on getting re-elected and willing to, even irrationally, change their policies for that reason only. However, this presumption does not appear to have been tested in any systematic, empirical way. What proof is there that market players indeed prefer regulators that enjoy complete political independence? Hardly any evidence has ever been produced to substantiate the claim that ensuring confidence in the minds of market players indeed requires precluding all political influence on regulatory decisions.[88] An urgent call for more research on this point seems justified. For the time being and for the reasons explained here, the time consistency argument seems to constitute rather poor grounds on which to base an argument for complete political insulation.

The credibility motive, however, does not exclusively revolve around consistency. Expertise, often of the technical kind, is also regarded as key to ensuring that (potential) market players regard regulatory institutions as trustworthy and legitimate. “Independence is defended as a way to assure that decisions are made by neutral professionals with the time and technical knowledge to make competent, apolitical choices.”[89] There is little doubt that in today’s European Union, which is typically characterised as highly technocrat, ensuring expertise plays a decisive role in the legislative’s (and especially the European Commission’s) predilection for independent regulation.

Involving expertise in administrative decision-making is clearly a valid motive *an sich*, since it contributes to well-thought out, evidence-based decisions. However, even in highly technical matters, it is not inconceivable that expert decision-making and political supervision can be reconciled. Guaranteeing expert decision-making does not necessarily rule out all forms of political input or control. Balanced forms of control, based on deliberation

[88] Empirical research has demonstrated that limitations on policy change in political systems foster investments in infrastructure, without, however, claiming that such an outcome requires the establishment of politically independent regulators. See eg Witold J Henisz, ‘The institutional environment for infrastructure investment’ [2002] Industrial and Corporate Change 355.

[89] Susan Rose-Ackerman, ‘The Regulatory State’ in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012), 676.

and consultation between politicians, responsible for the furtherance of the public interest and experts, responsible for making decisions that are technically sound, can be conceived and deserve further consideration. In many European legal systems, it has been quite common to make autonomous public bodies created for reasons of expertise subject to moderate forms of political supervision, such as powers of approval or homologation, suspension, veto, annulment etc. More knowledge is needed on whether, to what extent and under what circumstances such powers are either detrimental to or reconcilable with the role of experts. This question requires empirical testing of different theoretical models and may turn out to be a process of trial and error. A central concern should, however, always be the protection of the separate and distinct roles of experts and elected politicians in the process.

A potential model that could work in many cases is that which I label a "qualified annulment power".[90] Such a model would allow the competent political principal (for instance, a minister) to annul decisions taken by the APB, but only after a compulsory prior consultation between both authorities has taken place. On a theoretical level, this model seems to offer important advantages. Firstly, is excludes censorship, since supervision takes place ex post facto; the APB does not need prior consent for its initial decision. Secondly, annulment does not allow for substitution. After the annulment, it is up to the APB, not the political principal to make a new decision, taking into account the motives for annulment. Thirdly, the compulsory consultation mitigates the unilateral character of the action (veto) of the political principal.[91] It aims to ensure that experts and politicians genuinely become equal partners in debating and decision-making. Ideally, the principal's obligation to consult before annulment results in a dialogue, in which both partners can share their considerations and concerns and which results in a solution that is both politically expedient and technically sound.

There is, however, a third reason why, especially in a European context, political independence of regulators may be desirable, and this motive is also reflected in EU law: the issue of avoiding potential conflicts of interest. Historically, the monopolists in the utilities markets were often government enterprises, who are currently still active as market players, but now in a competitive environment. If a political principal (typically a government

[90] In Belgium and the Netherlands, for instance, autonomous public bodies are often established for reasons of technical or practical expertise. Both the Flemish and the Dutch Framework regulation make such bodies subject to powers of supervision in the hands of the responsible minister. Unless an explicit derogation is found in the legislation establishing the specific body, these powers are applicable. See article 23 Kaderdecreet Bestuurlijk Beleid 2003 (Flanders); article 17 ff. Kaderwet Zelfstandige Bestuursorganen 2006 (the Netherlands).

[91] In the Netherlands, it follows from article 10:41 (1) of the General Administrative Law Act that, in case of an annulment power, consultation of the administrative body that has taken the initial decision is obligatory.

minister), who is ultimately responsible for the success and financial wellbeing of such a government enterprise (one of the market players under supervision), at the same time has the last word in the decisions of the regulatory body, there is a real chance of a conflict of interest arising. “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 (now electronic communications) legislation, where the independence requirement has for a long time been exclusively linked to ownership of or control over the market players.[92]

In situations where central, politically dominated government is under scrutiny from APBs, how can any form of political supervision be justified? At first sight, this seems a problem that cannot be transcended. But then again, perhaps this argument underestimates the potentials of modern administrative law. Administrative decision-making revolves around conflicting interests and the guarantees and procedures that characterise administrative law in the 21st century are designed precisely to ensure that governments and administrations strike the best possible balance. All developed systems of administrative law dispose of a principle or a ground of appeal on the basis of which so-called *détournement de pouvoir* (diversion of power) can be challenged. The exercise of supervisory powers that results in an administrative decision should be subject to judicial review. Diversion of power exists when a decision is not made in the general interest, but with ulterior (personal or other) motives. A political principal annulling or vetoing a decision of a Data Protection Authority against a public institution because he does not want the government to be cast in a bad light, therefore diverts his power. In most legal systems, moreover, a decision taken with the aim of promoting an aspect of the public interest, other than that for which the legislative has entrusted the authority with the power in question, is also vitiated by diversion of power.[93] An interference with a righteous decision to impose a fine on a government enterprise in order to keep it financially sound therefore qualifies as diversion of power (even though it is

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[92] Leigh Hancher and Pierre Larouche, ‘The coming of age of EU regulation of network industries and services of general economic interest’ in Paul Craig and Gráinne de Búrca (eds), *The evolution of EU law* (OUP 2011), 773-774. See also Lea Rodrigue, *Les aspects juridiques de la régulation européenne des réseaux* (Bruylant 2012) 5-6.

[93] E.g. André Mast, Jean Dujardin, Marnix Van Damme and Johan Vande Lanotte, *Overzicht van het Belgisch administratief recht* (Kluwer 2009) 1001-1006 (Belgium); Georges Dupuis, Marie-José Guédon and Patrice Chrétien, *Droit administratif* (Dalloz 2007) 634; Pierre-Laurent Frier and Jacques Petit, *Précis de droit administratif* (Montchrestien 2006) 459-461 (France); Gerard van Ballegooij, Tom Barkhuysen, Willemien den Ouden et. al., *Bestuursrecht in het AWB-tijdperk* (Kluwer 2008) 93-94 (the Netherlands); Stanley de Smith, Harry Woolf and Jeffrey Jowell, *Judicial review of administrative action* (Sweet & Maxwell 1995) 553-556; Paul Craig, *Administrative Law* (Sweet & Maxwell 2012) 576 (in the UK, ‘bad faith’ is used instead of ‘diversion of power’).

arguably in the public interest to promote the financial health of government enterprises), since the power of supervision will only be entrusted to the minister with the aim of ensuring proper economic regulation. Zijlstra, who argues – differently and more radically than this contribution does – that tasks of market supervision should not be exercised at a distance from politics at all, substantiates his claim by referring to e.g. the prohibition of *détournement de pouvoir*, which suffices to overcome possible conflicts of interest, although the author admits that they can probably never be averted entirely.[94]

Admittedly, diversion of power is difficult to prove, which is precisely the reason why there are few examples of the procedure being applied in most legal systems. Perhaps an enhanced duty to state reasons could overcome these difficulties. If a minister is obliged to motivate his supervisory decision in the light of general policy objectives predefined by the legislative and succeeds in demonstrating that his interference was indeed necessary in that regard, it will be easier for the administrative judge to determine whether there is indeed diversion of power.

What then about human rights supervisory bodies? Even though economic regulation and human rights monitoring may seem to have very little in common substantively, the ratios underlying the requirements of political independence discussed for the latter field are very similar to those for economic regulation. Indeed, credibility, although comparatively less frequently documented in the scarce literature on human rights institutions, is a key concern for international and regional human rights organizations as well.[95] According to Smith, the political neutrality of national human rights institutions and their commitment to human rights inspires public confidence.[96] These institutions are moreover considered "more likely to be able to guarantee a certain expertise which is free from any politically partisan approach."[97] Furthermore, even more so than in the case of economic regulations, conflicts of

[94] Sjoerd Zijlstra, 'Zbo's, marktautoriteiten en regelgevende bevoegdheid' (2005) 1 Tijdschrift voor Ondernemingsbestuur 2, 4.

[95] E.g. Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' [2006] Human Rights Quarterly 904, 904, 906 and 909; Rachel Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing Their Effectiveness' (2007) 25(2) Netherlands Quarterly of Human Rights 189, 211; Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 Global Governance 23, 38. See also Principle 7 of the Appendix, 7 of General Policy Recommendation No. 2 on specialized bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level, adopted on 13 June 1997, discussed above: 'Specialized bodies should operate in such a way as to maximize the quality of their research and advice and thereby their credibility both with national authorities and the communities whose rights they seek to preserve and enhance.'

[96] Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' [2006] Human Rights Quarterly 904, 925.

[97] Brice Dickson, 'The Contribution of Human Rights Commissions to the Protection of Human Rights' [2003] Public Law 272; Rachel Murray, 'National Human Rights Institutions. Criteria and Factors for Assessing Their Effectiveness' (2007) 25(2) Netherlands Quarterly of Human Rights 189, 212.

interest are a constant risk for politically controlled or steered human rights institutions. This is so for the very reason that human rights obligations, despite successful and less successful attempts to give them horizontal effect, are still primarily directed to governments. Therefore, they will be the main subjects of the supervision and scrutiny by bodies involved in human rights monitoring. Obviously, undue influence on the body's task by the political organs whose conduct the body is supposed to assess in an objective way is undesirable.[98] Considerations of credibility are moreover closely intertwined with this conflict of interests motive: a perception of partiality naturally negatively affects citizens' belief in the institution.

It is indeed possible to argue that the case for political independence is even stronger for human rights monitoring bodies, given the fundamental character of the guarantees that are protected as well as the rights-based approach that is inherent to it and which – at first sight – leaves only little room and at the same time only little need for political input. Although there is some truth in this argument, it is at the same time undeniable that the scope and delineation of human rights, as well as the balancing exercise needed when human rights conflict, may, in particular national contexts, require and allow for political assessments to be made.[99] Again, for the reasons mentioned above, this political input does not have to conflict with the valid reasons underlying the claim for a certain degree of political autonomy.

Moreover, one should be careful not to open Pandora's box accepting conflicts of interest as valid ratios for political autonomy of administrative bodies, by giving the concept an unduly broad application and interpretation. In *Commission v Germany*, cited above, the European Court of Justice identified several possible conflicts of interest in the relationship between central government and the German data protection authority, responsible for the private sector only.[100] The Court referred to the possible involvement of the government in Public-Private Partnerships, which would make it inclined to be lenient vis-à-vis infringements of data protection legislation by its private partner. The Court also referred to the government's interest in obtaining access to data for use in tax and criminal procedures, as well as to the fact that concerns regarding the economy would possibly override respect for privacy for some governments, again entailing a risk for the proper and impartial application of the data protection rules. These situations have a highly hypothetical character and it

[98] See Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' [2006] Human Rights Quarterly 904, 909 : '… states are creating institutions that will or should act as a watchdog of the very body that created them.'
[99] This e.g. follows from the concept of the 'margin of appreciation' that contracting states often enjoy pursuant to the case law of the European Court of Human Rights.
[100] *Commission v Germany* (n 73), paras 33-36.

hardly seems reasonable to immunise an entire administrative body with important coercive powers from political supervision in order to prevent these situations from derailing.

One of the main characteristics of administrative law is the constant need to balance the general interest against individual interests or to mediate between different aspects of the general interest, which is often difficult. In 2014, we expect the executive to be fit for that task and to demonstrate, via the duty to give reasons, that an unbiased and well-thought-out balancing exercise has taken place. Unless it can be demonstrated that the executive holds a clearly identifiable interest in a certain sector,[101] which yields a presumption of partiality, ensuring an unbiased judgment in administrative decision-making is not a sufficient ground for granting (even a moderate form of) political independence.

E. CONCLUSION

This contribution aimed to demonstrate that international and European (regional) organisations have increasingly become advocates for the use of APBs and have expressed this preference in both soft law instrument and clear-cut legal obligations, anchored in treaties, legislation and case law. There is still incipient awareness of this subtle influence of supra-state law on national administrative organisation. After an overview of the most important examples of this tendency in a European context, the validity of the rationales behind the trend was assessed. It was argued that the far-reaching account of political independence advocated for supervisory bodies at EU level in particular is disproportionate in the light of the motives underlying the obligations, outlined above. In other words, complete political independence is not required for the fulfilment of any of these three motives. They are unfit as justifications for the requirements of independence, which makes them illegitimate infringements of the principle of (representative) democracy.

The trend of international and European impulse with regard to the creation of APBs is emerging and is likely to raise many more questions in the future. It is important that lawyers show an interest in such matters of administrative organisation. They should engage, to a greater degree than is now the case, in debates about the extent to which the use of APBs for the implementation of international and European law strikes a fair balance between valid motives for requiring political independence and common European constitutional principles impacting on decisions regarding administrative organisation. Administrative organisation is not neutral or value-free and it is up to lawyers to make that clear to policy makers, but also

[101] e.g. when government companies operate in the sector.

to other academic disciplines studying similar topics. On that matter: the lack of interdisciplinary research on these questions is regrettable. Political scientists, economists and lawyers should perform more complementary and integrated research. Only then can we achieve models that are at the same time desirable from an economic viewpoint, expedient in terms of an efficient administration and permissible in the eyes of the law.