



Media Pluralism and The European Audiovisual Space: The Role and Cooperation of Independent Regulatory Authorities

Fabrizio Barzanti

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Examining Board

Prof. Bruno de Witte (European University Institute, Supervisor)
Prof. Loïc Azoulai (European University Institute)
Dr. Rachael Craufurd Smith (University of Edinburgh)
Prof. Roberto Mastroianni (Università di Napoli)

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SUMMARY

This Thesis explores the legal and institutional settings that contribute to the creation of general preconditions for the freedom of expression and, primarily, genuine pluralism to prosper throughout the European audiovisual media space. Taking into account the intense legislative and judicial activity on audiovisual media matters in the European Union (EU) and bearing in mind the developments brought about by new digital communications and technological convergence, the analysis focuses on the institutional forms and modes of governance for the media that are apt to foster an effective and consistent supranational approach to the fundamental objective of media pluralism and the values it involves, considering notably the role and functioning of Independent Administrative Authorities (IAAs) for the media.

To this end, the three Parts into which the Thesis is divided deal with, respectively: the notion of media pluralism and its employment in EU law, highlighting the limits of classical hard-law based approaches (Part I); an examination of the institutional features as well as the operation of three national IAAs for the media – namely, the French *Conseil Supérieur de l'Audiovisuel* (CSA), the UK Office of Communications (Ofcom) and the Italian *Autorità per le Garanzie nelle Comunicazioni* (AGCom) – selected as case studies to illustrate the role of these bodies in securing media pluralism (Part II); the investigation of EU action in setting the necessary institutional preconditions and some specific related requirements to guarantee attainment of this objective, also looking in some detail at the legislative developments that have occurred in comparable sectors, such as data protection legislation, equality law and electronic communication regulation, before considering the arrangements in place at the supranational level, as well as the incipient ones in the governance of audiovisual media (Part III).

TABLE OF CONTENTS

INTRODUCTION.....	1
PART I.....	5
Chapter I	
Media Pluralism and the European Audiovisual Space: Re-Launching the Ongoing Debate.....	7
1.1 Media pluralism: what is at stake?	7
1.2 The notion of media pluralism and the regulatory instruments to ensure it: united in their plurality	11
1.2.1 Internal pluralism and content regulation.....	14
1.2.2 External pluralism and structural regulation	15
1.2.3 The necessary interrelationship between the two dimensions	16
1.3 The EU and the debate on media pluralism: when and why?	17
1.4 Media pluralism and the new audiovisual landscape	18
Chapter II	
Media Pluralism and EU Law: the Limits of the Traditional Approaches, Between Respect and Promotion.....	21
2.1 Media pluralism and EU law: mentions in and around the Treaties	21
2.2 Negative integration and respect of media pluralism: Member States' domain?.....	24
2.2.1 Media pluralism in the case-law of the European Court of Justice (ECJ)	24
2.2.2 The limits of competition law: general remarks.....	28
2.3 Positive harmonisation and the promotion of media pluralism: room for EU intervention?.....	30
2.3.1 Positive harmonisation and internal pluralism: from the Television Without Frontiers (TWF) Directive to the Audiovisual Media Services (AVMS) Directive	32
2.3.2 Positive harmonisation and external pluralism: the competence issue	35
a) The attempt to adopt a Directive on 'Concentration and Pluralism' (or rather, on 'Media Ownership')	36
b) In search of a legal basis	36
2.3.3 Limits and failures of EU hard-law interventions to promote media pluralism: taking stock	38
2.4 Combining the two dimensions and re-lunching a European approach to media pluralism: how and why?	39
2.5 Concluding remarks	43
PART II.....	45
Introductory observations	
Independent Administrative Authorities (IAAs) and the Rise of a New Model of Administrative Governance	47
a) IAAs in general	47
b) IAAs in the audiovisual broadcasting sector	49

Chapter I	
France and the Conseil Supérieur de l'Audiovisuel (CSA)	51
1.1 Prior to the establishment of the CSA: some remarks on the political and legal debate and context	51
1.2 The setting-up of the CSA.....	53
1.2.1 The institutional structure.....	54
1.2.2 Mission and competences.....	59
1.2.3 Other coexisting institutions with competences in broadcasting	67
1.3 The functioning of the CSA and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?.....	75
Chapter II	
The United Kingdom and the Office for communications (Ofcom)	89
2.1 Prior to the establishment of Ofcom: some remarks on the political and legal debate and context	89
2.2 The setting-up of Ofcom	92
2.2.1 The institutional structure.....	94
2.2.2 Mission and competences.....	102
2.2.3 Other coexisting institutions with competences in broadcasting	113
2.3 The functioning of Ofcom and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?.....	124
Chapter III	
Italy and the Autorità per le Garanzie nelle Comunicazioni (AGCom)	151
3.1 Prior to the establishment of AGCom: some remarks on the political and legal debate and context	151
3.2 The setting-up of AGCom.....	156
3.2.1 The institutional structure.....	160
3.2.2 Mission and competences.....	168
3.2.3 Other coexisting institutions with competences in broadcasting	173
3.3 The functioning of AGCom and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?.....	181
Concluding and comparative remarks	
IAAs for the media as institutional safeguards for media pluralism	191
PART III	199
Introductory notes.....	201
Chapter I	
The Influence of EU Law in the Setting-up of IAAs at National and EU Level.....	203
1.1 IAAs and fundamental rights: the case of data protection institutions	203
1.1.1 The right to the protection of personal data and EU law: preliminary observations.....	203
1.1.2 EU law and the institutional guarantees for data protection	208
a) Institutional guarantees at the national level	208
i) The model institutional arrangement	210

ii) The main institutional features: in particular, the independence requirement	212
iii) Key functions	227
iv) The operating dimension(s)	228
v) Some conclusions	229
b) Institutional guarantees at EU level	232
i) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data (the Working Party)	232
ii) The European Data Protection Supervisor (EDPS)	236
1.2 IAAs and fundamental rights: the case of equality institutions	241
1.2.1 The equality principle and EU law: preliminary observations	241
1.2.2 EU law and the institutional guarantees for equality	244
a) Institutional guarantees at the national level	244
i) The establishment of equality bodies	246
ii) Main institutional features: namely, independence	251
iii) Competences of equality bodies	253
iv) Operating dimension(s)	255
v) Some conclusions	256
b) Institutional guarantees at EU level	258
i) The European Network of Equality Bodies (EQUINET)	259
ii) The European Agency for Fundamental Rights (EU FRA)	260
1.3 IAAs and regulated sectors: the case of electronic communications regulation	272
1.3.1 EU legislative intervention in the field of electronic communications: the background	272
1.3.2 EU law and the institutional settings for the governance of electronic communications	278
a) Institutional guarantees at the national level	278
i) The establishment and main features of National Regulatory Authorities (NRAs)	279
ii) Objectives and functioning of NRAs	281
iii) A key institutional feature: the independence of NRAs	284
b) Institutional guarantees at EU level	287
i) The rise and decline of the European Regulators Group (ERG)	288
ii) The establishment of the Body of European Regulators on Electronic Communications (BEREC)	292
iii) BEREC structure, duties and powers	295
iv) A key BEREC institutional feature: its independence	301
v) Some concluding remarks	306

Chapter II

Institutional Governance of the Audiovisual Media: an Incipient European

Dimension?	309
2.1 Institutional cooperation and coordination in audiovisual matters at supranational level: the <i>acquis</i>	309
2.1.1 The Contact Committee	309
2.1.2 The Standing Committee on Transfrontier Television	315
2.1.3 The European Platform of Regulatory Authorities (EPRA)	321
2.2 EU law (soft) support for (national) independent media regulators and their cooperation: the case of the AVMS Directive	327
2.2.1 Institutional cooperation under Article 30 of the AVMS Directive	327

2.2.2 Article 30 of the AVMS Directive compared to other EU law institutional provisions on the establishment of national independent administrative bodies	333
2.2.3 The role of regulatory bodies and, in particular, of their independence in securing media pluralism	337
a) The view of the Council of Europe (CoE)	338
b) The EU approach	341
2.3 The creation of the European Regulators Group for Audiovisual Media Services (ERGA) and prospective institutional developments in EU audiovisual media law	346
2.3.1 The formalisation of cooperation among independent media regulators within the EU: the case of ERGA.....	346
2.3.2 Some concluding remarks: what for the (near) future?.....	354

CONCLUSIONS.....	361
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BIBLIOGRAPHY	373
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INTRODUCTION

The aim of this Thesis is to explore the legal and institutional settings that contribute to the creation of general preconditions for the freedom of expression and, primarily, genuine pluralism to prosper throughout the European audiovisual media space. Taking into account the intense legislative and judicial activity on audiovisual media matters in the European Union (EU) and bearing in mind the developments brought about by new digital communications and technological convergence, the dissertation deals with the institutional forms and modes of governance for the media that are apt to foster an effective and consistent supranational approach to the fundamental objective of media pluralism and the values it involves. In this respect, against the background of developing EU audiovisual law and policy, the focus here is placed on the role and functioning of Independent Administrative Authorities (IAAs) for the media (also often referred to as National Regulatory Authorities, or NRAs), in the light of their increasing cooperation (and prospective coordination) within the framework of the European media governance discourse.

To this end, the Thesis is divided into three Parts.

Part I begins with background considerations regarding the EU's direct and substantive intervention in relation to media pluralism accompanied by reflections on the importance of a European approach to steering the governance of an intrinsically transfrontier phenomenon like the free movement of audiovisual media services and content beyond national borders. This Part discusses the notion of media pluralism and its application, mainly from the point of view of EU substantive and institutional law, so as to speculate on the possibility of a supranational approach to fostering the protection and promotion of media pluralism, and on the (new) forms and routes this might take, especially once the limits and shortcomings of traditional ones have been highlighted.

Thus, the First Chapter of Part I offers a theoretical (and partly historical) description of the notion of media pluralism in general, in its various dimensions, paying special attention to its development at the European level and in the digital age. The Second Chapter of Part I provides an overview of that notion as employed, in particular, in the relevant legal provisions of primary and secondary EU law, and developed in the pertinent case-law of the European Court of Justice (ECJ). Overall, Part I also aims, substantially, to introduce and present the core issues at stake in this dissertation and set the scene for their subsequent in-depth analysis.

Part II is devoted to studying the model of governance for the audiovisual media provided by the specialised national IAAs (with particular emphasis on television broadcasting). This study is introduced by some preliminary observations regarding the main rationales for the establishment of IAAs and their key general, and specifically broadcasting sector-related, features. Indeed, their establishment and functioning in this sector represent an institutional response to the need to guarantee and promote media pluralism. In this respect, in order to appreciate the institutional characteristics and role of IAAs for the media in detail, the following three Chapters are respectively centred on the analysis of three case studies concerning the relevant independent national authorities operating in France, the UK and Italy. These are, notably, the *Conseil Supérieur de l'Audiovisuel* (CSA), the Office of Communications (Ofcom) and the *Autorità per le Garanzie nelle Comunicazioni* (AGCom). The three authorities considered are examined both from an institutional and substantive perspective, looking at their structures, powers and accountability mechanisms, as well as at the outputs of their activities and the impact they have on defining some key issues of audiovisual media regulation. The three cases selected, which correspond to the main institutional patterns followed by other EU countries, embody different options available in structuring such authorities. These cases therefore present interesting features for comparison, as they provide examples not only of so-called “convergent authorities”, dealing with both electronic communications and television broadcasting (in the Italian and UK cases) and non-convergent ones (like the French regulator, having powers solely over the latter sector), but also of authorities devoted only to sector-specific regulation in the public interest (such as the Italian and the French regulators), in contrast to those (the UK one) also responsible for applying competition law to the media.

On this basis, building on the findings of Part I and moving on from the analysis conducted in Part II, Part III of the Thesis focuses on the scope of EU action in setting the institutional preconditions to guarantee media pluralism. Indeed, institutional settings are a key issue as far as the achievement of substantive goals is concerned. More precisely, the establishment of independent public bodies such as the regulatory authorities for the media should be seen as crucial institutional preconditions for the effective protection and promotion of media pluralism, both at the national and European level.

Thus, the final Part comprises two Chapters. The first one explores the influence of EU law in the setting-up and design of independent authorities, both at Member State and EU level. For this purpose, attention is paid to the institutional features of administrative authorities established in sectors showing comparable constitutional and structural relevance to the

audiovisual media one. On the one hand this implies looking closely, from an EU law perspective, at data protection as well as equality institutions. The reason for focusing on these two cases stems from the fact that fundamental rights (such as data protection and equality/non-discrimination) are at stake in the operation of such bodies. The specific interest in the aforementioned cases is justified by the possibility of comparing the institutional solutions crafted in the fields of EU data protection legislation and equality law with those in the domain of media law, where other fundamental rights (such as the freedom of expression and media pluralism) are involved. This comparison could also prove to be of relevance because of the different degrees of institutional harmonisation (especially at EU level) in the chosen sectors. On the other hand, considerations will be made at some length also regarding electronic communications law, essentially in relation to the development of its institutional governance, especially because of the increasingly strong technological and economic connection between electronic communications and audiovisual media and the interactions between the institutions established in those fields.

The Second and final Chapter of Part III then discusses the European institutional governance of the audiovisual sector. After mapping the institutions and cooperation fora in place not only within the EU legal order, but also in the broader framework of the legal system of the Council of Europe (CoE), the focus shifts to the current requirements of EU legislation as regards the setting-up of independent public bodies for the media. In this respect, also drawing on the examples analysed in the Chapter above, particular attention is paid to the possibilities and limits for EU law to dictate the institutional features of independent regulatory (and supervisory) institutions for the media that are already established (or to be established), with specific regard to the independence requirement, as well as to the evolution of institutional cooperation (and, perhaps, coordination) among national IAAs for the media at supranational level. Recent developments are taken into detailed account and critical observations *de lege ferenda* are finally presented.

As for the approach and methodology employed in this dissertation, they are rooted in a theoretical and substantive/institutional positive law analysis, with some normative discussion. This will imply dealing mainly not only with institutional and substantive EU law, and more specifically with EU audiovisual law measures (and policy), but also – especially in Part II – with national legislations and regulations, as well as with some relevant non-binding documents (such as consultation papers, opinions, and so forth) issued by the IAAs considered (as all of these stand at December 2014). Particular attention will be paid to the relevant academic literature, looking predominantly at the production of legal scholars.

PART I

Chapter I

Media Pluralism and the European Audiovisual Space: Re-Launching the Ongoing Debate

1.1 Media pluralism: what is at stake?

Nowadays, regulatory intervention in the field of the media is a matter of fact at both national and supranational levels, despite differences in form, degree and even its desirability. Any brief survey of the bulk of regulatory measures in place concerning the media shows that the various measures in this sector aim to pursue several different objectives.¹ Among these, media pluralism is by far the most influential, attractive, and perhaps the most relevant; as it is also, nevertheless, the most complex and difficult to clearly define.

Providing a conclusive definition of media pluralism is beyond the scope of these pages. What will be done, instead, is to first offer an understanding of the very essence of the notion of media pluralism, and then develop and apply that to further investigations within the field of media regulation, particularly at the European Union (EU) level. Thus, in searching for the ‘soul’ of the notion of media pluralism one could start from an inquiry about the very nature and usage of the terms ‘media’ and ‘pluralism’, first separately and then in combination, at both theoretical and practical levels.

From a theoretical viewpoint, beginning with ‘pluralism’, it should be acknowledged that the main difficulty in referring to this notion in clear terms lies in its intrinsically heterogeneous and extremely broad nature. It should also be recognised that pluralism consists of different conceptions that operate in, and result from, the application of this notion in different contexts. As pointed out by NIEUWENHUIS, the meaning of pluralism may vary throughout the different disciplines in which it is employed.² This author suggests, indeed, that we can distinguish at least between value pluralism, social pluralism and political pluralism, respectively meaning: in philosophical ethics, the diversity of conflicting values; in social sciences, a society populated by different religious, cultural, ethnic or other groups; and in political science, the

¹ See, among many, E.M. BARENDT, *Broadcasting law: a comparative study*, Oxford, Clarendon Press, 1995, pp. 3-10.

² See A. NIEUWENHUIS, “The Concept of Pluralism in the Case-Law of the European Court of Human Rights”, in *European Constitutional Law Review* [2007] 3, pp. 367-384.

coexistence on an equal footing of different associations and groupings. These different meanings can then be associated with a different emphasis, placed upon individual liberties in the first case, and upon collective interests in the latter two. If this is transferred into legal reasoning, what originates is an “ambivalence” (and a tension) that might be difficult to reconcile. In fact NIEUWENHUIS shows how the “different concepts may all affect the meaning of pluralism when used in jurisprudence”, demonstrating, in particular, how that ambivalence is reflected in the case-law of the European Court of Human Rights (ECtHR) when touching upon several fundamental rights (such as freedom of speech, freedom of association, freedom of religion and belief, and of education) that are caught in the very wide net of the notion of pluralism.³ Moreover, this ambivalence can be further strengthened if one considers that pluralism is usually depicted in the ECtHR case-law as both “a characteristic of and a condition for a democratic society”,⁴ thus underlining a passive/descriptive dimension – that is, recognising and respecting what already exists in society – and a dynamic/active side – that is, the need to pursue and promote the establishment of an essential precondition for democracy. Finally, on the theoretical level, reconciling the different conceptions of the notion of pluralism is further complicated by the tension between the role of the nation State and that of supranational/international organisations as guarantors and promoters of pluralism in its various dimensions. This, in turn, adds further complexities to the shaping of a clear and distinct (‘universal’) meaning for the notion in question.

When qualified by the term ‘media’, the polysemous notion of pluralism on the one hand benefits from some clarification, but on the other hand becomes subject to other ambiguities. These derive not only from the variety of conceptions underpinning the notion of pluralism, as underlined above (as they are also reflected in this specific application), but also from the term ‘media’ in itself. Due to technological progress and changes in social behaviours, the very notion of *mass media* is increasingly blurred and its theoretical foundations and boundaries under attack. While the media addressing the indistinct masses of populations were traditionally newspapers and television (and radio) broadcasting, nowadays they operate in a sector that has expanded its boundaries to encompass new delivery platforms (such as satellite or cable television) and even *new media*. The latter are, for instance, personal computers, which grant access to the Internet and the information it contains, and new generation mobile phones, capable of broadcasting contents almost like portable televisions.

³ See NIEUWENHUIS, cited, p. 367.

⁴ See NIEUWENHUIS, cited, p. 369.

Moreover, technological developments have also changed the way information and contents of any genre are delivered and accessed: not just by ‘merging’ the potentials of different media (generating, for instance, on-line newspapers), but also, when applied to traditional media, by exploiting their potential and changing their very nature to a considerable extent. One such example is the application of digital transmission techniques to television broadcasting and the related development of new services, such as video-on-demand, which address and satisfy individual requirements more than the expectations of the masses.⁵ It follows that the notion of media pluralism, once developed through political and legal reasoning and then rooted in and confined to the field of television broadcasting (and less incisively to newspapers as well) is now able, and often interpretatively stretched, to find a broader scope of application. This broadening of its scope of application can therefore generate further complexities, as well as new challenges, in drawing up regulatory measures capable of fostering media pluralism within the new technological environment (as will be highlighted later on).

From a practical point of view, moreover, the sometimes “nebulous” concept of media pluralism creates great trouble to whoever ventures into research on the methods and forms of policies and regulatory interventions related to it. Indeed it appears, from a review of the vast array of legal sources and doctrinal documents, that these diverse methods and forms almost equate with different understandings of the notion at stake. The notion of media pluralism is frequently portrayed as having many nuances and often (arguably) assimilated to related, but differently expressed concepts, such as “media diversity”, “plurality of the media”, “media variety” and “information pluralism”. These differences sometimes render it particularly difficult to appreciate, interpret and eventually compare what different legal texts and different scholars are actually talking about when they refer to the idea of media pluralism.⁶

⁵ Under the pressure of technological convergence, brought about by the advent of digital techniques, the traditional media of mass communication (and television broadcasting in particular) are facing a crisis of their identities, usually based on the peculiar nature of the services each form of media used to deliver. According to N. NEGROPONTE, *Being digital*, New York, Knopf, 1995, “the medium is not the message in a digital world. It is an embodiment of it” (p. 71), since communications media now have the flexibility to adapt themselves to the messages they carry. This challenges the notorious statement “the medium is the message” by M. McLuhan, *Understanding media: the extensions of man*, London, Routledge & Kegan Paul, 1964 (p. 18).

⁶ See M. ARIÑO, *Regulation and competition in European broadcasting: a study of pluralism through access* (PhD Thesis, European University Institute, 2005), notably at pp. 151-158. See also D. WESTPHAL, “Media Pluralism and European Regulation”, in *European Business Law Review* [2002] 5, pp. 459-487, in particular, where the Author notes that “since [media] pluralism is apparently a very complex concept, there is no simple and short definition of it [...]. Therefore, when referring to this concept scholars and legislator as well as the executives should clearly indicate the specific features which they refer to” (p. 487).

Despite all the observations above, one could still believe that it is possible to arrive at a common understanding at least of what underpins the concept of media pluralism, so as to work with a meaningful tool when using this notion to justify interventions in policy and regulatory terms. Thus, taking into account the above (and the observations made in the following pages), and notwithstanding the variety characterising the conceptions and applications of the notion of media pluralism, it is conceivable that its very essence has to be related to the very nature of democracy. For democracy to exist, the recognition of the founding, and not just fundamental, role of freedom of expression and the derived freedoms to hold opinions, to receive and impart information and ideas, must be guaranteed, since these freedoms ensure the representation and reproduction of the multiplicity of viewpoints present within a democratic society, which constitute its connective tissue.⁷ To narrow this down more specifically to the media sector, taking into account the key role that is indisputably recognized to the media in the democratic and informational process, “media pluralism should be understood as *diversity of media supply*, reflected, for example, in the existence of a plurality of independent and autonomous media and a *diversity of media contents* available to the public”.⁸ Therefore, media pluralism becomes a precondition for the existence and exercise of freedom of expression and information, as well as an instrumental tool for everyone’s enjoyment of the right to be informed. In other words, media pluralism appears to be an essential condition for the preservation of the right to information and freedom of expression that underpins the democratic process, and not just the outcome of the exercise of those rights. A free, independent and diverse media system, in fact, effectively gives groups and individuals within a certain society the possibility to form their ideas and opinions and express them freely, thus generating a plurality of viewpoints that enriches each individual and the society he belongs to.⁹

⁷ According to M. LUCIANI, “La libertà d’informazione nella giurisprudenza costituzionale”, in *Politica del diritto* [1989], pp. 605-623, “la libertà di manifestazione del pensiero e la libertà di informazione [...] vengono collocate [...] non solo tra i valori *fondamentali* (nel senso di importanti al massimo grado) *nell’ordinamento*, ma anche tra quelli che dell’ordinamento sono *fondanti*” (p. 606). On the link between pluralism and democracy note also, however, that according to the best political doctrine there is no mutual coincidence between the two: as N. BOBBIO, *Il futuro della democrazia*, Torino, Einaudi, 1984, points out, “il concetto di democrazia e il concetto di pluralismo non hanno, direbbe un logico, la stessa estensione. Si può benissimo dare una società pluralistica non democratica e una società democratica non pluralistica” (p. 48).

⁸ See G. DOYLE, *Media ownership: the economics and politics of convergence and concentration in the UK and European media*, London, SAGE, 2002, p. 12 (*emphasis added*). The Author reports that the abovementioned interpretation of media pluralism was provided by the Committee of Experts on Media Concentration and Pluralism (MM-CM) within the framework of the Council of Europe (CoE).

⁹ As G. SARTORI, *Pluralismo, multiculturalismo e estranei*, Milano, Rizzoli, 2000, puts it, in differentiating pluralism from tolerance, “la differenza è che la tolleranza rispetta valori altrui, mentre il pluralismo afferma un

Moreover, media pluralism is related to factors of a cultural, political, social and even economic nature. Although, as noted,¹⁰ all these elements appear to constitute “inseparable” parts of the very concept of media pluralism, one could claim that its key features are the cultural, political and social dimensions, more than the economic one. What is coessential of the notion, in fact, is primarily its political and cultural nature. Then, whether or not a definite line can be drawn between what is surely political and what is cultural, as well as, more broadly, whether a distinction can be made between the concepts of pluralism and diversity – the former being more politically connoted and the latter being predominantly rooted in the cultural environment –¹¹ what eventually emerges is that all these variations originate from and refer to an understanding of media pluralism that focuses on the *qualitative dimension* rather than *quantitative aspects*. Thus media pluralism is something more than a mere quantitative multiplicity of viewpoints and voices: it is their effective qualitative variety and diversity. It is the politically (in a broad sense) and culturally significant diversity and variety of information, contents and events (of relevance to democratic society): contents, events and information that should have access to the media and should also be accessible through the media in their variety and diversity. Thus, regulatory interventions in the field of the media, whatever forms they take in seeking to foster media pluralism, all must share and be reconcilable with this common understanding of the notion of media pluralism.

1.2 The notion of media pluralism and the regulatory instruments to ensure it: united in their plurality

Within the European space the notion of media pluralism is, first and foremost, rooted in the constitutional heritage of several Member States. Indeed, its origins can be traced back to the case-law of the constitutional courts mainly of Italy, France and Germany. Starting from the early 1960s, in dealing with cases concerning challenges brought mainly by the emerging private broadcasters against the well-established national public monopolies of television

valore proprio. Perché il pluralismo afferma che la diversità e il dissenso sono valori che arricchiscono l'individuo e anche la sua società politica” (p. 20).

¹⁰ See WESTPHAL, cited, p. 487.

¹¹ See, notably, B. KLIMKIEWICZ, *Media Pluralism: European Regulatory Policies and the Case of Central Europe*, EUI Working Papers, RSCAS 2005/19; and L. HITCHENS, *Broadcasting pluralism and diversity: a comparative study of policy and regulation*, Oxford, Hart Publishing, 2006, especially pp. 8-9.

broadcasting, each of these courts endorsed and elaborated the notion of media pluralism, reaching a common understanding of it as a distinct legal principle of constitutional status.¹²

Indeed, by considering the peculiar nature of broadcasting as not just an economic activity but also as a relevant vehicle for enhancing democratic participation and promoting culture, and by balancing, then, the different constitutional rights inherently involved – mainly the freedom of expression and freedom of economic initiative – the constitutional courts of the aforementioned countries have developed a notion of media pluralism as an integral part of the freedom of expression itself. Moreover, and most importantly, as results from the same constitutional traditions, since freedom of expression has been recognized very much in its positive dimension, implying an action/obligation on the part of the State to ensure the preconditions for all to freely form and publicly express their opinions, media pluralism has itself been identified as the object of this positive obligation to act, and as an objective in the pursuit of which public regulatory interventions could be soundly justified.

However, in other fora, a diverse understanding of freedom of expression – and particularly the derived freedom of information – and media pluralism has led to different interpretations of their relationship and, hence, to a different appraisal of regulatory interventions aimed at fostering the latter objective. As CRAUFURD SMITH has shown, this has been the case, for instance, of the ECtHR.¹³ While endorsing the notion of media pluralism, the ECtHR has mainly interpreted it as a potentially legitimate ground upon which to justify restrictions to the freedom of expression, rather than a constitutive element of the latter. Indeed, in interpreting Article 10 of the European Convention on Human Rights (ECHR) the ECtHR has so far only clearly taken the view that pluralism can be a legitimate exception to the principle of freedom of expression, despite allowing some space for the recognition within that Article of an individual right to receive information, which national constitutional courts have certainly done when interpreting equivalent national constitutional provisions.¹⁴ Thus, while

¹² See P. KREMMYDA, *Between competitiveness and pluralism: concentration in the broadcasting industry in the EU* (PhD Thesis, European University Institute, 2004), especially pp. 40-45. On the details concerning the development of the case-law of the abovementioned countries' respective constitutional courts, see (for Italy) E. CHELI, "Libertà di informazione e pluralismo informativo negli indirizzi della giurisprudenza costituzionale", in A. PISANESCHI, L. VIOLINI (eds.), *Poteri, garanzie e diritti a sessanta anni dalla Costituzione (Scritti per Giovanni Grottanelli de' Santi)*, Milano, Giuffrè Editore, 2007, pp. 1405-1420; (again for Italy, and for France) R. CRAUFURD SMITH, *Broadcasting law and fundamental rights*, Oxford, Clarendon Press, 1997, notably at pp. 151-168; and (also for Germany) KREMMYDA, cited, notably at pp. 38-51.

¹³ See CRAUFURD SMITH, cited, pp. 174-183. For an in-depth analysis of ECtHR case-law on the freedom of expression in general, see M. OETHEIMER, *Freedom of expression in Europe: case-law concerning Article 10 of the European Convention of Human Rights*, Strasbourg, Council of Europe Publishing, 2007.

¹⁴ See P. BARILE, *Diritti dell'uomo e libertà fondamentali*, Bologna, Il Mulino, 1984, notably pp. 239-240.

the ECtHR allows a certain margin of appreciation on the part of the States when enacting regulatory measures based on the principle of media pluralism, since such measures are considered as limitations to a fundamental right, they must nonetheless be narrowly interpreted and strictly scrutinized under the parameters of necessity and proportionality.¹⁵

Nevertheless, more recently, the ECtHR appears to have adopted a more pro-active approach towards the realisation of media pluralism. In developing its case-law on freedom of expression and the regulation of television broadcasting (and in particular concerning structural rules on the allocation of broadcasting frequencies), the ECtHR has stated that, according to Article 10 ECHR, in addition to their negative duty of non-interference, States have “a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism”¹⁶ and grant broadcasters effective access to the audiovisual market, so as to ensure the diversity of the overall programme content, reflecting as far as possible the different opinions in society. Thus, according to the ECtHR, providing for the theoretical possibility of operators accessing the market, or the mere existence of several channels, is not sufficient to ensure what the ECtHR itself identifies as “true pluralism in the audiovisual sector in a democratic society”. In fact, positive intervention in appropriate and effective forms is encouraged and almost deemed mandatory whenever necessary to achieve the objective of securing media pluralism.

Beyond this extremely relevant but theoretical debate, if one looks in more practical terms at the regulatory instruments through which the protection and promotion of media pluralism have usually been conceived and provided, they can be grouped within two main (but flexible) categories, usually labelled, respectively, as internal pluralism measures and external pluralism ones.

¹⁵ On the interpretation of Article 10 and the case-law of the ECtHR in relation to the media, see notably R. PISILLO MAZZESCHI, “Diritto al pluralismo informativo nei media audiovisivi e Convenzione europea dei diritti dell’uomo”, in R. PISILLO MAZZESCHI *et al.* (eds.), *Il diritto al pluralismo dell’informazione in Europa e in Italia*, Roma, RAI-ERI, 2012, pp. 23-99; E. KOMOREK, “Is Media Pluralism a Human Right? The European Court of Human Rights, the Council of Europe and the Issue of Media Pluralism”, in *European Human Rights Law Review* [2009] 3, pp. 395-414; as well as, focusing in particular on the justifications for licensing provisions on television broadcasting, see among many, M.W. JANIS *et al.*, *European human rights law: text and materials*, Oxford, OUP, 2008, notably at pp. 301-305.

¹⁶ See, notably, Case *Centro Europa 7 SRL and Di Stefano v. Italy*, App. No 38433/09, 7 June 2012, § 134 (but see similarly, also Case *Manole and Others v. Moldova*, App. No 13936/02, 17 September 2009, § 107).

1.2.1 Internal pluralism and content regulation

The category of internal pluralism mainly encompasses measures regarding what is broadcast, and is therefore related to the broader category of content regulation.¹⁷ However, the term ‘internal pluralism’ (pluralism *within/in* every single media outlet) is used to refer cumulatively (and can be achieved by resort) either to obligations concerning programme requirements or to structural obligations in a strict sense. The former may include measures favouring the access to a media outlet of a diversity of opinions, the balanced and unbiased presentation of information, the granting of equal access time to different religious and political groups, the release of contents produced by diverse or independent authors, and even the broadcasting of a plurality of programmes of different genres to satisfy different tastes. Structural obligations, on the other hand, may regard the composition of bodies responsible for managing the broadcasting outlet or selecting the contents to be broadcast. Altogether, these measures are intended to achieve a broad political and cultural diversity of contents, starting from each individual media outlet.

Traditionally, the concept of internal pluralism has primarily been shaped around and targeted to the providers of Public Service Broadcasting (PSB) – *alias*, in the majority of cases, the former national monopolies – by stressing their key role in addressing the social, democratic and cultural needs of each society and focusing in particular on certain measures suited to the achievement of PSB purposes, as envisaged at national level by laws or regulations conferring, defining and organising the PSB remit.¹⁸ However, some measures for internal pluralism (in the broader sense, as pointed out above) are also already applied to private channels (e.g., broadcasting contents generated by independent producers, granting access to content of major relevance to the general public), while others (e.g., the provision of information in an unbiased and neutral way, time-sharing of access by different political and religious groups) could be extended to them as well, especially when external pluralism measures do not really achieve their purpose.

¹⁷ For a thorough discussion of all types and forms of content regulation for the media in place at European level, see, among many, M. HOLOUBEK *et al.*, *Regulating content: European regulatory framework for the media and related creative sectors*, Alphen aan den Rijn, Kluwer Law International, 2007, especially Ch. 3 and Ch. 4 relating to sector-specific regulation at, respectively, infrastructure and content level.

¹⁸ On the broad topic of PSB, for a European and comparative perspective on the actual status of PSB, see S. NIKOLTCHEV (ed.), *The public service broadcasting culture*, Strasbourg, European Audiovisual Observatory, 2007; T. PROSSER, *The limits of competition law: markets and public services*, Oxford, OUP, 2005; and J. HARRISON, “Interactive Digital Television (iDTV) and the expansion of the public service tradition: A new public service communications template for the digital age”, in *Communications Law* [2003] 8, pp. 401-412, showing how PSB can survive and adapt its remit to the new technological context.

1.2.2 External pluralism and structural regulation

The category of external pluralism measures generally comprises measures regarding the structure of the overall media environment. Thus, this category can be related to that of structural regulation, in a broad sense. External pluralism (pluralism *of* the media) is linked not only to regulatory measures that impose constraints on media ownership and control – such as mono-media or cross-media ownership constraints, prohibitions of control by foreign investors or by specific entities such as public institutions, limits to the number of broadcasting licences or (alternatively) to market shares – but also to other constraints such as ‘must carry’ rules, which require certain television channels to be carried over certain networks to guarantee their universal accessibility, and limits on advertising shares and revenues. Altogether, the aim of this kind of measure is to tackle dominant positions and impede their formation (as they are generally presumed, as such, to be detrimental to media pluralism), as well as to structure the overall media market so that it can offer citizens the fullest range of cultural and political views expressed in society. Indeed, the application of such measures is purported to spread variety across the various independent and autonomous media outlets, and, therefore, to deliver to viewers a generally pluralistic media system.

This set of measures was largely devised earlier than most of the measures for internal pluralism listed above. In general, they were first put in place when private television broadcasting channels appeared and began operating alongside (and competing with) public broadcasting companies, generating the so-called “dual system” that is usually considered in itself to further contribute to the attainment of the objectives related to media pluralism. In any case, structural regulation, targeted prevalently at private broadcasters so as to ‘compensate’ and ‘counterbalance’ internal pluralism regulations for public ones, was subsequently extended (in certain forms) to the latter. Moreover, along the same line, external pluralism measures have increasingly been strengthened in order to tackle the growing phenomena of concentration affecting the media sector and to govern the generally renovated media environment. In certain cases, this set of measures has become increasingly believed in and employed as a means of achieving media pluralism, up to the point of resorting predominantly to it at the expense of many measures of internal pluralism.¹⁹

¹⁹ See E.M. BARENDT, “Structural and Content Regulation of the Media: United Kingdom Law and some American Comparison”, in *The Yearbook of Media and Entertainment Law* [1997-1998] III, pp. 75-77.

1.2.3 The necessary interrelationship between the two dimensions

Media pluralism analysis very often privileges the aspects of external pluralism and structural regulation.²⁰ Among the many factors that may determine this inclination there is certainly a perceived difficulty in effectively enforcing content regulation, which in most cases is deemed inadequate to deliver efficient results. Thus, when compared to internal pluralism measures, content regulation is frequently only seen as a set of supplementary measures. Moreover, the preference for structural regulation also derives from the pragmatic element of the need to measure the accomplishment of a satisfactory level of media pluralism (and the difficulty of doing so), as this operation is perceived as necessary before opting for regulatory intervention and choosing the suitable regulatory tools with which to perform it. While it appears extremely complex to measure the satisfaction of internal pluralism and predominantly qualitative objectives, measuring what are perceived as more quantitative/external pluralism objectives, notwithstanding the variety of possible criteria and indicators that can be adopted to estimate them (and often the related operational difficulties), is usually deemed more likely to deliver concrete results.²¹

Nevertheless, I share the view that external and internal pluralism measures represent complementary rather than interchangeable tools with which to achieve the single general objective of media pluralism as identified above. As stated by the European Commission (hereafter, the Commission), “although pluralism of ownership is important, it is a necessary but not sufficient condition for ensuring media pluralism. Media ownership rules need to be complemented by other provisions”.²² In fact, although the specific and direct objectives pursued by these two sets of measures are different, thus justifying their distinction into two categories,²³ both content and structural regulation find their *raison d’être* and coexist in the

²⁰ As pointed out by ARIÑO, cited, “in the global context media pluralism has come to rely almost exclusively on the plurality of ownership, in other words, external pluralism, whilst the traditional role of public service broadcasting (and the internal pluralism model) is increasingly questioned in a multi-channel environment” (p. 154).

²¹ See M. POLO, “Regulation for pluralism in the media markets”, in P. SEABRIGHT, J. VON HAGEN (eds.), *The economic regulation of broadcasting markets: evolving technology and the challenges for policy*, Cambridge, Cambridge University Press, 2007, pp. 150-188, notably at pp. 174-180. In general, the measuring of audience (instead of market) shares seems to be the most appropriate indicator, since it is adaptable to the needs of the new technological landscape.

²² See Commission Staff Working Document on Media Pluralism in the Member States of the European Union, SEC(2007) 32, of 16 January 2007 (p. 5).

²³ However, in extending the analysis of content and structural regulation to the American case, BARENDT, “Structural and Content Regulation of the Media: United Kingdom Law and some American Comparison”, cited, argues that “there may be a fine, perhaps imperceptible, line between structural regulation and general

overarching general objective they both pursue. Furthermore, both internal and external pluralism measures are necessary in the media markets as they stand nowadays throughout Europe: that is to say in broadcasting markets that are still characterised by “dual systems”, in which the objectives of media pluralism need to be pursued not only by all different operators (i.e. PSBs and private media companies) in a balanced way according to their nature, but also by the broadcasting sector as a whole.

1.3 The EU and the debate on media pluralism: when and why?

The abovementioned findings are shared at not just nationally, but also on an international level – with particular reference to the activity of the Council of Europe (hereinafter, CoE) – as well as at EU level.²⁴ As regards the latter, in fact (as will be shown below), alongside the development of European audiovisual law and policy, the notion of media pluralism, in its internal and external dimensions, has been endorsed and debated since the early 1990s: almost in parallel to its development at the national level. Since that time, however, the various EU institutions have approached the notion from different perspectives.²⁵ In particular, while the European Parliament, in its various Resolutions dealing with the matter (and even in reports issued in the 1980s), has shown great attention (predominantly) to the cultural dimension at the roots of media pluralism and has spurred direct action in this direction, the Commission has chosen to focus in particular upon the external pluralism/media ownership/media concentration dimension, which appeared more closely connected to the internal market project (and thus also more strongly rooted within EU competences).

The milestone in this debate remains the 1992 Green Paper on *Pluralism and Media Concentration in the Internal Market*,²⁶ in which the Commission made it quite clear that preserving pluralism is not, in itself, an EU objective. According to the Commission’s

programme standards” (p. 82) and that “the difficulty of drawing any bright line between the categories of *structural* and *contents* regulation” is due to the fact that “some types of regulation can be characterised as both structural and content in character, while others might be said to be structural in form but content-based in their overall aim” (p. 94).

²⁴ As (re)affirmed by the EP in a Draft Report on concentration and pluralism in the media in the European Union (2007/2253(INI)), “any consideration of media pluralism must take into account both pluralism of ownership (external pluralism) and pluralism of content (internal pluralism)”.

²⁵ See A. HARCOURT, *The European Union and the regulation of media markets*, Manchester, Manchester University Press, 2005.

²⁶ See the Commission’s Green Paper on Pluralism and media concentration in the internal market – an assessment of the need for Community action (COM(92) 480 final, of 23 December 1992).

position in this Green Paper, the interest in, and the main reason for, dealing with media pluralism at the EU level depends predominantly upon the need to ensure the accomplishment and the smooth functioning of the internal market (for broadcasting), potentially affected by disparities between national regulatory interventions in the field of (external) pluralism that may need to be harmonised, as the internal market itself, according to the Commission, is beneficial to media pluralism goals. This Green Paper marked the origin of fervent activity, which has led to the production of further discussion documents collecting the reactions of the various stakeholders. Moreover, it has been followed by other pronouncements by EU institutions, such as the European Parliament, all reiterating their positions. In this ongoing debate, however, the *acquis* thus far seems to be the “inappropriateness” of the EU launching a concrete and direct initiative (via hard-law instruments) on media pluralism.²⁷

1.4 Media pluralism and the new audiovisual landscape

Both at national and supranational levels the debate on the notion of media pluralism, and on the regulatory measures promoted or adopted to foster it, is increasingly focused on the opportunities that new technologies are generating, and on the contribution they can make to enhancing media pluralism itself. Since the advent of digital (satellite, cable, as well as terrestrial) broadcasting technologies and the connected phenomenon of technological convergence between broadcasting and telecommunications, the traditional arguments used to justify regulatory interventions to achieve goals of public interest, such as media pluralism, have lost much of their strength. This is the case of arguments such as, first and foremost, radio spectrum scarcity and, hence, of the naturally limited number of television channels/broadcasters available, but also of the strong impact exerted on the public by television broadcasting, or the scarcity and concentration of economic resources available for this activity. In fact, technological convergence and the effects of the digital compression of broadcasting signals have released great portions of the radio spectrum, resulting in a

²⁷ Still valid are the comments of R. OLLA, *Riflessioni giuridiche sul sostegno europeo all'industria dei programmi audiovisivi*, (PhD Thesis, European University Institute, 2001): “le istituzioni comunitarie non hanno ancora maturato un livello di consenso politico necessario e sufficiente al fine di disciplinare in maniera aperta e diretta il pluralismo nei mass media. Nonostante questo vuoto normativo, diverse istituzioni comunitarie hanno contribuito in maniera indiretta alla tutela e al mantenimento del pluralismo. La giurisprudenza della CEG, le decisioni della Commissione in materia di concorrenza, ed i programmi comunitari tesi al sostegno dell'industria audiovisiva hanno indubbiamente contribuito alla tutela di questo valore di fronte alla disarmante assenza di un contributo positivo da parte del legislatore comunitario” (p. 298).

potential increase in the number of TV channels, services to be broadcast, and broadcasters. Moreover, these technological advances have generated more platforms capable of delivering audiovisual contents to the public, either in a ‘TV-like’ manner or in innovative forms, including new personal, ‘on-demand’, services that can be tailored to viewers’ individual requirements by the viewers themselves, consequently mitigating the impact of television broadcasting on the general public.

However, one should resist the temptation to idealize technological advances and assert that threats to media pluralism have thus been swept away by the panoply of means and forms now available for the delivery of and access to audiovisual contents of any genre. The availability of a huge number of channels, indeed, does not in itself necessarily and automatically generate and ensure the availability of different opinions and views through the media, although it can naturally make a significant contribution to doing so. Moreover, as the increased number of television channels does not prevent them from being controlled by a small number of operators (or, in theory, a single one), especially if they hold most of the economic resources/advertising revenues available, the issue of external pluralism, as identified above, will persist.²⁸ In addition, many issues related to content regulation for reasons of pluralism (thus, internal pluralism issues) will remain topical, since technological developments cannot completely resolve them.

Media pluralism will, therefore, remain at the heart of media regulation in this new audiovisual landscape since, as pointed out above, it is rooted first and foremost in the value of democracy that it contributes to fostering in, and realising through, the media. Far from being a value in itself, technology is only one aspect of media pluralism, although it must nevertheless be taken into account in (the evolution of) regulation for the media and audiovisual sector. Moreover, other influential aspects of media pluralism and, hence, of the policy and regulatory interventions regarding audiovisual contents and broadcasting activity, are the political (in a broad sense: democratic) and cultural dimensions at stake in that principle. Concerning the latter in particular, policies to protect and promote media pluralism are also recognized as constituting an integral part of cultural policies. At the EU level, indeed, audiovisual and media policy and regulation have been very much approached and dealt with using cultural policy instruments adopted to support and supplement actions taken at the Member State level. Moreover, as recognised (now) by the Treaty on the Functioning of the

²⁸ See the Communication from the Commission to the Council and the European Parliament, Follow-up to the consultation process relating to the Green Paper on “Pluralism and media concentration in the internal market” (COM(94) 353 final, of 5 October 1994), notably at p. 34.

European Union (TFEU), cultural policy objectives permeate EU law. According to Article 167 TFEU, cultural objectives, and especially the respect and promotion of cultural (and linguistic) diversity, as manifested by the multiplicity of European identities, must always be taken into account by the EU when acting in any field covered by EU law.²⁹

Drawing in particular on these remarks, one could claim that media pluralism, as understood in these pages, being deeply connected with democracy, is a technologically neutral objective. Far from being a ‘burden’ of sector-specific regulation, the notion of media pluralism therefore still has an important role to play in the new audiovisual landscape, by providing sound rationales and justifications for regulatory intervention in the media sector. Nevertheless, it is true that sector-specific regulation (as shaped in the previous analogue environment) needs to be revised, to take into account the technological advances, from the perspective (perhaps) of an updated but technologically neutral regulation.³⁰ In fact the new technologies applied to the media bring new challenges for and threats to media pluralism.³¹ Issues such as (the possibility to foreclose) ‘access’ in all its various forms, such as access to content - as the very scarce resource nowadays from the point of view of both broadcasting platforms and viewers -³² become (one of) the subject matters that media regulation will increasingly have to deal with in the technologically modernized audiovisual landscape. Thus, media pluralism will remain an objective that regulators will need to deal with when acting in the media field. Bearing this in mind and looking in particular at the EU dimension, the following pages will offer an overview (in more concrete terms) of how this objective has affected and been acknowledged by EU law to date.

²⁹ See B. DE WITTE, “The Cultural Dimension of Community Law”, in *Collected courses of the Academy of European Law*, Dordrecht, Martinus Nijhoff, 1995, pp. 229-299; J. HOLMES, “European Community Law and the Cultural Aspects of Television”, in R. CRAUFURD SMITH (ed.), *Culture and European Union Law*, Oxford, OUP, 2004, pp. 169-203.

³⁰ For an appraisal of other grounds that still justify regulations, see D. GOLDBERG *et al.*, *Regulating the changing media: a comparative study*, Oxford, Clarendon Press, 1998, especially pp. 298-307.

³¹ See B. ROTENBERG, *The legal regulation of communications bottlenecks in European digital television* (PhD Thesis, European University Institute, 2005).

³² See F. BARZANTI, “Il diritto di accesso ai contenuti nel mercato radiotelevisivo digitale e multiplatforma”, in *Diritto dell’informazione e dell’informatica* [2007] 1, pp. 37-101.

Chapter II

Media Pluralism and EU Law: the Limits of the Traditional Approaches, Between Respect and Promotion

2.1 Media pluralism and EU law: mentions in and around the Treaties

In exploring the relationship between media pluralism and EU law, the TFEU constitutes a pertinent starting point. First, however, it should be pointed out that the body of the TFEU (or rather, the Treaties previously in force) did not contain the phrase “media pluralism” until 1997. Only at that time, with the adoption of the Treaty of Amsterdam amending (also) what was then the Treaty establishing the European Community (EC Treaty), was a Protocol annexed to the latter, making explicit reference to the notion of media pluralism.¹ Focusing in particular on PSB, this Protocol is mainly purported to offer an interpretative aid for the application of EU competition and state aid law to the funding of PSB.² The Protocol highlights the need to strike a balance between fulfilling the public service remit entrusted to PSB, as defined and organised at Member States’ level, and satisfying the common supranational interest in the efficient and undistorted functioning of the EU’s internal (broadcasting) market, and hence to reconcile the latter with the former.³ In dealing with a public service task with such a strong political dimension, the Protocol indicates that the reason for paying this special attention to PSB lies in the consideration that “the system of

¹ See Protocol on the system of public broadcasting in the Member States, OJ [1997] C 340/109. As for the Treaty of Amsterdam, this annexed Protocol entered into force on 1st May 1999.

² On this issue, see, in particular, R. MASTROIANNI, “Public Service Media and Market Integration: A Differential Application of Free Movement and State Aid Rules?”, in M. CREMONA (ed.), *Market Integration and Public Services in the European Union*, Oxford, OUP, 2011, pp. 149-178; H. HOBBELEN *et al.*, “The increasing importance of EC state aid rules in the communications and media sectors”, in *European Competition Law Review* [2007] 2, pp. 101-115; and R. CRAUFURD SMITH, “State Support for Public Service Broadcasting: The Position Under European Community Law”, in *Legal issues of economic integration* [2001] 1, pp. 3-22.

³ See, in particular, R. MASTROIANNI, “Il Protocollo sul sistema di radiodiffusione pubblica”, in *Il Diritto dell’Unione europea* [1998] 2-3, pp. 533-539, where he affirms that “pur in una formula infelice, il testo del Protocollo richiede dunque alle istituzioni comunitarie (in particolare, alla Commissione) un’applicazione delle norme rilevanti del Trattato in maniera da garantire il finanziamento del servizio pubblico di radiodiffusione [...]. Viene inoltre richiesto che detto finanziamento non sia tale da incidere sugli scambi in misura contraria all’interesse comune. Non si tratta dunque di un’aprioristica esenzione del comportamento degli Stati nei confronti delle emittenti pubbliche dall’applicazione delle norme del Trattato” (p. 538). More broadly, as pointed out by S. WEATHERILL, “Finding Space for Closer Cooperation in the Field of Culture”, in G. DE BURCA, J. SCOTT (eds.), *Constitutional change in the EU: from uniformity to flexibility?* Oxford, Hart Publishing, 2000, pp. 237-257, the Protocol “offers a further example of the anxiety to emphasize the key role of public services, but to admit that their operation cannot be immunised from EC trade law” (p. 248).

public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism”. Thus, by using the notion of media pluralism (albeit without actually defining it) and stressing the important contribution that PSB makes to its maintenance, the Protocol (indirectly) recognises media pluralism as a crucial component in the functioning of the democratic process at not only Member States’ but also the EU level.⁴

The Protocol on PSB is not, however, the only primary source of EU law in which the notion of media pluralism is mentioned. In fact, the Charter of Fundamental Rights of the European Union (hereinafter, the Charter) explicitly mentions the notion.⁵ In recognising freedom of expression and information as fundamental rights that belong to everyone, Article 11 of the Charter also states in paragraph (2), that the “freedom and *pluralism of the media* shall be *respected*” (*emphasis added*).⁶ As can be seen from the *travaux préparatoires* of the Charter, this paragraph (2) was inserted at a late stage in the lengthy process of drafting Article 11. Indeed, it was contained in an amendment that originally explicitly provided for the cultural and political pluralism of the media to be *guaranteed*.⁷ However, after further modifications, the final agreed and adopted version of Article 11(2) envisaged the significant change of the

⁴ See I. KATSIREA, *Public broadcasting and European law: a comparative examination of public service obligations in six Member States*, Alphen aan den Rijn, Kluwer Law International, 2008.

⁵ The Charter, first proclaimed in Nice in December 2000, then incorporated (as Part Two) in the Treaty establishing a Constitution for Europe – which did not enter in force – has finally been referred to (as adapted at Strasbourg on December 2007) by Article 6(1) of the Treaty on the European Union (TEU) as a legal source of the “same legal value of the Treaties”. Despite the vagueness of the term “value”, it could be argued that the main purpose of the provision in question is to confer on the Charter the same legally binding nature as the EU Treaties.

⁶ The wording of Article 11(1) of the Charter corresponds to the first two sentences of Article 10(1) ECHR: thus, as stated by Article 52(3) of the Charter itself, in so far as the rights contained in the Charter correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. In the text of Article 11 of the Charter, in any case, there is no reference to the possibility for the MS to require the licensing of broadcasting, television and cinema enterprises, nor to a catalogue of the possible grounds for limiting the freedom of expression: instead, both elements are expressly stated respectively in Article 10(1) (last sentence) and Article 10(2) of the ECHR. This gap is filled, however, by the application of the general provision embodied in Article 52 of the Charter. Moreover, as clarified – without, however, any binding legal value – by the Explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter (CHARTE 4473/00 CONVENT 49, 11 October 2000), the limitations that may be imposed on the rights recognised in Article 11(1) do “not exceed those provided for in Article 10(2) of the [ECHR], without prejudice to any restrictions which Community competition law may impose on Member States’ rights to introduce the licensing arrangement referred to in the third sentence of Article 10(1) of the ECHR”.

⁷ According to M. PANEBIANCO (ed.), *Repertorio della Carta dei Diritti Fondamentali dell’Unione Europea*, Milano, Giuffrè Editore, 2001 (at p. 156), in the language in which it was originally drafted, this limb of the abovementioned amendment, presented by three Italian members of the Convention (namely, Rodotà, Paciotti and Manzella – the overall amendment suggested an alternative formulation for the whole Article 11), stated that “è assicurato il pluralismo culturale e politico dei mezzi di comunicazione di massa” (*emphasis added*).

verb from “*guaranteed*” to “*respected*”.⁸ Thus, on the one hand, the inclusion of the principle of media pluralism in the Charter (again, albeit not clearly defined) can surely be taken as an indicator of its acknowledged relevance as a principle resulting from the constitutional traditions common to the Member States and, hence, of the necessity to observe it as a general principle of EU law as it stems directly from the freedom of expression.⁹ On the other hand, Article 11(2) of the Charter reveals (and reinforces) the EU’s prevailing attitude of non-interference (or negative/‘non-harming’ stance) regarding media pluralism, rather than a proactive approach seeking to effectively and directly guarantee and promote it EU-wide.

This last statement, however, contains various nuances that need to be explained: this will be done later on, focusing in particular on the underlying legal rationales and reasoning. Nevertheless, it highlights, once more, the two basic attitudes towards media pluralism, as mentioned above: the passive/respect-oriented approach and the active/promotion-driven one. Both approaches appear to be reflected at the EU level, although to a different extent. Moreover, the two approaches can be related to the two different routes of the internal market-making process arising from the Treaties. These are, on the one hand, the route of negative integration based on the application of the free movement (and competition) rules and the removal of national barriers to trade (and of market players’ anti-competitive behaviours) and, on the other hand, the route of positive harmonisation, based on the adoption of regulatory measures to approximate national provisions envisaging justified obstacles to trade integration. While far from being a definitive classification, the following exposition will show that there are interrelations and linkages between the two different strategies for

⁸ See G.E. VIGEVANI, “Il Pluralismo dei Mezzi di Comunicazione di Massa nella Carta dei Diritti”, in *Rivista Italiana di Diritto Pubblico Comunitario* [2003] 5, pp. 1247-1266, in particular where he affirms that “tale modifica rispondeva indubbiamente alla preoccupazione di non legittimare attraverso tale norma una automatica crescita di competenze dell’Unione in questo settore” (p. 1248).

⁹ Moreover, as clarified by the aforementioned Explanations to the Charter, Article 11(2) “spells out the consequences of paragraph (1) regarding freedom of the media. It is based in particular on Court of Justice case-law regarding television, particularly in case C-288/89 (judgment of 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others* [1991] ECR I-4007) [fn 14 *infra*], and on the Protocol on the system of public broadcasting in the Member States annexed to the EC Treaty [fn 1 *supra*], and on Council Directive 89/552/EC (particularly its seventeenth recital) [fn 36 *infra*]”. On the connection between media pluralism and the constitutional traditions common to the MS, see above. In that last respect, note also Article 52(4) of the Charter, stating that “[in] so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions”. In general, and in substance, as pointed out by L. WOODS, “Article 11: Freedom of Expression and Information”, in S. PEERS *et al.* (eds.), *The EU Charter of Fundamental Rights: a commentary*, Oxford, Hart Publishing, 2014, pp. 311-339, Article 11(2) of the Charter “states two things: first, that the media shall enjoy freedom of expression; and, secondly, that [MS] must ensure media pluralism. While the former do not imply the latter, pluralism does imply media freedom. It can therefore be seen as recognising the institution of the media and the important role that the media can play in a democracy. It is, however, not yet clear whether media pluralism should be viewed as an independent right seen as imposing positive obligations on the state” (p. 326).

market-making and the two different attitudes towards media pluralism. Beyond the complexities and varieties within the different approaches, a common bottom-line will be identified among the difficulties and limitations involved so far in the development of sound and far-reaching strategies regarding media pluralism at the supranational level, and specifically within the European audiovisual space.

2.2 Negative integration and respect of media pluralism: Member States' domain?

If one looks, first, at the process of market integration through the application of the free movement provisions, one will note that this process has also significantly affected the broadcasting (and, more generally, the media) sector, particularly since the 1970s.¹⁰ The European Court of Justice (ECJ) recognized in *Sacchi*¹¹ that “in the absence of express provision to the contrary in the Treaty, a television signal must, by reason of its nature, be regarded as provision of services” and, hence, must be considered as within the scope of application of (now) Article 56 TFEU. This paved the way for challenges against many regulatory measures adopted at the national level to govern the broadcasting sector, as they were alleged to create obstacles to trade that needed to be removed (unless justified) in order to ensure the full realisation of the fundamental freedoms.

However the ECJ found that many of the national regulatory measures challenged, which were mainly related to broadcasting, had been adopted on the grounds of the maintenance and respect of media pluralism. This finding consequently implied an appraisal by the ECJ of the notion of media pluralism.

2.2.1 Media pluralism in the case-law of the European Court of Justice (ECJ)

Within its case-law on that matter, the ECJ has primarily been concerned with assessing whether media pluralism is to be considered as a domain reserved to Member States' regulatory intervention and what is the nature of its relationship with the fundamental

¹⁰ This is no coincidence, since broadcasting activities (*de facto*) acquired a potentially growing trans-national dimension in that period, mainly due to the development of cable and satellite transmission technologies.

¹¹ Case 155/73, *Sacchi* [1974] ECR 409, § 6. It is also stated therein that “it follows that the transmission of television signals, including those in the nature of advertisements, come, as such, within the rules of the Treaty relating to services [...]. On the other hand, trade in material, sound, recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for goods” (§ 6-7).

(economic) freedoms.¹² Looking at the pertinent ECJ case-law, one may note, in general, that despite the many judgments on this matter, the ECJ has not provided a definition of media pluralism, unlike national constitutional courts or relevant ECtHR judgments (as recalled above). However, the ECJ has developed its own understanding of media pluralism by making extensive reference to existing national and, in particular, ECtHR case-law. Thus, the ECJ has (on almost all relevant occasions) affirmed that ensuring media pluralism is connected with the freedom of expression as protected by Article 10 ECHR, which is one of the fundamental rights guaranteed by the EU legal order (via Article 6 TEU).

Moving on from this general remark, one could highlight, in particular, three main points that represent different perspectives in the ECJ's appraisal of media pluralism.

First, on the several occasions that the ECJ has had the opportunity to deal with media pluralism within the context of the application of free movement rules (and in particular the freedom to provide services, as in now Article 56 TFEU), it has created a consistent set of case-law. In this set of cases, media pluralism is generally classified as a ground upon which certain national measures resulting in impediments to trade can be justified. This already transpires from the very first judgments on the matter and continues to the present day. Indeed, in all these rulings the ECJ, while not including media pluralism as one of the strictly interpreted grounds for justification (now) listed in Article 52 TFEU,¹³ explicitly recognizes it as part of a cultural policy that may constitute an overriding requirement of general interest which, then, justifies a restriction of the freedom to provide services.¹⁴ While affirming that

¹² For a more in-depth analysis of the ECJ case-law on this matter, see F. BARZANTI, "La giurisprudenza della Corte di giustizia dell'Unione europea in tema di pluralismo dell'informazione", in R. PISILLO MAZZESCHI *et al.* (eds.), *Il diritto al pluralismo dell'informazione in Europa e in Italia*, Roma, RAI-ERI, 2012, pp. 205-229; and F. BARZANTI, "Brevi note sulla giurisprudenza della Corte di giustizia dell'Unione europea in tema di pluralismo dell'informazione", in *Il Diritto dell'Unione europea* [2012] 3, pp. 461-483.

¹³ See Case 352/85, *Bond van Adverteerders v. Netherlands* [1988] ECR 2085, particularly § 38-39, and Case C-211/91, *Commission v. Belgium* [1992] ECR I-6757.

¹⁴ For example, see Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, concerning certain restrictions imposed on the re-transmission of advertisements contained in radio and television programmes broadcast from other MS; Case C-353/89, *Commission v. Netherlands* [1991] ECR I-4069, concerning the obligation to use the services of a national undertaking for the production of radio and television programmes; Case C-23/93, *TV10* [1993] ECR I-4795; Case C-11/95, *Commission v. Belgium* [1997] ECR I-4115, concerning the introduction of a preliminary licensing system for the cable re-transmission of televised programmes broadcast from other Member States, particularly § 54; and also Case C-250/06, *UPC* [2007] ECR I-11135, concerning the obligation imposed on Belgian cable operators to broadcast, in the bilingual region of Brussels-Capital, television programmes transmitted by certain private broadcasters designated by the authorities of that State (the so-called 'must carry' rules, discussed below), which was also at stake in Case C-134/10, *Commission v. Belgium* [2011] ECR I-1053, where that MS was condemned for failure to fulfil its obligations under Article 56 TFEU and the provisions of Directive 2002/22/EC of the EP and of the Council, of 7 March 2002, on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive'; OJ [2002] L 108/51), having incorrectly transposed Article 31 thereof,

measures amounting to non-discriminatory restrictions on the free movement of services which seek to achieve the objective of safeguarding media pluralism may be justified, the ECJ has nonetheless rigorously assessed their proportionality and necessity. As a result of this scrutiny, many such measures have been deemed effectively unjustifiable.¹⁵ In so doing, despite recognizing media pluralism as (part of) a policy domain reserved to the Member States, to be respected and not hindered by market integration, the ECJ has, in fact, interfered in this area frequently and increasingly actively.¹⁶

A second point that could be raised is that in its case-law on media pluralism the ECJ has also stressed the dimension of fundamental rights inherent therein (as mentioned above), especially in relation to the freedom of expression, recalling that fundamental rights form an integral part of the general principles of law, the observance of which it guarantees.¹⁷ Accordingly, in ensuring the exercise of fundamental economic freedoms, the ECJ has also guaranteed the respect of the fundamental right to freedom of expression and the related maintenance of media pluralism. Thus, in balancing different fundamental rights and principles – none of which are regarded as absolute – the ECJ has demonstrated that trade integration cannot, by any means, take place at the expense of other policy preferences. This

on ‘must-carry’ obligations (on the application of which, see also Case C-336/07, *Kabel Deutschland* [2008] ECR I-10889).

¹⁵ For an example of measures found not to be objectively necessary to safeguard the legitimate objective of media pluralism, and, hence, the suggestion of alternative measures to pursue the same objective see Case C-288/89 *Gouda*, fn 14 *supra*, § 24-25; for a positive example, see Case C-148/91, *Vereniging Veronica Omroep Organisatie* [1993] ECR I-487, especially at § 9-13.

¹⁶ For a significant example of such ‘interference’ on the part of the ECJ, see Case C-213/07, *Michaniki* [2008] ECR I-9999, where the Court ruled that EU law (notably, Council Directive 93/37/EEC, of 14 June 1993, concerning the coordination of procedures for the award of public works contracts, OJ [1993] L 199/54; as amended in 1997) precludes a provision of a MS establishing an irrebuttable presumption of general incompatibility between the sector of the media and that of public contracts, although that national provision was enshrined in the Greek Constitution and was grounded (inter alia) on the protection of media pluralism (see, in particular, § 27 of the related Opinion of AG Poiares Maduro, of 8 October 2008). On the action and different approaches adopted by the ECJ as regards the protection of relevant national values (such as, indeed, media pluralism) within the context of EU (free movement) law, see L. AZOULAI, “The European Court of Justice and the duty to respect sensitive national interests”, in M. DAWSON, B. DE WITTE, E. MUIR (eds.), *Judicial Activism at the European Court of Justice*, Cheltenham, Edward Elgar, 2013, pp. 167-187, notably at pp. 180-186.

¹⁷ See Case C-260/89, *ERT* [1991] ECR I-2925, § 41, on the compatibility with internal market provisions, as well as with Article 10 ECHR, of the (radio and) television broadcasting’s monopoly regime (formerly) established in Greece, where the Court notably affirmed (at § 43) that, where MS relies on overriding requirements to justify rules which are likely to obstruct the exercise fundamental economic freedoms, such justification “must [also] be interpreted in the light of the general principles of law and in particular of fundamental rights” (including, thus, freedom of expression and media pluralism). For the ‘constitutional’ implications of this judgment (where the ECJ clearly stated that national measures falling within the field of EU law must be governed by EU fundamental rights norms), see D. CHALMERS, “Looking Back at *ERT* and Its Contribution to an EU Fundamental Rights Agenda”, in M. POIARES MADURO, L. AZOULAI (eds.), *The past and future of EU law: the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Oxford, Hart Publishing, 2010, pp. 140-150.

shows, furthermore, that trade law is permeated by and needs to be reconciled with broader values that have to be respected in its application.¹⁸ Media pluralism is one of these values. Moreover, the value of media pluralism, as it is now explicitly embodied (also) in the Charter, could have an even greater effect on the balancing exercise performed when the ECJ judges not only the compatibility of national measures restricting trade with the law on free movement,¹⁹ but also the validity of EU law provisions, especially in the light of the safeguarding of (other) fundamental rights.²⁰ In the future, this could also possibly lead the ECJ to provide a more detailed and precise definition and recognition of the notion of media pluralism itself.

The third and final point regarding the relationship between negative integration and media pluralism in the case-law of the ECJ is that the realization of the former (and of the freedom to provide services in particular) in the media market and the maintenance of the latter are often seen as reciprocally instrumental and thus almost coinciding.²¹ This interpretation stems from understanding the freedom to provide services in the field of television broadcasting (in particular) as a specific manifestation of the freedom of expression grounded in the principle of pluralism.²² In essence, the development of such an argument would ultimately lead to a

¹⁸ For a concrete example in the ECJ case-law, see Case C-368/95, *Familiapress* [1997] ECR I-3689, concerning an Austrian ban on the marketing of magazines containing prize crosswords, where the balancing exercise involved the free movement of goods (the goods being a German magazine with crosswords, to be sold in Austria), the freedom of expression (on the part of the publisher of the German magazine) and the maintenance of pluralism (of the Austrian press). Interestingly, the Court pronounced itself on almost the very same provisions (not only designed to protect consumers but also to pursue other objectives, such as, notably, safeguarding media pluralism) in Case C-540/08, *Mediaprint Zeitungs- und Zeitschriftenverlag* [2010] ECR I-10909, ruling (on that occasion) on their incompatibility with Directive 2005/29/EC of the EP and of the Council, of 11 May 2005, concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the EP and of the Council and Regulation (EC) No 2006/2004 of the EP and of the Council ('the Unfair Commercial Practices Directive'; OJ [2005] L 149/22).

¹⁹ More broadly on this (and on the relevance of the Charter in the process of creating the internal market) see S. WEATHERILL, "The Internal Market", in S. PEERS, A. WARD (eds.), *The European Union Charter of Fundamental Rights*, Oxford, Hart Publishing, 2004, pp. 183-210.

²⁰ See notably Case C-283/11, *Sky Österreich* [2013] (mentioned at fn 48 *infra*).

²¹ Beyond the case-law, the same position also emerges from the Commission's Communication to the Council, *Television Without Frontiers*, Green Paper on the establishment of the common market for broadcasting, especially by satellite and cable (COM(84) 300 final, of 14 June 1984), p. 149; and from the already cited Green Paper on Media Pluralism, p. 71. In the academic literature, see I. SCHWARTZ, "La liberté d'expression (Art. 10 CEDH) et la libre prestation des services (Art. 59 Traité CEE) dans le domaine de la radiodiffusion télévisuelle", in A. CASSESE, A. CLAPHAM, (eds.), *Transfrontier television in Europe: the human rights dimension = La télévision transfrontière en Europe dans la perspective des droits de l'homme*, Baden-Baden, Nomos Verlagsgesellschaft, 1990, pp. 165-188; as well as R. MASTROIANNI, "Diritti dell'uomo e libertà economiche fondamentali nell'ordinamento dell'Unione europea: nuovi equilibri?", in *Il Diritto dell'Unione europea* [2011] 2, pp. 319-355 (notably at pp. 329-332).

²² For a significant account of this position, see the Opinion of AG Poiares Maduro, of 12 September 2007, in Case C-380/05, *Centro Europa 7* (especially at § 39). In the judgment rendered in that same case ([2008] ECR I-

reconsideration of the process of negative integration, more in terms of a proactive attitude towards the maintenance of media pluralism.

Therefore, what emerges from the combination of these three perspectives, despite some possible contradictions, is mainly that, to date, for the ECJ media pluralism appears to be an effect of the full application of the free movement of services provisions and the realisation of the internal market.

2.2.2 The limits of competition law: general remarks

The creation of a single European market depends not only on the removal of national obstacles to trade, but also on the prevention of behaviours on the part of market players that can partition the market and undermine its efficient functioning. Thus, by tackling such behaviours, EU competition law has a major role to play in the realisation of the internal market.²³

The same obviously holds true for the internal market in broadcasting. Moreover, the application of competition rules (namely, Articles 101 and 102 TFEU) within this specific market can also play a fundamental role in guaranteeing the respect of media pluralism: for example, by favouring liberalisation, preventing the abuse of dominant positions, tackling horizontal and vertical concentrations that can foreclose access to the market, especially by new players, and, in the language of the digital age, by removing obstacles preventing access to contents and platforms for operators in the new broadcasting sector value chain. All of these market obstacles and barriers are evidently detrimental to media pluralism. By removing them, therefore, competition law can contribute to safeguarding media pluralism itself.

Based on these (and other similar) findings, many argue in favour of competition law rather than ad hoc regulatory interventions playing a crucial and primary role in achieving the objective of media pluralism. Those who argue in favour of competition law having such a role usually describe media pluralism either as an almost ‘spontaneous’ result of the

349), the ECJ established, in essence, that the Italian system for the allocation of radio frequencies for television broadcasting activities at stake, which essentially favoured incumbent operators and prevented new ones from entering the market, infringed EU law, as it did not comply with the principle of freedom to provide services and did not meet the objective, transparent, non-discriminatory and proportionate selection criteria provided by the relevant EU legislation on that respect (i.e., the EU measures adopted in the field of electronic communications, for which see fn 45 *infra*): overall, although the Court does not make any explicit reference to media pluralism therein, it seems to suggest that the full application of EU law can contribute to helping the latter to flourish.

²³As a background to the following considerations, see N.TH. NIKOLINAKOS, *EU Competition law and regulation in the converging telecommunications, media and IT sectors*, Alphen aan den Rijn, Kluwer Law International, 2006.

undistorted functioning of a market that is not unnecessarily over-regulated²⁴ or (although a more political than economic objective), as a result whose realisation will depend above all on the outcome of the market forces.²⁵

However, if one agrees with the premises (and the development) of the reasoning presented here and, thus, shares the understanding of media pluralism suggested above, it follows that one would see competition law instruments, despite their indisputable usefulness, as being able to make a limited contribution to the achievement of media pluralism, in particular in its (coessential) qualitative (and not just quantitative) dimension, as underlined above. The attainment of this objective will require effective (and qualitative) policy choices, aimed at protecting and promoting (the diversity of) the political and cultural values that market mechanisms and competition law instruments alone cannot ensure.²⁶ While competition law is unavoidably influenced by and must take into account (to a certain extent) sector-specific policy choices characterising the markets in which it operates, it appears to be driven first and foremost by efficiency arguments. These arguments limit the scope and the effects of the application of competition law (and the results it delivers) in guaranteeing the respect of those policy objectives. In the broadcasting market, for instance, where the maintenance of pluralism is a sector-specific policy choice that implies (among other things) the need to preserve a non-concentrated market structure and, thus, to tackle dominance *per se*, efficiency-driven competition law mechanisms will have little room for manoeuvre and a limited role to play in guaranteeing media pluralism, as they will not automatically lead to intervention against dominant positions.²⁷

Moreover, further limits of EU competition law in guaranteeing the respect of media pluralism are shown, for instance, in the case of merger control. While establishing the Commission's sole jurisdiction for mergers of an EU dimension, Article 21(4) of the Merger

²⁴ See V. ZENO-ZENCOVICH, *La libertà di espressione*, Bologna, Il Mulino, 2004, notably at p. 43.

²⁵ See POLO, cited.

²⁶ Moreover, as pointed out in the Green Paper on Media Pluralism (mentioned above), "Community competition law will serve the interests of pluralism only if the situation raises problems which can be expressed in its terms. But that is not always the case" (p. 83); the Paper goes on to say, more broadly, that "although there is a convergence between them, competition and pluralism are fundamentally different things. Effective competition is concerned with the economic behaviour of undertakings, while pluralism is concerned with the diversity of information" (ibid.).

²⁷ In this respect, there are also more 'technical' limits in ordinary competition law: such as turnover threshold limits; or difficulties in defining markets and measuring dominance in cross-media concentration cases that are, nevertheless, extremely detrimental to media pluralism.

Regulation²⁸ nonetheless allows Member States to ‘interfere’ (or rather, interact) and take appropriate measures in merger cases where a legitimate interest – i.e., a ground other than competition-related ones taken into account by the Merger Regulation itself – needs to be protected, such as the “plurality of the media”. This provision implicitly reinforces the classification of media pluralism as a policy domain of Member States. However, it also implicitly recognises the limits of EU competition law instruments, such as merger control indeed, in safeguarding and effectively ensuring the respect of media pluralism.²⁹

2.3 Positive harmonisation and the promotion of media pluralism: room for EU intervention?

Turning, then, to the process of market-making through the enactment of common rules to structure it and govern its functioning, one may note that certain influential pieces of harmonised legislation concerning the regulation of media services (and television broadcasting in particular) are in place at EU level.

We have already seen that broadcasting is not mentioned as an EU competence in the TFEU (or in earlier Treaty versions). Nonetheless, as shown above, the broadcasting sector has been deeply affected by the impact of the internal market freedoms, as their application has effectively contributed to the creation of a common broadcasting market. The ECJ has mainly paved the way for this market to be regulated partly by means of harmonised measures

²⁸ See Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ [2004] L 24/1, which repealed Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ [1989] L 395/12, containing a similar provision (namely, Article 20(3) thereof).

²⁹ For a (relevant) instance where this provision has been referred to, see the Commission’s Decision of 21 December 2010 (C(2010) 9684), in Case No COMP/M.5932 – *News Corp/BskyB*, unconditionally approving the acquisition of sole control on the part of News Corp (i.e., a diversified international media company active in a number of sectors, including the production of films, television shows, and newspapers) over BskyB (i.e., the leading satellite pay-TV operator in the UK and Ireland), as the (proposed, but eventually abandoned) merger did not raise any concerns on completion grounds, but also making it clear that such approval was without prejudice to the media plurality review conducted by the relevant UK authorities, having a different scope and focusing on issues going beyond a (mere) competition assessment. Indeed, in general, “European competition law cannot replace – nor does it intend to do so – national media concentration controls and measures to ensure media pluralism. Article 21(4) of the Merger Regulation allows Member States to apply additional controls in order to protect pluralism in the media” (see the already cited Commission Staff Working Document on Media Pluralism, p. 7). Much more could be said, in more detail, about the relationship between competition law and media pluralism, and about the possibilities/desirability/legitimacy and complexities of competition law taking media pluralism concerns into account; as well as on the Commission’s practice under the Merger Regulation and on the application of (what is now) Article 101 TFEU, especially in the light of non-economic considerations: for an account of the main issues at stake, see, among many, M. ARIÑO, “Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps”, in *Communications & Strategies* [2004] 2, pp. 97-128, notably at pp. 116-122.

adopted at the supranational level.³⁰ In early cases such as *Debauve*³¹ and *Coditel*³², the ECJ upheld restrictive national regulations concerning certain features of broadcasting activity. These measures were deemed not to be discriminatory and seen as intended to serve objectives of general interest. As the ECJ specified, the persistence of such measures, creating impediments to the freedom to provide cross-border television broadcasting services, was rendered possible by the absence of any harmonization in the relevant rules on the matter. Prompted by this and by the need to complete the internal market (also in the field of broadcasting services), the Commission decided to act, successfully proposing the harmonisation of such relevant rules in 1984.³³ Less than ten years later, in 1992, it made a second, less successful, attempt at launching a debate on the possibility of harmonising other elements of the disparate national broadcasting regulations concerning restrictions on media ownership.³⁴

However, among the elements of harmonised legislation actually adopted in order to favour the completion and the effective functioning of the internal market for broadcasting services, as well as among those that were proposed but never entered into force, certain ‘compensatory measures’ were included in addition to elements dealing directly with strictly internal market objectives. These ‘compensatory measures’ are (or would have been) provisions addressing ‘non-market objectives’, including media pluralism.³⁵ Thus, the

³⁰ See notably A. ARENA, “The ECJ as Agenda Setter in European Audiovisual Media Policy”, in K. DONDEERS, C. POWELS, J. LOISEN (eds.), *The Pelgrave Handbook of European Media Policy*, London, Pelgrave, 2014, pp. 218-238, stressing the prominence of the Court’s role in guiding the EU legislator when shaping the norms applicable to this policy field and striking therein a balance between the liberalisation of audiovisual media services and the safeguarding of non-trade values (such as media pluralism) that characterise this domain.

³¹ Case 52/79, *Procureur du Roi v. Debauve* [1980] ECR 833; concerning the Belgian legislation used to order a total ban on television advertising, without any discrimination between national/non-national broadcasters.

³² Case 62/79, *Coditel v. Ciné Vog Films* [1980] ECR 881; concerning the Belgian copyright law that provides for the possibility to obtain exclusivity in the broadcasting of films, thus preventing cable operators from airing films originally broadcast from another MS.

³³ In the words of the Green Paper on Television Without Frontiers, fn 21 *supra*, the “simultaneous applicability of the rules of several Member States to the same facts leads in practice to considerable uncertainty in the law and creates serious difficulties. The observance or enforcement of contradictory rules renders in many cases the free movement of broadcasting between Member States impossible. From being the rule, the free movement of service becomes an exception. This makes the harmonisation of such advertising and copyright rules imperative and a matter of urgency. The Court’s reference to the approximation of laws is therefore quite unambiguous” (p. 149).

³⁴ See, in particular, the already cited Commission Green Paper on Media Pluralism.

³⁵ More broadly on the ‘contamination’ of internal market legislation by non-market values, and for a critical interpretation of the *Tobacco Advertising* judgment (i.e. Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419), in this respect, where it denies the existence for the EU legislature of “a general power to regulate the internal market” (§ 83), see B. DE WITTE, “Non-market values in internal market legislation”, in N. SHUIBHNE (ed.), *Regulating the Internal Market*, Cheltenham, Edward Elgar Publishing, 2006, pp. 61-86.

question inevitably arises of the extent to which the EU can act and has legitimately acted in this respect: in our case, for the *promotion* of media pluralism. On the other hand, it is beyond doubt that any relevant piece of internal market legislation will have to at least *respect* (if not take into account and promote) media pluralism as a general principle of EU law, as noted above.

Below, in reviewing both actual and attempted EU hard-law interventions to promote media pluralism, a distinction will be drawn between internal and external pluralism measures enacted at EU level, which will be addressed separately, while not neglecting the issue of competence and the (constitutional) limits it poses to the adoption of harmonised EU legislation.

2.3.1 Positive harmonisation and internal pluralism: from the Television Without Frontiers (TWF) Directive to the Audiovisual Media Services (AVMS) Directive

As mentioned above, the 1984 initiative to introduce a Directive on the harmonisation of certain national regulations for broadcasting was successful. In 1989, indeed, such a Directive, based on what now is 53 TFEU (and Article 62 TFEU), was adopted.³⁶ The label ‘Television Without Frontiers’ Directive (hereinafter, TWF Directive) would almost seem to indicate not only that television broadcasting is, by its very nature, an activity that physically transcends national borders, but also that some EU competence in the regulation of that sector is intrinsic in its cross-border character. By establishing fundamental principles relating to television broadcasting services within the EU, the TWF Directive immediately became a milestone of and a point of reference for EU audiovisual regulation and policy.³⁷ Closely modelled on and developed in parallel with the text of the European Convention on Transfrontier Television (ECTT),³⁸ the TWF Directive took into account the two-sided nature of audiovisual services:

³⁶ Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [1989] L 298/23. For a first commentary on this Directive, see A. TIZZANO, “La Direttiva CEE sulla «Televisione senza frontiere»”, in *Il Foro Italiano* [1990] 2, pp. 92-112.

³⁷ As a background to (and general reference for) that topic, see P. VALCKE, K. LEFEVER, *Media Law in the European Union*, Alphen aan den Rijn, Kluwer Law International, 2012, as well as J. HARRISON, L. WOODS, *European broadcasting law and policy*, Cambridge, Cambridge University Press, 2007.

³⁸ The ECTT (of 5 May 1989, ETS No 132), is an international Treaty, adopted (and subsequently amended) within the framework of the CoE. Despite its shared purpose and many formal similarities with the text of the TWF Directive, many recognise that while the latter is essentially based on the more economic rationale of the internal market, the ECTT is predominantly inspired by the protection of human rights and cultural values, which are key areas of concern to the CoE. On the ECTT, see also Part III below.

(between) market and culture. Indeed, on the one hand it favoured the free circulation of television broadcasting services by establishing the ‘country of origin principle’³⁹ and recurring to minimum harmonisation of some divergent national measures (for instance, those that regulate the quantitative and certain qualitative aspects of television advertising). On the other hand, it also introduced some more specific (and content-oriented) measures aimed at fostering the protection of minors, respect for human dignity and protection of the consumer. Moreover, against the backdrop of the cross-sectional clause of (now) Article 167(4) TFEU on cultural policy, the TWF Directive included provisions such as the so-called ‘European-quota rule’,⁴⁰ intended to promote the distribution of European television works and independent productions (and indirectly to support both of the relative industries),⁴¹ as well as (following its first amendment in 1997)⁴² measures to ensure that events regarded by Member States as being of major importance for society cannot be broadcast in such a way that a substantial part of the population of that Member State could be prevented from accessing them.⁴³ These last couple of examples clearly show that the TWF Directive, beyond its primary purpose of facilitating the free movement of television broadcasts within the EU (in terms of both freedom to provide services and freedom of establishment), was also clearly intended to promote non-market values, such as internal media pluralism, and protect cultural diversity.

³⁹ I.e. broadcasting activities are subject to the rules of the country in which the broadcaster is established, while the receiving States have to abstain from exercising their control over the former and from restricting reception or retransmission – apart from certain exceptional cases explicitly provided for and following the procedure indicated by the TWF Directive – in the areas coordinated by the TWF Directive. In fact, the mutual recognition mechanism applies.

⁴⁰ Known also, more properly, as the ‘European content requirement’, Article 4 provides for MS to ensure “where practicable and by appropriate means” that broadcasters devote the majority of their transmission time to European works, as defined by the TWF Directive itself; Article 5 demands that the same broadcasters reserve “at least 10% of their transmission time [...] or at least 10% of their programming budget” for European works created by producers who are independent of broadcasters. For a thorough analysis of these provisions see B. DE WITTE, “The European Content Requirement in the EC Television Directive-Five Years After”, in *The Yearbook of Media and Entertainment Law* [1995] I, pp. 101-127, who describes the effect of such provisions in ensuring “the fair operation of the internal market” (p. 119).

⁴¹ Direct support from the Community for the European audiovisual content industry comes in the so-called MEDIA programme, grounded on (now) Article 173(3) TFEU (i.e. industrial policy).

⁴² Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [1997] L 202/60. For a comment on this amending Directive and its impact on the original TWF Directive, see P. KELLER, “The New Television Without Frontiers Directive”, in *The Yearbook of Media and Entertainment Law* [1997-1998] III, pp. 176-195.

⁴³ See Article 3a of the TWF Directive, as amended in 1997 (on the interpretation of which see notably Cases C-201/11 P, *UEFA v. Commission*, C-204/11 P, *FIFA v. Commission*, and C-205/11 P, *FIFA v. Commission* [2013]).

The successor of the TWF Directive, i.e. the ‘Audiovisual Media Services’ Directive (hereinafter, the AVMS Directive), moves in very much the same direction.⁴⁴ The AVMS Directive is, in fact, the result of a second and more radical amendment to the TWF Directive, needed in order to adapt the latter to the technological developments taking place in the media sector, and to structure and consolidate (to a certain extent) at EU level one of the two poles of the ‘law of convergence’, which is still being developed.⁴⁵ Apart from the important change in the gradual extension of the scope of application to all ‘audiovisual media services’,⁴⁶ and in the relaxation of more stringent provisions (such as those regarding advertising),⁴⁷ from the point of view of measures intended to promote internal media pluralism, the AVMS Directive has not only confirmed those of the TWF Directive (referred to above). In fact, it has also extended the scope of the ‘European-quota rule’ and added a measure providing for a right to short news reports, so as to ensure the freedom and plurality of information.⁴⁸ Thus, notwithstanding the language of the abovementioned provisions,

⁴⁴ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ [2007] L 332/27; now, in its codified version, Directive 2010/13/EU of the European Parliament and of the Council, of 10 March 2010, OJ [2010] L 95/1. For a thorough commentary on this Directive, see: R. MASTROIANNI, *La direttiva sui servizi di media audiovisivi e la sua attuazione nell’ordinamento italiano*, Torino, Giappichelli, 2011; F. JONGEN (ed.), *La directive Services de Médias Audiovisuels: le nouveau cadre juridique de l’audiovisuel européen*, Louvain-la-Neuve, Anthemis, 2010; O. CASTENDYK, E. DOMMERING, A. SCHEUER (eds.), *European media law*, Alphen aan den Rijn, Kluwer, 2008.

⁴⁵ In this respect, the AVMS Directive will represent the core of content regulation (as one pole of the ‘law of convergence’), while the soul of infrastructural/transmission regulation (the second pole) will be the so-called “2002 electronic communications regulatory package” (for which, see Part III below) and, within it, particularly the Framework Directive, i.e. Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ [2002] L 108/33 (now amended by Directive 2009/140/EC of the European Parliament and of the Council, of 25 November 2009, OJ [2009] L 337/37). See, in this context, recital (5) of Directive 2002/21/EC, which also significantly states that “the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”. Thus, it seems that electronic communications regulation could serve as an instrument to tackle certain media pluralism issues arising from the infrastructural/content-transmission layer, such as bottlenecks at the level of broadcasting platforms, which could be extremely detrimental to external pluralism in particular: for a thorough reflection on this topic, see P. IBÁÑEZ COLOMO, *European communications law and technological convergence: deregulation, re-regulation and regulatory convergence in television and telecommunications*, Alphen aan den Rijn, Kluwer Law International, 2012. More generally, on the ‘law of convergence’, see G. MORBIDELLI, F. DONATI (eds.), *Comunicazioni: verso il diritto della convergenza?*, Torino, Giappichelli, 2003.

⁴⁶ For the definition of ‘audiovisual media services’ see Article 1(a) of the AVMS Directive.

⁴⁷ For a thorough and critical analysis (of an almost definitive version) of the AVMS Directive and the mixed trends of de-regulation/(re)regulation within it, see R. CRAUFURD SMITH, “Media Convergence and the Regulation of Audiovisual Content: Is the European Community’s Audiovisual Media Services Directive Fit for Purpose?”, in *Current Legal Problems* [2007], pp. 238-277.

⁴⁸ See, respectively, Article 13 and 15 of the AVMS Directive. On the interpretation of the latter provision, see notably Case C-283/11, *Sky Österreich* [2013], where, in addressing a question regarding the validity of that same provision on the basis of an alleged infringement of the fundamental rights of the holder of exclusive

which sometimes appears to be more exhortative than binding; notwithstanding their dubious proportionality and their (indirect) relationship with industrial policy goals under (now) Article 173 TFEU; and despite the fact that the promotion of media pluralism as such is not mentioned in the operative part of the AVMS Directive (nor was it in the TWF Directive), media pluralism is still an influential and underlying goal that the abovementioned measures aim to achieve.⁴⁹

2.3.2 Positive harmonisation and external pluralism: the competence issue

Furthermore, in terms of the promotion of media pluralism, the EU has made more explicit attempts to intervene with ad hoc legislation when dealing with issues of external pluralism (and the control of media ownership in particular). However, it has failed to achieve any satisfactory or concrete results in this field. The main obstacle in the way of the EU passing a Directive dealing specifically with the issue of media pluralism and concentration has proven to be the lack of a clearly defined competence to act in this respect. The lack of effective political determination has also contributed, to a great extent, to the failure of the initiative

broadcasting rights, who is required by Article 15(6) of [the AVMS Directive] to authorise any other broadcaster established in the EU to make short news reports, without being able to seek compensation exceeding the additional costs directly incurred in providing access to the signal, the Court affirmed that, in “the light, first, of the importance of safeguarding the fundamental freedom to receive information and the freedom and pluralism of the media guaranteed by Article 11 of the Charter and, second, of the protection of the freedom to conduct a business as guaranteed by Article 16 of the Charter, the [EU] legislature was entitled to adopt rules such as those laid down in Article 15 of [the AVMS Directive], which limit the freedom to conduct a business, and to give priority, in the necessary balancing of the rights and interests at issue, to public access to information over contractual freedom” (§ 66).

⁴⁹ See, notably, the Opinion of AG Kokott, of 16 May 2013, in Case C-234/12, *Sky Italia*, where it is affirmed that the “principle of the freedom and pluralism of the media, as laid down in Article 11(2) of the Charter [...], is of great importance in a democratic society [and that the AVMS Directive] also pursues the aim of preventing restrictions on pluralism and freedom of televised information” (§ 74), referring on this respect to recital 8 of the AVMS Directive itself, according to which it is essential for MS “to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole” (but see also its recital 34, recognising that “to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union, only one [MS] should have jurisdiction over an audiovisual media service provider and pluralism of information should be a fundamental principle of the Union”; recital 48, emphasising the need “to promote pluralism through the diversity of news production and programming across the Union and to respect the principles recognised by Article 11 of the Charter” as regards the broadcast of events of high interest to the public; as well as recital 94, stating generally that the instruments MS choose to implement the AVMS Directive “should contribute to the promotion of media pluralism”). One of the issues raised in this case (which, however, was not dealt with by the ECJ in its judgment of 18 July 2013) was to determine whether a national rule, such as the (Italian) one at stake, providing for shorter hourly television advertising limits for pay-TV broadcasters than those set for private free-to-air broadcasters, was compatible with media pluralism, as enshrined in Article 11 of the Charter. The only other question – positively – addressed instead by the Court having been the compatibility of that rule with the relevant AVMS Directive (minimum harmonization) provisions, the principle of equal treatment, and Article 56 TFEU.

described below. Leaving the political dimension and obstacles aside, attention will now be (briefly) paid to the competence issue in relation to external pluralism.

a) The attempt to adopt a Directive on ‘Concentration and Pluralism’ (or rather, on ‘Media Ownership’)

The debate launched in 1992 with the Green Paper on *Pluralism and Media Concentration in the Internal Market* and followed by a lengthy and intensive consultation process, eventually (in 1996) led the Commission to propose the adoption of a Directive on “Concentration and Pluralism in the Internal Market”. The aim of this would-be Directive was to resolve the disparities between national regulations on media concentrations and set common (harmonised) standards for measuring and evaluating them at (former) Community level. While citing the rationale of the functioning of the internal market to legitimise its intervention, the (never formalised) proposal also clearly referred to the need for media pluralism at EU level and sought to ensure its promotion. The initiative failed. A second attempt to pass such a Directive, having amended it to involve a more flexible set of measures and almost freed it of references to the notion of media pluralism – as indicated even in the (new) title “Media Ownership in the Internal Market” – also met with a lack of success:⁵⁰ (several) further calls from the European Parliament for the Commission to act and initiate legislative proposals on that respect have also (so far) been left unattended to.⁵¹

b) In search of a legal basis

Apart from the political obstacles (both from Member States and within the Commission itself) to the success of this initiative, one could speculate on its limits – like those of any other future proposal to pass harmonised legislation specifically centred on external pluralism measures – from a constitutional viewpoint, considering the EU competence to act and the legal basis for the legitimacy of such legislation. In this respect, CRAUFURD SMITH has

⁵⁰ See HARCOURT, cited, pp. 62-89.

⁵¹ See, notably, the EP Resolution (P7_TA(2011)0094) of 10 March 2011 (on “media law in Hungary”), recalling its previous Resolution (P6_TA(2008)0459) of 25 September 2008 (on “concentration and pluralism in the media in the European Union”) and Resolution (P5_TA(2004)0373) of 22 April 2004 [on “the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights”]; but see also the EP Resolution (P5_TA(2002)0554) of 20 November 2002 (on “media concentration”), the EP Resolution on “on concentration of the media and pluralism” of 27 October 1994.

carefully analysed the various provisions already within the former EC Treaty that could be invoked as a basis for action in relation to media ownership.⁵² In listing all the possible legal bases, one by one, against the background of the subsidiarity principle (now under Article 5(3) TFEU), this Author excludes the likelihood that any of them could be resorted to for the adoption of a hard-law measure in this policy domain.

First and foremost, one could certainly share the Author's view when she explains that (now) Article 114 (as well as Articles 53 and 62) TFEU is intended to remove obstacles to the internal market and can only indirectly, and hence less effectively, be used to strengthen media pluralism. It could also be claimed that, while it may be difficult to ground any piece of legislation entirely devoted to the promotion of media pluralism on such a legal basis, on the other hand some room for the employment of such provisions could still be found, as long as the proposed (harmonising) measure will actually contribute to eliminating obstacles to the freedom to provide services, or to removing appreciable distortions to competition; moreover (complementary) pro-pluralism provisions will be necessary to guarantee the strengthened internal market, in terms of its quality and fair operation. Nonetheless, as can be inferred from the abovementioned ECJ case-law, as well as from the secondary legislation in force in this field, it is safe to admit that the internal market provisions do not offer a solid basis for the enactment of measures *specifically* centred on and devoted to media pluralism understood beyond the mere economic dimension.

Concerning other legal bases provided for by the Treaties and of possible use for the adoption of media pluralism measures, one can completely agree with CRAUFURD SMITH's argument that (now) Article 352 TFEU is "procedurally problematic" to this end and of limited aid "for measures which are at all controversial";⁵³ that (now) Article 25 TFEU (on Union citizenship) could possibly be used instead, although it imposes the high threshold of unanimity voting in the Council; and that (now) Article 106 TFEU, despite its attractiveness, "cannot be a suitable basis for introducing media ownership controls across the commercial and public service media sectors".⁵⁴

To the same end, one could also point to Article 14 TFEU, which provides a legal basis for regulations in the field of services of general economic interest. Indeed, this provision could

⁵² See R. CRAUFURD SMITH, "Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship", in *European Law Review* [2004] 5, pp. 652-672.

⁵³ See CRAUFURD SMITH, "Rethinking European Union competence in the field of media ownership: The internal market, fundamental rights and European citizenship", cited, p. 660.

⁵⁴ *Ibid.*

possibly be used to act only sectorially, for example only in the field of PSB. However, even if such an action could then be used to produce some benefits in terms of enhancing media pluralism, any initiative grounded on this legal basis would inevitably be limited to PSB, and would not therefore be capable of embracing the whole broadcasting market in which media pluralism should be reflected.

Finally, a potential new source of inspiration in the search for a suitable legal basis upon which to ground a targeted hard-law intervention on media pluralism could be the new provision introduced by the Treaty of Lisbon, corresponding to Article 11 TEU on the so-called “European citizens’ initiative”. This initiative enables a significant number of EU citizens from different Member States to call upon the Commission to propose legislation on matters where the former consider that a legal act of the Union is required for the purpose of implementing the Treaties. Thus such an initiative may bring to the fore – as has actually happened – the individuals’ quest to ensure the respect of their fundamental right to freedom of expression and information and, thus, media pluralism.⁵⁵ Nevertheless, while this provision could perhaps represent a new route for normative intervention in support of media pluralism, e.g. by serving as the basis for the adoption of measures on ownership transparency (extremely useful but nonetheless not sufficient to ensure pluralism), its possible (material) scope of application for the enactment of other measures in this same domain should not be overestimated. In fact, the background against which the European citizens’ initiative is called upon to operate is still dominated by, and well rooted in, the principle of conferral (or attributed competences), whereby if a competence is not attributed to the EU, it must remain within the Member States. Here, therefore, it seems that the lack of any direct competence on the part of the EU to intervene with targeted media pluralism measures, and in particular in relation to the external dimension of that pluralism, remains a problematic issue.⁵⁶

2.3.3 Limits and failures of EU hard-law interventions to promote media pluralism: taking stock

In brief, to conclude this excursus on the actual and potential hard-law interventions to promote pluralism within the media (and particularly in broadcasting) at EU level, the overall

⁵⁵ For details of the European citizens’ initiative on media pluralism, see Part III below.

⁵⁶ A very similar reasoning can be applied, *mutatis mutandi*, to Article 225 TFEU, which provides for the EP, acting by a majority of its Members, to request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties.

picture painted shows that such interventions appear to be either limited in their scope and effects – as in the case of the pro-internal pluralism measures embodied in the TWF/AVMS Directive(s) described above – or simply inexistent – as in the case of an EU media ownership regulation and, hence, external pluralism measures. Despite the emerging tendency to act positively to promote media pluralism and seek to build a consistent framework for the regulation of its different but coessential faces, only weak solutions have been provided and evident regulatory gaps persist at EU level. To a great extent, from a legal viewpoint this is probably all due to the EU lacking explicit and targeted competence in the matter at stake.

2.4 Combining the two dimensions and re-lunching a European approach to media pluralism: how and why?

The analysis conducted so far ultimately shows that even if the EU competences do not comprise media pluralism *per se*, and the actions taken so far to ensure media pluralism have been necessarily and severely limited, the EU is nonetheless clearly committed to the issue at stake.⁵⁷ Indeed, since the adoption of the AVMS Directive, the Commission has lunched various different initiatives on media pluralism, among which it is worth recalling here the study it commissioned regarding the development of a monitoring tool not only to focus on topical aspects (such as media ownership), but also to cover combinations of political and media power. This detailed study, published in 2009 and grounded on a risk-based approach, develops a so-called ‘European Media Pluralism Monitor’, combining economic, socio-demographic and legal indicators capable of covering issues such as media ownership, political pluralism, cultural and geographic diversity, as well as media types and genres, in order to offer (at least) a self-assessment tool to monitor real threats to pluralism in a concrete and objective manner.⁵⁸ While, according to the original plans, the study should have been

⁵⁷ Or, in other words, “whilst the protection of media pluralism is primarily a task for the Member States, it is for the Community to take due account of this objective within the framework of its policies” (Commission Green Paper on Services of General Interest, COM(2003) 270 final, of 21 May 2003, p. 45). As a background reference, see M. DI FILIPPO, *Diritto comunitario e pluralismo nei mezzi di comunicazione di massa*, Torino, Giappichelli, 2000.

⁵⁸ See ICRI *et al.*, *Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach (Final Report and Annexes: User Guide, MPM, Country Reports)*, Brussels: European Commission (July 2009), at http://ec.europa.eu/information_society/media_taskforce/pluralism/study/index_en.htm. See also P. VALCKE, “A European Risk Barometer for Media Pluralism: Why assess damage, when you can map risk?”, in *Journal of Information Policy* [2011] 1, pp. 185-216; P. VALCKE *et al.*, “The European Media Pluralism Monitor: Bridging Law, Economics and Media Studies as a First Step towards Risk-Based Regulation in Media Markets”, in *Journal of Media Law* [2010] 2, pp. 85-113; and P. VALCKE, “From Ownership Regulation to Legal Indicators of

followed by other (essentially, soft-law oriented) Commission actions (namely, the adoption of a Communication on indicators of media pluralism), no such action has taken place to date (the Commission having nonetheless supported ‘institutionalized’ qualified discussions in this policy domain).⁵⁹ The question therefore remains of how the EU can develop its role in ensuring respect for and promoting media pluralism and move forward. In other words, which alternative and complementary routes and forms could be used to ensure a more effective European approach to media pluralism remains an open issue.

The need to develop an approach to media pluralism at the European level arises from the interplay of many factors. One is that the naturally cross-national dimension of today’s audiovisual media services, and the consequent development of related cross-border markets at the expense of nation-confined media markets, increasingly render national policies and regulatory strategies not only less suitable to govern them and to deliver effective results, but also, if left alone, less incisive and successful in securing highly sensitive and fundamental objectives related to the development of those markets, other than the mere economic objectives. Among those fundamental objectives, as mentioned several times above, the respect and promotion of media pluralism is of primary relevance. A second reason why it is appropriate (if not strictly necessary) to construct a European approach to media pluralism is because the technological developments and related convergence between formerly separate sectors, such as the telecommunications and the audiovisual ones, entail the increasing correlation between and overlapping of their respective regulatory and policy instruments as well as their objectives, which used to be guaranteed separately by those instruments.⁶⁰ The EU has long acquired and expanded its broad competences in the telecommunications (now the electronic communications) market, which it has been liberalized and regulated at the Member States’ expense. Moreover, within this sector, the need has emerged to govern certain aspects in a coordinated fashion at the supranational level, such as (certain features of) radio spectrum management:⁶¹ these aspects evidently have a significant bearing on media

Media Pluralism: Background, Typologies, and Methods”, in *Journal of Media Business Studies* [2009] 3, pp. 19-42. For some preliminary observations on the study, see F. BARZANTI, “Il pluralismo dei media può essere monitorato?”, at http://www.key4biz.it/News/2009/06/18/Policy/pluralismo_riskbased_framework_Media_Pluralism_Monitor_Fabrizio_Barzanti.html (2009).

⁵⁹ For an account of the various other initiatives launched by the Commission after the release of the European Media Pluralism Monitor, see Part III below.

⁶⁰ See fn 45 *supra*.

⁶¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Reaping the full benefits of the digital dividend in

(especially broadcasting) policy and regulatory issues, such as, primarily, media pluralism. For these reasons a more effective and coordinated EU-wide approach to media pluralism will be required to ensure that such a delicate democratic issue does not succumb to (but rather coexists with) prevalently economic efficiency-oriented choices, influenced by the needs and demands of telecommunications/electronic communications network operators and service providers. Another reason for developing a European approach to media pluralism is the need to prevent national policy and regulatory solutions, especially if predominantly in the hands of national governments and politics alone, from being dangerously influenced by political pressures and consequently shaped according to contingent and distorted interests, thus threatening the proper and full democratic life of a community in all its cultural, political, social aspects. Finally, a fourth reason for the development of a European approach to media pluralism is the crucial role that its respect and promotion at the European level can play in creating and consolidating a European public sphere; in supporting the process of political integration; in bringing the common European cultural heritage to the fore; and in strengthening the European identity, united in the diversity of the traditions and cultures of (and within) its Member States.⁶²

Europe: A common approach to the use of the spectrum released by the digital switchover (COM(2007) 700 final, of 13 November 2007).

⁶² It is worth recalling here that, according to Article 2 TEU, the values on which the Union is founded, such as the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, “including the rights of persons belonging to minorities”, are common to the MS “in a society in which *pluralism*, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (*emphasis added*). Moreover, those values are constituent parts of “un patrimonio costituzionale comune idoneo a definire l’essenza stessa dell’identità europea, pur nel rispetto [...] della diversità della storia, della religione, delle culture e delle tradizioni dei popoli d’Europa (see R. ADAM, A. TIZZANO, *Manuale di diritto dell’Unione europea*, Torino, Giappichelli, 2014, p. 391). In fact, the importance for the Union of respect of cultural (religious and linguistic) diversity is now clearly stated (and reinforced) notably, on the one hand, by Article 3(3) TEU (providing, among the objectives of the Union, for its “rich cultural and linguistic diversity” to be respected, and “Europe’s cultural heritage [to be] safeguarded and enhanced”), which can also be read in conjunction with Article 4(2) TEU (providing also for the Union to respect “the national identities” of its MS); and, on the other hand, by the ad hoc provision of Article 22 of the Charter, on cultural, religious and linguistic diversity, which could (inter alia) “influence the balance to be struck between the ‘freedom and *pluralism* of the media’ in Article 11(2) [of the Charter itself]” (see R. CRAUFURD SMITH, “Article 22: Cultural, Religious and Linguistic Diversity”, in S. PEERS *et al.*, cited, pp. 605-631, p. 613; *emphasis added in the original*). Last but not least, in the ECJ case-law, see in particular Case C-222/07, *UTECA* [2009] ECR I-1407, where the Court ruled that EU law does not preclude MS measures (such as the ones adopted in Spain) which, in essence, provide a duty for television operators to contribute to the funding for audiovisual works whose original language is one of the official languages of that MS, since those measures, although constituting restrictions on several fundamental (economic) freedoms, are nonetheless based on cultural grounds such as the defence of (Spanish) multilingualism, and are thus justified. The Court reached this conclusion especially taking into account the intrinsic link between language and culture, as pointed out by, inter alia, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the General Conference of UNESCO in Paris on 20 October 2005 and approved on behalf of the Union by Council Decision 2006/515/EC of 18 May 2006, OJ [2006] L 201/15). On the impact of that Convention on the European audiovisual sector, see, more broadly, M. BURRI, “Business as usual? The implementation of the UNESCO Convention on Cultural Diversity and EU media law and policies”, in *European Law Review* [2013] 6, pp. 805-828.

Of course, Member States have and will retain primary competence regarding media pluralism. However, the above considerations show that further benefits can also derive from their cooperation and coordinated action on the matter at the supranational level. The issue thus arises of the ways in which this target could be achieved from a legal standpoint. As we have seen, it will be difficult to pass something like an effective hard-law piece of EU legislation dealing directly with this matter. There are, however, a number of other different forms that an approach to media pluralism could take at the European level in order to support and supplement – not to replace – but also to coordinate individual Member States’ initiatives to better secure this objective, alongside direct/indirect EU interventions in that respect. Among them, the role that Independent Administrative Authorities (IAAs), acting essentially in the form of National Regulatory Authorities (NRAs) for the media, can play in helping to ensure the realisation of media pluralism should be emphasised: not only at the national level, where (and when) they act individually and separately, but also at the European level, if (and when) they manage to effectively coordinate their actions and cooperate to attain this common objective.

Therefore, the following pages concentrate, on the one hand, on the structure and functioning of IAAs (or NRAs) for the media and their contribution to ensuring respect for and the promotion of media pluralism at the national level, where these authorities were set-up and operate. On the other hand, consideration will be paid to the actual room (and further possibilities) for these authorities to establish, among themselves, forms of cooperation/coordination at the European level in order to exchange best regulatory practices, guarantee the consistent implementation of European media regulations and the effective supervision of their application, but also, through their cooperation/coordination, to re-launch a European approach to media pluralism. In this respect, the analysis starts from the broader context of the European governance discourse, as well as the “better law-making” commitment endorsed by the Commission, the Council and the European Parliament, pushing for intervention to take alternative routes to traditional law-making, such as new or soft forms of governance,⁶³ against the background of the evolution of the forms and modes of EU administrative law. Within this broad framework, the focus is placed on the governance of the European information society and especially the media sector, while attention is also paid to comparable institutional experiences. Going beyond the classical hard-law approaches at EU level and highlighting, in particular, the new modes of governance and the softer approaches

⁶³ See, respectively, the Commission’s White Paper on European Governance (COM(2001) 428 final, of 25 July 2001); and the Interinstitutional agreement on better law-making, OJ [2003] C 321/1.

to be developed or already developing against the background of the existing (and incipient) forms of administrative cooperation and coordination at the same level, attention is paid to the establishment and functioning of cooperation/coordination among independent national regulators and the effects that they could exert on the development of the media pluralism discourse at the European level.

2.5 Concluding remarks

All the foregoing observations have shown that regulatory and policy (as well as judicial) interventions aimed at securing the objective of media pluralism have a central role to play in governing the media sector (and television broadcasting in particular). This will also be so – albeit, perhaps, through new and more up-to-date regulatory and policy measures – in the digital age, since securing media pluralism implies promoting democracy, as well as respecting political and cultural diversity, in and through the media. These are all objectives that go beyond what the developments of technology and the refinements of market mechanisms in and of themselves are capable of providing.

As noted above, from the EU perspective, as the law stands to date, media regulation and, hence, the objective of securing media pluralism are principally matters of Member States' competence. On the other hand, however, the interplay between different factors has increasingly prompted the development of forms of media regulation at the supranational (European) level. Technological, economic and political factors, in fact, coupled with the processes of European market and political integration are determining the emergence of a truly European audiovisual media space, beyond national ones. As a response to this, in dealing with media regulation and media pluralism at the supranational level, traditional hard-law approaches have prevailed so far on the part of the EU. Nevertheless they have proven to be limited in their scope and inadequate to deliver far-reaching results, primarily due to the constitutional (as well as political) limits within which the EU has operated.

The issue has arisen, then, of whether there are alternative and complementary forms and modes of intervention, which would allow for the development of a European approach to effectively and consistently govern the European audiovisual space and secure within it the fundamental objective of media pluralism. In this respect, the last considerations presented above have made it possible to focus on the role that independent administrative NRAs for the media can play in (re)launching a European approach to media pluralism, starting from the

appraisal of their activities in securing this objective at the national level (especially through the implementation of the relevant national and European legislation and the adoption of regulatory measures), and focusing, then, on the modes and forms of their possible (and actual) coordination/cooperation at the supranational level, especially with a view to developing that approach, against the backdrop of a 'European administrative law for the media'.

PART II

Introductory observations

Independent Administrative Authorities (IAAs) and the Rise of a New Model of Administrative Governance

Looking at today's regulation of audiovisual media services, especially from the point of view of institutional settings, independent administrative authorities (IAAs) established at national level represent one of the key actors and have a major role to play. The reasons for their establishment and operation in the field of audiovisual media are similar to those that have justified their rise in other sectors, and are related to the key features of this type of institution. Nevertheless, IAAs for the media do manifest certain peculiarities, mainly in relation to the specific policy and regulatory objectives of this sector, such as the protection and promotion of media pluralism. Therefore, before looking in detail at the structure and functioning of national IAAs for the media by closely examining three significant national examples, some introductory remarks will be presented here on IAAs in general, as well as IAAs in the specific field of audiovisual broadcasting.

a) IAAs in general

Nowadays IAAs represent an important institutional tool for the governance of many economic and non-economic sectors. Due to their significant proliferation across different fields, in different times and different countries, it is difficult (if not impossible, and perhaps not even desirable) to appraise them in unitary and exhaustive terms.¹ However, having regard to the relevant literature dealing with the phenomenon of IAAs, some general (and brief) observations can be made, particularly concerning the rationales underpinning their establishment.² Indeed, it emerges from this literature that IAAs have been set up outside the

¹ Even a single expression to describe these institutions is difficult to find: indeed, to mention the more frequently used ones, IAAs are also usually referred to (or encompass) independent regulatory authorities (IRAs) or national regulatory authorities (NRAs), as well as independent or regulatory agencies (or bodies), each of these different expressions being used (albeit most of the time, interchangeably) to emphasize some peculiarity of these institutions, especially in relation to the various sectors in which they operate.

² Among the many valuable references on the matter, see P. CRAIG, *EU Administrative Law*, Oxford, OUP, 2012, notably at pp. 140-142; D. HALBERSTAM, "The promise of comparative administrative law: a constitutional perspective on independent agencies", in S. ROSE-ACKERMAN, P.L. LINDSETH (eds.), *Comparative Administrative Law*, Cheltenham, Edward Elgar, 2010, pp. 185-204; G.P. CIRILLO, P. CHIEPPA (eds.), *Le Autorità amministrative indipendenti*, Padova, CEDAM, 2010; A. LA SPINA, S. CAVATORTO, *Le Autorità indipendenti*, Bologna, Il Mulino, 2008; M. CUNIBERTI, *Autorità indipendenti e libertà costituzionali*, Milano, Giuffrè Editore, 2007; R. CARANTA, M. ANDENAS, D. FAIGRIEVE (eds.), *Independent Administrative Authorities*,

classical structure of governmental administration and entrusted with key functions (and different powers, such as advisory, decision-making and quasi-judicial ones) for two main purposes: either to perform regulatory and supervisory tasks, consisting in the implementation of general legislation according to the specific conditions of different markets, and monitoring/enforcing the application of the measures adopted; or to strengthen the respect and promotion of fundamental rights (or even for both purposes at the same time). In the first case, looking especially at the European context, the rise of IAAs dates back to the late '80s and is mostly related to the process of market liberalisation, which was accompanied by a shift in the role of the State from direct economic participation through public monopolies to control over the markets by means of public regulation enacted by IAAs to ensure the efficient functioning of those markets. These developments have been conceptualised in the well-known 'regulatory state' doctrine, which focuses on the role of regulatory bodies in correcting market failures and realising objectives of common interest.³ As regards the second case, the upsurge of IAAs is mostly related to the development of alternative means to protect fundamental rights besides (notably) legislative and judicial intervention, in the form of administrative (institutional) safeguards contributing to that end.

Looking at both cases, two relevant (and common) features of IAAs appear. One is the need for expertise in performing the aforementioned functions. The other is the impartiality required to better accomplish these functions and ensure effective results. Indeed, IAAs are intended to satisfy both of these two needs. On the one hand, as they operate in specific sectors, IAAs normally consist of experts in possession of the necessary knowledge to take decisions in (highly) technical fields subject to frequent developments that bring new challenges, with which ordinary legislation has difficulty coping (promptly). Informed and accurate decisions are thus essential in order to deliver efficient outputs. On the other hand, to achieve these results, both in the case of liberalised sectors and for the protection of fundamental rights, impartial action insulated (as far as possible) from the powerful direct influence of States/politics, as well as from private (conflicting) interests, can prove to be more appropriate, if not decisive. Thus, the independence requirement emerges as a crucial feature of IAAs.

London, BIICL, 2004; E. CHELI, "Le autorità amministrative indipendenti nella forma di governo", in *Quaderno dell'Associazione per gli studi e le ricerche parlamentari* [2000] 11, pp. 129-141; G. AMATO *et al.*, *Regolazione e garanzia del pluralismo: le Autorità amministrative indipendenti*, Milano, Giuffrè Editore, 1997.

³ See, notably, G. MAJONE (ed.), *Regulating Europe*, London, Routledge, 1996.

As far as this feature is concerned, it can be observed that, in democratic political systems based on the separation of constituted powers and on a system of checks and balances operating in this respect, the existence of completely independent bodies can prove to be almost inconceivable and (constitutionally) difficult to accept. In fact, the independence of these bodies is not absolute, since relevant legislative provisions (more or less) strictly encapsulate their remit. Moreover, various types of control of different degrees and natures are established in order to ensure compliance on the part of IAAs with their mandates, for instance through public accountability mechanisms and judicial oversight of their work. Nevertheless, the independence they do enjoy and the institutional guarantees afforded in order to support it can determine the added value of IAAs in the performance of the aforementioned tasks. Ensuring the proper legal (and notably structural) preconditions to satisfy this requirement appears (first and foremost) a task for the legislator to accomplish. It is not so surprising, then, that the EU, which has actively contributed to the spread of these bodies (as will be seen in Part III), has insisted especially on the independence requirement in cases involving both market regulation and fundamental rights protection on the part of IAAs. It is remarkable, however, that this has not effectively taken place in the audiovisual media sector, where national IAAs are also established by Member States and operate.

b) IAAs in the audiovisual broadcasting sector

As regards IAAs in the field of audiovisual media in particular, their establishment at national level seems to respond to both the rationales mentioned above.⁴ Indeed, even if national experiences of the establishment and functioning of IAAs for the media are not necessarily identical (as, in most cases, they take into account different factual, political, legal backgrounds and other specific circumstances), there seems to be some consistency in the fact that IAAs were mostly created in (several) EU Member States at the time the latter relinquished their monopolies over broadcasting activities (again, around the '80s), and were subsequently strengthened not only in order to govern the coexistence of public and private operators within the same market, but also to ensure that fundamental policy objectives were realised through their operation and the governance of that market. These policy objectives

⁴ For a recent account of the phenomenon of IAAs for the media from a socio-political perspective, see K. IRON, R. RADU, "Delegation to independent regulatory authorities in the media sector: a paradigm shift through the lens of regulatory theory", in W. SCHUZ, P. VALCKE, K. IRON (eds.), *The Independence of the Media and its Regulatory Authorities*, Bristol, Intellect, 2013, pp. 14-53.

consist, first and foremost (as noted in Part I), of protecting and promoting the freedom of expression and all its corollaries, such as the individual right to information, and the preconditions for their fulfilment, such as an effectively pluralistic media environment.

Thus, if IAAs for the media share the same fundamental features highlighted above, which characterises this type of public administrative institution (such as expertise and impartiality), they need to be adapted to ensure the fulfilment of their sector-specific tasks, consisting in the implementation of public policy and enforcement of the law in order to guarantee the attainment of the aforementioned objectives. In this respect, their institutional settings appear extremely relevant in allowing them to operate as guardians and promoters of media freedom and pluralism.

Moving on from these general findings, in the following pages the focus will be on three paradigmatic cases of regulatory IAAs established in three EU countries (namely, France, the UK and Italy), presenting some differences as well as commonalities, especially regarding their respective remits and scope of action. Attention will first be paid to their institutional settings. Then substantive aspects related to their function in securing media pluralism in their respective (national) spheres of action will be considered.

Chapter I

France and the Conseil Supérieur de l'Audiovisuel (CSA)

1.1 Prior to the establishment of the CSA: some remarks on the political and legal debate and context

In France, the question of the establishment of an independent authority for the broadcasting sector first arose in the early 1980s, at the beginning of the process of liberalisation of the national broadcasting market.¹ It was, indeed, with Law No 82-652 of 29 July 1982, abolishing the State monopoly over broadcasting activities, that the *Haute autorité de la communication audiovisuelle* was established as an independent body with the main task of guaranteeing the independence of public radio and television broadcasting.² As pointed out, “l'idée qui commande la création de cette Haute autorité est de soustraire aux passions et aux préférences politiques l'instrument audiovisuel afin de garantir la crédibilité et l'indépendance de ce dernier”.³ Thus, quite significantly, the *Haute autorité* was also entrusted with the task of appointing the Chairs of public service broadcasting channels.⁴ Moreover, in defining its mission, Law No 82-652 clearly mandated for the *Haute autorité* to (also) “veiller par ses recommandations, dans le service public de la radiodiffusion sonore et de la télévision [...] au respect du pluralisme et de l'équilibre dans les programmes[,] à la défense et à l'illustration de la langue française[, ainsi que] à la promotion des langues et cultures régionales”.⁵ The choice for such an institution to perform this mission was all but expected: in fact, at the time of its establishment, the model of an independent regulatory administrative agency was not yet a very popular one.⁶

¹ For a thorough account of this matter, see notably: D. DE BELLESCIZE, L. FRANCESCHINI, *Droit de la communication*, Paris, Puf, 2011; T. VEDEL, *Television across Europe - Regulation, Policy and Independence: France* (Open Society Institute, 2005); C. DEBBASCH *et al.*, *Droit de la communication: audiovisuel, presse, Internet*, Paris, Dalloz, 2002.

² See Law No 82-652 “sur la communication audiovisuelle”, published in JORF of 30 July 1982, p. 2431.

³ See DEBBASCH *et al.*, cited, p.143.

⁴ See Article 16 of Law 82-652 (now repealed).

⁵ See Article 14 of Law 82-652 (now repealed).

⁶ As DEBBASCH *et al.*, cited, note, “les exemples étrangers vont alors conduire les pouvoirs publics à opter pour le modèle, encore relativement inhabituel en France, de l'autorité administrative indépendante” (p. 94). Along very much the same line, J.-L. AUTIN, “Le Conseil supérieur de l'audiovisuel en France”, in *Revista catalana de*

A few years after the establishment of the *Haute autorité*, as a further stimulus to the process of liberalisation within the broadcasting sector, the new government in power, while maintaining the institutional choice of having an independent agency for that sector, nevertheless decided to replace the *Haute autorité* with the *Conseil national de la communication audiovisuelle* (CNCL), established by Law No 86-1067 of 30 September 1986 and therein explicitly defined as an “autorité administrative indépendante”.⁷ Apart from the political will to mark a change from the previous system, the reasons for the replacement of the *Haute autorité* with the CNCL included, on the one hand, the need to provide for more political independence (especially by re-designing the rules for the appointment of its members) and, on the other hand, an attempt to extend the competence of the sector-specific regulator to also cover certain matters concerning telecommunication activities. Nevertheless, the effective accomplishment of those objectives via the setting-up (and operation) of the CNCL has been (strongly) questioned.⁸

Without going into the details of some specific differences identifiable between the two abovementioned authorities, it is worth mentioning here that the key tenet supporting the resort to the model of an ad hoc administrative body to regulate (and control) the audiovisual sector seems to be mainly related to the opening up of the market to private actors in the field of broadcasting, coupled with moves on the part of the State to lessen direct control over public broadcasters. Indeed, this trend brought about the need to strengthen (and then maintain) the independence of all broadcasters, either public or (the new) private ones, from direct political (and governmental) interference. As a way of ensuring this objective, an independent regulatory body was established: its own independence both from political influence (to be achieved and ensured mainly via the mechanisms of appointment of its

dret públic [2007] 34, pp. 83-115, states that the model of an IAA represented at the time was “une catégorie totalement inédite car étrangère [aux] traditions juridiques [françaises]” (p. 86). It could be recalled here that the definition of the *Haute autorité* as an IAA comes not from within its establishing law, but rather from a pronouncement of the *Conseil constitutionnel* (the French Constitutional Court): namely, decision No 84-173 DC, of 26 July 1984. It could also be added here that, according to French administrative law, the distinguishing (and peculiar) institutional feature of IAAs is indeed their independence from hierarchical control by the Government (although they are part of the State’s administrative apparatus, their acts can undergo judicial scrutiny, and...of course, they remain subject to the law).

⁷ See Law No 86-1067 “relative à la liberté de communication” (also known as “Loi Léotard”, from the name of the Minister of culture and communication at that time), published in JORF of 1 October 1986, p. 11755, and notably Article 4 thereof (as in its text that came into force in 1986), as well as decision No 86-217 DC, of 18 September 1986, of the *Conseil constitutionnel*. In fact, Law No 86-1067, which constitutes the national framework (and most important piece of) legislation for radio and audiovisual broadcasting, has been repeatedly modified by several subsequent acts: as also indicated below, all further references to Law No 86-1067 are to be intended as being to its text currently in force (unless otherwise stated).

⁸ See, in particular, J. CHEVALLIER, “De la C.N.C.L. au Conseil supérieur de l’audiovisuel”, in *L’actualité juridique - Droit administratif* [1989], pp. 59-76.

members, its financing system, and the guarantee of its accountability) and from the broadcasters (more generally, from economic actors) over which it was to exercise its regulatory and supervisory powers was immediately perceived as a crucial element in its institutional design. In the light of this guiding rationale, a further change was made to the detriment of the CNCL, replacing it with the *Conseil supérieur de l'audiovisuel* (CSA). The following considerations will focus at length on this latter institution.

1.2 The setting-up of the CSA

The CSA was established by Law No 89-25 of 17 January 1989, modifying Law No 86-1067.⁹ Although there was no mention in the former legislative act (nor is there in the latter) of the word ‘administrative’ in relation to the newly established Authority, on the basis of the institutional features of its predecessors, the CSA was immediately conceived and commonly referred to as an administrative body.¹⁰ What does emerge unequivocally from the abovementioned acts, as a key requirement of the established Authority, is its independence. Indeed, the CSA has been defined as an independent authority (“autorité indépendante”) from the outset.¹¹ Moreover, later amendments to Law No 86-1067 (as already modified by the legislative act establishing the CSA), especially those brought about by Law No 2013-1028 of 15 November 2013,¹² confirmed the central role of the (formal) independence requirement. In particular, Law No 2013-1028 somewhat reinforced the independence of the CSA, as it transformed this body into a so-called “autorité publique indépendante”, entrusted with its own legal personality.¹³ Nevertheless, no precise indication has been provided on what the

⁹ See Law No 89-25, published in JORF of 18 January 1989, p. 728, which amended Law No 86-1067. In the following pages, the Articles mentioned refer to the text of Law No 86-1067 as modified and currently in force (unless indicated otherwise). See also the CSA’s official web-site, at www.csa.fr.

¹⁰ See, in fact, decision No 88-248 DC, of 17 January 1989, of the *Conseil constitutionnel*, on Law No 89-25, where the CSA is qualified as an “autorité administrative indépendante”.

¹¹ See Article 3-1 of Law No 86-1067, as modified by Law No 89-25.

¹² See Law No 2013-1028 “relative à l’indépendance de l’audiovisuel public”, published in JORF of 16 November 2013, p. 18622.

¹³ See again Article 3-1 of Law No 86-1067, as amended by Law No 2013-1028. According to French administrative law, the main difference between ‘simple’ IAAs and (the more specific and recently established sort of sub-category of) ‘independent public authorities’ appears to consist in the latter benefitting from a proper legal personality, distinct from that of the State, which entails full (autonomous) legal and financial responsibility for the acts they adopt. For an overview of this and other features of IAAs in France, see the *Rapport d’information* No 616 of 11 June 2004, of the French Senate, on “Autorités administratives indépendantes - 2006-2014: un bilan” (available at http://www.senat.fr/rap/r13-616/r13-616_mono.html).

CSA has to be independent of, nor how to ensure such independence. Thus, in addressing these issues, reference should be made to the rules concerning the composition of the CSA, the statute of its members, its organisation and its financial arrangements.

On the basis of the legislative act establishing the CSA, which assigned it the task of guaranteeing the exercise of freedom of audiovisual communication, as stated by Law No 86-1067 itself,¹⁴ this independent administrative authority (or better, independent public authority) is meant to represent the principal and most influential institution – albeit not the only one – to supervise and regulate the media sector in general. Indeed, in the debate prior to its establishment, the CSA was presented as “la clé de voûte du système français de régulation des activités de communication audiovisuelle”. Thus, moving from the text of Law No 86-1067 (as modified), and focusing on audiovisual broadcasting in particular, the following pages will first offer an analysis of the most relevant institutional features of the CSA, then focus on more substantive aspects concerning the competences it is entrusted with, as well as its tasks and activities. Finally, some remarks will be made about the main features of the institutional context within which the CSA operates, looking in particular at the other institutions that have retained functions in governing broadcasting in France, even after its establishment.

1.2.1 The institutional structure

As mentioned above, independence is an extremely important feature of the CSA’s institutional structure. The independence of the CSA from the influence of both political powers and economic stakeholders acting in the regulated audiovisual sector is mainly reflected in the rules governing its composition and organisation, and is strengthened by those on the statute of its members.

First of all, as far as its institutional composition is concerned, at the apex of the CSA there is a Board (*Collège*) consisting of seven members (*conseillers*), who are all officially nominated by Decree of the President of the Republic.¹⁵ As for their actual appointment, the President of

¹⁴ Ibid.

¹⁵ See Article 4 of Law No 86-1067. The arrangements for appointing members are the result of the amendments introduced by Law No 2013-1028. Prior to these amendments, the rules that applied since the establishment of the CSA were shaped on the ones provided for the appointment of the members of the *Conseil constitutionnel*, in order to give prestige and authority, as well as independence, to the CSA itself (see, notably, the statement of Jack Lang during the parliamentary debate for the adoption of Law No 86-1067, as reported in F. NEVOLTRY, B. DELCROS, *Le Conseil Superior de l’Audiovisuel*, Paris, Legipresse, 1989, p. 32, where it also emerges that great emphasis was placed on the need to provide for the expertise of the persons to be nominated as members of the

the Republic himself designates (only) the President of the CSA, while the other six members are appointed by the President of the *Sénat* and the President of the *Assemblée nationale* (i.e., the two Chambers of Parliament), three members each, subject to the approval of the respective standing parliamentary committees on culture (expressed on the basis of a three-fifths majority of the votes cast, i.e. an ample and multi-party majority): board members must be persons with (economic, legal or technical) competences or professional experience in the fields of activity of the CSA, and equal representation between women and men is provided for.¹⁶ Concerning the specific preconditions for appointment as members of the CSA, Law No 86-1067 sets the limit of sixty-five years of age at the time of nomination, and mandates the incompatibility of such a role with any elective office, or any other employment or professional activity.¹⁷ Once appointed, each member remains in office for six years, during which time he/she cannot be removed. Except for the post of President, a third of the CSA Board is renewed every two years, while (in principle) none of its former members can be re-appointed.¹⁸

As regards the statute of the Board members, during their respective terms in office they are obliged to comply with the requirements established by Law No 86-1067 – and further detailed by a Code of Conduct adopted in 2003 by deliberation of the CSA itself –¹⁹ which prevent them from directly or even indirectly exercising any other function, receiving any fee (unless for services rendered before their appointment), holding any interest or having any employment contract in companies operating in the audiovisual, film, publishing, press,

Board, as a means of guaranteeing the independence of the Authority itself). It should be noted that Article 32 of Law No 2013-1028 provided, in essence, for the continuity of the mandates of the CSA members in office at the time of its enactment until their natural end, so that the overall number of CSA members will progressively decrease (from nine to seven). Interestingly, and differently from that, the replacement of the *Haute autorité* with the CNCL, as provided for by (the original) Law No 86-1067, took effect immediately, without waiting for the natural end of the mandates of the members of the former, with the *Conseil constitutionnel* validating (in its already mentioned decision No 86-217 DC) such a choice (and the power) of the legislator.

¹⁶ According to the (original) system previously in place, the Board of the CSA was composed of nine members, three of whom (including the President of the CSA) were appointed directly by the President of the Republic, while, for the other six, similar, but less detailed, rules to the ones now in force applied (i.e., parliamentary committees were not involved, nor were competences or professional qualifications expressly required by the law for the persons to be appointed, nor was equal representation between women and men provided for).

¹⁷ For the (very detailed) incompatibility rules, see Article 5 of Law No 86-1067.

¹⁸ Article 4 of Law No 86-1067 specifies that, in the event of a vacancy occurring more than six months prior to the expiry of a term of office, a new member has to be appointed in accordance with the terms of that provision: the term of office of this new member will expire on the date on which the term of office of the person replaced would have expired. In such cases, the term of office of the ‘replacing’ member can be renewed if he/she has occupied the replacement office for less than two years.

¹⁹ See Délibération of 4 February 2003, “Code de déontologie applicable aux membres du Conseil” (JORF of 23 February 2003, p. 3307).

advertising, or electronic communications sectors.²⁰ If an appointed member falls foul of such requirements, Law No 86-1067 provides for a three-month period of grace in which he/she is required to remedy the situation. However, if these obligations are still not complied with, the members of the Board concerned can be subject to criminal proceedings. Moreover, members who violate these requirements – or who take up an office incompatible with their role, as indicated above – will be declared to have resigned *ex officio* by the Board, which decides by (simple) majority of its components.²¹ Furthermore, during the whole term they are in office (and also for a year thereafter), all members are bound to refrain from taking any stance in public debates involving issues that are dealt with by the CSA, as well as, more generally and without time limits, to preserve the secrecy of its deliberations.²²

Apart from the provisions on the structure of the Board and the statute of its members, the need to ensure independence from political institutions and from audiovisual communication operators is also reflected in, and further strengthened by, the rules concerning the administrative organisation of the CSA. For its functioning, indeed, the CSA can count on internal working groups and task forces,²³ as well as on services placed under the authority of the President of the CSA.²⁴ As provided for by Decree No 2014-382 of 28 March 2014 on the organisation and functioning of the CSA, these services are under the control of a Director-General appointed by Decree of the President of the Republic on the basis of a proposal made by the President of the CSA.²⁵ The current organisation of CSA services is regulated by the Decision (of the President) of the CSA itself, establishing seven Directorates (*directions*) and one Department (on documentation and information).²⁶ While all the Directorates have the task of preparing and giving execution to the deliberations of the CSA, each of them deals

²⁰ See, again, Article 5 of Law No 86-1067. These restrictions also apply for the year after the six-year term has come to the end.

²¹ *Ibid.*

²² See, once more, Article 5 of Law No 86-1067.

²³ Several working groups (*groupes de travail*) and task forces (*missions*) have been set up, covering, as for their subject-matters, all fields of action of the CSA: in particular, among the working groups, for instance, there is one on pluralism (rather, “pluralisme et vie associative”), one on the respect of rights and freedoms, one on diversity, one on international affairs, and one on the “économie de l’audiovisuel et affaires européennes”. Every Member of the Board chairs one of those internal bodies or participates in its work, which mainly consists in preparing the decisions and actions to be taken by the Board itself.

²⁴ See Article 7 of Law No 86-1067.

²⁵ See Decree No 2014-382, published in JORF of 30 March 2014, p. 6193 (repealing the original Decree No 89-518 of 26 July 1989, in JORF of 27 July 1989, p. 9364); see, in particular, Articles 5 thereof.

²⁶ See, for the details, Décision No 2005-P-08 of 4 October 2005 “sur l’organisation et missions des directions et des services” (JORF of 20 October 2005), as amended by Décision No 2014-P-03 of 11 December 2014 (JORF of 12 December 2014).

with different and specific issues. Among these Directorates, it is worth noting, in particular, that there is one for programmes (*direction des programmes*), which is in charge of, inter alia, monitoring the respect of pluralism by radio and television services, and another one for European and international affairs (*direction des affaires européennes et internationales*), which has the task of managing the CSA's international relations, especially with other regulatory authorities, foreign public institutions and EU bodies. Law No 86-1067 states that, in order to avoid any conflict of interest, members of these administrative services cannot, at the same time, be members of the board of directors of public companies operating in the audiovisual communications sector, nor can they hold an authorisation issued by the CSA in relation to a private audiovisual communication service, nor any office or interest in a company or association possessing such an authorisation.²⁷ Moreover, as well as the members of the CSA, the officials working as its staff are also bound by professional secrecy in relation to all facts, acts and information that may come to their knowledge by reason of their office.²⁸ Besides its main central (Paris-based) headquarters, the CSA can also count on the so-called *Comités territoriaux de l'audiovisuel* (CTA) operating at local level.²⁹ These regional audiovisual committees are essentially specialised technical bodies (consisting of experts) established by the CSA itself to operate as its local branches, which contribute to the implementation of its policies and adapt its actions to regional (audiovisual) situations. In this context, they are entrusted with mainly consultative functions: examining applications for authorisation to run local (radio stations and) television services, and monitoring compliance with the requirements set forth in those authorisations (once they have been granted by the CSA). However, more recently, they have also been assigned some decision-making competences related to these authorisations, under the conditions set forth by the law and its implementing measures, with the CSA maintaining the power to intervene following the decisions of each CTA, in order to ensure consistency.³⁰

Finally, the need to guarantee the CSA's independence and autonomy is also reflected in both the rules concerning its operational organisation and those dealing with its financing.

²⁷ See Article 7 of Law No 86-1067.

²⁸ See Article 8 of Law No 86-1067.

²⁹ See Article 29-3 of Law No 86-1067. Specific provisions on these committees, previously named as *Comités Techniques Radiophoniques* (CTR), were first made by Decree No 89-632 of 7 September 1989, now repealed by Decree No 2011-732 of 24 June 2011, which (in fact, inter alia) changed their name into CTA, established their overall number (i.e., sixteen, scattered throughout mainland France and overseas territories) and dictated specific rules concerning their setting-up, composition and functioning.

³⁰ See, again, Article 29-3 of Law No 86-1067, as well as Decree No 2011-732.

Concerning the first, Law No 86-1067 grants the CSA the power to adopt rules governing its concrete functioning (*règlement intérieur*) on its own.³¹ Thus, the CSA itself decides on the mechanisms to be followed to convene meetings of the Board, for the Board's deliberations, for hosting hearings when deemed useful, and so forth, as well as on the formal requirements to be observed when issuing decisions or delivering opinions.³²

However, regarding decisions in particular (and still in relation to the independence issue), it is interesting to note that while they are not, in principle, subject to any external administrative oversight, in certain cases, when they are of a regulatory nature (“présentent un caractère réglementaire”, as could occur, for instance, when they concern the utilisation of radio-spectrum frequencies), they need to be forwarded to the Prime Minister, who may request the CSA to reassess the matter.³³ Furthermore, all CSA decisions concerning the issuing of sanctions (or the settling of disputes referred to it, as discussed below) can be appealed against before the *Conseil d'État* (the highest French administrative court) “de pleine juridiction”, implying that, in such circumstances, the *Conseil d'État* will not only have the power to annul those decisions, but also the competence to reform them.³⁴

More generally, decisions, as well as the results of CSA deliberations and the reports it prepares, whatever their nature, are to be published in the *Journal officiel de la République française* (JORF), as a way of guaranteeing transparency.³⁵ For this same purpose, and also as a matter of accountability, Law No 86-1067 mandates the CSA to prepare a public report on its activities every year, to be addressed to the President of the Republic, the Government and Parliament. This report (now) also has to deal, inter alia, specifically with the measures adopted to limit media concentration and protect pluralism (presenting a detailed picture of the current positions held by audiovisual operators in relation to the established antitrust

³¹ The power to adopt such a *règlement intérieur* is conferred to the CSA by Article 4 of Law No 86-1067.

³² The latest version of the CSA's *règlement intérieur* is contained in its Délibération of 9 April 2014 (JORF of 7 May 2014).

³³ See Article 6 of Law No 86-1067.

³⁴ See, notably, Articles 42-8, 42-15 and 48-8 of Law No 86-1067. It should also be noted that, besides that specific case, according to French administrative law, decisions of the CSA can more generally be subject to judicial review (still by the *Conseil d'État*) via “recours pour excès de pouvoir”, which aim to control their legality and may culminate in their annulment.

³⁵ See, again, Article 6 of Law No 86-1067. As regards transparency, it should also be noted that the CSA itself edits (or rather, as it appears, used to edit, until 2013) a monthly publication (called *la Lettre du CSA*) that keeps track of the actions it performs (although the greatest publicity of its work is ensured via its aforementioned web-site).

thresholds).³⁶ Moreover, the Parliament's competent committees have the power to summon members of the CSA for hearings before them in order to receive information.³⁷

As for its financial arrangements, Law No 86-1067 ensures a certain degree of autonomy to the CSA by vesting it with the power to 'propose' the credit needed to carry out its assignments at the time the annual finance bill is prepared (the final decision coming, at least formally, from the Government and Parliament). Although this credit, included in the general budget of the State (which is the CSA's only source of funding), is not subject to the ordinary provisions relating to the auditing of expenditures incurred by the Authority, the CSA's accounts are nevertheless submitted to the control (*a posteriori*) of the (national) Court of Auditors.³⁸

1.2.2 Mission and competences

Turning to the more substantive issue of competences, it appears, generally speaking, that the mission the CSA is entrusted with is to both guarantee and promote the freedom of audiovisual communication, specifically regarding (radio and) audiovisual services, whatever means of electronic communication are used to broadcast the relative programmes. This implies that its competences do not cover all media, but are limited to (radio and) television broadcasts, as well as on-demand audiovisual media services, whatever the technical

³⁶ See Article 18 of Law No 86-1067, which prescribes (some of) the issues the report must address. Thus, apart from what has been already indicated, the CSA not only has to provide in it an account of its activities, especially in relation to the application of Law No 86-1067 (and, notably, on the economic impact of its decisions granting the right to use radio-spectrum resources, or on the developments of the financing arrangements of local television services), but can also suggest concrete modifications to laws and regulations as it deems necessary to cope with technological, economic, social and cultural developments taking place in the audiovisual sector (as it actually and extensively does: see, for instance, the last CSA *Rapport annuel 2013*, adopted the 12 March 2014 and available on its web-site, especially at pp. 19-67). Interestingly, the CSA annual report also has to offer an overview of the cooperation and...convergences that have emerged among EU national regulators for audiovisual services.

³⁷ See, again, Article 18 of Law No 86-1067. In particular, the President of the CSA has to present the aforementioned annual report before the standing parliamentary committees on culture, which can then address an opinion (*avis*) to the CSA containing, notably, suggestions on the correct application of Law No 86-1067. In addition to this, according to the same provision, either the Government, the President of the *Assemblée nationale*, the President of the *Sénat*, or the competent parliamentary committees can address requests to the CSA to obtain opinions or studies in subject-matters falling within its field of activity.

³⁸ See Article 7 of Law No 86-1067. The importance of the arrangements for funding the CSA and their relationship with/impact on its independence are highlighted in the *Rapport d'information* No 371 of 23 June 2004, of the French Senate, on "Le Conseil supérieur de l'audiovisuel: garantir les moyens d'une ambition" (available at <http://www.senat.fr/rap/r03-371/r03-371.html>).

arrangements/networks used to convey them, to the significant exclusion of the electronic communications sector (as will be discussed below).³⁹

As defined by Law No 86-1067, audiovisual communication is a form of public communication via electronic means, whose freedom is declared as a matter of principle by Article 1 of Law No 86-1067.⁴⁰ Nevertheless, this same Article also establishes that the exercise of such a freedom can be limited, but only to the extent needed to ensure, *inter alia*, respect for the pluralistic nature of the expression of ideas and opinions.⁴¹ It is also made clear that it is the CSA's task to ensure respect for the pluralism of thoughts and opinions within radio and television broadcasting programmes, especially if these concern general and political information.⁴² Moreover, according to Law No 86-1067, in protecting and promoting the freedom of audiovisual communication, the CSA has several important tasks to perform, such as, in particular: ensuring equality of treatment and guaranteeing the independence and impartiality of public audiovisual communications; promoting free competition and the establishment of non-discriminatory relationships between producers and service providers; monitoring the quality and diversity of programmes broadcast (also by making proposals for their improvement, as it sees fit); overseeing (the developments in) the creation and production of French audiovisual content, as well as the protection and representation of the French language and culture.⁴³

³⁹ See Article 3-1 of Law No 86-1067. In this respect, Article 2 thereof defines audiovisual communication as “toute communication au public de services de radio ou de télévision, quelles que soient les modalités de mise à disposition auprès du public, toute communication au public par voie électronique de services autres que de radio et de télévision et ne relevant pas de la communication au public en ligne [as defined by Article 1 of Law No 2004-575 of 21 June 2004, “pour la confiance dans l'économie numérique”, JORF of 22 June 2004, p. 11168], ainsi que toute communication au public de services de médias audiovisuels à la demande”.

⁴⁰ The “communication au public par voie électronique” is then defined as “toute mise à disposition du public ou de catégories de public, par un procédé de communication électronique, de signes, de signaux, d'écrits, d'images, de sons ou de messages de toute nature qui n'ont pas le caractère d'une correspondance privée” (Article 2 of Law No 86-1067).

⁴¹ Indeed, Article 1 of Law No 86-1067, speaks of “le respect [...] du caractère pluraliste de l'expression des courants de pensée et d'opinion”.

⁴² In the wording of Article 13 of Law No 86-1067, the CSA “assure le respect de l'expression pluraliste des courants de pensée et d'opinion dans les programmes des services de radio e de télévision, en particulier pour les émissions d'information politique et générale”. It is interesting to note that while the text of Article 13 in force clearly envisages the need to ensure pluralism in the whole television (and radio) sector, without any distinction between public and private operators in this respect, the wording of this provision as it resulted from its (former) amendment by Law No 89-25, mandated the CSA to ensure the respect of pluralism only on the part of public television (and radio) broadcasters, and in particular only in relation to political information programmes.

⁴³ See Article 3-1 of Law No 86-1067. Moreover, it is stated therein that the CSA has to ensure the equitable, transparent, homogeneous and non-discriminatory treatment of television services in relation to their numbering, when inserted in the offers made by programme service providers. Furthermore, the CSA is required to support actions undertaken within the audiovisual communication sector to favour social cohesion and anti-discrimination practices, ensuring in particular, through the monitoring of content providers, that their

All of the above implies that the CSA does not just exercise supervisory functions, but also acts positively to ensure the achievement of these general objectives.⁴⁴ Thus, Law No 86-1067 has conferred upon the CSA specific competences and powers to effectively perform this two-pronged mission. The powers the CSA has been vested with can be grouped in two main categories: normative/decision-making powers on the one hand and, on the other hand, advisory powers.⁴⁵

As for the first group, a further distinction can be made between general regulatory powers and individual decision-making ones.

Concerning the general regulatory powers bestowed upon the CSA, to be exercised in relation to both public and private television (and radio) operators, these essentially consist of planning radio-spectrum (terrestrial) broadcasting frequencies and related activities, including establishing the conditions for the use of those frequencies, to be allocated to operators for the distribution of (radio and) audiovisual communication services.⁴⁶

Furthermore, as already recalled, the CSA has to ensure respect for the pluralism of opinions and thoughts present in society. This implies, in particular, guaranteeing the respect of internal pluralism by (all) television broadcasting channels. Nevertheless, as remarked above, no precise and clearly defined attribution of (general) regulatory competence to the CSA has been made in this respect, especially as regards the regulatory tools the latter can use to effectively act to guarantee this fundamental objective.⁴⁷ As will be seen below, most of the work done by the CSA on internal pluralism revolves around the issue of ensuring political pluralism in (public and private) television broadcasting. From a decision-making viewpoint,

programmes do reflect the diversity of French society (giving account of this in its annual report, while also proposing measures capable of rendering the representation of such diversity more effective). The CSA is also required to foster respect for the rights of women and minors, and even the protection of the environment and public health in relation to the development of the communications sector.

⁴⁴ As figuratively described by DEBBASCH *et al.*, cited, “le CSA est tout à la fois le gardien de la liberté de communication audiovisuelle et le gendarme de cette liberté” (p. 114).

⁴⁵ This classification is mainly based on the one suggested by E. DERIEUX, *Droit des médias: droit français, européen et international*, Paris, LGDJ, 2010, notably at pp. 194-204.

⁴⁶ See notably Article 25 of Law No 86-1067. The CSA is also in charge, more generally, of managing the frequencies for radio and television broadcasts over the French territory. It participates in international coordination procedures for spectrum frequency management. It also has the task of tackling problems with reception that viewers may experience. It therefore plays an important role in providing incentives for the development of new transmission-technology systems. As far as radio-spectrum management in general is concerned (in relation to its different possible uses, beyond radio and audiovisual broadcasting), an ad hoc body has been established (by Law No 96-659 of 26 July 1996, “de réglementation des telecommunications”, published in JORF of 27 July 1996, p. 11384, now amended and absorbed into the so-called “Code des postes et des communications électroniques”: see notably Article L 97-1 thereof), the so-called *Agence nationale des fréquences* (ANFR), with whom the CSA has to coordinate the performance of its (more specific) tasks.

⁴⁷ See DERIEUX, cited, p. 196.

in fact, with the aim of guaranteeing political pluralism in particular, Law No 86-1067 has specifically attributed to the CSA the power (or rather, the duty) to set rules concerning the conditions applicable to the production, planning and distribution of programmes related to election campaigns, to be realised and broadcast (only) by public television channels during election periods.⁴⁸ For the same purpose, and in relation to all broadcasting services (including private channels), it can issue general (but still detailed, in practice) recommendations.⁴⁹

As far as individual decision-making powers are concerned, in relation to the public broadcasting sector, the CSA is called upon to perform the important task of appointing (and, if applicable, removing) the heads (and some of the members of the administrative boards) of French public broadcasters.⁵⁰

Concerning individual private operators, the CSA has the significant power to issue authorisations for the use of the frequencies they have been assigned (by the CSA itself) and for the delivery of television (or radio) broadcasting services. As provided by Law No 86-1067, in the case of private (now, digital) terrestrial broadcasters, the granting of these authorisations follows the completion of a tendering procedure (*appel à candidatures*) and is subject to the conclusion of an agreement (*convention*) with the CSA, which has to take into account respect for information pluralism.⁵¹ For private broadcasters not using frequencies

⁴⁸ These are inserted in the terms of reference (*cahiers des charges*), established by (governmental) Decree after having consulted the CSA (see Articles 48 and 27 of Law No 86-1067), which contain the programming obligations that public service broadcasting operators (or “sociétés nationales de programmes”, identified by Article 44 of Law No 86-1067: i.e., France Télévisions, Radio France and France Médias Monde, this latter in charge of “l’audiovisuel extérieur de la France”) have to comply with.

⁴⁹ See Article 16 of Law No 86-1067. Moreover, pursuant to Article 55 thereof, the CSA has to define the terms and conditions for party political broadcasts managed by political parties represented by parliamentary groups in at least one of the two Chambers, as well as by trade unions and professional organisations that are representative on the national scale.

⁵⁰ See Articles 47-1–47-6 of Law No 86-1067. The power to appoint these figures, assigned to the CSA since its inception, was transferred to the President of the Republic by Organic Law No 2009-257 of 5 March 2009 (JORF 7 March 2009, p. 4321), repealed by Organic Law No 2013-1026 of 15 November 2013 (JORF of 16 November 2013, p. 18616), which re-assigned it to the CSA. In this context, see also Law No 2009-258 of 5 March 2009 “relative à la communication audiovisuelle et au nouveau service public de la télévision” (JORF of 7 March 2009, p. 4321), which has in turn been modified by Law No 2013-1028.

⁵¹ According to the provisions contained in Section III of Law No 86-1067, concerning the whole authorisation procedure, in essence, it is for the CSA first to issue a call for tenders, specifying the geographical areas and the frequencies to be allocated. Upon expiry of the call for tenders, the CSA, exercising limited discretionary power, draws up a list of eligible applicants and pre-selects them after public hearings. Finally, following the conclusion of the legal agreement with the selected operators, the authorisations granted on the basis of this procedure are issued by the CSA for a maximum duration normally of ten years, but they can be renewed (and thus extended) for up to the same time-length and without any need for a new call for tenders. This regime, leading to the conclusion of a *convention* (as provided notably by Article 28 of Law No 86-1067) applies only to private broadcasters: for public ones, instead, (as well as for ARTE, the “European cultural channel”, established by international treaty, as mentioned by Article 45 of Law No 86-1067), according to Article 26 of Law No 86-1067, the frequencies necessary to broadcast their programmes are allocated by the CSA without any call for

allocated by the CSA (such as cable networks, satellites, Internet, mobile phone networks, etc.), two different regimes apply (depending on their annual budgets): in fact, in order to operate, they either have to enter into legal agreements with the CSA (*régime du conventionnement*) or register with the CSA itself (*régime déclaratif*). The latter regime applies to television channels established in other EU countries that are also broadcast in France.

To perform all the aforementioned tasks (and, more generally, its overall mission), the CSA can also count on very extensive monitoring and controlling powers. Indeed, many provisions scattered throughout Law No 86-1067 envisage the exercise of a supervisory function (as noted above) by the CSA, which is of crucial importance in ensuring respect for fundamental principles and compliance with the relevant statutory, regulatory and conventional obligations on the part of audiovisual communications operators and, therefore, ensuring the effective application of the whole regulatory framework governing the freedom of audiovisual communication in France. Among the CSA's several specific monitoring powers, the most significant consist in controlling the utilisation of the radio-spectrum frequencies allocated,⁵² as well as, in general terms, supervising the programmes broadcast. On the latter issue – which, in substance, implies a shift in the focus of supervision from the broadcasters to the content broadcast – the CSA is required to monitor *ex post* (i.e., after the programmes have been broadcast): respect for the obligations relating to pluralism; the honesty of information provided; television channels' contribution to the development of audiovisual productions; the protection and enhancement of (the use of) the French language; and the 'audiovisual quotas' provisions (or the similar obligation placed upon radio operators to broadcast a certain percentage of songs in French).⁵³ The *ex post* nature of its control implies that the CSA cannot exercise any censorship on content that does not comply with such requirements. Moreover, the CSA is specifically called upon to control (commercial) advertising broadcast by public and private (radio and) television operators, which implies monitoring (again, *a posteriori*) its content and modes of programming.⁵⁴ The Authority also has the specific mission to ensure

tenders, as they benefit from a priority right of access to the terrestrial radio-spectrum in order to fulfil their public service mission.

⁵² See Article 22 of Law No 86-1067.

⁵³ See Article 28 of Law No 86-1067, which recognises a certain margin of manouvre for the CSA to determine these percentages (in some cases).

⁵⁴ See Article 14 of Law No 86-1067. In collaborating with the *Autorité de Régulation Professionnelle de la Publicité* (ARPP), which is an autonomous professional body created by stakeholders in the advertising sector themselves and entrusted with some self-regulatory functions, the CSA exercises such controls only after

(and control), by means of appropriate regulatory (and sanctioning) interventions, that audiovisual contents do not harm the physical, mental or moral development of minors, nor disregard respect for human dignity, nor contain incitements to hatred or violence on the grounds of race, sex, morality, religion or nationality.⁵⁵ To ensure the effectiveness of all these controls, the CSA is supported by the extensive information-gathering power assigned to it by Law No 86-1067, allowing it to collect, either from other authorities or from producers and distributors of audiovisual communication services, all the information needed to verify their compliance with the obligations placed upon them; or, from administrative authorities, the information necessary to render opinions or adopt decisions.⁵⁶

The controlling powers of the CSA are not only related to standard-setting, but are also – as noted above – closely connected (and instrumental) to its competence to impose (administrative) sanctions in cases of breaches of the general principles established by Law No 86-1067 or other statutory, regulatory and contractual obligations imposed on broadcasters. Indeed, in essence, according to Law No 86-1067, the CSA can sanction broadcasting operators responsible for any such breaches, following a procedure that normally requires, first, the serving of a formal notice (*mise en demeure*) and, then, if the broadcaster concerned does not follow the requirements stated in that notice and comply with its obligations, the issuing of a sanction.⁵⁷ Without entering here into the details of the CSA’s exercise of its sanctioning power and its extreme relevance for the fulfilment of its mission,⁵⁸ a few remarks should nonetheless be made. First, the possibility of imposing sanctions is (now) a general competence of the CSA to be exercised, as prescribed by Law No 86-1067, in relation to public and private (radio and) television broadcasters. There is also a list of the sanctions that can be imposed, ranging from the suspension of broadcasting of certain programmes/services, to financial penalties, the suspension of an authorisation, reduction of

advertising has been broadcast. Differently, the CNCL had to perform a more stringent control on advertising by operating *ex ante* to verify compliance with statutory provisions prior to broadcasting.

⁵⁵ See Article 15 of Law No 86-1067.

⁵⁶ See Article 19 of Law No 86-1067, which also states other specific information-gathering and survey-conducting powers. Moreover, Article 79 thereof provides for a pecuniary sanction for failure to reply or inaccurate replies to the requests for information made by the CSA pursuant to that same Article 19.

⁵⁷ For the *mise en demeure*, see Articles 42 and 48-1 of Law No 86-1067 (dealing with, respectively, private and public broadcasters). Article 42-3 thereof, however, provides that in the event of substantial changes affecting the information on the basis of which authorisation to broadcast has been granted, the *mise en demeure* is not necessary: on the (limited) possibility of resorting to such a procedure, see notably the *Conseil d’État*’s decision No 27415 of 27 September 2006.

⁵⁸ For a thorough account on the matter, see E. DERIEUX, “Le pouvoir de sanction du Conseil supérieur de l’audiovisuel”, *Petites affiches*, 15 March 2005, pp. 3-12.

its duration, to even (in the most serious cases) its withdrawal. Finally, in order to ensure impartiality (and the right to a fair trial), a separation has been introduced (through relevant amendments brought about by Law No 2013-1028) between the investigation and prosecution of each case and the imposition of a sanction. Indeed, an independent (and external) rapporteur (appointed by the Vice-President of the *Conseil d'État*) is in charge of all activities related to the first stage, while the CSA can impose sanctions based on the referral of the rapporteur and following an *inter partes* procedure (*procédure contradictoire*).⁵⁹ The decisions adopted accordingly by the CSA (which must be motivated, notified to the party concerned and published in the *Journal officiel*) can be appealed against before the *Conseil d'État*.⁶⁰

The CSA also has extensive (and diverse) advisory functions. This is apparent in the many provisions of Law No 86-1067 envisaging either its power to render recommendations and opinions, or to be consulted by (or even to consult itself) other institutions when regulatory issues falling within its competence are at stake. Some of these functions have already been mentioned above, especially as far as the relationship between the CSA and Parliament or Government is concerned, while others will be referred to below. Here, it is interesting to note, in general, that Law No 86-1067 attributes to the CSA the general competence to issue recommendations (to be published in the *Journal officiel*) to audiovisual operators, relating to their compliance with the principles enshrined in Law No 86-1067 itself.⁶¹ No clear-cut definition (indeed, no definition at all) is given by the latter of the legal effects of the recommendations (*recommandations*) or opinions (*avis*) issued by the CSA (nor of the differences, if any, between these two types of acts). Nevertheless, it has been argued that the advisory or consultative functions of the CSA do represent “un pouvoir d’influence” to be exercised over public institutions and market stakeholders, and that, by filling the gaps in the

⁵⁹ See notably Article 42-7 of Law No 86-1067 (as well as, for the concrete procedural norms, Decree No 2013-1196 of 19 December 2013, published in JORF of 21 December 2013, p. 20848). Before these changes were introduced (in 2013), the running of the whole procedure was in the hands of the CSA. In this respect, issues were raised about its compatibility with the fundamental constitutional safeguards related to the right to a fair trial. However, upon the referral of a “priority question on constitutionality” (*question prioritaire de constitutionnalité*) of that matter on the part of the *Conseil d'État*, limited to Article 42 of Law No 86-1067 (i.e., to the *mise en demeure* mechanism), the French Constitutional Court, in its decision No 2013-359 QPC, of 13 December 2013, did not find any breach of the Constitution (stating that the mere issuing of a formal notice does not in itself constitute a sanction).

⁶⁰ For details of the sanctioning instruments and procedure, see notably (as regards private broadcasters) Articles 42-1–42-10 of Law No 86-1067, and (for public broadcasters) Articles 48-2–48-9 thereof. Sanctions related to the authorisations are available only against private broadcasters, while in all cases the CSA also has the power to order the broadcast of a statement in order to remedy any violations ascertained.

⁶¹ See Article 3-1 of Law No 86-1067.

regulatory powers *strictu sensu* that the CSA can count on, they nonetheless contribute to strengthening and increasing the effectiveness of its regulatory mission.⁶²

Besides all the aforementioned functions, the CSA has also been called upon to perform the role of dispute settlement body in disputes relating to the distribution of audiovisual services and arising between audiovisual content providers and service providers. Indeed, as established by Law No 86-1067, both the former and the latter can voluntarily decide to refer their disputes to the CSA for settlement, following the procedure set up to handle such cases.⁶³

As indicated by Law No 86-1067, the disputes the CSA can deal with are not only those capable of affecting constitutional principles, such as, *inter alia*, the pluralistic nature of the expression of ideas and opinions, but also those of a more economic nature, as they are concerned with fair, equitable and non-discriminatory treatment in contractual relationships between content producers and service distributors, or the conditions for the distribution to the public of the programmes offered.⁶⁴ As will be highlighted below, the CSA's competence in this latter type of dispute, in particular, paves the way for it to develop an "economic regulation" in order to fully accomplish the mission it has been assigned.⁶⁵

⁶² See L. FRANCESCHINI, "La régulation du secteur audiovisuel français: cadre institutionnel et réglementaire", in *La réforme de l'audiovisuel* (Regards sur l'actualité, n. 347/2009), pp. 37-48, where it is affirmed that "l'expression 'influence' est utilisée ici dans le bon sens du terme: il s'agit de contribuer concrètement aux réflexions et prises de décisions concernant le secteur audiovisuel" (p. 47). See also AUTIN, cited, notably at pp. 91-93.

⁶³ See Article 17-1 of Law No 86-1067. In its decision No 321349 of 7 December 2011, the *Conseil d'État* has provided some guidance to the CSA regarding the exercise of its dispute settlement competence, highlighting in particular the need to balance the different fundamental rights at stake in the disputes referred to it (see A. BLOCMAN, "Le Conseil d'Etat encadre strictement les pouvoirs du CSA en matière de règlement des différends", IRIS 2012-2:1/22, available at <http://merlin.obs.coe.int/iris/2012/2/article22.fr.html>).

⁶⁴ In the wording of the above-mentioned Article 17-1, the CSA "peut être saisi par un éditeur ou par un distributeur de services [...] de tout différend relatif à la distribution d'un service de radio, de télévision ou de médias audiovisuels à la demande [...], lorsque ce différend est susceptible de porter atteinte au caractère pluraliste de l'expression des courants de pensée et d'opinion, à la sauvegarde de l'ordre public, aux exigences de service public, à la protection du jeune public, à la dignité de la personne humaine et à la qualité et à la diversité des programmes, ou lorsque ce différend porte sur le caractère objectif, équitable et non discriminatoire des conditions de la mise à disposition du public de l'offre de programmes ou des relations contractuelles entre un éditeur et un distributeur de services". On the procedural rules followed by the CSA to deal with such issues, see Articles 17-23 of its *règlement intérieur* (as by Délibération of 9 April 2014, cited above). In general, in the event of disputes, the CSA also has to attempt conciliation between the parties involved (see Article 3-1 of Law No 86-1067).

⁶⁵ As acknowledged by the CSA itself, with particular regard to the second dimension, "les règlements des différends devant le [CSA] apparaissent comme un élément essentiel de la régulation économique qui, aujourd'hui, doit être considérée comme l'un des champs d'action essentiels d'un régulateur moderne" (see *Lettre du CSA* No 221, of Novembre 2008, p. 21). Moreover, it is also affirmed therein that "à travers l'exercice des règlements de litiges, il apparaît que la régulation audiovisuelle poursuit autre chose que la seule mise en œuvre des principes du droit de la concurrence. Elle s'attache véritablement à garantir l'effectivité de la liberté du téléspectateur, destinataire essentiel de la liberté de communication" (*ibid.*).

Finally, it is worth mentioning that Law No 86-1067 also recognises an external/international role to the CSA. Indeed, it explicitly mandates for the CSA to be consulted on the position France should adopt in international negotiations on radio and television broadcasting, and charges the CSA with the task of favouring co-ordination between the positions of public and private broadcasters within international fora, especially European ones.⁶⁶

1.2.3 Other coexisting institutions with competences in broadcasting

Despite its central role in the governance of the audiovisual media sector and the extensive scope of the competences it has been entrusted with, the CSA is not, however, the only actor to regulate this sector in France. Indeed, since its establishment, the CSA has never acted in a (regulatory) vacuum. Other actors also have powers to regulate (or influence the regulation of) various aspects of broadcasting, and have retained some of their competences in this respect even after the setting-up of the new and sector-specific regulatory body, with whom they have established cooperation to different extents.

The first reference should naturally be to the role of the Parliament and Government. As far as Parliament is concerned, as explicitly mandated by the French Constitution, it is indeed the law that determines the rules concerning, inter alia, freedom, pluralism and independence of the media.⁶⁷ Parliament therefore exerts this general competence in the regulation of the media by passing statutory measures establishing the principles and (main) objectives on the matter. Furthermore, several provisions of Law No 86-1067 confer upon Parliament more specific competences and tasks in this domain. Among the most relevant ones are, for example: the task of establishing the level of funding for public television and radio broadcasters each year and, at a later stage, approving their financial statements;⁶⁸ the duty to

⁶⁶ See Article 9 of Law No 86-1067. In the wording that provision, the CSA is to be ‘consulted’ (*consulté*) on international negotiations concerning the audiovisual (but not the electronic communications) sector, while, originally, it was proposed to make the CSA itself a party (*associé*) to those negotiations: see NEVOLTRY & DELCROS, cited, pp. 61-65.

⁶⁷ See Article 34 of the Constitution, as amended by (Article 11 of) Constitutional Law No 2008-724 of 23 July 2008 “de modernisation des institutions de la V^e République” (JORF of 24 July 2008, p. 11890), stating that “la loi fixe les règles concernant [...] les droits civiques et les garanties fondamentales accordées aux citoyens pour l’exercice des libertés publiques; la liberté, le pluralisme et l’indépendance des medias [...]”. Before the insertion of this specific provision, the regulation of audiovisual communication activities in general was already encompassed within the domain of “l’exercice des libertés publiques” and, thus, already subsumed under Parliament’s competence to pass laws in this respect: see notably DEBBASCH *et al.*, cited, p 88.

⁶⁸ See Article 53(III) of Law No 86-1067.

appoint some members of the administrative boards of those broadcasters;⁶⁹ the competence to supervise (via the competent parliamentary committees) the live broadcasting of parliamentary debates (again, by public broadcasters); and the production of a (broadcast) programme giving account of its work, to be released under its exclusive responsibility and control.⁷⁰ It should also be recalled here that, as mentioned above, the CSA is held accountable, and has to report on its activities annually, to Parliament.

The Government (and especially the competent Ministry, i.e. the Ministry for Culture and Communication) retains the fundamental function of designing and shaping policies that impinge on the broadcasting sector. Indeed, it has the crucial role of drafting and proposing normative measures concerning the media. Thus it can exercise its power to adopt regulatory instruments designed to implement the relevant legislative provisions, by issuing governmental/ministerial decrees in this respect. Several statutory provisions also envisage specific tasks for the Government in the audiovisual sector.⁷¹ One of the most significant of these provisions is Article 27 of Law No 86-1067, according to which the Government issues decrees that will establish, inter alia, the general principles (*principes généraux*) determining the obligations applicable to both public and private (terrestrial) broadcasters in relation to several matters, such as: advertising, teleshopping and sponsorship services; services devoted exclusively to self-promotion or teleshopping; the already-mentioned cinematographic and audiovisual content-distribution quotas that broadcasters will have to abide by; as well as obligations concerning the (financial) contribution that content providers will have to make to fostering (especially independent) production of those contents. It is worth highlighting that, in its original version, this statutory provision assigned the competence to establish rules on programming and production to the established sector-specific regulatory body. In the same vein, Law No 89-25 sought to extend the powers of the CSA, notably in the field of advertising regulation. Nevertheless, due to the pronouncement of the *Conseil constitutionnel*, ruling that the attribution of such (too) extensive regulatory competences to the CSA was in breach of the Constitution, they were (re)allocated to the Government.⁷² While the CSA has

⁶⁹ See Articles 47-1–47-3 of Law No 86-1067.

⁷⁰ See, respectively, Article 55 and Articles 45-1–45-3 of Law No 86-1067. According, in particular, to Article 45-1 thereof, that programme “peut également porter sur le fonctionnement des institutions parlementaires et faire place au débat public, dans le respect du pluralisme des groupes constitués dans chacune des assemblées”.

⁷¹ For a thorough review of these provisions and the related governmental competences, see DERIEUX, cited, pp. 205-209.

⁷² See the already mentioned French Constitutional Court’s decision No 88-248 DC of 17 January 1989. These measures were challenged on the basis of the provision of the Constitution conferring executive powers to the Prime Minister. However, and more generally, as regards the attribution of (discretionary) regulatory powers to

retained an advisory role to be exercised via *avis motivés* addressed to the Government (and published in the *Journal officiel*) before the latter issues the aforementioned decrees, it could nevertheless be argued that the wording of Article 27 of Law No 86-1067, referring to “principes généraux”, implies that some significant room for discretionary intervention is left regarding the further implementation of those very principles on the part of the specialised regulatory authority itself. Moreover, it should also be recalled that the Government is the main actor in international negotiations concerning the audiovisual sector, as well as domestically, in defining (after having heard the CSA’s opinion) some important technical aspects of regulation, such as those related to the designation of frequency bands, the allocation and assignment of which are entrusted to the CSA.⁷³ Finally, the Government also retains some important regulatory powers specifically regarding public and private broadcasters. As for the former, the Government (besides exerting some appointing power) sets forth their programming obligations by decree, notably in the form of terms of mission (*cahiers des charges*), having particular regard to the programmes related to the educational, cultural and social mission that public broadcasters are called upon to fulfil.⁷⁴ The CSA then monitors effective compliance with those obligations. According to Article 53 of Law No 86-1067, the Government also concludes the so-called “contrats pluriannuel d’objectifs et de moyens”, which are agreements between it and each public broadcasting operator, specifying the public service mission of the latter and establishing the financial means they will be allocated to perform that mission. In contrast to the *cahiers des charges*, the latter agreements seem to fall outside the scope of direct control by the CSA.⁷⁵

It goes without saying that the judiciary also plays a significant (albeit, perhaps, indirect) role in the regulation of the audiovisual sector. Both administrative and jurisdictional courts can (and do) exert an impact on the shaping of this sector when they are called upon to deal with cases relating to it. While for the former courts (especially the *Conseil d’État*) these will mainly be cases concerning the review of (mostly, sanctioning) decisions issued by the CSA, for the latter, they will be predominantly concerned with (alleged) violations of Law No 86-

the CSA, the *Conseil constitutionnel* recognised therein that this is compatible, in principle, with the Constitution, as long as those powers are assigned and exercised within the framework set by the laws and (governmental) regulations, thus confirming its previous similar decision No 86-217 DC, of 18 September 1986, on the CNCL.

⁷³ On this latter issue, see Article 21 of Law No 86-1067.

⁷⁴ See Article 48 of Law No 86-1067. For the *cahier des charges* of France Télévisions, see Decree No 2009-796 of 23 June 2009 (JORF of 25 June 2009, p. 10528), subsequently modified several times.

⁷⁵ See I. KATSIREA, *Public broadcasting and European law: a comparative examination of public service obligations in six member States*, Alphen Aan Den Rijn, Kluwer Law International, 2008, p. 21.

1067, the control of which does not fall under the competence of the CSA.⁷⁶ In fact, the evolution of the case-law of the *Conseil constitutionnel* in relation to statutory provisions on the media has brought about major developments in the recognition and establishment of the principles governing audiovisual regulation, among which media pluralism has certainly proven to be one of the most relevant.⁷⁷

Considering, then, the issue of economic regulation, with particular reference to the competition and anti-concentration measures applicable to the media, the powers of the CSA on this matter seem to be quite limited. In fact, although Law No 86-1067 recognises in general terms the CSA's competence to promote free competition and the establishment of non-discriminatory relationships between content producers and service providers within the audiovisual sector, it does not confer upon it much power to fulfil that objective.⁷⁸ First and foremost, the achievement of this goal is left to the action of another independent administrative authority, namely the *Autorité de la concurrence*.⁷⁹ This latter independent body (normally performing *ex post* controls) retains the competence to monitor the application of competition law and sanction anti-competitive practices (even) in the audiovisual sector. The same holds true for the application of general anti-concentration measures. In this respect, however, it has to be highlighted that Law No 86-1067 also encompasses some anti-concentration provisions specifically addressed to the media. Adopted, notably, under the rationale of ensuring (mainly external) pluralism, these provisions not only impose limits on the ownership of a single communication medium, but also provide for cross-media ownership caps. As regards (private) television broadcasting, the most relevant and paradigmatic measures of the first type provide that a single (moral or

⁷⁶ It goes beyond the scope of this dissertation to analyse the role of the judiciary in this context in depth: for a more detailed account, see DERIEUX, cited, pp. 221-226.

⁷⁷ See, notably, R. CRAUFURD SMITH, *Broadcasting law and fundamental rights*, Oxford, Clarendon Press, 1997, especially at pp. 162-168 (and below, in the text).

⁷⁸ See, again, Article 3-1 of Law No 86-1067. Nevertheless, the agreements (*conventions*) to be entered into with private broadcasters (as mentioned above) could be seen as useful instruments that the CSA can use to achieve these aims, especially to guarantee the independence of content providers vis-à-vis service providers and setting, thus, the preconditions for competition to flourish. It could also be mentioned here, however, that according to Article 17 thereof, the CSA has an advisory power as regard practices that restrict competition or determine economic concentrations. This power consists in the issuing of recommendations to the Government to foster the development of competition by radio and television broadcasting activities. Anyway, as specified in that same provision, the CSA is only empowered to raise the matter of restrictive trading practices and economic mergers before the proper administrative or judicial authorities, which may (as they are not obliged to) in turn ask the CSA for its opinion.

⁷⁹ The competition Authority, in its current form, was set up by Law No 2008-776 of 4 August 2008 “de modernisation de l'économie” (JORF of 5 August 2008, p. 12471): see also <http://www.autoritedelaconcurrence.fr>.

legal) person cannot hold, either directly or indirectly, more than 49% of the capital shares (or the voting rights) of an authorised (terrestrial) television operator.⁸⁰ This type of measure is complemented by some other specific anti-concentration provisions, setting thresholds regarding the number of authorisations (i.e., seven) each single person can be assigned for the delivery of (digital terrestrial) television broadcasting services.⁸¹ As for the cross-media ownership caps, the so-called rule of ‘two-out-of-three situations’ applies. This means that, in essence, according to Law No 86-1067, no authorisation relating to a (terrestrial) television broadcasting service can be granted to a person who is already operating, under certain conditions, in the radio broadcasting and the press sectors.⁸² Given this normative framework, which in itself is not immune to criticism,⁸³ it must be pointed out that the supervision of the application of all these (very detailed) anti-concentration measures seems eventually to rest mainly upon the CSA. Indeed, this Authority monitors and enforces such provisions, especially when called upon to deliver the aforementioned authorisations to broadcast, notably by verifying the applicants’ requisites in this respect. Moreover, on a more general level, the sector-specific competence of the CSA is recognised by Article 41-4 of Law No 86-1067, whereby the *Autorité de la concurrence*, in deciding to conduct more in-depth analysis into a proposed concentration it is dealing with, which directly or indirectly affects either a (television) content or service provider, is required to obtain a preliminary (but not binding) opinion on the matter from the CSA (which can suggest the imposition of certain commitments upon the parties involved in the merger, in order to authorise it); and more

⁸⁰ See Article 39(I) of Law No 86-1067: as specified therein, this threshold applies to the television broadcasting services that have an average annual audience of maximum 8% of the total audience of television services. Moreover, according to Article 40 thereof, foreign ownership (excluding entities established in the EU) is also limited to a maximum share of 20% of the capital (as well as of the voting rights) of a broadcasting company. This type of anti-concentration measure aims to prevent an individual (or a single legal entity) from having enough room to determine the editorial content of a television service alone (especially one transmitted by terrestrial means), and could thus also relate to safeguarding internal pluralism. All these limits (as well as the ones mentioned below) do not apply to public broadcasting.

⁸¹ See Article 41 of Law No 86-1067. This type of limit can be more closely related to ensuring external pluralism.

⁸² More precisely, the ‘two-out-of-three situations’ rule forbids a company to be in more than two of the following situations: holding an authorisation for one or more terrestrial television services broadcasting to more than four million inhabitants; holding an authorisation for one or more radio services serving more than thirty million inhabitants; publishing or controlling one or more daily newspapers or publications representing more than 20% of total circulation in France (see Articles 41-1 and 41-1-1 of Law No 86-1067). While these provisions apply at the national level, different, but structurally similar, rules apply at the local one: see, in this respect, Articles 41-2 and 41-2-1 thereof.

⁸³ See, in particular, the analysis contained in the *Étude annuelle 2014 du Conseil d’État - Le numérique et les droits fondamentaux* (available at <http://www.ladocumentationfrancaise.fr/rapports-publics/144000541/>), notably at pp. 306-308, where it is claimed that that system does not appear fit to address the challenges of the new digital audiovisual scenario.

generally, to seek such an *avis* of the CSA whenever the former has been referred issues relating to anti-competitive practices taking place in the audiovisual sector.⁸⁴ This provision is of great relevance in regulating the relationship between the two independent authorities and shedding some light on their respective spheres of influence. In fact, it appears therein that, while the *Autorité de la concurrence* is to control (and act to remedy) any economic malfunctioning affecting the whole sector, the CSA is to bring to the fore any other interests specific to the audiovisual sector, which are to be safeguarded in such cases and, thus, taken into account even when applying more general and economically-oriented statutory provisions. However, since the CSA was also allocated the competence to settle disputes among audiovisual operators encroaching upon issues of economic regulation, its direct influence and control over matters relating to competition law in the audiovisual sector has certainly (at least, in principle) increased. It could be argued that this has been accompanied by greater opportunities for the sector-specific regulator itself – which certainly has a significant deal of expertise and knowledge in the (audiovisual) sector – to directly combine issues of economic regulation with the more specific objectives pursued by audiovisual policies. In so doing, the CSA has been called upon to deal with matters that come very close to the sphere of competence of the *Autorité de la concurrence*. Significantly, while vesting the CSA with the power to adjudicate disputes, Law No 86-1067 also provides for it to refer to the *Autorité de la concurrence* any matter arising out of such disputes relating to a possible breach of the general provisions on anticompetitive practices, as well as for the latter to decide on its own competence in this respect.⁸⁵ In these cases, it clearly appears that, notwithstanding the cooperation envisaged, there could still be a risk of divergences and contrasts, or even perhaps ‘competition’ between the two independent administrative bodies. This risk can only be limited, but not avoided – it could be argued – by the *passerelles*

⁸⁴ Article 41-4 of Law No 86-1067 states, also, that the *Autorité de la concurrence* has to inform the CSA of all such cases that have been referred to it. Moreover, it is specified therein that the latter has to inform the former of any anti-competitive behaviour in the audiovisual sector that comes to its knowledge, also asking for appropriate (interim) measures, and to request an opinion on the matter from it. As for the power of the CSA to ask the *Autorité de la concurrence* for its opinion, the combination of Articles 41-4 and 17 of Law No 86-1067 seem to suggest that the cooperation between the two Authorities is limited to (contentious) cases concerning anticompetitive practices: on these issues, as well as on the desirability of extending consultation more generally, beyond cases of anti-competitive behaviours, see the “Rapport au Premier Ministre sur *Les problèmes de concentrations dans le domaine des medias*” (so-called Lancelot Report), issued in December 2005 by a commission chaired by Mr. Lancelot, appointed by Decree No 2005-217 of 8 March 2005 (JORF of 9 March 2005, p. 3943), especially at p. 99.

⁸⁵ See, notably, Article 17-1 of Law No 86-1067.

provided for by Law No 86-1067, establishing reciprocal consultative or referral procedures.⁸⁶ Overall, the picture above shows that, while the competence of the CSA regarding issues of economic regulation is increasing in scope, the *Autorité de la concurrence* still has a pivotal role to play in these areas, so that the relationship between these two institutional bodies remains of crucial importance for the development of competition in the audiovisual sector in a way that safeguards the specificities of this sector and ensures the achievement of important objectives other than merely economic ones, such as, first and foremost, media pluralism. Finally, considering the other relevant institutions whose actions impinge on the regulation of the audiovisual sector, as well as their relationship with the CSA, another (important) independent administrative authority has to be mentioned, i.e. the *Autorité de Régulation des Communications Électroniques et des Postes* (ARCEP), formerly the *Autorité de Régulation des Télécommunications* (ART).⁸⁷ The ARCEP is the ad hoc independent body in charge of ensuring competition in the liberalised national electronic communications (and postal) sector. The regulation of the increasingly converging audiovisual and (former) telecommunications services is in fact entrusted, in France, to distinct sector-specific institutions. Thus, while the CSA's competence focuses upon audiovisual contents and their distribution (whatever the transmission network employed), the competences of the ARCEP encompass technical and economic issues relating to the regulation of network infrastructures for electronic communications (and postal) operators.⁸⁸ Nevertheless, due predominantly to

⁸⁶ See D. THÉOPHILE, E. RENAUDEAU, “Les relations entre le Conseil de la concurrence, l’ARCEP, la CRE et le CSA: Coopération ou concurrence?”, in *Concurrences* [2008] 3, pp. 67-75 (where the *Conseil de la concurrence* is the predecessor of the *Autorité de la concurrence*, the CRE is the *Commission de régulation de l’énergie*, i.e. the independent regulatory authority for the energy sector, and the ARCEP is the *Autorité de Régulation des Communications Électroniques et des Postes*, which will be described below): in particular, it is claimed therein that “les opérateurs économiques peuvent, dans certains cas, se retrouver confrontés à des situations relevant concomitamment de la compétence du Conseil de la concurrence et [...] du CSA, des pratiques identiques pouvant recevoir plusieurs qualifications. Une telle situation amène à s’interroger sur l’éventualité et la pertinence d’un ‘forum shopping’ entre autorités” (p. 72).

⁸⁷ See Law No 96-659 of 26 July 1996, “de réglementation des télécommunications” (JORF of 27 July 1996, p. 11384), which opened the telecommunications sector to full competition and set up, at the same time, the ART (actually established on 5 January 1997). Law No 2004-669 of 9 July 2004, “relative aux communications électroniques et aux services de communication audiovisuelle” (JORF of 10 July 2004, p. 12483) was then adopted to implement the EU Directives constituting the new common regulatory framework for electronic communications (for which see Part III below), but only in 2005, with the adoption of Law No 2005-516 of 20 May 2005, “relative à la régulation des activités postales” (JORF of 21 May 2005, p. 8825), was the ART replaced by the ARCEP.

⁸⁸ It is interesting to observe that, according to Article 10 of Law No 86-1067 as modified by Article 7 of Law No 89-25 (then repealed by Article 29 of Law No 2004-669), a certain competence on the part of the CSA is also envisaged in the domain of telecommunications. Anyway, it also appears that while the project to create an equivalent body to the American FCC, with powers extended to the telecommunications sector, was (already) considered at the time of the establishment of the CNCL, this was clearly abandoned when setting up the CSA: see NEVOLTRY & DELCROS, cited, pp. 66-70.

the technological convergence taking place between electronic communications and broadcasting networks and services, the activities undertaken by the ARCEP tend to touch increasingly directly upon audiovisual media matters. This is particularly the case when the ARCEP is called upon to deal with the regulation of issues concerning satellite or cable providers, as well as Internet service providers or mobile operators, when they all carry television (and TV-like) contents. Furthermore, the ARCEP also has general competence to deal with the planning of radio spectrum frequencies and the setting of technical conditions for their exploitation. Thus, its decisions can easily exert a significant impact on certain (crucial) aspects of broadcasting activities.⁸⁹ It comes, then, as no great surprise that Law No 86-1067 provides for some *passerelles* (as in the case, *mutatis mutandi*, of the *Autorité de la concurrence*) in order to establish the necessary coordination between the regulatory actions of the ARCEP and those of the CSA, especially by mandating consultation between these two bodies.⁹⁰ Nevertheless, in the light of the full digitisation of transmission networks and services and, hence, the increasingly tangible process of technological convergence, the need to better deal with this situation in regulatory terms has emerged ever more forcefully, and the very existence of two separate institutional actors has recently been questioned. In this respect, suggestions have been put forward to ‘merge’ the two sector-specific regulators and set up a new independent one, with competence for matters related to both transmission infrastructures and the contents delivered.⁹¹ So far, however, this prospective institutional

⁸⁹ See, for instance, the provision of Article 26 of Law No 86-1067, whereby it is up to the ARCEP to assign the radio-spectrum resources needed to distribute radio and television broadcasting programmes, also taking into account the need to ensure the fulfilment of the public service remit (on the part of public broadcasters).

⁹⁰ See, for instance, of Article 23 of Law No 86-1067, establishing that, in the case of an electronic communication service using frequencies (or frequency bands) whose assignment or allocation has been entrusted to the CSA, before the necessary authorisation to use them can be issued, a positive opinion on the part of the ARCEP is needed. Furthermore, Article 17-1 of Law No 86-1067 provides that, in the event of disputes arising between content providers and service providers, and referred to the CSA for their settlement, “[l]orsque les faits à l’origine du différend sont susceptibles de restreindre l’offre de services de communications électroniques, le [CSA] recueille l’avis de [l’ARCEP]”. This latter provision is mirrored by Article L 36-8 of the “Code des postes et des communications électroniques”, which provides that, in establishing the competence of the AERCEP to settle disputes “[e]n cas de refus d’accès ou d’interconnexion, d’échec des négociations commerciales ou de désaccord sur la conclusion ou l’exécution d’une convention d’interconnexion ou d’accès à un réseau de communications électronique, [lorsque] les faits à l’origine du litige sont susceptibles de restreindre de façon notable l’offre de services de communication audiovisuelle”, the ARCEP itself has to obtain the opinion of the CSA. More broadly, according to Article L36-6 of the “Code des postes et des communications électroniques”, when a decision to be taken by the ARCEP is capable of having “un effet notable sur la diffusion de services radio et de télévision”, it has the duty to seek the opinion of the CSA on the matter.

⁹¹ One such suggestion was first made in the already mentioned Lancelot Report, which, based on the ‘convergence argument’ admits that “le rapprochement des instances de régulation [est] une évolution inéluctable. Il a d’ailleurs déjà eu lieu dans des pays tels que le Royaume-Uni ou l’Italie, qui ont rejoint le modèle de la FCC aux Etats-Unis” (p. 100). Also the more recent ‘Giazzi Report’ (i.e., the report commissioned to Mrs. Giazzi by the President of the Republic, on *Le médias et le numérique*, released on 11 September 2008) states that “[d]e même que les groupes de médias doivent apprendre à penser la convergence, de même la

development has remained mainly confined to policy debate and no concrete legislative proposals have been put forward.⁹² This implies that, for the present time, the CSA will maintain its current institutional structure and competences, as the central actor with the primary role in regulating audiovisual media services and contents.

1.3 The functioning of the CSA and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?

As observed previously, among the many tasks the CSA has been assigned as guarantor of the freedom of audiovisual communications is that (stemming notably from the reading in conjunction of Articles 1 and 3-1 of Law No 86-1067) of ensuring that the socio-cultural pluralism of opinions and thoughts is reflected in the audiovisual sector. Moreover, according to the already mentioned Article 13 thereof, the CSA is specifically called upon to ensure “le respect de l’expression pluraliste des courants de pensée et d’opinion dans les programmes des services de radio et de télévision”.⁹³ Given the (above-illustrated) competences the CSA has been entrusted with, as well as the instruments it possesses with which to perform its mission, it could be asked to what extent and in which sense the CSA has accomplished the task of securing media pluralism so far.

réflexion sur la régulation doit intégrer cette dimension. L’une des premières mesures à envisager est sans doute la fusion du [CSA] et de [l’ARCEP], tant il est étrange, dans ce monde de convergence, que ces deux institutions continuent leur cheminement parallèle et séparé” (p. 13).

⁹² On this issue, however, it is interesting to note the position of the (former) President of the CSA, Michel Boyon, who declared in an interview on the occasion of the 20th anniversary of the CSA’s establishment, that the “CSA et l’ARCEP ont des responsabilités très différentes qu’ils exercent avec des états d’esprit tout aussi différents. La coordination existe sur les sujets d’intérêt commun, [mais que] aucune modification institutionnelle ne pourra avoir lieu avant 2012, c’est-à-dire avant le passage au tout numérique. À cette date, on y verra aussi plus clair sur le droit de la concurrence à appliquer aux télécommunications. Mais, j’insiste, la priorité, ce sont les contenus!” (Le Figaro, 3 February 2009). In fact, in 2012, the Prime Minister invited the competent Ministries to put forward proposals on the possible merger between the CSA and the ARCEP, thus launching a new round of debate on that matter, in which the two bodies participated: they both envisaged some alternative options to favour and enhance their reciprocal collaboration, but also highlighted some shortcomings of having a single convergent body instead of two (with the CSA in particular insisting on the risk that, in such a case, economic considerations could take precedence over cultural and social concerns). For an account of these debates (which have not so far produced any changes to the legislation), see A. BLOCMAN, “Le gouvernement réfléchit à un éventuel rapprochement entre le CSA et l’ARCEP” (IRIS 2013-1:1/21, available at <http://merlin.obs.coe.int/iris/2013/1/article21.fr.html>).

⁹³ It is interesting to highlight that in a previous version of this same provision (i.e., as amended by Article 8 of Law No 89-25), it was clearly stated that this task was limited to the *sociétés nationales de programme* (i.e., the public broadcasters). It was Article 29 of Law No 2000-719 of 1 August 2000 (JORF of 2 August 2000, p. 11903) that deleted this reference, thus rendering the provision applicable to all radio and television broadcasters (public and private ones).

An answer should start from the very notion of pluralism as embraced in the French media context. Indeed, in France, media pluralism is firmly recognised as an objective of constitutional value. In the (original) absence of an explicit reference to it in the Constitution, this recognition has been confirmed by the evolution of the case-law of the *Conseil constitutionnel*, which, as shown by CRAUFURD SMITH,⁹⁴ has been dealing with the concept of media pluralism in relation to the freedom of expression since the early 1980s. As affirmed in a report commissioned by the President of the Republic to an ad hoc committee in 2008, exploring possible updates to the catalogue of fundamental rights proclaimed by the Constitution, it is on the basis of “un *raisonnement constructif* que le Conseil constitutionnel a, sur le fondement des dispositions de l’article 11 de la Déclaration [des droits de l’homme et du citoyen] de 1789 encadré l’action du législateur en lui imposant de veiller à la préservation du pluralisme, en particulier par des dispositifs appropriés de contrôle des concentrations dans les medias”.⁹⁵ As noted in this report, the most recent and significant outcome of the full and independent recognition of a constitutional status to media pluralism occurred in 2008, as a consequence of (one of) the amendments to the Constitution. Indeed, on that occasion, it was decided to insert an explicit reference in the text of the Constitution to “la liberté, le pluralisme et l’indépendance des médias”, to clearly confirm them (beyond a merely symbolic recognition) as general objectives towards which policy and normative interventions in the audiovisual sector have to be oriented.⁹⁶ Building on the aforementioned judicial developments, the very notion of media pluralism as now enshrined in the text of the Constitution should therefore be interpreted as protecting and promoting the variety and diversity of opinions and thoughts that are present in and characterise a democratic society and that, as such, should be reflected not only in the programmes offered by media outlets,

⁹⁴ See CRAUFURD SMITH, cited, especially at pp. 162-165.

⁹⁵ See the December 2008 “Rapport au Président de la République du Comité de Réflexion sur le Préambule de la Constitution”, set up by Decree No 2008-328 of 9 April 2008 (JORF of 10 April 2008, p. 6033) and chaired by Simone Veil (available at <http://www.ladocumentationfrancaise.fr/rapports-publics/084000758/>), p. 65 (*emphasis added in the original*). In this report, it is also stated that “cette *construction jurisprudentielle* a été le produit d’une prise de conscience favorisée par les mutations économiques et technologiques touchant la presse et le secteur audiovisuel” (ibid.; *emphasis added*).

⁹⁶ This reference to freedom, pluralism and independence of the media was introduced by Article 11 of the already mentioned Constitutional Law No 2008-724, which modified Article 34 of the Constitution. Regarding the wording of the renewed constitutional provision, the abovementioned report underlines that “si le constituant de 2008 s’est borné à intervenir par le biais d’une disposition énonçant une simple règle de compétence en réservant à la loi le soin de fixer les règles concernant la liberté, le pluralisme et l’indépendance des médias, il a clairement entendu, ce faisant, rappeler des objectifs de fond” (p. 69), and that “en réalité, à l’origine, la volonté des auteurs de l’amendement était claire: “*Il s’agit d’inscrire dans la Constitution que la loi garantit explicitement le principe de liberté, du pluralisme et de l’indépendance des medias*” (ibid., *emphasis added in the original*).

representing the diversity of viewpoints (i.e., internal pluralism), but also in the diversity of the operators acting in the whole media sector (i.e., external pluralism).⁹⁷

Within this legal framework, the CSA has generally taken into account both these dimensions of media pluralism in its actions. Nevertheless, a critical appraisal of its work shows that, first, as regards external pluralism, the instruments the CSA has been provided with to guarantee such an objective do not appear to be very incisive to that end. The reference here is, in particular, to the above remarks regarding the provisions of Law No 86-1067 on media ownership and anti-concentration measures. In this respect, it has already been observed that the CSA can avail itself of two main tools to prevent concentrations negatively affecting the diversity of media outlets (in particular, as regards terrestrial television broadcasters). The first amounts to general supervision of the respect of such provisions, especially and most effectively at the time of the issuing (or renewal) of an authorisation to broadcast. As a preliminary point in this context, it is interesting to note that the wording of these provisions stresses the need to intervene to impede the emergence of a situation that can be detrimental to media pluralism. Indeed, all the relevant provisions start out by affirming that the measures they dictate are justified “*afin de prévenir les atteintes au pluralisme*”, either at national or regional level.⁹⁸ It appears therefrom that the *ex ante* control over the application of media ownership and anti-concentration measures is perceived by the legislator as being of paramount importance. As seen above, since it is the CSA that grants (or renews) authorisations for private operators to broadcast, when (inter alia) no breach of the requirements set forth in the provisions is found, its role in securing external pluralism has a strategic impact.⁹⁹ Furthermore, in the specific provision targeted to the issuing of

⁹⁷ For a thorough account on the recognition of this double-pronged dimension of media pluralism within the French audiovisual sector, see P. MARCANGELO-LEOS, *Pluralisme et audiovisuel*, Paris, L.G.D.J., 2004.

⁹⁸ See, respectively, Articles 41-1-1 and 41-1-2 of Law No 86-1067, for digital television broadcasting (*emphasis added*). Similar provisions (with an identical incipit) are set for analogue television and radio broadcasting: see Articles 41-1 and 41-2 thereof.

⁹⁹ In this respect, it could be recalled that, on the basis of Article 42-3 of Law No 86-1067, if the CSA comes to know (inter alia) that a substantial change in the ownership of an authorised broadcaster has occurred, affecting the company’s capital, management or financing arrangements, it could (almost) immediately withdraw the related authorisation to broadcast. However, following the amendments brought to that provision by Law No 2013-1028, Article 42-3 thereof also establishes that a change in the financing arrangements of the authorisation’s holder from a (mainly) user-subscription to an advertising-based regime (i.e., from pay-TV to freeview), or vice versa, requires the...authorisation of the CSA, which is conditional upon the respect of the principles set forth by Articles 1 and 3-1 of Law No 86-1067, thus including media pluralism, to be ascertained by the CSA itself (according to the procedure established therein). For the first cases, see the CSA Décisions No 2014-357, 2014-358 and 2014-359, of 29 July 2014, concerning three different television stations, one of which was an all-new channel, where (in all of them) the change from a pay-TV to freeview regime was not authorised, having regard, especially, to the detrimental effect on media pluralism (on the digital terrestrial platform, already too ‘crowded’ and lacking sufficient economic resources for all).

authorisations for digital television operators, it is clearly stated that one of the (positive) criteria to be followed by the CSA for that purpose is to take into account the contribution that the applicant (private television broadcaster) can make to favouring diversity among operators and the pluralism of information.¹⁰⁰ In this context, it is worth highlighting that, on the basis of (a broad interpretation of) Articles 1 and 3-1 of Law No 86-1067, the CSA has (sometimes) proven capable of adopting also general regulatory measures aimed at the same objective.¹⁰¹ Last but not least, the actual role the CSA can play in supporting external pluralism is further strengthened by the specific measures dictated by Law No 86-1067, requiring the CSA to take into account the economic functioning of the audiovisual sector when granting authorisations.¹⁰²

¹⁰⁰ See Article 30-1(III) of Law No 86-1067, where it is stated that “[d]ans la mesure de leur viabilité économique et financière notamment au regard de la ressource publicitaire, [le CSA] favorise les services ne faisant pas appel à une rémunération de la part des usagers et contribuant à renforcer la diversité des opérateurs ainsi que le pluralisme de l’information, tous médias confondus”. This obligation is reinforced by the general (and imperative) statutory requirement the CSA has to abide by in granting authorisations to broadcast, whereby the latter is required to decide on the matter “en appréciant l’intérêt de chaque projet pour le public, au regard des impératifs prioritaires que sont la sauvegarde du pluralisme des courants d’expression socioculturels, la diversification des opérateurs, et la nécessité d’éviter les abus de position dominante ainsi que les pratiques entravant le libre exercice de la concurrence” (see, notably, Article 30-1 of Law No 86-1067, together with Articles 29, 29-1, 30, 30-5 and 30-6 thereof; as well as, in a similar vein, Article 28-1(I) thereof, where it is stated that, “si la reconduction de l’autorisation hors appel aux candidatures est de nature à porter atteinte à l’impératif de pluralisme sur le plan national ou sur le plan régional et local” the CSA cannot proceed accordingly). For a critical appraisal of the significant margin of discretion the CSA possesses in implementing this ‘public-interest test’, see K. FAVRO, “L’intérêt du public, standard de la régulation de la communication audiovisuelle”, in P. MBONGO (ed.), *La régulation des médias et ses standards juridiques*, Paris, mare & martin, 2011, pp. 107-130. For an account of how such a system has worked so far (notably, in the former ‘analogue environment’) and of the importance attached to pluralism by the CSA, see VEDEL, cited, pp. 657-659.

¹⁰¹ See, in particular, Délibération No 2012-45 of 16 October 2012, “relative à la diffusion simultanée d’un même programme par plusieurs chaînes hertziennes terrestres à vocation nationale”, where it is stated that the “diffusion de tout ou partie d’un même programme, au même moment, par plusieurs chaînes de télévision hertziennes nationales est susceptible de porter atteinte au pluralisme des courants d’expression socioculturels et ne contribue pas à la diversité des programmes. Par ailleurs, elle ne relève pas d’une gestion optimale de la ressource radioélectrique que le [CSA] est chargé d’assurer. En conséquence, plusieurs services de télévision hertziens terrestres à vocation nationale ne doivent pas diffuser tout ou partie d’un même programme de manière simultanée, ni avec un différé inférieur à une heure, sauf accord écrit préalable du [CSA]. Est néanmoins admise, à titre exceptionnel, la diffusion simultanée ou en léger différé de tout ou partie d’un même programme présentant un intérêt particulier pour le public, tel que la retransmission d’une cérémonie, d’un débat ou de l’intervention de personnalités”.

¹⁰² Indeed, according to Article 31 of Law No 86-1067, as amended by Law No 2013-1028, in order to take into proper account (also) economic considerations when allocating radio-spectrum resources for audiovisual media services (as mandated by that provision), the CSA is required to undertake an impact study prior to the launch of a new call for tenders that is likely to significantly alter the market (and, hence, external pluralism as well), so as to measure its possible economic consequences: in the event that the impact assessment (or the public consultation it should also conduct on that matter) shows that the economic situation is not favourable to the launch of such a call, the CSA has been entrusted with a discretionary power, whereby it can now even decide (under certain conditions) to postpone the call (while, before that amendment, it did not have that discretion when new resources were available).

Still regarding the safeguarding of external pluralism, and in some relation to these last considerations, the second most relevant instrument the CSA can use is represented by the *avis* it has to render to the *Autorité de la concurrence* when the latter is evaluating a merger operation involving audiovisual media outlets. The effectiveness of the power to ensure the respect of external pluralism in such cases on the part of the CSA is limited by the non-binding and, thus, less incisive (at least formally) nature of the *avis* provided for by Article 41-4 of Law No 86-1067, as already discussed above.¹⁰³

Besides all the foregoing, another tool available to the CSA to guarantee (mostly, but not exclusively) external pluralism lies in its competence to settle disputes between audiovisual media operators. Indeed, while (as discussed above) this competence is bestowed upon the Authority mainly in order to confer it greater powers of economic regulation, its exercise could (or rather, should) nonetheless be grounded in and oriented (also) towards securing external pluralism itself.¹⁰⁴

As far as internal pluralism is concerned, the CSA has proven to be quite effective in its action, at least in guaranteeing and concretely promoting some of its constituent elements. What is striking in this respect is, first of all, the very extensive and intense activity the CSA has undertaken to ensure that the specific dimension of pluralism explicitly mentioned in the Constitution (i.e., political pluralism) is represented in the broadcasting media.¹⁰⁵ In particular, by consistently interpreting internal pluralism as an obligation placed upon all television broadcasting outlets, consisting of a balanced representation of different viewpoints within each television channel, the CSA has acted to concretely affirm this general objective in relation to political pluralism. As noted above, this mission is expressly conferred upon the CSA directly by Law No 86-1067, namely by Articles 13 and 16 thereof. However, since

¹⁰³ In this respect, a paradigmatic example is provided by the “Avis du CSA au Conseil de la concurrence sur le projet de prise de contrôle de TPS et CanalSatellite par Vivendi Universal - Groupe Canal+”, of 23 May 2006, which was rendered in the procedure that led to the authorisation of the merger in question (in the pay-TV market), subject to several ‘behavioural’ commitments on the part of the merged (new) entity, and within which clear reference to (external) pluralism was made by the CSA as the crucial objective to be achieved (and maintained).

¹⁰⁴ See, for instance, Décision No 2007-471 of 17 July 2007, concerning a dispute between a content provider (Voyage) and a television service distributing platform (CanalSatellite) on the (commercial) arrangements concerning the distribution of the latter by the former, where, having regard to the issues at stake, the CSA stated that “dans la mesure où sont en jeu la présence de la chaîne Voyage dans l’offre de la société CanalSatellite et les conditions tarifaires de sa mise à disposition du public, le présent différend se rapporte au pluralisme, à la qualité et à la diversité des programmes, ainsi qu’au caractère objectif, équitable et non discriminatoire des relations contractuelles entre un éditeur et un distributeur de services”, and pronounced itself on the merits of the case for the protection of that objective.

¹⁰⁵ Article 4 of the French Constitution states that “[l]a loi garantit les expressions pluralistes des opinions et la participation équitable des partis et groupements politiques à la vie démocratique de la Nation”.

these provisions are phrased in general terms, it has been up to the CSA to shape the actual measures to be applied to ensure political pluralism via television broadcasting programmes, as well as, once established, to enforce them by monitoring their compliance. In this context, according to the aforementioned statutory provisions, a distinction must be drawn between election and non-election periods. During election time, on the basis of Article 16 of Law No 86-1067, specifically regarding public service broadcasters, the measures applied concerning conditions for the production, planning and distribution of programmes related to election campaigns apply, as adopted by the CSA (according to the nature of the specific election at stake) and recalled by the *cahiers des charges*, are detailed ones, while for all agreed (by *convention*) or simply authorised broadcasting services, the CSA issues general (as well as, where appropriate, complementary and specific) recommendations on the same matters.¹⁰⁶ Beyond election periods, the CSA has elaborated and enforced other rules and standards in the exercise of its competence as guarantor of political pluralism in the audiovisual sector, acting with quite a broad margin of discretion (in the absence of specific definitions and limits set forth by statutory provisions). The first milestone in this sense dates back to 2000, when the CSA formalised the so-called “principe de référence”, which adjusted the well-established (since 1969) and purely quantitative rule of the “trois tiers”. According to this rule, broadcasters, when covering political activities, had to allocate one-third of the related airtime to the Government representatives, one-third to the parliamentary majority’s political parties, and the remaining one-third to the political parties representing the opposition in Parliament. With the formalisation of the so-called *principe de référence*, broadcasters were required to take also qualitative criteria into account, such as by ensuring comparable programming arrangements to all political interventions and “fair access” (*accès équitable*) to television

¹⁰⁶ See, in particular, the CSA Délibération No 2011-1, of 4 January 2011, containing the general recommendations for (radio and) television broadcasting during elections. These recommendations are then complemented, for each specific election, by further measures (also applicable to public broadcasting channels): see, for instance, the CSA Recommendation No 2012-5 of 2 May 2012, for the national legislative election (of 2012); as well as Recommendation No 2014-2 of 2 April 2014, issued for the elections to the EP of May 2014. Interestingly, in both these recommendations it is stated that they apply to “l’ensemble des services de radio et de télévision, quel que soit leur mode de diffusion par tout procédé de communication électronique” for the relevant periods established therein. It is worth highlighting that, according to the *Conseil constitutionnel*, those recommendations have... a binding character: see the already cited decision No 86-217 DC (referring to the CNCL). It could also be recalled that, during election periods, a general principle of ‘fair representation’ of all political actors is applied, while for presidential elections in particular, a ‘principle of equality’ between candidates (for a certain time-frame) is in force: on the application of these principles, the CSA has launched (in 2014) a consultation (with stakeholders and experts), especially in order to evaluate their adequacy in the changing media landscape (see <http://www.csa.fr/Etudes-et-publications/Les-autres-rapports/La-regulation-des-medias-audiovisuels-lors-des-trois-campagnes-electorales-du-premier-semester-2014-elements-de-propositions>).

programmes for political parties not represented in Parliament.¹⁰⁷ However, the *principe de référence* also provided some precise indicators for the broadcasters themselves to measure political interventions in broadcasting media and report the results of those measurements to the CSA (this computation mostly being carried out by the CSA itself). This allows the CSA, in turn, to report each month to the Presidents of the *Assemblée nationale* and the *Sénat* (as well as to the leaders of the various political parties represented in Parliament) on the records regarding politicians' speaking time in all the programmes broadcast (and, in particular, in news programmes, information bulletins, and current affairs programmes), as mandated by Article 13 of Law No 86-1067.¹⁰⁸ Based on the outcomes of the application of all these standards and instruments, as well as considering the evolutions affecting both the political and audiovisual media landscapes in France, the CSA issued (in August 2006) some

¹⁰⁷ The documents relating to the *principe de référence* (in which the distinction between “pluralisme externe” and “pluralisme interne” is employed), as adopted on 8 February 2000, are available at the CSA web-site. As provided therein, the *principe de référence* applied “à tous les éditeurs audiovisuels [sauf que pour les] radios d’opinion [ainsi que] les éditeurs dont la thématique exclut le traitement de l’actualité politique dans leurs programmes. En outre, pour les programmes à diffusion locale ou régionale, ce principe ne saurait s’appliquer au traitement de l’actualité politique locale ou régionale, pour laquelle le pluralisme doit être assuré en tenant compte des équilibres politiques locaux ou régionaux”. It appears from this that the airtime devoted to politicians standing for the opposition in Parliament could not be less than half of the total amount of airtime devoted to politicians standing for the Government and for the majority parties represented in Parliament. Moreover, the exact meaning of a “fair” amount of airtime to be devoted by channel operators to politicians standing for parties that are not represented in Parliament was not clearly defined and remained opened to discretionary assessments (by the CSA). On this last matter, the *principe de référence* also stated that, besides quantitative indicators focused on politicians’ public statements, a more qualitative evaluation of the coverage of politics by the media was needed: this amounted to television broadcasters taking other parameters into account, such as the duration, format and audience of programmes devoted to politics. Overall, however, as commented by VEDEL, cited, “practically, it seems that the new reference principle inaugurated in January 2000 [had] only changed the ‘three-thirds rule’ into an ‘about 30 per cent-30 per cent-30 per cent and roughly 10 per cent’ rule. Judging by the official statements of the CSA, it is not clear how the qualitative assessment of political coverage [could have] been implemented” (p. 691).

¹⁰⁸ As regards these indicators in particular, a distinction was made between “le temps d’antenne” and “le temps de parole”, according to which the former consists of “la totalité du temps consacré [aux sujets] notamment politiques, économiques ou sociaux, contribuant à la formation de l’opinion”. “Le temps de parole” is instead “le seul temps pendant lequel une personnalité s’exprime”. In this respect, the CSA also points out therein that “au-delà du seul volume de temps de parole, il est important d’apprécier dans quelles conditions ‘d’exposition’ ont été diffusées les interventions. En effet, l’audience varie suivant les éditions des journaux télévisés. Aussi les temps de parole politiques sont-ils présentés sous forme globale avec leur répartition par éditions. Ces différents indicateurs permettent ainsi au Conseil de savoir: qui a parlé; sur quel sujet; pendant combien de temps; devant quelle audience”. Regarding the frequency in time of any measurement, it is established therein that this “reste mensuelle, mais l’évaluation du respect du pluralisme portera à la fois sur les résultats d’un mois et sur ceux d’un trimestre glissant (par exemple pour le mois de mars, analyse des temps de mars et de la période janvier-février-mars; pour le mois d’avril, analyse des temps d’avril et de la période février-mars-avril, etc.). Les trois mois glissants ont l’avantage d’atténuer les répercussions des événements de l’actualité sur un mois donné. Pour les magazines d’information et les autres émissions du programme (hors journaux télévisés), l’appréciation restera semestrielle. Le bilan annuel récapitulera les résultats de chaque trimestre glissant”. Finally, “en cas de manquement constaté au respect du principe de référence, le CSA alerte par courrier le président de la chaîne concernée, afin qu’il soit procédé au rééquilibrage nécessaire”. All the foregoing shows how detailed the standards elaborated by the CSA at its own discretion are, and, thus, how incisive its action is in the operationalization of political (internal) pluralism for audiovisual broadcasters.

“réflexions sur les modalités du pluralisme” that introduced the possibility of making significant changes to the *principe de référence*.¹⁰⁹ Moreover, in the meantime the *Conseil d’État* delivered a ruling whereby, in contrast to what the CSA itself had maintained thus far, it was established that the statements of the President of the Republic within political debate (and not when performing institutional functions, pursuant to Article 5 of the Constitution) also had to be computed for the purposes of those measurements.¹¹⁰ Thus, on 21 July 2009 the CSA adopted a new “principle of political pluralism” (*principe de pluralisme politique*) intended to reconsider the *principe de référence* and replace the ‘three-thirds rule’. According to the “principle of political pluralism”, in essence, the total speaking time devoted to the parliamentary opposition may no longer be less than half the total speaking time reserved to the President of the Republic and the presidential majority altogether.¹¹¹ From all the foregoing, it transpires that the CSA, through all the different and detailed measures it has adopted and its related enforcement activity, has not only contributed to providing concrete guarantees for political pluralism in the (broadcast) media, but has also shaped and given substance to that pluralism by exercising its (not unconditional, but significantly ample) margin of discretion.

The role of the CSA in promoting and protecting internal pluralism is not, however, limited to the political dimension of the latter. In fact, other more general and cultural-diversity oriented aspects of internal pluralism are guaranteed and safeguarded by the CSA through various means. One of these instruments is certainly represented by the *conventions*. Indeed, as observed above, when granting authorisations to private audiovisual operators to broadcast their programmes, the CSA enters into a legally binding agreement with the latter, in the form

¹⁰⁹ The “reflection” made by the CSA on the matter is summarized and available at <http://www.csa.fr/Etudes-et-publications/Les-dossiers-d-actualite/Reflexions-sur-les-modalites-du-pluralisme>.

¹¹⁰ See the *Conseil d’État*’s decision No 311136 of 8 April 2009, resulting from an action brought against a *Décision* (of 3 October 2007) of the CSA rejecting a request to take into account the speaking time of the President of the Republic for the purposes of the application of the *principe de référence*. In its ruling, the *Conseil d’État* censured the decision of the CSA, but expressly left it to the latter to define the concrete rules to be laid down in order to take (the effects of) its pronouncement into account. In order to take this ruling immediately into account, the CSA adopted (temporary) measures modifying (de facto and de jure) the *principe de référence*: see *Délibération* No 2009-34 of 3 June 2009.

¹¹¹ See *Délibération* No 2009-60 of 21 July 2009 “relative au principe de pluralisme politique dans les services de radio et de télévision” (repealing *Délibération* No 2009-34). See also the CSA *Délibération* No 2013-7 of 23 April 2013 (repealing *Délibération* No 2011-5 of 18 January 2011), concerning some practical arrangements to be followed by broadcasters in measuring the speaking time of politicians, whereby (inter alia) a monthly obligation to report to the CSA on data collected is placed upon some (main) broadcasters, while for all the others a general duty to report (only) at the request of the CSA is established.

of a contract, which constitutes a (potentially) powerful regulatory tool in its hands.¹¹² Each *convention* stipulated by the CSA (on behalf of the State) and the broadcasting operator concerned is designed to regulate all the key aspects relating to the exercise of broadcasting activities by the latter, and is intended to put (some) flesh on the bones of statutory (and regulatory) principles by adapting them to each concrete case. As for the content of the *conventions*, Article 28 of Law No 86-1067 dictates the guidelines to be followed. First and foremost, it is established therein that the specific provisions of such agreements have to take into account the need to respect information pluralism.¹¹³ The same Article 28 then lists a series of specific points, offering a blueprint for the various clauses of the *conventions* to be drawn up. Notwithstanding this quite strict and fairly detailed statutory guidance, limiting the CSA's margin of manoeuvre in shaping the actual content of each *convention*, some room for 'negotiating' and adjusting it to each case remains available.¹¹⁴ This proves to be particularly important considering that, at first sight, the aforementioned points do not explicitly mention pluralism, although a closer look suggests that many of the points are actually capable of having an impact on socio-cultural pluralism. This is, for instance, the case of clauses on issues such as: the terms and general features of broadcasting programmes; the time devoted to the first broadcasting of original French audiovisual works in France and the share of revenues devoted to purchasing the broadcasting rights for these works; the specific provisions to be adopted in order to ensure the protection of the French language; the broadcasting of educational and cultural programmes, as well as programmes intended to promote various forms of artistic expression; and finally (but quite importantly) the provisions necessary to ensure the independence of content producers from distributors/broadcasters. In

¹¹² As noted by VEDEL, cited, the *conventions* represent an instrument of (a sort of) "contract-based" regulation (p. 711), constituting a quite peculiar feature of the CSA's regulatory action since its inception. However, while such a regulatory instrument allows some flexibility, it also implies some shortcomings, such as, first, the asymmetry in the relationship between private broadcasters and the regulatory Authority on the one hand, and public broadcasters and that same Authority on the other hand (the latter not having to enter into such *conventions*). The disequilibrium of forces (mainly, in terms of resources) between the regulator and the regulated parties, to the advantage of the latter, is also remarked upon. Finally, it is pointed out that "for contract-based regulation to be socially satisfying, it is necessary for all parties concerned to be involved, and especially the viewers. If not, the contract-based regulation quickly tends to focus on business concerns only": this is a real risk, as the law and practice stand to date (p. 711).

¹¹³ Precisely, Article 28 of Law No 86-1067 states that "[d]ans le respect de l'honnêteté et du pluralisme de l'information et des programmes et des règles générales fixées en application de la présente loi et notamment de son article 27, [chaque] convention fixe les règles particulières applicables au service, compte tenu de l'étendue de la zone desservie, de la part du service dans le marché publicitaire, du respect de l'égalité de traitement entre les différents services et des conditions de concurrence propres à chacun d'eux".

¹¹⁴ Article 28 of Law No 86-1067 states, indeed, that each "convention porte notamment *sur un o plusieurs* des points" indicated therein (*emphasis added*), leaving it hence to the negotiating parties to actually make the choices and adjust the content of the *convention* in accordance with the needs of each case.

surveying the *conventions* currently in force for all the major private television broadcasting channels in France (operating predominantly on the terrestrial platform), it may be observed that they all contain (almost all of) these clauses, as well as a specific provision referring to political pluralism (or, more broadly, to impartiality and honesty in news reporting).¹¹⁵ In general, setting aside the case of specific (thematic) channels, these clauses appear to be drafted in almost the same rather general way, without significant differences from case to case. However, it is (perhaps) through their actual enforcement – via resort to the sanctioning instruments contained in the *conventions* themselves, which mirror those provided for by statutory measures (such as financial penalties, temporary suspension of the authorisation, and so forth) – that the CSA can intervene to ensure that the objectives they pursue are specifically and effectively fulfilled.

As mentioned above, among the clauses of the *conventions* that have a bearing on internal pluralism-related matters, the well-known requirement of audiovisual (and cinematographic) quotas (together with that of financing the production of audiovisual and cinematographic work) should be highlighted. The way in which these measures are phrased in the *conventions* closely reproduces the previously mentioned text of Article 27 of Law No 86-1067 with reference to the quotas. Thus, under the heading of “diffusion d’œuvres audiovisuelles”, the *conventions* entered into with the major private (terrestrial) television broadcasters usually state that “l’éditeur réserve, dans le total du temps annuellement consacré à la diffusion d’œuvres audiovisuelles, au moins 60% à la diffusion d’œuvres européennes et 40% à la diffusion d’œuvres d’expression originale française”.¹¹⁶ Reference is thus made therein to the

¹¹⁵ The texts of the various *conventions* are available through the CSA web-site, at <http://www.csa.fr/Espace-juridique/Conventions-des-editeurs>. As for the clause specifically addressed to (mainly political) pluralism, it normally bears, under the heading “pluralisme de l’expression des courants de pensée et d’opinion” the following content: “[l’]éditeur assure le pluralisme de l’expression des courants de pensée et d’opinion, notamment dans le cadre des recommandations formulées par le [CSA]. Il veille à ce que l’accès pluraliste des formations politiques à l’antenne soit assuré dans des conditions de programmation comparables. Les journalistes, présentateurs, animateurs ou collaborateurs d’antenne veillent à respecter une présentation honnête des faits évoqués et des questions prêtant à controverse et à assurer l’expression des différents points de vue”. Sometimes, reference is expressly made to the already cited CSA Délibérations No 2009-60 and No 2011-1 on political pluralism, respectively, outside and during election periods. In some cases, depending on the nature of the content offered (predominantly) by the broadcaster concerned, it is added thereto that “[l’]éditeur transmet au [CSA], pour la période qu’il lui indique, le relevé des temps d’intervention des personnalités politiques, syndicales et professionnelles”. Moreover, if the broadcaster at stake offers essentially information services, for instance, this clause is somewhat reinforced by also stating that “[u]n comité composé de personnalités indépendantes de la société titulaire et des sociétés qui la contrôlent directement ou indirectement est constitué auprès de la société afin de contribuer au respect du principe de pluralisme. [Le CSA] est tenu informé de toute modification dans sa composition. Le comité établit un bilan annuel. Ce comité peut être consulté à tout moment par la direction de la société” (see Article 2-3-2 of the *convention* concluded by I-Télé, which is an all-news channel, as updated on 13 March 2014).

¹¹⁶ A separate and analogous supplementary provision normally deals especially with the distribution of cinematographic works (while Article 27 of Law No 86-1067 takes both into account at the same time).

decree that defines the criteria for a European or originally French-language audiovisual (or cinematographic) work to be considered as such.¹¹⁷ Interestingly, it is the CSA that is called upon to attribute such qualifications to audiovisual content on the basis of these criteria, to make it eligible to (help) fulfil the quota requirement. Moreover, while the distribution of such audiovisual works has to take place particularly during prime-time, it is up to the CSA to define in each *convention*, according to the specific features of the broadcasting outlet involved, the so-called “significant viewing or listening time in substitution to prime-time” as the reference broadcasting time for measuring compliance with the quota provision.¹¹⁸ Naturally, as for the other clauses of the *conventions*, the conduct of a television broadcaster not complying with the quota requirement is subject to sanctions from the CSA itself, as pointed out above.

All the aforementioned measures and instruments are commonly (and rightly) perceived as having a direct relationship with the protection and promotion of internal media pluralism. They are, therefore, the appropriate parameters to consider in assessing the CSA’s contribution to effectively fostering the achievement of that objective. Nevertheless, in concluding this analysis of the CSA’s role in securing media pluralism, brief reference can be also made to some other actions this Authority undertakes in the exercise of its competences. Two (main) cases in particular are worth mentioning.¹¹⁹ The first concerns the exercise of the powers the CSA has been entrusted with to ensure that the diversity of French society is reflected in the programmes broadcast by the media.¹²⁰ The issue here is mainly ensuring social policy objectives, such as preventing discrimination between people of different sexes, or different ethnic origins, as well as favouring social cohesion and solidarity. In pursuing these objectives, the need to ensure that the diversity of the cultures reflected in the multi-ethnic origins of French society are represented in the programmes broadcast, and thus that certain

¹¹⁷ This is Decree No 90-66 of 17 January 1990 (JORF of 18 January 1990, p. 757), as subsequently (and repeatedly) modified.

¹¹⁸ See, again, Article 27 of Law No 86-1067.

¹¹⁹ In addition to these cases, one could also point to the implementing provisions for the distribution of short news reports related to sport events (or other events of major importance for society) by audiovisual media services, adopted by the CSA with Délibération No 2014-43 of 1 October 2014 (repealing Délibération No 2013-2 of 15 January 2013).

¹²⁰ According to Article 3-1 of Law No 86-1067, the CSA “contribue aux actions en faveur de la cohésion sociale et à la lutte contre les discriminations dans le domaine de la communication audiovisuelle. Il veille, notamment, auprès des éditeurs de services de communication audiovisuelle, compte tenu de la nature de leurs programmes, à ce que la programmation reflète la diversité de la société française [et] rend compte chaque année au Parlement des actions des éditeurs de services de télévision en matière de programmation reflétant la diversité de la société française et propose les mesures adaptées pour améliorer l'effectivité de cette diversité dans tous les genres de programmes”.

aspects of socio-cultural pluralism are secured internally, within (each and) all broadcasting outlets also comes into play. To achieve those objectives in the field of television broadcasting, the CSA engages in dialogue with the programme editors, which results not only in the negotiation of related (general) clauses to be inserted in the *conventions*, imposing some related obligations on the broadcasters,¹²¹ but also in agreements on specific commitments that each broadcaster has to put in practice each year, on the basis of the type of programmes it offers to the public.¹²² These actions are supported by intense monitoring activity on the part of the CSA, notably through a (yearly) measuring tool known as the “baromètre de la diversité”,¹²³ as well as the so-called *Observatoire de la diversité audiovisuelle*, which began operating in 2008 as an internal office dedicated to this specific field.¹²⁴

The second and last field of intervention to be mentioned is that concerning language policy. Again, in every *convention* (as in the *cahiers de charges* of the public broadcasting channels) a provision is devoted to the television broadcaster’s obligation to distribute content in French language and, particularly, to ensure its correct use.¹²⁵ In pursuing the mission of securing the protection and the representation of French language in the audiovisual environment, assigned to the CSA by Law No 86-1067, as already noted, the CSA has issued general recommendations specifying the relative principles to be observed by audiovisual media operators: in fact, the monitoring of the correct use of the French language in television (and radio) broadcasts can contribute to the maintenance of cultural pluralism, represented by the

¹²¹ For example, in each *convention*, a clause is normally inserted in an article headed “vie publique”, stating that “l’éditeur veille dans son programme [...] à prendre en considération, dans la représentation à l’antenne, la diversité des origines et des cultures de la communauté nationale”.

¹²² See, notably, the CSA Délibération No 2009-85 of 10 November 2009, “tendant à favoriser la représentation de la diversité de la société française sur les chaînes nationales”, dictating the practical arrangements in that respect.

¹²³ As stated by the CSA, the way the *baromètre* functions “consiste à indexer, dans chaque émission, toutes les personnes et tous les personnages qui apparaissent à l’écran et qui s’expriment, quels que soient la durée de cette apparition et le temps de parole. Seuls les locuteurs sont indexés. L’indexation des locuteurs est faite sur la base de 4 caractéristiques apparentes: les professions et catégories socioprofessionnelles [...]; le genre masculin ou féminin; l’origine perçue; le handicap” (for other operational details, see <http://www.csa.fr/Television/Le-suivi-des-programmes/La-representation-de-la-diversite/La-diversite-a-la-television/Le-barometre-de-la-diversite>).

¹²⁴ See <http://www.csa.fr/Espace-juridique/Decisions-du-CSA/Le-Conseil-cree-l-Observatoire-de-la-diversite-audiovisuelle>. For an overview of the action of the CSA (and the *Observatoire*) in this field, see the CSA report to the Parliament on the *Représentation de la diversité de la société française à la télévision et à la radio* (of April 2014, available therein).

¹²⁵ The typical provision on the matter normally reads as follows: “[I]a langue de diffusion est le français. Dans le cas d’une émission diffusée en langue étrangère, celle-ci donne lieu à une traduction simultanée ou à un sous-titrage. Ces stipulations ne s’appliquent pas aux oeuvres musicales. L’éditeur veille à assurer un usage correct de la langue française dans ses émissions ainsi que dans les adaptations, doublages et sous-titrages de programmes étrangers. L’éditeur s’efforce d’utiliser le français dans les titres de ses émissions.”

‘survival’ of the French culture expressed in its ‘proper’ language, in relation to the use of other languages (such as English, in particular), which characterizes many audiovisual works available (as well) on the French market.¹²⁶

¹²⁶ See Recommandation No 2005-2 of 18 January 2005, “relative à l’emploi de la langue française par voie audiovisuelle”. On its web-site, the CSA indicates that “[i]l est attentif à la qualité de la langue employée dans les programmes des différentes chaînes de télévision et de radio, tout en étant conscient que la nature même de la communication radiophonique et télévisuelle impose un style oral et justifie des facilités que bannirait la langue écrite”, and proposes the use of French expressions instead of equivalent foreign ones (especially, English: see <http://www.csa.fr/Television/Le-suivi-des-programmes/Le-respect-de-la-langue-francaise>). Moreover, the findings of the CSA in that respect are reported in a special section, in every issue of *La Lettre du CSA*.

Chapter II

The United Kingdom and the Office for communications (Ofcom)

2.1 Prior to the establishment of Ofcom: some remarks on the political and legal debate and context

In the United Kingdom (UK) the issue of the establishment of an independent authority to regulate the media (regarding television broadcasting in particular) dates back to the mid-1950s. This was when the pre-existing monopoly of the UK's established public broadcasting operator, the British Broadcasting Corporation (BBC) was first eroded by the launch of independent commercial television. As recounted by BARENDT,¹ it was in fact the Television Act 1954 that opened the market to the first commercial broadcaster (now corresponding to Independent Television, ITV or Channel 3) and established the Independent Television Authority (ITA).² The ITA was an agency whose mission was only partially to regulate commercial broadcasting, since it was also involved in broadcasting activities itself to a large extent. Later on, at the beginning of the 1970s, with the Sound Broadcasting Act 1972, the ITA was substituted by the Independent Broadcasting Authority (IBA), which was also intended to regulate the emerging commercial radio services and the new commercial television channel (i.e., Channel 4, set up in 1980), but nonetheless still held intrusive powers in broadcasting, such as the possibility to censor certain programmes.

In fact, the very first independent regulator for television broadcasting in the UK was established by the Broadcasting Act 1990, when the Independent Television Commission (ITC) was set up to replace the IBA as a regulatory body in charge of the commercial television sector. The ITC was designed as an independent body with competences spanning from the awarding of licenses to commercial television broadcasters, the monitoring of their

¹ See E.M. BARENDT, *Broadcasting law: a comparative study*, Oxford, OUP, 1993, p. 12. For a brief historical account of the (major) developments in the UK broadcasting sector, see also G. ROBERTSON, A. NICOL, *Media Law*, London, Sweet and Maxwell, 2007, pp. 865-869. For a thorough (and updated) account of the background issues relating to the media sector in the UK, see notably: E.M. BARENDT *et al.*, *Media Law: Texts, Cases and Materials*, Harlow, Pearson, 2014; T. GIBBONS, *Media Law in the United Kingdom*, Alphen aan den Rijn, Kluwer Law International, 2014.

² The newly established commercial system was organised around a series of regional licences, with separate programme contractors appointed by the ITA to make programmes: an inbuilt plurality of ownership of commercial television was therefore established from its very inception.

activity, and the issuing of sanctions in the event of breaches of the licence provisions, to the regulation of media ownership and content-related aspects of television broadcasting. In contrast to the IBA, the ITC could not count on pre-censorship powers but only on sanctioning powers, ranging from formal warnings to the issuing of fines, up to the revocation of licences to operate.³

While the ITC represented the sector-specific regulator for television broadcasting, it co-existed for more than ten years with other regulatory bodies operating in the broader communications sector. Together with the ITC, there were another four main regulators holding significant functions. One of these was the Broadcasting Standards Commission (BSC), a public body responsible for television (and radio) content supervision regarding both commercial and public broadcasters. The BSC was mandated by the Broadcasting Act 1996 to produce codes of conduct related to standards and fairness in broadcasting, and to monitor compliance with them; as well as respond to viewers' complaints so as to safeguard the interests of the public in relation to decency, fairness, and privacy in broadcasting.⁴ The task of allocating, maintaining and supervising the radio spectrum was then assigned to an executive agency of the former Department of Trade and Industry (later, the Department for Business, Enterprise and Regulatory Reform; now, the Department for Business, Innovation and Skills), i.e. the Radiocommunications Agency. Another statutory body, known as the Radio Authority (RA), was established by the Broadcasting Act 1990 essentially to perform the same duties assigned to the ITC, but in relation to the commercial radio broadcasting sector. Finally, a distinct regulator was in charge of the telecommunications sector: the Office of telecommunications (Ofcom), set up under the Telecommunications Act 1984 (at the time of the privatisation of British Telecom (BT), the national former-monopoly telecommunications operator) as a non-ministerial government department, run by the Director General for Telecommunications. Among its duties, Ofcom had to ensure an adequate provision of telecommunications services throughout the UK, the promotion of competition in this sector, as well as the safeguarding of consumers' interests.

³ For a lengthier account of this 'era' of broadcasting regulation in the UK, see W. HOFFMANN-RIEM, *Regulating media: the licensing and supervision of broadcasting in six countries*, New York, Guilford Press, 1996, pp. 67-113.

⁴ The BSC was in turn the result of a merger between the two pre-existing bodies with authority over broadcasting programmes: the Broadcasting Standards Council and the Broadcasting Complaints Commission (BCC). While the first had to handle complaints concerning standards of taste and decency and the portrayal of violence and sexual conduct, the BCC had to deal with complaints regarding respect for privacy and fairness in programmes broadcast. For a more detailed account, see E.M. BARENDT, L. HITCHENS, *Media law: cases and materials*, Harlow, Longman, 2000, pp. 138-150.

Moving on from this thumbnail sketch of the institutional structure of communications regulation in the UK at the end of the last century, two remarks are worth making. First, it appears therefrom that the division of tasks and powers among the several aforementioned regulators often meant that they were required to coordinate their work and cooperate with each other in dealing with issue of broadcasting regulation. For example, with the development of new (or rather, alternative) delivery platforms for radio and television contents (like the telecommunications network), it became apparent that the role of Oftel (regarding the management of communication networks in particular) increasingly impinged on regulatory issues related to broadcasting.⁵ More generally, some overlaps appeared from the very outset between the BSC and the ITC (and RA), when exercising their respective competences over contents broadcast. Secondly, it is interesting to note that the regulatory bodies primarily concerned with the broadcasting sector and with content issues (that is to say, the ITC, the BSC and RA) were designed differently from the others and enjoyed a great deal of statutory independence. This was intended to ensure that commercial broadcasting – the object of their supervision – remained beyond the direct control of the Government. This reflected the same ‘arm’s length’ approach, deriving in considerable measure from the UK’s deep-rooted tradition of ensuring that the management of the public broadcasting service (entrusted to the BBC) was independent of government influence. The need to better coordinate interventions in the regulation of broadcasting, as well as to ensure the sound independence of the regulators in order to achieve coherent and efficient results, were taken into account in the broader political debate of the late 1990s, concerning the necessity of reforming the regulation and governance of the technologically evolving communications sector. The outcome of this debate is reflected notably in the 2000 Communications White Paper on *A New Future for Communications* (hereinafter, the 2000 Communications White Paper) prepared by the Government.⁶ Showing full awareness of the technological

⁵ See M. CAVE, T. VALLETTI, “Il mercato radiotelevisivo nel Regno Unito”, in A. PERRUCCI, G. RICHERI (eds.), *Il mercato televisivo italiano nel contesto europeo*, Bologna, Il Mulino, 2003, pp. 165-212, where it is affirmed that “durente gli anni ’90, Oftel e ITC hanno goduto di un potere regolamentare che andava sovrapponendosi in misura crescente. In talune occasioni, tali poteri venivano esercitati in modo armonico – ad esempio, nell’esame dell’offerta combinata dei servizi di telecomunicazione e televisivi. In altre aree, specialmente per quanto riguarda la regolamentazione del mercato della televisione a pagamento ‘all’ingrosso’ (che coinvolgeva anche il regolatore della concorrenza, l’Office of Fair Trading) le azioni sono state meno coordinate, generando così un pubblico ‘scontro tra regolatori’ e l’opportunità per le società regolate di impegnarsi nella ricerca del forum più ‘conveniente’” (p. 173).

⁶ The 2000 Communications White Paper results from the joint work of two different governmental departments: the Department for Culture, Media and Sport, and the Department for Trade and Industry. It seems, however, that the very first (official) backing for a single regulator for the communications sector appeared earlier and was expressed in a report, of 21 May 1998 (on *The Multi-Media Revolution*, HC520), published by the House of

developments that had started to revolutionise the communications sector, the 2000 Communications White Paper takes a clear stance by promoting the creation of a less complex system of codes and rules that would be flexible enough to cope, in the long term, with the pressure of increasingly frequent technological changes towards the digitisation of the delivery networks and the content delivered. The quest for simplification, for greater flexibility and for more up-to-date regulatory institutions launched by the 2000 Communications White Paper paved the way for the statutory reform that took place some three years after its publication and led to the establishment of the radically new institutional protagonist of broadcasting regulation in the UK, which will be looked at in detail in the following pages: i.e., the Office of communications (Ofcom).⁷

2.2 The setting-up of Ofcom

With the entry into force of the Communications Act 2003⁸ (as the legislative outcome of the aforementioned 2000 Communications White Paper) Ofcom, the new regulatory authority for the (whole) communications sector, was finally set in motion. In fact, the actual establishment of Ofcom (as a statutory corporation) dates back to 2002: formally, with the Office of Communications Act 2002⁹ (more simply, the Ofcom Act 2002) the Government – or rather, the Secretary of State for Culture, Media and Sport and the (former) Secretary of State for

Commons Culture, Media and Sport Committee during the 1997-1998 parliamentary session: see para. 158 thereof.

⁷ However, it has also been suggested by P. SMITH, “The politics of UK television policy: the making of Ofcom”, in *Media, Culture & Society* [2006] 28, pp. 929-940, that “the making of Ofcom was shaped by: (1) UK commercial media interests and their attempts to use convergence to justify deregulation; (2) New Labour’s commitment to free market principles and policy innovation; (3) a regulatory ‘turf war’ between the ITC and Oftel; and (4) bargaining between rival departments within the Labour government. On this basis, [...] Ofcom should be seen as the institutional embodiment of New Labour’s ‘competition policy plus’ approach to UK television regulation, rather than as merely the product of a regulatory ‘tidy up’ prompted by technological change” (p. 937). In general, on the setting-up and institutional features of Ofcom, see also R. CRAUFURD SMITH *et al.*, “The independence of media regulatory authorities in Finland and the UK: An Assessment”, in W. SCHULZ, P. VALCKE, K. IRION (eds.), *The Independence of the Media and its Regulatory Agencies*, Bristol, Intellect, 2013, pp. 289-332 (notably pp. 316-314).

⁸ The Communications Act 2003 (c. 21) received Royal Assent on 17 July 2003. It began its ‘life’ as a draft Bill, published in May 2002, which was (intensely) scrutinised by a joint committee of both Houses of Parliament, chaired by Lord Putnam (i.e., the House of Lords and House of Commons’ Joint Committee on the Draft Communications Bill, HL169, HC176, which published its report on 31 July 2002). Ofcom started operating on 29 December 2003. Any further reference to the Communications Act 2003 is to the version currently in force (unless otherwise stated). For all relevant information on Ofcom, see its institutional web-site, at <http://www.ofcom.org.uk/>.

⁹ The Office of Communication Act 2002 (c. 11) received Royal Assent on 19 March 2002.

Trade and Industry, acting together – set up Ofcom and prepared it to receive the regulatory functions that the Communications Act 2003 conferred upon it. Even if the Ofcom Act 2002 contains some provisions on the body’s institutional structure (which will be looked at more closely below), it mostly deals with the arrangements for the transitional period in between the beginning of the proper functioning of Ofcom and the ‘dismantling’ of the pre-existing regulators (also sometimes referred to as ‘legacy regulators’).¹⁰ The implementation of the provisions of the Communications Act 2003 led, then, to the completion of this process, involving the winding up of the five aforementioned sectorial regulatory bodies for the radio, television and telecommunication sectors, and Ofcom being vested with its powers, the vast majority of which were inherited from the regulators it replaced. Ofcom’s actual powers are therefore a combination of sector-specific competences for the regulation of electronic communications networks and services, licensing powers regarding radio and television, powers for audiovisual content regulation, as well as market competition-related powers regarding economic regulation (and, from 2011, also powers over postal services, especially in order to ensure the related universal service obligations).¹¹

It already emerges from these preliminary remarks that one of the key features of the statutory reforms leading to the simplification of the picture painted above, by replacing a plethora of regulatory bodies with a single statutory-designed regulator and conferring upon it the competences and tasks they formerly held, was the creation of what used to be called a single ‘converged regulator’. That is to say that Ofcom was intended to operate as a unified national regulatory authority with competence over the communications sector as a whole. Thus, in the UK, the distinction between different regulators for different communications sectors was overcome by the birth of a single regulatory authority capable of oversight in both the broadcasting and the telecommunication sectors at the same time. To use the ‘jargon of convergence’, Ofcom therefore has competence over both infrastructure and content matters, regardless of the communication medium used.

This institutional reform could be perceived, on the one hand, as a response to the increasing and unstoppable technological progress towards the digitisation of communications technologies and their growing integration. On the other hand, the setting-up of a converged

¹⁰ As detailed in the Explanatory Notes to the Ofcom Act 2002, this “should enable a more orderly transition by: establishing the Office of Communications; giving OFCOM a preparatory function; and placing the existing regulators under a duty to assist OFCOM to prepare” (para. 7). It appears that under this Act, Ofcom is not yet given any power to perform regulatory tasks in relation to the communications sector, as those tasks are set out in the Communications Act 2003.

¹¹ See, in particular, the Postal Services Act 2011.

regulator also has the effect of leading and pushing the structuring of regulation itself towards a new ‘converged’ model, so as to adapt it to the current technological trend. Therefore, the setting-up of a converged regulator represents not only an answer to the pressure for change brought about by technological developments, but also – it could be argued – a well-pondered and precise decision to support and drive them following the appropriate regulatory approach.¹²

The Ofcom Act 2002 identifies Ofcom’s mission as the elaboration, application and enforcement of the new rules and codes for the communications sector embodied in the Communications Act 2003, and to this end it specifies some of the key institutional features of the new regulator. This means that in describing Ofcom’s institutional structure, the focus below will first (and primarily) be on the Ofcom Act 2002 itself, while to subsequently describe its competences and functions reference will be made essentially to the Communications Act 2003.

2.2.1 The institutional structure

Turning now to an analysis of Ofcom’s internal institutional structure, its prominent feature is that it is inherently convergent. That is to say that Ofcom’s internal architecture does not show any apparent distinction that reflects the different communications sectors falling within its regulatory remit. It appears, instead, that within a single and unitary institutional framework the internal divisions of the UK’s converged regulator have been functionally organised to reflect the very impact of convergence. To better clarify this, it will help to briefly outline what Ofcom’s internal organisation consists of.

At the top of Ofcom’s corporate structure there is the unitary body of the Board. This is Ofcom’s main decision-making body, with responsibility for guiding it in the discharge of the duties and functions conferred upon it by statute. The Board is (currently) composed of nine members, who are a combination of executive (full-time) and non-executive (part-time) members.¹³ The power to appoint the Board’s members is conferred by statute (mainly) upon

¹² In first describing Ofcom (established soon afterwards), the 2000 Communications White Paper affirms the need “for a regulatory body with the vision to see across these converging industries, to understand the complex dynamics of competition in both content and the communications networks which carry services. It should not demand the same regulation for each medium, but must see across the whole sector and help build a coherent system” (para. 1.3.5).

¹³ See section 1 Ofcom Act (notably sub-section (2) thereof, originally providing for membership “of less than three or more than six”, to be determined by the Secretary of State), as complemented by the Office of Communications (Membership) Order 2005, increasing the maximum number to ten (and repealing the previous

the Secretary of State: as emerges from the Explanatory Notes to the Ofcom Act 2002, the Secretary of State for Business, Innovation and Skills, and the Secretary of State for Culture, Media and Sport, will actually make these appointments jointly.¹⁴ Among the members to be appointed to the Board by the latter are the Chairman of Ofcom (as well as a Deputy Chairman) and all the other non-executive members. However, the Chairman and the non-executive members, in turn, appoint the Chief Executive (with the approval of the Secretary of State) as well as the other executive members of the Board, following consultation with the appointed Chief Executive. Overall, it appears that the way the Ofcom Board is structured recalls the model of governance typical of some of the commercial companies it regulates; at the same time, it departs quite markedly from the models of governance in place for the former regulators replaced by Ofcom.¹⁵ In contrast to its various predecessors, Ofcom does not have a Director-General entrusted with sole decision-making responsibility; nor a Board consisting of entirely part-time members; nor even a body of commissioners. The responsibility and accountability for the governance of Ofcom, instead, is collectively held by the Board, composed of executive and non-executive members.

As for the status of the members of the Board, however, slightly different rules apply for the non-executive and the executive members. As far as the first group is concerned, as a precondition for being eligible for the post of non-executive member, the person in question must not have any financial or other interest that can prejudice the (impartial) conduct of the

Office of Communications (Membership) Order 2002, which had already increased that maximum number to nine). Pursuant to statutory provision (notably, section 1(6)(b) thereof), the executive members must in any case be fewer in number than the non-executive ones.

¹⁴ See para. 9 of the Explanatory Notes to the Ofcom Act 2002. It could be added that, as highlighted by CRAUFURD SMITH *et al.*, cited, the appointments to be made by the Government (branches) are governed by “the seven ‘Nolan Principles of Public Life’, established in 1995[, which] call for holders of public office to be selfless and have integrity; to be objective, accountable, open and honest; and to show leadership. The Nolan principles led to improvements in the way in which key public appointments are made in order to reduce the risk of patronage and cronyism. In particular, a Commissioner for Public Appointments was established, whose remit is to ensure that appointments are made on merit and conform to a code of practice [the so-called *Code of Practice for Ministerial Appointments to Public Bodies*, whose latest version is of 1 April 2012, available at <http://publicappointmentscommissioner.independent.gov.uk/the-code-of-practice/>]; posts are advertised publicly; and independent assessors are involved in the selection of suitable short lists. Final selection of the individual to fill key posts will in most instances, however, remain with the government, it being argued that the government is ultimately accountable to Parliament for the operation of executive bodies under its control” (p. 296).

¹⁵ See T. PROSSER, *The Regulatory Enterprise: Government, Regulation, and Legitimacy*, Oxford, OUP, 2010 (dedicating an entire Chapter to Ofcom, i.e. pp. 153-175), notably at p. 156, where the Author (also) affirms that the model chosen “avoids both the personalization of power associated with the Director General model and the horse-trading of interests possible with a commission. The danger is, however, that there is less room for the representation of outside interests and that the non-executive directors bear a heavy burden of ensuring that Ofcom is responsive to its environment”.

functions related to that role.¹⁶ Provided that the Secretary of State is satisfied of this, he/she can proceed with the appointment, for a term to be set at the time of the appointment itself (normally, from three to four years).¹⁷ Once the established period comes to an end, all appointed persons remain eligible for re-appointment.¹⁸ Moreover, as provided for by statute, any appointed person is free to resign at any time. The Secretary of State can act to remove any non-executive member from office, provided that at least one of the circumstances listed in the law has occurred (such as prejudicial financial arrangements, misbehaviour, incapacity or unfitness to carry out the related functions). As regards the executive components of the Board, nothing specific seems to be stated in the law regarding the qualifications required for their membership. It is, instead, expressly stated that the duration of their term of office as well as their remuneration are to be determined by the Chairman and the other non-executive members.¹⁹

Once appointed, however, all members of the Board have to abide by the norms contained in the Code of Conduct adopted by Ofcom itself.²⁰ This Code is very detailed in its prescription of mainly behavioural rules in different respects.²¹ Its core content rests, however, on conflict of interest-related issues. In dealing at length with this matter, the Code of Conduct provides, for example, for members of the Board not to retain any investments (nor their partners or dependent children) or undertake any work that Ofcom sees as equivalent to an unacceptable conflict of interest.²² Moreover, all members are also required to declare any direct or indirect interests or connection he or she may have regarding any item set for discussion or decision. It is made clear in this respect that the interests to be declared are not only financial ones: they can also concern material benefits to either party, while even personal “friendships, other than mere acquaintances, may constitute a connection”.²³ For the sake of transparency and

¹⁶ See para. 1 of the Schedule to the Ofcom Act 2002. It should be noted that the rules dictated for non-executive members also apply to the (post of) Chairman.

¹⁷ See Ofcom’s *Annual Report and Accounts 2013-2014* (of 2 July 2014), notably at p. 50.

¹⁸ See para. 2 of the Schedule to the Ofcom Act 2002.

¹⁹ See para. 6 of the Schedule to the Ofcom Act 2002.

²⁰ For the full text of the Ofcom Code of Conduct, see <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board/code-of-conduct>.

²¹ Grouped under two main headings (respectively, “General Propriety” and “Concerns about Propriety”), the Code contains norms spanning from the conduct to be followed by Board members when speaking publicly on matters falling within Ofcom’s remit; to the avoidance of politically active involvement; to norms relating to their behaviour when they are on missions for Ofcom.

²² See, notably, para. 18 of the Code of Conduct.

²³ Para. 21 of the Code of Conduct.

accountability, a publicly accessible register of disclosable interests is established, to include details of shareholding, directorships, employment and any relevant financial interest that the members themselves, as well as their partners or even dependent children, have in companies whose core business activities (and hence share price) could be affected by Ofcom's decisions.²⁴ This all shows a general commitment to avoiding any foreseeable and meaningful conflict of interest that could be detrimental to the role and functioning of Ofcom. Such commitment is further strengthened by the endorsement of a specific policy on this matter to ensure the establishment and maintenance of a reputation for impartiality, integrity and high professional standards for Ofcom itself.²⁵

Besides the Board, Ofcom's institutional structure consists of many other bodies. Indeed Ofcom has established a significant numbers of committees, in the exercise of the power expressly conferred upon it by the Ofcom Act 2002 to set up such bodies for the purpose of supporting the Board in the discharge of its duties.²⁶ All these committees can essentially be grouped into three main sets, on the basis of their functional features: Executive Committees, Board Committees and Advisory (or Non-Board) Committees.²⁷ While the committees within the first two sets have predominantly decision-making functions, as delegated to them, the Advisory Committees are mainly intended to provide (independent) information to Ofcom on matters relating to the carrying-out of its duties. Apart from some specific requirements

²⁴ As regards this register, also including any company directorships, offices held in charitable bodies, and other public appointments, see <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board/members/register-of-disclosable-interests/>.

²⁵ See <http://www.ofcom.org.uk/about/how-ofcom-is-run/ofcom-board/policy-on-conflicts-of-interest/>. It is worth noting that, after the end of the term in office, norms are provided for members to the Board not to be employed (for a certain period of time) in companies that fall under the scope of Ofcom's (regulatory) action.

²⁶ See para. 14 of the Schedule to the Ofcom Act 2002.

²⁷ The list of the committees set up by Ofcom is fairly long: for a complete overview of the existing committees belonging to the three abovementioned categories, see: <http://www.ofcom.org.uk/about/how-ofcom-is-run/>. By way of example, it is worth mentioning: within the first group, the Executive Committee, i.e. the senior executive team responsible for overseeing the management of Ofcom, whose core activities focus on setting directions for organisation, financial and administrative decision-making and monitoring; among the Board Committees (performing more substantive and sector-specific tasks), the Election Committee, responsible for adjudicating disputes involving licensed broadcasters and political parties for the allocation of airtime in relation to party political broadcasts (and related matters), as regulated by Ofcom pursuant to section 333 of the Communications Act 2003 (but note also, as further examples of this group: the Broadcast Licensing Committee, having delegated authority from the Ofcom Board to discharge Ofcom's functions in relation to radio and local television broadcast licensing, including taking decisions on the award of new and re-advertised licences, and on licence variations and revocations; or the Nominations Committee, comprising all the non-executive members of the Ofcom Board and working with the Secretary of State on the selection process for new non-executive members, as well as making recommendations on the appointments of the executive ones); and, finally, among the Advisory Committees, the Spectrum Advisory Board, providing Ofcom with advice on strategic spectrum management issues to support the latter in securing optimal use of the radio spectrum (as within its remit), by taking into account the different needs and interests of all users. Some further examples will also be referred in the text (as well as in the following footnotes).

regarding the composition of all these committees and the procedures to be followed by them, a considerable amount of flexibility is left to Ofcom in establishing their number, their internal working arrangements, and so forth.²⁸ Nevertheless, the Communications Act 2003 mandated for some specific committees to be established (not only within Ofcom).²⁹ Among these, a (special and) central one (especially due to its influence in broadcasting matters) is the Content Board.³⁰ The Content Board is a (Board-like) committee that performs delegated decision-making and advisory tasks covering a broad range of content-related matters.³¹ Its mission is to serve as Ofcom's primary forum for the regulation of television and radio quality and standards. In accomplishing this mission, the Content Board is required to take the utmost account of the interests of viewers (or listeners) and citizens, especially when they go beyond the interests of consumers, and to focus on aspects of public interests that fall outside the reach of competition and market forces. While Ofcom enjoys a margin of discretion in conferring functions to the Content Board – as with the other committees, pointed out above – it is stated that they must include functions related to “matters that concern the contents of

²⁸ As for the membership of these committees, while it remains open to laymen, as specified by para. 14(3) of the Schedule to the Ofcom Act 2002, at least one member of every committee (that is not a purely advisory committee nor a committee that has not been authorised under para. 18 therein to carry out functions on behalf of Ofcom) has to be a person who is either a member or an employee of Ofcom. Nonetheless, para. 15 of the Schedule to the Ofcom Act 2002 provides that Ofcom could make arrangements to regulate the procedures of the committees it establishes, and that such arrangements may include provisions as to the quorum and the making of decisions by a majority. According to para. 16 therein, Ofcom also has to make arrangements for the keeping of proper records of the proceedings of any established committee.

²⁹ This is the case, for instance, of the so-called Communications Consumer Panel, which is a (peculiar, Advisory-type of) committee established pursuant to section 16 of the Communications Act 2003 to contribute in supporting (almost, but not exclusively) Ofcom, by ‘feeding’ it with useful information relevant to its decision-making on consumer issues and concerns related to the communications sector (other than those related to advertising and programming content). In fact, the way that Panel is set up provides for its independence from Ofcom: the former, indeed, is made up of independent experts operating at full arm’s length from the latter, setting its own agenda and making its views available to the public. Ofcom has agreed with the Panel a MoU that establishes the principles by which both have to abide in managing their relations. An example of an internal committee whose establishment is provided for by statute is the Advisory Committee on Older and Disabled People, set up according to section 21 of the Communications Act 2003 (and deliberately made up of the same members as the Communications Consumer Panel, to avoid the potential duplication of work) to represent within Ofcom the interests of older and disabled people on broadcasting, telecommunications and spectrum issues, and to ensure that Ofcom’s policies and practices take into account views expressed by older and disabled citizens and consumers.

³⁰ The setting-up of the Content Board is a statutory duty provided for by section 12 of the Communications Act 2003.

³¹ The Content Board, dealing essentially with all content-related decisions that are not reserved by the Ofcom Board to itself, has no responsibility, however, for applying sanctions in cases of breaches of content rules: this is a task that used to be performed by another committee of the Board, namely the Content Sanctions Committee, chaired nevertheless by the chairman of the Content Board, which now belongs to the Ofcom Board. It is worth highlighting that, according to its Terms of Reference, the Content Sanctions Committee had competence over content or content-based cases referred to it by the executive for consideration of statutory sanctions, including cases involving the BBC, and that its decisions were final and not subject to review, reconsideration or appeal by Ofcom.

anything which is or may be broadcast or otherwise transmitted by means of electronic communications networks”;³² as well as those related to media literacy.³³ Moreover, in determining the functions to be conferred upon the Content Board, particular regard must be paid to the “desirability of securing that the [Ofcom] Board has at least a significant influence on decisions which involve the consideration of different interests and other factors as respects different parts of the United Kingdom”.³⁴ This appears to show concern for a certain amount of diversity-oriented considerations – at least from a regional perspective – to be taken into account when considering content issues; and this is not the only trace of such concern. Indeed, according to the rules on the formation of the Content Board, while Ofcom enjoys a great degree of flexibility in the selection of the persons to be appointed as its members – the majority of them, somewhat unusually, not being members or employees of Ofcom – as well as their number, the Communications Act 2003 does set a precise duty to ensure that there are members of the Content Board capable of representing the interests and opinions of the people living in each of the UK’s four different nations.³⁵ This requirement also seems to reflect the wish to give a proper voice and proper representation to regional needs and diverse interests, and can perhaps be perceived as a way of contributing to ensuring that local diversities and specificities are taken into account in the regulation of content-

³² See section 13(2)(a) of the Communications Act 2003. As this provision is framed, the influence of the convergence discourse in the shaping of the regulation and the competence of the regulator itself is clear: the Content Board is therefore designed to have competence over content whatever the means employed for its transmission and delivery.

³³ On (Ofcom’s duty to promote) ‘media literacy’ (i.e., the acquisition by people of the skills, knowledge and understanding necessary to make full use of the opportunities presented by both traditional and new communication services), see notably section 11 of the Communications Act 2003: for a record of Ofcom’s activities in that context, see <http://stakeholders.ofcom.org.uk/market-data-research/other/media-literacy/>. It could be argued that a policy concerning media literacy can be considered as part of a broader and more comprehensive media pluralism policy: having the necessary knowledge and skills to use the media at most allows users to understand the nature of what is being received, so the freedom to receive information – a component of the freedom of expression – can be said to be meaningfully exercised.

³⁴ See section 13(3)(b) of the Communications Act 2003. It could be added that, according to sub-sections (5) and (6) therein, the Content Board may be authorised to establish committees or panels to advise it in carrying out its functions.

³⁵ See, in particular, section 12(5) of the Communications Act 2003. Moreover, according to sub-sections (3) and (4) therein, the Content Board has to be led by a chairman chosen from any of the non-executive members of the Ofcom Board (other than the Chairman of Ofcom); then, at least one other member of the Content Board has to be another non-executive member of the Ofcom Board. As for the remaining posts, the opening up of the Content Board to laymen can serve to ensure broader input in content regulation. Currently, there are a total of twelve members on the Content Board. Moreover (looking also at sub-sections from (9) to (12) therein), still from an institutional perspective, the importance of the Content Board is apparent when one considers that – differently from all the other committees – a Code of Conduct applies to its appointed members that is very similar to the abovementioned Ofcom Board’s Code of Conduct: that of the Content Board, dealing (again) with conflict of interest issues in particular, its available at <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/code-of-conduct/>. Last but not least, it is curious to note that the members of the Content Board are also members of the aforementioned Broadcast Licensing Committee and the Election Committee.

related matters.³⁶ Nevertheless, there is no mention in the same provision of a similar (and more targeted) requirement for the appointment, for instance, of members of ethnic, religious or linguistic minorities, who would all be capable of representing core cultural diversity issues.

Furthermore, the internal organisational structure of Ofcom also comprises more technical and service-specific divisions, structured into Groups. Two small points can be made in this respect. The first is that, once again (here, at a more practical level) the functionally-oriented distinctions among the various Groups (strategy, licensing, etc.) seem to reflect the internal impact of convergence on the institutional design mentioned above. Thus, among the most relevant Groups are those dedicated to: Content, Consumers and External Affairs; Competition; Spectrum Policy; Strategy, International, Technology, Economy; Operations; and the Legal Group; all of which have and exercise competences covering broadcasting and telecommunications domains. The second point is that, although the Communications Act 2003 mandated the setting up and maintenance of separate local offices in England, Wales, Scotland and Northern Ireland, all functioning as sorts of regional operative branches of Ofcom,³⁷ it appears that the general administrative structure of the latter remains quite centralised (in London) and that the needs and interests related to regional communities are channelled through the other specific Ofcom bodies/members designated for those purposes. To complete this overview of Ofcom's institutional features, two other issues need to be addressed. These concern its financing mechanisms and the accountability of the regulator. As for the first, it should be pointed out that Ofcom raises the funds it needs from two main sources: a significant part of them are provided by the (licence) fees and (administrative) charges levied on broadcasting and communications operators (but not by the revenues deriving from the financial penalties it can impose on them), whereas the Government (i.e.,

³⁶ As a way of further specifying the institutional representation of local diversities, regarding England in particular, section 12(6) of the Communications Act 2003 adds that "in appointing a person for the purposes of subsection 5(a), OFCOM must have regard to the desirability of ensuring that the person appointed is able to represent the interests and opinions of persons living in all the different regions of England". It could also be recalled here that, besides the Content Board, the representation of regional interests in relation to communications matters more broadly (and not just content issues) is channelled, on the one hand, through the so-called Advisory Committees of the Nations (i.e., four committees representing, respectively, Scotland, Wales, Northern Ireland and the regions of England), whose establishment was made mandatory by section 20 of the Communications Act 2003, to provide advice to Ofcom about the interests and opinions, in relation to communications and postal matters, of people living in the part of the UK for which each of them has been established. On the other hand, the (Board-type) Nations Committee was set up to monitor the political dynamics in each nation of the UK and advise on Ofcom's engagement in each of them; to agree appropriate processes for Ofcom's engagement with each national advisory committee; to monitor stakeholder events in each nation; and to oversee the involvement, and engagement, of the Ofcom Board in each nation.

³⁷ See section 2(6) of the Communications Act 2003.

again, the Departments for Business, Innovation and Skills, and for Culture, Media and Sport) also contributes by providing the regulator with sufficient financial means via grants-in-aid.³⁸ The issue of accountability, then, appears to have been one of the most debated aspects in Ofcom's institutional design.³⁹ As emerges from the combination of the relevant statutory provisions, first and foremost, the mechanism chosen to ensure Ofcom's accountability *strictu sensu* is through a duty placed upon the latter to report annually to Parliament on its activities (as well as on its budget, expenditure and remuneration of the members of the Board, the Content Board and the Executive Committee). In fact, the regulator performs this duty by reporting to the Secretaries of State for Culture, Media and Sport and for Business, Innovation and Skills, who both, in turn, present the report to Parliament. These two governmental branches also contribute to ensuring Ofcom's accountability indirectly, by making themselves available to answer questions raised by the competent parliamentary Committees concerning Ofcom.⁴⁰ However, Ofcom itself is responsible for providing Parliament (including its relevant Committees) with whatever information may be requested concerning its policy decisions and actions. Ofcom may also be called upon to give evidence to select parliamentary committees and, in particular, to the Parliamentary Audit Committee, as the case requires.⁴¹ It is interesting to note in this respect that the Code of Conduct for the members of the Board (referred to above) contains a provision linking the accountability issue to Ofcom's independence.⁴² It is stated therein that, while the two abovementioned Secretaries of State are indeed answerable to Parliament for the performance of Ofcom, this does not (have to) affect the ability of the regulator to act independently of Government. Concerns

³⁸ See sections 28, 38 and 347 of the Communications Act 2003, and also paras. 8-10 of the Schedule of the Ofcom Act 2002, where it emerges that Ofcom has to be self-financing, i.e. it has to finance its operations out of the revenues it generates in the sectors subject to its regulation, so as to cover the costs it incurs, while the Secretary of State may also make grants to Ofcom with the consent of the Treasury.

³⁹ Part of this debate is referred to in the 2002 Report of the Joint Committee on the Draft Communications Bill (mentioned above), where it is stated that "one of the principles of regulation set out by the Government [...] was that 'Parliament must have an effective means of holding regulators to account'. Neither the [2000 Communications] White Paper nor the draft [Communications] Bill indicates what these means are" (para. 93 therein). This gap has been filled by the accountability requirements contained in the Ofcom Act 2002, discussed in the text. Still in relation to accountability, the issue of the publicity of hearings and meetings was discussed and strongly backed – even if ultimately not endorsed – by the House of Commons' Culture, Media and Sport Committee, in its Report of 4 March 2004, *Broadcasting in Transition*, HC380, paras. 44-49.

⁴⁰ See mainly para. 12 of the Schedule to the Ofcom Act 2002. It could be added here that, as for its financial management, Ofcom is accountable to the House of Commons' Public Accounts Committee regarding propriety and value for money, and is subject to the inspection of the National Audit Office: on this matter see, also, para. 11 of the Schedule to the Ofcom Act 2002.

⁴¹ See para. 12 of the Ofcom Code of Conduct (mentioned above).

⁴² This is para. 9 of the Code of Conduct.

about Ofcom's independence may in fact arise if one considers in particular that, in specific cases set out in the Communications Act 2003, the Secretary of State has the power to give instructions to the regulator.⁴³ This same provision also makes it clear that "while it is certainly appropriate for Ofcom to take account of the views of Ministers, it would be improper for [that body] to direct its actions purely on that basis". Thus, it appears that further indirect means of ensuring its accountability *latu sensu* can certainly be considered as appropriate, to strengthen Ofcom's independence from political powers as well as from the regulated players. Among these means are reference to the principles governing the exercise of Ofcom's regulatory activity. In this context, the Communications Act 2003 states that, in performing its duties, Ofcom must have regard in all cases to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; [and] any other principles appearing to Ofcom to represent the best regulatory practice".⁴⁴ On this plane, the process of holding public consultations upon policy proposals regarding matters that fall within Ofcom's remit and appear to be of interest to the affected parties can also be perceived and employed as a means to strengthen the regulator's (public) accountability.⁴⁵ Last but not least, it should also be mentioned that Ofcom's decisions, in general, can be subject to judicial review by the High Court, while its decisions relating, in particular, to competition matters can be appealed against before the Competition Appeal Tribunal.

2.2.2 Mission and competences

It may be asked, then, what the duties assigned to Ofcom actually amount to. In general terms, the answer is provided by section 3 of the Communications Act 2003. According to this provision, indeed, the principal duties of Ofcom are two. On the one hand, Ofcom has to act "to further the interests of *citizens* in relation to communications matters", whereas, on the

⁴³ For an example of a case in which the Secretary of State is granted such a power, see section 5 of the Communications Act 2003, where that power is provided for (under specific conditions) in relation to network and spectrum functions. On that issue, see notably PROSSER, cited, at p. 157.

⁴⁴ See section 3(3)(a) and (b) of the Communications Act 2003.

⁴⁵ In this respect, Ofcom has adopted the so-called Consultation Guidelines (the latest version to date is of November 2007 and is available at <http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>), to provide the method to be followed by itself and the parties involved in a consultation. As Ofcom affirms therein, "[c]onsultation is an essential part of regulatory accountability[,] the means by which those people and organisations affected by our decisions can judge what we do and why we do it". It is also made clear therein that the above Guidelines do not have a binding legal effect; and that, hence, they leave Ofcom free to depart from them as it sees fit, as long as it gives reasons for doing so.

other hand, it is required “to further the interests of *consumers* in relevant markets, where appropriate by promoting competition”.⁴⁶ It is quite interesting to underline this distinction between *citizens* and *consumers* (to which reference has also been made in the previous pages). Indeed, it could be argued that the distinction in question points to a tension between different sets of values and objectives, which both have to be taken into account, and preferably reconciled to the greatest possible extent, by the regulator in the discharge of its duties. In fact, while the interests of consumers appear more closely related to the securing of market-driven and economic objectives, citizens’ interests are more directly linkable to the pursuit of public interest-oriented targets, mostly related to output quality, such as satisfying democratic, social and cultural needs.⁴⁷ In this respect, it also appears that Ofcom is left with an appreciable margin of discretion in balancing out these two general duties and resolving any potential conflict between them that may arise in cases under its analysis. It is worth highlighting that the Communications Act 2003 does not provide for any detailed guidance or

⁴⁶ See, respectively, letters (a) and (b) of section 3(1) of the Communications Act 2003 (*emphasis added*). According to sub-section (14) therein, “citizens” are defined as “all members of the public in the United Kingdom”; whereas section 405(5) of the Communications Act 2003 more accurately states that, for the purposes of that Act, “persons are consumers in a market for a service, facility or apparatus, if they are: (a) persons to whom the service, facility or apparatus is provided, made available or supplied (whether in their personal capacity or for the purposes of, or in connection with, their businesses); (b) persons for whose benefit the service, facility or apparatus is provided, made available or supplied, or for whose benefit persons falling within paragraph (a) arrange for it to be provided, made available or supplied; (c) persons whom the person providing the service or making the facility available, or the supplier of the apparatus, is seeking to make into persons falling within paragraph (a) or (b); or (d) persons who wish to become persons falling within paragraph (a) or (b) or who are likely to seek to become persons falling within one or both of those paragraphs”. As for the ‘consumers’ group’, in particular, section 3(5) of the Communications Act 2003 further clarifies that its main interests, which Ofcom has to take into account, are “choice, price, quality of service and value for money”.

⁴⁷ Evidence of this comes from the 2002 Report of the Joint Committee on the Draft Communications Bill (mentioned above): see especially paras. 15-27 therein. The distinction between the interests of citizens and those of consumers also appears in the 2000 Communications White Paper: not only does the latter devote two different chapters to these two aspects, but it also, when sketching the regulatory objectives for the regulator to be established, identifies the central ones as the “protection of the interests of consumers in terms of choice, price, quality service and value for money, in particular through promoting open and competitive markets”; the maintenance of “high quality of content, a wide range of programming, and plurality of public expression”; and finally the protection of “the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy” (p. 79 therein); adding moreover that “in the context of any particular decision falling to the regulator, those objectives may pull in different directions, and that it will then be for the regulator to strike the right balance” (*ibid.*). Although the final streamlined wording of section 3(1) of the Communications Act 2003 (as reported in the text) does not exactly match the abovementioned indications, the substance remains quite the same: thus, the call for the regulator to strike the right balance of interests remains clear. Finally, it has been observed that, among the various UK economic regulators, the duty to further/promote the interest of “citizens” has been explicitly assigned only to Ofcom, whereas other bodies are only placed under the duty to protect the interest of “consumers” (see the House of Lords Select Committee on Regulators’ Report on *UK Economic Regulators*, of 13 November 2007, HL Paper 189-I, at para. 3.16).

solution to be applied in such cases, hence leaving the regulator quite ample (policy) leeway in exercising its functions.⁴⁸

The Communications Act 2003 does further detail the general but principal duties that Ofcom has to perform in carrying out its functions. In particular, according to section 3(2) thereof, Ofcom is required to secure “the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests” and the “the maintenance of a *sufficient plurality* of providers of different television and radio services”.⁴⁹ Many other specific factors are then added, to which Ofcom must also have regard in performing its duties whenever relevant in the circumstances: among the factors listed in section 3(4) of the Communications Act 2003, Ofcom has to consider “the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural or urban areas”.⁵⁰ To complete this picture, reference

⁴⁸ Section 3(7) of the Communications Act 2003 affirms that when, in a particular case, the general duties of Ofcom are in conflict with each other, it is for the regulator to “secure that the conflict is resolved in the manner [Ofcom] think[s] best in the circumstances”. Moreover, in line with section 3(8)-(10) thereof, when conflicts arise in “important” cases – i.e., according to section 3(11)-(12) of the Communications Act 2003, cases either including a major change in Ofcom’s activity or likely to have a significant impact on communications business or the general public, or even cases that appear to Ofcom to be of unusual importance – Ofcom is required as soon as possible after the conflict has been resolved to publish a statement (unless obliged not to disclose something that would be in the statement) setting out the conflict and how it has been resolved, and justifying the particular approach that has been taken. A summary of the manner in which such conflicts have been resolved is also to be included in the annual report. As observed by GIBBONS, cited, the “dual duty is symbolically important because it reflects the outcome of a keenly fought political battle in Parliament about the relative priorities of economic and general interests. Notwithstanding the equal weighting [of the two mentioned duties], Ofcom was perceived by many to have given greater emphasis to the economic and competition aspects of regulation in its early days, reflected in the idea of the ‘consumer *as* citizen’. More recently, the independent interests of citizens as members of the general public seem to be receiving appropriate attention” (p. 146). In any case, it could also be claimed that, in fulfilling the two duties, Ofcom could ‘contaminate’ the categories of “citizens” and “consumers”, trying to reach (where possible) compromises that suit the interests of both.

⁴⁹ These are respectively letters (c) and (d) of section 3(2) of the Communications Act 2003 (*emphasis added*). As mentioned therein, the other targets Ofcom is required to secure are “(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum; (b) the availability throughout the United Kingdom of a wide range of electronic communications services; [...] (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both (i) unfair treatment in programmes included in such services, and (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services”. The two requirements mentioned in the text prove to be of certain interest in analysing the role of Ofcom regarding media pluralism and will thus be referred to, more extensively, below.

⁵⁰ This is letter (l) therein. The other factors amount to: the desirability of promoting the fulfilment of the purposes of public service television broadcasting; the desirability of promoting competition in relevant markets; the desirability of promoting and facilitating the development and use of effective self-regulation; the desirability of encouraging investment and innovation; the desirability of encouraging the availability and use of high speed data transfer services; the different needs of all existing and potential users of the radio spectrum; the need to guarantee an appropriate level of freedom of expression when applying the standards falling within the above

also has to be made to the ‘European duties’ imposed by section 4 (as well as in sections 24 and 25) of the Communications Act 2003: only when exercising certain functions, Ofcom is charged with the duty to act in accordance with six ‘EU requirements’, which take precedence in the event of any conflict between the latter and the aforementioned general duties.⁵¹

Ofcom can rely upon wide-ranging powers for the fulfilment of its mission in line with all the aforementioned duties. Focusing here on what is essentially of relevance for broadcasting, above all its powers are broad and general regulatory ones.⁵² In this respect, as far as broadcasting content in particular is concerned, the exercise of these powers is structured in three different tiers of regulation, which were already outlined in the aforementioned 2000 Communications White Paper. As subsequently refined and actually applied by Ofcom (mainly through its Content Board), against the backdrop of the Communications Act 2003, these tiers are composed as follows. The first encompasses (minimum) requirements relating to programming standards and obligations applicable to all UK (radio and television) broadcasters: the focus here is primarily on negative requirements aimed at ensuring impartiality, accuracy, fairness and privacy, as well as at preventing harm and offence. The second tier is related to quantitative measures involving particular types of output: essentially, they revolve around quotas for independent television production, regional production and original EU/UK production, as well as around minimum quantitative requirements for the provision of news, current affairs or educational programming. Moreover, these second-tier requirements concern (to varying degrees) all public service broadcasters, i.e. not only the BBC radio and television services, but also the terrestrial free-to-air television operators, such as Channel 3 (or ITV), Channel 4 and Channel 5.⁵³ The third and last tier of regulation also

cited sub-section (2)(e) and (f) of the provision at stake to television and radio services, the opinions of consumers and of members of the public generally; the need to protect potentially vulnerable members of society such as children, the elderly, those with disabilities and those on low incomes; the desirability of preventing crime and disorder.

⁵¹ This is established by section 3(6) of the Communications Act 2003. The EU requirements amount to: promote competition; ensure that Ofcom’s activities contribute to the development of the European internal market; promote the interests of all persons who are citizens of the EU; take account of the desirability of carrying out their functions in a manner which, as far as practicable, does not favour one form of network, service or associated facility, or one means of providing or making available such a network, service or facility over another; encourage the provision of network access and service interoperability; and encourage compliance with international standards to the extent necessary to facilitate service interoperability and to secure a freedom of choice for customers.

⁵² For a concise but exhaustive (conceptual) overview of regulation in the UK media sector, see M. FEINTUCK, M. VARNEY, *Media regulation, public interest and the law*, Edinburgh, Edinburgh University Press, 2006 (especially pp. 201-210 and pp. 235-243).

⁵³ The list of the UK public service broadcasters includes also Sianel Pedwar Cymru (or S4C, the Welsh-language television channel) and the public teletext service.

covers the public service broadcasters and refers to fundamentally qualitative obligations: it includes measures requiring the broadcasters to provide a range of diverse and high-quality programming. Within this context, Ofcom has specific responsibility for Channel 3 (or ITV), Channel 4 and Channel 5.⁵⁴ Altogether, therefore, the second and third tiers, in contrast to the first one, encompass positive content obligations.

A particularly significant example of regulatory intervention by Ofcom, mainly covering the first tier mentioned above, is the Broadcasting Code (or the Code).⁵⁵ This is one of the most valuable outputs of broadcasting regulation, as it provides for a significant set of (programming-related) measures that broadcasters have to comply with. The Code derives from the “standards objective” listed in section 319(2) of the Communications Act 2003. It gives effect to a number of statutory requirements (also contained in EU legislation) by setting out broadcasting standards in ten separate sections, each dealing with a specific topic: six of them concern all broadcasters (i.e.: protecting under-eighteens; harm and offence; crime; religion; fairness; and privacy), whereas the other four (i.e.: due impartiality, due accuracy, and undue prominence of views and opinions; elections and referendums; commercial references in television programming; as well as commercial communications in radio programming) contain standards set out for all but the BBC (albeit with some exceptions, notably on product placement rules, which are also applicable to the BBC), which has to abide by targeted obligations on such matters. Besides the Broadcasting Code, there are other more sector specific pieces of regulation also known as ‘codes’: for instance, in line with the relevant statutory requirements, Ofcom has issued the *Code of Sports and Other Listed and Designated Events* (these being the events of great interest to the public, to be broadcast on a free-to-air basis).⁵⁶ It is worth mentioning that the regulator has also adopted

⁵⁴ Third-tier requirements are also reflected in the programme policy statements made by the BBC: for the (limited) functions of Ofcom in relation to the BBC, see notably section 198 of the Communications Act. As noted by GIBBONS, cited, that third tier of regulatory requirements “may be regarded as a form of co-regulation, whereby the programme providers are responsible for setting and complying with their own detailed plans for meeting their public service remits, subject to the regulator’s general oversight” (p. 117).

⁵⁵ The Code was published, in its first version, in May 2005. The latest version in force is of March 2013 and is available at <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/>. Ofcom has also issued Guidance Notes for the interpretation and application of the Code (available also therein).

⁵⁶ As for the Code of Sports and Other Listed or Designated Events (available, together with the other codes released, at the web-site mentioned in the fn above), Ofcom states that its purpose is to “ensure that key sporting events are made available to all television viewers, particularly those who cannot afford the extra cost of subscription television. Listed events are categorised either as Group A or Group B events. The rights to broadcast listed events – live rights in the case of Group A events (e.g. Olympics, FIFA World Cup, Wimbledon and European Football Championship) or highlights in the case of Group B events (e.g. Cricket Test Matches, Six Nations Rugby or Commonwealth Games) must be offered to qualifying broadcasters [i.e., those whose channels are available without payment to at least 95% of the UK population]. However, qualifying broadcasters

other systematic rules to cover certain particular matters and provide guidance to broadcasters on their interpretation and application: this is the case, for example, of the *Rules on Party Political (and Referendum) Broadcasts*, concerning access to television and radio by political parties both outside and within election or referendum periods.⁵⁷

In exercising its general regulatory functions, Ofcom is required by the Communications Act 2003 not only to have regard to any principle that appears to represent “the best regulatory practice” (under section 3 thereof), but also, more broadly but explicitly, to observe a general duty of constantly reviewing the burden of the regulations it produces.⁵⁸ Indeed, according to section 6 of the Communications Act 2003, Ofcom has to ensure that its regulation does not involve the imposition or the maintenance of unnecessary burdens and that, in performing this reviewing exercise for the purpose of removing or reducing regulations as it sees fit, it must “have regard to the extent to which the matters which [Ofcom itself is] required under section 3 [of that Act] to further or to secure are already furthered or secured, or are likely to be

are not obliged to bid for these rights, so it is possible that on some occasions listed events may not be shown by a qualifying broadcaster” (see <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/code-sports-events/>). On listed event measures, see also below.

⁵⁷Their latest version is of March 2013 (see <http://stakeholders.ofcom.org.uk/broadcasting/guidance/programme-guidance/ppbrules/>).

⁵⁸ One could recall here the general regulatory principles outlined by the above-cited section 3(3) of the Communications Act 2003 (i.e., for better regulation to develop, this should be transparent, proportionate, consistent, accountable and targeted only at cases where action is needed), and add that, building on those statutory principles, Ofcom (also) developed a more specific set of regulatory principles to inform its day-to-day work. In this respect, as results from Ofcom’s (already mentioned) *Annual Report and Accounts 2013-2014* (of 2 July 2014), and reiterating what has already been provided in the past, Ofcom has (re)established that: (as regards “when” it regulates) it “will operate with a bias against intervention, but with a willingness to intervene promptly and effectively where required [as well as] where there is a specific statutory duty to work towards a goal that markets alone cannot achieve”; (as regards “how” it regulates), it “will always seek the least intrusive regulatory methods of achieving its objectives[,] will strive to ensure that interventions are evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome[, and] will regulate with a clearly articulated and publicly reviewed annual plan, with stated objectives”; (as regards, finally, how it supports regulation), it “will research markets constantly and will aim to remain at the forefront of technological understanding [and] will consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation on a market” (p. 38). See also the Ofcom “overarching strategy” set by the regulator itself (or actually, restated) in its latest *Annual [Work] Plan 2014/2015* (of 31 March 2014), where it is marked that it “will work for consumers and citizens by promoting effective competition, informed choice and the opportunity to participate in a wide range of communications services, including post[;] will secure the optimal use of spectrum, through market mechanisms where possible and regulatory action where necessary[;] will provide proportionate protection for consumers and help maintain audiences’ confidence in broadcast content[;] will contribute to public policy defined by Parliament, including high quality public service broadcasting and plurality of media ownership”; and overall, that, in order to “achieve these aims, [Ofcom] will be consultative, transparent and proportionate[;] will be informed through high quality research and information, which [it] will share widely[;] will be mindful of the diversity of the UK and its nations[;] will aim to be innovative, responsive and effective in everything” it does (p. 2 therein).

furthered or secured, by effective self-regulation”.⁵⁹ Thus, as expressly put forward by the Communications Act 2003, the approach to regulation that emerges seems to favour other forms of regulatory intervention alongside, or alternatively to, mainstream regulation. It is probably (also) because of this statutory-oriented attitude to formal regulation as the last-resort option that Ofcom has demonstrated its willingness to investigate the different appropriate regulatory solutions deemed fit for the purposes of the various cases at stake, and to rely significantly upon such alternative forms of regulation. The reference here is not exclusively to self-regulation mechanisms, but also to co-regulation instruments.⁶⁰ Ofcom has made this clear in its consultations with stakeholders on such matters,⁶¹ from which it emerges that its understanding of the two alternative forms of regulation and their differences can be explained in the following terms. Self-regulation, for example, refers essentially to a regulatory option whereby industry collectively administers a centralised solution to address citizens’ or consumers’ issues, or other regulatory objectives, without formal oversight from the regulator (or government). As for co-regulation, this is meant to refer to schemes that involve elements of both self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue. While in the first case there are no explicit *ex ante* legal backstop powers in relation to rules agreed by the scheme (although general obligations may still apply), in the second case, although the division of responsibilities between the regulator (or government) and industry may vary, typically the regulator does have legal backstop powers to secure the desired objectives. These are indeed

⁵⁹ See, respectively, section 6(1) and (2) of the Communications Act 2003. According to section 6(4)-(10) of the Communications Act 2003, Ofcom must publish from time to time and have regard to a statement setting out how it intends to comply with this statutory duty of regulatory review.

⁶⁰ It should be pointed out that while “self-regulation” does explicitly appear in the text of the Communications Act 2003, there is no mention therein of the term “co-regulation”.

⁶¹ Relevant consultations on the issues of co- and self-regulation have taken place twice to date. Indeed, the first consultation on these matters was formally launched with a document published on 17 December 2003 on the *Criteria for Transferring Functions to the Co-regulatory Bodies*, and concluded with the statement published on 10 June 2004 on the *Criteria for Promoting Effective Co- and Self-regulation* (see <http://stakeholders.ofcom.org.uk/consultations/co-reg/>). A set of (twelve) indicative criteria has indeed been adopted to assess when to allow proposed co-regulation schemes to be put in place: according to Ofcom, those criteria have to be complementary to the ones already provided for by the Communications Act 2003 for the two sorts of co-regulation schemes mentioned therein, respectively concerning (telecommunications) premium-rate services (see section 120 thereof) and the arrangements for an alternative dispute resolution scheme (see section 54 thereof). The criteria set forth in 2004 were then re-assessed in the light of an incentive-based approach (in five steps) to evaluate when industry would be better off with effective co- and self-regulation. This was the result of the second consultation on the matter, which was launched with the publication, on 27 March 2008, of a document on the *Initial Assessment on When to Adopt Self- and Co-regulation*, and concluded with the statement on *Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation* published on 10 December 2008 (see <http://stakeholders.ofcom.org.uk/consultations/coregulation/?a=0>). In essence, Ofcom’s commitment to “light touch regulation” coupled with the general “bias against intervention” emerges clearly from both consultation exercises.

the powers that Ofcom possesses to ensure, through regular review, that the system is working effectively and consistently and, *in extremis*, to take back responsibility for regulation if the alternative route provides for consistent failure. It has emerged from these consultations that one of the ways in which Ofcom promotes effective self-regulation is by delegating regulatory powers to a self-regulatory body, where appropriate, whilst retaining backstop control: this will result, in fact, in a series of co-regulatory schemes put in place by the regulator, still leaving itself some scope of intervention. Examples of the co-regulation type of interventions are the case of broadcast advertising regulation, equal opportunity regulation, and the resort to co-regulation for video-on-demand services, in line with EU legislation.⁶² Examples of self-regulation include the case of (illegal) Internet content control (as Ofcom does not have statutory powers over Internet regulation *per se*).⁶³

Overall, it emerges that regulation by Ofcom consists of a variety of options, spanning from formal regulatory intervention led solely by the regulator, to no regulation at all, and passing through co- and self-regulation, also involving other parties in the regulatory process. These alternative forms to mainstream regulation are increasingly appealing, especially if set against the backdrop of the process of technological and market convergence taking place within the communications sector, since they appear to ensure the flexibility (as well as timeliness and cost savings) needed to cope with such a fast-changing scenario. To achieve this purpose and deliver sound results, however, these alternative regulatory forms need to be effective and, hence, be adapted and tailored to the markets, where they are considered as appropriate

⁶² On these three cases see, respectively: the consultation on *The Future Regulation of Broadcast Advertising* (available at http://stakeholders.ofcom.org.uk/consultations/reg_broad_ad/), which launches a new co-regulatory system, delegating to the Advertising Standards Authority (ASA; on which see below), within the framework of a MoU, the responsibility (also) for the setting and enforcement (especially in cases of individual complaints) of (operational television and radio) advertising standards, with Ofcom nonetheless retaining some competences in that respect (including the possibility to impose statutory sanctions when ASA's powers fall short of that); the proceedings (and outcome) of the consultation on the *Proposal for Co-regulation of Equal Opportunities* (available at <http://stakeholders.ofcom.org.uk/consultations/equalopps/>), suggesting a co-regulatory scheme to facilitate compliance by relevant broadcasters with license conditions imposed under the legislation to make arrangements for promoting equal opportunities in employment, in terms of gender, race and disability; and, finally, the *Proposal for the Regulation of Video on Demand Services* on which consultation has been held (see <http://stakeholders.ofcom.org.uk/consultations/vod/?a=0>) regarding entrusting a co-regulatory body with the competence over video-on-demand editorial content, which led to the formal designation of the Authority for Television On Demand (ATVOD; on which see also below) as the co-regulator for editorial content (with ASA, again, as the co-regulator for advertising content as well).

⁶³ As for this self-regulation scheme, reference here is made to the work of the Internet Watch Foundation (IWF; see <http://www.iwf.org.uk/>), as an independent self-regulatory organisation – mentioned by Ofcom as an example of successful self-regulation – established in 1996 by the UK Internet industry to provide a national “hotline” to report potentially illegal online content that falls within its remit, and to be the “notice and take-down” body for this content. It is within the IWF's remit to minimise the availability of potentially illegal content on the Internet, specifically concerning images of child sexual abuse “hosted anywhere in the world” (sic), criminally obscene content and content inciting racial hatred, both hosted in the UK.

responses to the needs encountered. The overall picture therefore shows a continuum of regulatory options that provides for flexibility to be injected into the formal regulatory schemes and brings about the co-existence of different forms of regulatory intervention in which Ofcom always plays a role, even though the extent of its involvement varies according to the case.

Apart from this multifaceted regulatory picture, another competence left almost solely to Ofcom consists in its exercise of the power to grant licences for all UK television (and radio) broadcasters to operate.⁶⁴ More precisely, according to the Communications Act 2003, it is up to Ofcom to award licences to private/commercial (or independent) broadcasters (for the different types of television and radio services). In essence, through the licenses granted Ofcom sets the detailed conditions that the licensees have to comply with in conducting their activities.

Ofcom also enjoys supervisory powers over broadcasters regarding their compliance with the obligations set forth in the various instruments mentioned above. As already recalled, however, the extent of these powers may vary according to the object of the scrutiny: for example, regarding supervision of compliance with the provisions of the Code, Ofcom does not have much power in relation to the BBC, but does have power over commercial broadcasters.

In addition to all the above competences, Ofcom can also exercise sanctioning powers to enforce broadcasters' obligations.⁶⁵ In particular, in the event of breaches of licencing or Code-related provisions, it is up to Ofcom to choose either the informal or the formal sanctioning route. In the first case, Ofcom can exercise its sanctioning power by warning the broadcasters concerned of the need to improve compliance with their obligations. For this purpose, it avails itself of the Broadcast Bulletin, i.e. the (official) publication edited and released fortnightly by the regulator, in which it releases its findings and explains the reasons for the violations ascertained. When it appears that a broadcaster has deliberately, seriously or repeatedly breached the Code, Ofcom can opt for the second route and may indeed impose statutory sanctions against it. The sanctions available are essentially three. In essence, Ofcom

⁶⁴ This competence is set out in Part 3 of the Communications Act 2003 and derives from the competence already envisaged for the ITC by Part 1 of the Broadcasting Act 1990 (as amended by the Broadcasting Act 1996).

⁶⁵ The considerations that follow primarily concern commercial television broadcasters and not the BBC. Nevertheless, although the BBC is not an Ofcom licensee, it is up to Ofcom to issue certain behavioural or financial sanctions similar to those applicable to all broadcasters for failure to observe (certain) standards set in section 319 of the Communications Act 2003.

can either oblige the broadcaster that has fallen foul of a provision of its licence or of the Code (or of another relevant regulatory measure) to transmit corrections or a statement of findings (or to not repeat a programme); if necessary, it can go further by issuing a financial sanction and, in the most serious cases, shorten the period of, or even revoke, the broadcaster's licence to transmit (except in the case of Channel 4, the Welsh-language television channel S4C, and the BBC). As a matter of procedure in cases of sanctions for programming-related violations, Ofcom will normally publish a finding and explain why a broadcaster has been found in breach of certain provisions. The proper procedure to be observed during the conduct of investigations in such cases (following the receipt of a complaint or on its own motion) and the application of statutory sanctions to broadcasters is fairly formalised and regulated by Ofcom itself.⁶⁶

Thus, the exercise of sanctioning powers is part of a broader competence to enforce regulation that is attributed to Ofcom. This competence of enforcement covers not only the maintenance of broadcasting standards (or the legal use of the radio spectrum), but also competition law matters, as well as the settlement of regulatory disputes between communications providers (whenever commercial negotiation has failed), and even consumer law issues in relation to relevant rules set under the Communications Act 2003. As regards competition matters in particular, it is indeed up to Ofcom, as one of the UK's national (but sector-specific) competition authorities, to exercise its powers to set the appropriate conditions (especially as regard licensing) to ensure fair and effective competition in the provision of licensed services: this denotes a function for Ofcom as an economic regulator as well. Moreover, in properly enforcing competition legislation, it is up to Ofcom to investigate complaints or concerns about anti-competitive conduct in communications, broadcasting or related markets, and to issue instructions as appropriate to bring infringements in relation to anti-competitive agreements or abuses of a dominant position to an end. While the competence to ensure "fair

⁶⁶ For the (procedural) provisions in force adopted by Ofcom, in compliance with section 325(2) of the Communications Act 2003 (notably: besides the *General Procedures for Investigating Breaches of Broadcast Licences*, of December 2013; the *Procedures for Investigating Breaches of Content Standards for Television and Radio*; and the *Procedures for the Consideration and Adjudication of Fairness & Privacy Complaints*; the latter two both of June 2011), see <http://stakeholders.ofcom.org.uk/broadcasting/guidance/complaints-sanctions/>. In a nutshell, it results therefrom that the actual procedure followed by Ofcom in considering complaints, conducting investigations and imposing sanctions differs on the basis of the type of case at stake (i.e., if the case concerns either a failure to comply with the conditions imposed on broadcasters or relates to an alleged breach of fairness or privacy requirements, this latter hypothesis requiring an adversarial-based more than investigatory-oriented process and thus more detailed rules to apply), with another set of specific rules dealing with the imposition of sanctions (i.e., the *Procedures for the consideration of statutory sanctions in breaches of broadcast licences*, as revised in July 2013; but see also Ofcom's *Penalty Guidelines*, of June 2006, adopted pursuant to section 392 of the Communications Act 2003 and used by the regulator to determine financial penalties). For a detailed analysis of these procedures and sanctions, see BARENDT *et al.*, cited, pp. 185-190.

and effective competition” comes from the Communications Act 2003, the powers to enforce competition law stem not only from the same source, but also from the Competition Act 1998.⁶⁷ In dealing with sensitive broadcasting-related issues, Ofcom has increasingly appears to have used the competence to act (*ex ante*) as an economic regulator rather than deploying its powers to enforce competition law (*ex post*).⁶⁸ In this respect, however, it is interesting to note that, in line with what has been mentioned above with reference to alternative forms of regulation, the policy option selected by Ofcom, as emerges especially from its guidelines for the handling of competition complaints and complaints concerning regulatory rules, appears to be in favor of restraining the use of economic regulation as much as possible, in favour of an increasing and extensive application of (pure) competition law.⁶⁹

As far as the dispute settlement function referred to above is concerned, this mainly refers to cases involving electronic communications providers and rights and obligations conferred by or derived from Part 2 of the Communications Act 2003, concerning networks, services and radio spectrum-related matters (such as network access issues, spectrum access management, interconnection matters): it is therefore a competence of no direct relevance to (pure) broadcasting issues. It may be of interest to mention here, however, that when resolving this kind of dispute under the Communications Act 2003, even if Ofcom intervenes as an arbiter between the parties involved, it nonetheless fulfils its function as a regulator. Ofcom is therefore not really third party resolving such disputes: in fact, the resolution of disputes is, in

⁶⁷ As for the first, see in particular section 316 (but also the following sections 318-318) of the Communications Act 2003; as for the second, see sections 369-372 of the Communications Act 2003 and mainly Section 32-33 of the Competition Act 1998.

⁶⁸ For a critical appraisal of this case see P. IBÁÑEZ COLOMO, *Ofcom's Proposal to Regulate Access to Premium Television Content: Some Thoughts*, EUI Working Papers, LAW 3/2009, especially at pp. 11-13.

⁶⁹ These guidelines (available at <http://stakeholders.ofcom.org.uk/consultations/draft-enforcement-guidelines/enforcement-guidelines/>) were adopted (in July 2012) following consultation on the matter with stakeholders and building on previous versions: in this respect, having regard to the consultation on the review of the first set of guidelines (adopted in 2004), it is interesting to highlight that it is stated therein that “Ofcom’s strategy is to operate with a bias against intervention. Our expectation is that through a process of de-regulation we will be withdrawing *ex ante* regulation and relying increasingly on competition law. Ofcom is committed to using the Competition Act where appropriate. It is in the interests of citizens and consumers that regulation be kept to a minimum and that the costs saved by removing additional or unnecessary regulation are passed back to consumers in the form of lower prices or better services, as a result of competition” (see the *Draft Enforcement Guidelines* document submitted to consultation, available at <http://stakeholders.ofcom.org.uk/consultations/enforcement/>, paras. 10.5-10.6). However, as made apparent by section 317 of the Communications Act 2003, quite ample and significant room for manoeuvre is left to the regulator in making the choice of whether to resort to regulation or the enforcement of competition law. It has to be admitted that, for the most part, this debate predominantly concerns communications matters *strictu sensu* (i.e., network and service issues): however, it is possible for a convergent regulator such as Ofcom to apply the principles relating to the exercise of competition law competences in combination with those relating to its sector-specific powers (namely, licensing) when dealing with the broadcast sector as well, and to actually strike a balance between them.

itself, essentially a form of regulation. In contrast to litigation or alternative dispute resolution mechanisms, the types of dispute referable to Ofcom under the Communications Act 2003 should therefore be regarded as regulatory disputes concerning the obligations and rights of the parties involved, and resulting in regulatory solutions.⁷⁰

Finally, to conclude this excursus on the powers and competences of Ofcom, it should be mentioned that the Communications Act 2003 provides for Ofcom to play a role on the international stage. According to section 22 of the Communications Act 2003, the Secretary of State can require Ofcom to represent the UK government in international or other bodies having “communications functions” and at international “meetings about communications”, as well as to become a member of, or to subscribe to, international and other bodies having such functions. For these purposes, it is made clear that “communications” functions encompass any function concerned with the use of the radio spectrum, television or radio broadcasting regulation, or any other matter in respect of which Ofcom does have competences to exercise (thus now including postal services). Moreover, the Communications Act 2003 states that Ofcom has to carry out such tasks in accordance with “general or specific directions” that it may receive from the Secretary of State in this respect: in particular, as regards broadcasting matters, section 23 of the Communications Act 2003 expressly provides for the Secretary of State to limit itself to giving directions to be contained in an order only for the purposes of securing compliance with an international obligation of the UK, including any EU obligation.

2.2.3 Other coexisting institutions with competences in broadcasting

It has already (occasionally) emerged in the previous pages that, although Ofcom certainly has a central role to play in regulating broadcasting in the UK, its functions in this respect are not exhaustive. Rather, they are part of a broader system comprising other institutions with alternative, concurrent or supplementary powers that, in combination with those of Ofcom, contribute to shaping the UK regulatory landscape for broadcasting. Although Ofcom’s inception clearly simplified the institutional picture (as explained at the very outset of this Chapter) and significantly reduced the number of bodies that could play a role in the substantive and economic regulation of broadcasting matters, by incorporating and exerting a

⁷⁰ The competence of Ofcom as settler of regulatory disputes is encompassed in Chapter 3 of Part 2 of the Communications Act 2003: see mainly sections 185-191 therein.

number of relevant functions, this has not prevented the (co)existence of other bodies as regulatory sources, to which reference will now be made in turn.⁷¹

First of all, it must be recognised that Parliament plays a significant role in establishing the main lines along which the whole regulatory system for broadcasting in the UK should be structured. Notwithstanding the lack of an explicit attribution of competence to pass acts on broadcasting matters, due to the inexistence of a written constitutional text explicitly dealing with such issues, it is beyond dispute that in exercising its sovereign (legislative) powers, Parliament has a significant influence, as can be seen in the various acts adopted since 1954 expressly addressing television and radio broadcasting.⁷²

The same holds even more true for the Government. Indeed, this has already (and repeatedly) been pointed out above, mainly regarding the interventions in the broadcasting field of the Department for Culture, Media and Sport, and that (now) for Business, Innovation and Skills, referring in particular to the competence they have been granted to issue directions to Ofcom when acting on certain matters. Few remarks can be added here. First, it should be recalled that, broadly speaking, the Government is responsible for fostering debate on policy topics and putting forward reform proposals affecting the media sector. Recently, for example, this has concerned the switchover process from analogue to digital broadcasting and, more generally, the governance of the inception of digital technologies applied to content and delivery platforms. While in the former case the Government has mainly set the agenda for the move from the traditional analogue to the new digital broadcasting environment,⁷³ as regards the latter case, mentioned should be made of the *Digital Britain* plan. Proposed by a joint action of the two aforementioned Departments, this culminated in the 2009 *Digital Britain* report, a broadly-framed initiative involving the whole communications sector, which and ultimately resulted in the Digital Economy Act 2010.⁷⁴ Overall, the “Digital Britain”

⁷¹ In fact, as results from the exposition below, the institutional actors involved in the regulation of the media sector are (still) many and it sometimes appears difficult to strike a balance between them, due to their (frequently) overlapping spheres of interventions, up to the point that, even recently, further calls for a (supplementary) “degree of rationalisation in the light of convergence” have been made: see R. CRAUFURD SMITH, Y. STOLTE, “Media Policy in the United Kingdom: Trust and Distrust in a Converging Media Environment, in E. PSYCHOGIOPOULOU (ed.), *Understanding Media Policies: A European Perspective*, London, Pelgrave, 2012, pp. 230-246, p. 243).

⁷² See the various Acts already mentioned above, at the very beginning of this excursus on the UK.

⁷³ See <http://www.digitaltelevision.gov.uk/>: in line with EU obligations/deadlines, the complete switch-over to all digital (terrestrial) television was set to be completed by 2012.

⁷⁴ The Digital Britain final report (of June 2009) is available at <http://interactive.bis.gov.uk/digitalbritain/final-report/>. It is interesting to observe that, in line with most of the actions indicated in that report, the Digital Economy Act 2010 (partially modifying the Communications Act 2003) provides (also) for the significant extension of Ofcom’s duties and powers in relation to (electromagnetic) spectrum access, in reporting (every

project (as well as its legislative outcome) has shown the Government's influence in setting the scene and outlining the development of policy and regulations affecting the media sector in order, inter alia, to modernize television and radio frameworks by maximizing the social and economic benefits from digital technologies. In doing so, it has also highlighted the guiding role of the competent governmental bodies and their work in coordination with other relevant institutions as well as private actors.⁷⁵ Moreover, regarding the Government's influence in the governance of the broadcasting sector, it is perhaps worth mentioning here, as a more specific case, the significant role it plays in relation to the BBC: when granting the so-called Royal Charter, as this represents the basic document governing the BBC's activities; when negotiating the BBC Agreement, accompanying and supplementing the Charter by setting out the provisions and contents concerning BBC services in more detail; and, not least, when establishing the licence fee to fund the majority of the BBC's activities.⁷⁶

Alongside Parliament and Government, the role of the judiciary should also be taken into account. Nevertheless, judicial scrutiny over broadcasting regulation has not traditionally played a significant role in the UK: one of the reasons for such a restrained attitude has been

three years) on communications infrastructures and media content, as well as against copyright infringements on the Internet (notably, the controversial provisions of sections 17-18 thereof). The Act also encompasses measures regarding public service content provided by Channel 4 and variations in the public service provisions in Channel 3 and Channel 5 licences.

⁷⁵ For instance, among the many issues touched upon notably in the Digital Britain final report, the modernization and strengthening of Ofcom's powers, particularly regarding communications infrastructures, had a certain prominence: indeed, it is affirmed therein that the "centrality of our communications infrastructure to our economy and society has grown since the Communications Act 2003 was drawn up. We have also moved from a relatively stable era of copper networks and early deployment of 3G to an accelerating picture of investment in multiple types of next generation networks. To that end the Government believes that Ofcom's duties should be modernised in two ways. Firstly, Ofcom should have an explicit general duty to encourage investment as a means of furthering the interests of consumers, alongside its duty to promote competition where appropriate. We also propose to give Ofcom a duty, which is the communications equivalent of the letter from the Governor of the Bank of England, to alert the Government to any significant deficiencies in the coverage, capability and resilience of the UK's communications infrastructure and to report every two years [then, three in the Act] on the state of that infrastructure" (p. 19).

⁷⁶ The *Royal Charter for the Continuance of the British Broadcasting Corporation* conferring its legal status and setting out its objectives and constitution, is normally renewed every ten years: the latest version was granted in 2006 and came into full effect on January 2007. Before the issue of the Royal Charter, a long public debate was conducted, touching upon the main points of the latter: the debate was kicked off by and moved from the policy auspices set forth by the Government in the Green Paper on *A Strong BBC Independent of Government* (available at http://www.bbccharterreview.org.uk/publications/cr_pubs/pub_bbcgreenpaper.html) to which the BBC responded with the "Building Public Values" report (available at <http://downloads.bbc.co.uk/aboutthebbc/policies/pdf/bpv.pdf>). Among the major issues addressed in these documents and absorbed by the Royal Charter for 2007-2016, was the change in the governance structure of the BBC, to which reference is made in the text below. In the view of the Government, if compared with the establishment of the BBC by an Act of Parliament, the Royal Charter as such represents a good instrument to ensure its independence from Government itself, as well as an opportunity to provide for greater flexibility for further thorough review of the BBC's role and remit. In adjunct to the Royal Charter, notably the Agreement (between the BBC and the Government) lays down the practical terms and conditions under which the BBC is allowed to broadcast: for the detailed arrangements, see GIBBONS, cited, pp. 89-94.

identified in the political preference for “allocating to specialised institutions the task of setting and overseeing broadcasting standards” with the consequence of isolating “those in the broadcasting industry from judicial scrutiny, whether as regards the policies adopted or the procedures by which they have sought to put those policies into effect”.⁷⁷

Looking, then, at the economic issues that arise in broadcasting regulation, it may certainly be noted that Ofcom’s competence in this respect is significantly complemented by the role of (now) the Competition and Markets Authority (CMA), which absorbs (most of) the responsibilities formerly belonging to the Office of Fair Trading (OFT) and to the Competition Commission.⁷⁸ As the UK agency with general competence for competition issues, the CMA holds a certain degree of responsibility for the enforcement of competition law, even when it touches upon the media sector.⁷⁹ In fact, as designed and detailed by the legislator, Ofcom shares concurrent powers to enforce general European and national competition provisions regarding communications matters (obviously including broadcasting and related issues) with the CMA, which is also an independent regulator and is thus ‘institutionally speaking’ on an equal footing.⁸⁰ The provisions for concurrent powers to be exercised by these two regulators on competition issues have led to the establishment of a duty of consultation between them before any such powers can be exercised, and the prohibition for one to exercise the same power in cases where the other has already done so.⁸¹

⁷⁷ See R. CRAUFURD SMITH, *Broadcasting law and fundamental rights*, Oxford, Clarendon Press, 1997, p. 69.

⁷⁸ The OFT was established as a non-ministerial government department (replacing the office of Director General of Fair Trading established by the Fair Trading Act 1973) by the Enterprise Act 2002. The Enterprise and Regulatory Reform Act 2013 (namely, section 26 thereof) on the one hand (in amending the Enterprise Act 2002, inter alia) abolished the OFT and the Competition Commission (the latter, formerly established by the Competition Act 1998 as another independent public body essentially entrusted with powers to investigate mergers and conduct market inquiries upon reference especially from the OFT) and, on the other hand, established the CMA in their place (see section 25 thereof), again as a non-ministerial government department, which started operating in April 2014 (see <https://www.gov.uk/government/organisations/competition-and-markets-authority>). The provisions of the Enterprise Act 2002 (as amended) are largely complementary to those of the Competition Act 1998 (as amended).

⁷⁹ This means, in brief, that the CMA is responsible for applying and enforcing Articles 101 and 102 TFEU as well as the Competition Act 1998 (and all the related relevant provisions) even as regards activities connected with communications matters: in this respect, nevertheless, it exercises the same powers granted to Ofcom.

⁸⁰ See Part 5 of the Communications Act 2003 (especially Chapter 1 therein, dealing with the functions of Ofcom under competition legislation). See also section 369 of the Communications Act 2003, providing the Secretary of State with the power to vary Ofcom’s competition functions under the Competition Act 1998 and the Enterprise Act 2002, which require coordination of its activities with those of the CMA. See, moreover, the provisions of Part 4 of the Enterprise Act 2002, conferring both to the CMA and Ofcom powers to conduct market investigations.

⁸¹ See section 370(5)-(6) of the Communications Act 2003. Alongside the provisions contained therein, there are ‘general’ (concurrency) rules in place to coordinate the exercise of concurrent powers, set forth (now) by the Competition Act 1998 and the Competition Act (Concurrency) Regulations 2014. Moreover, in order to ensure consistent results in the application of competition law, the CMA published (on March 2014, as already done by

Furthermore, it is worth highlighting that, alongside Ofcom, the CMA also has a voice in cases involving (broadcasting) media mergers: although both retain powers of investigation in this context, Ofcom mainly needs to be consulted when such cases arise and expresses non-binding advice, while the CMA has a more incisive (decision-making) role in such cases.⁸² Overall, Ofcom's functions as regards competition matters are of a certain relevance: this consequently raises the issue (as mentioned above) of whether Ofcom, as a sector-specific regulator, should use 'classical' competition law instruments when it detects (the risk of) anti-competitive behaviours, or resort to the sector-specific regulatory powers it has been granted via the Communications Act 2003 (also for competition, or rather, economic regulation, purposes) to tackle such cases.⁸³

Moving forward in mapping the institutions with relevant competences on broadcasting matters, and looking beyond the statutory bodies, the list of institutions performing regulatory activities in these matters can be significantly lengthened, but it is difficult to achieve an exhaustive one. This is mainly because in the UK the different mechanisms of regulation – from traditional/statutory, to co-regulation and self-regulation, as emerged above – give rise to a panoply of regulatory bodies with a consequentially multi-layered and multifaceted regulatory framework. This being the case, the following remarks will focus upon only some

the OFT) a document on the *Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries* (available at <https://www.gov.uk/government/publications/guidance-on-concurrent-application-of-competition-law-to-regulated-industries>), providing information concerning the regulated sectors affected by the "concurrency provisions" and the scope of the concurrent powers. As regards the application and enforcement of the Competition Act 1998 to communications matters, section 370 of the Communications Act 2003 gives Ofcom concurrent powers with the CMA: when such cases arise, as stated in the Explanatory Notes to the Communications Act 2003 (referring to the OFT, now to be read as the CMA), "OFCOM and the OFT will consult with each other before a decision is made as to who will deal with a case in respect of which there is concurrent jurisdiction. Formal arrangements for consultation are set out in regulations made under the Competition Act 1998. In general, anti-competitive agreements or abusive conduct that relate to activities connected with communications matters will be dealt with by OFCOM (unless the OFT is better placed to do so). Where it is unclear which regulator has jurisdiction, the matter will be referred to, and determined by, the Secretary of State. However, no objection may be made against anything done by OFCOM on the grounds that it should have been done by the OFT" (para. 786 thereof). Furthermore, see the MoU that Ofcom and the CMA signed (in June 2014) regarding the exercise of their concurrent powers. Overall, it could be claimed that, in essence, whilst both the CMA and Ofcom could apply the relevant competition provision when appropriate, only one of them can act: all the aforementioned rules provide for guidance in the choice of who should act, for the settlement of would-be disputes on their respective jurisdiction, and for the avoidance of double jeopardy.

⁸² See section 106B of the Enterprise Act 2002, assigning Ofcom a general advisory function in relation to media mergers. More substantive issues related to mergers in the media sector will be addressed in following pages, especially as regards their impact on media pluralism (or rather, plurality).

⁸³ It seems to be up to Ofcom to make the choice – most likely challengeable by judicial review – of whether, according to each case at stake, it would be more appropriate to act via its competition law enforcement powers or to enforce the licence conditions; and it appears that the two (alternative) routes will be considered in that order (see section 317(2) of the Communications Act 2003). If Ofcom opts for the second route, the decisions it takes may be appealed before the Competition Appeal Tribunal, as provided for by section 317(6)-(8) of the Communications Act 2003 (and already recalled above).

of them, deemed of particular relevance to this analysis, having regard in particular to their interrelationship and (potential) overlapping with Ofcom.

To move on through this list, the BBC Trust (henceforth, the Trust) is certainly one of the bodies worth mentioning. Indeed, the Trust is the “sovereign body” within the BBC.⁸⁴ It also represents the greatest novelty brought about by the renewal of the Royal Charter in 2006, as it replaces the long-established Board of Governors of the BBC at the apex of its internal governance structure.⁸⁵ The Trust exerts regulatory functions over BBC programming by issuing the licences for the various BBC services, although the licences’ obligations are established within the framework of the public purpose remits included in the Charter and the Agreement.⁸⁶ Anyway, the Trust’s oversight of contents broadcast contributes to ensuring the (editorial) independence of the main public broadcaster from governmental interference; as well as the BBC’s (partial) self-sufficiency in regulating it. From the point of view of content regulation, in fact, distinct spheres of influence are shared by the Trust and Ofcom. These are apparent from the (abovementioned Ofcom Broadcasting) Code, which excludes the possibility for Ofcom to apply and enforce some of its provisions against the BBC: indeed, as already recalled above, regarding issues of impartiality and accuracy (as well as matters related to elections and referendums, sponsorship and commercial references), Ofcom has no supervisory role in relation to the BBC and the latter retains responsibility for maintaining its

⁸⁴ See Article 9(2) of the Royal Charter. Interestingly, Article 12 thereof specifies that the word “Trust” is used “in a colloquial sense, to suggest a body which discharges a public trust as guardian of the public interest”. As for the constitution of the Trust, see Articles 13-18 of the Royal Charter: suffice it to note here that it is essentially up to the Government to make appointments concerning the Trust’s members.

⁸⁵ The change in the institutional setting of the BBC’s governance structure was a response to the conflict of interests found in the dual and...conflicting role of the Governors, who were both managers and providers of public oversight. This was indeed one of the points that emerged in some of the reports and investigations (as well as in the debate preceding the enactment of the Communications Act 2003) concerning the BBC between the adoption of the 1996 Charter and the current one: on this, see L. WOODS, “Regulation and Extra-Legal Regulation of the Media Sector” in D. GOLDBERG *et al.* (eds.), *Media Law and Practice*, Oxford, OUP, 2009, pp. 335-372, at pp. 347-348. In response to this concern, the renewed Royal Charter replaced the Board of Governors with a separate body, the BBC Trust – the decider of the overall strategic direction of the BBC – to which the role of general oversight has been assigned, even over the established Executive Board. The latter is, however, an independent body from the Trust, with operational responsibility for day-to-day management (and service delivery). For a picture of the pre-existing framework of BBC governance, see D. WARD, *Television across Europe - Regulation, Policy and Independence: United Kingdom* (Open Society Institute, 2005), notably at pp. 1623-1627.

⁸⁶ The public purposes are listed in Article 4 of the Royal Charter. As affirmed by WOODS, cited, “the licences are one of the Trust’s main tools of governance. They are significant because they go to the general framework of broadcasting and comprise positive obligations rather than focusing on individual instances of breach at programme level, which seems more the concern of a complaint system; they are thus primarily a regulatory mechanism rather than part of a system of enforcement of individual rights” (p. 351). More detailed obligations to the ones included in the licences, such as commissioning obligations and detailed scheduling commitments, are to be found in the annually revised Statement of Programme Policy prepared by the Executive Board and approved by the Trust on the basis of clause 21 of the Agreement.

own standards under the Charter, although they share some overlapping competences as regards complaints on the remaining matters.⁸⁷ Moreover, a greater overlapping of responsibilities between Ofcom and the Trust becomes apparent when one considers the latter's duty to review BBC services in the public interest and for compliance with its public service obligations, together with the overall responsibility that Ofcom has been granted over public service broadcasting as a whole. It is interesting to note that in order to deal with such issues of mutual concern (as they are framed by the Communications Act 2003, the Charter and the Agreement), the BBC Trust and Ofcom have signed a Memorandum of Understanding dictating the main features of their necessary institutional inter-relationship and committing themselves to working constructively together in the areas that require their interaction.⁸⁸ This necessary co-operation between the Trust and Ofcom is further reinforced and institutionalised in specific cases: one of these concerns the evaluation of "significant" changes to the provision of public service such as, for instance, the wish to launch a new service or to make relevant amendments to an existing one.⁸⁹ In such cases, the Trust is required to intervene and apply a so-called Public Value Test, consisting of two elements: a Public Value Assessment to be performed by the Trust itself and a Market Impact Assessment, to be undertaken by Ofcom.⁹⁰ To coordinate their actions, a Joint Steering Group

⁸⁷ Complaints about infringements of programme standards can be addressed either by the BBC or Ofcom, or both together; but impartiality complaints can only be heard by the BBC itself. I. KATSIREA, *Public broadcasting and European law: a comparative examination of public service obligations in six member states*, Alphen Aan Den Rijn, Kluwer Law International, 2008, notes that "this overlapping system of complaints is not satisfactory as it gives rise to legal uncertainty" (p. 135). More broadly, as ROBERTSON & NICOL, cited, puts it, a "viewer or listener who wishes to complain about an inaccurate BBC broadcast must therefore complain to the BBC. However, such listeners may also complain to the BBC about any breach of its own Procedure Guidelines [now called Editorial Guidelines], which cover substantially the same areas as the Ofcom code (often in greater detail). Ultimately, therefore, the BBC and Ofcom have concurrent jurisdiction to rule on the majority of matters – a recipe for the very confusion and double jeopardy that Ofcom was set up to avoid. By way of contrast with its publicly funded services, however, the BBC's commercial services, whether broadcasted to the United Kingdom, or from the United Kingdom to its international audiences, must comply with the whole of the Ofcom code" (p. 887).

⁸⁸ The MoU between Ofcom and the BBC Trust of March 2007 is available at <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/ofcom-bbc-joint-steering-group/>. This has been updated by some Additions (the first, of September 2008; the others, of February and December 2011), dealing respectively with: regulatory jurisdiction, especially in cases where this significantly overlaps in between the two (i.e., when a service/programme gives rise to issues of both offence and/or harm, and accuracy, the latter being within the BBC's exclusive competence while the former is within Ofcom's); product placement; and (most interestingly) the so-called "significance tests" (i.e., the assessments that, according to the Charter and Agreement, the Trust has to carry out on some of the BBC Executive's proposals in order to determine when the Public Value Test (PVT), described below, must be applied).

⁸⁹ As put by clause 23(1) of the Agreement, "[d]uring the lifetime of the Charter, the BBC will need to be able to modify its UK Public Services – for example, to respond to changes in technology, culture, market conditions, public expectations and views, etc."

⁹⁰ Clauses 23-33 of the Agreement are devoted to establishing the understanding and functioning of the Public Value Test (PVT). It is under the judgement of the Trust, following the guidance provided for by clause 25 of

is established, mainly as a forum for the Market Impact Assessment exercise.⁹¹ Apart from its role in this specific forum, Ofcom has significant responsibilities in relation to the BBC. This mainly appears to be a result of the entry into force of the Communications Act 2003 (and the last renewal of the Charter some three years later), which partially eroded the traditional, almost self-regulatory, structure of the BBC and changed the relationship between it and the general sector-specific regulator to a significant degree. In this context, section 198 of the Communications Act 2003 offers the statutory basis granting Ofcom powers to regulate the BBC's services (as well as other activities connected with their provision), to the extent that provisions in this sense are included in the Charter and in the Agreement.⁹² The Act also granted Ofcom powers to impose financial penalties on the BBC for breaches of relevant requirements regarding, *inter alia*, programme standards and programming obligations.⁹³ This broadly renewed framework has not, however, prevented some criticisms being raised on the resulting design of the relationship between Ofcom and the BBC. In this respect, the most (and still) controversial issue seems to be the possibility/necessity to fully subject the BBC to Ofcom's control instead of maintaining such a complex and overlapping governance and regulatory structure. In other words, claims have been advanced in favour of extending Ofcom's supervision over the BBC to all matters covered by the Code, thus including

the Agreement, to establish when a significant change to the UK Public Services occurs and, hence, to perform the PVT. The latter represents a decision-making tool that weighs public value against the market impact of a proposed new/changed service: while the Public Value Assessment (PVA), carried out by the Trust, provides an assessment of the likely value of the service to licence fee payers, particularly in terms of its contribution to the BBC's public purposes, the Market Impact Assessment (MIA), carried out by Ofcom, aims to assess the effect of the proposed service on other services in the market, considering both the direct impact on consumers and producers of other services (for example in terms of price and choice) and the likely impact on competition and market development, which will affect consumers' and citizens' interests in the longer term. As regards the operation of the MIA, see <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/bbc-mias/statement/>, which provides the methodology that Ofcom will follow in carrying out the latter, as agreed with the Trust (and as mandated by clause 30(3) of the Agreement). For an overview of the application of the PVT (which also implies public consultation before the final decision is taken) from the Trust's perspective, see http://www.bbc.co.uk/bbctrust/governance/tools_we_use/public_value_tests.html.

⁹¹ The establishment of the Joint Steering Group is mandated by the provision of clause 29 of the Agreement: the composition, functions, procedure for meetings and other matters related to its operations are set out in Annex 6 of the abovementioned MoU between the BBC and Ofcom. See also <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/ofcom-bbc-joint-steering-group/>.

⁹² See, in particular, clauses 91-95 of the Agreement. It could be noted, however, that the BBC commercial services run by its commercial subsidiaries (as well as multiplexes on which the BBC broadcasts its digital programmes) fall under Ofcom's control (i.e., they have to comply with the whole of the Broadcasting Code). Moreover, Ofcom (concurrently with the CMA) has *ex post* competition powers to deal with any anti-competitive behaviour by the BBC: if the BBC enters into anti-competitive arrangements (as under Chapter I of the Competition Act 1998) or abuses a dominant position acquired in a market (as under Chapter II thereof), Ofcom can investigate the BBC's activities and may penalise the BBC in accordance with the Competition Act 1998. Similarly, Ofcom could include the BBC in a market investigation carried out under the Enterprise Act 2002.

⁹³ See, specifically, section 198(3) of the Communications Act 2003 (as well as clauses 94-95 of the Agreement).

accuracy and impartiality issues, in line with the other (terrestrial) broadcasters, so as to leave to the Trust the sole function of governance, while placing regulatory competence wholly within Ofcom's hands.⁹⁴

Coming to the conclusion of this institutional overview, three more non-statutory bodies with a stake in the regulation of (specific aspects of) broadcasting activities could be recalled. First in this list is the Authority (formerly Association) for Television on Demand (ATVOD): on its own, this self-defined "independent regulator" appears (or rather, originally appeared) to be a self-regulatory body (in the form of a private company), composed, on a voluntary basis, of all the main providers of on-demand services in the broadcasting (and telecommunications) sector.⁹⁵ It is run by a board consisting of an independent chairman, as well as an independent director, with representatives from its member organisations.⁹⁶ The ATVOD has drawn up a Code of Practice and some Guidelines that its members must abide by in their provision of on-demand audiovisual services.⁹⁷ Like the relevant provisions in the Code of practice, the Guidelines also touch upon various issues, such as protection of minors and of human dignity against harm and offence, and provide for the adoption of requirements and technical mechanisms to secure these objectives. The requirements are tailored according to their addressees, depending on whether or not they are service providers with editorial control over the content they offer. To police the misapplication of the principles and safeguards embedded in the Guidelines, a complaints procedure is in place: this mainly seems to result

⁹⁴ See, for instance, FEINTUCK & VARNEY, cited, where they affirm that "it seems that the current regulatory system in place constitutes an unfortunate half-way house for the regulation of the BBC's programme standards. Indeed, given that Ofcom is responsible for applying the whole of the Broadcasting Code to all other broadcasters, it seems likely that greater clarity and consistency of approach might be achieved if the BBC was subject to the Code in its entirety" and that "there seems to be no logical reason why the BBC should be treated differently from all other broadcasters just because of its different history" (p. 52); and where they note that "it may be that it would be more satisfactory for the distinction between regulation and governance to be drawn more clearly for the BBC, in other words if the BBC was subject to Ofcom's jurisdiction in the same way that commercial public service broadcasters are in relation to programme standards, compliance with quotas and competition law" (p. 54).

⁹⁵ See the ATVOD web-site, at <http://atvod.co.uk/>, where it is written that "the Association for Television On Demand (ATVOD) is the independent regulator committed to protecting consumers of television on demand services provided by its members". As it is mentioned on this web-site, the ATVOD was set up in 2003 "with the support and encouragement of the Government". Moreover, it is also affirmed therein that "ATVOD acts as an industry body, providing information and advice to its members, as well as a single point of contact not only for consumers but for Government, DCMS, [...] Ofcom".

⁹⁶ On the composition of ATVOD's Board see <http://atvod.co.uk/the-atvod-board>. Its restructuring has led to four out of the eight members being independent of on-demand service providers, alongside the independent Chair; the majority therefore being independent members, and only the remaining four being industry members.

⁹⁷ See <http://atvod.co.uk/about-atvod>.

into an alternative dispute resolution scheme.⁹⁸ The ATVOD has recently been ‘authoritatively’ backed by Ofcom, which has delegated to the ATVOD its (supplementary) powers to regulate video-on-demand editorial content, to the extent that this is provided for by the measures adopted for the implementation of the AVMS Directive. This has turned the ATVOD (as restructured to be fit-for-purpose) into a (mandatory) co-regulatory body (at least when performing the tasks assigned by Ofcom). Ofcom, in turn, has demanded regular reporting from the ATVOD and retained backstop regulatory powers on these matters, including the power to act concurrently or in place of the co-regulator where necessary and appropriate.⁹⁹ A very similar body to this co-regulatory forum (especially in its relationship with Ofcom) is the Advertising Standards Authority (ASA): first set up by the industry in 1962 as an independent adjudicator with responsibility for monitoring compliance with the ‘self-established’ Code of Advertising Practice (covering all non-broadcast advertising), it

⁹⁸ As explained by the ATVOD itself, the complaints resolution process requires complainants to go first to the service provider and then to ATVOD, only if they are dissatisfied with how their supplier has acted. ATVOD’s complaints system allows for further independent adjudication, if necessary, with an external independent adjudicator who will make a binding decision on appeals made by suppliers or consumers against ATVOD’s decisions. ATVOD has a progressive range of actions that it can apply to enforce the Code of Practice and when complaints are upheld. The BBC has the status of “associate” member of ATVOD and complaints against BBC’s on-demand services can be considered only by the BBC itself. For further details, see <http://atvod.co.uk/who-to-complain-to>.

⁹⁹ The policy choice to give Ofcom the task of selecting the co-regulator was made by the Government (opting to not confer powers and responsibilities over the regulation of programme content on video-on demand services solely to Ofcom) and appeared in what is now section 368B of the Communications Act 2003, stemming from the Audiovisual Media Services Regulations 2009 and 2010 amending (or, rather, adding provisions to) the Communications Act 2003, and implementing the AVMS Directive into UK law. In the explanatory memorandum (available at http://www.opsi.gov.uk/si/si2009/em/uksiem_20092979_en.pdf) prepared by the DCMS to accompany the 2009 Regulations, it is stated that “the [AVMS] Directive does not allow for self-regulation by the on-demand industry – a regulatory system with the backing of the law is required to achieve effective implementation of the [AVMS] Directive – but it does permit and encourage co-regulation. As the services to which the [AVMS] Directive relates are not currently regulated by law as a separate category of services in the UK (although there is a self-regulatory scheme to which most, though not all, of the major industry players currently subscribe), legislation is required to establish a regulatory system. The Government is therefore amending the Communications Act 2003 to include a definition of on-demand programme services and establish a legal framework within which such services will be regulated. The minimum standards for programmes and advertising in on-demand programme services are transposed directly from the [AVMS] Directive into UK law. Ofcom will be given powers to regulate on-demand programme services and ensure that they comply with the minimum standards, and may designate one or more bodies to act as co-regulator(s). The Government expects that a body established by the on-demand industry will be designated as the co-regulator for programme content and that the Advertising Standards Authority will be designated as the co-regulator for advertising” (para. 7.2 therein). It is also made clear therein that programme content in on-demand public services provided free of charge by the BBC (or S4C) is not to be subject to regulation by the industry co-regulator. The process (and the debate) through which Ofcom selected the ATVOD as a co-regulator for these purposes is traced in Ofcom’s already mentioned consultation on *Proposals for the Regulation of Video On Demand Services* (of 2009), the formal designation of the ATVOD as co-regulator of on-demand programme services being made, then, by Ofcom (in 2010) pursuant to section 368B of the Communications Act 2003 (see <http://stakeholders.ofcom.org.uk/broadcasting/tv/video-on-demand/>). In the recitals to the (original) designations (which have since been enriched/amended), it is stated that “ATVOD is *sufficiently* independent of providers of on-demand programme services” (recital (5)(iv) thereof; *emphasis added*).

increasingly took on the form of a self-regulatory body and acquired competence in advertising regulation across almost all media. Indeed, since 2004, the ASA has been performing co-regulatory functions under the aegis of Ofcom in relation to broadcasting advertising (now also extending towards video-on-demand advertising), by adopting and maintaining relevant codes of standards.¹⁰⁰ Finally, mention could also be made of the former Cultural Diversity Network, now the Creative Diversity Network (CDN).¹⁰¹ This industry-based network was originally established in 2000 (then refunded in 2011, following new membership) and mainly comprises all the major UK broadcasters, with the aim of promoting diversity on and off screen, i.e. in both output and the workforce. The CDN provides a forum for sharing expertise, resources and models of good practice among its partners in relation to the accommodation of diversity issues (including, especially in its original version: modernising the casting and portrayal of ethnic minorities in mainstream programming; sharing non-commercially sensitive research on cultural diversity; obtaining a comprehensive picture of ethnic minority employment in UK broadcasting; establishing industry standards for the collection of ethnic monitoring data). For this purpose, it launched a so-called Diversity Pledge: a public commitment made by independent production companies, in-house producers and other suppliers to take measurable steps to improve diversity in the industry. The Pledge is essentially a flexible and voluntary scheme organised around four sections, aimed at increasing the number of people from diverse and under-represented backgrounds actually represented and involved in broadcasting content and activities.¹⁰²

¹⁰⁰ For more details, see <http://www.asa.org.uk/>. Similarly to the ATVOD (see the fn above), in order to maintain responsibility for the co-regulation of broadcasting advertising, i.e. set the relevant standards and resolve complaints about their observance, ASA revised its internal structure by adding a specific Broadcast Committee of Advertising Practice to write and enforce the Broadcast Advertising Codes, while maintaining the self-regulatory nature for non-broadcast advertising. However, already in 1988, ASA's self-regulation system was backed up by statutory powers under the Control of Misleading Advertisements Regulations, now replaced by the Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008; these regulations enabled the ASA to refer advertisers who made persistent misleading claims and refused to co-operate with the self-regulatory system to the CMA for legal action. As regards the co-regulatory relationship with Ofcom, springing from the delegation by the latter of the main powers to regulate broadcast advertising, ex sections 319-328 of the Communications Act 2003, the already mentioned MoU adopted in 2004 governs the relationship between Ofcom and ASA.

¹⁰¹ See <http://creativediversitynetwork.com/>. The (original) CDN was already mentioned in the 2000 Communications White Paper as an example of an effort on the part of broadcasters to maintain diversity and plurality in the broadest sense: it is written therein that "as well as serving regional interests, *broadcasters all* need to be alert to the UK's many cultural, linguistic and social communities" and that the CDN is providing for a first response to this (para. 4.4.7 thereof; *emphasis added*).

¹⁰² The four "sectors" amount to four general commitments, as follows: 1) recruit fairly and from as wide a base as possible; encourage industry entrants and production staff from diverse backgrounds; 2) encourage diversity in output; 3) encourage diversity at senior decision-making levels; 4) take part in, or run, events that promote diversity. Every party that enters into the Pledge is required to commit to at least two of these sections and conduct the necessary actions (with the possibility to choose among certain suggested actions): see

2.3 The functioning of Ofcom and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?

The following analysis of Ofcom's role in the promotion and protection of media pluralism in the UK cannot but start from the usual, but still relevant, remark made in academic work concerning media freedom and the UK legal system: that, in contrast to other European countries, the UK does not have a written constitution, and, therefore, that media freedom is not defined nor detailed in such a seminal legal source as it is in other European States. Moreover, no black-letter positive definition (of constitutional status) of the related concept of media pluralism is to be found either. As clearly pointed out before, in fact, in the UK common law tradition the principle of media freedom has emerged and been guaranteed essentially as a negative liberty: that is to say that media freedom has largely been conceived as *freedom from* something, this being identifiable in external public control (by the State or the Government) and, mainly, in censorship.¹⁰³ In line with such an understanding of media freedom, it also appeared as a 'residual' liberty: its scope was (indirectly) defined by the application of statutory and common law provisions having an impact on the matter, and consequently remained quite blurred.

However, this picture changed significantly at the time of the enactment of the Human Rights Act 1998 (the HRA),¹⁰⁴ which incorporated the ECHR into UK law.¹⁰⁵ This marked a shift whereby the free expression provision laid down in Article 10 ECHR, incorporated into UK law, brought with it the specific recognition and guarantee of the principle of media freedom, which stems from the interpretation of this provision. As a consequence, to put it briefly,

<http://creativitydiversitynetwork.com/resource/diversity-pledge/>. It emerges, however, that such strategies aim essentially to ensure that people as individuals coming from minority groups are represented in broadcasting.

¹⁰³ See E.M. BARENDT, *Freedom of speech*, Oxford, OUP, 2005, p. 38 ff.

¹⁰⁴ The HRA became enforceable in English law on 2 October 2000. The UK's ratification of the ECHR, however, dates back to the 1951.

¹⁰⁵ In fact, as claimed by BARENDT, cited (notably, p. 40), the move towards a proper recognition of media freedom (or rather, freedom of speech) as a self-standing legal principle already emerged in common law before the enactment of the HRA. Moreover, still E.M. BARENDT, "Freedom of Expression in the United Kingdom Under the Human Rights Act 1998", in *Indiana Law Journal* [2009] 84, pp. 851-866, affirms that, while the HRA seems to make a significant difference to the general reasoning of the courts in freedom of expression cases, "the concern for freedom shown by the common law had developed appreciably in the decade or so before the [ECHR] right was established in UK law, so it is less clear that incorporation of the right necessarily marks an advance in the degree of its legal protection" (p. 855).

media freedom has increasingly acquired autonomy and proper standing as a legal principle, and has been recognised and treated as a *positive liberty* within the UK legal order.¹⁰⁶

A point could be made here that relates the HRA's recognition of the freedom of expression to Ofcom. Indeed, as set forth by section 6(1) of the HRA, it is unlawful for a 'public authority' to act in a way that is incompatible with a right provided for by the ECHR. As Ofcom could well (rightly) be qualified as a 'public authority' in the meaning of that section, it follows that it is obliged to guarantee the freedom of expression (and the derived rights) when discharging its duties.¹⁰⁷ Hence, it could be argued, this places upon Ofcom a duty that equates to negative protection of the principle of media freedom, without implying any direct commitment to act in favour of securing such an objective. However, it also means that the work of the UK media regulator as a public authority has to be constantly guided and inspired by the principle of freedom of expression and its corollaries (as well as other human rights guarantees), and that it cannot function nor be interpreted against them.¹⁰⁸

However, even after the passing of the HRA and, hence, the express 'constitutionalisation' of the freedom of expression/media freedom, it remains difficult to find a manifest recognition of the principle of media pluralism in the UK legal order. The difficulty in framing this principle is apparent from the almost complete absence of case-law on the matter. As CRAUFURD SMITH admits, the UK courts have not contributed very much (if at all) to the development of pluralism as a distinct legal principle. Indeed, they have not dealt with it in their case-law on the freedom of expression, which in itself has failed to provide a consistent body of doctrine on the interpretation and application of that freedom.¹⁰⁹

Nevertheless, some traces of the objective(s) underlying media pluralism can be found in relevant pieces of legislation. Looking first at primary sources of law, (the already mentioned) section 3(2)(d) of the Communications Act 2003 embodies and details one of the main

¹⁰⁶ For a thorough account on the matter, see H. FENWICK, G. PHILLIPSON, *Media Freedom under the Human Rights Act*, Oxford, OUP, 2006 (and especially pp. 4-12 therein).

¹⁰⁷ See FENWICK & PHILLIPSON, cited, pp. 112-113. It emerges therein (p. 113) that Ofcom, "the super-regulator of all broadcasters, a creature of statute, given coercive powers and duties that are clearly governmental in nature, will be a public authority for the purpose of the HRA. It is likely to be deemed a standard public authority, as it is a statutory government regulator; even if it is not, there is no doubt that its regulatory functions will be caught by the [HRA], by virtue of section 6(3)(b) [thereof]", providing the basis for a definition of public authorities in functional terms, i.e. whenever certain functions of those bodies are of a public nature. Hence, under section 6(1) of the HRA, Ofcom is obliged to act in conformity with the ECHR.

¹⁰⁸ See A. NICOL *et al.*, *Media Law & Human Rights*, Oxford, OUP, 2009, pp. 195-210, referring not only to the freedom of expression principle, but also to the need for Ofcom to abide by the right to a fair trial (as enshrined in Article 6 ECHR) as long as its decisions involve "civil rights or obligations".

¹⁰⁹ See CRAUFURD SMITH, cited, pp. 168-174.

features of the principle of media pluralism when it provides that one of the specific objectives of Ofcom's activities must be to ensure "the maintenance of a sufficient *plurality of providers* of television and radio services" (*emphasis added*). Moreover, other statutory provisions contribute to extending and enriching this understanding of media pluralism: this is the case, indeed, of (the again already mentioned) section 3(2)(c) of the same Act, which assigns to Ofcom the task of ensuring the "availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a *variety of tastes and interests*" (*emphasis added*). Further details are provided by reading this in conjunction with section 12(3) of the Broadcasting Act 1996, stating that when the holder of a television multiplex licence applies to Ofcom for a variation in the licence conditions, such variation shall not be granted if it appears that "the capacity of the digital programme services broadcast under the licence to appeal to a variety of tastes and interests would be unacceptably diminished".¹¹⁰

Some remarks on the interpretation of these provisions could be made here. To begin with, at first sight, they appear to be little more than statements of principle, rather than operative tools capable of bestowing significant powers upon their main addressee (i.e., Ofcom). Nevertheless, it could still be argued that, as general principles, they should guide and be implemented by Ofcom in the exercise of its competences and powers. For example, concerning the task of granting the licenses/authorisations to broadcast services (across all delivery platforms, as required): when performing this function, Ofcom can have a significant influence not only by controlling the access to the market by one broadcaster or another, but also in relation to the structural design of the market itself. It could be assumed that, under the guidance of the abovementioned principles, Ofcom will seek to accommodate minority groups and interests, as long as they are seen as promoting plurality and variety; it may also refuse licences to entities with too much weight in the market, or entities that represent interests considered unsuitable by the legislation, in that they adversely affect those principles.¹¹¹ Hence, it is in such cases that, via the granting of licences or authorisations to

¹¹⁰ In the same vein, section 85(2) of the Broadcasting Act 1990, dealing with radio services, states that Ofcom must secure the provision of a diversity of national and local services which cater to the tastes of different audiences; as well as section 54(6)(a) of the Broadcasting Act 1996, mirroring the second aforementioned provision as regards variations in radio multiplex licences.

¹¹¹ See I. WALDEN, "Who Owns the Media? Plurality, Ownership, Competition and Access", in GOLDBERG *et al.*, cited, pp. 19-55, notably at p. 23. Note also that, as recalled by T. BALLARD, "Broadcasting", in GOLDBERG *et al.*, cited, pp. 299-334, notably at pp. 317-319, under UK law, local authorities, political parties, religious bodies and advertising agencies are disqualified from holding a broadcast licence, since it is assumed that these people could exercise undue influence, detrimental to the public interest.

broadcast and by framing their content, Ofcom can (and, perhaps, should) contribute to ensuring that a plurality of providers is established, and that the services they provide match the variety of the public's tastes. Although no reference to the term 'pluralism' is to be found in the abovementioned statutory provisions, nor in other parts of the Communications Act 2003, nor elsewhere in other relevant pieces of legislation, the two main components embedded in that notion are nevertheless evidently present. That is to say that both the external and the internal dimension of pluralism are encompassed in the Communications Act 2003, in that it provides for a multiplicity of providers and the diversity of content to be considered among the objectives whose achievement Ofcom has to take the utmost account of.

Based on this last remark, an issue of terminology may be brought to the fore here. Looking at the relevant sources of media regulation, a difference emerges in the use of terms such as "plurality" and "diversity" (or, often, "variety"). While the former appears to hint at the external dimension and thus to structural regulation (i.e., the sources of content), the latter, instead, refers more closely to content regulation (to ensure its broad availability). Thus, "plurality" as such should not be taken as a comprehensive proxy for "pluralism" (although, as increasingly occurs in policy discussions in the UK on these matters, media "plurality" is in fact employed to indicate the need to ensure a diversity of viewpoints and prevent undue influence). "Pluralism" could actually result from the combination of the regulatory policies respectively adopted to foster the two dimensions: "plurality" and "diversity" are, hence, terms that are not used interchangeably, but rather in a complementary fashion for the benefit of a broader goal.¹¹² Moreover, especially in statutory instruments, plurality-related concerns appear to be much more frequent than diversity-oriented considerations. It could be argued, then, that the use of 'plurality-driven' measures, although not very frequent in itself, denotes a tendency to emphasise the quantitative dimension of the pluralism discourse. The qualitative counterbalance is not absent, though: rather it comes together with (and within) the public service concept, and seems to be reflected in the public interest test to be used in media

¹¹² In the 2000 Communications White Paper, indeed, a Chapter brings together the two dimensions under the title "Maintaining diversity *and* plurality" (see Chapter 4 therein, *emphasis added*) and links them to the guarantee and the promotion of independent production and the diversity of television news provisions and services which meet regional, local and cultural interests. It is clearly stated that "by diversity we mean the range of different programmes and services available to viewers and listeners. Plurality, on the other hand, is about the choices viewers and listeners are able to make between different providers of such services. Society benefits from *both* a diversity of services between and within genres (such as news, entertainment, documentaries etc.) and plurality of suppliers of such services (since this increases exposure to a variety of editorial styles and a range of views and opinions)" (para. 4.2.1 therein, *emphasis added*). The same quote is reported by L. HITCHENS, *Broadcasting pluralism and diversity: a comparative study of policy and regulation*, Oxford, Hart Publishing, 2006, notably at p. 9.

merger cases, especially to temper the quantitative dimension implied by plurality-considerations in such cases. Finally, it also emerges from sector-specific measures relating to content quota requirements, party political broadcasts, must-carry/must-offer provisions and listed events broadcasts. To better appreciate all of this, some light will be shed on the boundaries of the notion of plurality, then the issue of the public service broadcasting system will be addressed and, to conclude, some consideration will be paid to the abovementioned specific measures: all of this, of course, will be done (mainly) from Ofcom's perspective.

As regards media plurality, it should first be made clear that it is mainly related to ownership (and control) measures. In this respect, it should also be acknowledged that these measures are essentially a product of legislation. Indeed, the media ownership provisions currently in force are essentially contained in the Communications Act 2003 (and in the secondary legislation based on it). It has been largely recognised that these measures are the outcome of a significant relaxation of the pre-existing ones, and that this trend has been driven by several factors, such as the increasing radio-spectrum abundance, the broadening of digitisation, the delivery of content across multiple different platforms as an effect of convergence, and the economic pressure to take advantage of all of these factors to profitably develop the related national markets.¹¹³ Indeed, on the one hand, as regards mono-media (broadcasting) ownership measures, the main (pre-existing) cap on holding two or more (national analogue) television licences where the licensee has 15% or more of the total television audience share, as set forth in the Broadcasting Act 1996, was removed by the Communications Act 2003, to the effect that restrictions on mono-media ownership as regards television-broadcasting no longer exist, apart from the specific rules excluding certain entities from holding television licences (as mentioned above) and the provision for persons to be disqualified from holding such licenses if they are not 'fit and proper'.¹¹⁴ On the other hand, as regards cross-media

¹¹³ See, among the many, WARD, cited, pp. 1633-1638; HITCHENS, cited, pp. 86-103 and pp. 268-280; and especially BARENDT *et al.*, cited, pp. 274-300 (devoted to the UK media ownership and plurality regime), notably pp. 277-282.

¹¹⁴ The main reference within the Communications Act 2003 is to section 350 thereof (interestingly entitled "Relaxation of licence-holding restrictions") and its schedule 14. This move was accompanied by the removal of a series of tighter provisions (prohibiting single ownership of the two London ITV franchises, preventing joint ownership of Channel 5 and one ITV company, and banning a non-EEA body or individual from owning a UK terrestrial television channel). Concerning ownership rules in other platforms, it is interesting to note that, as stated in the Consultation on *Media Ownership Rules*, held by the Department for Culture, Media and Sport in 2001, since "the publication of the [2000] Communications White Paper, the ownership of digital terrestrial television (DTT) has been liberalised by secondary legislation – there are now no effective limits on the ownership of multiplexes or on the provision of programme services. Limits were originally introduced to ensure competition within the fledgling DTT industry. It is now clear that competition in digital is primarily between different platforms, rather than within them. In view of this[,] limits were amended to permit market-determined consolidation. No such limits have historically been placed on other pay-TV carriers on cable and satellite

ownership regulations, while their basic structure has been maintained, they have also undergone significant simplification, with the result that the only real restriction still applicable (at national level) is the so-called “20/20 rule”, whereby nobody owning one or more newspapers with (individually or cumulatively) more than a 20% share of the relevant market is allowed to hold any Channel 3 (or ITV) licence or more than a 20% stake in a Channel 3 licensee.¹¹⁵

In this (very much relaxed) framework of media ownership regulation (essentially related to terrestrial television-broadcasting) delivered by the legislation, Ofcom’s role appears to be rather limited. However, two points can be made to better define its role. Since it is possible to exercise control over a corporate body even without owning it, as emerges from the Communications Act 2003, the control of media outlets itself poses questions that are closely connected to those advanced by ownership concerns when they relate to pluralism issues. The notion of control appears more intrinsically slippery than that of ownership and, hence, may entail even more subtle problems. Corporate control can essentially manifest itself in three ways: legal control, material influence and *de facto* control.¹¹⁶ Ofcom is involved in the delimitation of the latter notion of control (and its consequential enforcement), being obliged under section 357(2) of the Communications Act 2003 to publish guidance on the matter.¹¹⁷ This exercise proves to be quite important, especially if related to the fact that Ofcom has to supervise changes of control in Channel 3 and Channel 5 (or radio broadcasters): as they arise, Ofcom must be informed and review them, having regard to the likely effect of the change on the service’s programme output, by looking at matters particularly concerning the

platforms, although broadcasters on these services are subject to the 15% share-of-audience ownership cap (now to be removed). The Government will continue to act to regulate content and ensure open access to gateways in these markets, but we will not impose ownership limits. Plurality is not threatened whilst there is competition between digital platforms and free-to-air broadcasters continue to hold such a significant share of the total audience. However, it is important that open access to digital platforms is maintained to ensure that content providers are able to reach audiences” (see paras. 6.2.13-6.2.14 thereof). For the ‘fit and proper’ person’s rule, see notably sections 3 of the Broadcasting Act 1990 (and for a significant example of its application, see the case of September 2012, concerning BSkyB: Ofcom’s related decision is available at <http://stakeholders.ofcom.org.uk/binaries/broadcast/tv-ops/fit-proper/bskyb-final.pdf>).

¹¹⁵ See para. 1 of the schedule 14 to the Communications Act 2003. Previously existing restrictions on cross-ownership at the local level were subsequently lifted (by the Media Ownership (Radio and Cross-media) Order 2011), also following suggestions from Ofcom in that respect (as will be mentioned below, in the text). For the way Channel 3 (or ITV) is structured, see GIBBONS, cited, pp. 100-102.

¹¹⁶ See WALDEN, cited, at p. 31. As for the media sector, according to para. 1(3)(b) of schedule 2 to the Broadcasting Act 1990, “control” occurs when a person will be able, even without having at least 50% of interest (shares) in a body (i.e., legal control), to have the affairs of such a body conducted according to his wishes (i.e., *de facto* control); while material influence can exist (even) where an entity has no equity interests in a body, but has commercial or financial agreements on which that body is dependent.

¹¹⁷ See notably Ofcom’s *Guidance on the Definition of Control of Media Companies* (of April 2006), available at <http://stakeholders.ofcom.org.uk/consultations/media2/>.

type, range and quality of programming. Finally, if deemed appropriate, Ofcom can modify the licence conditions so as to prevent any detrimental effects of such changes.¹¹⁸ What could be observed, on the face of it, is the significant discretionary power that Ofcom is given in assessing such situations and determining their outcomes, having an evident bearing on pluralism issues. This, it could be argued, can be combined with the inherent discretion bestowed upon the regulator by the abovementioned general clause of section 3(2)(d) of the Communications Act 2003, which provides for “the maintenance of a *sufficient* plurality of providers” (*emphasis added*): what should ultimately be perceived and pursued as “sufficient” inevitably remains (despite the framework of the statutory indications) subject to the discretion of the body that has to exercise its regulatory power to achieve this goal.

Thus the Communications Act 2003 also confers upon Ofcom a duty to periodically (i.e., at least every three years) review the ownership measures and make (policy) recommendations to the Secretary of State to modify them as it sees fit.¹¹⁹ Of the three reviews conducted so far on this basis: the first one (concluded in November 2006) made the case for no change to be brought to the regime in force; the second one (completed in November 2009) recommended the Government undertake marked liberalisation of the local cross-media ownership provisions relating to newspapers, radio and television enterprise, while keeping the national ones in place; the third one (concluded in November 2012) did not suggest any other change/relaxation of the existing provisions, having taken into account the further simplification of the media ownership regime, resulting from the successful reception of the latter recommendations above, together with the continuing appropriateness of the measures in place in responding to their underlining objectives, as well as the broader ongoing policy discussion on media ownership in general (for which see below).¹²⁰ Having regard in

¹¹⁸ See sections 351-356 of the Communications Act 2003.

¹¹⁹ See section 391 of the Communications Act 2003.

¹²⁰ The outcomes of these three reviews can be found at <http://stakeholders.ofcom.org.uk/market-data-research/other/crossmedia/media-ownership-research/>. The second review was preceded by a public consultation on the matter. In its closing document, it is interesting to note that the argument put forward for maintaining the national cross-ownership provisions first recognises that “Parliament made the national cross media ownership rules to stop individuals owning significant interests across different types of media because this could give individuals too great a share of the national media voice”, and then asserts that since the “Parliament’s rationale for putting the rules in place is still applicable [...] because of the evidence that the way people consume national news has *not yet* changed significantly” and that consumers still rely on television, newspapers and radio as sources of information (alongside a growing use of the internet for that purpose), the national cross-ownership rules should not be removed *yet!*. As for the amendments to the local cross-ownership measures, it is stated that “liberalisation rather than removal [has been proposed] to strike a balance between enabling flexibility of industry to adapt to change while still retaining some protections for plurality” (see the *Report to the Secretary of State (Media, Culture and Sport) on Media Ownership Rules*, of 17 November 2009, respectively paras. 4.5, 4.8 and 1.39; *emphasis added*). As mentioned in the text, the report concerning the third

particular to the 2009 review of media ownership rules, which was certainly the most substantive and incisive of the three, it is interesting to note that the rationale the dismantling of local ownership caps was to facilitate the economic viability of those markets and guarantee the continuation of their existence, as they were exposed to major issues of economic sustainability (especially because of the increasing shortfall of advertising revenues and increasing competition due to the growth of digital platforms). The underlying assumption was, then, that the extreme relaxation of those measures could ensure that local content could still be provided and that, hence, media plurality could still be secured at the local level. It is difficult to avoid the observation that this reasoning, while posing evident threats to plurality itself, is likely to be used (in the future) in relation to the dismantling of national ownership measures (as they now stand), since the national media market also appears to be starting to suffer from increasingly fierce inter-platform competition (and the resulting economic downturn), which undermine its viability as such.¹²¹ Overall, although Ofcom does not have a direct influence in shaping media ownership legislation, as the final decisions are in the hands of the Government and, ultimately, Parliament, it appears that from the way the regulator exercises its attributed power to review this legislation, it can nonetheless play a significant role in orienting the choice of the other actors and shaping the statutory tools according to its will.

It has been said above that the Communications Act 2003 has rendered the media-ownership measures more flexible, according to the underlying assumption, among the many, that a competitive market can effectively make a significant contribution to the delivery of a pluralistic media landscape, without preventing the economic growth and competitiveness (nationally and internationally) of media enterprises. This evidently implies an appreciable shift to increasing reliance on competition law tools to govern the media market (inter alia, to achieve that aim) and to operate in parallel to the media ownership provisions; thus, it could be argued, sidestepping Ofcom's role as a competition authority. In this context, it should also

review contains similar statements as to the ongoing soundness of the rules in place to match the needs they aim to address.

¹²¹ Almost in parallel to the second review of media ownership rules, however (still concerning plurality at the local level), Ofcom warned about the sensitive area of news provisions: on the occasion of a thorough review of local and regional media in the UK, it expressed its support for the Government's proposal to sustain a system of publicly funded news-gathering consortia that could operate to the benefit not only of television operators, but also of radio, newspaper and purely on-line providers, to protect and foster (local) pluralism (see the *Local and Regional Media in the UK* Discussion Document (published on 22 September 2009), available at <http://stakeholders.ofcom.org.uk/market-data-research/other/tv-research/lrmuk/> (and, in particular, section 7 therein). The issue of plurality in news provisions (and its central role in the democratic discourse) lies at the basis of the House of Lords' 2008 Communications Committee Report on *The Ownership of the News* (of 27 June 2008, HL 122).

be acknowledged that the Communications Act 2003 has introduced (or rather, extended) a special device for handling the application of competition law in sensitive cases concerning broadcasting media enterprises, under the rationale of protecting the public interest in plurality. In other words, the relaxation of mono-media and cross-media ownership rules has occurred simultaneously with the development of a special mechanism for appraising media mergers that could not only substantially reduce competition, but also lessen pluralism. Indeed, as long as media mergers are deemed to raise public interest concerns, it has been recognised that they must be subject not only to the application of the general merger regime and the related competition-oriented provisions contained in the Enterprise Act 2002 (which remain applicable *per se* in other cases not raising such concerns but still involving the media, and could therefore still indirectly protect plurality), but also to special provisions inserted in that Act by the Communications Act 2003, with the aim of tackling plurality concerns more directly.¹²² These provisions amount to the so-called “media public interest” test (or “media-plurality” test). This test implies the possibility for the competent Secretary of State (previously, for Business, Innovation and Skills, and now for Culture, Media and Sport) to intervene in a media merger case to ensure “(a) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be *a sufficient plurality of persons with control of the media* enterprises serving that audience; (b) the need for the availability throughout the United Kingdom of a *wide range of broadcasting* which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and (c) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting to the standards objectives set out in section 319 of the Communications Act 2003” (*emphasis added*).¹²³ These are, therefore, the three “media public interest” criteria that form the subject of the test.¹²⁴ By discretionally issuing an

¹²² For details, among the many, see HITCHENS, cited, pp. 207-213; and WALDEN, cited, pp. 35-40.

¹²³ See section 58(2C) of the Enterprise Act 2002, which relates to broadcasting and newspaper/broadcast cross-media mergers. Other (different) public interest considerations are set for mergers involving only newspaper publishers (see section 58(2A)-(2B) thereof).

¹²⁴ The test was introduced by section 375 of the Communications Act 2003, amending (section 58 of) the Enterprise Act 2002, which originally only provided specifically for national security (including public security) and (later) for the maintenance of the stability of the UK financial system as public interest considerations. While a (special) public interest consideration-based regime for newspaper mergers already existed since the Fair Trading Act 1973, that relating to broadcasting was a complete novelty, brought about by the Communications Act 2003 (as advocated especially by the above-mentioned Joint Committee on the Draft Communications Bill). The Government provided some guidance for dealing with media mergers triggering public interest considerations: see notably the document on *Guidance on the Operation of the Public Interest Merger Provisions Relating to Newspaper and Other Media Mergers*, published (on May 2004) by the (former)

“intervention notice” whenever the Secretary of State believes that one or more of these public interest considerations are of relevance in a media merger case, he/she has the power to step in (while normally, in merger cases, the competition authority alone would proceed, on solely competition grounds); and not only (as in ‘ordinary’ competition law) when the case appears to involve a so-called “relevant merger situation”.¹²⁵ When such an intervention notice is served, both the CMA and Ofcom have a duty to investigate and report, respectively, on the competition and media-plurality aspects of the merger in question.¹²⁶ Ultimately, however, it is still up to the Secretary of State to decide either to clear such a merger, or to require the negotiation of undertakings, or to refer the merger for further investigation. In the latter case, it is (now, again) up to the CMA, following a further “second-phase investigation”, to report to the Secretary of State who, bound by CMA’s competition findings (i.e., essentially clarifying whether a relevant merger situation has been created and whether the merger results in a “substantial lessening of competition”), but still free to form his/her own (and final) opinion on the specific public interest issue(s) at stake, decides whether the

Department for Trade and Industry (but see also the document issued by the CAM, in January 2014, on *Mergers: Guidance on the CMA’s Jurisdiction and Procedure*, notably paras. 16.1-16.27 therein).

¹²⁵ Section 23 of the Enterprise Act 2002 identifies the criteria for establishing a “relevant merger situation”: that is either when two or more enterprises cease to be distinct and the merger is of a certain economic significance, given the turnover of the enterprise to be taken over exceeding £70 million (the “turnover test”), or when the merger would create or enhance (at least) a 25% market share of supply of the particular goods or services relevant in that merger in the UK or a substantial part of it (the “share of supply” test). Even if these thresholds are not met, the Secretary of State can still intervene in the so-called “special merger situations”: in this latter hypothesis, however, which is of relevance for media mergers, it is sufficient for one of the merging parties to have an existing 25% share (or more) of the supply of broadcasting services (or newspapers) in the UK (or, again, in a substantial part of it), as provided by section 59 thereof. The main difference between a relevant merger situation and a special merger case is that in the latter there is no competition assessment, it being based only upon (media) public interest grounds; nor can the Secretary of State add a new public interest consideration that is not already specified by statute (something that is possible, instead, in the former case, according to section 58(3) of the Enterprise Act 2002, whereby new public interest considerations, in general, can be created or removed, or existing ones amended). Moreover, it should be recalled that, according to Article 21(4) of Council Regulation (EC) 139/2004, of 20 January 2004, on the control of concentrations between undertakings [2004] OJ L 24/1, the public interest test could still be applied in cases involving the EU Commission, since it is up to MS “to take appropriate measures to protect legitimate interests”: in such cases the Secretary of State will serve (what is called) a European intervention notice.

¹²⁶ If no intervention notice is (deemed to be) issued, the merger will be assessed on competition grounds alone.

merger is contrary to such issue(s) and how to proceed accordingly (by imposing remedies).¹²⁷ In any case, the decisions of the Secretary of State may be subject to judicial scrutiny.¹²⁸ Before appraising the role of Ofcom in the public interest test, two points could be raised on the test itself. First, as it has been claimed, the test may appear to be a useful instrument in the protection of plurality within the new multimedia platform environment, if shaped and used appropriately. In contrast to the ownership measures that, as depicted so far, are capable of tackling only traditional (albeit relevant) media, the media plurality test seems to be more flexible and capable of adaptation to engage with the challenges brought by the new media sector.¹²⁹ The second observation relates to the substance of the test. Looking at the three above-cited criteria around which it is built, it can be appreciated that, overall, they are capable of addressing a broad understanding of pluralism: while the first consideration focuses predominantly on the controllers of media enterprises, the other two relate more closely to their output. In other words, it could be said that the first consideration clearly

¹²⁷ Note, moreover, that section 47 of the Enterprise Act 2002 indicates that the CMA, once referred to with such a case, has to decide not only on whether a relevant merger situation has been created, but also on whether its creation results in a substantial lessening of competition, and also whether it operates against the public interest. It could be mentioned here that, prior to the establishment of the CMA, the OFT and the Competition Commission were both (as the two relevant competition authorities) involved in this procedure, with the former performing the first phase of the investigation and the Competition Commission (acting on reference from the Secretary of State) the second.

¹²⁸ As provided for by section 120 of the Enterprise Act 2002, application for review can be brought before the Competition Appeal Tribunal (CAT), whose rulings can be appealed against (in point of law) before the Court of Appeal.

¹²⁹ Nonetheless, currently sections 58 and 58A of the Enterprise Act 2002 make the test applicable only to “media enterprises”, interpreted as consisting of or involving (only) broadcasting companies (and newspapers), to the exclusion of Internet (or wholesale) content providers, and generally, all broadcasters not holding a licence. See also HITCHENS, cited, p. 211, where it is claimed that “a media public interest test [such as the one at stake] could overcome the limitations of merger law, and widen the scope for pluralism protection by incorporating also new media platforms. This seems entirely the sort of approach which is needed if traditional ownership and control regimes are to be relaxed or removed, and broadcasting pluralism protection measures are to remain effective. Even if current ownership regulation is retained, a public interest test could add a further dimension of protection by being made applicable to mergers involving services falling outside the mainstream media”. However, as the Author herself notes, it appears from the guidance document issued by the (former) Department for Trade and Industry (notably, Section 8 therein), that the Government intends to use the test predominantly for situations that would have still been covered by the lifted media ownership provisions, and not in cases where those in force are still applicable (except under “exceptional circumstances”: this occurred in the first case in which the “sufficient plurality” public-interest consideration was at stake, to which reference will be made below). In the past, Ofcom has made the case for the maintenance of the test as such: in this context, in the aforementioned second media ownership review (encompassing, as usual, an assessment of also the public interest test, as required by statute), it recognised that the test “plays an important role as a final safeguard that can be invoked by the Secretary of State [...] in order to protect plurality [and that] the rationale for Parliament’s decision to include a media public interest test has not changed”, noting in addition that, “if other media ownership rules are relaxed [as in fact has happened, as recalled above], the role of the test in acting as a safeguard of the public interest, for example in plurality, could become more important”; but it also did not hide that “there may be arguments for removing the media public interest test if its existence currently deters potential media mergers or if competition in media markets automatically delivers plurality and diversity” (paras. 7.6-7.8 therein).

points to external pluralism concerns (i.e., the plurality of people controlling the media), whereas the latter two are closely related to internal pluralism considerations (i.e., the availability throughout the UK of broadcasting of high quality and wide appeal, and the commitment to observe the broadcasting standards objectives). This may prove that the test could effectively be used to provide for the protection of pluralism in its broadest sense, and that an understanding of it as such can still be read between the lines of the law. Nevertheless, it should also be acknowledged that, considering the test, while it suggests and encourages (even greater and broader) engagement in the concrete and substantive measurement of media pluralism, such measurement is a particularly challenging exercise, as several (different) parameters and aspects could (or should) be taken into account in this respect, leading to complex (and potentially contrasting) evaluations and outcomes.¹³⁰

Having said all this on the public interest test, however, it is inevitable to observe that Ofcom's role in its handling is quite marginal. When a case for the application of the test arises, the outcome is essentially in the hands of the Government. The (competent) Secretary of State launches, conducts and concludes the multi-stage process involving the application of the media public interest considerations. The decision to intervene, and under which public interest consideration, is entirely in the hands of the Secretary of State: in fact, the latter will not receive Ofcom advice on whether to intervene, although leaving room for Ofcom to

¹³⁰ On this matter, it should be reported that, following a specific request for advice made (in October 2011) by the Secretary of State (formerly) for Culture, Olympics, Media and Sport (in connection with Ofcom's analysis in the context of the application of the public interest test, regarding the proposed transaction between NewsCorp and BSkyB, for which see fn 137 below), following public consultation Ofcom released (on 19 June 2012) a first report on the feasibility of measuring media plurality (across platforms, but focused on news and current affairs), completed by supplementary advice (of 5 October 2012). In a nutshell, according to Ofcom, an "effective framework for measuring media plurality is likely to be based on *quantitative evidence and analysis* wherever practical[, while] there are also areas where a *high degree of judgement* is required[, so that the] appropriate approach to exercising such judgement is ultimately for Parliament to debate and determine"; Ofcom also stated that three categories of "metrics" are particularly relevant to that end (such as: "availability", referring to the number of providers available; "consumption", considering the people using the media; and "impact", taking into account the influence on content consumption on how people's opinions are formed: see paras. 1.4-1.5 of the related executive summary, with *emphasis added*; for all pertinent documents, see <http://stakeholders.ofcom.org.uk/consultations/measuring-plurality/>). Moreover, it should also be mentioned that the Secretary of State (now) for Culture Media and Sport, taking into account the outcomes of a consultation touching (inter alia) on those issues (launched by the related government Department in July 2013, and concluded in August 2014), and having established the scope of the measurement framework, asked Ofcom (on 9 September 2014) to further develop this framework into a set of practical indicators: Ofcom has started working on this, opening (on 30 October 2014) a further round of consultation with stakeholders and interested parties (for all relevant documents, see <http://stakeholders.ofcom.org.uk/consultations/plurality-cfi/>). On the same matter, see notably, R. CRAUFURD SMITH, D. TAMBINI, "Measuring Media Plurality in the United Kingdom: Policy Choices and Regulatory Challenges", in *Journal of Media Law* [2012] 1, pp. 35-63, looking in particular at the 'share of reference' test proposed by Ofcom (notably in relation to the 'impact' metric).

deliver information to assist in the decision.¹³¹ Although Ofcom has a duty to advise on the public interest aspect of the case and formulate a recommendation on whether the case should be referred for further (deeper, or second-phase investigation), this advice is non-binding and is delivered under the constraints of the analysis of the public interest considerations specified by the Secretary of State in his/her intervention notice. Ofcom has issued a guidance statement on the public interest test to be adopted in its advice, which stresses that it can only act when requested to do so, by the Secretary of State issuing the intervention notice.¹³² It is worth restating that the final decision on such media merger cases is, anyway, firmly in the hands of the Government.

It is fairly clear, therefore, that Ofcom does not have a central role to play in the application of the test, despite being – it could be argued – the body that is supposed to have greatest expertise in such matters. In fact, Ofcom has no power of initiative in this area and its intervention on the public interest grounds does not appear to be crucial to the outcome of merger cases. It should also be pointed out that the conferral of such an ample margin of discretion to the Government in media merger cases goes against the trend of (severely) limiting government intervention in standard merger cases and leaving decision-making to independent competition authorities. This may raise further concerns, especially if one points to the fact that the Government could use the conferred discretion to fulfil its own interests, which will not necessarily coincide with those of the public. It is striking to note, moreover, that the statutory grounds upon which the Government is required to exercise its discretionary assessment, especially as regards plurality concerns, are very similar to those (reported above) that are normally to be taken into account by Ofcom as its statutory objectives.¹³³ Probably

¹³¹ See the guidance document issued by the (former) Department for Trade and Industry (notably, para. 4.13 therein).

¹³² See Ofcom's *Guidance for the Public Interest Test for Media Mergers* (published in May 2004, and available at http://stakeholders.ofcom.org.uk/broadcasting/guidance/other-guidance/pi_test/). As stated therein, only when the Secretary of State serves an intervention notice does Ofcom have "a duty" to advise the latter on the media public interest aspects of the case, while there is no statutory role for Ofcom unless such a notice is issued, although the competition authority will routinely consult it in media merger cases (see para. 6 therein); it is recalled, nevertheless, that "Ofcom may also give advice to the Secretary of State as it considers appropriate in relation to either the [former] Competition Commission's [now the CMA's second-phase] report or the taking of enforcement action by the Secretary of State (i.e. remedies)" (para. 22 therein). Ofcom's guidance statement does not reveal much about how it will interpret the public interest considerations, but deals eminently with procedural aspects: interestingly, in this context it is affirmed therein that Ofcom will provide confidential, non-binding advice to the merging parties in advance regarding the likelihood of a reference to the competition authority or the negotiation of commitments, as well as more detailed confidential guidance where the Secretary of State is required to intervene on public interest grounds; and in general, when the latter asks for Ofcom's advice, that it will seek comments from third parties and will hold meetings with the merging parties.

¹³³ The public interest considerations of section 58(2C) almost literally mirror the objectives that Ofcom is required to secure under section 3(2)(d), (c), (e) and (f) of the Communications Act 2003; moreover, note that

(also) with the aim of resolving some of these unbalances, the House of Lords' Select Committee on Communications has explicitly proposed (since 2008), within the framework of a partial reform of the system, that Ofcom should be granted the power to serve the intervention notice (in addition to the Secretary of State), as well as the establishment of a clear separation between the investigation of a media merger by Ofcom, in relation to public interest issues, and by the Competition Commission, in relation to competition issues:¹³⁴ the Government has not endorsed this proposal.¹³⁵ Interestingly, in reiterating and reinforcing this proposal, the same Committee of the House of Lords has (also) suggested conferring upon Ofcom a more proactive monitoring and supervisory role regarding media plurality, beyond the operation of the public interest test in media merger cases, through more general, systemic and periodic "plurality reviews".¹³⁶ Anyway, as the test still stands, alongside the abovementioned findings, the risk remains that, due the many different bodies involved in its application, different orientations and inconsistencies in the solutions delivered may well arise, especially as regards the interpretation and enforcement of the public interest considerations, to the (potential) detriment of the sound protection of media plurality.

These remarks are, indeed, notably underpinned by the first case (in 2006) that triggered the whole process concerning the application of the media-plurality public interest test (including, in that case, judicial scrutiny of the relevant decisions): the case involving the acquisition by (the satellite pay-TV broadcasting operator) British Sky Broadcasting (BSkyB) of a 17.9% stake in (the terrestrial broadcaster) ITV, where the public interest ground of the "sufficient plurality" (of persons with control of the media) was at stake.¹³⁷ In this case, while Ofcom

section 119A(4) of the Enterprise Act 2002 provides that the general duties of Ofcom under section 3 of the Communications Act 2003 do not apply when it is exercising its functions under the media merger provisions of the Enterprise Act 2002.

¹³⁴ See the Select Committee on Communications of the House of Lords' s report (of 2008) on *The Ownership of the News* (already mentioned above), paras. 261 and 271.

¹³⁵ See the DCMS Government Response to the Report of the House of Lords Select Committee on Communications on the Ownership of the News (Cm 7486, October 2008) available at <http://www.parliament.uk/documents/upload/Own.pdf>.

¹³⁶ See the Select Committee on Communications of the House of Lords' report on *Media Plurality* (of 21 January 2014 HL 120). This suggestion takes into account the proposal advanced to a similar extent by Ofcom itself in its elaborations on the issue of measuring media plurality (mentioned at fn 130 above).

¹³⁷ For a thorough appraisal of this case and its effects, see R. CRAUFURD SMITH, "Media Ownership and the Public Interest: The Case of Virgin Media, British Sky Broadcasting and ITV Shares", in *Journal of Media Law* [2009] 1, pp. 21-36; as well as C. ARNOTT, "Media Mergers and the Meaning of Sufficient Plurality: A Tale of Two Acts", in *Journal of Media Law* [2010] 1, pp. 245-275 (all relevant related documents being available at <http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/broadcasting-and-cross-media-mergers>). It should be noted that the above-described ownership rules did not affect this case, as the shareholding at stake was below the 20% threshold. Overall, it appears that only two cases to date have raised media-plurality

warned about the threats to the sufficient plurality of media enterprises serving the UK (cross-media) audience for (national) news (in its mandatory report to the Secretary of State after the public intervention notice was issued), the (former) Competition Commission stated that the transaction gave rise to a relevant merger situation under the Enterprise Act 2002 and would be likely to lead to a substantial lessening of competition in the (television broadcasting) market, arising from a loss of rivalry between ITV and BSkyB within that market (by placing the latter in a position that would allow it to exert material influence over the former). However, the Competition Commission also stated that the transaction did not materially impact the plurality consideration (as ITV's internal structural arrangement and strong culture of editorial independence were capable of preventing that from happening), concluding (on the basis of its assessment on competition grounds only) that the merger was expected to go against the public interest. The Competition Commission's recommendation (as regards its proposed remedies) for a partial divestment by BSkyB of its shareholding (to below 7.5%) was supported by the Secretary of State in his/her final decision on the case, who further noted therein that such a remedy was also appropriate to address any adverse effect on media plurality that might be identified, but that was not actually present in that very case, contrary to Ofcom's findings. The different conclusions reached by the relevant institutional actors involved in that procedure on the media-plurality consideration at issue seem to have stemmed from a different understanding of its very scope, the emphasis having been placed

concerns (on that very same ground, according to section 58(2C)(a) of the Enterprise Act 2002) in relation to television broadcasting (with a further and most recent one, of 2012, focusing on local radio broadcasting, and notably on the acquisition by Global Radio of the Guardian Media Group's radio services), justifying the issuing of intervention notices on the part of the Secretary of State and triggering, thus, the public interest test procedure. Besides the case just mentioned, the media public interest test was also used (in 2010) when News Corp, holding several newspapers in the UK, announced its wish to increase its 39% shareholding in BSkyB to acquire its total control (and thus give birth to a powerful media conglomerate operating in that country): in this case, the Secretary of State did not accept Ofcom's advice to refer the matter to the (former) Competition Commission due to the detrimental impact (it could have had) notably on the (plurality and) independence of available news sources (while, in the radio broadcasting merger case, it did follow Ofcom's advice not to proceed further with the media-plurality investigation, due to the lack of threats to it). Instead the Secretary of State (successfully) sought commitments from that media company about measures to preserve such (plurality and) independence (through ad hoc ownership/corporative arrangements concerning Sky News services). However, before the merger was approved, News Corp withdrew its offer (in 2011), in the wake of a major scandal about telephone hacking by one of its UK newspapers, the *News of the World*, which triggered an intense (and long-lasting) public debate (on the need and measures, both substantive and institutional, to regulate the press), culminating in the publication of Lord Justice Leveson's Report, *An Inquiry into the Culture, Practices and the Ethics of the Press* (HC 780, of 29 November 2012, available at <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/>). This (would-be) merger operation, given its (considerable) economic dimension, was also reviewed at EU level (and cleared by the Commission, as mentioned in Part I above), on the basis of (the already cited) Regulation No 139/2004. For further details on these cases, see notably BARENDT *et al.*, cited, pp. 285-288 (all the related relevant documents are available at <https://www.gov.uk/government/publications/statement-on-the-proposed-acquisition-by-news-corporation-of-bskyb>).

either on the external or the internal dimension of plurality. Indeed, in the subsequent judgments of the CAT and the Court of Appeal, the discrepancies in the construction of the “sufficient plurality” consideration manifested in the diverging positions adopted by Ofcom and the Competition Commission, and (also) submitted to judicial scrutiny, were brought to the fore and addressed although leading to different conclusions (the CAT ruling essentially being contrary to the Competition Commission’s findings and the Court of Appeal’s judgment supporting them).¹³⁸ Apart from the useful insights regarding the media plurality consideration emerging from this litigation, which was the first to directly address the matter, it generally highlights the shortcomings of (only) giving the sector-specific regulator a say in media merger cases involving pluralism concerns, but no strong (and binding) value to its findings; the consequence being that the other authorities involved may legitimately come to conflicting conclusions (relying only on effective-competition rationales), with no action actually being suggested or taken despite Ofcom’s findings against the public interest in media pluralism.¹³⁹

Measures governing media ownership, (pure) competition law, as well as specific instruments such as the public interest test, can all significantly underpin the external dimension of pluralism in particular, while also contributing (perhaps somewhat indirectly) to ensuring internal pluralism. What seems most focused on guaranteeing and reinforcing the latter (also) in the UK appears to be the system of public service broadcasting (PSB), due to its very nature and framework. The striking feature of the UK PSB system is its ‘inner plurality’, so to speak: that is to say that, in the UK, the delivery of PSB content is entrusted upon and ensured by different actors, which all have (to varying degrees) to abide by comparable standards and obligations. The latter arise (in part) from different sources, but overall aim to secure the attainment of general “purposes” set out in the public interest, consisting of a wide range of subject-matters to be covered, to meet the needs and satisfy the interests of as many different

¹³⁸ See, respectively, Cases 1095/4/8/08 and 1096/4/4/08, *British Sky Broadcasting Group plc v. (1) Competition Commission (2) The Secretary of State and Virgin Media, Inc v. (1) Competition Commission (2) Secretary of State for Business, Enterprise and Regulatory Reform* [2008] CAT 25; and Case *BSkyB Group v. Competition Commission* [2010] EWCA Civ 2.

¹³⁹ It may appear, hence, that a possible solution to avoid this risk could involve assigning Ofcom the powers to adjudicate on (or, anyway, play a more incisive and decisive role in) media-related matters of public interest ; with the consequence of shifting related discretionary judgments away from the government, while bestowing them upon the independent regulatory body. In other words, as CRAUFURD SMITH & TAMBINI, cited, put it, although there are clear policy issues at play in the running of the public interest test, “decision-making power [in this respect] should be vested in an independent, specialist media body, such as Ofcom, while retaining scope for judicial oversight in the form of judicial review” (p. 62), notably to avoid (in addition to the shortcomings mentioned above) the risk that government (partisan) involvement could call into question the integrity of the whole system (as emerged in the case concerning the proposed transaction between NewsCorp and BSkyB, for which see fn 137 above).

audiences as possible (with properly balanced television services, as regard their nature and object, in order to meet such interests) and provide programming that meets high standards regarding content, quality, and professionalism, as well as editorial integrity in its making.¹⁴⁰ Indeed, both public and (certain, i.e. the traditional terrestrial free-to-air) commercial broadcasters are part of the PSB system, as they all have public service obligations to discharge: these ensure that while each channel maintains its own editorial style and content, together they provide viewers with diverse voices and programmes by competing each against each other and striving for diversity and quality in content provision, as public values.¹⁴¹ Thus, besides the BBC, as (historically) the main UK public service broadcaster, Channel 3 (or ITV), Channel 4 and Channel 5 (the latter being considered commercial public service broadcasters, as they are financed by advertising revenues and not by licence fees, as is essentially the case for the BBC) also receive public support in return for undertaking certain programme commitments.¹⁴² This basically means that the commercial public service broadcasters receive access to transmission resources (and other support, such as due prominence on Electronic Programme Guides, or EPGs) by discharging slightly different sets of obligations covering a wide range of programming, structured around their own specific PSB remits, which, since the Communications Act 2003, have gained clear statutory recognition and foundation.¹⁴³ These remits are very generally framed in their definition, lacking regulatory precision: thus, while offering their addressees a substantial margin of discretion in the fulfilment of the related obligations, their enforcement is difficult to achieve without the risk of intruding into the sphere of their editorial freedom.¹⁴⁴

¹⁴⁰ These are, in essence, the purposes of public service television enshrined in section 264(4) of the Communications Act 2003.

¹⁴¹ As HITCHENS, cited, notes, such a plurality could not, however, have been a planned policy target of PSB structuring, but rather its effect (p. 67 therein).

¹⁴² Channel 3 (or ITV) and Channel 5 are ordinary commercial companies, whilst Channel 4 is a non-profit statutory public corporation working as a publisher-broadcaster, commissioning programmes from independent production companies. As already recalled above, also the teletext service and S4C (the Welsh-language broadcaster) are to be included in the PSB system.

¹⁴³ While section 264(4) of the Communications Act 2003 lists the PSB purposes (as recalled above), section 265 thereof identifies the features of the PSB remit for commercial broadcasters: as is made clear in the explanatory notes to the Communications Act 2003, “a public service remit applies to each licensed public service channel. For Channel 3 services, and Channel 5, the remit is to provide a range of high quality and diverse programming. For Channel 4, the remit specifically includes the need for programming to be innovative, creative and distinctive, for it to take account of cultural diversity and to make a significant contribution to meeting the need for licensed public service channels to include educational programmes. For the public teletext service [...] the remit is to provide a range of high quality and diverse text material. Licences relating to each of these must include a condition requiring that the public service remit be satisfied” (para. 574 therein).

¹⁴⁴ As noted by WALDEN, cited, “while such generalities can be criticized as being effectively meaningless, as well as largely overlapping the programming practices of mainstream commercial broadcasters, more detailed

This being, very broadly speaking, the framework of the consolidated UK PSB system, the role and powers of Ofcom to shape it (also) in order to ensure the delivery of pluralism, appear to be of a certain relevance but somewhat limited. In fact, beyond the already mentioned competence to grant broadcasting licences (for commercial operators) and define their content (as well as enforcing the related conditions, as by section 263 and especially section 270 of the Communications Act 2003), it remains for the regulator to exert a general, albeit significant, review of the functioning of the whole PSB system.¹⁴⁵ Under section 264 of the Communications Act 2003, Ofcom is required to issue a report on the state of public service television broadcasting, no less frequently than once every five years. This report must document the extent to which broadcasters have, together, satisfied the requirements of the PSB remit set out in that section (with particular regard to the indications concerning the manner in which the PSB purposes should be fulfilled, according to sub-section (6) thereof). In essence, Ofcom is required to have regard not only to the actual provision of a balanced diversity of high-quality programming, which meets the needs and interests of different audiences, but also to more detailed obligations relating to culture, news and current affairs, sport, education, entertainment, religion and other beliefs, science, social issues, matters of international significance, programming for children, and local programming.¹⁴⁶ The theme of cultural diversity is clearly envisaged in this list. Indeed, section 264(6)(i) of the Communications Act 2003 specifies that one way of assessing the fulfilment of the PSB purposes as part of Ofcom's reviewing and reporting exercise is to verify "that those services (taken together) include what appears to Ofcom to be a sufficient quantity of programmes that reflect the lives and concerns of different communities and cultural interests and traditions

criteria, laid down in statute or by regulators, could be perceived as state interference in the editorial independence of broadcasters" (p. 30).

¹⁴⁵ As noted by L. WOODS, "Regulation and Extra-Legal Regulation of the Media Sector", in GOLDBERG *et al.*, cited, "the Communications Act 2003 specifies certain conditions governing what is required by public service broadcasters but [that Act] also brought in a change of emphasis in PSB review and enforcement. There are two aspects to this change: the approach to review and the increase emphasis on self-assessment. Ofcom is under a duty to review at regular intervals the provision of PSB, but in doing so it focuses on the public services broadcasting provided by the television services as a whole. This is a more general and environmental assessment than the licensee-by-licensee assessment found in the ITC reports" (p. 358). In analysing the regulatory style that emerges especially from the first of such PSB reviews conducted by Ofcom, T. GIBBONS, "Competition policy and regulatory style: issues for Ofcom", in Info [2007] 5, pp. 42-51, notes that the latter has adopted a utilitarian approach through the use of competition language when discussing normative issues relating to culture and media values that, while inappropriate in itself, also reflects the desire to narrow the scope of its remit.

¹⁴⁶ As further provided for by section 264 of the Communications Act 2003, Ofcom is also required to have regard to the number of programmes within the services which are made outside the so-called M25 area (i.e., the area bound by the London orbital "M25" motorway); in addition, Ofcom must consider the costs to the broadcasters of fulfilling their public service television remit and their available resources.

within the United Kingdom, and locally in different parts of the United Kingdom”. In its guidance on the preparation of statements regarding programme policies – to be published by the licensed providers of public service channels and to form the basis against which their performance as regards the PSB obligations is tested – Ofcom has provided some insights into its understanding of cultural diversity in broadcasting. In a separate paragraph entitled “cultural and other diversity”, it has asked the broadcasters when drafting their statements “to have a separate indication of how programmes will reflect the cultural diversity of the UK. Examples of how this could be demonstrated are: through the level of use of on-screen and off-screen talent; the range of perspectives engaged; the depiction of different communities. However, these representations should be underpinned by a qualitative sense of diversity that demonstrates an approach that goes beyond tokenism. In particular, therefore, broadcasters should point to: where their output reflects the contribution of various ethnic groups to British society, both today and in the past; any innovative or creative ways of achieving that, across various genres; and what commissioning strategies have been instrumental in delivering diversity to the screen. Other issues of diversity should also be given regard, such as age, sexual orientation, disability, etc.”.¹⁴⁷ However, apart from this specific guiding role, and concerning the review of PSB in general, it should also be noted that, while the Secretary of State has the power to amend the public service purposes and remits by issuing appropriate orders pursuant to section 271 of the Communications Act 2003, this can only be done if Ofcom recommends such an order in its report under section 264 thereof, in order to maintain and strengthen the quality of PSB in the future. Therefore, this appears to be more than a formal precondition, and even represent a partial curtailment of governmental discretionary intervention in the field, to the benefit of a stronger policy and regulatory-design role for Ofcom in relation to PSB.

So far, two reviews of PSB have been completed pursuant to section 264 of the Communications Act 2003.¹⁴⁸ In the first one, conducted between the end of 2003 and the

¹⁴⁷ See Ofcom’s *Public Service Television Guidance Notes for Statements of Programme Policy and Self-Assessment Reviews by TV Networks* (of October 2004), available at http://stakeholders.ofcom.org.uk/consultations/psb_selfasses/, pp. 9 and 16 therein. The duty for licensed broadcasters to issue annual statements of programme policy, as well as the issuing of guidance on that by Ofcom, is mandated by section 266 of the Communications Act 2003. Moreover, according to section 267 therein, Ofcom has to be consulted and its views have to be taken into account when a material change to the character of the channel’s programme policy occurs.

¹⁴⁸ For all relevant documents and details, see <http://stakeholders.ofcom.org.uk/broadcasting/reviews-investigations/public-service-broadcasting/>. A third PSB review (in progress) was launched in spring 2014 (and is set to be concluded during the summer of 2015). This builds on the previous ones, but focuses in particular on the funding and distribution of public service content, having regard especially to the commercial channels’ sector in the context of the technological innovations (and the related risks and fragilities, mainly economic)

beginning of 2005 (covering the period from 1998 to 2002), the main finding was that the move towards the fully-digital television environment was posing a threat to the position of analogue terrestrial broadcasters, and that the traditional broadcasting model (along with its institutions, regulations, and funding arrangements) would not survive as such in the digital era. The resulting concerns put forward rested upon the upcoming difficulties for commercial broadcasters in meeting PSB requirements in an increasingly highly competitive digital environment, characterised by a marked reduction in advertising revenues, audience fragmentation across the new media platforms, the loosening of requirements related to regional programming by Channel 3 (or ITV), and the proposed (but not realised) creation of a new Public Service Publisher (PSP) to compete with the BBC and counterbalance the abovementioned trend.¹⁴⁹ As regards this last point, the PSP was almost supposed to resemble a new provider, as well as a commissioning and publishing body, broadcasting public service content and ensuring its provision through multiple digital platforms. This also appeared to be Ofcom's suggested response to the still encountered demand for the continuation of public intervention in broadcasting, in order to ensure the fulfilment of public service purposes in the new digital environment, under the rationale that the related benefits could be under-provided if the market were left alone to develop competitively. This recommendation came together with a call for plans for local television and broadband services to be developed, as well as a new model of governance, accountability and regulation to be introduced, with a clear framework for the governance of the BBC and a consistent cross-sector approach to regulation. More broadly, in this first review, Ofcom also detailed its understanding of the PSB's purposes (in the digital age), so as to measure their effective delivery by the relevant broadcasters. Thus it specified four (main) purposes, spanning from "informing our understanding of the world", "stimulating knowledge and learning", to "reflecting UK cultural identity" and "representing diversity and alternative viewpoints". For the latter two, it indicated that it valued the ability of the content delivered to reflect and strengthen cultural identity through original programming at UK, national and regional level, even bringing

affecting that sector (and the whole delivery of audiovisual content). In this context, Ofcom will (necessarily) also take into account the new tasks assigned to it in performing this review exercise, notably by section 264A of the Communications Act 2003 (as inserted by the Digital Economy Act 2010), providing for it to consider (also) the extent to which, in the period taken into account, material included in "media services" (i.e., not only television and radio broadcast, but also on-demand programme services, and all other services provided by means of the internet where there is a person who exercises editorial control over the material included in the service) has contributed towards the fulfilment of the public service objectives.

¹⁴⁹ For an account of the first (long and detailed) PSB review, through the three phases in which it was conducted, see FEINTUCK & VARNEY, cited, pp. 155-158.

audiences together for shared experiences on occasion, as well as the broadcasters' ability to make viewers aware of different cultures and alternative viewpoints, through programmes that reflect the lives of other people and other communities, both within the UK and elsewhere.¹⁵⁰

In the second review (covering the period from 2003 to 2007), conducted between 2007 and 2009, the focus still rested upon the need to deliver public interest objectives while platforms and services (continued to) converge and the traditional model of PSB was proving to be no longer sustainable. From this review, accompanied by extensive consultations and evidence-based research, the main focus of PSB appears to be on the BBC, with a recommendation being made to keep its role and funding for its programmes and services at the heart of the whole system. Nevertheless, Ofcom also continued to recommend the existence of an alternative public service content provider alongside the BBC, which would otherwise risk (re)gaining an almost monopolistic position by acquiring an increasingly dominant role as a provider of PSB content. In this respect, Channel 4 was recognised as capable of playing a significant role, preferably through resort to partnerships, joint ventures or mergers, on the scale necessary to sustain the effective fulfilment of public purposes across digital media, and with a new remit, governance and accountability. Moreover, Ofcom has called for reinforced investment in, and the wider availability of, high quality original and independent programming, by positioning the Channel 3 and Channel 5 services as commercial networks with more limited public service commitments, in line with the diminishing commercial value of their licenses as new, less costly, delivery channels emerge. Ofcom has also been called upon to act to ensure the availability of high quality news alongside that of the BBC in the nations and English regions, for instance through independently funded news consortia (already mentioned above), as the plurality of news sources appears to be fundamental to (an informed public opinion and hence truly) democratic societies. In addition to the abovementioned main recommendations, the need to supply adequate funding for the provision of a plurality of content genera (other than news), which the developing market risks lacking, has been pointed out to the Government. As regards commercial public service operators, Ofcom has acknowledged that the need has arisen to balance the value of license benefits with the cost of public service obligations, in order to maintain the incentive for the former to retain their licenses and, thus, continue to provide public service contents, instead of surrendering them and migrating to alternative distribution channels where purely commercial

¹⁵⁰ See the Ofcom document *Ofcom Review of Public Service Television Broadcasting: Phase 2 - Meeting the Digital Challenge* (of November 2004), available at <http://stakeholders.ofcom.org.uk/consultations/psb2/>, notably at para. 2.12 thereof.

strategies are followed: in essence, Ofcom has proposed a significant alleviation of their obligations (such as the very detailed regional obligations of Channel 3). Nevertheless, in this second PSB review a thorough appraisal was made of the plurality issue. While this has been depicted as consisting of more than a multiple-channel environment and referring more broadly to the provision of a diversity of voices, ensuring that different perspectives are represented and preventing the dominance of political and social debate by a particular cultural agenda, a strong claim has been made for the need to continue developing plurality-oriented policies even in the new digital multi-platform context, so as to ensure that the values underpinning plurality will always be delivered.¹⁵¹

Overall, the ongoing relevance of PSB content provision, and its related feature of internal pluralism, emerges from the abovementioned reviews. While the focus is increasingly shifting from broadcasters to content with specific characteristics (including, for example, national and regional news, current affairs programmes, the arts, children’s programming, programmes dealing with religion and other beliefs and UK content), as well as to ensuring its provision through the new media environment, nonetheless the concern remains regarding the need for public service content to be available to viewers across the wide range of digital media.¹⁵² The Government, responding to the recommendations arising out from the PSB reviews in its Digital Britain report (mentioned above), endorsed many of them (such as the pilot proposals for local news consortia to provide news in the English regions and devolved nations; although this has recently been abandoned), while, interestingly, it suggested discussing “with Ofcom how it can take best account of the wider delivery of public service content in the future and in particular, whether Ofcom’s statutory obligation to regularly review and report on the extent to which the purposes of PSB on television have been fulfilled, with a view to maintaining and strengthening the quality of public service television broadcasting in the UK, should be amended to allow that review to consider the wider delivery of public service content”.¹⁵³ This offers a picture of how the understanding of PSB is developing alongside and within the digital revolution, and the impact that this is having on the (re)structuring of the PSB system for the near future, so that it can remain plural in its very essence, while

¹⁵¹ During the second PSB reviews, a collection of essays was published under the auspices of Ofcom: see T. GARDAM, D.A.L. LEVY (eds.), *The Price of Plurality: Choice, Diversity and Broadcasting Institutions in the Digital Age*, London, Reuter Institutes for the Study of Journalism, 2008.

¹⁵² It is interesting to note the increasing use of the phrase “public service content” with its own acronym PSC *en lieu de* “public service broadcasting” (PSB), also in statutory provisions (as is the case of the above-mentioned section 264A of the Communications Act 2003).

¹⁵³ See the (already recalled) final Digital Britain Report, p. 137 (which evidently set the basis for the amendment introduced by the already considered section 264A of the Communications Act 2003).

multi-platform and multi-media in its organisation, in order to overcome an alleged short-term crisis and rely on a long-term solution.¹⁵⁴

Besides what has been mentioned so far, a number of measures are capable of addressing internal (or content-related) pluralism objectives, and foresee significant involvement on the part of Ofcom in their shaping and/or enforcement. Such measures span from those ensuring that certain types of content are made available to viewers – either through the imposition of content-carrying obligations or through the setting of rules governing access to that content – to those aimed at ensuring that certain views and opinions are given proper but balanced access to media outlets.

The so-called “must-carry” provisions fall within the first set of measures. These rules requiring the carriage of specific (mainly, public service) content in order to secure its distribution through different platforms, while facilitating its wider accessibility to viewers, and having their statutory foundation in section 64 of the Communications Act 2003 (transposing relevant EU legislation on the matter), are to be implemented by Ofcom through the so-called General Conditions of Entitlement, applicable in principle to all networks providers. It is for Ofcom to decide when an electronic communications network used by a significant number of end-users as their principal means of receiving TV programmes should be subject to these requirements and thus transmit the content (or services) at stake.¹⁵⁵ Ofcom has rooted the must-carry requirements in the public interest, admitting that one of the general interest objectives that justifies the imposition of such obligations is “the diversity of

¹⁵⁴ On this, see in particular the House of Lords Select Committee on Communication’s Report on *Public Service Broadcasting: Short-Term Crisis, Long-Term Future?* (of 8 April 2009, HL61). It is interesting to recall that, already in the recalled 2000 Communications White Paper it was pointed out that “the end of spectrum scarcity does not mean [...] that broadcasting will automatically become a perfectly functioning market” (para. 5.3.5 thereof) and that “the democratic importance of public service broadcasting is as great as the economic justification” since “public service broadcasting ensures that the interests of all viewers are taken into account” and “it is a counter-balance to fears about concentration of ownership and the absence of diversity of views” (paras. 5.3.9 and 5.3.10 thereof); and lastly that, also in the new digital environment, “the goals of and reasons for public service broadcasting remain the same, but the challenges [...] are new” (para. 5.4.1 thereof).

¹⁵⁵ The General Conditions of Entitlement are a component of the general authorisation regime for network providers, replacing the license regime, as provided for following the implementation (still in the Communications Act 2003) of the 2002 EU framework for electronic communications: they are the conditions applicable to all providers, alongside the specific ones applicable only individually. Their most recent drafting is available at <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/general-conditions/>: as for must-carry obligations, the relevant general condition is the one set in para. 7 therein, stating that a network provider must comply with the must-carry rules if so directed to (also by the Secretary of State). The must-carry channels have been (statutorily) identified in the list contained in section 64(3) of the Communications Act 2003 so as to encompass all public service ones (in their digital forms). This list can be reviewed and, if necessary, amended accordingly by an order from the Secretary of State as under section 64(7) thereof, following compulsory consultation with Ofcom; it is nevertheless up to the Secretary of State to issue orders concerning making transmission capacity available for the distribution of must-carry channels and to set the conditions under which these services are carried (even if to date no such order appears to have been served).

programming for citizen-consumers within the United Kingdom”, and acknowledging that “to ensure diversity there needs to be a sufficient plurality of providers of television content”.¹⁵⁶ Nevertheless, as noted previously (and still valid), “to date, Ofcom has not imposed the ‘must-carry’ condition upon any provider, primarily because the nature of such public service channels makes them highly desirable for any platform provider and therefore the policy concern has not materialised”.¹⁵⁷ It should also be pointed out that as a counter-balance to the recognition of must-carry status, Ofcom also has the power to impose conditions upon public service broadcasters to ensure that their services are made available for broadcasting or distribution over certain platforms (i.e., “must-offer”, or “must-provide” obligations).¹⁵⁸ Content requirements (or programming quotas), which ensure (inter alia) the broadcast of programming that could be under-provided by the market alone, while at the same time strengthening the pluralism of the content itself, could still be located within the first group of measures. These provisions belong to the aforementioned second-tier requirements of Ofcom’s regulatory approach. This implies that it is up to the regulator to set the detailed quota provisions relating to regional, independent or original programming and the like (mainly within broadcast licences).¹⁵⁹ These measures, therefore apply to commercial broadcasters. For the BBC, the quotas are negotiated in agreement with Ofcom.¹⁶⁰ All these provisions appear to be extremely detailed, as they aim to set not just the proportion of certain

¹⁵⁶ See the 2005 consultation on Ofcom’s *Provision of Managed Transmission Services to Public Service Broadcasters* (available at http://stakeholders.ofcom.org.uk/consultations/bcast_trans_serv/), para. 2.1.

¹⁵⁷ See WALDEN, cited, p. 49.

¹⁵⁸ See, notably, sections 272-273 of the Communications Act 2003. Ofcom made use of this type of measure in 2010, imposing upon BskyB (wholesale) must-offer obligations through the insertion of ad-hoc conditions in the relevant licences in relation to (two of) its sporting channels: see the Ofcom’s *2010 Pay-TV Statement* (available at http://stakeholders.ofcom.org.uk/consultations/third_paytv/statement/), which is, however, currently under review (see <http://stakeholders.ofcom.org.uk/consultations/wholesale-must-offer/>).

¹⁵⁹ According to sections 277 and 278 of the Communications Act 2003, Ofcom is to include conditions in the licences of all licensed public service channels in order to ensure that at least 25% (or whatever other figure is substituted by the Secretary of State by order) of the time allocated to the broadcasting of “qualifying programmes” on that channel is allocated to the broadcasting of a range and diversity of independent productions; as well as in the same way to secure that an appropriate amount of airtime is allocated to original productions, and that the time allocated is divided as may be appropriate between peak viewing times and other times. Moreover, according to section 309 thereof, Ofcom is to include conditions in every licence for a digital television programme service that is not comprised in a licensed public service channel conditions to ensure that at least 10% of the time allocated to the broadcasting of qualifying programmes in the service is allocated to the broadcasting of a range and diversity of independent productions. The Secretary of State may, by order, and having consulted Ofcom, vary this percentage and determine what are to be considered “qualifying programmes” and “independent productions”. For regional productions and programme quotas, see sections 286-288 of the Communications Act 2003.

¹⁶⁰ See I. KATSIREA, “Cultural Diversity in Broadcasting”, in GOLDBERG *et al.*, cited, pp. 463-499, notably at p. 496.

content to be supplied, but also the time-frames within which it should be broadcasted. Most of all, such measures derive from the implementation of the EU content requirement rules, compliance with which still has to be monitored by Ofcom.¹⁶¹

A further (and final) type of measure that may still be included in the first group are those on listed events (also rooted in EU legislation), which imply that specific content of major interest and relevance to the general public is to be made widely available: to that end, a (complex statutory) scheme has been set in place, which restricts the possibility of acquiring exclusive rights for the (live) coverage/broadcasting of the listed events, unless Ofcom (operating as a sort of gatekeeper) gives its consent, according to the regulatory standards it has established (in an ad hoc “code”).¹⁶²

As for the second set of measures mentioned above, reference can be made essentially to those aimed in particular at sustaining and protecting the representation of political pluralism. Among these measures, the impartiality, accuracy and fairness requirements (notably in relation to news reporting) could be seen as contributing, in general, to setting the preconditions for the provision of a balanced representation of different political viewpoints and opinions.¹⁶³ Specific and detailed (minimum-requirement) rules have been designed (again in the form of a “code”) by Ofcom itself to ensure, in particular, on top of the general rules (mainly contained in the Broadcasting Code) that Party Political Broadcasts (PPBs),

¹⁶¹ See, in this respect, the Ofcom document on *European Production Quotas: Guidance on the Television Without Frontiers Directive* (of February 2005), available at http://stakeholders.ofcom.org.uk/consultations/e_p_q/.

¹⁶² The relevant rules are contained in sections 97-105 of the Broadcasting Act 1996; see also sections 229-302 of the Communications Act 2003. In a nutshell, according to the relevant statutory provisions, two categories of television broadcasters are identified, the first consisting of the free-to-air ones that are accessible by 95% of the UK population (i.e., the major PSB broadcasters), while the other category encompasses all the other (remaining) broadcasters. As already (partially) described above, the listed events are placed by the Secretary of State (and not by Ofcom) into two groups, i.e. “Group A” (for the more relevant ones) and “Group B”: as GIBBONS, cited, puts it, the scheme works so that, “unless Ofcom consents, a broadcaster in one category may only show exclusively live coverage of the whole or any part of a Group A event if a broadcaster in the other category has also acquired the right to show live coverage”; and that “Ofcom will give its consent to a broadcaster in one category having exclusive live coverage of a Group B event if adequate provision is made for a broadcaster in the other category to provide adequate [i.e., amounting to at least 10% of the scheduled duration of the event and if it is not excessively delayed] secondary coverage, that is, edited highlights or delayed coverage” (pp. 134-135). It is interesting to note that the listed events (in both groups), while potentially belonging to any genre, so far include only sporting events.

¹⁶³ In particular, “due accuracy” and “due impartiality” (notably in relation to matters of political or industrial controversy, or to current public policy) are essential requirements (already mentioned above) set forth by Ofcom in the Code, as statutorily prescribed, which show the necessary flexibility (but also inner difficulties) to be adopted in their application (and enforcement by the regulator itself) in the various cases. The BBC has its own (stricter) standards on the matter, set down in its Agreement. For a critical appraisal of the impartiality and accuracy requirements (for news and current affairs) in the new (technologically) convergent media scenario, see the House of Lords’ Select Committee on Communications Report on *Media Convergence* (of 27 March 2013, HL 154), notably at paras. 114-120, proposing, in essence, the relaxation of those requirements as regards especially non-PSB broadcasters.

including Party Election Broadcasts (PEBs) and Referendum Campaign Broadcasts (RCBs) are included among the programmes offered by licensed PSB operators.¹⁶⁴ Overall, all these multifarious roles and activities, conducted on the basis of the relevant provisions and powers assigned to the regulator, make Ofcom an indispensable guardian and promoter of media plurality (or rather, pluralism) in all its dimensions.

¹⁶⁴ See the already mentioned *Ofcom Rules on Party Political and Referendum Broadcasts* (whose latest available version is of March 2013, resulting from a review that approached some debated issues, notably regarding the representation of independent politicians and local politics, on which see G. COOPER, “United Kingdom: Ofcom Rules on British Election Coverage”, IRIS 2013-6:1/23, available at <http://merlin.obs.coe.int/iris/2013/6/article23.en.html>). These Rules were adopted on the basis of the statutory provisions contained in section 333 of the Communications Act 2003, notably concerning the length, frequency, allocation and/or scheduling of PEBs and RCBs (essentially based on a system that reflects the measure of the support parties have attained in previous elections). Again, the BBC has its own (similar) rules set out in its Agreement. For a thorough description of how that (complex) system works, see BARENDT *et al.*, cited, pp. 168-182. It could be added here that (television and radio) political advertising is not allowed in the UK (under sections 319 and 321 of the Communications Act 2003).

Chapter III

Italy and the Autorità per le Garanzie nelle Comunicazioni (AGCom)

3.1 Prior to the establishment of AGCom: some remarks on the political and legal debate and context

In Italy, the debate about setting up an independent authority to regulate the media began in the early '80s. Indeed, the first traces of an autonomous body acting in this sector can be seen in the *Garante per l'attuazione della legge [sull'editoria]* (the Guarantor for the implementation of the law [on publishing]; hereinafter, the *Garante*), established by Law No 416 of 5 August 1981.¹ Within the framework of the profound and systemic reform of the daily and periodical press sector taking place at that time, the legislator envisaged the need to guarantee the effectiveness of the major innovations brought about by that reform. One of these innovations was the introduction of antitrust caps in relation to the ownership of newspapers, essentially to strengthen the pluralism of information in daily publishing. Indeed, the *Garante* was established especially to ensure the effective implementation of and compliance with the law on antitrust thresholds for newspaper ownership. It was set up as a single-person body (although with an office at its disposal), autonomous from Parliament (and Government), but working in close cooperation with it. Indeed, the *Garante* had the duty to report to Parliament every six months (as well as to the competent parliamentary committees, upon request) on the state of the publishing sector.² Moreover, the appointment of this figure was to be the result of an agreement between the President of the *Senato della Repubblica* and the President of the *Camera dei Deputati*, i.e. the heads of the two Chambers of Parliament. The law provided for high-profile figures (namely, former members of the Constitutional Court, or other acting or former magistrates from the highest national courts) to be eligible for the five-year post of *Garante*. Both the appointment procedure and the qualifications of the

¹ This was the Law concerning the “disciplina delle imprese editrici e provvidenze per l’editoria”, published in GURI No 215, of 6 August 1981 (henceforth, Law No 416/81): on the institution of the *Garante*, see, notably, Articles 8 and 9 therein.

² Article 8 of Law No 416/81 stated, at its very outset, that the “organo di garanzia” (the *Garante*) was established “al fine di consentire la continuità dell’azione di vigilanza del Parlamento sull’attuazione della presente legge”.

person appointed (as well as the incompatibilities provided for) seemed to work as guarantees of the body's autonomy.

In reality, the autonomy of the *Garante* remained very much confined to the institutional plane and did not cover its powers. At the very outset, these powers were rather limited. They mainly amounted to indirect information-gathering from governmental branches, in order to report to Parliament. In the event of ascertained breaches of the antitrust caps, the *Garante* had the obligation to resort to the judiciary for the annulment of the acts determining those breaches. Later on, the powers of the *Garante* were slightly stretched, allowing it to intervene directly in certain cases of antitrust violations and request interim measures from the judiciary, as well as to act autonomously in collecting relevant information for the performance of its tasks, although without having inspective functions.³ Overall, it was still the Government that possessed significant competences (e.g., financing) and supervisory functions (e.g., the maintenance of the National Register of the Press, *Registro nazionale della stampa*, to keep track of the ownership structures and accounts of publishers for transparency purposes), notably through the publishing Division (*Servizio dell'editoria*) of the former Directorate General for Information, Publishing and Intellectual Property (*Direzione generale dell'informazioni, dell'editoria e della proprietà letteraria, artistica e scientifica*, nowadays the *Dipartimento per l'informazione e l'editoria*), under the Presidency of the Council of Ministers. Notwithstanding its weaknesses, the establishment of the *Garante* represented *per se* quite a significant novelty in the Italian administrative institutional framework. This novelty lay in the creation of an institutionally autonomous body entrusted with supervisory functions for the implementation of the law and the pursuit of the objectives it set.⁴

The same pattern of governance was also followed in the broadcasting sector, where the first systemic legislative reform took place in the early '90s. This reform was mainly due to the needs to accommodate emerging technological developments and codify legal ones, as encouraged by the Constitutional Court, which repeatedly called upon the legislator to deal

³ These changes were brought about by Law No 67, of 25 February 1987 (GURI No 56, of 9 March 1987).

⁴ See notably P. CARETTI, *Diritto dell'informazione e della comunicazione*, Bologna, Il Mulino, 2013, p. 91. See, also, however, M. MANETTI, *Le autorità indipendenti*, Bari, Laterza, 2007, where it is noted that “a differenza dei suoi successori, il Garante [...] non era concepito come un'autorità amministrativa indipendente, ma come un ufficio ausiliario del Parlamento” (p. 106); and, on the political significance of its establishment, where it is observed that “esso consisteva nel sottrarre alla discrezionalità del Governo le sorti di una legge ritenuta particolarmente importante per il pluralismo, affidandole ad un organismo concepito come *longa manus* del Parlamento” (p. 131).

with and resolve issues arising in the evolving scenario. In a nutshell:⁵ following the adoption of the first significant framework legislation (i.e., Law No 103 of 14 April 1975)⁶, private broadcasters began operating first at the local and then at national level, thus eroding the State monopoly existing at both levels since the very inception of broadcasting activities. However, as regards the national plane, the advent of a mixed broadcasting system, characterised by the co-existence of a public operator (represented by the public corporation RAI, holding three channels) and private broadcasters (essentially Canale5, Italia1 and Rete4, all held by the Fininvest group), was a *de facto* result of the expanding activities of the latter at (and beyond) the edges of the law, which (still) did not in any way provide for the complete liberalisation of broadcasting. In filling the gap left by the legislator, with the Government proposing only temporary measures (such as Decree-Laws) to react to the *de facto* changes and legalise them *ex post*, it was the Constitutional Court that first gave the ‘green light’ to the liberalisation of local broadcasting markets in 1976 and subsequently laid the foundations for the opening-up of the national broadcasting market to private operators.⁷ In 1981 and, more incisively, in 1988, the Constitutional Court allowed the fall of the State broadcasting monopoly (since then upheld judicially), but only under the condition of the enactment of a comprehensive set of legislative measures to shelter the broadcasting system from the dangers of the rise of private oligopolies and guarantee within it the safeguard of the fundamental principle of pluralism.⁸ Thus, under the ‘pressure’ of these constitutional rulings, Parliament adopted Law No 223, of 6 August 1990 (the so-called “legge Mammi”, from the name of the Minister of Posts and Telecommunications), establishing not only common principles applicable to public and private broadcasters, as well as more specific measures on licensing, advertising activities and programme obligations, but also antitrust rules on broadcasting (and cross-media) ownership.⁹ Moreover, in this evolving landscape, Law No 223/90 also provided for the replacement of

⁵ For a thorough ‘legal history’ of broadcasting in Italy from 1960 onwards, see A. PACE, M. MANETTI, *La libertà di manifestazione del proprio pensiero*, Bologna, Zanichelli, 2006, notably at pp. 575-624; and E.M. BARENDT, *Broadcasting law: a comparative study*, Oxford, OUP, 1993, notably at pp. 24-28. For a detailed overview of the social and political background, see F. DEBENEDETTI, A. PILATI, *La guerra dei trent’anni - Politica e televisione in Italia (1975-2008)*, Torino, Einaudi, 2009. For an up-to-date and thorough analysis of the existing legal framework, see R. MASTROIANNI, A. ARENA, *Media Law in Italy*, Alphen aan den Rijn, Kluwer Law International, 2014.

⁶ Law No 103/1975 set the “nuove norme in materia di diffusione radiofonica e televisiva”, and was published in GURI No 102, of 17 April 1975.

⁷ See ruling 202/1976 of the Constitutional Court.

⁸ See rulings 148/1981 and 826/1988 of the Constitutional Court.

⁹ Law No 223/1990 dealt with the “disciplina del sistema radiotelevisivo pubblico e privato”, and was published in GURI No 185, of 9 August 1990.

the existing *Garante* with the new *Garante per la radiodiffusione e l'editoria* (Guarantor for broadcasting and publishing; hereinafter, the new *Garante*).¹⁰

Against this background, although the new *Garante* was essentially intended to perform the (limited) tasks and duties of its predecessor, the scope of its activity was extended. Like the old *Garante*, the new one was still structured as a single-person body, whose appointment followed almost the same pattern provided for the former.¹¹ However, as a consequence of the adoption of Law No 223/90 more responsibilities and powers were shifted from the Government to the (new) *Garante*. The latter was made responsible for keeping the National Register of the Press, and entrusted with the related powers to conduct investigations and inspections to verify the correctness of the data to be inserted in the Register (including the supervision of balance sheets and other relevant documentation). Moreover, as was apparent from its new full title, the (new) *Garante* was also vested with (some) competences in relation to both public and private broadcasting. Essentially, these amounted to the exercise of certain regulatory powers on very specific issues, the maintenance of a similar but new Register for broadcasters (provided for by Article 12 of Law No 223/90), and the patrolling of the new antitrust thresholds, set also for cross-media ownership.¹² Moreover, Law No 223/90 bestowed upon the (new) *Garante* autonomous (administrative) sanctioning powers, to be exercised in cases of ascertained breaches of statutory provisions, including the antitrust ones.¹³ However, the important function of licensing was not conferred to the (new) *Garante*, remaining in the hands of the competent Ministry.¹⁴

¹⁰ See Article 6 of Law No 223/90. In general, see CARETTI, cited, especially at p. 93.

¹¹ According to Article 6(2) of Law No 223/90, the new *Garante* was appointed by Decree of the President of the Republic, while it was still selected by the Presidents of the two Chambers of Parliament, advancing their proposal in that respect in agreement among themselves. Originally, as stated by para. 3 therein, the new *Garante* was set to be appointed for a three-year mandate (renewable once): however, this was amended by Law No 483, of 17 December 1992 (GURI No 297, of 18 December 1992), which provided for a five-year non-renewable mandate. Furthermore, to highlight the differences with the system previously in place, the person to be appointed as *Garante* could have been not only a magistrate, but also a university professor or an expert in the field: nevertheless, the incompatibilities provided for the former *Garante* still applied. Finally, according to para. 13 therein, the new *Garante* had to report annually to Parliament.

¹² As for the antitrust caps, see Article 15 of Law No 223/90; on the regulatory powers, see Article 8(4) thereof, notably establishing, in the implementation of the TWF Directive, the power of the *Garante* (acting together with a commission of experts appointed by itself) to determine the works of high artistic value, as well as the broadcasts of an educational and religious nature, that cannot be interrupted by advertising; see also Article 28 of Law No 223/90, concerning the power of the *Garante* to issue regulations on the appointment and functioning of the *Consiglio degli utenti* (for which see below). Moreover, the *Garante* had to exercise its supervisory role also in relation to the collection and publication of data on broadcasting audience shares, as stated in Article 6(10)(5) of Law No 223/90.

¹³ See Article 31 of Law No 223/90. However, while in case of a breach of advertising limits or of the duty to broadcast European works it was for the *Garante* to issue the related sanction, as far as antitrust violations are concerned, the role of the *Garante* was limited to giving a time-limit to the party concerned to end the violation,

To sum up the main features of the two aforementioned autonomous administrative bodies, it could be pointed out that, while the old *Garante* had essentially supervisory powers, limited to the publishing sector, the new one also enjoyed some administrative regulatory and sanctioning powers (alongside the competent Minister), extending to the broadcasting sector. Therefore, the new *Garante* acquired some functions of governance, especially in relation to this latter domain.¹⁵

Overall, the creation of autonomous bodies to perform supervisory and governance functions in the media sector was mainly determined by a will to ensure the protection and fulfilment of fundamental constitutional guarantees, such as the freedom of expression (and the related objective of information pluralism) and freedom of economic initiative, as well as the exercise of balancing them, free from direct political and economic influences.

This institutional choice was upheld and strengthened by the second systemic legislative reform on broadcasting, brought about by Law No 249, of 31 July 1997 (the so-called “legge Maccanico”, from the name of the Minister of Communications).¹⁶ This Law took into account the observations made in 1994 by the Constitutional Court, especially regarding the aforementioned antitrust regime set forth by Law No 223/90.¹⁷ Indeed, the new legislative measures decreased the pre-existing antitrust thresholds for broadcasting ownership, to 20% of the national channels available instead of the previous 25%, i.e. two instead of three channels, while still admitting temporary derogations to their full entry into force. With the adoption of Law No 249/97, the legislator also took the opportunity to develop the institutional model of an independent authority for supervising and governing the

as the power to revoke the permission to broadcast was in the hands of the Minister of Posts and Telecommunications, acting nevertheless upon a proposal from the *Garante*.

¹⁴ See Article 16(19) of Law No 223/90.

¹⁵ For a detailed comparison, see P. VIPIANA, “Il Garante dell’attuazione della legge per l’editoria ed il Garante per la radiodiffusione e l’editoria: due figure istituzionali a confronto”, in *Il Diritto dell’Informazione e dell’Informatica* [1991] 1, pp. 235-245. For a critical appraisal of the (new) *Garante*’s work against the background of the legislative provisions conferring competences and powers to it, as well as regarding its implications in relation to the (exercise of) the functions attributed to the (already established) antitrust authority (for which, see below), see A. TIZZANO, “Il garante televisivo e il diritto antitrust”, in *Il Foro Padano* [1997] 1, pp. 15-37.

¹⁶ Law No 249/97 on the “istituzione dell’Autorità per le Garanzie nelle Comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo”, published in GURI No 177, of 31 July 1997. For an accurate general picture of that legislative act and a detailed description of AGCom, see: C. CALABRÒ, R. VIOLA, L. ARIA, “L’Autorità per le garanzie nelle comunicazioni”, in G.P. CIRILLO, R. CHIEPPA (eds.), *Le autorità amministrative indipendenti*, Padova, CEDAM, 2010, pp. 473-550; M. CUNIBERTI, *Autorità indipendenti e libertà costituzionali*, Milano, Giuffrè Editore, 2007, especially at pp. 295-402; E. CHELI, G. D’AMATO, “L’Autorità per le garanzie nelle comunicazioni”, in *Enciclopedia del diritto (Aggiornamento IV)*, Milano, Giuffrè Editore, pp. 99-130.

¹⁷ See ruling 420/1994 of the Constitutional Court.

communications sector, by setting up the *Autorità per le Garanzie nelle Comunicazioni* (AGCom).

3.2 The setting-up of AGCom

AGCom was established as an independent body for the supervision and regulation of the whole communications sector. It replaced the (new) *Garante* and inherited its role and mission, but significantly expanded them to cover new domains. Indeed, while maintaining the (limited) competences of its predecessor in the publishing sector, AGCom acquired some new ones, not only in broadcasting, but also in telecommunications. For this reason it is known as the guarantee (and regulatory) authority for communications.

It could be argued that, in addition to responding to the need to address the issues referred to by the Constitutional Court in its aforementioned ruling of 1994, the setting-up of AGCom responded to two other main calls. These were, on the one hand, the need to comply with European legislation and the principles embodied therein, and, on the other hand, the necessity to offer an institutionally adequate response to technological evolutions.¹⁸

On the institutional plane, the establishment of AGCom is clearly rooted in the implementation of the various Directives on telecommunications issued in the '90s, which steered the process of liberalisation in this field. Already in the various 'first-round' EU (or rather, EC) law measures on the matter, reference was made to the existence of independent national regulatory and supervising authorities to govern the liberalisation process, and especially to implement the related Directives and exercise the powers and tasks identified therein.¹⁹ Nothing of this kind seemed to exist in Italy prior to the establishment of AGCom. Very preliminary attempts had been made to establish by statute an independent body to regulate only telecommunications, in line with EU principles, but that body never saw the

¹⁸ As observed by its first President, E. CHELI, "Poteri e limiti dell'Autorità garante delle comunicazioni", in L. CARLASSARE (ed.), *Il pluralismo radiotelevisivo tra pubblico e privato*, Padova, CEDAM, 2007, pp. 29-35, AGCom "nasce dalla confluenza, un po' casuale, tra due percorsi che il legislatore si trova a dover affrontare [...]: un primo percorso legato alla sfera comunitaria, che investiva il recepimento e l'attuazione delle direttive emanate tra la fine degli anni '80 e la metà degli anni '90 ai fini della completa liberalizzazione del settore delle telecomunicazioni; un secondo percorso, che investiva, invece, la sfera nazionale e che riguardava l'esigenza di dare attuazione ad una pronuncia della Corte costituzionale, cioè a quella [sentenza] n. 420 del 1994, che aveva dichiarato l'illegittimità del tetto del 25% delle risorse frequenziali disponibili da parte di uno stesso soggetto per le reti radiotelevisive nazionali, ma che aveva poi, anche rimesso al legislatore il compito di trovare il nuovo tetto" (p. 29).

¹⁹ For the details, see the final part of the first Chapter of Part III, below.

light as such.²⁰ It is interesting to note, however, that even this first legislative reference to a telecommunications authority contained a provision allowing for revisions to the structure of the authority itself, in order to adapt it to the evolving technological scenario.²¹

As far as technology is concerned, the setting-up of AGCom as a single body to govern both broadcasting and telecommunications represented a direct response, in institutional terms, to the pressures of technological convergence in the field of communications.²² Indeed, AGCom is an institutionally and functionally convergent body. This means – as will be shown in greater detail below – that AGCom, while maintaining a general supervisory function, is structurally designed to overcome the diminishing separation among the various media and their related markets, while reflecting the emerging distinction between the regulation of networks and related services on the one hand, and the regulation of content provision and distribution on the other. At least from a formal standpoint, this distinction is mirrored in Law No 249/97. However, the overall legal framework as such did not fully adapt itself to the effects of this incipient technological convergence, which remained confined to the institutional design of the Authority, whose establishment anticipated (and was perhaps even intended to foster) the transition towards a set of legislative measures re-shaped in the name of convergence.²³ Curiously, within Law No 249/97 there is no mention of the term

²⁰ See Law No 481, of 14 November 1995, on “Norme per la concorrenza e la regolazione dei servizi di pubblica utilità. Istituzione delle Autorità di regolazione dei servizi di pubblica utilità” (GURI No 270, of 18 November 1995). Law No 481/95 marked a significant step on the path towards the setting-up of national regulatory authorities. It provided some general principles regarding the authorities to be established, and actually established the one for energy and gas. On the setting-up of the would-be ad hoc authority for telecommunications, see Article 2 thereof. As noted by F. BRUNO, G. NAVA, *Il nuovo ordinamento delle comunicazioni: radiotelevisione, comunicazioni elettroniche, editoria*, Milano, Giuffrè Editore, 2006, Law No 481/95 had the twofold purpose of initiating privatisation of the public energy and telecommunications companies and transforming the role of the State from owner and administrator to regulator and market arbiter (“da padrone e gestore a regolatore ed arbitro dei mercati”; see p. 121 therein). The Authors observe, moreover, that “in questo contesto, l’istituzione formale dell’Autorità per le telecomunicazioni costituisce [...] una mera indicazione di tendenza. [...] [N]on v’è, nel testo della legge, né un passo concreto nella direzione dell’istituzione effettiva dell’Autorità, né una reale articolazione di soluzioni ed indirizzi nella direzione dell’integrazione dei mercati della comunicazione e della convergenza multimediale” (pp. 121-122). It remains unclear, however, why the establishment of the ad hoc authority for telecommunications was not actually provided for: in this respect, one could probably speculate on the importance of the technological argument. Finally, it should be noted that Article 2(4) of Law No 481/95 expressly attributes to further autonomous legislative interventions the setting of rules and the organisation of the sector-specific authorities (particularly, therefore, the one for telecommunications), in compliance with the general principles established therein, some of which are expressly referred to by Law No 249/97.

²¹ Article 2(1) of Law No 481/95 stated that “tenuto conto del quadro complessivo del sistema delle comunicazioni, all’Autorità per le telecomunicazioni potranno essere attribuite competenze su altri aspetti di tale sistema”.

²² See R. ZACCARIA, *Diritto dell’informazione e della comunicazione*, Padova, CEDAM, 2010, notably at pp. 186-189.

²³ On the perspectives of a “diritto della convergenza”, see G. MORBIDELLI, F. DONATI (eds.), *Comunicazioni: verso il diritto della convergenza?*, Torino, Giappichelli, 2003.

‘convergence’ as such, even in relation to the Authority established. Nevertheless, one of the key features of AGCom – repeatedly highlighted by AGCom itself, as well as by many commentators – is indisputably its intrinsically convergent mission and structure, resulting, above all, from its institutional design as conceived by Law No 249/97.²⁴

As for its mission, the legislator chose to attribute to AGCom significant regulatory and supervisory functions in the telecommunications and audiovisual sectors (as will be seen in more detail below). This choice had already been endorsed by Law No 249/97, and was strengthened by Legislative Decree No 259 of 1 August 2003 (implementing the 2002 EU regulatory framework on electronic communications), as well as by Legislative Decree No 177 of 31 July 2005, which represented the third (and last) systemic legislative intervention in the field of broadcasting.²⁵

Moreover, the institutional structure constructed in the name of technological convergence also seems to have been chosen to favour the duration of the body established in the long term. Thus, from its very beginning AGCom was adapted to the need to effectively govern the developing telecommunications and broadcasting markets, which were in transition from the traditional technological environment to a new one characterized by multimedia convergence, as mentioned above.

All these attributions rendered AGCom almost a prototype convergent authority, being the first of the kind to be established in Europe, thanks to the forward-looking stance of the Italian legislator. Indeed, it must be acknowledged that, at the time of its establishment, the phenomenon of multimedia convergence was not at all tangible, but appeared as an undefined

²⁴ It is interesting to note that also in the report accompanying its draft text (n. 1021, presented before the *Senato della Repubblica* during the XIII legislature) no reference is made to ‘convergence’, while the argument that is used to justify the establishment of a single body for telecommunications and broadcasting clearly hints at it: indeed, it is explained that with Law No 249/97, “si istituisce un organismo indipendente unico in considerazione dell’esigenza di disciplinare congiuntamente il settore delle telecomunicazioni e quello radiotelevisivo i quali, originariamente separati, possono ormai essere ricompresi nel più ampio sistema delle comunicazioni” (p. 3 thereof).

²⁵ These Legislative Decrees are known, respectively, as the “Codice delle comunicazioni elettroniche” (GURI No 14, of 15 September 2003) and the “Testo unico dei servizi di media audiovisivi e radiofonici” (GURI No 208, of 7 September 2005). The latter stems from the Enabling Law No 112, of 3 May 2004, on “Norme di principio in materia di assetto del sistema radiotelevisivo e della RAI-Radiotelevisione Italiana Spa, nonché delega al Governo per l’emanazione del testo unico della radiotelevisione” (GURI No 104, of 5 May 2004). Moreover, its title is the result of the changes brought about by the adoption of the national measures implementing the AVMS Directive (as it derives from Article 1(1) of Legislative Decree No 44, of 15 March 2010, on “Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l’esercizio delle attività televisive”, GURI No 73, of 29 March 2010). Any further reference to Legislative Decree No 177/05 is to its text as amended by Legislative Decree No 44/2010 (unless otherwise indicated).

and prospective development.²⁶ Confronted with the evolving technological scenario, the legislator chose to use the law to set general guiding principles, while leaving the established convergent Authority ample room for manoeuvre and flexibility, in order to render it more capable of effectively accompanying and orienting the developments in what immediately appeared to be an increasingly integrated communications system.²⁷

For these reasons, the distinctive features characterising the structure, as well as the role and mission of AGCom, are established at the very outset of Law No 249/97. These key features are its full operational autonomy, as well as its independence in decision-making and assessment.²⁸ Acting as the very guiding principles of AGCom's activity, they underpin the construction of a body designed by statute to achieve the sound protection of constitutional rights and values by governing the related sector without interference from either political influence or from market operators' interests.²⁹

Nevertheless, it would be interesting to examine the extent to which these principles have been rendered operative through the normative framework regulating the establishment and

²⁶ See CHELL, cited, p. 30: the Author also mentions that AGCom is shaped in way that recalls equivalent transatlantic models, such as the American Federal Communication Commission (FCC) or the Canadian Authority for communications.

²⁷ See CARETTI, cited, pp. 223-224.

²⁸ See Article 1(1) of Law No 249/97, where it is stated that AGCom “opera in piena autonomia e con indipendenza di giudizio e di valutazione”. See, specifically, also judgement 7/2014 of the Constitutional Court; as well as, more broadly, Article 97 of the Italian Constitution, providing for “l'imparzialità dell'amministrazione”. On the (formal/institutional as well as, mostly) actual independence and autonomy of AGCom, see E. PSYCHOGIOPOULOU, F. CASAROSA, A. KANDYLA, “The independence of media regulatory authorities and the impact of the socio-political context: A comparative analysis of Greece and Italy”, in W. SCHULZ, P. VALCKE, K. IRION (eds.), *The Independence of the Media and its Regulatory Agencies*, Bristol, Intellect, 2013, pp. 213-248 (especially, pp. 231-235).

²⁹ See S. SICA, V. ZENO-ZENCOVICH, *Manuale di diritto dell'informazione e della comunicazione*, Padova, CEDAM, 2012, recognising that “indipendenza e autonomia sono gli elementi costitutivi che caratterizzano l'attività e le deliberazioni dell'Autorità. Attraverso l'analisi dei suddetti elementi costitutivi è da ritenersi corretto l'orientamento di parte della dottrina che individua la natura giuridica dell'Autorità quale «organismo amministrativo caratterizzato dal fatto di essere sottratto all'indirizzo politico - amministrativo del Governo»” (p. 160). See also CARETTI, cited, who asserts that “l'impostazione fatta propria dalla legge n. 249 non risponde soltanto a ragioni di migliore tecnica legislativa e di più efficiente governo del sistema della comunicazione sociale, ma risponde anche ad una esigenza di carattere più generale, ossia quella di sottrarre al circuito politico-partitico il governo, appunto, del sistema e di affidarlo invece ad un organismo indipendente (proprio dal circuito politico-partitico) in grado di svolgere nelle migliori condizioni di imparzialità i compiti affidatigli. Si tratta di un modello che [...] va diffondendosi a macchia d'olio nella nostra legislazione, soprattutto nei settori nei quali la tutela di interessi di rilievo costituzionale risulta particolarmente difficile e delicata, ma che ha trovato proprio nel settore qui esaminato la sua applicazione ad oggi più articolata e complessa” (p. 224). It is interesting to note that the Constitutional Court (in its order 137/2000, delivered in a specific type of proceedings, i.e. concerning disputes between branches of the State regarding the protection against infringements of their respective spheres of competence, as guaranteed by the Constitution) affirmed (quite arguably, in the light of the foregoing considerations) that AGCom (in contrast to the *Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi*, for which see below), “benché goda di una posizione di particolare indipendenza all'interno dell'ordinamento, esercita attribuzioni disciplinate dalla legge ordinaria, prive – al pari di quelle svolte dal [new *Garante*] al quale è succeduta – di uno specifico rilievo costituzionale”.

functioning of AGCom. Thus, in the following pages the focus will be first on the institutional organisation of the Authority and then on its competences and mission, predominantly provided for by Law No 249/97, but also by other relevant legislative measures mentioned above. The focus will then shift to the broader framework of broadcasting governance, with a look also at the other institutional stakeholders operating in this sector.

3.2.1 The institutional structure

As far as AGCom's internal institutional structure is concerned, it very much reflects that of a collective body.³⁰ Indeed, AGCom consists of four organs, each entrusted with specific functions. These are: the Board (*Consiglio*), composed of four members, or Commissioners (*Commissari*);³¹ the President of AGCom (who chairs the Board), which is a single-person organ; and two Commissions (which are established as collective bodies themselves): the Networks and Infrastructures Commission and the Services and Products Commission (respectively, *Commissione per le infrastrutture e le reti* and *Commissione per i servizi e i prodotti*). Each Commission consists of two *Commissari* and is chaired by AGCom's President.

As for the appointment of AGCom members, Law No 249/97 provides for two main procedures to be followed, one for the President and the other for the Commissioners.³² Concerning the appointment of AGCom's President, the President of the Council of Ministers, in agreement with the Minister of Communications, and on the basis of a (necessary) positive opinion on the part of the competent parliamentary committees, suggests the name of the person to be appointed for this position. In this respect, the competent parliamentary committees might hold hearings for the designated candidate(s). Before the person can be appointed, the parliamentary committees in question have to express their favourable opinion, adopted by a two-thirds majority vote of their members (i.e. by a broad

³⁰ See Article 1(3) of Law No 249/97.

³¹ The number of AGCom Commissioners was lowered from eight to (the current) four in 2012, following the adoption of measures aimed at reducing (public) expenditures generated by the operations of the national IAAs: see Article 23 of Decree-Law No 201, of 6 December 2011 (GURI No 284, of 6 December 2011), as converted and integrated by the provisions of Law No 214, of 22 December 2011 (GURI No 300, of 27 December 2011), and the provisions of Law No 62, of 18 May 2012 (GURI No 117, of 21 May 2012): the latter are the provisions that modified Article 1(3) of Law No 249/97 in that respect.

³² See, again, Article 1(3) of Law No 249/97, as well as Article 2(7) of Law No 481/95, as referred to by the former.

multi-party majority). The appointment is then made by Decree of the President of the Republic.

The appointment procedure for the four *Commissari* is somewhat different. Here, the leading role is played by Parliament. Indeed, Law No 249/97 provides for the four members of AGCom to be elected by the two Chambers of Parliament. Each Chamber elects two *Commissari*, with every member of the two Chambers having the right to cast one vote (indicating one name).³³ The appointment of the elected members is then officialised by Decree of the President of the Republic.

As already partially apparent, there are some commonalities in the procedures for the appointment of the President and the four *Commissari*.³⁴ Like the President, the *Commissari* are also officially appointed by presidential Decree.³⁵ Moreover, the mandates of the both the President and the Commissioners last for seven years and are not renewable. Normally, the terms in office of the President and the four Commissioners begin and end at the same time.³⁶ Moreover, as regards the personal qualifications required to fill these posts, the persons to be appointed either as President or as Commissioner have to possess significant and recognised professional knowledge and competence in the field of activity of AGCom.³⁷

³³ This procedure is the result of the novelties introduced by Law No 62/2012, amending the original provisions of Article 1(3) of Law 249/1997, whereby each member of the two parliamentary Chambers was called upon to cast her/his vote by indicating two names, one for the *Commissione per le infrastrutture e le reti* and the other for the *Commissione per i servizi e i prodotti*. The (new) procedure currently in force no longer envisages any reference to the *Commissione* to which the elected member will be assigned, but to the *Consiglio* in general: according to Delibera No 314/12/CONS, of 25 July 2012, it is for the *Consiglio*, following a proposal made by the President of AGCom, to assign each member to one of the two Commissions.

³⁴ It could be highlighted that, according again to Article 2(7) of Law No 481/95, not only would the authority (for telecommunications) have been comprised of only three members, but these would also have all been appointed in the same way that it is now applicable to the President of AGCom.

³⁵ The appointment by presidential Decree opens the door to possible judicial review of the appointment itself (as this would not be possible, in the case of appointments made by internal acts of Parliament, as occurred for the abovementioned *Garante*): see MANETTI, cited, p. 131.

³⁶ So far, the appointments of the President and the members of AGCom have been made on the same date, but through two separate presidential Decrees: one for the President and another one for the (formerly eight, now) four *Commissari* altogether. Moreover, as for the parliamentary elections of AGCom members, these have taken place on different dates but closely to each other: an exception to this might arise (and has a couple of times so far) in the event that one of them needs to be replaced because of his/her death or resignation, or some impediment. To this end, Law No 249/97 provides for the competent Chamber of Parliament to elect a new member to hold the post of his/her predecessor until the mandate of the latter would have ended. Only in this case, and only if the newly appointed *Commissario* occupies the post when there are less than three years until the term in office ends, can he/she be reappointed for a new mandate.

³⁷ As provided for by Article 2(8) of Law No 481/95, referred to by Article 2(5) of Law No 249/97, the members of the Authority are selected from among “persone dotate di alta e riconosciuta professionalità e competenza nel settore”.

As far as the status of AGCom members is concerned, the law provides some common measures to avoid direct conflicts of interest. For instance, in a quite ample fashion, it mandates for AGCom members, during their term in office, not to exercise any professional or consultancy activity, either directly or indirectly; nor to administer or work as employees of any public or private body; nor to work as public officials, nor to hold any related elective or representative post in any political party; nor, finally, to hold any direct or indirect interest in any enterprise operating in the sector falling within AGCom's scope of action.³⁸ In addition to this, the law also forbids AGCom members from either directly or indirectly taking up any post in companies operating in the communications sector once they have completed their mandate and for at least four years thereafter.³⁹

Moreover, the conduct of all AGCom members (and personnel) is subject to the provisions of an internal Code of Conduct (*Codice etico*).⁴⁰ As one of the signs of its organisational and functional autonomy, according to Law No 249/97 this Code is adopted by the AGCom Board.⁴¹ The Code contains predominantly general obligations regarding the behaviour of members and personnel in (and even beyond) the exercise of statutory functions. All these obligations are inspired by the general principles of impartiality and independence.⁴² For instance, the Code of Conduct mandates for the members and personnel of AGCom not to be influenced by external pressure, nor to accept gifts or other benefits from parties affected by the activity of AGCom, nor to take any decision or undertake any activity in the exercise of their functions when affected by conflicts of interests, but rather to abstain in any case where abstention clearly appears to be appropriate.⁴³ The Code of Conduct also provides for a duty

³⁸ See Article 2(8) of Law No 481/95, as referred to by Article 2(5) of Law No 249/97, where it is stated that the members of AGCom “non possono esercitare, direttamente o indirettamente, alcuna attività professionale o di consulenza, essere amministratori o dipendenti di soggetti pubblici o privati né ricoprire altri uffici pubblici di qualsiasi natura, ivi compresi gli incarichi elettivi o di rappresentanza nei partiti politici né avere interessi diretti o indiretti nelle imprese operanti nel settore di competenza della medesima Autorità. I dipendenti delle amministrazioni pubbliche sono collocati fuori ruolo per l'intera durata dell'incarico”. The consequence of a breach of the aforementioned requirements is loss of the position.

³⁹ See Article 2(9) of Law No 481/95. A breach of the duty not to take up any of the posts mentioned therein is subject to a pecuniary sanction in the terms provided for by that same Article.

⁴⁰ The first version of the Code of Conduct was embodied in Delibera No 18/98, of 16 June 1998 (GURI No 169, of 22 July 1998), and has now been repealed by a new version contained in Delibera No 577/10/CONS, of 11 November 2010 (available at <http://www.agcom.it/codice-etico>).

⁴¹ See Article 1(9) of Law No 249/97: as provided therein, the Board has to vote with an absolute majority to adopt the Code of Conduct.

⁴² See Article 3 of the Code of Conduct, which anchors these principles to the relative constitutional provisions (namely, Articles 54 and 97 of the Italian Constitution).

⁴³ See, respectively, Articles 6, 7 and 9 of the Code of Conduct.

not to disclose key information on ongoing activities, while it indicates the President, the members and the designated AGCom officials as the only figures entitled to communicate on behalf of the Authority with information media.⁴⁴ The enforcement of these very generally framed provisions is essentially attributed to the Board. Nonetheless, a committee (*Comitato etico*) has been established to support the Board in this respect. This committee is appointed by the Board itself and consists of at least three members of renowned independence and moral authority.⁴⁵ The committee supervises the correct application of the Code of Conduct and accordingly suggests to the Board possible solutions or guidelines to tackle cases arising, acting either on its own motion or when requested by the Board itself. However, when the enforcement of the Code of Conduct concerns the members of AGCom, the Board takes over the role of the committee, while the latter is merely consulted in order to obtain opinions. The Code of Conduct itself does not provide for sanctions and connected procedures in the event of breaches of its provisions. To fill this gap, it has been suggested that reference should be made to other internal measures adopted by AGCom to govern (the status of) its members and personnel.⁴⁶

For organisational and functional purposes, AGCom has made use of the power bestowed upon it by Article 2(9) of Law No 249/97 and, as mandated therein, has adopted comprehensive regulations concerning its internal organisation and functioning.⁴⁷ The provisions contained in these internal regulations are manifold. Overall, however, they are essentially devoted to organising AGCom's internal administrative structure. Thus, it emerges that the Authority is equipped with a General Secretariat and several Directorates and Services. The organisation of the Directorates takes into account the convergent structure of the top organs of AGCom. Indeed, there is a Directorate in charge of electronic communications networks and services, with preparatory and preliminary regulatory, supervising and sanctioning functions in relation to network access issues, and other related

⁴⁴ See Articles 10 and 11 of the Code of Conduct.

⁴⁵ See Article 14 of the Code of Conduct.

⁴⁶ See N. LIPARI *et al.*, *Sistema radiotelevisivo e Autorità per le telecomunicazioni*, Padova, CEDAM, 2000, p. 144, where it is indicated that that gap can be filled by reference to the regulations on the legal and economic treatment for personnel (*trattamento economico e giuridico del personale*) adopted by Delibera No 17/98, of 16 June 1998, (GURI No 95, of 22 April 2008), and subsequently modified, namely Articles 19-21 thereof, concerning sanctions and disciplinary procedures for personnel.

⁴⁷ In its first version, these internal regulations were enacted by the aforementioned Delibera No 17/98, together with the regulations on administrative management and accounting (*gestione amministrativa e contabilità*), and the already-mentioned regulations on the economic and legal treatment of personnel. The first regulations were modified repeatedly and entirely repealed by a new text adopted by Delibera No 223/12/CONS, of 27 April 2012 (which itself has also already undergone further modifications).

tasks.⁴⁸ A separate Directorate held similar powers, but concerning audiovisual and multimedia contents, notably as regards issues of access to contents and platforms, programming obligations, the protection of pluralism and monitoring of public service broadcasters. This has now been split into two: one Directorate dealing specifically with infrastructures and media services, and the other with audiovisual content.⁴⁹ Other Directorates focus on digital services (and the Internet), consumer protection, and (the liberalised) postal services (the supervision and regulation of the latter also having been assigned to AGCom).⁵⁰ Among the Services supporting the activity of the Directorates and of the top organs of AGCom, it is worth mentioning the one in charge of keeping the Register of Communications Operators (ROC) and carrying out general inspection-related activities, as well as the one responsible for maintaining relationships with relevant EU and international institutions.⁵¹

The aforementioned internal regulations concerning the organisation and functioning of AGCom also offer an opportunity to appreciate the relationships among the top organs of the Authority in greater detail. The central role of the President of AGCom, in particular, emerges therefrom.⁵² Indeed, the President not only has (limited) autonomous decision-making powers, but also, when participating in the work of the two separate and specialised Commissions, as

⁴⁸ See Article 14 of the aforementioned internal regulations.

⁴⁹ See Articles 15 and 15bis of the aforementioned internal regulations: the first Directorate is now in charge of issues related to external pluralism (such as, especially, frequency allocation and control of antitrust rules), while the second is responsible for internal pluralism matters (with particular attention towards programming obligations, digital content rights, protection of minors, etc.). K. JAKUBOWICZ, “Broadcasting regulatory authorities: Work in progress”, in W. SCHULZ, P. VALCKE, K. IRION (eds.), *The Independence of the Media and its Regulatory Agencies*, Bristol, Intellect, 2013, pp. xi-xxiv, argues that the actual internal organisational arrangements adopted by AGCom reflect much more a “merely integrated” Authority, rather than a truly convergent one, in contrast to its very first internal structure (i.e., just three Departments, respectively in charge of regulation, monitoring operators’ compliance with it, and dispute resolution), which was “based on the idea of ‘process’ and ‘knowledge’ rather than on markets” (p. xix). However, it could be objected that, having reargd in particular to the two *Commissioni* (and the *Consiglio*), the statutory structure of AGCom fully embraces the convergent model, as it distinguishes between infrastructure and content regulation, and not among the specific (electronic communications, broadcasting, or publishing) markets.

⁵⁰ See, respectively, Articles 16, 17 and 18 of the aforementioned internal regulations: the competences of AGCom in the field of postal services derives from the above-quoted Decree-Law No 201/2011 and Law No 214/2011.

⁵¹ According to Article 1(6)(5) and (6) of Law No 249/97, the “Registro degli operatori di comunicazione” (ROC) replacing the above-mentioned “Registro nazionale della stampa” as well as the “Registro nazionale delle imprese radiotelevisive”, contains information on all telecommunications and broadcasting operators, as well as publishing operators, advertising providers, content producers and distributors and national infrastructure establishments. AGCom has the power to issue regulations establishing the criteria for registration. As for the specific provisions on the many Services of AGCom, including the legal and human resources ones, see Articles 19-23bis of the above-mentioned internal regulations.

⁵² See Article 3 of the above-mentioned internal regulations.

well as in that of the Board, and exerting his/her voting power therein, performs the indispensable task of fostering and coordinating the activity of these different branches of the Authority, while guaranteeing the consistency of AGCom's overall work.⁵³ As will be highlighted below, the two Commissions are highly specialised in their respective fields of competence, being quite independent of each other, and (each) enjoying decision-making powers. The Board itself is entrusted with its own distinct competences. Thus, both the Board and the Commissions are designed and called upon to exercise their functions without directly interfering with each other's. The President, from his/her position and in the exercise of his/her tasks, institutionally ensures the necessary interaction among these different collective organs, and ultimately guarantees the coordination and unity of AGCom's work.

Alongside the central organisational structure (based in Naples, but with premises also in Rome), as depicted above, AGCom can also count on the functional support of local bodies in the performance of its tasks.⁵⁴ These are the so-called Regional Committees for Communications (CoReCom)⁵⁵, whose establishment is provided for by Law No 249/97.⁵⁶ The CoReCom can be (and have been) set up in all Regions (by regional laws).⁵⁷ Their establishment responds to the need for decentralisation and the effective governance and supervision of the communications sector at the local level. For these purposes, first and foremost, the CoReCom have a supporting and advisory role in relation to the Regions, whenever the latter exercise their functions on communications matters. Although the CoReCom appear to be regional institutions and are structurally autonomous from AGCom, they are nevertheless involved in a relationship of functional dependency with the latter. As provided for by the law, AGCom issues regulations delegating competences to the CoReCom.

⁵³ As is apparent from the above-mentioned internal regulations, the President represents the Authority; summons the meetings of its collegiate organs and sets their agenda; directs their work and supervises the enforcement of their decisions. Only under exceptional circumstances can the President adopt appropriate measures on his/her own motion, which, however, has to be promptly ratified by the competent collegiate organ.

⁵⁴ See ZACCARIA, cited, pp. 219-223.

⁵⁵ To a certain extent, these committees replace the pre-existing *Comitati regionali per i servizi radiotelevisivi*, provided for first by Article 5 of Law No 103/75 and then by Article 7 of Law No 223/90.

⁵⁶ See, indeed, Articles 1(13) and (14) of Law No 249/97. As provided therein, the regional laws adopted to establish the CoReCom should follow the guidelines elaborated by AGCom in agreement with the *Conferenza permanente per i rapporti tra lo Stato, le Regioni e le Provincie autonome di Trento e di Bolzano* (i.e., the collective body composed of the Presidents of all the Regions and the autonomous Provinces of Trento and Bolzano, representing the interests of these territories before the national institutions), concerning the requirements for the composition of the CoReCom, their organisation and financing, as well as the statute of their members. These guidelines were established by Delibera No 52/99/CONS, of 28 April 1999 (GURI No 119, of 24 May 1999): the resulting model seems to closely mirror that of the (national) Authority.

⁵⁷ In one Region (i.e., Trentino Alto Adige), two CoReCom have been set up, one for each of the autonomous Provinces of Trento and Bolzano.

In exerting this power, AGCom has provided for the attribution of an increasing number of functions to the CoReCom.⁵⁸ This trend seems to have been endorsed by the legislator, who has reinforced the role of general (functional) support of the CoReCom in relation to AGCom when the latter is called upon to exercise its own competences in electronic communications and, especially, audiovisual matters.⁵⁹

Furthermore, Law No 249/97 provides for the establishment of another body to support the work of AGCom. This is the so-called Users' National Council (*Consiglio Nazionale degli Utenti*, CNU)⁶⁰, whose organisation and functioning, as well as the appointment of its members, are established, again, by a regulation adopted by the Authority following the general principles set forth by the law.⁶¹ Among these principles, it is expressly stated that the members of the CNU are to be appointed from among qualified experts selected by users' representative associations. The mission of the CNU is identified by law as well. It consists in delivering opinions, as well as advancing proposals or recommendations, not only to AGCom, but also to Parliament, Government or any other public or private entity dealing with matters of interest to the CNU, such as the guarantee of users' rights and basic democratic safeguards (e.g. information pluralism) and, in particular, the protection of minors. Therefore, the CNU is a relatively autonomous body representing the scattered interests of telecommunications and broadcasting services users, and acting as an intermediary between the latter and institutional actors. However, the CNU may suffer from its very autonomy. Indeed, due to its merely

⁵⁸ See, again, Article 1(13) of Law No 249/97. The regulation for delegating functions from AGCom to the CoReCom was established in Delibera No 53/99/CONS, of 28 April 1999 (GURI No 119, of 24 May 1999). This provides that the functions to be delegated to the CoReCom have to be indicated in conventions negotiated between each CoReCom and AGCom. A draft model for these conventions was provided by Delibera No 402/03/CONS, of 12 November 2003. Among the functions actually delegated to the CoReCom accordingly, there are, for instance: administrative tasks for the keeping of the ROC; the monitoring of broadcasts, especially during election periods; and the settlement of disputes between (electronic communications) operators and end users. The abovementioned regulation, as well as the framework agreement with the representatives of regional government, provides a (broader) list of possible functions to be delegated to the CoReCom. Overall, it seems that the latter are not equipped with proper regulatory and sanctioning powers, while they are bound to the principles and guidelines issued by AGCom whenever exerting their delegated functions, for consistency purposes. Moreover, in case they do not accomplish their attributed tasks, AGCom can substitute itself for the CoReCom and exercise the related functions. In general, however, the CoReCom have also been entrusted with some tasks directly by the legislator (such as the application of the so-called *par condicio* rule, for which see below) and the Regional legislator who set them up.

⁵⁹ See Article 13 (in combination with Article 10) of Legislative Decree No 177/05.

⁶⁰ See Article 1(28) of Law No 249/97. The CNU is intended to continue the work of the pre-existing Users' Consultative Council established by Article 28 of Law No 223/90 to support the *Garante*.

⁶¹ See Delibera No 54/99/CONS, of 5 May 1999 (as subsequently modified).

advisory powers and lack of a structural relationship with AGCom, the CNU is exposed to the risk of not being efficient in its task of representing the interests of users.⁶²

Finally, to conclude this overview of the institutional structure of AGCom, some light could be shed on the accountability mechanisms and the financing arrangements provided for by the law. First and foremost, it should be stressed that AGCom is directly accountable to Parliament. Indeed, it is established that the Authority has to report annually to Parliament on its work,⁶³ and the law specifies some of the matters that need to be included in the annual report. Among these, it is expressly stated that AGCom has to provide data and analysis concerning the plurality of opinions registered within the information sector. The law also provides for AGCom to supply relevant information on cross-ownership participation in the media at both national and European level.

However, it could be argued that reporting to Parliament on its work is only one way of ensuring the accountability of AGCom. More broadly, the Authority is accountable (generally speaking) through the publicity of its work, and specifically of its decisions. According to its internal regulations, this publicity is ensured in several ways: indeed, its decisions are published in the *Gazzetta Ufficiale* (the Official Journal), which normally works as a precondition for their entry into force; then, they are usually published in a special monthly journal (*Bollettino*) edited by the Authority itself (as well as on its web-site).⁶⁴

Another form of (indirect) accountability for AGCom is via the judicial review of its decisions, which is firmly guaranteed by the law.⁶⁵ Accordingly, the judicial review of the decisions adopted by AGCom falls under the exclusive competence of administrative courts. Specifically, the Regional Administrative Court (TAR) of Lazio is the competent court of first instance, while Appeals are then admitted before the Supreme Administrative Court (*Consiglio di Stato*), as the court of last resort.

As far as AGCom's funding system is concerned, a mixed arrangement is in place.⁶⁶ Indeed, AGCom receives its financial support partly from the State budget and partly (but mostly)

⁶² Users, however, either individually or through their collective associations, also have the possibility to make their voices heard by resorting directly to AGCom whenever they claim to have been prejudiced by measures adopted by this Authority: see Article 1(10) of Law No 249/97.

⁶³ See Article 1(6)(c)(12) of Law No 249/97. Formally, the report is presented to the President of the Council of Ministers to be forwarded to Parliament.

⁶⁴ See Article 11 of the internal regulations on the organisation and functioning of AGCom (mentioned above). It should be noted that no mention of the publicity of the acts issued by AGCom is made by Law No 249/97.

⁶⁵ See Article 1(26) of Law No 249/97.

⁶⁶ See Article 1(9) of Law No 249/97.

from market operators' contributions (as well as from other specific fees).⁶⁷ Interestingly, AGCom itself has the power to set the amount of these contributions, under a ceiling established by the law.⁶⁸

3.2.2 Mission and competences

Turning to consider the competences of AGCom, although sector-specific, they nevertheless appear to be quite wide-ranging in nature. In broad terms, it could be said that these competences are regulatory, consultative, supervisory and enforcement-related in their essence. Altogether, they contribute to shaping the multifaceted nature of AGCom, which is not only a specialised regulatory body, but also a controlling authority of a quasi-judicial nature.

Overall, AGCom exercises all its different functions in relation to both market operators and citizens/users of media communication services. While it contributes to ensuring the smooth development and functioning of competitive markets in electronic communications and audiovisual media networks, services and content provision – as well as in the publishing sector – for the benefit of those markets, it also has to abide by its statutory duty to safeguard the fundamental rights of media and service users.

The majority of competences conferred upon the different organs of AGCom are listed in Law No 249/97.⁶⁹ Article 1 (6) thereof establishes the general framework, as well as detailed measures for the allocation of tasks to the two Commissions and the Board of AGCom. As for the general principles, the law provides for the distribution of competences among the various internal organs, while also envisaging the possibility for AGCom itself to modify this

⁶⁷ This latter form of funding may give rise to criticism, especially in the light of the related risks of influence over (or capture of) the regulator by the regulated entities: see ZACCARIA & VALASTRO, cited, p. 192.

⁶⁸ In essence, as regards these contributions, charges are imposed on electronic communications and media operators to support the (significant) costs of AGCom's functioning not covered by State financing, on the basis of the earnings deriving from sales and services of those operators: see notably Article 1(65)-(66) of Law No 266, of 23 December 2005 (GURI No 302, of 29 December 2005), as well as, for a recent example of the amounts established (in percentage, having regard to the operators' revenues), *Delibera 547/13/CONS*, of 30 September 2013. On this financing arrangement, see also the judgment of the ECJ in Case C-228/12 to C-232/12 and C-254/12 to C-258/12, *Vodafone Ommitel et alia* [2013], where it was established that, having regard to specific EU electronic communications rules, the charges imposed on the operators are justified only with respect to the costs actually incurred by the Authority in its related regulatory activity, and not generally in relation to all its types of functions.

⁶⁹ However, Law No 249/97 does not in itself provide a complete overview of all the functions assigned to AGCom. Nor is such a systemic exposition to be found in other pieces of legislation (or other normative sources). In fact, not all the competences possessed by AGCom stem from Law No 249/97. Thus, due account will be given to the functions bestowed upon AGCom also by other legislative sources, i.e., essentially, Legislative Decree No 259/03 and Legislative Decree No 177/05.

distribution by ad hoc internal regulations.⁷⁰ Thus, the (internal) attribution of the various tasks as envisaged in Law No 249/97 is ultimately not immutable. However, the definition of the various competences identified by the law is not modifiable (except by the legislator itself). Moreover, another general and binding principle provided for by the law entails a subsidiary function for AGCom's Board in relation to the two Commissions. Apart from the matters directly assigned to the Board, it is also competent for all matters not clearly defined, but nonetheless resulting as issues for AGCom to deal with, according to either Law No 249/97 or any other relevant legislative instrument.⁷¹

For an in-depth review of AGCom's competences, it would be useful to follow the way they are presented by Law No 249/97:⁷² not only because this facilitates the organisation of their exposition, but also because it helps to highlight the effect of the construction of a convergent Authority from the point of view of the attribution of competences. Hence, in line with Law No 249/97, the (most relevant) competences of each of the two Commissions will be highlighted first, followed by those of the Board.

The Infrastructures and Networks Commission is called upon to act in four main areas: interconnection and access rights, universal service regulation, technical surveillance on radio-frequency emissions and standard setting on specific technical issues. While the last two appear to refer to highly technical tasks, the first two fields of action are more closely related to both regulatory and sanctioning competences.⁷³ Interconnection and access (to networks and related services) have been recognised by EU law (and the national implementing provisions) as the first tools to drive the liberalisation of the (former) telecommunications sector, and are consequently employed by national regulators to achieve that goal.⁷⁴ To this end, in exercising its regulatory powers vis-à-vis business players, the Infrastructure and Networks Commission has (fulfilled) the duty to define objective and transparent criteria for the management of interconnection and access demands in compliance with the principle of

⁷⁰ See, namely, Article 1(7) of Law No 249/97. The internal redistribution of competences has actually happened: first with Delibera No 17/98 and then with Delibera No 223/12/CONS (both mentioned above; the latter, especially, as modified by Delibera No 315/12/CONS, of 25 July 2012) some attributions conferred by the law to the Commissions were moved to the Council.

⁷¹ See, notably, Article 1(6)(c)(14) of Law No 249/97.

⁷² For a different organisation, see, for instance, CARETTI, cited, pp. 225-227, presenting the various competences schematically by grouping them according to their nature (consultative, regulatory, quasi-judicial/sanctioning, authorisation powers).

⁷³ See, respectively, Articles 1(6)(a)(3) and (15); and 1(6)(a)(4) of Law No 249/97.

⁷⁴ For a detailed description of the actual employment of those regulatory tools by AGCom, see BRUNO & NAVA, cited, pp. 311-530.

non-discrimination.⁷⁵ The abovementioned Commission is also in charge of supervising the effective recognition by network providers of interconnection and access rights granted to other operators, as well as settling any disputes arising in this respect.⁷⁶ Concerning universal service, the Infrastructures and Networks Commission has the duty to implement supranational and national provisions identifying the sphere of application of the relevant obligations in relation to both their content and addressees. It is also required to deal with the economic aspect of universal service provisions, by determining its actual cost and establishing its redistribution among the providers affected.⁷⁷

As for the Services and Products Commission, this is called upon to act within three main fields: general supervision of the products and services available, in order to monitor their compliance with statutory requirements; substantive aspects of content provision; and the gathering of audience and other related data. The latter also appears to be quite a technical and not particularly creative task, albeit one of a certain importance.⁷⁸ In contrast, in the first field of action mentioned above, the law bestows very broad supervisory competence upon the relative Commission, without significantly limiting its margin for manoeuvre (or that of the Authority as a whole) in exercising it, while guiding its use towards the promotion of the integration of technologies.⁷⁹ This supervisory function was originally coupled with a steering one, with the intention of ensuring general levels and minimum standards of service quality,

⁷⁵ See Article 1(6)(a)(7) of Law No 249/97. On interconnections and access, see also Articles 40-52 of Legislative Decree No 259/03.

⁷⁶ See Article 1(6)(a)(8) and (9) of Law No 249/97. It is interesting to note, also, that this Commission can act to promote technological agreements between market operators to avoid the proliferation of transmission infrastructure: this indirectly implies favouring interconnection and access arrangements. Moreover, the Commission at stake is also required to promote the interconnection of national telecommunications apparatuses with international ones, as in Article 1(6)(a)(12) thereof.

⁷⁷ See Article 1(6)(a)(11) of Law No 249/97.

⁷⁸ See Article 1(6)(b)(11) of Law No 249/97. According to the same provision, the Services and Products Commission is required to gather data on the penetration of different communications media.

⁷⁹ Article 1(6)(b)(1) of Law No 249/97 states that “[la Commissione per i servizi e i prodotti] vigila sulla conformità alle prescrizioni della legge dei servizi e dei prodotti chi sono forniti da ciascun operatore destinatario di concessione ovvero di autorizzazione in base alla vigente normativa promuovendo l’integrazione delle tecnologie e dell’offerta dei servizi di telecomunicazioni”. The only limit to the action of the Services and Products Commission in this respect is on the nature of the supervisees, which have to be licensed or authorised operators. Thus, the provision at stake seems not to be applicable to the publishing sector. Overall, this provision works as a general and subsidiary clause with respect to other more detailed competences attributed to this same Commission within this field, such as the supervision of advertising distribution (i.e., Article 1(6)(b)(3) thereof), or of the norms intended to protect minors (i.e., Article 1(6)(b)(6) thereof). Moreover, the aforementioned provision is to be read against the general wording of the abovementioned Article 1(6)(b)(3), which, apart from mentioning the specific field of advertising, confers to that Commission a more general regulatory function in dealing with the distribution of contents and services.

although the latter function has now been transferred to the Board.⁸⁰ As regards content requirements, the law confers upon this Commission some significant competences in the reconciliation of the economic freedom to provide broadcasting services with the constitutional rights of citizens/users. In this respect, the Services and Products Commission was originally responsible for the application of legislative measures on political information and advertising, predominantly by resorting to regulatory implementation to ensure non-discriminatory treatment and equality of access: this task has also now been assigned to the Board.⁸¹ In any case this Commission still monitors respect of the guarantees for national linguistic minorities in broadcasting media, as well as the application of provisions aimed at the protection of minors.⁸² However, in the event of ascertained breaches, the Commission can also issue sanctions regarding the latter. The supervision and prompt enforcement (with some incisive sanctioning powers) of the right to reply could also be included in this Commission's scope of action.⁸³ Finally, in addition to the abovementioned areas of action for the Services and Products Commission, the law also confers upon it significant duties regarding copyright supervision and enforcement.⁸⁴

The Board, for its part, exercises its functions in relation to several issues, among which it is worth highlighting its competence in authorisation and licensing, radio-spectrum management, and sector-specific antitrust enforcement. Indeed, the Board has acquired the competence of adopting the National Frequency Allocation Plan, previously assigned to the Infrastructures and Networks Commission.⁸⁵ While this may rightly appear to be a highly

⁸⁰ See Article 1(6)(b)(2) of Law No 249/97. The abovementioned function is also related to the general competence for monitoring broadcasting programmes, by resort, if necessary, to the technical/inspective branches of the competent Ministry: see Article 1(6)(b)(2)(13) thereof.

⁸¹ See Article 1(6)(b)(9) of Law No 249/97. See, also, Article 7(3) of Legislative Decree No 177/05. Further details on this topic will be provided below.

⁸² See Article 1(6)(b)(7) and (6) of Law No 249/97. As for the protection of linguistic minorities in the media, it is interesting to observe that this was recognised for the first time by Law No 249/97 itself (while it is embedded, in general terms, beyond the media domain, in Article 6 of the Constitution), which, apart from the aforementioned provision, provides for the taking into account of that objective in the elaboration of the National Frequency Allocation Plan and the operation of foreign or local broadcasting channels relevant to those linguistic minorities (see Article 2(6) thereof). Moreover, Article 5(1)(l) of the Legislative Decree No 177/05 now has recognised as a general principle (for broadcasting regulation) the provision of "specifiche forme di tutela dell'emittenza in favore delle minoranze linguistiche riconosciute dalla legge".

⁸³ See Article 1(6)(b)(8) of Law No 249/97 (as well as, notably, Article 32quinquies of Legislative Decree No 177/05 (concerning the procedure to be followed in cases of disputes on the exercise of the right of reply, which involves AGCom).

⁸⁴ See Article 1(6)(b)(4bis) of Law No 249/97.

⁸⁵ See Article 1(6)(a)(1) of Law No 249/97. This competence has been moved to the Board by the already-mentioned internal organisational regulation adopted by AGCom. See also the guiding principles dictated for the elaboration of the Plan by Article 2(6) of Law No 249/97, and by Article 42 of Legislative Decree No 177/05.

technical exercise, it nevertheless offers the Authority a significant opportunity to intervene in the planning (of the attribution) of radio frequencies, which has an evident impact on pluralism issues. It is on the basis of this Plan that the Ministry – not AGCom – has to issue the relevant authorisations for broadcasters. The Board is, however, required to adopt regulations determining the criteria for the issuing of the authorisations. AGCom itself only issues authorisations for satellite broadcasting (or rather, content providers over satellite networks).⁸⁶ As for the antitrust provisions, the law confers upon the Board a general supervisory role, which it can also exercise through its maintenance of the ROC.⁸⁷ The Board has several other functions, among which it is worth recalling its power to authorise transfers of property concerning broadcasting enterprises. The exercise of this power contributes to ensuring transparency, while it is also closely related to the supervision/enforcement of the aforementioned antitrust provisions.⁸⁸ Generally, the Board appears to exercise general supervision (as well as powers of intervention) over all of AGCom's different domains of activity, being at its apex and therefore in the best position to develop an effectively convergent (and consistent) approach to regulation.

Some functions appear to be transversal among the various organs of AGCom, and dispute settlement is certainly one of them. It has already been recalled above that the Infrastructures and Networks Commission has adjudicative functions in relation to the resolution of disputes between market operators (especially concerning interconnection and access issues). It could be added here that, in general terms (i.e., without specifying the subject matter), the law also confers upon AGCom the task of settling other disputes between communications operators.⁸⁹ This provision is related to a further one conferring upon the Authority (i.e., in line with the aforementioned general principles, upon the Board) the settlement of disputes between communications operators and private users; this provision being related, in turn, to the other one entrusting to the same Commission the resolution of disputes concerning telecommunications providers and users.⁹⁰ Regarding all these disputes, however, the law provides for the adoption of regulations to determine the criteria for their settlement, while

⁸⁶ See Article 20 of Legislative Decree No 177/05.

⁸⁷ See Article 1(6)(c)(8) of Law No 249/97. As for the keeping of the ROC, this competence has been moved from the Infrastructures and Networks Commissions, to which it was originally assigned (as from Article 1(6)(a)(5) thereof). More details of the antitrust enforcement mission will be given below.

⁸⁸ See Article 1(6)(c)(13) of Law No 249/97. See also Delibera No 646/06/CONS, of 9 November 2006 (as modified by Delibera No 368/14/CONS, of 17 July 2014).

⁸⁹ See Article 1(11) of Law No 249/97. See, also, Article 13 of Legislative Decree No 259/03.

⁹⁰ See again, respectively, Article 1(11) and (6)(a)(14) of Law No 249/97.

establishing a duty to resort to conciliation through AGCom first, before seeking court intervention (if still necessary).⁹¹

Another (and final) example of such competences can be found in the sanctioning power, namely through the issuing of administrative fines, entrusted to the Authority by the framework law on audiovisual services.⁹² However, Law No 249/97 also provides, in general terms, for this competence to be exercised by the Services and Products Commission.⁹³ In any case, this power can be exercised by AGCom against all market operators, including the public service broadcasting provider.

3.2.3 Other coexisting institutions with competences in broadcasting

Despite the wide-ranging mission and high variety of competences assigned to AGCom, the governance of the media is not as concentrated in its hands as it may appear. In fact, broadcasting-related competences continue to be scattered among several institutional players, which still maintain and exert significant regulatory and policy functions.⁹⁴ This results in a framework within which some overlapping persists, often, it may be assumed, to the detriment of the consistency and transparency of policy outputs and decision-making. It

⁹¹ Those regulations were adopted by Delibera No 173/07/CONS, of 19 April 2007, regarding disputes between communications operators and private users (as, most recently, modified by Delibera No 597/11/CONS, of 17 November 2011); and Delibera No 352/08/CONS, of 25 June 2008, regarding disputes between market operators themselves. It should also be mentioned that the settlement of disputes involving operators and users has been attributed to the CoReCom, and that, according to the aforementioned regulations, these disputes can be heard by the Authority itself if the attempt made by the CoReCom to achieve conciliation fails.

⁹² See, especially, Article 51 of Legislative Decree No 177/05. As it will be noted below, the Authority can also issue other types of (non-pecuniary) sanctions, such as injunctions or other structural remedies. The detailed procedural rules for the issuing of sanctions are (now) set by Delibera No 410/14/CONS, of 29 July 2014 (as already amended).

⁹³ See Article 1(6)(b)(14) of Law No 249/97.

⁹⁴ In this respect, G. MAZZOLENI, G.E. VIGEVANI, *Television across Europe - Regulation, Policy and Independence: Italy* (Open Society Institute, 2005), assert that “broadcasting regulation is characterised by the plurality of its regulatory bodies” (p. 884): it is argued there that this is a consequence of the overabundance of legislation and the maintenance of old regulatory structures together with the newly created ones. See also F. CASAROSA, “Italian Media Policy Under Ongoing Transition to Meet the Challenges of the 21st Century”, in E. PSYCHOGIOPOULOU (ed.), *Understanding Media Policies: A European Perspective*, London, Pelgrave, 2012, pp. 150-165, where she recognises that the overall governance aspects of Italian media policy have historically been “very complex, with several bodies charged with different, but in some cases overlapping, functions”, and that the attempt “to reorganise the system, centralising the monitoring functions in the hands of a single body [i.e., AGCom]” did not properly succeed, as the legislative interventions following its establishment “progressively reduced the coherence of the system”, shifting responsibilities away from that body, to other institutional actors (pp. 161-162). For a general and detailed picture of the various institutions with competences on broadcasting, see L. CARLASSARE, “Gli organi di governo del sistema”, in R. ZACCARIA (ed.), *Informazione e telecomunicazione*, Padova, CEDAM, 1999, pp. 119-171.

would therefore be useful to refer here to the main bodies of governance/control that operate alongside AGCom, which nonetheless continues to play the pivotal role.

Above all, it should be recalled that the general power to issue laws shaping the media sector is firmly in the hands of Parliament. As a statutory body, AGCom has to abide by the law and observe the limits imposed therein, in particular when issuing relevant regulations. Parliament also has some more specific (marginal) competences concerning broadcasting matters. According to the measures of the Service Contract (*Contratto di servizio*) drawn up between the Government and the public service broadcasting operator (RAI) to organise the provision of the latter, the Presidents of the two Chambers of Parliament must act in agreement in planning the parliamentary works to be broadcast on a dedicated channel and set the criteria to be followed accordingly, having regard to impartiality and balanced representation in order to ensure respect for social, cultural and political pluralism.

However, apart from the exercise of its legislative power or its sectorial competences, as mentioned above, Parliament exerts its highly incisive and more general influence in the governance of broadcasting through the so-called *Commissione parlamentare per l'indirizzo generale e la vigilanza dei servizi radiotelevisivi* (Parliamentary committee for the general guidance and supervision of broadcasting services, hereinafter the *Commissione parlamentare*).⁹⁵ The *Commissione parlamentare* was established by Law No 103/75 as the most significant institutional sign of the transferral of broadcasting-related competences from Government to Parliament, for the purpose of better ensuring media pluralism in compliance with the abovementioned judgment of the Constitutional Court rendered in 1974.⁹⁶ The *Commissione parlamentare* is structured as a joint committee composed of forty members selected from both Chambers of Parliament (twenty from each one) by their respective

⁹⁵ For an overview of the establishment of the *Commissione di vigilanza*, see notably S. GRASSI, “La Commissione parlamentare per l’indirizzo e la vigilanza sulla RAI: prospettive di riforma”, in R. ZACCARIA (ed.), *Trattato di diritto amministrativo - Informazione e telecomunicazione*, Padova, CEDAM, 1999, pp. 155-172. For current information, see the official web-site at <http://parlamento17.camera.it/74>.

⁹⁶ See the already mentioned judgment 225/1974 of the Constitutional Court. See, then, in particular, Article 1(3)-(5) of Law No 103/75. As defined by BARENDT, cited, the *Commissione parlamentare* is “the supreme administrative and regulatory body for public broadcasting” (p. 63). Note, however, that at the time this statement was made (1992), AGCom did not yet exist (while the *Garante* was in place). As regards the judgement cited, the Author notes that “it required Parliament, as representative of the national community, to assume responsibility for the [public] service [broadcasting], in particular to ensure its comprehensiveness and impartiality. Government control was [judged] incompatible with the freedom of expression granted by Article 21 of the Constitution” (p. 64). In that context, the A. critically adds that it is “a nice question whether the present arrangement [i.e., transferral of government supervision to a committee of Parliament] satisfies the Court’s requirements. It is surely unsatisfactory to entrust the guarantee of objectivity, balance and diversity to a Parliamentary Commission composed entirely of politicians, with a majority of government members. [...] Under this system the views of political opposition may be inadequately represented, while the voice of minority social and cultural groups are excluded altogether” (ibid.).

Presidents, so as to ensure proportional representation of the political groups sitting in the parliamentary assembly. The mission of the *Commissione parlamentare* is to issue guidelines on and supervise the conduct of (only) public service broadcasting, in order to ensure its independence, objectivity, and openness to the various social, political and cultural orientations, in line with the general principles set forth (now) by Legislative Decree No 177/05. To this end, as the parliamentary guarantor of (public broadcasting) information pluralism, the *Commissione parlamentare* has been entrusted with wide-ranging powers over the provider of public service broadcasting, comparable to those of an autonomous supervisory and regulatory body.⁹⁷ Apart from its general steering role and its participation in the appointment of the public service broadcasting provider's governing body, the *Commissione parlamentare* has to regulate two specific aspects of information pluralism.⁹⁸ These concern, on the one hand, the access rights to programmes broadcast on the part of socially relevant groups, whose requests are dealt with by a permanent sub-committee set up within the *Commissione parlamentare*, according to the law and the measures contained in the regulations adopted by the latter, as well as the guidelines issued by the sub-committee itself.⁹⁹ On the other hand, the *Commissione parlamentare* is mandated to ensure the balanced representation of political opinions (both outside, but especially) during election campaigns (and referenda). This entails the application of the principles set forth in Law No 28 of 22 February 2000 (establishing the so-called regime of *par condicio*), which involves issuing

⁹⁷ See the critical analysis provided for by ZACCARIA, cited, 163-172. For a complete account of the competences, see Articles 4 and 6 of Law No 103/75; and Article 50 of Legislative Decree No 177/05. See, also, Article 1(6)(b)(6) and (10) of Law No 249/97 (respectively, on the protection of minors and the consultative function on the draft Service Contract and convention with the public service broadcaster). The *Commissione parlamentare* is, anyway, a body of Parliament, apt to represent the interests of the latter by itself. Its nature and position in the constitutional framework was confirmed and reinforced as such in the recent litigation promoted by *Commissione parlamentare* against the Government before the Constitutional court, concerning the latter's move to revoke the appointment of a member of the administrative board of RAI without consulting/obtaining consent from the *Commissione parlamentare*: see order 61/2008 (where its *locus standi* for promoting a conflict in the attributed powers against another institution was recognised), and, then, judgement 69/2009 of the Constitutional Court (which upheld the claim of the *Commissione di vigilanza*). On these last issues see R. DICKMANN, G. MALINCONICO, "La posizione costituzionale della Commissione di vigilanza RAI nel quadro delle competenze normative in materia di servizio pubblico radiotelevisivo", *Federalismi.it* [2009], available at <http://www.federalismi.it/ApplMostraDoc.cfm?Artid=12386>.

⁹⁸ The *Commissione di vigilanza* has the (temporary) power to appoint seven out of nine members of the administrative board of the public service broadcasting provider, and to express a binding opinion on the suggested president of that board, whose name (together with that of the remaining member of the board) is indicated by the majority shareholder (i.e. the Ministry of economy and finance): see Article 49 of Legislative Decree No 177/05.

⁹⁹ See BARENDT, cited, pp. 155-157.

detailed regulatory measures before each relevant election campaign takes place.¹⁰⁰ While (as will be discussed below) Law No 28/00 also entrusts AGCom with the adoption of similar measures for private broadcasters, it allocates only to this Authority the competence to sanction breaches of all the measures established, even those issued by the *Commissione parlamentare* and, hence, to ultimately supervise their application.¹⁰¹ This shows a tendency – reinforced by the most recent framework legislation on audiovisual matters – to shift specific supervisory and sanctioning competences to the independent regulator, while leaving predominantly steering functions to the *Commissione parlamentare*.¹⁰²

Nonetheless, possible overlapping of the actions of the *Commissione parlamentare* and AGCom can still occur. For instance, concerning the representation of political viewpoints in programmes broadcast during election campaigns, a case (recently) arose that revealed the actual dangers (or, at least, marked inconsistency) caused by the overlapping of the functions of the *Commissione parlamentare* and AGCom in the pursuit of the same goal, i.e. information pluralism in broadcasting. For the 2010 local government elections in several Italian Regions, the *Commissione parlamentare* adopted a regulation, on the basis of Law No 28/00, that was fiercely contested as unconstitutional.¹⁰³ It was argued that subjecting ‘ordinary’ information broadcasts (such as talk shows and the like) to the same normative (and very detailed) treatment as dedicated political broadcasts for election purposes – as the regulation appeared to have done –¹⁰⁴ was in stark contrast with the distinction drawn by the legislator between the two different but related categories of programmes (respectively *programmi d’informazione* and *comunicazione politica*).¹⁰⁵ The regulatory choice of the *Commissione parlamentare* was therefore in contrast with the constitutional understanding of Law No 28/00 and the abovementioned distinction embedded therein. Indeed, in 2002, the

¹⁰⁰ Law No 28/00 on the “Disposizioni per la parità d’accesso ai mezzi di informazione durante le campagne elettorale referendarie e per la comunicazione politica” is published in GURI No 43, of 22 February 2000 (as later amended by Law No 313, of 6 November 2003, GURI No 268, of 18 November 2003).

¹⁰¹ See Article 10 of Law No 28/00 (and further below).

¹⁰² As a sign of this tendency, see Article 48 of Legislative Decree No 177/05. Indeed, the *Commissione di vigilanza* does not have sanctioning powers. See, also, BRUNO & NAVA, cited, pp. 142-143. Note, however, that, apart from the trend pointed out, up to now, the core competences of the *Commissione di vigilanza* have not been reshaped by the establishment of AGCom: see Article 11 in combination with Article 50 of Legislative Decree No 177/05; as well as the similar Article 1(4) of Law No 249/97.

¹⁰³ See the regulation approved by the *Commissione parlamentare* on 9 February 2010.

¹⁰⁴ See Article 6(4) of the abovementioned regulation, providing that “le trasmissioni di informazione, con l’eccezione dei notiziari, a partire dal decorrere del termine ultimo per la presentazione delle candidature, sono disciplinate dalle regole proprie della comunicazione politica”.

¹⁰⁵ See, in general, Law No 28/00.

Constitutional Court upheld the constitutionality of the core provisions of Law No 28/00 in relation to Article 21 (as well as, to some extent, Articles 3 and 42) of the Constitution, on the basis of the aforementioned distinction, which allows for different degrees of regulation/intrusion in broadcasting freedom – i.e., greater intervention, albeit limited in time and scope, regarding the *comunicazione politica* type of programmes – in the name of pluralism.¹⁰⁶ Interestingly, in exercising its power over private broadcasters, AGCom issued a regulation mirroring the one adopted by the *Commissione parlamentare*, as is normally the case, although on this occasion it expressed its doubts about the choice.¹⁰⁷ The regulation issued by AGCom was challenged by certain private broadcasters before the administrative courts, which upheld the claimants' request, issuing interim measures to suspend the enforceability of the regulation and (indirectly) inducing AGCom to deliberate again and change it accordingly.¹⁰⁸ In contrast, the (almost) identical measures issued by the *Commissione parlamentare* remained in place. The effect of this case was that in the implementation of the same general statutory principles – namely, the fair and balanced representation of different political viewpoints on television during election campaigns – applicable to the television broadcasting system as a whole, an evident inconsistency in regulation was provoked by the intervention of two different institutional actors entrusted with the same powers, but in relation to different market players. It could be claimed that the main problem here lies in the impossibility of submitting the acts adopted by the *Commissione parlamentare* to judicial review. Indeed, such acts are considered as political decisions and, hence, immune from the review of administrative (or civil law) courts. In any case, it would certainly have been less problematic if these regulatory powers had been conferred (or moved) upon the same body, namely AGCom, in order to avoid such troubling issues, while also ensuring greater consistency and effectiveness in the enforcement of general constitutional principles to the whole communications sector.

Notwithstanding first the shift of competences to Parliament, and then the establishment of AGCom, the Government has maintained a significant stake in broadcasting regulation. In

¹⁰⁶ See judgment 155/2002 of the Constitutional Court.

¹⁰⁷ See Delibera No 25/10/CSP, of 24 February 2010. It is reported that the Delibera No 25/10/CSP was adopted with a majority vote, while the President stated his observations against it. It should be highlighted that, according to Article 2(5) of Law No 28/00, (as will also be pointed out below) the *Commissione di vigilanza* and AGCom have to consult each other before adopting their respective measures for implementing the *par condicio* rules during each relevant election campaign. See also Delibera No 24/10/CSP, of 10 February 2010.

¹⁰⁸ See the orders of TAR Lazio (Sezione III Ter), 1179/2010, in case *Telecom Italia Media Spa v. AGCom*, of 12 March 2010, and 1180/2010, in Case *Sky Italia Srl v. AGCom*, of the same date. AGCom first annulled the said regulation and then adopted a new one, namely by Delibera No 31/10/CSP, of 12 March 2010.

particular, the focus here will be briefly on the former Ministry of Communications, now the Ministry of Economic Development, to which all the relative competences and apparatus of the pre-existing Ministry have been transferred.¹⁰⁹ It is not easy (nor appropriate here) to identify all the regulatory and administrative functions of this Ministry, since the legislative framework is extremely detailed and quite intricate in this respect.¹¹⁰ Suffice it to mention that, among its administrative powers, the most significant appear to be those related to the planning of radio spectrum resources and the granting (and relative supervision of) the authorisations required by the law to exercise the activity of network provider, service provider, or even content provider.¹¹¹ It has been (critically) argued that, in implementing the regulatory framework for electronic communications, the primary role reserved therein for the independent Authority has been somewhat overshadowed by the conferral of the abovementioned functions to the competent Ministry.¹¹²

¹⁰⁹ See Decree-Law No 85, of 16 May 2008 (GURI No 114, of 16 May 2008), converted into Law No 121, of 14 July 2008 (GURI No 64, of 15 July 2008). As in the Decree of the President of the Council of Ministers No 158, of 5 December 2013 (GURI No 19, of 24 January 2014), the Department of Communications, originally constituted within that Ministry, under the direction of a Deputy Minister, was abolished and replaced by Directorates-General (namely two of them: one for spectrum planning and management, and one for electronic communications, radio and postal services). More generally, some competences of the Government (rather, the Council of Ministers), the President of the Council of Ministers and the Ministry of Economy and Finance have been already mentioned in this Chapter and will not be repeated here; for a general and complete overview, see notably ZACCARIA, cited, pp. 174-186.

¹¹⁰ See Article 9 of Legislative Decree No 177/05. For a detailed overview of all the competences, especially the ones on broadcasting, see A. FRIGNANI, E. Poddighe, V. ZENO-ZENCOVICH (eds.), *La televisione digitale: temi e problemi - Commento al D. lgs. 177/05, T.U. della radiotelevisione*, Milano, Giuffrè Editore, 2006, notably at pp. 342-351. See also BRUNO & NAVA, cited, pp. 131-139. It is perhaps worth adding here that the Government is also entitled to approve the Service Contract with RAI (as negotiated by the competent Ministry) and the Licence Convention between the State and RAI (i.e., a 20-year agreement on the conditions for using the licence for public radio and television broadcasting).

¹¹¹ Regarding the plan of the distribution of radio spectrum resources (among different types of services), which is drawn up by the competent Ministry after having consulted, inter alia, AGCom, see Article 42 of Legislative Decree No 177/05. As for licensing requirements, see Articles 14 and 25 of Legislative Decree No 259/03 as well as Article 15 (again) of Legislative Decree No 177/05. According to the latter provisions, in essence, network operators and service providers are subject to a 'general authorisation' scheme. For the provision of (linear audiovisual) contents on terrestrial frequencies, authorisations are issued by the competent Ministry (on the basis of the rules established by AGCom), while for the provision of (linear audiovisual) contents through other communications networks, AGCom itself grants the authorisation. It could be mentioned that the distinctions between these different operators were (already) specified by AGCom, in Delibera No 435/01/CONS, of 15 November 2001.

¹¹² See SICA & ZENO-ZENCOVICH, cited, noting that the competent Ministry "viene trattato a tutti gli effetti come una seconda autorità nazionale di regolamentazione, nonostante all'interno del codice delle comunicazioni elettroniche [i.e., the Legislative Decree No 259/03] solo l'AGCom venga esplicitamente definita come tale e [...] che l'intreccio dei ruoli spettanti ai due organismi di controllo porta spesso ad una sovrapposizione di competenze" (p. 156). It should be mentioned, however, that provisions are established to ensure consultation and cooperation between the competent Ministry and AGCom: see, for instance, Article 7 of Legislative Decree No 259/03.

Alongside the central administration, an important role in the governance of the communications sector is played by the Regions. Indeed, very briefly, apart from the specific functions they fulfil through the abovementioned CoReCom, the Regions are entrusted by the Constitution with shared legislative competences in the communications sector. The attribution of such competence to the Regions stemmed from the 2001 reform affecting Title V of the Constitution.¹¹³ Questions have been raised concerning how to implement the renewed Article 117 of the Constitution, which did not previously provide for such shared legislative power in this field.¹¹⁴ Some necessary guidelines, as well as some more detailed criteria for the exercise of this power, have now been established by the national statutory provisions on electronic communications and audiovisual media services, in relation to regional activities.¹¹⁵ Although framed in a very broad way, these provisions appear to be of utmost importance in ensuring uniformity and coherence not only with principles of constitutional status (such as the freedom of expression, under Article 21 of the Constitution), but also with supranational principles, such as those established by EU law, within a State that does not have a federal structure. Here, other delicate issues arise, which are not exclusively confined to the need to ensure consistency with the action of national bodies, such as AGCom.

Finally, apart from the role of Parliament, and that of central and local administrations, it should also be mentioned that other administrative bodies fulfil important functions in the governance of broadcasting.¹¹⁶ In this respect, a few words should be spent on the *Autorità Garante della Concorrenza e del Mercato* (the competition Authority, AGCM), established as an independent Authority by Law No 287 of 10 October 1990.¹¹⁷ According to this law, the AGCM has general (non-sector specific) competence in the enforcement of competition law. This competence therefore also encompasses the communications sector.¹¹⁸ In this respect,

¹¹³ See Constitutional Law No 3, of 18 October 2001 (GURI No 248, of 24 October 2001).

¹¹⁴ The main problems have been encountered in defining the boundaries of the notion employed by the Constitution of “ordinamento della *comunicazione*” (*emphasis added*) – note the singular form – and accordingly in setting the limits of State interventions and the margins of actions (to be) taken by the Regions. It could also be observed that Article 117 of the Constitution provides for competition law to remain within the exclusive competence of the national legislator: reconciling the new shared competence with this exclusive one may pose additional problems.

¹¹⁵ See, respectively, Article 5 of Legislative Decree No 259/03 and Article 12 of Legislative Decree No 177/05.

¹¹⁶ Besides the case mentioned below, one could also recall here the CNU, already described above.

¹¹⁷ Law No 287/90 on “Norme per la tutela della concorrenza e del mercato”, is published in GURI No 240, of 13 October 1990. See also <http://www.agcm.it/>.

¹¹⁸ Moreover, under Legislative Decree No 206, of 6 September 2005 (GURI No 235, of 8 October 2005), the AGCM has also competence on misleading and comparative advertising (but, note the ruling of the Consiglio di

Law No 249/97 reserved a merely consultative function for AGCom.¹¹⁹ Hence, whenever the enforcement of competition law by the AGCM affects communications operators, this Authority is obliged to obtain the opinion of the AGCom Board.¹²⁰ Nevertheless, the AGCM may disregard the suggestions of AGCom when adopting its decisions. In fact, the opinion of the latter is not binding in its content. Inconsistencies between the positions adopted by the two Authorities are therefore possible.¹²¹ However, it should also be pointed out that, according to EU law, the legislator attributed to AGCom the task of analysing the relevant communications markets and introducing appropriate measures to correct any distortions to competition arising therein. In this context, it is AGCom that must seek advice from the AGCM.¹²² Overall, it appears that, while introducing the risk of inconsistencies in the application of competition law within the communications sector, the legislator has nevertheless laid the foundations for intense institutional collaboration between the two Authorities, which are both called upon to perform this task, each within its own sphere of competence. The 2004 agreement between the two independent authorities could be seen as a

Stato 11/2012, which in substance attributed exclusive jurisdiction to AGCom on issues related to misleading advertising concerning telecommunications). According to Law No 215, of 15 July 2004, on “Norme in materia di risoluzione dei conflitti di interessi” (GURI No 193, of 18 August 2004), the AGCM is also empowered to verify that holders of government posts, in the exercise of their functions, devote themselves exclusively to promoting the public interest and abstain from taking actions and participating in collegial decisions when they are exposed to a conflict of interests (as defined therein). It should be noted, however, that still according to Law No 215/04, AGCom performs this function in cases of conflicts of interests involving government officers directly holding/controlling (or through their relatives) market operators active within the communications sector.

¹¹⁹ Before the establishment of AGCom, the *Garante* itself had the power to enforce general competition law in relation to broadcasting and publishing, whereas the consultative role was reserved to the AGCM: Article 20(1) of Law No 287/90 explicitly provided for this derogation in favour of the attribution of competition enforcement functions to the sector-specific Authority. This provision was then repealed by Law No 249/97, namely by Article 1(6)(c)(9) thereof. However, it should be recalled that the enforcement of sector-specific antitrust provisions is bestowed upon AGCom: see Article 43 of Legislative Decree No 177/05. Hence, while it is a matter for the AGCM to patrol abuses of dominant positions in the communications market according to the general provisions of competition law, it is for AGCom to intervene in cases of the mere establishment of dominant positions according to the sector-specific statutory measures.

¹²⁰ See Article 1(6)(c)(11) of Law No 249/97: it is also worth stressing here that, as provided therein, if the opinion is not rendered within the set time-frame, the AGCM can proceed without it.

¹²¹ One (significant) case has actually given rise to different assessments and conclusions by the two independent Authorities, as far as competition and pluralism in the broadcasting sector are concerned. This merger case involved (in 2001) two media groups (SEAT Pagine Gialle and Cecchi Gori Communications), where AGCom opposed the merger in the name (inter alia) of the protection of media pluralism (see *Delibera* No 51/01/CONS, of 17 January 2001), while the AGCM authorised it (albeit conditionally, imposing some commitments, without referring to media pluralism at all: see *Provvedimento* No 9142 (C4158), of 23 January 2001): on this case, see F. DONATI, “Pluralismo e concorrenza nel sistema dell’informazione (considerazioni a margine del caso Seat-Telemontecarlo)”, in *Diritto delle Radiodiffusioni e delle Telecomunicazioni* [2001] 1, pp. 23-48.

¹²² See Article 19 of Legislative Decree No 259/03. In these cases, nonetheless, it is up to AGCom to resort to competition law categories. On a further issue, note also that, in cases of misleading and comparative (broadcasting) advertising, the AGCM has to request a non-binding opinion from AGCom: see *Legislative Decree* No 206/05.

sign of the development of such collaboration, especially in the field of electronic communications.¹²³ More generally, reference could also be made to the provisions adopted by AGCom regarding its internal organisation and functioning, wherein it recognises its task of promoting appropriate coordination with the other independent authorities established by the law, as well as with the authorities (and administrations) of foreign States.¹²⁴

3.3 The functioning of AGCom and its impact on the governance of the audiovisual sector: what contribution to securing media pluralism?

As it has emerged from the foregoing considerations, the statutory provisions governing the activities of AGCom call upon this Authority, inter alia, to contribute to safeguarding and promoting media pluralism in the broadcasting sector. However, these provisions lack any definition of the notion of media pluralism, neither is it enshrined as such in the Italian Constitution. Nonetheless, the scope and normative nature of this notion has been substantially clarified by the Constitutional Court through its case-law.

Indeed, in its interpretation of Article 21 of the Constitution (as recalled above), which guarantees that anyone has the right to freely express their thoughts in speech, writing, or any other form of communication, the Constitutional Court has firmly anchored media pluralism to the right to (seek, receive and impart) information, which is directly related to freedom of expression.¹²⁵ In this respect, the Court has explicitly given shape to this notion in the field of

¹²³ See the “Accordo di collaborazione tra l’Autorità per le garanzie nelle comunicazioni e l’Autorità garante della concorrenza e del mercato”, agreed by the respective Presidents of the two Authorities and published on 28 January 2004. The agreement fulfils the need to establish mechanisms for cooperation as indicated by Article 8 of Legislative Decree No 259/03. Anyway, as it appears from its title, this agreement is purportedly intended to deal with the necessary cooperation in the field of electronic communications: more general ones have also been adopted by the two Authorities, such as the “Protocollo di intesa tra l’Autorità per le garanzie nelle comunicazioni e l’Autorità garante della concorrenza e del mercato”, of 22 May 2013, in view of the realisation of a sincere cooperation between themselves in order to guarantee the correct functioning of the market they supervise (see, in this respect, the judgment of the Consiglio di Stato 1271/2006).

¹²⁴ See (now) Article 35 of the measures adopted by (the already-mentioned) Delibera No 223/12/CONS.

¹²⁵ The landmark ruling rendered by the Italian Constitutional Court in this context is judgment 826/1988 (by which the following brief notes are inspired). Other relevant constitutional decisions that followed suit are judgments 112/1993, 420/1994, 155/2002 and 466/2002. For a detail account of this (and earlier) case-law, as well as its repercussions on legislation, see CARETTI, cited, notably pp. 117-135 and pp. 145-148; PACE & MANETTI, cited. For the pivotal role of the Constitutional Court (as well as the judiciary, in general) in implementing the principles related to freedom of expression in the Italian legal order, see F. CASAROSA, E. BROGI, “The Role of Courts in Protecting the Freedom of Expression in Italy”, in E. PSYCHOGIOPOULOU (ed.), *Media Policies Revisited: The Challenges for Media Freedom and Independence*, London, Pelgrave, 2014, pp. 101-114.

broadcasting, by distinguishing between external and internal pluralism. The Constitutional Court has made it clear that information pluralism encompasses, on the one hand, a plurality of media outlets operating in the broadcasting market, supported by diversity in their ownership and, hence, by the prohibition not only of monopolies (or oligopolies), but also of situations in which a single actor can occupy a dominant position within that market, as this would render any structural plurality nugatory. On the other hand, information pluralism also requires (each of) the media outlets to represent in their programming the diversities existing in society at a political, cultural or religious level (and so forth). The constitutional case-law has also clarified that external pluralism essentially relates to the private sector, while internal pluralism is related (mostly, but not exclusively) to the public service broadcaster. According to the Constitutional Court, both dimensions are to be reconciled in order to achieve ‘substantive’ pluralism, and thus effectively ensure everyone’s right to information.

It is within this context, and under the ‘pressure’ of such case-law, that the Italian legislator has (over time, with more or less satisfactory results) taken into account the aforementioned normative principles laid down by the Constitutional Court. Thus, media pluralism is explicitly recognised, in the national legislative framework regulating audiovisual media services, as a fundamental principle governing the entire audiovisual media system,¹²⁶ as well as a general interest objective to be ensured by sector-specific normative provisions.¹²⁷ Moreover, precisely in view of the need to guarantee media pluralism, the legislator has provided for the norms on audiovisual media services to be applied as special ones, notably prevailing, where appropriate, over provisions established in the field of electronic communications.¹²⁸

¹²⁶ According to Article 3 (headed, “Principi fondamentali”) of Legislative Decree No 177/05, the fundamental principles of the audiovisual media system are in fact “la garanzia della libertà e del *pluralismo dei mezzi di comunicazione radiotelevisiva*, la tutela della libertà di espressione di ogni individuo, inclusa la libertà di opinione e quella di ricevere o di comunicare informazioni o idee senza limiti di frontiere, l’obiettività, la completezza, la lealtà e l’imparzialità dell’informazione, [...], l’apertura alle diverse opinioni e tendenze politiche, sociali, culturali e religiose e la salvaguardia delle diversità etniche e del patrimonio culturale, artistico e ambientale, a livello nazionale e locale, nel rispetto delle libertà e dei diritti [...] garantiti dalla Costituzione, dal diritto dell’Unione europea, dalle norme internazionali vigenti nell’ordinamento italiano e dalle leggi statali e regionali” (*emphasis added*). See also Article 4 (where pluralism is specified as a principle aimed at protecting the audience) and Article 5 thereof (where, in order to guarantee media pluralism itself, further principles are dictated).

¹²⁷ See notably Article 15 of Legislative Decree No 177/05, which provides for the respect of pluralism among the conditions to be taken into account in the exercise of the activity of network operator.

¹²⁸ See Article 53 of Legislative Decree No 177/05.

Against this background, AGCom has an important role to play in the promotion and protection of media pluralism.¹²⁹ To this end, its governing statutory provisions bestow upon it decision-making, monitoring and sanctioning powers that cover all its aforementioned dimensions.

As regards external pluralism, one (complex) field in which AGCom has significant responsibilities and decision-making powers is planning the allocation of radio spectrum frequencies needed to conduct broadcasting activities (and, more broadly, the general regulation of these activities).¹³⁰ As already recalled, it is indeed up to AGCom to adopt the necessary measures to regulate the allocation of television (and radio) broadcasting frequencies. In this respect, for example, AGCom steered the process that has led to the inception of digital television, leading to a multiplication of the broadcasting frequencies available (the so-called “digital-dividend”), by setting the criteria to be observed in the transition from the old analogue-based transmission system to the new digital broadcasting environment, having regard especially to the allocation of these (new) frequencies.¹³¹ These

¹²⁹ Article 10(1) of Legislative Decree No 177/05, states that AGCom, “nell’esercizio dei compiti ad essa affidati dalla legge, assicura il rispetto dei diritti fondamentali della persona nel settore delle comunicazioni, anche mediante servizi di media audiovisivi o radiofonici”. As noted by F. STANCATI, “Governo dei vecchi e nuovi media, ruolo degli organi di garanzia e presidi costituzionali della informazione e della radiodiffusione: spunti problematici”, in *Il Diritto dell’Informazione e dell’Informatica* [2005] 2, pp. 205-235, the legislative interventions in the field of broadcasting following the establishment of AGCom have increasingly affirmed not only its function as “organo ‘equilibratore’ o ‘di governo’ del sistema inteso nella sua valenza meramente organizzativa e, segnatamente, economico-finanziaria – ovvero di organo dotato di attivi poteri di controllo (e contrasto) verso gli effetti elistorisivi connessi agli assetti del mercato radiotelevisivo e di regolazione e ricomposizione dello stesso alla stregua dei (radi) criteri dettati dalla legge – bensì di organo garante, nel senso più esteso del termine, dell’esercizio (e del rispetto) di un diritto fondamentale nella sua raffigurazione più ampia; nella specie comprensiva non più soltanto della dimensione strutturale ma anche della dimensione sostanziale della libertà di manifestazione del pensiero” (p. 216). Given the broad scope of action of AGCom as regards media pluralism, and the considerable amount of acts (of diverse nature and content) it has adopted in this respect, the following considerations are not intended to be by any means exhaustive, but rather to take into account the most relevant cases as examples.

¹³⁰ As regards the regulation of digital (television) broadcasting activities, the framework measures adopted by AGCom are contained in Delibera No 353/11/CONS, of 23 June 2011 (as subsequently modified), which repeals Delibera No 435/01/CONS.

¹³¹ See Delibera No 181/09/CONS, of 7 April 2009, which modifies Delibera No 603/07/CONS, of 21 November 2007. The measures were adopted after having consulted relevant market and institutional stakeholders (as set forth by Delibera No 414/07/CONS, of 2 August 2007). The procedures for the allocation of the newly available frequencies were enacted by Delibera No 497/10/CONS, of 23 September 2010, in essence, requiring (as a sort of “must-offer” obligation) the biggest operators (RAI, RTI and Telecom) to transfer 40% of the (new) transmission capacity they would have acquired (free-of-charge) to independent content providers (for a period of five years) via the so-called “beauty contest” (thereby launched). However, Decree Law No 16, of 2 March 2012 (GURI No 52, of 2 March 2012), then converted by Law No 44, of 26 April 2012 (GURI No 99, of 28 April 2012), annulled the “beauty contest” and provided for digital terrestrial frequencies to be awarded through an auction procedure. To comply with the new procedure (and explicitly taking into account also the need to cope with relevant EU law obligations), AGCom then adopted Delibera No 277/13/CONS of 25 June 2013, which, however, did not include any obligation to transfer transmission capacity, since the frequencies to be awarded had significantly decreased and the aforementioned operators were excluded from the new procedure. Interestingly, AGCom launched (by Delibera No 438/13/CONS, of 18 July 2013) a market analysis straight

criteria, the majority of which consist of technical requirements, have also served as the basis for its plan for the allocation of digital broadcasting frequencies, adopted in 2010 and now in force.¹³² Among them, the guarantee of pluralism stands out as the key rationale embraced by AGCom in orienting the choices to be made.

In order to ensure external pluralism, pursuant to its statutory obligations, AGCom has also constantly undertaken monitoring and (to a lesser extent) enforcing activities. Indeed, it is AGCom's task to verify (either *ex officio* or upon the request of a third party with a legitimate interest) whether there are dominant positions in the relevant market, which are prohibited *per se*.¹³³ According to the legislation, dominant positions are to be assessed essentially on the basis of anti-concentration caps of a technical and economic nature.¹³⁴ The former consist of a limitation (already referred to above) for each broadcaster (or rather, audiovisual media content provider) to operate no more than 20% of all available channels (having regard to the aforementioned frequency plan, in an all-digital broadcasting system). The latter amount to an individual threshold of a maximum of 20% of the total turnover generated within the so-called "integrated communications system" (*sistema integrato delle comunicazioni, SIC*).¹³⁵ As regards the economic cap in particular, AGCom is required to conduct market analysis aimed at verifying that the threshold has not been exceeded. In fact, having identified and examined the (sub-)markets composing the SIC,¹³⁶ AGCom first has to annually assess their

afterwards to verify the actual conditions for the offer of available transmission capacity before possibly establishing regulatory obligations in this respect, which was concluded with the adoption of Delibera No 283/14/CONS, whereby, given the ascertainment of "l'esistenza di un'ampia, oltre che diversificata, offerta di capacità trasmissiva disponibile a livello nazionale", it was decided not to impose any access obligation. For an account of (almost all) the different stages of this 'saga', see G. AVANZI, "Sistemi di assegnazione delle frequenze radio-televisive tra valorizzazione economica e tutela del pluralismo", in *Rivista Italiana di Diritto Pubblico Comunitario* [2013] 2, pp. 317-350.

¹³² See Delibera No 300/10/CONS, of 15 June 2010. As far as the allocation of broadcasting frequencies is concerned, it should be mentioned that the law itself (i.e., Article 8 of Legislative Decree No 177/05) provides (as a sort of "must-carry" obligation) for one third of the overall transmission capacity to be reserved for local broadcasters, in order to ensure the protection and promotion of local and regional cultures.

¹³³ See, in general, Article 43 of Legislative Decree No 177/05, which (also) provides for contracts, mergers and arrangements exceeding the established antitrust caps to be null and void.

¹³⁴ Moreover, detailed cross-media thresholds are also provided: Article 43(12) of Legislative Decree No 177/05 precludes companies engaging in nationwide broadcasting or electronic communications activities exceeding given revenue thresholds from acquiring stakes or participating in the establishment of daily newspapers.

¹³⁵ See Article 43(9) of Legislative Decree No 177/05. The SIC, which is a relevant market defined by the law, includes a number of significant economic activities relating to: (daily and periodical) newspapers and magazines; yearly and electronic publishing (also via the Internet); radio and audiovisual media services; cinema; advertising; communication initiatives for products and services; sponsorship.

¹³⁶ See Delibera No 555/10/CONS of 28 October 2010, whereby, having regard to competition law rationales as well as to media pluralism objectives, five sub-markets were identified: free-to-air TV, pay TV, radio broadcasting, daily newspapers and periodicals.

actual size (in economic terms) and then concretely verify any possible breach of the threshold.¹³⁷ Should such a breach be confirmed, AGCom is called upon to intervene and set remedies.

To date, no violation of the thresholds has been found, although, on the basis of the legislation previously in force (which did not encompass the SIC), a breach of the similar technical threshold provided for in the old analogue-broadcasting environment was identified, and sanctions were issued against the public service broadcaster (RAI) and the most prominent private one (RTI).¹³⁸ However, these sanctions were contested by the broadcasters involved and overruled by the competent administrative court, notably on the basis that AGCom's resolutions failed to identify precise measures to remedy the situation, as they were limited to ascertaining factual circumstances, without fully taking into account the power (also) conferred upon the sector-specific regulator by the legislation to prevent similar cases from happening, instead of merely intervening *ex post*.¹³⁹ Interestingly, in relation to these findings, AGCom also adopted a specific resolution to safeguard media pluralism, imposing measures targeted to the aforementioned broadcasters, such as the duty to grant independent content providers the possibility to exploit part of their transmission infrastructure resources.¹⁴⁰ On a more general level, and more recently, in performing its monitoring activities within this field, and considering the contribution of the Internet to fostering media pluralism, AGCom

¹³⁷ For a recent example, see Delibera No 114/14/CONS, of 13 March 2014. It should be noted that companies operating in the SIC must notify mergers both to AGCom and to the AGCM, at the same time.

¹³⁸ See, first, Delibera No 226/03/CONS (followed by Delibera No 117/04/CONS, of 30 April 2004), and Delibere No 297/04/CONS, No 298/04/CONS and No 299/04/CONS, of 15 September 2004); and, then, Delibere No 150/05/CONS, No 151/05/CONS and No 152/05/CONS, of 8 March 2005, issuing the contested sanctions (of 2% of the 2003 advertising turnover of the operators involved).

¹³⁹ See the judgments of TAR Lazio 13766/2005, 13767/2005 and 13768/2005, later confirmed by the judgments of the Consiglio di Stato 5460/2006, 5461/2006 and 5462/2006. The significant and ample powers of AGCom to act not only *ex post*, but also *ex ante* to prevent threats to media pluralism, are now clearly indicated by Article 43(5) of Legislative Decree No 177/05, where it is stated that it is for AGCom itself to adopt “i provvedimenti necessari per *eliminare o impedire* il formarsi delle posizioni [dominanti], *o comunque lesive del pluralismo*”, taking into account the changing features of the market (*emphasis added*). In such cases, AGCom can issue injunctions and other structural remedies.

¹⁴⁰ See Delibera No 136/05/CONS, of 2 March 2005. The features of independent content providers were defined by Delibera No 264/05/CONS, of 6 July 2005. However, in view of the not completely satisfactory results of these measures, further supportive ones were enacted, notably though Delibera No 163/06/CONS, of 22 March 2006. It could be added here that, in order to ensure competition and pluralism in the (old) analogue broadcasting market, favouring new entrants and smaller competitors, as well as preventing dominant firms in that market from acquiring similar market power in the (new) digital market, AGCom decided to continue applying the obligations imposed on the biggest operators (RAI and RTI) by Delibera No 159/08/CONS, of 9 April 2008 (relating to analogue broadcasting, issued after the related market analysis, and notably obliging these operators to grant access to their transmission infrastructure on a transparent and non-discriminatory basis), adopting Delibera No 181/09/CONS, of 2009 (concerning digital broadcasting, and valid until the completion of the digital switchover process, i.e. 31 December 2012).

has suggested (to the legislator) modifying the economic areas that should be taken into account in assessing dominant positions within the SIC, to include some new ones (such as Internet advertising revenues) and exclude others (minor ones): this suggestion was largely adopted then by the legislator.¹⁴¹

As far as internal pluralism is concerned, one of the major roles assigned to AGCom consists in the supervision of the public service broadcaster (RAI). This supervision is conducted through constant monitoring of the latter's activities on the basis of the relevant statutory provisions, of the objectives set forth by the aforementioned *Commissione parlamentare* and, in particular, of the obligations imposed upon it by the (national) "Service Contract" (mentioned above).¹⁴² This contract, renegotiated every three years between the competent Ministry and the public broadcasting company, details the public service remit according to the guidelines adopted by the Ministry together with AGCom, defined in relation to market developments, technological progress and changing local, national and cultural requirements. In setting these guidelines and the related obligations AGCom has a margin of manoeuvre to ensure respect for the fundamental policy objective at stake. Looking, for instance, at the latest guidelines issued by the Authority,¹⁴³ they establish specific requirements concerning the need for the public broadcaster to improve the quality of information programming in order to give a concrete form to pluralism. Against this background, it should also be highlighted that it is then up to AGCom to verify that the public service broadcasting mission is effectively fulfilled, in compliance with the prescriptions contained in the service contract (and the relevant statutory provisions), and therefore including those on information pluralism. In cases of non-compliance, AGCom has the power to open formal proceedings, which, in the event of a confirmed infringement, could lead, besides formal warnings, to sanctions of a pecuniary nature or, in the most serious cases, suspension of broadcasting for a limited time.¹⁴⁴ To date, however, no such infringements have been found on the grounds of a breach of information pluralism (except perhaps for one case, although not so clearly),¹⁴⁵ and hence no such sanctions have been issued by AGCom.

¹⁴¹ See Article 43(10) of Legislative Decree No 177/05.

¹⁴² See Article 45 of Legislative Decree No 177/05.

¹⁴³ See Delibera No 587/12/CONS, of 29 November 2012, which provides the guidelines for the Service Contract for the years 2013-2015.

¹⁴⁴ See Article 48 of Legislative Decree No 177/05.

¹⁴⁵ See Delibera No 19/09/CONS, of 21 January 2009.

However, this Authority's contribution to internal pluralism goes beyond overseeing (and sanctioning) the public service broadcaster's activities in general, focusing in particular on the regulation and monitoring of political representation in television broadcasts (as mentioned above). In this respect, once again the legislative provisions set the framework within which AGCom is required to intervene.¹⁴⁶ According to these provisions, two general distinctions are made: the first is between non-electoral and electoral broadcasting periods, while the second is between information programmes and political communication ones (with a third category of programmes also being provided for: the so-called "self-managed" airtime slots). In both of the first two cases, general principles of impartiality and undue prominence apply, while in the latter two, stricter quantitative prescriptions are to be observed. Given these distinctions, AGCom is responsible for dictating specific rules to implement the principles set forth by the general provisions to be observed by private broadcasters; while (as already recalled above) the *Commissione parlamentare* draws up specific provisions for the public broadcasting service operator (although the two entities are required to act after having consulted each other and produce similar outputs). However, it is worth restating that the monitoring and enforcement of all the detailed provisions for both private and public broadcasters is the sole competence of AGCom, which carries them out at both national and regional level (in the latter case, with the support of the aforementioned CoReCom). In this context, it is interesting to note that AGCom has enacted a regulation for broadcasting programmes outside electoral periods that elaborates upon the criteria for ensuring political pluralism.¹⁴⁷ This regulation intrudes upon the broadcasters' editorial freedom, as it prescribes a series of detailed requirements to be observed in terms of the representation of political actors in programmes broadcast, which are set to be more stringent as electoral periods approach.¹⁴⁸ Indeed, during these periods, stricter quantitative rules are drawn up (each time) and applied. In particular, AGCom is responsible for the adoption of regulations addressed (again) only to private broadcasters (as the detailed rules for the public service operator are to be set by the *Commissione parlamentare*), in relation to the already mentioned so-called '*par condicio*'

¹⁴⁶ These provisions are established by Law No 28/00 (as subsequently modified). Moreover, and more generally, having stated that broadcasting information (in general) is a service of general interest, Article 7 of Legislative Decree No 177/05 provides, inter alia (as one of the main aims of broadcasting regulation), that all political actors should have access to news programmes and political advertising on a non-discriminatory and impartial basis, and that it is up to AGCom to implement these principles.

¹⁴⁷ See Delibera No 200/00/CSP, of 22 June 2000, as integrated by Delibera No 22/06/CSP, of 1 February 2006.

¹⁴⁸ See notably Article 2(3) of the aforementioned Delibera No 22/06/CSP.

(i.e., equal treatment, or equal time) principle.¹⁴⁹ This means, in essence, that all political forces have to benefit from quantitatively and qualitatively equivalent broadcasting time. It seems that, by adopting the necessary implementing rules, AGCom is able to shape the degree of political representation, for instance by defining the notion of “political actors” (*soggetti politici*) who have the right to enjoy broadcasting time under equal conditions, and thus going beyond the mere correspondence with political parties.¹⁵⁰ Once again, it is up to AGCom to monitor and enforce the regulations established in relation to all operators, both public and private. The monitoring and enforcement functions are performed according to the rules AGCom itself has adopted in order to guarantee the transparency of its work.¹⁵¹ It is apparent from these rules that the methodology employed is essentially based on quantitative measuring, which varies (in its frequency in time) between electoral and non-electoral periods (monitoring being carried out more often in the former case), and that the distinction between information and political communication programmes is difficult to apply in practice. The interventions on the part of AGCom are constant and numerous, but not always consistent. They normally consist of orders to the broadcaster concerned to restore the broken equilibrium in the representation of political forces, or of pecuniary sanctions, which are applied pursuant to the general powers conferred upon AGCom (as the specific legislation on political representation in broadcasting does not refer to such an option). AGCom’s interventions in the supervision of political pluralism are mostly based on claims brought to its attention by interested parties.¹⁵²

Last but not least, it should also be mentioned that (still within the framework of the statutory provisions on broadcasting) AGCom is required to perform important tasks in the implementation of EU law requirements that have an impact on (internal) pluralism, such as those regarding the promotion of European works,¹⁵³ access to events of major importance for society,¹⁵⁴ or short news reporting.¹⁵⁵ In all these cases AGCom has given a concrete form to

¹⁴⁹ See, as a matter of example, Delibera No 138/14/CONS, of 2 April 2014, on the EU elections of spring 2014.

¹⁵⁰ See Article 2 of the aforementioned Delibera No 138/14/CONS.

¹⁵¹ See Delibera No 243/10/CSP, of 15 November 2010.

¹⁵² For a more detailed account of the implications related to the *par condicio* regime, see O. GRANDINETTI, “Par condicio e programmi d’informazione”, in *Giornale di diritto amministrativo* [2008] 10, pp. 1157-1163.

¹⁵³ See Delibera No 66/09/CONS, of 13 February 2009 (as subsequently modified), which was integrated, as far as on-demand audiovisual media services are concerned, by Delibera No 188/11/CONS, of 6 April 2011.

¹⁵⁴ See Delibera No 8/99/CONS, of 8 March 1999, integrated then by Delibera No 131/12/CONS, of 15 March 2012.

these requirements by adopting specific measures, and thus constructed their application in order to favour (also) media pluralism.

To sum up, the powers to foster media pluralism bestowed upon AGCom appear wide-ranging, and their exercise by this Authority is particularly significant, given, notably, the (relatively) wide margin of manoeuvre it has in performing its regulatory (as well as supervisory) functions.¹⁵⁶ As results from the findings above, it could be said that, in some cases in particular, such as in the allocation of radio spectrum frequencies, AGCom has played a decisive role and has effectively identified interventions capable of taking into account (also) the criticism raised by the EU Commission on the shortcomings of the national (legislative) framework. Likewise, when establishing the principles to be included in the renewal of the Service Contract with the public service broadcaster (RAI), AGCom has fulfilled its task in a timely and consistent manner. Moreover, its monitoring of broadcasters' programmes during election periods is performed with commitment and has often given rise to useful indications for the correction of evident imbalances, notwithstanding the difficulties of implementing somewhat cumbersome legislation. Thus, it can be concluded that the promotion and protection of pluralism owes much to the functioning of the national regulator, and that the strengthening of its role can have a significant (and positive) impact in this respect.

¹⁵⁵ See Delibera No 667/10/CONS, of 17 December 2010, integrated by Delibera No 392/12/CONS, of 4 September 2012.

¹⁵⁶ F. DONATI, V. BONCINELLI, "I regolamenti dell'Autorità per le garanzie delle comunicazioni", in P. CARETTI (ed.), *I poteri normativi delle autorità indipendenti*, Torino, Giappichelli, 2005, pp. 119-166, note that the normative powers of AGCom are atypical within the Italian legal order, from both procedural and substantive points of view, as its decision-making most frequently involves consulting interested parties and is based on discretionary assessments, especially in the broadcasting field, which are not strictly encapsulated in, nor merely reproductive of, statutory prescriptions.

Concluding and comparative remarks

IAAs for the media as institutional safeguards for media pluralism

The three national cases considered in the Chapters above, concerning the establishment and functioning of IAAs for the media (focusing especially on television broadcasting) in France, the UK and Italy, are particularly helpful in reconstructing the well-established tendency to select this model for the institutional actor with chief responsibility for the governance of the respective national audiovisual sector. Indeed, these case studies bring to the fore the main paradigmatic elements of IAAs for the media that operate within the EU audiovisual space and are now deeply rooted in the related institutional *acquis*, revealing some prototypical commonalities as well as differences in the institutional settings and functioning of the bodies established, especially concerning their contributions to securing media pluralism. These are the main reasons why the choice was made to take these three particular cases into account and explore them here. It is thus on such commonalities and differences that the following concluding (and briefly summarizing) remarks will focus, taking into account – in a (slightly) comparative perspective – the key features that have emerged in the previous pages concerning the CSA, Ofcom and AGCom.

As far as the institutional aspects of these three regulators are concerned, first of all, one could certainly note that their setting-up has not only responded to, but has also been fundamentally supported by, the need to deliver better – essentially, but not exclusively, economic – regulation for the evolving and increasingly competitive market(s) they oversee, as well as to simultaneously strengthen protection of the fundamental rights at stake in their field(s) of action: notably, the freedom of expression and its corollaries, such as media pluralism.¹ As seen above, both of these rationales have been put forward in the adoption of the establishing statutes of the CSA, AGCom and Ofcom (at different times, i.e. respectively in 1989, 1997, and 2003), giving a constitutional dimension to their work (having regard to the second rationale in particular), despite the fact that in France and Italy their existence and operations are not explicitly embedded in the respective national written Fundamental Laws.

Moreover, taking into account the above-described legal and historical processes that led to the establishment of the three national collegiate and board-led administrative bodies and their

¹ It could be claimed that economic rights (such as, first and foremost, the freedom to conduct a business and the right to property) are also at stake in the action of these bodies, and need to be guaranteed by them.

branches at the local level (particularly for AGCom), their birth does not seem to have constituted a complete novelty in the institutional framework for the regulation and supervision of audiovisual media, but rather an ‘evolution’ of pre-existing structures. This is particularly apparent for the UK, with Ofcom being set-up to simplify a somewhat ‘overcrowded’ institutional context, by replacing several pre-existing regulators and both absorbing and extending their functions. Nonetheless, in the cases of France and Italy, it may be noted that, while the CSA and AGCom also replaced pre-existing administrative bodies, their inception resounded like an institutional ‘revolution’, since their respective structures and competences were significantly broadened and strengthened vis-à-vis those of their predecessors.

In this respect, looking first and foremost at AGCom and Ofcom, beyond the differences in their foundations, the real ‘revolution’ in their establishment resides in the choice of the concrete model for their structure, which is that of the so-called “convergent regulator”, i.e. a single body with competence for both audiovisual media and electronic communications at the same time. As results from the analysis above, this choice has affected the internal organisation of these two regulators, essentially making a distinction among their key constituent organs and/or offices between those devoted to (audiovisual media) content/service regulation and those in charge of (electronic communications) network/service regulation, while also providing for the coordination of their work and a synthesis of it by their top internal bodies (if not, sometimes, the exercise of both types of competence). On a broader plane, this choice has also been grounded on – or, at least, has been supported by – the pertinent (substantive) regulatory framework evolving towards an approach that takes into account the convergence phenomenon and its related effects on the increased availability of audiovisual content through several distribution networks and platforms, beyond traditional delivery patterns. Furthermore, the choice of convergent bodies has not been questioned since the establishment of authorities such as AGCom and Ofcom, which have, in fact, consolidated their functions, and even experienced the expansion of their scope of action in relation to other regulated services (such as postal services), which are not strictly related to their traditional ‘core-business’.

However, in sharp contrast to the situation in Italy and the UK, France opted for, and has so far maintained, the alternative model of a single regulator for a single sector notwithstanding recurrent policy debates on the issue, bestowing regulatory competences upon the CSA only for audiovisual content-related issues, while entrusting regulatory powers in electronic communication matters to a separate ad hoc ‘equal-footing’ administrative authority and

providing for interactions between these two authorities, when appropriate. Each of the two models – i.e., the convergent regulator, such as AGCom and Ofcom, or the single sector-specific audiovisual media regulator, such as the CSA – has its own advantages and shortcomings.² Thus, a one-size-fits-all solution is difficult to envisage (and, perhaps, not even desirable), as no single option can, *a priori*, deal perfectly with and resolve all issues at stake in the domain of activities of the regulatory bodies concerned, also taking into account the specificities related to each national (and local) context. However, given the development, notably at EU level, of a trend in favour of convergent and technology-neutral, rather than sector-based, regulation (as already mentioned in Part I, and as will be further illustrated below, in Part III), which essentially distinguishes only between content and network-related issues, while also taking into account their interrelation, regulatory bodies such as AGCom and Ofcom may appear (at least in principle, and in institutional terms) better equipped to take full advantage of this situation and act accordingly.

Besides the major differences among the three media regulators considered, it is essential to stress a common fundamental feature that intrinsically characterises and links these (and other similar) bodies. The CSA, AGCom and Ofcom are, indeed, legally designed as *independent* administrative regulatory authorities. As confirmed elsewhere,³ formal independence matters, as it is intended (and does help) to guarantee the delivery of efficient results in the performance of the tasks and duties assigned to these administrative authorities, as well as the effective implementation on their part of the relevant statutory principles and provisions belonging to the legal framework(s) for audiovisual media services. It should be mentioned that ‘de facto’ independence, or a related ‘cultural attitude’, is also important for the same

² See, notably, C. COWIE, C.T. MARSDEN, “A Comparative Institutional Analysis of Communications Regulation”, in C.T. MARSDEN, S.G. VERHULST (eds.), *Convergence in European Digital TV Regulation*, London, Blackstone, 1999, pp. 191-215 (especially, pp. 194-195). Among the arguments presented in favour of convergent regulators, topical ones are: their better adaptability to evolving technological trends; avoidance of the duplication of activities; greater consistency in the results delivered; cost savings; building on (different) experiences; having a (sort of) ‘one-stop-shop’ for market operators and consumers/citizens alike, which are bigger in size and, hence, stronger in their institutional bodies. Arguments against them normally consist, instead, of: the risk of one-sector-related rationales overcoming the others and the delivery of inefficient results; difficulties in reconciling previously different regulatory cultures ‘under the same roof’; operational problems relating to the running of a bigger institutional entity, also in terms of transparency and accessibility to its functions from outside; and so forth.

³ See, in particular, the results of the study, commissioned by the (EU) Commission, on the “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive (INDIREG)”, whose final report was released in February 2011 (and is available at <http://www.indireg.eu/>), notably at pp. 11-74.

reasons, although more difficult to measure and appreciate.⁴ Indeed, independence allows these bodies to act impartially and accommodate the various interests at stake by adopting sound and consistent positions in the public interest, especially when sensitive policy objectives are involved, such as the protection and promotion of media pluralism through the operation of free and independent media.

As seen above, having regard to statutory independence in particular, several provisions, differing in nature, aim to ensure that these bodies are autonomous from political (and especially government) influence and the interference of market participants when carrying out their multifarious duties and functions. To this end, appointment-related rules, conflict of interest measures, transparency and accountability requirements and other relevant institutional provisions are set in place in all three legal orders examined, as reconstructed in the Chapters above. In this context it is interesting to note that the mechanisms provided, for instance regarding appointment-related rules, involve a key role for Parliament, especially in Italy, and to a lesser extent in France. While, on the one hand, this can somewhat indirectly lend a sort of democratic legitimacy to such bodies, like the IAAs at stake, which are normally referred to in political science literature as “non-majoritarian institutions” (i.e., decision-making bodies not directly elected by citizens),⁵ on the other hand, it could also negatively affect their independence, by tending to favour partisan (political) representation among the members appointed. The latter, however, is somewhat prevented – or, at least, moderated – by certain checks and balances (such as: appointment-related voting requirements; the duration of the mandate, generally exceeding that of the appointing Parliament; rules against unfair dismissal or preventing reappointment; personal requirements, such as expertise, the absence of any specific incompatibility, and abidance by rules of conduct; etc.), as well as other arrangements (e.g. the more or less formal participation of other actors, such as the President of the Republic, in the appointment of top organs; or, for the CSA, the system of partial and stepped renewals). A similar reasoning could also be followed for Ofcom, although the key appointing authority in this case is

⁴ See, notably, M. MAGGETTI, *Regulation In Practice: The De Facto Independence of Regulatory Agencies*, Colchester, ECPR Press, 2012, providing an accurate theoretical framework and analytical approach to this broad topic, as well as an explanation of the rationales characterizing that particular dimension of the independence requirement.

⁵ See, notably (in the vast literature on the matter), A. STONE SWEET, M. THATCHER, “Theory and Practice of Delegation to Non-Majoritarian Institutions”, in *West European Politics* [2002] 25, pp. 1-22, where, more precisely, they are defined as “governmental entities that [...] possess and exercise some grant of specialised public authority, separate from that of other institutions, but [...] are neither directly elected by the people, nor directly managed by elected officials” (p. 2).

different: while the almost exclusive role in the appointment of its (Board) members is played by the Government, general principles for public appointments and other specific measures (mainly: incompatibility requirements, rules of conduct and provisions to guard against unjustified dismissal; no rule clearly sets time limits for the mandate, while others allow for its renewal), including some peculiar structural arrangements envisaging the presence on the Board of appointed executive members amongst its internal officials apply in order to formally ensure its autonomy.

To further support the independence of the CSA, Ofcom and AGCom, as well as to legitimise their actions in the eyes of interested parties and public opinion in general, mechanisms of accountability and transparency are provided in all three cases and appear largely similar. These mainly consist of public consultations prior to the adoption of relevant measures, both official and less formal publicity for their acts, public reports on their work normally to Parliament, which does not have any formal power to approve them, although it can generally inquire into the work of these bodies, and judicial review of (some of) the decisions adopted. Last but not least, in relation to the (formal) independence of the media regulatory bodies concerned, it is also important to mention that the CSA, AGCom and Ofcom enjoy the power to organise their respective internal structures and adopt procedural norms to guide their work. Moreover, their general functioning is guaranteed by the financial resources they can rely on, provided through partially different arrangements for each of them, ranging from funds exclusively from the State budget (as in France) to a mixed system, whereby the necessary financial means derive both from the State and from fees charged to regulated entities (as in the UK), as well as from fines imposed on the latter where appropriate (as in Italy).

Besides independence, all three media regulators share very similar features as regards the missions and powers they have been assigned. Indeed, they were all created as the key player in the regulation of the audiovisual (and, for AGCom and Ofcom, also the electronic communications) sector within their respective legal orders, and are thus entrusted with considerable sets of competences, covering various aspects of broadcasting, ranging essentially from managing radio-spectrum transmission resources, to licensing/authorising relevant services, setting content-related as well as technical standards, adopting binding decisions, exerting advisory functions, monitoring compliance, handling individual complaints, settling disputes and issuing sanctions, where appropriate. *Ratione personae*, these powers cover, in particular, both the private/commercial and public service broadcasters subject to their jurisdiction, although their competence in relation to the latter is not exclusive,

but concurrent (or even overlapping) with ad hoc governing bodies (mostly internal to the public service broadcasters themselves, such as in the UK), which frequently have to deal with specific, but not radically dissimilar, provisions for certain matters beyond the scope of action of the sector-specific regulator. *Ratione materiae*, apart from the distinction between convergent and non-convergent regulators, the CSA and AGCom cover not only traditional linear broadcasting services but also new types of audiovisual services (such as on-demand ones). Ofcom, on the other hand, has delegated its functions in relation to the latter to an autonomous body, under a co-regulation arrangement, while also allowing other governance schemes, such as self-regulation, to develop – much more than in the two continental cases considered – regarding specific subject-matters, but always maintaining the ‘last-word’ on the work of these alternative modes of mainstream regulation.

It also emerges from the foregoing analysis that, although they represent the main regulatory/supervisory authorities in their respective fields of action, the CSA, Ofcom and AGCom do not operate alone. In fact, they coexist with other more or less relevant public authorities, which contribute to the regulation and supervision of the sectors at stake through complementary or even concurrent approaches, interacting with each other in performing their respective missions and competences, with the related risk of overlapping and inconsistencies in the results delivered. In this context, here it is interesting to highlight a distinctive feature that has emerged in relation to the application of competition law. Indeed, while Ofcom also represents the antitrust authority for the media, in the case of France and Italy competition law-related functions are not directly exerted by the CSA and AGCom, but rather by the respective competition authorities established in those countries, with whom the former collaborate to that end. At the same time, it has been pointed out above how, in all three legal systems considered, audiovisual regulation is increasingly permeated by economic/competition-oriented rationales adopted by the sector-specific regulatory bodies, so that here again, despite the coordination and cooperation arrangements between the relevant authorities, inconsistencies in the solutions envisaged are possible and can be detrimental to the development of the related market(s).

Besides analyzing the institutional features of the three IAAs for the media looked at closely in the Chapters above, the considerations made regarding their functioning have highlighted the great deal of work they all carry out, each in their respective national field of operation, with the aim of securing (external and internal) media pluralism. In this respect, in the implementation and application of the relevant statutory provisions, the CSA, Ofcom and AGCom make mostly policy-related choices to give concrete substance to media pluralism,

by resorting to their many powers, which differ in nature and extent (i.e., regulatory, enforcement, sanctioning powers and so forth). Several actions and measures have been considered above in order to show the fundamental role played by these independent administrative bodies. Among the most remarkable ones, it is worth recalling here: for the CSA, its intervention to ensure that political pluralism is properly represented through audiovisual broadcasting, via the elaboration and application of quantitative as well as qualitative criteria for its measurement; for Ofcom, its involvement in the assessment of media merger operations within the framework of the public interest test, in order to take into account media pluralism (or plurality) concerns; for AGCom, its intervention in network regulation, notably by prescribing network access provisions in order to allow independent content providers to effectively enter the market and offer their services, so as to strengthen programme diversity and variety.

Nevertheless, the above examination of the functioning of the three media regulators has also brought to the fore the existence of margins for further improvement in their role as guarantors and promoters of media pluralism. While intervention to that end at the national level could certainly contribute to addressing the issue, action on the part of the EU could also prove useful in that respect. Indeed, it has been seen above that the CSA, Ofcom and AGCom are in charge of the practical implementation of relevant media pluralism-related provisions of EU law (although mostly through the preliminary filter of statutory measures), such as, for example, those on broadcasting quotas, listed events and short news reports. Moving on from that, and perhaps even broadening the horizon towards a consistent ‘pan-European’ safeguard for media pluralism, so to speak, it could well also be up to the EU to introduce provisions for the consolidation and improvement of the national media regulators’ role and contribution, setting them as institutional preconditions to secure such a fundamental objective, which belongs to the constitutional traditions common to the Member States and is firmly enshrined among the values that permeate the action of the EU.

At present, as will be seen below (in Part III), while EU law itself seems to increasingly rely on independent regulatory bodies to ensure the implementation and enforcement of the audiovisual regulatory framework established at supranational level, (so far) it does not clearly deal with them in the same way as similar entities operating in other comparable sectors, where it explicitly prescribes their establishment according to certain precise institutional features. In fact, it has been noted above that the establishment of the three regulators taken into account did not stem from the need to abide by specific EU law requirements in this respect, at least – as far as the convergent regulators are concerned –

from the point of view of their competences regarding audiovisual media. However, bodies such as AGCom and Ofcom, which also cover electronic communications regulation, do fulfil the (EU) obligation imposed on Member States to have independent authorities that deal with such matters, and thus have to comply with EU rules in that context (this will be looked at below, again in Part III).

On the basis of all this, it cannot be ruled out that EU law, building on the comparable experiences gained in other regulatory fields, could provide a source to support and enhance the role of national IAAs for the media in their work as institutional guarantors of media pluralism in the European audiovisual space, also through their cooperation at the supranational level. It is thus to this latter dimension that the focus will turn in the following pages.

PART III

Introductory notes

Part I of this Thesis highlighted the boundaries and limits of the EU's direct and substantive regulatory intervention to foster media pluralism, alongside the importance of a European approach to steer the governance of such an intrinsically transfrontier phenomenon as the free circulation of audiovisual media services and content beyond national borders; Part II focused on the institutional response to the need to guarantee and promote media pluralism, namely through the establishment and functioning of national independent administrative bodies for the media. Building on all this, it is now interesting to take into account and evaluate what contribution the EU can make to setting the institutional preconditions to guarantee media pluralism, notably through the establishment and functioning of independent authorities, whether at national or at European level, in the latter case also by favouring their cooperation. The main underlying assumption of the following pages is, indeed, that institutional settings do matter as far as the achievement of substantive goals is concerned. EU law plays a significant role in establishing these settings in sectors that manifest comparable constitutional and structural relevance to that of audiovisual media, either due to their involvement of (other) fundamental rights or due to their economic/market and regulatory dimension: these are namely the sectors of data protection legislation, equality/non-discrimination law and electronic communication regulation.

Thus, attention will be paid first to the relevant developments and contents of EU legislation in such fields, as they could offer examples or models to be taken into account in the domain of audiovisual media law. Attention will then be paid to this latter domain, looking at the institutional governance settings in place not only within the EU legal order, but also outside (although in connection with) it, as well as to the existing, but somewhat weak, requirements of EU legislation as regards the setting-up of independent (national) public bodies for the media. In this respect, drawing also on the examples analysed in the other fields mentioned above, particular attention will be paid to the possibilities and limits for the EU in strengthening the institutional features of already established (or still to be established) independent regulatory and supervisory institutions for the media, with specific regard to the issue of independence, as well as to the incipient (formalised) cooperation among them, which offers some room for the development of an effective and consistent substantive approach to media pluralism at the European level.

Chapter I

The Influence of EU Law in the Setting-up of IAAs at National and EU Level

1.1 IAAs and fundamental rights: the case of data protection institutions

1.1.1 The right to the protection of personal data and EU law: preliminary observations

Article 8 of the EU Charter of Fundamental Rights (the “Charter”) recognises the protection of personal data as a fundamental right within the EU legal order. Its first paragraph states that “everyone has the right to the protection of personal data concerning him or her”. Such an explicit recognition of data protection as a right *per se* within a catalogue of fundamental rights is something of a novelty. In fact, many international legal texts on fundamental human rights (as well as national constitutions) take data protection into account mostly – if not exclusively – in relation to the right to privacy, rather than as an autonomous right.¹ Article 8 ECHR is a prominent example of this.² Nevertheless, remaining within the CoE’s legal order, one could also consider the existence of a more targeted instrument as regards data protection: namely, the Council of Europe Convention of 28 January 1981 for the Protection of

¹ It could be noted, however, that the right to data protection appears in some national constitutions: this is the case, for instance, of Article 35 of the 1976 Portuguese Constitution; of Article 18 of the 1978 Constitution of Spain. Nevertheless, G. GONZALEZ FUSTER, R. GELLERT, “The fundamental right of data protection in the European Union: in search of an uncharted right”, in *International Review of Law, Computers & Technology* [2012] 26, pp.73-82, argue for the inexistence of a common tradition of ensuring the protection of personal data as a fundamental right in several EU MS. The same Authors also contend, in substance, that the ECJ has not so far exploited the potentialities inherent in the recognition of data protection as a fundamental right, distinct from the right to respect for private life, arguing that the Court has been influenced by what they call ‘privacy thinking’ to construe the operation of a such new right. This seems to be confirmed by the reasoning the Court recently provided in Cases C-291/12, *Schwarz* [2013], C-131/12, *Google Spain and Google* [2014] as well as C-293/12 and C-594/12, *Digital Rights Ireland* [2014].

² Article 8 ECHR on the respect for private and family life (corresponding in essence to Article 7 of the Charter) has also been interpreted and applied to provide for the protection of personal data (as encompassed within the protection of private life), notwithstanding the absence within this Article (and within the whole ECHR) of an explicit reference to data protection (see, for instance, the ECHR judgment in Case *M.S. v. Sweden*, of 27 August 1997, in which the Court, at § 41, “reiterates that the protection of personal data [...] is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention”; or more recently, in the same vein, the ECHR judgment in Case *E.B. and others v. Austria*, of 7 November 2013, § 75).

Individuals with regard to the Automatic Processing of Personal Data (the so-called “Data Protection Convention”, also known as “Convention 108”, because of its numbering).³

As admitted by the explanations related to the Charter,⁴ Article 8 thereof was elaborated on the basis of pre-existing provisions of primary and secondary EU legislation (in addition to the abovementioned international legal texts). Accordingly, the foundations of the data protection provision contained in the Charter are to be found in Article 286 EC. This latter provision was one of the novelties introduced to the EC Treaty with the adoption of the Treaty of Amsterdam. Article 286 EC provided that Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data should (also) apply to the Community institutions and bodies. This provision has now been partially re-elaborated and merged into Article 16 TFEU. Very much in line with Article 8 of the Charter, Article 16 TFEU affirms, in its first paragraph, the right of “everyone” to data protection. In its second paragraph, this Article encapsulates the new ad hoc legal basis for the European Parliament and the Council (acting in accordance with the ordinary legislative procedure) to lay down rules relating, on the one hand, to the protection of individuals with regard to the processing of personal data – not only by EU institutions, bodies, offices and agencies, but also by the Member States when carrying out activities that fall within the scope of EU law – and, on the other hand, rules relating to the free movement of such data. Finally, the second paragraph of Article 16 TFEU specifies that the measures grounded on this provision cannot be of prejudice to the specific rules laid down in Article 39 TEU, which grants the Council the power to adopt decisions establishing rules relating to the protection of individuals, with regard to the processing of personal data by the Member States when carrying out activities that fall within the scope of the common foreign and security policy, as well as rules relating to the free movement of such data.⁵

³ Convention 108 deals with data protection essentially as the protection of the individual right to personal privacy – thus on the basis of Article 8 ECHR – with regard to the automatic processing of personal information relating to the individual. The Preamble states that the Data Protection Convention was adopted “to extend the safeguards for everyone’s rights and fundamental freedoms, and in particular the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing”, bearing in mind the necessity “to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples”. With these aims, Convention 108 was opened to signature also by non-CoE member countries. It now represents one of the oldest and still most prominent binding international legal instruments with a worldwide scope of application in this field. Amended and supplemented by an Additional Protocol (discussed later) and several recommendations, the Data Protection Convention has been ratified by all EU MS (the majority of them ratified, in fact, before the adoption of specific EU legal instruments in the field of data protection).

⁴ OJ [2007] C 303/17 (see p. 20).

⁵ To specify (or rather, limit) the scope of the general clause laid down in Article 16 TFEU, Declaration No 20 annexed to the final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon states, in line

As regards secondary EU legislation, the basis of Article 8 of the Charter lies in what could probably be identified as the oldest data protection instrument adopted within the EU legal order, pre-dating the first appearance of data protection in the body of the Treaty via the abovementioned former Article 286 EC. This legal instrument, which still constitutes the cornerstone of EU data protection law, is Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.⁶ As stated at its very outset, Directive 95/46 was adopted to protect “the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data” and ensure “the free flow of personal data between Member States”⁷. While it is clear that Directive 95/46 was conceived as an instrument of harmonisation of the divergent national legislations aimed at safeguarding fundamental rights and freedoms, and notably the right to privacy with regard to personal data, which sometimes hindered the cross-border flow of this data (the latter being both inherent in and beneficial to the development of economic and social activities within the internal market),⁸ it is also apparent that Directive 95/46 has the purpose of reconciling the functioning of the internal market with the protection of fundamental rights.⁹ In dictating common and general rules establishing equivalent safeguards among Member States in all activities relating to the processing of personal data, far from looking for a minimum common denominator among the existing safeguards, Directive 95/46 seeks to achieve and ensure a common high standard of data protection.¹⁰

with specific derogations already set down in the EU legislation in force, that whenever rules on the protection of personal data to be adopted on the basis of this provision could have direct implications for national security, due account will have to be taken of the specific characteristics of the matter; the following Declaration No 21 suggests that specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 TFEU may prove necessary because of the specific nature of these fields.

⁶ OJ [1995] L 281/31.

⁷ Respectively, paragraphs 1 and 2 of Article 1 of Directive 95/46, labelled “Object of the Directive”.

⁸ The internal market rationale of Directive 95/46 is clearly apparent from the legal basis referred to for its adoption: namely, former Article 95 EC (now, substantially, Article 114 TFEU).

⁹ See recitals 7-9 of Directive 95/46.

¹⁰ See recital 10 of Directive 95/46. According to O. DE SCHUTTER, “Article II-68”, in R. BURGORGUE-LARSEN, A. LEVADE, F. PICOD (eds.), *Traité établissant une Constitution pour l’Europe*, Bruxelles, Bruylant, 2005, (Tome 2), pp. 122-152, “il s’agissait, par l’adoption de cette directive [95/46], d’éviter que les États membres n’entravent l’échange de données transfrontières en invoquant la nécessité de protéger l’individu du risque que les données le concernant ne bénéficient pas, dans d’autres États, d’un même niveau de protection. L’établissement d’un seuil élevé de protection à travers l’Union va donc de pair avec une obligation de reconnaissance mutuelle de la protection de la vie privée qu’assure chacun des États; c’est en cens que la directive [95/46] constitue, à la fois, un important instrument visant à la protection des droits fondamentaux et un puissant atout dans la création d’un espace sans frontières intérieures” (p. 131).

To these ends, Directive 95/46 sets out a very detailed legal framework, providing definitions of the various notions in use in EU data protection law (e.g., the notion of “personal data”, which encompasses all information relating to an identified or identifiable person, either directly or indirectly; of “processing”, of “data subject”, etc.), and setting down substantive principles to form the bones of this body of law.¹¹ Article 8 of the Charter has taken some of these key principles on board. Thus, in its second paragraph, it states, in substance, that everyone has the right to have his/her personal data processed fairly and lawfully for specified purposes, and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, while he/she also holds the right of access to collected data and the right to have it rectified. Thus, in a sort of ‘virtuous circle’, the processing of personal data is governed by the legislation defining appropriate data protection conditions and requirements in order to substantiate the principles evoked above in sufficient detail, as well as to provide for exceptions in order to safeguard other legitimate interests.¹² In this respect, Directive 95/46 comes into play again, as it details the basic measures prescribing the conditions, criteria and limitations for such processing of personal data to take place.

However, apart from Directive 95/46, EU data protection law consists of several other normative acts, most of which have been adopted to detail and to adjust the provisions contained in the abovementioned Directive to specific contexts.¹³ This is the case, for instance, of Regulation (EC) No 45/2001 of the European Parliament and of the Council, of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies, and on the free movement of such data.¹⁴ This Regulation, in substance, extends the application of Directive 95/46 to EU institutions and

¹¹ Looking in detail at Directive 95/46, as regards the definitions and principles hinted at above, as well as the rights of data subjects and the standards of data quality it sets, its scope of application and actual functioning, fall beyond the scope of the present analysis: suffice it to refer, among the (not very) many general and systemic analyses of EU data protection law (and notably of Directive 95/46) to C. KUNER, *European Data Protection Law – Corporate Compliance and Regulation*, Oxford, OUP, 2007 (especially at pp. 19-24). See also L. COUDRAY, *La protection des données personnelles dans l’Union européenne: naissance et consécration d’un droit fondamental*, Berlin, 2010; and European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, *Handbook on European non-discrimination law*, Luxembourg, 2014.

¹² Concerning the possibility to derogate from the general principles established by Article 8 of the Charter, no objection can be raised to the application of the general provision of Article 52 to the former and, thus, to reading into the relevant sector-specific legislation already in place the guarantees providing lawful limitations to the exercise of the fundamental right to the protection of personal data. This is confirmed by joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke et Eifert* [2010], where the ECJ has underlined that the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society. See also Case C-543/09, *Deutsche Telekom* [2011].

¹³ See again KUNER, cited, *passim*.

¹⁴ OJ [2001] L 8/1.

bodies themselves (as envisaged by the abovementioned former Article 286 EC), while also establishing the European Data Protection Supervisor (EDPS), discussed below. Another significant example of an instrument designed to tackle specific concerns related to data protection and the development of new communication services and networks is Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (the so-called ‘e-Privacy’ Directive).¹⁵

In fact, still against the background of the need to further strengthen internal market functioning by removing persisting obstacles generated by different regulatory responses among Member States, and of growing concern for the protection of human rights’ protection, the development of information and communication technologies has pushed the Commission towards a review of the entire general legal framework on data protection – obviously focusing in particular on Directive 95/46. The aim of this review was to modernise the framework and give it the necessary efficiency to afford effective safeguards for the recognition and enforcement of the right to data protection in the scenarios evolving.¹⁶ Probably due to the increasing awareness of the fundamental right dimension of data protection, as formally recognised by the Treaties, and somewhat inverting the perspective behind Directive 95/46, the measures proposed (some of which will be looked at in more detail below) aim first and foremost to reinforce individuals’ fundamental right to data protection, while also considering the benefits for the digital single market of a more

¹⁵ OJ [2002] L 201/37. Directive 2002/58 replaces Directive 97/66/EC of the EP and of the Council, of 15 December 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ [1998] L 24/1). Directive 2002/58 has been now partially amended by Directive 2006/24/EC of the EP and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (OJ [2006] L 105/54) and further modified by Directive 2009/136/EC of the EP and of the Council of 25 November 2009 (OJ [2009] L 337/11). Overall, Directive 2002/58 deals with a number of issues, ranging from the security and confidentiality of communications, to the storage and use of traffic and location data, and unsolicited communications.

¹⁶ A review of the current legal framework for data protection was launched in 2009, followed by a public consultation. When the consultation closed, the Commission issued a Communication (COM(2010) 609 final, of 4 November 2010) on “A comprehensive approach on personal data protection in the European Union” (followed by another public consultation), paving the way for the reform proposals presented together with a new Communication from the Commission to the EP, the Council, The European Economic and Social Committee and the Committee of the Regions on Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century (COM (2012) 9 final, of 25 January 2012). As a general point, the proposal envisages the replacement of Directive 95/46 by a Regulation (thus, directly applicable within all national legal orders), as provided by COM (2012) 11 final, of 25 January 2012 (hereinafter, the proposed Regulation), which will maintain the vast majority of the principles and the substantive norms introduced by the former. However, as it is still difficult to predict when and what will be the final outcome of this set of proposals to review the EU legal framework on data protection, commentaries on some interesting features put forward by these proposals in relation to certain aspects of the legislation in force today (discussed below) will be kept (short) in the footnotes.

harmonised legal framework. In this regard, it is interesting to observe how, apart from the review of substantive provisions, there has been continuous emphasis on the procedural and institutional tools that can contribute to ensuring that the right to data protection is effectively exercised.

Indeed, it is relevant to point out that the data protection legislation described so far is not limited to the establishment of substantive norms aimed at defining the scope and features of the rights involved, nor to offering procedural instruments to give effectiveness to these rights, nor even to providing for judicial remedies to counterbalance any breach of the rights guaranteed to individuals by the law applicable to the data processing in question (e.g., specifically providing for the entitlement to compensation for damage suffered as a result of the unlawful processing of personal data).¹⁷ Indeed, the existing (and proposed) rules on data protection also set out institutional guarantees for the effective enjoyment of the fundamental rights at stake. This is particularly the case of all the aforementioned Treaty provisions, as well as of the relevant secondary legislation, such as Directive 95/46 and Regulation 45/2001. These institutional guarantees regard, in essence, the establishment and functioning of independent authorities. The next two Sections will look at these issues in closer detail.

1.1.2 EU law and the institutional guarantees for data protection

If one looks closely at the institutional aspects of EU data protection law, paying particular attention to the rules on independent authorities, one will note that these rules primarily feature Member States as their addressees. Nevertheless, these rules co-exist (sometimes not unambiguously) with other ones referring to the EU dimension of institutional guarantees. All these rules will be dealt with in detail in the following two sub-sections, with reference to the two distinct dimensions (i.e., the national and the EU one). Nevertheless, the distinction proposed is not to be intended as peremptory, as many observations made will be of cross-dimensional interest.

a) Institutional guarantees at the national level

In considering the institutional guarantees of data protection provided by EU law and to be implemented at national level, the most relevant piece of legislation is (again) Directive

¹⁷ It should be noted, however, that the provisions on judicial remedies set down, notably at Article 22 of Directive 95/46, are not common measures to be found in equivalent legal documents.

95/46. Indeed, Article 28 of Directive 95/46 mandates the establishment of independent public bodies responsible for data protection at the national level, to which a relevant set of functions is to be assigned. More precisely, it states (*emphasis added*):

Article 28

Supervisory authority

1. Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

2. Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

3. Each authority shall in particular be endowed with:

- investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,
- effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,
- the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

4. Each supervisory authority shall hear claims lodged by any person, or by an association representing that person, concerning the protection of his rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

Each supervisory authority shall, in particular, hear claims for checks on the lawfulness of data processing lodged by any person when the national provisions adopted pursuant to Article 13 of [...] Directive [95/46] apply. The person shall at any rate be informed that a check has taken place.

5. Each supervisory authority shall draw up a report on its activities at regular intervals. The report shall be made public.
6. Each supervisory authority is competent, whatever the national law applicable to the processing in question, to exercise, on the territory of its own Member State, the powers conferred on it in accordance with paragraph 3. Each authority may be requested to exercise its powers by an authority of another Member State.

The supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information.

7. Member States shall provide that the members and staff of the supervisory authority, even after their employment has ended, are to be subject to a duty of professional secrecy with regard to confidential information to which they have access.

There are several interesting points to be made regarding the Article above.¹⁸ These can be grouped into (at least) four topics: first, the model institutional arrangement adopted to guarantee data protection; second, the main features of the model; third, the key functions attributed to the institution proposed; and lastly, the operating dimension(s) of this body.

i) The model institutional arrangement

Having regard to Article 28 of Directive 95/46, and looking first at the specific institutional arrangements set down therein, as already mentioned, the model chosen is that of an administrative body in charge of supervising (and guaranteeing) the enforcement of data protection law. To this end, more precisely, Article 28 mandates the establishment of “public authorities”, identified by the same provision as “supervisory authorit[ies]” (with reference to one of their key functions). As already made clear in the preparatory documents to the Directive, the term “supervisory authority” does not prejudice the adoption of a multiple-institution internal structure, based on the constitutional system of each Member State.¹⁹ Indeed, to further clarify this possible option, the text of Article 28 in force speaks of “one or more” public authorities to be established at the national level.²⁰ These institutional bodies are commonly known (and very frequently referred to in EU documents) as Data Protection Authorities (or DPAs). It is worth highlighting that Article 28 is a mandatory provision that obliges Member States to establish DPAs in national legal orders, or at least – as may be inferred from the same Article 28, where nothing is stated to the contrary – to adjust existing

¹⁸ Most of the following considerations can be extended to other similar provisions contained in other pieces of EU legislation on data protection: this is the case, mostly, of the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ [2008] L 350/60) which contains a provision (i.e., Article 25 therein) similar to Article 28 of Directive 95/46. One could also consider, in the same respect, Article 15a of the consolidated version of Directive 2002/58, where “competent national regulatory authorities” are featured as contributors to the implementation of the same Directive.

¹⁹ See COM (90) 314 final, of 13 September 1990, on a Proposal for a Council Directive concerning the protection of individuals in relation to the processing of personal data (SYN 287, p. 42). It could be noted that the original Commission Proposal of the data protection Directive also featured a (sort of) definition of supervisory authorities that, however, is not been included in the Directive’s text in force, according to which “ ‘supervisory authority’ means the independent public authority or other independent body designated by each [MS] in accordance with Article 26 of [the text of the proposed Directive]” (see Article 2(f) therein).

²⁰ For instance, Germany has several authorities (at central and local levels) because of its federal structure and the competences of the *Länder*. Spain also appears to have more than one body. Finally, Nordic countries can provide further examples of multiple institutions being in place to meet the Directive’s institutional obligation, as these countries have left in place the Ombudsman pre-dating the enactment of Directive 95/46, while also setting up other ad hoc institutions.

bodies according to the requirements provided for therein. In fact, it must be pointed out that data protection institutions already existed in many EU countries prior to the enactment of Directive 95/46, although they were organised in different ways, in terms of both their structure and attributed powers.²¹ EU legislative intervention in this field has harmonised (a significant set of) features and functions of these institutions to a great extent. The aforementioned harmonisation aims not only to improve the level of data protection in all Member States, but also to achieve closer co-operation between them (as will be highlighted below), thus facilitating dialogue among national data protection institutions. In mandating specific requirements for DPAs, Article 28 of Directive 95/46 has created a sort of institutional prototype to work with and paved the way for its diffusion also at an international level.²² Nevertheless, as the law stands now, especially because of the not very detailed prescriptions of Article 28, some room for manoeuvre has remained regarding Member

²¹ See the study on the implementation of Directive 95/46 carried out (in 2002) by D. Kroff (available at <http://194.242.234.211/documents/10160/10704/Stato+di+attuazione+della+Direttiva+95-46-CE>), mapping bodies that span from those with mere consultative functions to those exercising binding powers of various nature. To some extent, the pre-existing national DPAs certainly constituted the source of inspiration in designing the EU model-authority: see P. HUSTNIX, "Introduction. The Role of Data Protection Authorities", in P. PALAZZI, M.V. PÉREZ ASINARI (eds.), *Défis du droit à la protection de la vie privée / Challenges of privacy and data protection law*, Bruxelles, Bruylant, 2008, pp. 561-566; as well as, from the same Author, "The role of Data Protection Authorities", in S. GUTWIRTH, Y. POULLET, P. DE HERT, C. DE TERWANGNE, S. NOUWT (eds.), *Reinventing Data Protection Law*, Dordrecht, Springer, 2009, pp. 131-137. According to KUNER, cited, "DPAs in Europe share a number of similarities in their organization and in the roles they play, but also demonstrate certain differences. The main difference is that some operate on the so-called 'ombudsman' model, while others operate under the 'regulation' model", whereby the 'ombudsman' model corresponds to a supervisory authority concentrating on the position of the individual filing a claim before the authority for breach of data protection law and seeking a remedy for that, while the 'regulation' model corresponds to an authority concentrating on compliance with the law more broadly rather than only providing a remedy for the persons who make the claims" (see p. 14 therein). From the observations below, it will appear that the 'EU model' stands somehow in between these two. See also P. SCHÜTZ, "The Set Up of Data Protection Authorities as a New Regulatory Approach", in S. GUTWIRTH, R. LEENES, P. DE HERT, Y. POULLET (eds.), *European Data Protection: In Good Health?*, Dordrecht, Springer, 2012, pp. 124-141. As a general reference, see also the Report of the European Union Agency for Fundamental Rights, *Data Protection in the European Union: the role of National Data Protection Authorities (Strengthening the fundamental rights architecture in the EU II)*, Luxembourg, 2010.

²² In 2001, an Amendment to the abovementioned Convention 108 was adopted (via an additional Protocol that entered into force in 2004) to introduce (together with rules on transborder data flows) an obligation addressed to the contracting Parties regarding the establishment of DPAs. These are conceived by the additional Protocol as an essential component of the data protection supervisory system in a democratic society and a significant improvement in the application of Convention 108 principles: in the words of the Explanatory Report to the additional Protocol, "effective protection [of the fundamental rights at stake] requires international harmonisation not only of the basic principles of data protection but also, to a certain extent, of the means of implementing them in such a rapidly changing, highly technical field" and "data protection supervisory authorities provide for an appropriate remedy if they have effective powers and enjoy genuine independence in the fulfilment of their duties". Although the Explanatory Report makes no reference to the pre-existing Directive (although the EC participated in the elaboration of the additional Protocol), the model-authority proposed by the former is very similar to the one mandated by the latter (the wording of Article 1 of the additional Protocol being to a large extent identical to that of Article 28). Curiously, it appears that not all EU MS have ratified the additional Protocol, although almost all of them signed it: for full details, see <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=181&CM=8&DF=06/08/2012&CL=ENG>.

States' implementation of the model-DPA, provided that its basic foundations are respected.²³ One of these basic aspects concerns the legal nature of DPAs. As mandated by Article 28, a DPA must be a public body. This implies, in particular, that DPAs are regulated by public law and must act as public institutions.

ii) The main institutional features: in particular, the independence requirement

Secondly, as regards the necessary institutional features, a key characteristic that national laws have to guarantee is the independence of DPAs. Indeed, Article 28 of Directive 95/46 requires DPAs to act with “complete independence” in the performance of their functions, underlining the importance of (effectively) independent institutions for the protection of a fundamental right, such as that of data protection.²⁴ In this respect, the need for DPAs to be designed as independent public bodies already emerged from the very first draft of Directive 95/46.²⁵ Thus, independence appears as a central and binding feature of DPAs as imposed by EU law, even though this is not clearly specified in the text of Article 28 in force. This latter provision speaks only of the “complete” independence of DPAs “in exercising” their functions, while it does not add further clarifications regarding what independence should consist of, or how it would be best achieved. Nevertheless – one could argue – by mandating “complete” independence and linking it to the operation of DPAs, Article 28 seems to require

²³ For instance, Article 28's text in force does not specify (at least directly) whether DPAs should be single-man institutions or collective bodies; nor what rules should govern the designation of their members; nor the terms of members' mandates; etc. The (pending) proposed Regulation, however, provides much more detailed indications of all the different rules (see Article 49 therein) that should be contained in national laws establishing (or governing) DPAs. This new would-be provision is labelled “Rules on the establishment of the supervisory authority” and provides a sort of check-list of all relevant measures to be included in the legislation establishing DPAs (such as those regarding the qualifications, experience and skills required to perform the duties of DPA members; or the rules and procedures for the appointment of DPA members; or the duration of members' term in office “which shall be no less than four years”; etc.). It appears from this very brief observation that, while most of the measures indicated are just ‘empty boxes’ to be filled in at national level, some contain certain substantive requirements, thus intruding quite significantly in MS institutional design choices.

²⁴ Indeed, the importance of independence from the very same perspective is stressed by recital 62 of Directive 95/46, according to which “the establishment in MS of supervisory authorities, exercising their functions with complete independence, is an *essential component* of the protection of individuals with regard to the processing of personal data” (*emphasis added*).

²⁵ See Article 26 of the original Commission Proposal (cited in fn 19 above). In comparing the version of Article 28 in force with the version proposed by the Commission in its first draft of what became Directive 95/46, it appears that the adjective “complete” was added at a later stage of the law-making process, to further strengthen the independence requirement. As regards the timing of the opening of infringement proceedings by the Commission, especially in the following two cases discussed below (i.e., several years after the entry into force of the relevant measures), it seems no coincidence that this...almost coincided with the adoption/strengthening of EU law provisions on the independence of national supervisory/regulatory bodies established in other domains (such as those on electronic communications, for which see below).

not only that DPAs should be formally independent (as emphasised by the adjective “complete”), but also that they should be guaranteed the necessary conditions to act, in practice, without any (external) interference.

The importance of the independence requirement is stressed by the Commission’s approach of intervening pro-actively in controlling Member States’ actual implementation of Directive 95/46 in this respect. Indeed, (to date) the Commission has already launched infringement proceedings against three Member States, challenging the effective “complete independence” of their respective DPAs.²⁶

The first procedure, opened in 2005, has not only already reached the ECJ but has also resulted in the related judgment, namely *Commission v. Germany* (of 9 March 2010, rendered in Case C-518/07), which represents a significant step towards a clarification of the notion of (complete) independence of DPAs (as well as, more generally, of any regulatory and supervisory authority, as will be claimed below) from the EU law perspective. The case in question concerns compliance with the “complete independence” requirement by German regional DPAs. According to German legislation, a distinction is made regarding the supervision of personal data processing, depending on whether such processing is carried out by public bodies or entities outside the public sector. In the case of public bodies, the supervision is entrusted to data protection institutions (at the federal and regional level), which answer only to their respective parliament and are not normally subject to any scrutiny, instruction or other influence from the public bodies they supervise. In the case of non-public bodies, on the other hand, under the law of the *Länder*, their supervision is vested upon different authorities that, although varying among the different *Länder*, all appear to be subject to State scrutiny.²⁷ In this respect, the Commission argued that the latter DPAs did not match the “complete independence” requirement provided for by Directive 95/46. The Commission claimed that, according to the Directive, the requirement of “complete

²⁶ Apart from the cases described below (surely representing the best concrete evidence of this attitude), in its recent Communication on “A comprehensive approach on personal data protection in the European Union” (see fn 16 *supra*), the Commission has also clearly stated, in more general terms, that it will continue to ensure the proper monitoring of the correct implementation of EU law in the data protection area, “by pursuing an active infringement policy” (p. 19), in pursuing the general wish, among other things, to strengthen, clarify and harmonise the status and the powers of national DPAs responsible for data protection – which should benefit from the status of “complete independence” – while also improving their cooperation and coordination, needed to ensure a more consistent application of data protection rules across the internal market.

²⁷ For more insights on the German legal framework for data protection, especially as regards its constitutional relevance, and the system of federal/regional authorities (as well as for a comment on the ECJ judgment in question), see F. FABBRINI, *Il diritto dell’Ue e l’indipendenza delle autorità nazionali garanti della protezione dei dati*, in *Giornale di diritto amministrativo* [2010] 10, pp. 1028-1033; and J. ZEMÁNEK, in *CMLR* [2012] 49, pp.1755-1768.

independence” must be broadly interpreted as meaning that a supervising authority has to be free from any influence, whether this is exercised by other authorities or comes from outside the administration and, hence, that State supervision is not compatible with such a requirement. On the contrary, Germany offered a narrower interpretation of the same requirement and claimed that DPAs had to have functional independence in the sense that they had to be independent of bodies falling under their supervision and not be exposed to external influences, while maintaining that the State scrutiny exercised in the German *Länder* did not constitute such an external influence, but rather the administration’s internal monitoring mechanism, implemented by the authorities attached to the same administrative machinery as the supervisory authorities, and required, like the latter, to fulfil the aims of Directive 95/46.

In the judgment rendered by the Great Chamber, having regard to the wording of Article 28 and the aims of Directive 95/46, the Court tends to attribute a broad scope to the notion of “complete independence” in EU law (also referring, for that purpose, to Regulation 45/2001).²⁸ Starting with the absence of any explicit definition of such a notion within Directive 95/46, it first establishes that, as appears from its usual meaning, the term “independence” related to a public body normally refers to a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure. Moreover, the fact that Article 28 qualifies such independence as “complete” appears to imply “a decision-making power independent of any direct or indirect external influence on the supervisory authority”.²⁹ As for the aims of Directive 95/46, the Court reiterates that this seeks to ensure both the free movement of personal data, necessary for the establishment and functioning of the internal market, and a high level of protection of fundamental rights and freedoms with respect to the processing of that data. Within this

²⁸ Indeed, the Court draws a comparison/parallel with the requirement of independence set forth by Regulation 45/2001 for the EDPS (on which, see below). It is relevant to note that the ECJ seems to identify a common general concept of independence at the basis of both pieces of EU legislation (i.e., Directive 95/46 and Regulation 45/2001) and establishes that the relevant provisions of these two instruments must be interpreted homogeneously, especially as regards the notion of independence. As the provisions of Regulation 45/2001 are somehow more detailed in that respect (e.g., to clarify the concept of independence, the latter specifies at Article 44(2) that the EDPS may neither seek nor take instructions from anybody), following the Court’s reasoning, the further elements provided therein to clarify the requirement of independence of the EU data protection body could be used in interpreting the same notion of independence provided for by Directive 95/46 concerning national DPAs, and thus imposed upon national DPAs. However, although a “parallel relationship” between Regulation 45/2001 and Directive 95/46 has been reaffirmed by the ECJ for the purpose of interpreting (and complementing) certain provisions of the latter (see notably Case C-92/09 and C-93/09, *Volker und Markus Schecke* [2010], § 106), the extent to which this reasoning can actually be developed in such broad and general terms is not yet clear (see below). Nevertheless, it appears certain that, as a notion of EU law, the “complete independence” requirement must be given a uniform interpretation.

²⁹ See § 19 of the judgment.

framework, according to the ECJ, DPAs are “the guardians of those fundamental rights and freedoms”,³⁰ whose main task is to guarantee the establishment of a fair balance between the protection of the right to private life and the free movement of personal data.³¹ In this respect, the Court affirms that the requirement of DPAs’ independence is not intended to grant them (and their agents) a special status, but is actually provided for “to ensure the effectiveness and reliability of the supervision of compliance with the provisions on the protection of individuals” with regard to data processing, in order to strengthen such protection vis-à-vis the decisions taken by DPAs affecting those individuals (as well as other entities concerned). It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. Thus, the requirement of “complete independence” of DPAs provided for by Article 28 of Directive 95/46 is to be interpreted as intending for them to remain free not only from any external influence exercised by the entities supervised, but also from any instructions or any other external interference, whether direct or indirect, that could affect the objectivity and impartiality of their decision-making, or call into question their performance of the abovementioned task.³²

The Court then applies this notion of “complete independence” to the case in hand and concludes that State scrutiny over DPAs is not consistent with the Directive’s requirements. Indeed, the Court recognises that, although State oversight is intended to guarantee that the decisions of DPAs comply with national and EU law, and therefore does not aim to potentially oblige those authorities to pursue political objectives – which would be inconsistent with the protection of individuals with regard to the processing of personal data, and with fundamental rights – it nevertheless implies the “mere risk” that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities.³³ Such a risk could take the form, on the one hand, of “prior compliance” on the part of the supervisory authorities in the light of the scrutinising bodies’ decision-making practice, thus undermining the objectivity of the DPAs’ actions, or, on the other hand, casting

³⁰ See § 23 of the judgment.

³¹ Furthermore, the Court considers independence as necessary in order to create an equal level of protection of personal data and thereby to contribute to the free flow of data that is necessary for the establishment and functioning of the internal market: see § 50 of the judgment.

³² See § 30 of the judgment, containing the Court’s definition (or rather understanding) of the requirement of independence.

³³ The Court also notes that the scrutinising authorities themselves, which are part of the general administration and therefore under the control of the government of their respective Länder, are not able to act objectively in interpreting and applying the provisions relating to the processing of personal data as, in certain circumstances, they may have an interest in not complying with these provisions: see §§ 34-35 of the judgment.

suspicion upon the partiality of DPAs' decisions. Hence, State scrutiny over DPAs, as in the cited Case *Commission v. Germany*, is at odds with the independence requirement mandated by Article 28 of Directive 95/46.³⁴

In the final part of its judgment, the Court also rejects the arguments brought forward by Germany based on the alleged breach of several principles of EU law (such as the principles of democracy, conferred powers, subsidiarity, proportionality and cooperation in good faith) that, according to that Member State, would occur if the independence requirement were interpreted in a way that would oblige it to renounce its tried and tested system of scrutiny of the supervisory authorities.³⁵ Regarding the principle of democracy (as guaranteed also at EU level, via the provisions of Article 6(1) TUE) in particular, the Court states that this “does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. That is precisely the case with regard to the tasks of the supervisory authorities relating to the protection of data”.³⁶ Thus, especially in relation to the principle of democracy, the Court recognises the existence of forms of State

³⁴ See § 36 of the judgment. The Court, therefore reaches a different conclusion than that of AG Mazák in his Opinion on this Case (of 22 October 2009). This latter adopts a relative and ‘functional’ understanding of independence (not very dissimilar, in some key elements, to the one embraced by the Court), by specifying that its actual degree depends on the need to ensure the effective exercise by DPAs of their functions, taking into account the purpose of DPAs existence, which is closely related to the main purpose of Directive 95/46 itself (see §§ 18-23 of the Opinion). He then claims, however, that “independence should not be confused with the lack of opportunity for supervision” and that “State oversight is one of the ways in which monitoring may be carried out” (§ 29 Opinion); and even that “State oversight contributes to the functioning of the system of monitoring the application of the provisions adopted pursuant to Directive 95/46” (§ 30 Opinion). Far from recognising State scrutiny of DPAs *per se* as inconsistent with their independence (as seemingly assumed, in principle, by the Court at § 32 of the judgment), the AG concludes that the Commission has not proved that the oversight by the Länder is exercised in a way that might hinder the data protection supervisory authorities in exercising their functions with complete independence (§ 31 Opinion). In essence, therefore, he seems to claim that Directive 95/46 does not mandate an independent supervisory body as such, but rather a body with complete independence in carrying out its functions. Besides that, it should also be stressed that the AG, in searching for DPAs’ scope of independence, suggests adopting a “negative approach”: that is to say, examining the influence of specific factors or a certain number of factors on the independence of a supervisory authority, rather than specifying all the factors necessary to guarantee the performance of the supervisory authorities’ tasks with “complete independence” (see § 24 Opinion).

³⁵ For the details, see §§ 38-56 of the judgment.

³⁶ See § 42 of the judgment.

control over independent administrative authorities (in general) that are not incompatible with the independence requirement. Indeed, apart from control exercised via court review (mentioned in the excerpt quoted above), the Court also mentions other possible forms of control required by the principle of democracy that are not contrary to the requirement of independence, such as: the appointment of independent supervisory authorities' management by parliament or by government; the definition by the legislator of the authorities' powers; and the placing by the legislator of an obligation on those bodies to report their activities to parliament.³⁷ It is important to note that some of these forms of control are actually mentioned in Article 28 itself in relation to DPAs. This is precisely the case of the duty (provided for by paragraph 5 therein) of these authorities to publicly report on their activities, as well as of some sort of judicial review of DPAs' decisions, provided for by paragraph 3 therein, although to a less binding extent.³⁸

As already mentioned, other infringement proceedings have also taken place, again focusing on the correct implementation of the "complete independence" requirement of DPAs, as mandated by Directive 95/46. Indeed, also in 2005, the Commission challenged the Austrian data protection legislation regarding the lack of independence of its national DPA. However, the case was brought before the ECJ only after the abovementioned judgment in *Commission v. Germany* was rendered.³⁹ In *Commission v. Austria* (Case C-614/10), the Commission claims that, although the Austrian data protection legislation explicitly requires the relevant established authority to exercise its functions independently and not to take any instruction in performing its duties, the same legislation (coupled with the internal rules adopted on its basis by the authority itself) provides that the managing member of the supervisory authority, who is responsible for dealing with its day-to-day business (thus, holding a pre-eminent role within the authority), must be an official of the Federal Chancellery, and that, as for any other member of the supervisory authority, this position is conceived as part-time employment to be conducted concurrently with other professional activities. The Austrian legislation also states that the supervisory authority's office is integrated into the Chancellery, in terms of its

³⁷ See §§ 43-45 of the judgment. Having regard to the wording used by the Court, one might assume that this sort of list is not exhaustive and that other balanced and acceptable forms of control can still be provided for. It would also be interesting to determine whether, for instance, these conditions are to be intended as cumulative, or whether only one (or some) of them could be regarded as satisfactory (and, in the latter case, which ones would count more than the others). On this connection, it should be noted that the Court has affirmed that the "absence of any parliamentary influence over [national DPAs] is inconceivable" (*ibid.*).

³⁸ As already reported above, this latter provision establishes, indeed, that decisions by the supervisory authorities giving rise to complaints "may" be appealed against through the courts. Thus, the decision to set up such a form of control and its actual functioning is left to MS.

³⁹ The action against Austria was brought before the Court only in December 2010.

organisation and staff, and that the Federal Chancellor is entrusted with an unfettered right to obtain information on all matters concerning the daily management of the authority. According to the Commission, these three measures set down by the national legislation to transpose Directive 95/46 hinder, to varying extents, the effective “complete independence” of the Austrian national DPA mandated by that Directive and are, therefore, inconsistent with EU law.

In his Opinion, delivered on 3rd July 2012, Advocate General Mazák argues that each of the three measures mentioned above regarding different aspects of the Austrian national DPA’s structure and functioning effectively constitutes an obstacle to its “complete independence”, as defined by the Court in the Case *Commission v. Germany*. To this end, the Advocate General recalls that the Court has adopted an autonomous notion of independence, which is not related to that elaborated in the abundant case-law on the interpretation of the criteria for independence of a court or tribunal within the meaning of (now) Article 267 TFEU.⁴⁰ Moreover, the Advocate General notes that the Court has not qualified the notion of the independence of supervisory authorities in relation to either its functional or institutional aspects, but has accepted a broad notion of independence, while leaving the door open to ad hoc assessments of measures relating to one or the other domain, which could be inconsistent with that notion.⁴¹

As regards the first measure (i.e., the position of managing member of the supervisory body being held by a government official serving, like the other members, part-time), while the Advocate General specifies that, according to his reading of the national legislation at stake, even an official of the federal authority (not necessarily from the Federal Chancellery) could cover the position, the remaining service-related link between the managing member and the federal authority to which he belongs nevertheless poses a threat to the independence of the supervisory authority, because of the risk it entails of indirect influence by the former over the work of the latter, via the managing member of the supervisory authority.⁴² Concerning the

⁴⁰ See § 25 of the Opinion.

⁴¹ Indeed, the AG assumes that the Court has not accepted a definition of “complete independence” as an (*a priori*) independence of supervisory authorities “in all conceivable dimensions” (see § 27 Opinion). Thus, in the words of the AG, “the Court’s interpretation has left the field open to a case-by-case assessment as to whether a measure which is the subject of a complaint against a [MS] is such as to represent an external influence, whether direct or indirect, over the work of the supervisory authority”, and therefore hinder its independence, no matter whether the contested measure is related to functional rather than organic or substantive aspects of (the independence of) the supervisory authority (*ibid.*). See also fn 34 above.

⁴² See §§ 31-32 Opinion. The AG also adds that “such influence could also originate from the employers of the other members of the [Austrian DPA], in view of the fact that duties resulting from membership of the [Austrian DPA] are conceived as constituting a part-time activity which is concurrent with other professional activities. If

second measure (i.e., the integration of the Austrian national DPA's office with the Federal Chancellery), the Advocate General rejects the Austrian contention that a distinction should be made between the national supervisory authority as a body and its office, so that the administrative supervision exercised over the staff of the latter (integrated into the Federal Chancellery) would not affect the independence of the former. Drawing inspiration from the provisions of Directive 2002/21 concerning national independent regulatory authorities for electronic communications, the Advocate General affirms that the office and its staff constitute essential elements of the status of the supervisory authority and, therefore, the influence exercised over the former also impacts the latter.⁴³ Finally, as for the third contested measure (i.e., the unlimited right to information of the Federal Chancellor), the Advocate General assumes that this could have harmful consequences for the independence of the supervisory authority for two main reasons: first, it is an unlimited and unconditional right; second, the holder of that right to information (i.e., the Federal Chancellor) is himself subject to the supervisory powers of the national DPA, "with the result that any exercise by him of the right to information could amount to influence by the body being supervised".⁴⁴

In its judgment, rendered on 16th October 2012, the ECJ again upheld the action of the Commission and found Austria in breach of the obligation set by Article 28, paragraph 1, of Directive 95/46. The Court essentially grounds its reasoning on the findings contained in *Commission v. Germany*, but also takes the opportunity to develop them further. First, the judgment confirms that the notion of (complete) independence set forth by the abovementioned provision is autonomous and thus independent of that inherent in Article 267 TFEU,⁴⁵ also reaffirming that this notion implies that DPAs must be in a condition to perform

the Court were to confirm its approach of interpreting Directive 95/46 in the light of Regulation No 45/2001, it could then be concluded that the prohibition of any other professional activity is one of the conditions required for the purpose of the independence of supervisory authorities laid down by Article 28(1) of Directive 95/46, since Article 44(3) of Regulation No 45/2001 lays down a similar condition with regard to the independence of the EDPS" (§33 Opinion). However, in its subsequent judgements, the Court seems not to have (overtly) confirmed that approach (nor to have reached such a broad and generally applicable conclusion).

⁴³ See § 39 of the Opinion.

⁴⁴ § 44 of the Opinion.

⁴⁵ See §§ 39-40 of the judgment (confirming the AG's Opinion on the point: see fn 40 above), where the ECJ affirmed that the interpretation of the notion of complete independence in Article 28(1) must be "based on the actual wording of that provision and on the aims and scheme of Directive 95/46". Thus, the position of the Court implies that if a body is independent in the sense developed for the application of Article 267 TFEU (see recently, for instance, Case C-222/13, *TDC* [2014], § 27-32), this does not mean that it is also independent for the purposes of Article 28(1) of Directive 95/46; and, possibly, vice versa (although this is may be unlikely, as the independence requirement set by Directive 95/46 seems to be broader than that of Article 267 TFEU). Unfortunately, a case that could have certainly shed light on the point has been removed from the Court register, as reference to the preliminary rulings made by the Austrian DPA has been withdrawn (see the Order of the Court of 27 May 2014, Case C-46/13, *H v. E* [2014]).

their duties free from external influence and from any other influence, direct or indirect, that is liable to have an effect on their decisions.⁴⁶ Second, and against the same background, the ECJ states that the requirement of functional independence, such as that provided for by the national legislation in question, is an essential condition to ensure that the (Austrian) DPA is free from all external influence, but this condition it is not in itself sufficient to that end.⁴⁷ Agreeing in substance with the Advocate General's Opinion, the Court finds that the various aspects of the Austrian legislation to which the Commission has pointed in its application preclude the national DPA "from being capable of being regarded as performing its duties free from all indirect influence" and therefore are contrary to the independence requirement.⁴⁸ Among the various interesting aspects of this case,⁴⁹ it should be highlighted that here, in contrast to *Commission v. Germany*, and possibly stretching the notion of complete independence for the purposes of Directive 95/46 to the maximum possible extent, the Court seems to no longer rely on the provisions of Regulation 45/2001, and the tight conditions set forth therein, to test the complete independence of the national DPAs. Indeed, the Court makes it clear that "Member States *are not obliged to reproduce* in their national legislation provisions similar to [the relevant ones of Regulation 45/2001] in order to ensure the total

⁴⁶ See § 41 of the judgment. See also § 43 of the judgment, where the Court specifies that the "independence required under the second subparagraph of Article 28(1) of Directive 95/46 is intended to preclude not only direct influence, in the form of instructions, but also, as noted in paragraph 41 above, any indirect influence which is liable to have an effect on the supervisory authority's decisions".

⁴⁷ See § 42 of the judgment.

⁴⁸ See § 44 of the judgment. As regards the first measure, concerning the position of the managing member of the Austrian DPA, the Court affirms that the service-related link between him/her and a political body such as the federal authority he/she belongs to implies (external) hierarchical supervision over the former, which is liable to hinder the DPA's operational independence, potentially leading to a form of "prior compliance" on the part of the managing member, as well as generating suspicions of partiality on the part of the DPA, while the manner in which the managing member is appointed does not affect these findings (§§ 45-55 of the judgment). The second measure, concerning the equipment and staff arrangements for the Austrian DPA's office, is also found to be incompatible with the complete independence requirement, in that it includes organizational overlaps between the DPA and the federal authority, which make it impossible to rule out all suspicions of partiality (§§ 56-61 of the judgment). The same holds true for the third and last of the contested measures, concerning the right of the Federal Chancellor to be informed, since this is unconditional and covers all aspects of the work of the national DPA (§§ 62-65 of the judgment). Beyond resolving the issue presented in the case at stake, all these findings of the Court can surely offer guidance for the assessment of the (legal) independence of other DPAs in similar cases, and prompt appropriate actions if it proves to be lacking.

⁴⁹ See M. SZYDŁO, *Principles underlying independence of national data protection authorities: Commission v. Austria*, in CMLR [2013] 50, pp. 1809-1826, where the Author identifies the objectives of the independence requirement in relation to DPAs in their protection of the individual and the enhancement of the credibility of the latter and claims that these aspects affected the (broad) interpretation of that requirement provided by the Court, which encompasses not only functional independence, but also organizational, personal/management, financial and reporting independence. See also K. VASSILIOS, *Vers la construction d'un droit européen des autorités administratives indépendantes*, in *Revue des affaires européennes* [2012], pp. 829-838, who points out that, having regard to the interpretation of the EU law notion of independence, this "peut s'avérer une notion au contenu à géométrie variable dans l'espace de l'ordre juridique communautaire" (p. 834).

independence of their respective supervisory authorities”.⁵⁰ Nevertheless, having regard also to the previous judgment (and the suggestions of Advocate General Mazák), with a view to reconciling the two Grand Chamber cases mentioned (on the point at issue), one could read the statement cited as implying that, for Member States to avoid censure (on the part of the Commission and possibly the Court) for failing to abide by the complete independence requirement of national DPAs, it is in fact safer (if not really desirable) to use the provisions of Regulation 45/2001 as models upon which to structure independent national supervisory authorities.

Last but not least, it should be noted that the Commission also decided to refer Hungary to the ECJ following the opening of infringement proceedings against that Member State for changes in its legislation affecting, inter alia, the independence of the national DPA.⁵¹ The Commission argued that Hungary breached EU law since, in setting up the newly established National Agency for Data Protection (a collegiate body), the term of office of the previous national data protection Supervisor (the Hungarian single-person DPA before the establishment of the new one) was brought to an end both prematurely and arbitrarily, therefore violating the independence requirement.⁵²

Called upon again to further clarify the notion of the (complete) independence of national DPAs according to Directive 95/46, by elaborating on its existing case-law on the matter,⁵³

⁵⁰ See § 58 of the judgment (*emphasis added*). The relevant provisions of Regulation 45/2001 are those in its Chapter V, which will be discussed below.

⁵¹ The infringement proceedings for the lack of independence of the Hungarian DPA is part of a series started by the Commission against the same MS on several other issues, such as the (lack of) independence of the national central bank (this issue was resolved in a pre-litigation stage: see Commission Press Release, of 25 April 2012, IP/12/395) and the anticipated retirement age set for judges (on which see Case C-286/12, *Commission v. Hungary* [2012], decided on 6 November 2012). In the same round of infringement proceedings, media pluralism and freedom issues were also at stake, also regarding the independence of the national media authority (this will be discussed below). Because of “the urgency of the matter ([as] the various laws in question [were] already in force)” (sic), the Commission launched and pursued “accelerated infringement procedure[s]” (see the Commission Press Release of 07 March 2012, IP/12/222).

⁵² As stated in the Commission Press Release IP/12/395 (cited in fn 51, above), “the personal independence of a national data protection supervisor, which includes protection against removal from office during the term of office, is a key requirement of EU law. The re-organisation of a national data protection authority is not a reason for departing from this requirement”. See also A. JÓRI, “The End of Independent Data Protection Supervision in Hungary – A Case Study”, in S. GUTWIRTH, R. LEENES, P. DE HERT, Y. POULLET (eds.), *European Data Protection: Coming of Age*, Dordrecht, Springer, 2013, pp. 395-406: JÓRI is the (former) data protection Commissioner/Supervisor, whose mandate was terminated in advance (compared to its natural deadline) due to the entry into force of the contested measures, offering interesting insights into the legal (and factual) situation in question.

⁵³ The Court essentially reaffirms (with minor additions) the interpretation of Article 28(1) of Directive 95/46 provided in the previous judgments discussed above: see §§ 51-52 of this judgment. See also § 64 therein, where, in order to reject the request made by Hungary to limit the temporal effects of the judgment establishing its failure to fulfil its obligations under EU law, the Court did not hesitate to state that “the phrase ‘with complete independence’ [appearing in that Article] is clear in itself and, in any event, [...] has already been interpreted by

the ECJ, in its judgment in Case C-288/12, *Commission v. Hungary*, rendered on 8 April 2014 (again) by the Grand Chamber,⁵⁴ found Hungary in breach of EU law. Indeed, in accepting, in substance, the arguments put forward by the Commission (as supported by the EDPS),⁵⁵ the Court stated that the DPAs' independence, as mandated by Article 28, paragraph 1, of Directive 95/46, entails an obligation from Member States to allow them to serve their predetermined full term of office, while any premature conclusion of such a term could only take place in accordance with the rules and safeguards established by the applicable legislation.⁵⁶ If it were permissible for a Member State to compel a supervisory authority to vacate office before serving its full term, in violation of the rules and safeguards established (in advance) in that regard by the applicable national legislation, that authority might be prompted to enter into a form of "prior compliance" with political powers, implying (even only) a "mere risk" for that authority to be subject to political influence, as well as a suspicion of partiality in its operation, which are at odds with the independence requirement.⁵⁷ In the case in question, the Court ruled that preventing the pre-existing data protection Supervisor from serving his full term of office and compelling him to vacate his office for reasons that were not those predetermined by law, but were dictated by the mere institutional change of model for the national DPA introduced by the new legislation (guaranteeing some continuity with the past, but notably not providing any transitional arrangement with a view to

the Court in [*Commission v. Germany*]" almost a year prior to *Commission v. Hungary*. It could also be noted here that, at the outset (see in particular § 34 of the judgment), the Court swiftly rejected as unfounded Hungary's (interesting) arguments against the admissibility of the Commission's action. The MS essentially claimed that, were the Court to establish an infringement in the case at stake, the only way for Hungary to rectify the illegality would be to revoke the appointment of the (new) Head of the Authority, replacing the latter with the former data protection Supervisor, which in itself would amount to committing the alleged infringement.

⁵⁴ It is interesting to observe that both *Commission v. Austria* and *Commission v. Hungary*, in contrast to *Commission v. Germany* (all cases cited above), were assigned to the Grand Chamber following the requests to that end by the MS concerned and pursuant to Article 60(1) of the Rules of Procedure of the Court of Justice (see § 24 of both judgments).

⁵⁵ As emerges from § 13 of the judgment, in the pre-litigation phase, the Commission charged Hungary not only with having compelled the former data protection Supervisor to vacate his office before his full term had expired, but also with failing to consult him regarding the drafting of the new law on data protection (as required, still, by Article 28 of Directive 95/46), as well as with offering too many opportunities in the new legislation for prematurely ending the term to be served by the Head of the newly established Authority (together with the role attributed to the President of the Republic and the Prime Minister in that context, thus enabling the country's executive powers to exert influence over the Head of the Authority). These two latter infringements were, however, resolved during the pre-litigation phase.

⁵⁶ In the words of AG Wathelet, contained in his Opinion delivered on 10 December 2013 (which was substantially followed by the Court), the "intrinsic link between [the] security of tenure throughout the term of office and the requirement of 'complete independence' is indisputable" (§ 72 therein). It is curious to observe that the AG refers here, by analogy, to the conditions set forth by the Statute of the Court in order to guarantee the independence of judges and AGs (and especially to the Order in Case C-17/98, *Emesa Sugar* [2000] ECR I-665, § 11).

⁵⁷ See §§ 53-55 of the judgment.

respecting the running mandate of the former Supervisor and, accordingly, his independence), was contrary to EU law.⁵⁸

As regards this last judgment, two remarks could be made on the ECJ's interpretation of the independence requirement as applicable to national DPAs. First, the argument made above about the desirability of modelling the requirement on the detailed provisions established by Regulation 45/2001 to guarantee the independence of the EDPS would seem to meet with significant support, as in *Commission v. Hungary* the Court made extensive use of these provisions in grounding its broad interpretation of Article 28, paragraph 1, of Directive 95/46.⁵⁹ Second, interestingly enough, much more than in the previous cases, in *Commission v. Hungary* the ECJ was confronted with the assessment of some specifically institutional features of supervisory authorities (such as the rules on members' appointment and dismissal) that could have an impact on their independence.⁶⁰ While one could follow Advocate General

⁵⁸ See §§ 59-61 of the judgment, where the Court recognizes that while MS are certainly "free to adopt or amend the institutional model that they consider to be the most appropriate for their supervisory authorities[, in] doing so, however, they must ensure that the independence of the supervisory authority [...] is not compromised, which entails the obligation to allow that authority to serve its full term of office". Interestingly, the institutional changes brought about by Hungary were anchored in its Constitution. On this connection, AG Wathelet clearly affirms in his Opinion (at § 80) that this "cannot compromise the effectiveness of the higher obligation imposed by EU law as regards the guarantee of 'complete independence', since the primacy of EU law applies whatever the nature of the national rule at issue" and adds that "if such circumstances were to be accepted as justification, any authority in a higher position, whether wielding legislative or constitutional power, would be able to exert undue external influence on the [national DPA] simply through the threat, express or implied, that such changes might be made and that the [DPA] might be compelled to vacate office without serving [its] full term – possibly prompting thereby a form of 'prior compliance'" (see also, in the same vein, although in a much less developed form, § 35 of the judgment).

⁵⁹ See notably § 56 of the judgment, where the Court first refers to the provisions of Regulation 45/2001, strictly limiting the circumstances in which the term served by the EDPS may be prematurely brought to an end and preventing this from happening unless there are overriding and objectively verifiable grounds for doing so, as well as qualifying such an institutional arrangement as "an overarching requirement" of (its) independence. Moving from such a finding, the Court then ascertained that the Hungarian legislation previously in force also provided similar grounds for justifying the premature conclusion of the term served by the data protection Supervisor (such as death, resignation, declaration of a conflict of interest, compulsory retirement or compulsory resignation, in some of these cases citing specific conditions), but that none of those grounds occurred when the supervisor in question was actually compelled to vacate his office (see notably §§ 57-58 of the judgment). No similar developments, nor substantial references to Regulation 45/2001 in this regard, are to be found in the Opinion of AG Wathelet, who nevertheless affirms that "it cannot reasonably be denied that 'complete independence' as required under EU law is predicated upon the existence and observance of specific and detailed rules, which – as regards that authority's appointment and term of office and the possible grounds for revoking its powers or dismantling that authority – dispel any reasonable doubt as to the imperviousness of that authority to external factors, whether direct or indirect, which might influence its decisions". However, notwithstanding the indications provided by the previous case-law, he draws something of a relationship between the requirement of "complete independence" for the purposes of Article 28(1) of Directive 95/46 and the independence that an authority must have in order to be recognized as a court or tribunal for the purposes of Article 267 TFEU (§ 74 of the Opinion and fn 36 therein).

⁶⁰ Still with reference to the case in question, the same reasoning could be extended to other related measures, such as those fixing the (appropriate) term of office for the members of the supervisory authority; those establishing the reasons that could justify the anticipated conclusion of their pre-determined term of office; or those concerning the procedures to be followed in such cases; and so forth.

Mazák's abovementioned Opinion in *Commission v. Austria* and share his view that the notion of independence shaped (so far) by the ECJ does not distinguish between functional, organic or substantive aspects, but potentially encompasses all of them, one could nevertheless agree that in *Commission v. Hungary* (as in the previous *Commission v. Austria* judgment) the Court clearly brought to the fore the importance of the institutional preconditions for the (complete) independence of supervisory authorities, not only adding some more flesh to the bare bones of the notion of independence resulting from the simple wording of Article 28 of Directive 95/46, but also setting significant principles (and precedents) that could well be applied to the independent authorities operating in other domains covered by EU law.⁶¹

Overall, at least five points can be raised on the basis of the issues at stake in the relevant case-law regarding the requirement of DPAs' independence according to EU law.

First, considering all the aforementioned cases together, it appears that a legal and detailed definition of the independence of national supervisory authorities for data protection is increasingly acquiring shape and substance as a definition grounded in case-law, although also developed on the basis of various pieces of EU legislation. Indeed, as mentioned above, despite the lack of any precise indication in Directive 95/46 on how to interpret the notion of independence contained therein (apart from, perhaps, its qualification as "complete"), the ECJ has made reference to the slightly more detailed requirements accompanying the similar notion of independence embodied in Regulation 45/2001 on the EDPS, so as to enrich and clarify the scope of that notion. Evidently, this implies a tendency towards a homogeneous notion of the independence of supervisory authorities for data protection operating at national and EU level and, thus, the increasing similarity of the institutional models in place at both stages (at least, but significantly, in relation to one of their central features).

Second, it appears from the abovementioned case-law that, by providing a rather homogeneous interpretation of the notion of independence to be applied in substantially

⁶¹ AG Wathelet, in his Opinion on *Commission v. Hungary* (cited), affirmed that the "judgment of the Court establishing an infringement in the present case [as it actually happened] would have great significance not only for the authorities created pursuant to Article 28(1) of Directive 95/46, but also for any other independent authority established in accordance with EU law. By assuring those independent authorities that they enjoy security of tenure until their term of office expires, except where this is precluded for overriding reasons pre-determined by law and objectively verifiable, the effect of such a judgment would be to diminish considerably the damaging risk of 'prior compliance' with external parties, whether public or private. Such a judgment would remove the 'sword of Damocles' represented by the paralyzing risk that their term in office might be prematurely terminated" (§ 83 of the Opinion). This argument could well be extended to the findings of the Court in the other cases concerning the independence of DPAs, where the established principles related to the various aspects of the independence requirement could be extended and applied (by analogy) to other supervisory authorities.

identical terms both to national DPAs and the EDPS, EU law has created the preconditions for at least an institutional comparison between the EU and national supervisory authorities for data protection, if not a proper cross-fertilisation of the institutional models chosen for their respective structuring and functioning, with the result of undoubtedly favouring their effective mutual dialogue and co-operation.

Third, in turn, such a homogeneous notion of independence and such institutional cross-fertilisation somehow pave the way for the development of a rather ‘horizontal’ (minimum) notion of the independence of supervisory (and regulatory) authorities beyond the data protection domain. This could be particularly true if one considers that, from the abovementioned case-law (and legislation), it emerges that DPAs represent essential components of the protection of individuals with regard to their fundamental rights involved in the processing of their personal data; or, in the words of the ECJ, they are the “guardians” of those fundamental rights and freedoms. DPAs therefore appear to play an essential role in the implementation and enforcement of the rules on data protection, which are key elements in ensuring the respect for individuals’ rights. As highlighted above, DPAs’ independence is (intended to be) instrumental to the effective and efficient performance of such a role. Thus there appears to be no obstacle to extending the same notion and guarantees of independence to similar supervisory (or regulatory) authorities operating in other domains (such as the audiovisual one) as guardians of the fundamental rights and freedoms they involve: authorities that are, in fact, required either by EU law or (also by) national law to be independent so as to effectively and efficiently perform their respective roles.⁶²

Fourth, concerning the very notion of independence, from the rich case-law discussed above (thus, *strictu sensu*, specifically in relation to DPAs), there emerges a quest to define it in more general terms: as a feature related not only to the exercise of the supervisory authority’s functions, but also to its institutional structure. In other words, beyond the actual wording of Article 28 of Directive 95/46, and especially with reference to EU primary law (namely Article 16, paragraph 2, TFUE, and Article 8, paragraph 3, of the Charter), one could infer

⁶² In this respect, one could question the approach apparently followed to date by the ECJ in seeking to identify the scope of the notion of independence (at least, according to the reading suggested by AG Mazák, see fn 41 above): as it has deliberately avoided providing a positive definition of independence by enumerating all the various features/measures that would be quintessential to its realisation. In fact, a more positive definition of the independence of a supervisory body, via the clarification of its key characteristics, would be extremely helpful - especially with the prospective of constructing a meaningful, enforceable, homogeneous and ‘horizontal’ notion to be applied cross-sector. Nonetheless, it would be up to the legislator rather than the Court to provide such a definition. Hence, it comes as no great surprise that in the Commission Proposal to reform Directive 95/46 (see fn 16 above) the guarantees and preconditions regarding the independence of national DPAs are significantly reinforced by explicit reference to a set of detailed measures intended to clarify the various features of the independence requirement, very much taking on board the general criteria indicated by the ECJ.

that, above all, it is up to the supervisory authority itself to be independent, rather than to comply with the independence requirement only when exercising its functions. While Article 28 of Directive 95/46 undoubtedly asserts that DPAs must “act with complete independence in exercising [their] functions”, both Article 16, paragraph 2, TFEU and Article 8, paragraph 3, of the Charter affirm, more generally, that compliance with the established rules on data protection has to “be subject to the control of independent authorities”. While in its seminal judgment on the matter (rendered in *Commission v. Germany*) the Court did not clearly endorse (nor did it in any way preclude) such a broad reading of national DPAs’ independence as going beyond mere functional/operative independence to also embrace institutional aspects, the following judgments in *Commission v. Austria* and *Commission v. Hungary* have shown that the latter are in fact essential parts of a broader and expanding constitutional notion of independence.⁶³

Fifth, and finally, in clarifying the notion of the independence of DPAs, it is beyond dispute that all the aforementioned judgments have highlighted and reinforced its crucial importance *per se*; as a valuable tool of EU law of institutional design to be used and implemented against Member States; and as a benchmark for national legal systems to refer to in setting up effective institutions while ensuring the utmost guarantee of the fundamental rights and freedom at stake. Thus, the clear and expanding reach of the notion of independence of national supervisory authorities for data protection (and, potentially, of other authorities/“guardians” of other fundamental rights), as derives from EU law, proves to be a useful vehicle for the development of a coherent European approach to the protection and promotion of fundamental rights at national as well as at EU level.

⁶³ In fact, it should be noted that while in *Commission v. Germany* the Court did not make any reference to the abovementioned EU primary law provisions regarding national supervisory authorities’ independence (especially those in the Charter), both in *Commission v. Austria* and *Commission v. Hungary* such explicit references constituted the starting point for the findings of the Court (in relation to the substance of the cases): see §§ 36 and 47 of the respective judgments, where it is stated that “the requirement that compliance with the EU rules on the protection of individuals with regard to the processing of personal data is subject to control by an independent authority derives from the primary law of the European Union and, in particular, from Article 8(3) of the Charter of Fundamental Rights of the European Union and Article 16(2) TFEU”. It should be noted, however, that, although the judgment in *Commission v. Germany* was rendered after the entry into force of the Lisbon Treaty, all references therein are made to EC law and relate to a time when Article 16 TFEU did not exist as such (the corresponding Article 286 TFEU being worded differently, as noted above), and when the provisions of the Charter were not formally binding.

iii) Key functions

Thirdly, continuing with the reading of Article 28 of Directive 95/46 from the point of view of the functions entrusted to DPAs, they mostly appear to consist of supervisory duties.⁶⁴ Indeed, the first task directly attributed to DPAs by Article 28 is for each of them to monitor the application of the Directive within the territory of their own competence, so as to support and ensure the enforcement of data protection law.⁶⁵ To that end, Article 28 lists the powers that DPAs have to be able to exercise in order to effectively perform their supervisory function. These amount to powers of investigation and intervention in data processing activities and in legal proceedings that are fitting for the discharge of their supervisory duties.⁶⁶

Thus, while monitoring appears to be the prominent function, DPAs' remit is not limited to it. According again to Article 28, DPAs are also recognised an advisory role: indeed, Member States should provide for DPAs to be "consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data".⁶⁷ Moreover, Article 28 attributes to DPAs a dispute settlement function. DPAs are supposed to hear complaints lodged by any person (or by representative associations) concerning the protection of individual rights and freedoms regarding the processing of personal data.⁶⁸ Against this backdrop, it is clear that DPAs are directly involved in the enforcement of the provisions of Directive 95/46, although they are not intended to be the sole mechanism for enforcing data protection. Traditional routes for achieving the enforcement of individual rights (e.g., via court proceedings) remain available, while other enforcement arrangements are envisaged and encouraged (to a limited and very controlled extent) by the same Directive, such as co/self-regulation via the adoption of codes

⁶⁴ Here, we leave aside some more technical duties that DPAs are required to perform according to the Directive, such as receiving and dealing with notifications of computerised data processing operations, as well as 'prior checking' certain types of processing operations that present particular risks, as provided for by Article 18 (and following Articles) of Directive 95/46.

⁶⁵ The direct involvement of DPAs in the application of EU data protection law is highlighted explicitly in the proposed Regulation (see Article 46 therein). According to the draft measures proposed, a much more detailed and systematised enumeration of the competences, powers and duties of DPAs (divided into three respective Articles: namely, Articles 51-53 of the proposed Regulation) will probably further clarify these three aspects (although not change them significantly).

⁶⁶ See paragraph 3 of Article 28 of Directive 95/46.

⁶⁷ See paragraph 2 of Article 28 of Directive 95/46.

⁶⁸ See paragraph 4 of Article 28 of Directive 95/46.

of conduct by private stakeholders (e.g., trade associations).⁶⁹ Nevertheless, DPAs are purported to represent an advancement in the enforcement strategies and results, in particular, thanks to the guarantees of the independence and continuity of their actions in support of the individual fundamental right to data protection, and of the combination of their functions, such as their consultative/advisory and dispute settlement roles. In this respect, DPAs can play a valuable proactive role in providing safeguards to data protection and promoting good practices, through both their consultative and dispute settlement role (as well as by fulfilling their supervisory mission). Hence, DPAs also have some sort of regulatory functions recognised by the Directive itself (or otherwise entrusted by national legislations).⁷⁰ Overall, it is interesting to note that such a broad and detailed remit is exercised by DPAs at not only national but also EU level.

iv) The operating dimension(s)

Fourthly and finally, it emerges from Article 28 of Directive 95/46 that, on the one hand, EU law requires Member States to set up DPAs to operate on the national level. This is clearly stated in Article 28(1) (as already reported above). On the other hand, the same Article 28 contains an obligation (directly) addressed also to DPAs to co-operate among themselves (in particular by exchanging all useful information) in ensuring the consistent implementation of Directive 95/46.⁷¹ As mentioned above, co-operation among DPAs is strengthened and facilitated by the fact that they should all be similar institutions (to a significant extent), exercising similar powers and facing similar tasks. The fast-growing cross-border dimension of personal data flows in itself encourages co-operation and co-ordination among DPAs to ensure that people can effectively and consistently exercise their rights at the supranational as well as national level.

⁶⁹ See Article 27 (and recital 61) of Directive 95/46.

⁷⁰ For instance, paragraph 4 of Article 8, Directive 95/46 provides, in substance, that further exemptions (to the ones listed therein) to the prohibition of processing certain categories of data (also listed in Article 8) can be adopted under the conditions cited, either by national law or by “decision of the supervisory authority”. Normally, DPAs can issue opinions and recommendations that, while generally not having binding effects, tend to serve as guidelines and have persuasive effects, and thus somehow steer regulation in the field.

⁷¹ See the last part of paragraph 6, Article 28 of Directive 95/46. As also stated by recital (64) of the same Directive, “the authorities in the different [MS] will need to assist one another in performing their duties so as to ensure that the rules of protection are properly respected throughout the European Union”. The proposed Regulation envisages strengthening the co-operation requirement by providing (in detail) for mutual assistance and joint operations among DPAs, as well as by specifying the need to co-operate with the Commission as well, to ensure the coherence of the measures adopted: see Articles 55-63 therein.

v) Some conclusions

From the picture sketched above, it emerges that national independent supervisory authorities are a cornerstone of the EU approach to data protection as an individual fundamental right. The Charter reinforces this argument. Indeed, Article 8, paragraph 3, of the Charter identifies these bodies as the institutional guarantors of compliance with the rules and regulations adopted to safeguard and promote the individual fundamental right to the protection of personal data. It is interesting to note that the same provision, while incorporating the autonomous right to data protection within a catalogue of fundamental rights, concurrently and explicitly recognises such a role and status for independent supervisory authorities (as well as mandating their establishment, albeit indirectly). As noted above, in fact, the provisions for these bodies to be set up and act to ensure the implementation and enforcement of data protection measures date back to the very first EU law intervention in this field. Nevertheless, it is of significant relevance that, at the time of the ‘constitutionalisation’ at EU level of the right to data protection (first in the Treaties and subsequently also in the Charter), the role of DPAs as “guardians” of the fundamental right at stake was also ‘constitutionalised’.⁷² As observed by RODOTÀ (especially in relation to freedom of expression and the protection of personal data), the emergent need to effectively protect fundamental rights and freedoms implies that “safeguarding these rights cannot be left to private parties, since they will tend to offer guarantees that suit their interests”.⁷³ This may explain why the establishment and efficient functioning of national independent DPAs is such an important tool in effective strategies for the protection and promotion of fundamental rights. Furthermore, elaborating on this statement and starting from the hard law measures already in place for data protection, one could legitimately speculate on whether there is room at EU level to lay down the (legal) preconditions for similar institutional guarantees for the protection and promotion of other fundamental rights and freedoms. These institutional guarantees could lead to the recognition of national independent supervisory/regulatory authorities (if not the obligation to set them up) as guardians of those rights and freedoms,

⁷² It is also interesting to note that Article 8(3) of the Charter is the only provision within it that refers to “independent authorit[ies]”. However, this provision, as such, does not add any further clarification regarding what these bodies should consist of, nor what they should look like in institutional and functional terms, apart from the explicit indication of the key requirement of independence, which is also not clearly defined.

⁷³ See S. RODOTÀ, “Data Protection as a Fundamental Right”, in S. GUTWIRTH *et al.* (eds.), *Reinventing Data Protection*, cited, pp. 72-82, p. 82. The statement quoted is made as a reaction to the acknowledged increasing development of industry-elaborated documents/charters for the protection of privacy and personal data.

especially in fields where private interests and actors could detrimentally affect the guarantees and exercise of rights and freedoms. In this respect, in accordance with what has been said above, the independence of such bodies will definitely be their common core and defining feature.

Against this backdrop and in the same vein, the provisions on independent authorities set down in Directive 95/46, together with the pertinent EU primary law measures mentioned above, and other relevant pieces of EU legislation in place, could be seen as ‘model-provisions’ serving as references for the establishment of similar bodies in other relevant sectors where the protection and promotion of fundamental rights is at stake, even in cases where the EU does not have the competence to intervene with hard law harmonising measures. In fact, it should not be forgotten that when Directive 95/46 was adopted (as recalled above) there was no specific legal basis for the EU to intervene in the field of data protection with the specific aim of safeguarding fundamental rights. Indeed it was the internal market rationale that provided the basis for intervention with legislative measures in that field. Within this context, nonetheless, the provisions on the establishment of national independent authorities seem to have been conceived not so much (or not exclusively) as an internal market measure, but rather as an instrument to ensure the protection of fundamental rights by reinforcing their guarantees directly at the national level and indirectly at the EU one. This shows how, while lacking a clear legal basis, EU law found room to intervene, especially by setting the institutional preconditions to guarantee the right to data protection, dictating their main features, and making these institutional choices effectively mandatory (as demonstrated by the several infringement proceedings conducted in that regard). Thus, one could legitimately imagine some similar intervention taking place in other domains, or could question the lack of such intervention in the domains where the EU does not have explicit competence to regulate through substantive measures, but (as demonstrated by the case of data protection) could still intervene to protect and promote some of the fundamental values and objectives it shares with Member States, by dictating the establishment and the key features of specific institutions intended to operate at national level (and co-operate at the EU level) to achieve these aims, while promoting an EU approach and respecting national specificities and interests.

As regards the last argument, the case of data protection also shows that EU law can achieve rather remarkable results, in terms of the effectiveness of its intervention concerning the establishment of independent administrative institutions as supervisory/regulatory authorities. As demonstrated by the interpretation and application of Directive 95/46, national DPAs,

although established and run according to national law, are not (or no longer) national organs governed solely by national rules. In fact, they fulfil functions directly attributed to them by EU law, while their status is governed by both national and EU law. It follows that national legislators are not completely free in shaping the rules pertaining to national DPAs. Rather, national legal systems must provide the guarantees envisaged by that Directive, which work as benchmarks for the setting up and functioning of such bodies. In certain cases, these guarantees may be similar to features already present in national legal orders, but such features acquire new substance via their incorporation and (re)shaping into EU law. This seems to be the case of independence. Although it may not be a completely novel feature for national administrative legal orders, the fact that the (complete) independence of DPAs is set as a mandatory requirement of EU law for national administrative authorities to comply with implies that it has (also) become a notion of EU law that must be interpreted and applied consistently across the Member States. As observed above, the developing case-law on the matter contains useful elements in this respect. In particular, the seminal judgment in *Commission v. Germany* contains some precious information on the dimensions and indicators to be used in assessing the independence of supervisory/regulatory authorities, especially regarding their relationship with the State/government. In contrast to other international documents and guidelines, EU law has (so far) described these elements in great detail.⁷⁴ Moreover, although the judgment above refers to independence from the supervisees only implicitly, without detailing the possible ways of measuring it, nevertheless it clearly implies that this is another dimension to be considered in judging the independence of such bodies. Overall, the result is an increasing fertilisation of national administrative law by EU law: as for the independence requirement, EU law directly dictates some key features of

⁷⁴ One could point to the rather more detailed indications provided by the Explanatory Report to the Additional Protocol to Convention 108 (see fn 22 *supra*) where, commenting on the provision of Article 1.3 of the Protocol whereby “the supervisory authorities shall exercise their functions in complete independence”, it is stated that “supervisory authorities cannot effectively safeguard individual rights and freedoms unless they exercise their functions in complete independence. A number of elements contribute to safeguarding the independence of the supervisory authority in the exercise of its functions. These could include the composition of the authority, the method for appointing its members, the duration of exercise and conditions of cessation of their functions, the allocation of sufficient resources to the authority or the adoption of decisions without being subject to external orders or injunctions. As a counterpart to this independence it must be possible to appeal against the decisions of the supervisory authorities through the courts, in accordance with the principle of the rule of law, when these decisions give rise to complaints. Moreover, in cases where the supervisory authority does not itself have judicial competence, the intervention of a supervisory authority shall not constitute an obstacle to the possibility for the individual to have a judicial remedy”.

institutional administrative bodies, thus creating new institutional players (or re-shaping old ones) at the national level, while also attracting them into the EU legal order.⁷⁵

b) Institutional guarantees at EU level

As mentioned above, EU law provides for institutional guarantees regarding data protection not only to be implemented at the national level, but also to be set up and function at EU level. Thus, besides the requirement of co-operation among national DPAs so as to strengthen cross-border safeguards of the fundamental right to data protection, EU law itself reinforces the guarantees of data protection at the EU level, also through the establishment of supranational institutional actors devoted to that purpose. In this respect, two main entities need be taken into account: the Working Party on the Protection of Individuals with regard to the Processing of Personal Data, and the EDPS.

i) The Working Party on the Protection of Individuals with regard to the Processing of Personal Data (the Working Party)

Article 29 of Directive 95/46 provides for the establishment of the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (also referred to as the ‘Article 29 Working Party; hereinafter, simply ‘the Working Party’). First and foremost, Article 29 mandates for the Working Party to be an advisory body that must “act independently”. Apart from clarifying the particular status of this body, at its very outset Article 29 also establishes the key features of the Working Party – namely its independence – in very similar terms to those of Article 28 regarding national DPAs (as described at length above).⁷⁶ Once again, as in Article 28, Article 29 also provides no further indications

⁷⁵ In this context, it is interesting to point to the (abovementioned) ongoing legislative developments within the EU data protection domain, and in particular to the proposal envisaging the replacement of Directive 95/46 by a directly applicable Regulation (see fn 16 above), which will: cover the position of supervisory authorities in greater detail, confer upon them new powers (such as the power to impose administrative sanctions: see Article 79 of the proposed Regulation), and notably strengthen their independence. The latter will be achieved by introducing (within a Section headed “Independent Status”) a set of provisions inspired by the ECJ’s case-law, by the pertinent provisions of Regulation 45/2001, as well as – it could be argued – by similar requirements set by other pieces of EU legislation adopted in different domains (such as electronic communication law, which will be discussed below), touching specifically upon several relevant crucial aspects, such as not only their functional, but also their organisational, personal, financial and reporting independence, without deleting the general requirement of “complete independence” (see Articles 47-50 of the proposed Regulation: Article 47 is exclusively devoted to the “Independence” of the national supervisory authorities).

⁷⁶ In contrast to Article 28, Article 29 does not qualify independence as “complete” or anything else, although by affirming that “[the Working Party] shall [...] act independently”, the latter appears to relate independence

concerning the proper interpretation of the established notion of independence. Nevertheless, one might assume that the observations on the independence of national DPAs made above could largely be extended to the Working Party too, especially in view of its composition. Thus, one might argue that the Working Party has to be free not only from any interference on the part of the addressees of its actions, but also from any direct or indirect influence from any government or Member State, as well as, presumably, from EU governmental institutions, such as the Commission in particular.⁷⁷

Indeed, regarding the composition of the Working Party, Article 29 specifies that it must consist of a representative of the supervisory authority established by each Member State, a representative of the authority established for the EU institutions and bodies (i.e., the EDPS), as well as (perhaps, surprisingly) a representative of the Commission, each of them designated by the institution, authority or authorities they represent.⁷⁸ Regarding the presence of a Commission representative within the Working Party, holding almost the same status as all the other Working Party members, this would appear to cast doubt upon the assumption presented above of the independence of that body from the ‘EU government’.⁷⁹ Similarly, a threat to the same would-be independence seems to be posed by the fact that, according to Article 29(7), the Working Party is obliged to consider items placed on its agenda by its chairperson, not only on his/her own initiative or at the request of a representative of the supervisory authorities, but also at the Commission’s request. Moreover, some inconsistency with the independence requirement (if it is also supposed to apply to the Commission) could well be determined by the provision of Article 29(5), whereby it is for the Commission itself to provide the Working Party’s secretariat.⁸⁰

mostly to the operating dimension of the established body, as the former does for national DPAs when it affirms that “[the national DPAs] shall act with complete independence”. Nevertheless, recital 65 of Directive 95/46 states that the Working Party must “be completely independent in the performance of its functions”.

⁷⁷ Interestingly, the Working Party website (although hosted on the Commission’s web platform) states as a disclaimer that “the material (opinions, working documents, letters etc.) issued by the Article 29 Working Party [...], available on this website reflect the views only of the [Working Party] which has an advisory status and acts independently. They do not reflect the position of the European Commission” (see http://ec.europa.eu/justice/data-protection/article-29/index_en.htm).

⁷⁸ Article 29(2), second sub-paragraph, also specifies that where, according to Article 28 of Directive 95/46, a MS has opted to establish more than one supervisory authority, it has to nominate a joint representative, and that the same rule applies to the authorities established for EU institutions and bodies.

⁷⁹ The Commission representative appears to be a member of the Working Party very much like the other members, the only substantial difference identifiable from reading Article 29 being that the former has no voting power (see *infra* in the text).

⁸⁰ One could, indeed, draw a parallel between this provision and the measures at stake in the Case *Commission v. Austria* mentioned above, where – according to the Commission and confirmed by the Court – the fact that the Federal Chancellery provides for the national DPA’s office runs contrary to its independence.

On the contrary, other provisions within Article 29 appear much more in line with the independence requirement. For instance, according to Article 29(6), the Working Party has been granted the power to adopt its own rules of procedure in almost complete freedom, the only rule already imposed by Article 29(5) itself being that its decisions have to be taken by “a simple majority of *the representatives of the supervisory authorities*” (*emphasis added*).⁸¹ According to the wording of this provision, it would seem that the Commission’s representative does not have a right to vote. A further sign of the Working Party’s independence can be found in the rule under Article 29(4) establishing that the Working Party elects its chairperson and decides whether to renew his/her two-year term of office (virtually, as many times as it wishes).⁸²

Directive 95/46 also sheds some light on the Working Party’s consultative role. Article 30 therein clarifies, in substance, that the main purpose of the Working Party is to provide independent and expert advice to the Commission on data protection issues, which predominantly arise at Member State level, so as to allow the latter to take informed and appropriate measures on such issues.⁸³ Furthermore, Article 30 attributes a prominent role to the Working Party in promoting consistent and uniform solutions concerning data protection policies across the EU, having regard, in particular, to the application of the national rules adopted pursuant to Directive 95/46. Indeed, it states that if the Working Party finds that “divergences likely to affect the equivalence of protection for persons with regard to the processing of personal data in the [EU] are arising between the laws or practices of Member

⁸¹ The Working Party rules of procedure in force are available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/rules-art-29_en.pdf. They include a re-statement of the key provisions of Directive 95/46 concerning the Working Party’s operations, as well as their development, in particular (among many other things) regarding its membership, chairmanship, agenda-setting, etc. and many other complementary rules necessary to its functioning.

⁸² Curiously, in the original Commission Proposal of Directive 95/46 (see fn 31 *supra*), it was stated that the chairman of the Working Party should be the Commission representative (see Article 27 therein). This was later changed into the chairman being elected by the Working Party members, so as to provide a further guarantee of independence.

⁸³ More specifically, Article 30(1) states that the Working Party has to “(a) examine any question covering the application of the national measures adopted under th[e] Directive in order to contribute to the uniform application of such measures; (b) give the Commission an opinion on the level of protection in the [EU] and in third countries; (c) advise the Commission on any proposed amendment of th[e] Directive, on any additional or specific measures to safeguard the rights and freedoms of natural persons with regard to the processing of personal data and on any other proposed [EU] measures affecting such rights and freedoms; (d) give an opinion on codes of conduct drawn up at [EU] level”. As regards the latter task, see also Article 27(3) of Directive 95/46. Finally, for a further domain of activity for the Working Party, see Article 15(3) of Directive 2002/58, stating that it must “also carry out the tasks laid down in Article 30 of [...] Directive [95/46] with regard to matters covered by [...] Directive [2002/58], namely the protection of fundamental rights and freedoms and of legitimate interests in the electronic communications sector”.

States, it shall inform the Commission accordingly”.⁸⁴ In performing this mission – another important sign of its independence – the Working Party has the power to act on its own initiative and issue recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the EU, which will be forwarded (along with its opinions) to the Commission: the latter, in turn, is required to inform the Working Party of any action taken pursuant to those recommendations (and opinions) within a public report addressed also to the European Parliament and the Council.⁸⁵ Finally, to combine the independence of the Working Party with its necessary transparency, Article 30(6) mandates the drafting of an annual public report by the Working Party itself, albeit limited to “the situation regarding the protection of *natural persons*” with regard to the processing of personal data in the [EU] and in third countries” (*emphasis added*), to be transmitted also to the Commission, the European Parliament and the Council.

Overall, the Working Party appears to be a peculiar supervisory body, since it is only entrusted with consultative functions (and no binding powers) to be exercised vis-à-vis the Commission. Furthermore, although structurally designed in a very similar way to a national DPA, as envisaged by EU law, and therefore having independence as its key institutional feature, its close institutional relationship with the Commission sounds not entirely consistent with the model chosen. Nevertheless, its ample powers of initiative and scope of action, if effectively exercised, could offer a significant contribution to the development and enforcement of data protection rules across the EU. In this respect, the Working Party appears to be an extremely interesting and precious forum for the exchange of useful information and best practices among national DPAs (and EU authorities): these are normally transposed into recommendations and opinions intended to reflect the general consensus among its members on relevant issues it deals with, so as to improve and implement a consistent and uniform EU approach to data protection that could prove to be beneficial at both national and supranational levels in the promotion and protection of this fundamental right⁸⁶.

⁸⁴ See Article 30(2) of Directive 95/46.

⁸⁵ See Article 30(3)-(5) of Directive 95/46. Looking at the Working Party website (see fn 77 *supra*) one can see the significant range of issues it covers, as well as its significant production in terms of opinions and recommendations.

⁸⁶ Against this backdrop, it is not really surprising that, with its proposal brought forward to amend Directive 95/46 (see fn 16 above), the Commission has suggested transforming the Working Party into a European Data Protection Board (EDPB), with a secretariat provided by the EDPS, which is intended to be the overarching body through which the consistent application of the new (now, draft) Regulation will be ensured (see Articles 64-72 of the proposed Regulation).

ii) The European Data Protection Supervisor (EDPS)

Besides the Working Party, the EU has established a proper supranational supervisory authority responsible for monitoring the application of data protection provisions by EU institutions and bodies. This European Data Protection Supervisor (EDPS) was established by Regulation 45/2001 which, as mentioned above, also details the provisions applicable to all processing of personal data carried out by an EU institution or body (mostly, by extending to them the application of existing EU measures on data protection addressed to Member States). Thus, in contrast to the Working Party, the EDPS, which has been operating since 2004, functions very much like a national DPA, but at EU level.⁸⁷ As the law dictates, the EDPS has duties and powers to act only with regard to EU institutions and is not intended to impinge upon DPAs' activities at the national level.

The legal basis for Regulation 45/2001 is the previously mentioned former Article 286 EC (now, in substance, Article 16 TFEU), which explicitly mandates the establishment of an independent supervisory body such as the EDPS.⁸⁸ Thus, Regulation 45/2001 contains basic provisions on the structuring and functioning of the EDPS.⁸⁹ Within this Regulation, a

⁸⁷ In the words of the ECJ in *Commission v. Germany* (discussed above), “in the same way as supervisory bodies exist at national level, a supervisory body responsible for ensuring the application of the rules on the protection of individuals with regard to the processing of personal data is also provided for at [EU] level” (§ 27 therein). In performing its role, the EDPS is supported by the so-called ‘Data Protection Officers’ (DPOs), designated by each EU institution or body pursuant to Regulation 45/2001, which are responsible for ensuring, in an independent manner, that the Regulation is applied within each institution and body, and therefore cooperate with the EDPS in this respect. On this matter, see Commission Decision 2008/597/EC of 3 June 2008, adopting implementing rules concerning the DPOs, pursuant to Article 24(8) of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies, and on the free movement of such data (OJ [2008] L 193/7), which defines the rules and procedures for implementing the function of DPO within the Commission (regarding, in particular, its appointment, status, duties, powers, etc.). More broadly, on the EDPS' role and functions, see in particular H. HIJMANS, “The European Data Protection Supervisor: The Institutions of the EC controlled by an Independent Authority”, in CMLR [2006] 43, pp. 1313-1342.

⁸⁸ Interestingly, while the former Article 286 EC refers to the establishment of “an independent supervisory body”, now Article 16 TFEU (as well as Article 39 TEU) speaks of “independent authorities”. In the plural now employed by Article 16 TFEU one could read a reference to the possibility of having several independent authorities operating at EU level in different policy fields where, as envisaged by the Treaties, specific data protection legislation is enacted: i.e., in the common foreign and security policy domain and in the field of judicial cooperation in criminal matters and police cooperation. It should also be noted that Article 16 TFEU (as well as the former Article 286 EC) does not contain any indications regarding the institutional model to be adopted for the establishment of the independent EU supervisory authorities for data protection, and therefore carries no obligation to opt for a sort of Ombudsman model, essentially centered on one person (as the EDPS appears to function) rather than a collective body (as DPAs are normally structured, at least in most continental countries). Above all, one could speculate on the need for an ad hoc provision to fund the establishment of a body such as the EDPS, instead of perhaps simply using the same provisions that constitute the legal basis of Directive 95/46, i.e. those of the internal market.

⁸⁹ For a broader account of the institutional aspects of the EDPS, apart from the specific features discussed below, see the first two annual reports issued by the EDPS itself, in accordance with to Article 48 of Regulation

specific Chapter (namely, Chapter V, consisting of eight Articles) is devoted to provisions addressed to the EDPS. Already at first sight, in contrast to Articles 28 and 29 (as well as Article 30) of Directive 95/46 concerning national DPAs and the Working Party, respectively, the provisions on the EDPS appear to be much longer and more detailed. For instance, the list of the EDPS' specific duties and powers (although in line with those attributed to national DPAs) are described at more length by (respectively) Article 46 and 47 of Regulation 45/2001. It emerges that the EDPS is called upon to exercise supervisory tasks to ensure that the fundamental right to data protection is respected by EU institutions and bodies (e.g., by carrying out prior checks, informing data subjects, hearing and investigating complaints related to alleged violations of rights protected by Regulation 45/2001, conducting other inquiries, and taking appropriate measures where needed), as well as to fulfil a consultative role towards EU institutions and bodies, and to co-operate in particular with national DPAs with a view to improving consistency in the protection of personal data.

Moreover, it is already apparent from primary law that the independence of the EDPS stands out as its prominent institutional feature. Thus, specific guarantees have been put in place to ensure that independence. In this respect, indeed, Regulation 45/2001 devotes an autonomous and specific provision to independence, namely Article 44 therein. Although this substantially resorts to the same formula employed in Directive 95/46 and states that the EDPS must “act in complete independence in the performance of his or her duties”,⁹⁰ unlike the latter, Article 44 of Regulation 45/2001 provides many more elements that prove useful in giving substance and shape to the very notion of independence. As observed above, the ECJ has indeed used (to a certain extent) the more detailed provisions on independence contained in Regulation 45/2001 to interpret the general concept also expressed by Directive 95/46. Apart from the provision used in this respect by the ECJ (in the Case *Commission v. Germany*, discussed above), mandating the EDPS not to “seek nor take instructions from anybody” in the performance of his/her duties,⁹¹ other interesting details help elucidate the scope of the independence requirement. Thus, Article 44(3) clarifies that the EDPS has to “refrain from any action incompatible with his or her duties and shall not, during his or her term of office, engage in any other occupation, whether gainful or not”, while Article 44(4) provides that he

45/2001 (namely, the 2004 Report on “Building a new institution”; and the 2005 Report on “Consolidating the EDPS”; both available at <http://www.edps.europa.eu/EDPSWEB/edps/cache/off/EDPS/Publications/AR>), which are essentially centered on the process leading to the establishment and consolidation of the EDPS, in general as well as concrete terms.

⁹⁰ See Article 44(1) of Regulation 45/2001.

⁹¹ See Article 44(2) of Regulation 45/2001.

or she “after his or her term of office, [must] behave with integrity and discretion as regards the acceptance of appointments and benefits”.⁹²

Other measures are also intended to safeguard independence. For instance, the provision contained in Article 42(2) on the appointment of the EDPS states that the latter has to “be chosen from persons whose independence is beyond doubt and who are acknowledged as having the experience and skills required to perform the duties of [the EDPS], for example because they belong or have belonged to the supervisory authorities referred to in Article 28 of Directive 95/46”.⁹³ As far as this provision is concerned, one could argue that relying on the personal independence of the person to be appointed as EDPS to guarantee (complete) independence to the institution he or she will represent might seem to create a sort of vicious circle. Moreover, the abovementioned ‘personal independence’ is not defined in any way: the questions of whom the person to appoint should be independent from, and whose and what doubt has to be overcome to ensure personal independence remain substantially unanswered by Article 42 (or the entire Regulation 45/2001). Moreover, if requiring appropriate experience and skills as preconditions for the appointment of EDPS could prove to indirectly guarantee his/her independence in the performance of their assigned duties and functions, identifying “expertise” as the mere ongoing or previous engagement with a national DPA does not appear as a good exemplification of the way to apply that requirement (also) as a tool to guarantee the independence of the EDPS.⁹⁴

Another possible guarantee of the EDPS’s independence could be found in the strict rule regarding his/her removal from office. Indeed, according to Article 42(4)-(6) of Regulation 45/2001, apart from routine replacement at the expiry of the five-year ordinary mandate (unless reappointment takes place), death or resignation, the duties of EDPS end (*ex nunc*) only in the event of compulsory retirement following a decision by the ECJ, based upon a

⁹² In particular, regarding the first provision mentioned above, it is interesting to note that in *Commission v. Austria* given the issues at stake (especially the fact that the members of the national DPA seem to hold other jobs/positions while working for the DPA), the ECJ, in contrast to AG Mazák in his related Opinion (see § 33 thereof), did not adopt an interpretative approach like that adopted in *Commission v. Germany*, and did not resort to this provision to condemn Austria (see also fn 50 *supra*). Overall, it is interesting to note that the measures provided for by Regulation 45/2001 to clarify the notion of independence are mostly related to personal elements: this is also because the EDPS is indeed, essentially, a physical person, although supported by a rather complex apparatus (as well as an Assistant Supervisor), while national DPAs are generally collective bodies, as mentioned in fn 88 *supra*.

⁹³ Concerning the procedure for appointment, one could read the provision of Article 42(1) of Regulation 45/2001 in the same vein, as it states that “the [EP] and the Council shall appoint by common accord the [EDPS] for a term of five years, on the basis of a list drawn up by the Commission following a public call for candidates”.

⁹⁴ This is especially because – one could argue – no specific expertise/skill is formally required (at least by EU law) in order to be appointed as a member of a national DPA.

request from either the European Parliament, the Commission and the Council when the EDPS no longer fulfils the conditions set for the performance of his or her duties, or if he or she is found guilty of serious misconduct. While the EDPS's independence is undoubtedly reinforced by making his/her dismissal (or the withdrawal of his/her right to a pension or other benefits) subject to a motivated request, accordingly (independently) assessed by the ECJ, the fact that such a request is to be issued by one of the main supervisees of the EDPS appears somewhat questionable.

Finally, as another example of a measure that contributes to guaranteeing the independence of the EDPS, one could point to Article 43(4) of Regulation 45/2001, which provides that the EDPS must be assisted by his/her own Secretariat, consisting of officials and staff members appointed by the EDPS him/herself and "subject exclusively to his or her direction".⁹⁵ Nonetheless, within the very same Article 43 it is stated, substantially, that the budget the EDPS should count upon is not directly controlled by the EDPS him/herself, but is rather prepared by the budgetary authority within the general budget of the EU (although under a separate heading). Furthermore, it is for the budgetary authority to ensure that the EDPS is provided with the human and financial resources necessary for the performance of his or her tasks.⁹⁶

To conclude, apart from the specificities mentioned above, the EDPS very closely resembles a national DPA.⁹⁷ This is particularly true as far as the common requirement of independence is concerned. In this respect, from an EU law perspective, it could be argued that at least some of the provisions detailed by Regulation 45/2001 could also have been included in Directive 95/46, which mandates the independence of national DPAs without specifying the actual scope of that concept. In fact, the ECJ is filling this 'gap' while the EU legislator is (currently) discussing new proposals concerning the replacement of the pertinent provisions of Directive 95/46 with a text that will contain much more detailed measures on independence, very similar to those already contained in Regulation 45/2001. In fact, this

⁹⁵ This measure can be compared/contrasted with the abovementioned Article 29(5) of Directive 95/46, stating that the Secretariat of the Working Party is, instead, provided for by the Commission. On the contrary, there are other measures that could be likened to those set for the Working Party, such as the autonomous powers entrusted to the EDPS to establish its own rules of procedure, according to Article 46(k) of Regulation 45/2001.

⁹⁶ Regarding human resources, and especially officials and staff members of the EDPS Secretariat, the last sentence of Article 43(4) makes it clear that "their numbers shall be decided each year as part of the budgetary procedure".

⁹⁷ Significantly, like national DPAs, the EDPS has equal status within the Working Party, thus enjoying voting rights like the representatives of the national DPAs. The Working Party represents itself, and therefore a central platform for co-operation between the EDPS and national DPAs in guaranteeing the fundamental right to data protection.

‘gap’ may create some problems. Indeed, in contrast to Regulation 45/2001, the fact that Directive 95/46 does not offer any detail to properly define the mandatory requirement of independence could, on the one hand, potentially leave more room to challenge the very different national provisions claimed to be inconsistent with that requirement: on the other hand, it may also limit EU scrutiny over specific national institutional choices that may prove to be crucial in order to meet the independence requirement as understood by the ECJ. Thus, it seems not only plausible but even desirable for EU law to intervene directly by detailing the factors that would be considered as essential to give substance and shape to the independence of a supervisory authority for data protection operating at the national level (as well as, possibly, to other similar bodies performing equivalent functions in other domains).

1.2 IAAs and fundamental rights: the case of equality institutions

1.2.1 The equality principle and EU law: preliminary observations

It is well established that the equality of people before the law is a general principle, belonging first to all constitutional traditions common to the Member States, and then to the EU legal order.¹ Indeed, this common principle has been granted fundamental constitutional status and progressively defined in all EU democracies (especially after the Second World War), while also being embodied in the founding European Treaties from the very beginning (as well as in other significant international and European legal documents).²

In particular, as far as EU law is concerned, the principle of equality was already enshrined in the Treaties of 1957 (albeit to a very specific extent), in what is now Article 157 TFEU (originally, Article 119 EEC), which lays down the requirement of equal pay for women and men.³ While that provision, especially following subsequent amendments, has permitted the adoption of EU legislation to actively combat this and other aspects of gender discrimination in the workplace (in particular, equal treatment in access to and conditions of employment, as well as social security), as a consequence of the introduction of now Article 19 TFEU within the founding Treaties (thanks to the Treaty of Amsterdam), the EU has gained the power to tackle discrimination on various important grounds listed therein, also beyond the employment context. Therefore, on the basis of primary law the EU has acquired competence to intervene in ensuring equal treatment between persons more generally, and against any discrimination in relation to sex, racial or ethnic origin, religion or belief, disability, age, and

¹ The following considerations will necessarily be extremely general: for a more detailed account of EU anti-discrimination and equality law and policy, in historical as well as current terms, see: P. CRAIG, G. DE BURCA, *EU Law: Text, Cases and Materials*, Oxford, OUP, 2012, notably Ch. 24; E. ELLIS, *EU Anti-Discrimination Law*, Oxford, OUP, 2005 (especially Ch. 1); M. BELL, *Anti-Discrimination Law and the European Union*, Oxford, OUP, 2002; as well as the European Union Agency for Fundamental Rights and European Court of Human Rights - Council of Europe, *Handbook on European non-discrimination law*, Luxembourg, 2011.

² The right to non-discrimination is recognised, inter alia, by the main international instruments such as the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights, the UN Convention on Economic, Social and Cultural Rights, the UN Convention on the elimination of racial discrimination, and the ILO Convention No 111. Within, Europe, one could point to the ECHR, and in particular to Article 14 and Protocol 12 therein.

³ It is acknowledged that, at the time of its adoption, this provision had a predominantly economic rationale, as it was originally intended to prevent MS from gaining a competitive advantage over each other by offering lower rates of pay or less favourable working conditions for women. Thus, the first applications of the principle of equal treatment were essentially driven by the main economic concern of internal market-making. In the same light, besides the abovementioned provision, one should also consider Article 7 EEC (now, Article 18 TFEU) mandated the prohibition of any discrimination on grounds of nationality, which is undoubtedly another manifestation of the principle of equality within the founding Treaties, albeit very specific to the EU legal order.

sexual orientation.⁴ Moreover, the Charter has reinforced the protection against discrimination and the promotion of equality provided by EU primary law, by specifically devoting an entire Title (namely, Title III, “Equality”) to it. This Title consists of several Articles, spanning from the explicit recognition of the principle of equality itself before the law (i.e., Article 20 of the Charter), to the prohibition of any discrimination (Article 21 of the Charter); from the guarantee of equality between women and men in any area (Article 23 of the Charter), to respect for cultural, religious and linguistic diversity (Article 22 of the Charter); as well as specifically acknowledging the rights of the child, the elderly and people with disabilities (respectively, Articles 24, 25 and 26 of the Charter); thus unquestionably highlighting the fundamental human rights dimension inherent in the principle of equal treatment between people, beyond any economic rationale.⁵

Against such a backdrop, the EU has already adopted several legislative measures (mainly in the form of Directives, although supplemented by a vast array of other policy instruments, of varying legal nature) to deal with discrimination on many of the above-listed grounds. Thanks especially to the abovementioned new legal basis, EU anti-discrimination and equality law has evolved over the last decade, from its original focus essentially only on sex discrimination in the context of employment and social security.⁶ Among the most relevant legislative interventions dealing with discrimination more broadly, one could cite: Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women regards access to employment, vocational training and promotion, and working conditions (simply, Directive 76/207, or the Original Equal Treatment Directive)⁷, amended by Directive 2002/73/EC of the European Parliament and of the Council, of 23 September 2002 (referred

⁴ It should also be remembered that, besides hard law measures protecting and promoting equality, the ECJ has been extremely pro-active in recognizing and guaranteeing a general principle of equal treatment in EU law: see, again, CRAIG & DE BURCA, cited, Ch. 24, specifically pp. 891-895.

⁵ The principle of equality is now also mentioned by many other Treaty provisions of symbolic as well as substantive importance: hence, it is mentioned within the Preamble to the TEU (and within that of the Charter), as well as in Article 2 TUE, which lists the values upon which the Union is founded, and in Article 3 TUE (regarding equality between men and women), among the objectives of the Union. Moreover, among the provisions on democratic principles, Article 9 TEU calls on the Union to observe the principle of equality between its citizens. Finally, Article 8 TFEU, as a provision of general application, states that “in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women”.

⁶ On the various measures enacted to tackle discrimination in the field of employment, see CRAIG & DE BURCA, pp. 873-891. Among the many legal instruments adopted in this context, it is perhaps worth mentioning Council Directive 2000/78/EC, of 27 November 2000, which establishes a general framework for equal treatment in employment and occupation (OJ [2000] L 303/16; usually referred to as the Framework Employment Directive) and covers several grounds for potential discriminations, such as religion, belief, disability, age and sexual orientation.

⁷ OJ [1976] L 39/40.

to below simply as the Amended Equal Treatment Directive)⁸, then repealed by and consolidated within the broader Directive 2006/54/EC of the European Parliament and of the Council 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 (simply, Directive 2006/54, or the Consolidated Equal Treatment Directive, to which reference will essentially be made);⁹ Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (simply, Directive 2000/43, or the Race Equality Directive);¹⁰ and, finally, 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 (simply, Directive 2004/113, or the Gender Equality Directive).¹¹ This increasingly extensive application of the principle of equality has even led to a legislative proposal put forward by the Commission in 2008 (whose adoption by EU legislators is still pending; henceforth, the Proposed Directive on Equal Treatment)¹² aimed at providing a substantially equal (and consistent) legal framework for the protection against discrimination on all relevant grounds mentioned by Article 19 TFEU (apart from race and sex, for which the already well-established and abundant legislation would remain in place), outside the field of employment (thus supplementing existing legislation in force in this latter domain). To that end, the Proposed Directive on Equal Treatment is intended to establish a framework for the prohibition of discrimination on grounds of religion or belief, disability, age or sexual orientation, and establish a uniform minimum level of protection within the EU for people who have suffered such discrimination, thus complementing the existing EU anti-discrimination and equality law.

⁸ OJ [2002] L 269/15.

⁹ OJ [2006] L 204/23.

¹⁰ OJ [2000] L 180/22.

¹¹ OJ [2004] L 373/37.

¹² See COM(2008) 426 final, of 2 July 2008. It should be observed that Directive 2006/54 (as well as Directive 2002/73) is rooted in former Article 141(3) EC (now Article 157(3) TFEU), while Directive 2000/43 and Directive 2004/113 are grounded in Article 13 EC (now Article 19 TFEU), as well as it is proposed for the Proposed Directive on Equal Treatment (which, like Directive 2004/113, should in fact be founded more precisely on paragraph 1 of former Article 13 EC, now paragraph 1 of Article 19 TFEU).

1.2.2 EU law and the institutional guarantees for equality

From the framework sketched above, it appears that EU equality and anti-discrimination law is now an extremely rich field of normative activity, increasingly embedded within human rights law. Taking into account all the various aspects and dimensions of this branch of EU law is far beyond the scope of this research.¹³ Much more narrowly, from the point of view of the implementation of the equality principle, and in the quest for effective remedies and enforcement strategies from the EU law perspective, the focus here will be on the abovementioned Directives (hereinafter, also, the three Equality Directives)¹⁴ as they all contain interesting institutional provisions addressed to Member States, which will be looked at in greater detail in the following pages. Some light will also be shed on other measures centred on institution setting at the EU level.

a) Institutional guarantees at the national level

In assessing the institutional guarantees of equal treatment established by EU law to operate at national level, all three Equality Directives should be focused on. Indeed, they are drafted in quite similar terms, resort to similar legal notions related to anti-discrimination and equality law, and all contain almost identical provisions concerning institution setting for the promotion of equal treatment in their respective fields of application. This ‘common’ provision states (*emphasis added*)¹⁵:

1. 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 (Directive 2000/43); sex (Directive 2000/73 and Directive 2004/113, as well as Directive 2006/54); religion or belief, disability, age, or sexual orientation (the Proposed Directive on Equal Treatment)]. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights.

¹³ Once again, for further speculation on this branch of EU law, see the reference indicated in fn 1 *supra*.

¹⁴ The Directives referred to here are indeed Directives 2000/43, 2004/113 and 2006/54, but not Directive 2000/78, which does not contain any such institutional provision. In fact, Directive 2000/78 (the Framework Employment Directive) does not require MS to establish or designate an equality body or institution charged with promoting equal treatment in the field covered (although generic reference to “competent bodies” is made therein).

¹⁵ The quotation is actually a reproduction of Article 13 of the Race Equality Directive, which is the first provision to contain the obligation to establish bodies for the promotion of equal treatment (in that field). The other relevant Directives have followed suit. Thus, both Article 8a of the Amended Equal Treatment Directive (now Article 20 of the Consolidated Equal Treatment Directive) and Article 12 of the Gender Equality Directive substantially correspond to Article 13 of the Race Equality Directive. Any relevant difference among these provisions will then be highlighted in the text, if and where deemed appropriate. Nothing on equality bodies was envisaged in Directive 76/207 before it was amended.

2. Member States shall ensure that the competences of these bodies include:

- without prejudice to the right of victims and of associations, organisations or other legal entities [...], providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination.

The national bodies for the promotion of equal treatment mentioned in this provision are usually referred to as “equality bodies”,¹⁶ or also, in the literature, as ‘equality institutions’,¹⁷ rather than ‘anti-discrimination’ bodies/institutions. This probably derives from a will to highlight one of the key reasons for their establishment and functioning: the active promotion of equal treatment, which is explicitly mentioned in the above-quoted provision. In this respect, it is useful to recall the specific distinction usually drawn between anti-discrimination and equality law. Although they are undoubtedly two sides of the same coin, anti-discrimination law is largely understood as a set of negative obligations regarding behaviours and attitudes that the parties concerned should refrain from engaging in, while equality law is generally employed with reference to a set of positive actions/duties to be performed to effectively promote and achieve equal treatment.¹⁸ Thus, talking about these specialised enforcement institutions as equality, rather than anti-discrimination, bodies immediately evokes the idea of the pro-active role they can play, in practice, in combatting and removing discrimination among people.¹⁹

Apart from this terminological note, at least four specific themes emerge from a reading of the provision quoted above: first, the very establishment of a “body or bodies for the promotion of equal treatment”; second, the main institutional features of the bodies established; third, their mission and competences; fourth, and finally, their operating dimension(s). These four themes will be considered in turn.

¹⁶ This expression is used explicitly, for instance, in Article 20 of Directive 2006/54, as the actual heading of that provision, as well as in the explanatory memorandum attached to the Proposed Directive on Equal Treatment.

¹⁷ Other possible alternative expressions employed to indicate the same bodies are ‘specialised bodies’, ‘enforcement bodies’ or ‘independent bodies’.

¹⁸ See, for instance, BELL, cited, p. 148.

¹⁹ It is not insignificant that the provisions quoted speak of “a body or bodies *for the promotion* of equal treatment” (*emphasis added*).

i) The establishment of equality bodies

As far as the establishment of (one or more) equality bodies is concerned, one could start from the observation that the provision cited does not respond to any specific indication coming from EU primary law in this respect. Indeed, none of the various Treaty Articles now dealing with equality and non-discrimination, nor any Article of the Charter on the same topic, contain a reference to specialised enforcement institutions to be set up as national equality bodies or such like. This is very similar to the situation at the national level. As observed by DE WITTE, national constitutions encompassing the principle of equality do not normally provide for the establishment of ad hoc institutions to patrol and ensure their multifarious applications in all the various relevant domains.²⁰ However, regarding EU law (in general), it is important to note that, apart for primary law, the secondary law provisions intended to guarantee equal treatment (especially beyond gender discrimination in the employment context) have introduced, with their entry into force, the obligation to have operational equality bodies in place at the national level. Indeed, this requirement has been clearly contained in all the three Equality Directives since the very first proposals leading to their respective adoption. This is also accompanied by a statement contained in the relevant recitals, whereby protection against discrimination on different grounds “would itself be strengthened by the existence of [such] a body or bodies in each Member State”.²¹

However, looking more closely at the abovementioned provision on equality bodies, one will also note that, strictly speaking, this provision does not necessarily impose the creation of new bodies. All three Equality Directives speak of “*designat[ing]* a body or bodies for the promotion of equal treatment” (*emphasis added*). While a Member State without an equality body may well be requested to set one up ‘from scratch’, so to speak, in order to comply with the Directives’ requirement, the same Member State could also appoint one (or more than one) already existing institution(s) operating within its legal order as an equality body (or bodies), provided that this is (or they are) placed in the condition to perform the duties and functions specified by the Directives, thus helping to enforce EU anti-discrimination and equality law.

²⁰ See B. DE WITTE, “National Equality Institutions and the Domestication of EU Non-Discrimination Law”, in *Maastricht Journal of European and Comparative Law* [2011] 1-2, pp. 157-178, p. 158.

²¹ See recital 24 of Directive 2000/43. Interestingly, the almost identical recital 25 of Directive 2004/113 uses the verb “should” instead of “would”. No similar recital is contained in Directive 2006/54 (nor in Directive 2002/78).

Moreover, according to the provision cited above, instead of setting up a specialised and self-standing entity, in order to comply with EU law a Member State may also opt to establish an equality body as part of a broader human rights agency (or an agency for the safeguard of individual rights), whether pre-existing or newly established. In this respect, one could observe that the second option is rather vague in institutional terms. Indeed, there seems to be no specific obligation under EU law to establish any human rights agency (or institution) with a broad mandate at national level.²² Hence, no indications or requirements to be applied to such an agency are set by EU law²³, and consequently no specific (enforceable) guarantees are provided in such a case, especially concerning the institutional features of a human rights body to which the equality body could be attached.

Apart from the choice offered to Member States to set up either one (or more than one) separate equality body or a wider human rights institution including the latter, in itself showing a certain lack of clarity by not identifying a precise (and consistent) institution, the abovementioned provision almost completely fails to provide concrete elements concerning the establishment of an equality body. Nothing, for instance, is stated in the provision about the ‘governing law’ of equality bodies and, consequently, about their nature: whether they should be public institutions established by public/administrative law (as effectively seems to be the case), or whether other arrangements (e.g., soft law) also fit the purpose? And what kind of guarantees should be attached to the establishing act?²⁴ To tackle similar issues arising from the weak wording of the above-quoted provision in relation to the establishment (and functioning) of equality bodies, it may prove useful to refer to certain international (soft law) documents that provide guiding principles on these very matters. The two prominent documents are the UN General Assembly Resolution No 48/134, of 20 December 1993, on the “Principles Relating to the Status of National Institutions” (the so-called Paris Principles), and the General Policy Recommendation No 2, on “Specialised bodies to combat racism,

²² It should be noted that, regarding international law, a more detailed framework is in place for the so-called “National Human Rights Institutions” (NHRI): for the various implications within the EU see the report on “National Human Rights Institutions in the EU Member States - Strengthening the fundamental rights architecture in the EU”, issued by the EU agency for Fundamental Rights in 2010 (available at http://fra.europa.eu/sites/default/files/fra_uploads/816-NHRI_en.pdf); for a broader and more detailed picture, J. WOUTERS, K. MEUWISSEN (eds.), *National Human Rights Institutions in Europe*, Cambridge, Intersentia, 2013.

²³ In this respect, however, regarding NHRI in particular, one could consider the more detailed international soft law documents in existence, such as the ones mentioned below.

²⁴ These questions are merely indicative, as there are several other issues that remain uncovered by the Equality Directives: for instance, to pick just one, there is no indication of whether equality bodies should be either single-person institutions (similar to Ombudsmen) or collegiate bodies (like Commissions, deriving predominantly from continental models).

xenophobia, anti-Semitism, and intolerance at national level”, adopted by the (CoE’s) European Commission against Racism and Intolerance (ECRI) on 13 June 1997.²⁵

It is striking to note that, despite the existence of these two fairly detailed international instruments, since its first appearance in the Race Equality Directive, the abovementioned provision has nevertheless been reproduced on different occasions but in substantially identical terms – in the subsequent Amended Equal Treatment Directive (and Consolidated Equal Treatment Directive), as well as in the Gender Equality Directive – without the addition of further elements to promote a more structured model for a national equality body. In fact, one could well claim that there is no single European model for an equality body and that the three Equality Directives have left Member States with ample freedom concerning the institutional models to adopt for equality bodies, since their establishment is not specifically required for the purposes of implementing those Directives, but more generally for the promotion of equal treatment.

This contention is further reinforced by the observation that, concerning the relevant provisions in each of the three Equality Directives, it is not even clear whether three distinct equality bodies should be designated, or whether a Member State can decide to set up just one equality body to be entrusted with competences to cover all grounds of discrimination dealt with by each of the three Equality Directives respectively. The first possibility is undoubtedly a legally sound solution, since there is no cross-reference among the three Equality Directives in this respect, and each of them contains its own (equal) institutional provision. However, the latter option also seems possible, since nothing in any of the three Equality Directives precludes it. Moreover, the establishment of a single equality body at national level now appears to be encouraged by the EU legislators (or rather, by the Commission, so far). According to the Explanatory Memorandum attached to the Proposed Equality Directive, Member States may decide that national equality bodies under this would-be Directive are the

²⁵ The Paris Principles are especially focused on NHRI and seek to identify a common model for such institutions, looking at key characteristics such as powers, composition and operating method, and laying down (minimum) criteria in that respect. Overall, as recorded by DE WITTE, these documents show the significant interest that arose during the 1990s in the implementation of human rights by means of special regulatory regimes, represented by dedicated national institutions that were separate from courts and governments and offered an alternative to traditional human rights enforcement (in Maastricht Journal of European and Comparative Law, cited, pp. 163-164). The currently increasing interest in these institutions, also on the part of international (binding) law, is demonstrated by the obligation to establish an “independent mechanism” at national level, operating in a specific domain, taking into account “the principles relating to the status and functioning of national institutions for protection and promotion of human rights” provided for by Article 33(2) of the UN Convention on the Rights of Persons with Disabilities, which was adopted on 13 March 2006 and entered into force on 3 May 2008. The EU is a party to that Convention: see Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ [2010] L 23/35).

same as those bodies already established under the previous Directives.²⁶ Curiously, however, while the operative provision contained within the Proposed Directive on Equal Treatment refers, on the one hand, to the possibility of creating a single equality body, on the other hand, it only explicitly (but, apparently, not exhaustively) mentions the Race Equality Directive and the Gender Equality Directive.²⁷ Recent relevant literature highlights the pros and cons of both a single/comprehensive equality body (also resulting from the merger of different equality institutions) and multiple equality institutions operating within a national legal order, while recording an increasing tendency to select the first option, either because of well-rooted traditions of having a single institution responsible for similar issues, or because of a process of merging different institutions, which seems to take place extensively across the EU.²⁸

In substance, Member States generally appear to enjoy a significant margin of manoeuvre in establishing equality bodies. This is particularly true if one also considers that the three Equality Directives lay down minimum requirements, thus leaving Member States free to introduce or maintain provisions that are more favourable to the protection of the principle of equal treatment and, perhaps, more stringent and detailed than those contained in the relevant Directives. The only limit set to that freedom is the prohibition against reducing the level of protection already afforded in each Member State.²⁹ The ample margin of manoeuvre that Member States possess in implementing the three Equality Directives could also work as a positive element in the setting up of equality bodies, as it implies that Member States are substantially free to decide on the structure and functioning of such bodies in accordance with their legal traditions and policy choices. However, with regard to the same vague and imprecise requirements concerning equality bodies, one could ask whether this is effectively helpful for the development of consistent and effective strategies for the promotion of equal

²⁶ See COM(2008) 416 final (cited at fn 12 above), p. 11. See also, albeit in the same vague terms, recital 25 of Directive 2004/113.

²⁷ Article 12(1) of the Proposed Equality Directive states that MS “shall designate a body or bodies for the promotion of equal treatment of all persons irrespective of their religion or belief, disability, age, or sexual orientation. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals’ rights, including rights under other EU acts including Directives 2000/43/EC and 2004/113/EC”.

²⁸ See I. RORIVE, “A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination”, in K. BOYLE (ed.), *New Institutions for Human Rights Protection*, Oxford, OUP, 2009, pp. 137-173, pp. 151-155. See also the Green Paper on “Equality and non-discrimination in an enlarged European Union” (COM(2004) 379 final, of 28.05.2004), at § 2.2.

²⁹ See, respectively, Article 6 (and recital 25) of Directive 2000/43, Article 7 (and recital 26) of Directive 2004/113, and Article 27 of Directive 2006/54. These provisions also make it clear that the three Equality Directives are minimum-harmonisation ones.

treatment in each of the relevant domains touched upon by the three Equality Directives (and perhaps across all of them) in all Member States.

It is not easy to establish the direct influence actually exercised by EU law over the establishment of national equality bodies, especially in the countries (not few) where these institutions have appeared as a complete novelty. As remarked by various commentators, beyond the northern Europe countries (such as the UK, the Netherlands, Belgium and Sweden), where similar institutions already proliferated before EU law mandated their establishment, the spread of equality bodies across Member States seems to have taken place, first and foremost, by imitating the institutional arrangements for the protection and promotion of equal treatment already adopted in those countries, which have provided examples to follow.³⁰ However, while this has also happened somewhat independently of EU law, the adoption of the three Equality Directives and the respective provisions they contain on the setting up of equality bodies, inspired in turn by pre-existing national models, have certainly contributed to the spread of these institutions across Europe.³¹ The above situation has been described as a good example of legal institutional transplanted, or rather a migration of ideas (in the field of public law).³² Nevertheless, the many differences among national equality bodies even after the entry into force of the three Equality Directives, especially in institutional terms, prove that EU harmonising measures have not been extremely effective, at least in terms of imposing a unique and definite institutional model. As hinted above, this could well be a consequence of the rather weak character of the relevant EU law provisions on equality bodies and the related difficulties of their enforceability.

³⁰ See RORIVE, cited, *passim*.

³¹ See DE WITTE, in Maastricht Journal of European and Comparative Law, cited, pp.158-159. See also the Green Paper on “Equality and non-discrimination in an enlarged Europe” (fn 28 above) where it is stated that “a number of [MS] have taken this opportunity to establish equality bodies, whether combined or separate, covering all of the grounds of discrimination set out in Article [19 TFEU]. This is a positive development, as it demonstrates that some [MS] are willing to go beyond the minimum standards set out in [EU] law. The equality bodies will certainly be key partners in the future development of anti-discrimination policy in the EU” (§ 3.5 therein).

³² This same process has also been described as a chain of legal transfers, or “a series of legal institutional transfers embedded within a broader policy transfer”, taking place in national systems of public and private law as a consequence of EU anti-discrimination and equality law as a whole (see B. DE WITTE, “New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance”, in American Journal Comparative Law [2012] 49, pp. 49-74, p. 50. The Author also highlights how the 15 MS present at the time of the adoption of the three Equality Directives, due of the unanimity requirement of their legal basis, all actually voted for it; the other 12 MS, arriving later, found the obligation to establish equality bodies as part of the *acquis communautaire* and had to accept it as such (see p. 52 therein).

ii) Main institutional features: namely, independence

As stated, the above-quoted provision does not clearly define many features of equality bodies in its text. One could say that the only characteristic of national equality bodies clearly resulting from EU law is their independence. The provision discussed mentions independence three times, in relation to each of the competences of national equality bodies: indeed, it refers to “*independent* assistance to victims”, “*independent* surveys” and “*independent* reports” (*emphasis added*) as the three main fields of action of equality bodies (see below).

Thus, independence appears to be a crucial characteristic of national equality bodies. However, it is curious to see that all three Equality Directives fail to define independence in any way. The lack of a definition of independence prompts some difficulties, such as uncertainty in implementing this requirement in practice when setting up equality bodies at the national level. Moreover, it is striking to note that the term “independence” is used not with reference to the equality bodies as such, but rather to their functions.³³ Strictly or formally interpreting the provision in question, in practice this could imply that national equality bodies are only required to exercise their competences independently, no matter whether they formally have an independent status or position.³⁴ Such a questionable assumption is another effect of the absence of any useful element in the three Equality Directives providing substance to the notion of independence.

Once again, it proves extremely important to take into account the indications deriving from other legal documents, such as the international soft law texts mentioned above that also deal substantially with independence. According to these documents, as summed up by HOLTMAAT, three main aspects of independence emerge: first, the ability to act autonomously (without having to ask permission from a third party or being threatened with the loss of mandate or financial resources, etc.); second, the appearance of neutrality and objectivity (i.e. not being perceived as acting in the interest of certain groups or interests); and third, the

³³ In the original Commission proposal of Directive 2000/43 (COM(99) 566 final, of 25 November 1999), it was actually stated (in what was then Article 12, labelled “Independent bodies”) that MS “shall provide for an *independent* body or bodies for the promotion of equal treatment” (*emphasis added*). The ad hoc Chapter in which that provision was inserted was explicitly headed as “*Independent* bodies for the promotion of equal treatment” (*emphasis added*). This was changed during the legislative process. Now, concerning all relevant Directive texts in force, the adjective “independent” has been dropped with reference to equality bodies, even from the Chapter titles. Moreover, the Explanatory Memorandum attached to the Proposed Directive on Equal Treatment (cited above) states that equality bodies “should *act independently* to promote the principle of equal treatment” (p. 11 therein), thus highlighting independence is an important feature in the operation of equality bodies.

³⁴ However, one might argue that the independent position or status of equality bodies is likely to contribute to them exercising the prescribed competencies in an independent manner.

possession of sufficient competence and authority to be taken seriously by all parties (i.e. having “weight” or reputation, having sufficiently educated and trained staff, etc.).³⁵ On these grounds, one could stress, first and foremost, the importance for equality bodies to be in a position to conduct their work independently of the political and ideological preferences of whatever government is in power, thanks to strong establishing and functioning rules; as well as to keep a certain distance from organisations that are active in the fight against discrimination, especially with a view to maintaining an appearance of neutrality and objectivity (and hence enhancing their credibility and authority by virtue of impartiality). To ensure independence, it may also be important for equality bodies to count on proper resources, and in particular on credible, well prepared, independent members and staff, whose composition could/should reflect the pluralism in society, and whose appointment should be based on well-established rules. Such bodies should also be accountable, accessible and transparent. Finally, having independent premises, which should reduce the risk of any sort of external interference, could prove to be an important factor for the effective independence of equality bodies. All these elements can be more or less defined in (or considered part of) special arrangements related either to the organisation (or structure) or the operation (or even functioning) of equality bodies.³⁶ Overall, looking at EU law, one may ask why no reference

³⁵ See the study by R. HOLTMAAT, *Catalyst for change? Equality bodies according to Directive 2000/43/EC - Existence, independence and effectiveness*, Luxembourg, 2006, p. 32. Based on an analysis of the aforementioned international soft law documents, the Author draws up a detailed but non-exhaustive list of indicators of relevance in determining whether a body is generally in an independent position (thus, mainly from a formal viewpoint), and likely to affect its functioning (see p. 33 therein). These indicators are: the existence of a firm legal basis for the establishment of the equality body; the existence of a firm legal basis for the mandate, objectives and competencies of the equality body; the existence of a firm legal basis for the equality body’s budgetary independence (in relation to the government or third parties); the existence of sufficient financial resources to exercise their competencies autonomously and to appoint sufficiently experienced and trained staff; the existence of a secure position for the members of the board of the equality body, the members of the equality body, and the head or director of the equality body, where these exist (e.g. are they fixed-term appointments?); the holding of autonomous decision-making power by the body’s board and/or its head/director as far as the appointment and dismissal of members of staff is concerned; the security of the position of members of staff as far as their employment conditions and dismissal are concerned (e.g. is their position comparable to that of civil servants?); the existence of adequate premises for the equality body, separate from government buildings; the freedom of the equality body from interference by other (non-governmental) organisations; the existence of staff members who are specifically (and highly) educated and trained to exercise the relevant competencies in a professional way; the accountability of the (board of the) equality body to external parties (audit, parliament, the press, the general public), especially regarding the exercise of its competencies and budget spending. The three main aspects of independence mentioned in the text are also highlighted by J. CORMACK, J. NIESSEN, “The Independence of Equality Bodies”, in *European Anti-Discrimination Law Review* [2005] 1, pp. 23-28, who state that “three facets of independence can be distinguished: first, independence as the authority to implement its mandate free from state interference; second, independence as neutrality, enabling the body to act without being overly influenced by any one interest group; and third, independence in terms of competences and capacity to act. In relation to all of these, the independence must not only be guaranteed formally but also guaranteed in practice” (p. 24).

³⁶ See, extensively, M. AMBRUS, *Enforcement Mechanisms of the Racial Equality Directive and Minority Protection*, Den Haag, Eleven, 2011, especially at pp. 345-357.

at all is made therein to the abovementioned documents, nor to any of these specific aspects concerning the independence of national equality bodies in one way or another, while these elements could have been absorbed and reiterated, for instance, in a sort of EU soft law document providing useful interpretive guidelines for the implementation of the Directives' requirements concerning the establishment of equality bodies.

The bottom line is that, although all the three Equality Directives are rather vague in this respect, national equality bodies are envisaged as effective means by which to enforce equality and non-discrimination law, as long as they are set up and operate as independent administrative institutions.

iii) Competences of equality bodies

As for their mandate, according to EU law, equality bodies should perform three main functions: they should assist victims of discrimination in pursuing their complaints, conduct surveys about the forms and prevalence of discrimination, and issue reports and recommendations on any matter relating to such discrimination. As mentioned above, equality bodies should exercise each of these competences in an independent manner.

These competences are not exhaustive. Indeed, the above provision mandates Member State to ensure that the competences of equality bodies “include” the abovementioned three. Also in this respect, therefore, Member States maintain a certain margin of manoeuvre regarding the expansion of established equality bodies' mandates beyond the three aforementioned fields.

Once again, the three Equality Directives under discussion provide no further clarification on the scope and content of each of the aforementioned competences.³⁷ For instance, there is no mention at all of the powers equality bodies should be entrusted with in order to effectively exercise their functions, nor of the actual boundaries of these functions. The three Equality Directives are thus limited to listing the main (but also minimum) functions of national equality bodies according to EU law, without rating them in any sort of scale of priorities, nor providing any definition of them at all. It becomes particularly difficult, then, to understand the precise extent to which each of these competences would be actually fulfilled by national equality bodies, and how this result could be achieved and guaranteed from the viewpoint of

³⁷ The relevant recitals are not helpful either, as they simply repeat verbatim that equality bodies should have the competence to “analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims”.

EU law.³⁸ Thus, as there is no single model specifying how to effectively assist victims, conduct surveys and issue reports and recommendations, a comparative approach regarding the actual practice of national bodies may help in clarifying the competences of these bodies and the ways they are exercised. This might also explain the flourishing of comparative studies on these very themes in relation to the functioning of national equality bodies already in place.³⁹

Nevertheless, it should not be forgotten that national equality bodies are intended by EU law to operate as enforcement bodies, to strengthen effective guarantees of the right to non-discrimination and equal treatment alongside other more traditional remedies, such as judicial ones.⁴⁰ In fact, as emerged from a recent ruling of the ECJ (which, apart from this case, has not so far had any proper opportunity to interpret the provision in question), the functions such bodies are called upon to exercise according to the three Equality Directives appear to be “not in any way of a judicial nature”.⁴¹ Thus, it is against this general background that the

³⁸ Trying to shed some more light on the competences of equality bodies identified by EU law would require a critical investigation of several aspects, starting from the understanding/definition of the terms/notion implied (such as, for instance, “assistance to victims”, etc.). For a more detailed account, see AMBRUS, cited, pp. 331-345.

³⁹ See notably AMBRUS, cited, *passim*. See also the Report prepared by M. AMMER *et al.*, “Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC”, 2010 (available at http://www.equineteurope.org/IMG/pdf/final_synthesis_report_en_de_fr_2_-2.pdf); as well as J. NIESSEN, J. CORMACK, “Organismi specializzati istituiti a livello nazionale in seguito all’adozione delle direttive antidiscriminatorie comunitarie”, in S. FABENI, M.G. TONIOLLO (eds.), *La discriminazione fondata sull’orientamento sessuale*, Roma, Ediesse, 2005, pp. 269-287.

⁴⁰ Formally speaking, it is interesting to note that in all the relevant Directives in force mentioned above, the provision on equality bodies is a separate Article contained within an ad hoc Chapter, except in Directive 2006/54, where that Article opens the Chapter devoted to the “Promotion of Equal Treatment - dialogue” (and, within it, is accompanied by the provisions on “Social dialogue” and “Dialogue with non-governmental organisations”), while in the proposed Directive on Equal Treatment it is encompassed within one same Chapter, which also contains the relative provisions on enforcement and remedies.

⁴¹ See Case C-394/11, *Belov* [2013], notably § 42. This case originated from a reference for a preliminary ruling issued by the Bulgarian equality body (namely, the Commission for Protection against Discrimination) in charge of promoting equal treatment within the framework of Directive 2000/43, which arose out of proceedings pending before that body, following a complaint filed with it by a Roma inhabitant (Mr Belov) of a Bulgarian city, seeking to establish whether the measure – the placement of meters to measure electricity consumption on posts at a height of seven meters outside houses connected to the electricity network in the areas of the city mainly inhabited by members of the Roma community – constitutes discrimination based on ethnic origin (if so this would imply ordering the cessation of that discrimination and the payment of fines by the persons responsible). In its judgment, rendered on 31 January 2013, the ECJ did not pronounce itself on the merits of the case, but ruled that it did not have jurisdiction to answer the questions referred by the equality body as it is not a “court or tribunal” within the meaning of Article 267 TFEU (see § 54 of the judgment). The Court reached this conclusion by closely examining the functions that the Bulgarian equality body exercised in the proceedings giving rise to the request for a preliminary ruling, and ascertaining that, in substance, they were of an administrative nature and not a judicial one within the meaning of the case-law relating to the concept of ‘court or tribunal’ in Article 267 TFEU (see § 51 of the judgment). In doing so, the Court did not follow the Opinion of AG Kokott (delivered on 20 September 2012), who (at §§ 23-54 thereof) claimed the opposite (also entering into the merits of the case). This judgment is instructive in that the ECJ in its reasoning seems not to rule out (while the AG Kokott effectively affirms) that equality bodies in general can exercise judicial-type functions if so provided for by national law. For a thorough analysis of this judgment (and the Opinion of the AG Kokott), see

performance of the functions listed above should be developed and tested. It is important to recall the general mandate of equality bodies, i.e. the promotion of equal treatment. Therefore, by independently assisting victims, conducting surveys and issuing reports (as well as performing other relevant functions assigned to them by Member States, as long as they are compatible with these three), equality bodies should actively engage in (helping to) ensuring the enjoyment of the constitutional rights of non-discrimination and equal treatment, and thus contribute to accomplishing the mission of implementing and enforcing anti-discrimination and equality legislation.

iv) Operating dimension(s)

The requirement to set up equality bodies is addressed to Member States. Equality bodies are thus intended to be established as national institutions operating at national level to ensure the implementation and enforcement of the principle of equality. Indeed, all three Equality Directives refer to the national dimension. This, however, does not prevent Member States from establishing equality bodies at lower levels, according to their respective internal legal systems, provided that their whole national territory is placed under the ‘control’ of equality bodies.

While nothing in the three Equality Directives impedes a more detailed internal structure (i.e., within each national legal order) for equality bodies, neither do these Directives contain any requirement concerning the supranational activities of these bodies. In this respect, it is interesting to note that only the Consolidated Equal Treatment Directive adds a new element to the usual (three main/minimum) competences of national equality bodies according to EU law. This Directive specifies that national equality bodies should also be intended to “at the appropriate level exchange[e] available information with corresponding European bodies such as any future European Institute for Gender Equality”.⁴² This new competence is also somewhat ambiguous. In fact, the meaning of the “appropriate level” at which to exchange relevant information is not really clear; neither is it clear which actual parties are to be involved in the exchange. Referring to the only example provided directly by the provision itself, one could assume that the exchange of information mentioned by the EU legislators is a

M. MÖSCHEL, “Race discrimination and access to the European Court of Justice: *Belov*”, in CMLR [2013] 50, pp.1433-1450.

⁴² See Article 20(2)(d) of Directive 2006/54. It could be noted that the adjective “independent” is not used in relation to this new competence. In this case, its absence does not seem to adversely affect the exercise of the competence to exchange available information. On the European Institution for Gender Equality, see below.

‘vertical’ exchange, i.e. between (each of the) national equality bodies and some other “corresponding European bodies”, among which the only one identified is the (would-be, at the time of the adoption of the Consolidated Equal Treatment Directive) European Institute for Gender Equality (another such body could be EQUINET, for which see below). The category of “corresponding European bodies” remains quite vague since, apart from the example provided, no reference is made in any of the three Equality Directives of something that could/should ‘correspond’ to a national equality body but operating at EU level. Co-operation with existing EU human rights institutions may also be covered by this provision. This would be the case, then, of co-operation between national equality bodies and the EU Fundamental Rights Agency (hereinafter, EU FRA).⁴³

It seems, however, that in its very wording, the provision of the Consolidated Equal Treatment Directive does not (directly) envisage or incentivise any exchange of available information between the national equality bodies of different Member States and, hence, any sort of direct (‘horizontal’) co-operation among them at supranational level.⁴⁴ More generally, the same provision does not contain any reference to the specific purpose(s) that should guide the exchange of relevant information at the appropriate level (nor, *a fortiori*, the manner in which such exchanges should take place).

v) Some conclusions

From the framework sketched above, it transpires that national equality bodies have been conceived and promoted by EU law as independent administrative institutions intended to operate as (institutional) safeguards for effective protection against discrimination.

As pointed out by DE WITTE, the idea of requiring the establishment and functioning of national equality bodies has fallen on “fertile ground, and resonated with a number of general evolutions” in comparative public and EU law that took place in the years preceding the

⁴³ Traces of this co-operation are indeed provided for in the EU FRA Regulation (see recital 17 thereof). As can be seen on the EU FRA website (<http://fra.europa.eu/en/cooperation/national-human-rights-bodies>), this Agency cooperates with equality bodies through their coordinating structure EQUINET (European Network of Equality Bodies) and through direct bilateral cooperation, while annual meetings are held between the EU FRA and EQUINET as well as with the EQUINET members.

⁴⁴ However, it is interesting to note that, according to the Green Paper on “Equality and non-discrimination in an enlarged Europe” (fn 28 above; namely, § 2.3 therein), the EU action programme to combat discrimination (for the years 2001-2006) established by Council Decision 2000/750/EC of 27 November 2000 (published in OJ [2000] L 303/23), which covers all of the grounds set out in Article 19 TFEU (with the exception of sex, which is dealt with separately by a separate EU gender equality programme), provides for funding for the establishment of a network of existing and new equality bodies and the promotion of exchanges of experience and good practice between these bodies.

adoption of the three Equality Directives.⁴⁵ Some of the factors that have ‘fertilised the ground’ have been identified as the Europe-wide diffusion of the Nordic ombudsman tradition; the international movement for the establishment of human rights institutions; the development of independent administrative authorities as a new and ubiquitous institutional format in EU public law; and the EU’s growing attention to the institutional preconditions for the effective implementation and application of EU law.

The obligation for Member States to designate equality bodies for the promotion of equal treatment introduced, as a major novelty, by the Race Equality Directive, has thus quickly become a “fixed ingredient” of subsequent EU equality legislation.⁴⁶ This has, in turn, been a major novelty for many Member States who did not have similar bodies already in place within their national legal orders but had to set up them to comply with EU law. Nevertheless, this has also been something of a novelty for the Member States that already had some sort of equality institutions, as they had to adjust them to the EU law requirements. The overall result of these novelties is that, while equality bodies are substantially national institutions, grounded within Member States’ legal orders and governed predominantly by national (public/administrative) law, some of their competences (and the manner in which these should be exercised) are directly identified and imposed by EU law, albeit to a minimum extent. Thus, their structure and functioning can be tested against EU law and appropriate actions taken to enforce the minimum requirements (starting from the very obligation to set up an equality body), as the case may be. One of the very enforceable institutional requirements of equality bodies according to EU law could be their independence (in exercising their competences). The more compliance with this requirement is monitored and enforced, the more institutional EU law choices such as the one discussed here will gain momentum and strength.⁴⁷

⁴⁵ See DE WITTE, in *Maastricht Journal of European and Comparative Law*, cited, p. 162. As regards the Race Equality Directive, the Author states that this “broke with the existing tradition of [EU] equality law in relation to nationality discrimination and gender discrimination in employment where [EU] legislation had not contained any requirement for national institutional reform apart from the very generic requirement that effective judicial remedies should be available for the enforcement of the equality rights contained in those [EU] law instruments” (p. 168).

⁴⁶ See DE WITTE, in *Maastricht Journal of European and Comparative Law*, cited, p. 169. See also the Report from the Commission to the Council and the EP on “The application of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” (COM(2006) 643 final/2, of 15.12.2006), §3.2. It is interesting to observe that, if the Proposed Directive on Equal Treatment vigorously reasserts the appropriateness of establishing equality bodies by specifying in a recital (namely, recital 27 thereof), this is because of the “experience” of the equality bodies already operating under other Directives.

⁴⁷ In this respect, it is worth mentioning the statement of the Commission contained in the Green Paper on “Equality and non-discrimination in an enlarged Europe” (fn 28 above), where it is affirmed that “the

As stated effectively again by DE WITTE, “the equality institutions can [...] be seen as an example of recourse to new modes of governance by the [EU]”, which have emerged especially “to improve the implementation of EU law” in a sort of hybrid regime of rights and governance.⁴⁸ That is to say that, by virtue of equality institutions, EU law has identified a sort of alternative way to ‘intrude’ into national legal orders to ensure the effective implementation of the equality principle, as well as to broaden its scope of action within the human rights domain. For the effective functioning of the institutional model of governance envisaged, it is crucial that the basic requirements set forth by EU law are respected. Again, considering the remarks made above, it is especially by observing the independence of equality bodies – intended to shelter them to some extent not only from the pressures of different stakeholders, but also from national (political) interests – that a European approach to equal treatment could well be developed, rooted in the necessarily common and consistent protection of EU citizens’ fundamental rights.

However, while several studies show that, in practice, the rapid and ubiquitous spread of equality institutions across Member States represents a success story (the merit for which can be ascribed to EU law for mandating their establishment), in more theoretical and institutional terms, and from an EU law perspective, this success is slightly more questionable. Indeed, the provisions discussed above appear too weak and vague in institutional terms. The ‘soft’ requirements they contain concerning the establishment and functioning of national equality bodies therefore run the risk of allowing too much fragmentation in their implementation, to the detriment of a consistent and common approach to equality protection and promotion, represented by a solid institutional precondition anchored in EU law.

b) Institutional guarantees at EU level

Apart from equality bodies established (also) on the basis of EU law, intended to promote equal treatment at Member State level by supporting the implementation and enforcement of EU equality and non-discrimination principles and rules, some institutional guarantees are in place and operate to the same end at supranational level as well. In fact, various EU-level institutions deal with EU equality and non-discrimination law. Each of them fulfils its own mandate in different ways, particularly in relation to its nature and mission. However, some

Commission is concerned to ensure that equality bodies have the independence, resources and capacities necessary to function effectively” (§ 2.2 therein).

⁴⁸ See DE WITTE, in *Maastricht Journal of European and Comparative Law*, cited, p. 175.

sort of co-operation among them is also provided for. In this context, the most relevant institutions, to be briefly discussed in turn below, are EQUINET and the EU FRA.

i) The European Network of Equality Bodies (EQUINET)

In order to better support the development and work of equality bodies across (and also beyond) the Member States and to enhance their impact, closer cooperation between them at supranational level has been provided for. The European Network of Equality Bodies (EQUINET) was originally set up in 2002 with the purpose of facilitating peer support and information exchange between equality bodies, as well as contributing to ensuring the uniform implementation of EU equality and anti-discrimination law (although no direct responsibility is conferred upon it in this respect). In particular, EQUINET is designed to enable equality bodies to work together in a rather informal way, by promoting (the exchange of) best practices and developing common strategic approaches. To this end, on the basis of a Strategic Plan and Annual Work Plans, EQUINET carries out a multiplicity of activities, such as promoting information exchange, organising training seminars and issuing publications and reports.

It should be pointed out that the establishment of EQUINET does not stem from EU law, nor is EQUINET recognised or even mentioned in any piece of EU legislation (not even in the abovementioned acts concerning equality bodies). Indeed, EQUINET is an international not-for-profit organisation (since the end of 2007), established spontaneously by (some of) its members.⁴⁹ Nevertheless, its operation benefits from EU support, since part of its functioning is funded by resources allocated to it by the Commission.⁵⁰

As far as EQUINET's institutional arrangements are concerned, they are laid down in its Statutes and provide for membership open not only to Member States' equality bodies, but also to similar institutions in countries in the process of joining the Union (and in Norway).⁵¹ EQUINET currently comprises 41 bodies from 31 countries (including Serbia, the Former

⁴⁹ This organisation was established under Belgian law (Aisbl): see <http://www.equineteurope.org/-About-us-#mission>.

⁵⁰ EQUINET built on the two-year project 'Strengthening cooperation between specialised bodies for the implementation of equal treatment legislation' (2002-2004) and was founded by the Commission financed PROGRESS programme (European Community Programme for Employment and Social Solidarity (2007-2013)). Members of EQUINET (also) participate in its financing by paying an annual contribution.

⁵¹ The Statutes are available at http://www.equineteurope.org/IMG/pdf/Equinet_Statutes_-_French_English.pdf; see, notably, Article 2 thereof. It is interesting to observe that, in identifying equality bodies, the Statutes refer to Directives 2000/43 and 2002/73 (as well as to Directive 76/207, which did not contain a provision on equality bodies).

Yugoslav Republic of Macedonia, and Norway). Its internal organisational structure, as detailed by its Statutes, is essentially based upon a “general meeting” that acts as its decision-making body and consists of all EQUINET members, each of whom has a deliberative vote within it. The general meeting elects an executive board (led by a Chair), which is responsible for its general management and strategic leadership. The operational structure consists of working groups composed of staff from national equality bodies, as well as a secretariat headed by an executive director, based in Brussels.

It could be said that this network fills a vacuum to a certain extent, since EU equality legislation does not foresee any formal arrangement for structured cooperation among equality bodies.⁵² The rather informal foundation of the network has certainly had an impact in shaping its institutional features, which appear somewhat weak. In particular, if one considers the independence requirement, almost nothing is to be found on this question in the EQUINET Statutes.⁵³ Rather simply, they refer only in general and unspecified terms to EQUINET’s independence, which is presented as a feature that characterises its component members.⁵⁴

ii) The European Agency for Fundamental Rights (EU FRA)

A significant and recent institutional development in the field of fundamental rights protection within the EU legal order is certainly represented by the establishment of the EU FRA (hereinafter also referred to simply as “the Agency”).⁵⁵ This took place with the adoption of Council Regulation (EC) No 168/2007, of 15 February 2007 (the “EU FRA Regulation”).⁵⁶

⁵² Moreover, EQUINET seems to provide a useful forum not only to favour cooperation among national equality bodies, but also to broaden the horizons of such cooperation, benefiting from the work of other institutions, such as NHRI: see the EQUINET Report, “Equality Bodies and National Human Rights Institutions Making the Link to Maximise Impact”, of 2011 (see http://www.equineteurope.org/IMG/pdf/EN_-_Equality_Bodies_and_National_Human_Rights_Institutions.pdf).

⁵³ For instance, no mention whatsoever is made to the Paris Principles (for which see fn 25 above).

⁵⁴ See Article 3 of the Statutes, where it is stated that “[a]s EQUINET and its members are independent, they promote transparency and must be able to justify their position vis-à-vis a large number of partners in society: legislative bodies, governmental structures, lobbyists, the media, NGOs and society in general”.

⁵⁵ For general references, among the copious works on the EU FRA, see: J. DUTHEIL DE LA ROCHERE, “La gouvernance de la non-discrimination: l’exemple de l’Agence des droits fondamentaux”, in F. FINES, C. GAUTHIER, M. GAUTHIER (eds.), *La non-discrimination entre les européens*, Paris, Editions Pedone, 2012, pp. 51-60; O. DE SCHUTTER, “The EU Fundamental Rights Agency: Genesis and Potentials”, in K. BOYLE (ed.), *New Institutions for Human Rights Protection*, Oxford, OUP, 2009, pp. 94-136; A. VAN BOGDANDY, J. VON BERNSTORFF, “The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law”, in CMLR [2009] 46, pp. 1035-1068; M. CARTABIA, E. LAMARQUE, D. TEGA, “L’Agenzia dei diritti fondamentali dell’Unione europea. Uno sguardo all’origine di un nuovo strumento di promozione dei diritti”, in *Il Diritto*

Proposals for the establishment of an ad hoc institution to develop and support the EU's actions in ensuring the promotion of and respect for fundamental rights date back to the late 1990s.⁵⁷ However, these proposals did not immediately land on fertile ground as, at the time, the EU had not yet developed a systemic and proactive approach to fundamental rights protection, nor was it equipped with formal instruments to that end. It is not by chance, then, that a stronger stimulus for the establishment of new institutional arrangements in this field was eventually provided by the achievements of a period of major (institutional) upheaval in this field. On the one hand these achievements can essentially be seen in the introduction to the former EU Treaty (following the amendments brought about by Treaty of Amsterdam) of not only the explicit recognition of fundamental rights as founding principles of the Union (former Article 6(1) EU; now, in substance, Article 6 TEU), but also (and especially) of a specific provision establishing a mechanism for reacting to threats or actual (serious and persistent) violations of those rights on the part of the Member States (former Article 7 UE; now Article 7 TUE). On the other hand, another key achievement is certainly represented by the drafting and proclamation (in December 2000) of the EU Charter of Fundamental Rights (hereinafter, the Charter). As is well known, the Charter acquired binding force (having obtained the same legal value as the Treaties, as set out by Article 6(1) TEU) following the Lisbon reform, although this was already envisaged, some years earlier, within the framework of the abandoned Treaty establishing a Constitution for Europe.

The increased formalisation and institutionalisation of fundamental rights protection represented by the two main achievements mentioned above undoubtedly paved the way for the establishment of an ad hoc fundamental rights institution such as the EU FRA. This is clearly apparent from the formal Commission Proposal leading to the adoption of the the EU

dell'Unione europea [2009] 3, pp. 531-561; G.N. TOGGENBURG, "Exploring the Fundament of a New Agent in the Field of Rights Protection: The F(undamental) R(ights) A(gency) in Vienna", in *European Yearbook of Minority Issues* [2007-2008] 7, pp. 597-625; G.N. TOGGENBURG, "The role of the new EU Fundamental Rights Agency: debating the "sex of angels" or improving Europe's human rights performance", in *ELR* [2008] 3, pp. 385-398; E. HOWARD, "The European Agency for Fundamental Rights", in *European Human Rights Law Review* [2006] 4, pp. 445-455.

⁵⁶ OJ [2007] L 53/1.

⁵⁷ Such proposals mainly arose out of academia: see P. ALSTON, J.H.H. WEILER, "An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights", in P. ALSTON (ed.), *The EU and Human Rights*, Oxford, OUP, 1999, p. 3-66. They were then taken on board by the report entitled *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, prepared by the so-called *Comité des Sages* (composed by Antonio Cassese, Catherine Lalumiere, Peter Leuprecht and Mary Robinson).

FRA Regulation.⁵⁸ Indeed, the Proposal draws a clear link between the establishment of the EU FRA and the Charter, as it affirms that the former will make the latter “more tangible”.⁵⁹ Moreover, the Proposal also points out that the establishment of the EU FRA “is in line with the specific commitments of the Union to respect and strengthen fundamental rights, as laid down in Articles 2, 6 and 7 [EU]”. However, it could also be noted that, even after the Lisbon reforms, neither the Treaties nor the Charter mention the EU FRA in any way.

Nonetheless, some challenges of a different nature were encountered in relation to the actual establishment of the EU FRA. These essentially concerned the choice of a model to draw inspiration from to that end; the positioning of the new Agency within the institutional framework already in place for monitoring fundamental rights protection in Europe; and the finding of a suitable legal basis for the EU FRA Regulation.

First, regarding the choice of the reference model, various different ones appeared to be available. Some were in favour of the EU FRA resembling either a sort of (supra)national human rights institution for the EU, governed by the principles elaborated at international level regarding the status and functioning of similar bodies (the abovementioned Paris Principles), or a network of Member States’ national human rights institutions. Others proposed that the new Agency be structured along the lines of the many other agencies proliferating in different EU fields and policy domains.⁶⁰ Besides the final result, which may appear to some extent like a combination of all these models (as will become apparent from the description below), it is interesting to note that the several options proposed for the establishment of the EU FRA could not sidestep the fact that EU law did not (and still does not) lay down any duty for Member States to set up national institutions comparable to the EU FRA among their respective competences and scope of action. Thus, any approach based on the combination of (uniform) national experiences was difficult to pursue.

Second, as for the positioning of the EU FRA, the major challenge was not so much defining its role *vis-à-vis* the other Union institutions (or Member States’ existing ad hoc bodies),⁶¹ but,

⁵⁸ The Proposal (COM(2005) 280 final, of 30 June 2005) was prepared on the basis of the consultation document (COM(2004) 693 final) adopted by the Commission on 25 October 2004, in the wake of the ‘political mandate’ of the European Council, of December 2003, to proceed towards the establishment of the Agency.

⁵⁹ On the EU FRA’s relationship with the Charter from an institutional viewpoint, see G.N. TOGGENBURG, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?*, EUI Working Papers, LAW 2013/13.

⁶⁰ See extensively DE SCHUTTER, cited, notably at pp. 101-109.

⁶¹ The EU FRA Regulation contains several provisions dealing with (or rather, encouraging) the establishment of cooperation mechanisms between the Agency and relevant EU bodies, offices and other agencies (through memoranda of understanding: see Article 7 thereof and for examples, see <http://fra.europa.eu/en/cooperation/eu-partners/eu-agencies>); with organisations at MS level (especially, by means of government officials nominated

most of all, clarifying its relationship with other international actors operating in the field of human rights protection, and especially the CoE. Indeed, serious concerns about the duplication and overlapping of roles, if not clashes and inconsistencies in results, were raised in this context and had a decisive influence on the possibility of a structured relationship between the two, resulting in institutional repercussions,⁶² and limiting the (territorial) scope of action of the EU FRA in relation to that of the CoE.⁶³

The third issue, although much less debated than the others, was the choice of the legal basis for the establishment of the new Agency. No specific provision was contained (nor there is now) in the Treaties to that end. Thus, resort was made to the general clause set down by former Article 308 EC (now, Article 352 TFEU), under the rationale that it was a general objective of the former Community (as it is now of the EU) to ensure that its own action fully complies with fundamental rights. In this respect, it seems relevant to note that the establishment of the new Agency could rely on a relevant precedent, i.e. Council Regulation (EC) No 1035/97, of 2 June 1997, establishing a European Monitoring Centre on Racism and Xenophobia (“the Centre”),⁶⁴ grounded on the equivalent general provision of the pre-

by MS as National Liaison Officers to act as the main contact points; or governmental organisations and public bodies competent in the field of fundamental rights, including national human rights institutions: see Article 8 thereof); as well as with civil society (in particular, by establishing a cooperation network named the “Fundamental Rights Platform”, to act as a sort of stakeholders’ group for the exchange of information and pooling of knowledge: see Article 10 thereof). It could be pointed out here that the Agency may also benefit from the experience of other pre-existing entities, such as the EU Network of Independent Experts on Fundamental Rights, established by the Commission, which operated from 2002 to 2006 (on which see O. DE SCHUTTER, V. VAN GOETHEM, “The Fundamental Rights Agency: Towards an Active Fundamental Rights Policy of the Union”, in ERA-Forum [2006] 4, pp. 587-607).

⁶² According to the EU FRA Regulation (namely, Articles 9, 12 and 13 thereof), the CoE is involved in the management of the EU FRA as it has the right to appoint one “independent person” to sit on the FRA Management Board, who can also participate in the meetings of the Executive Board (on which see below). Moreover, and more broadly, as also envisaged by the EU FRA Regulation (see, again, its Article 9), on 28 February 2008 the EC concluded an agreement with the CoE on cooperation between the latter and the EU FRA (OJ [2008] L 186/6), in order to ensure complementarity and added value and coordinate their activities. The agreement establishes a general cooperation framework (e.g., providing for regular contact between the Agency and the CoE, at appropriate levels) and sets out some specific measures on the exchange of information and data, the methods of cooperation (e.g., through regular consultations or temporary exchanges of staff), as well as the appointment of the independent CoE-appointed person in the EU FRA.

⁶³ It is not very surprising that, as an EU body, the territorial scope of action of the Agency is limited, by the establishing Regulation, to the EU and the MS (although, according to the provisions of Article 27(2) and (3) therein, it could also be extended, under specific conditions, to candidate countries as well as potential candidates, such as the States with which the Commission has concluded Stabilisation and Association Agreements). The original Commission Proposal envisaged a broader mandate for the EU FRA, as it suggested the Agency also take into account the countries with which the EC has concluded agreements containing human rights provisions, or opened (or was planning to open) negotiations for such agreements, and in particular countries covered by the European Neighbourhood Policy (see Article 3(4) of the Proposal). On these issues, see in particular the House of Lords’ European Union Committee Report on “Human rights protection in Europe: the Fundamental Rights Agency” (No 155, of 28 March 2006), paras. 55-65.

⁶⁴ OJ [1997] L 151/1. This act was first amended by Council Regulation (EC) No 1652/2003, of 18 June 2003 (OJ [2003] L 245/33) and finally repealed by the EU FRA Regulation. As explained in the related Commission

Amsterdam EC Treaty (i.e., Article 235 EC).⁶⁵ In fact, the EU FRA was designed to build upon this pre-existing body, which it succeeded, absorbing its specific tasks and exercising an extended mandate, with the result that the institutional features of the EU FRA are significantly influenced by those of the Centre.⁶⁶ Moreover, it should also be recalled that the discussion on the establishment of the EU FRA took place almost in parallel with that on the setting-up of a similar institution to deal specifically with gender equality issues within the EC/EU legal order, which eventually led to the adoption of Regulation (EC) No 1922/2006 of the European Parliament and of the Council, of 20 December 2006, on establishing a

Proposal (COM(96) 615 final, of 27 November 1996), the principal aim of the Centre was “to supply the [EC and MS] with objective, reliable and comparable data on racism, xenophobia and anti-Semitism and, by so doing, to enhance the exchange of information and experience in this field[, working] in close conjunction with other international organizations”, and in particular entering into a cooperation agreement with the CoE (see OJ [1999] L 44/34), which constituted a blueprint for the new centre, now concerning the EU FRA (mentioned in fn 62 above). The Proposal cited explains at some length the reasons for the choice of the legal basis selected. According to the Commission, Article 235 EC (which was, in fact, the only legal basis originally envisaged in the Proposal) well reflected the Centre’s abovementioned objectives and operative dimension, as with its establishment the “point [was] not to take specific measures to combat racism and xenophobia, nor to assign the Centre any political responsibility in the field, nor [was] it to modify the system for protecting human rights in the Community or to make any major change to the institutional system in the Community or any of its [MS]”. The collection and analysis of data at European level undertaken by the Centre and then made available to the Community (as well as to MS) was intended to support informed policy and legislation making, so as to ensure the utmost respect for the fundamental rights involved (see recital 2 and Article 2 of the abovementioned Regulation). In performing its mission, the Centre had to look in particular at some policy/legislative fields corresponding either to core Community spheres of intervention (such as free movement of persons and goods, as well as social policy and employment), or other areas where MS retained a significant share of competence (such as education, vocational training and youth, culture, as well as, specifically, “information and television broadcasting and the other media and means of communication”: see Article 3(3) of the Regulation cited), which somewhat confined the Centre’s scope of action (recital 25 points out, nevertheless, that the Centre’s tasks could be extended in relation to any changes in Community powers), although no general provision was included to exclusively limit it to the scope of application/implementation of Community law.

⁶⁵ The Regulation establishing the Centre was (eventually) also grounded on former Article 213 EC (which now corresponds to Article 337 TFUE), providing for the Commission to collect any information and carry out any checks required for the performance of the tasks entrusted to it. This provision could not have served alone as a basis for the Regulation, as the Centre was not conceived and did not in any way look like a body exclusively serving the Commission (hierarchically dependent upon it), although it did enjoy legal personality (see Article 6 of the establishing Regulation) and maximum autonomy in the performance of its tasks (see recital 23 therein). The added value of also resorting to former Article 213 EC (together with former Article 235 EC) is difficult to perceive: in fact, reference to this Article could cast doubt upon the very independence of the Centre, due to its *status*. Thus, it is not really surprising that the EU FRA Regulation does not make any use of this provision.

⁶⁶ The Centre was conceived as a specialised and autonomous body, acting independently to perform the abovementioned tasks in the various forms and with the means indicated in detail by Article 2 of the founding Regulation. To this end, its institutional structure, consisting essentially of a Management Board (with one independent member per MS, plus one independent person appointed by the EP, another appointed by the CoE, and one Commission representative), a smaller Executive Board and a Director (see, respectively, Articles 8, 9 and 10 therein), very closely resembled that of the EU FRA. One peculiar feature that is worth mentioning is the express provision for the Centre to set up and coordinate a so-called European Racism and Xenophobia Information Network (RAXEN) of governmental and non-governmental actors (such as national university research centres, NGOs, specialist centres) in the fields related to the phenomena of racism and xenophobia, which would establish cooperation and gather relevant information to better carry out its tasks (see Articles 2(2)(h), 4 and 7(1) of its founding Regulation). For further details on the establishment and features of the Centre, see in particular D. ROSEMBERG, “La lutte contre le racisme et la xénophobie dans l’Union européenne”, in RTDE [1999], p. 201-238.

European Institute for Gender Equality (the “Institute”).⁶⁷ Indeed, the Institute is supposed to work in a very similar way to and closely with the EU FRA in the neighboring (if not really overlapping) field of gender equality and anti-discrimination. It is intended to build on the comprehensive body of specific legislation in place at the EU level in this context (recalled above), in order to contribute to and strengthen the promotion of related objectives, including gender mainstreaming in all supranational policies and the resulting national policies, as well as fighting against discrimination based on sex and raising EU citizens’ awareness of gender equality. This is to be done by providing technical assistance to the EU institutions (in particular, the Commission) and Member State authorities, working as a knowledge-based expert body performing a series of information and data gathering, analysing and delivering activities (but not policy-related or decision-making ones).⁶⁸ However, from the institutional viewpoint, possibly because of its more targeted (and narrower) remit, the still alive and operating Institute has some peculiarities concerning, notably, not only the legal basis chosen for its establishment, i.e. the specific provisions of former Articles 141(3) and 13(2) EC,⁶⁹ but also its management structure.⁷⁰

⁶⁷ OJ [2006] L 403/9. However, the Institute started operating from 2010, following the adoption of its (first) annual work programme.

⁶⁸ See Articles 2 and 3 of the Regulation mentioned above. In fact, a lively debate has accompanied the adoption of the cited Regulation establishing the Institute, essentially revolving around the need to have two autonomous bodies, such as the Institute and the EU FRA, entrusted with similar tasks instead of incorporating the Institute’s remit within the broader one of the EU FRA (as happened for the Centre). This debate is well exemplified by the House of Lords’ European Union Committee Report on a “Proposed European Institute for Gender Equality” (No 119, of 14 February 2006). Overall, it emerges that the (pre)existence of a substantial body of specific legislation at Community level on the issues touched upon by the activities of the Institute, together with the intention of giving them greater visibility, were among the reasons invoked to justify the need for a separate body (see recital 4 of that Regulation). Although autonomous, the Institute is not supposed to operate alone. In carrying out its tasks, Article 8 of the establishing Regulation provides for the Institute to cooperate with organisations at international, European and national level (such as, in this latter case, “equality bodies”), while recital 14 thereof recalls the need to work in close contact with other relevant EU agencies (in order to avoid duplication and ensure the best possible use of resources), among which explicit mention is made of the EU FRA (although, when the Regulation was adopted, the EU FRA Regulation had not yet been approved), whose establishing Regulation in turn makes reference to and provides for some cooperation/contacts with the Institute (see recital 16 and Article 12(10) of the EU FRA Regulation). However, no reference to the CoE is to be found in the Regulation establishing the Institute. It should also be pointed out here that the Institute, together with the EU FRA and other agencies of the Union operating in the so-called Justice and Home Affairs domain, are part of a network established to foster bilateral and multilateral cooperation and synergies in areas of common interest among those bodies, such as strategic and operational work, external relations or training.

⁶⁹ In its Proposal (COM(2005) 81 final, of 8 March 2005), the Commission indicated that it was appropriate to combine those two provisions, since the first offered the specific basis for the adoption of measures aimed at ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, while the second provided powers to adopt Community “incentive measures” to support and promote the objective of combating discrimination (inter alia) on grounds of sex outside the realm of employment (see also, then, recital 24 of the abovementioned Regulation).

⁷⁰ In contrast to the Centre (as well as to the EU FRA, as we will see below), the Institute comprises a Management Board (its decision-making body) and a Director (its executive organ, appointed by the Management Board “on the basis of a list of candidates proposed by the Commission after an open competition”:

All these issues have undoubtedly had an impact in shaping the EU FRA as it now stands, especially as far as its institutional structure and powers are concerned. In this respect, the EU FRA Regulation designated the new Agency as the EU's expert body on fundamental rights, with a supporting and consultative role, that mainly – independently – fulfils information and data gathering, analysing and reporting functions.⁷¹ Indeed, the Agency assists and advises EU institutions as well as Member States “when implementing [EU] law”,⁷² providing them with expertise on issues relating to the protection of fundamental rights, as defined in former Article 6(2) EU (now essentially Article 6 TEU),⁷³ in cases falling within the scope of application of EU law (more precisely, “within the competences of the [Union]”), in order to

see Article 12 of the establishing Regulation), together with an internal consultative body, named the “Experts’ Forum”, but not an Executive Board, possibly because of its lighter structure. Indeed, the Institute’s Management Board consists of nineteen components (all appointed for a three-year term, “in such a way as to secure the highest standards of competence and a broad range of relevant and interdisciplinary expertise in the area of gender equality”, but without any express requirement of autonomy or independence), i.e. one member representing the Commission and another eighteen representatives nominated by the Council, on the basis of proposals from an equal number of MS, selected following the order of the rotating Presidencies (of the Council), one member being designated by each MS concerned (see Article 10 of the establishing Regulation). This peculiarity, which does not envisage the habitual one- member per MS ratio, is commented upon in the statement of the Council, the EP and the Commission, added later to the establishing Regulation (see OJ [2007] L 54/3), whereby they affirm that the Institute “management structure, and in particular the number of representatives of the [MS] on the Management Board, is determined by reference to [its] specific nature and does not therefore constitute a precedent for other agencies in the future”, then providing details of the concrete functioning of the arrangements envisaged for their appointment. As for the Expert Forum, Article 11 of the establishing Regulation provides for this body to be “composed of members from competent bodies specialised in gender equality issues, on the basis of one representative designated by each [MS], two members representing other relevant organisations specialised in gender equality issues designated by the [EP], as well as three members designated by the Commission and representing interested parties at European level, with one representative each from” some sector-specific organisations, and to support the Director in ensuring the “excellence and independence of activities of the Institute”. As regards independence in particular, an ad hoc provision (namely, Article 6 thereof) states that the Institute has “to carry out its activities independently in the public interest”.

⁷¹ All the specific tasks of the EU FRA are listed in detail in Article 4 of the establishing Regulation. They can be grouped into data and information collection and analysis; their dissemination; offering political advice; and networking with the relevant institutions and actors in the field of fundamental rights protection.

⁷² See Article 2 of the EU FRA Regulation. Reference was made to “Community” law in order to exclude third (as well as second) pillar issues from the Agency’s remit. The Commission Proposal to adopt the EU FRA Regulation also contained a draft Council Decision empowering the EU FRA to pursue its activities in areas referred to in Title VI of the former EU Treaty, which has never been adopted. However, the EU FRA Regulation made possible any activity of the Agency within those fields, as it provided for the Agency to act at the requests of the EP, the Council or the Commission in areas they indicated, without any express limitations (see Article 4(3) thereof). Nevertheless, it is argued that nowadays, following the entry into force of the Lisbon Treaty and the dismantling of the pillar structure, the Agency’s remit also covers the areas referred to in Title VI of the former EU Treaty: see, in particular, L. PANELLA, “L’Agenzia dei diritti fondamentali dell’Unione europea: una occasione perduta per la protezione dei diritti umani o una possibilità da valorizzare?”, in N. PARISI, M. FUMAGALLI MERAVIGLIA, A. SANTINI, D. RINOLDI (eds.), *Studi in onore di Ugo Draetta*, Napoli, Editoriale Scientifica, 2011, pp. 487-502, notably at p. 499.

⁷³ It should be pointed out that, while the former Article 6 EU referred only to the ECHR and the constitutional traditions common to the MS, the new Article 6 EU includes direct reference to the Charter, which should then be taken into account in ‘defining’ fundamental rights (also) for the purpose of the EU FRA’s actions (see, in this respect, recitals 2 and 9 of the EU FRA Regulation).

ensure respect of those rights.⁷⁴ No decision-making power is entrusted upon the EU FRA to allow it to adopt binding acts. Nor does the EU FRA have any adjudicating or enforcement competence to deal with complaints concerning fundamental rights violations. The Agency also lacks dedicated powers in relation to the fulfilment of its mission, such as powers to seek and obtain specific information, which could prove useful for the production of sound independent analysis and evaluations, rather than forcing it to rely predominantly on data collected by other organisations and bodies.⁷⁵ Thus, the picture that emerges from the EU FRA Regulation is that of an information Agency called upon to perform what has been identified as “observatory” rather than “normative” monitoring.⁷⁶ This means that, rather than performing a normative assessment of fundamental rights compliance (on the part of EU institutions or Member States), the Agency pursues broader guidance-related objectives, such as general awareness-raising and informed policy-making on the part of the competent institutions.⁷⁷

As for the institutional and organisational structure that characterise the functioning of the EU FRA, from the point of view the independence requirement in particular, it should be noted that while some strong preconditions appeared to be set in this respect by the establishing Regulation, there are also arrangements that pose potential threats to such independence. Overall, the Agency consists of four main bodies: the Management Board, the Executive Board, the Scientific Committee and the Director. The Management Board, that is the Agency’s planning and monitoring body with general responsibility for the performance of its

⁷⁴ See Article 3(1) of the EU FRA Regulation and the remarks contained in fn 74 above.

⁷⁵ Article 6 of the EU FRA Regulation envisages the “working methods” to be adopted by the Agency, in order to ensure the provision of objective, reliable and comparable information, drawing on the expertise of a variety of organisations and bodies in each MS and taking account of the need to involve national authorities, indicating in particular the need to set up and coordinate “information networks and use existing networks”, to organise meetings of external experts, and to set up, when necessary, “ad hoc working parties”, also taking into account the work already accomplished by other relevant international actors.

⁷⁶ See M. SCHEININ, “The Relationship between the Agency and the Network of Independent Experts”, in P. ALSTON, O. DE SCHUTTER (eds.), *Monitoring Fundamental Rights in the EU*, Oxford, OUP, 2005, pp. 73-90, notably at p. 73.

⁷⁷ For instance, most significantly, it emerges from the EU FRA Regulation (notably, Article 4(2) thereof) that the Agency is not involved in preventive (EU) legislative scrutiny, which can only be activated if the institutions involved in the legislative procedure so require; nor it has any competence to pronounce itself on the legality of the acts adopted (see also recital 13 thereof, referring to a “right to formulate opinions [...] without interference with the legislative and judicial procedures” established in the Treaties). Moreover, no specific or general involvement (nor, *a fortiori*, any right of initiative) is envisaged for the Agency in Article 7 TEU procedure. In this respect, in a Declaration (of 27 February 2007, 6396/07 ADD 1) related to the EU FRA Regulation, the Council stated that it could seek the assistance of the Agency when deciding to obtain from independent persons a report of a situation in a MS within the meaning of Article 7 TEU, and that the Council would also decide when the conditions of this provision were met.

tasks,⁷⁸ is composed of one “*independent person* appointed by each Member State, having high level responsibilities in an independent national human rights institution or other public or private sector organisation” (plus one more “independent person” appointed by the CoE, as recalled above), together with two Commission “representatives” (as well as alternate members selected according to the same procedure).⁷⁹ Specific rules are dictated to support the personal independence requirement, also providing for self-government by the Board in their respect.⁸⁰ The Management Board is supported by the Executive Board, comprising the Chairperson and Vice-Chairperson of the former, by two other members of the Management Board elected among those appointed by the Member States and by one of the abovementioned Commission representatives (the person appointed by the CoE to participate in the meetings of the Executive Board).⁸¹ The Scientific Committee, which was not foreseen

⁷⁸ The specific tasks of the Management Board are listed in Article 12(6) of the EU FRA Regulation and span from the setting of the Agency budget (on which see the detailed provisions of Articles 20 and 22 thereof) to the adoption of its Annual Work Programme or of the internal rules of procedure (in this latter case, on the basis of the draft submitted by the Director, after the Commission, the Scientific Committee and CoE-appointed member of the Board have delivered an opinion). According to Article 12(8) of the EU FRA Regulation, the Management Board normally makes its “decisions” by simple majority (of the vote cast, every member having one vote), although in several cases (such as those mentioned) a two-thirds majority (of all members) is required (while unanimity is necessary for decisions concerning internal language arrangements, but nothing is to be adopted by consensus). According to the same provision, the CoE-appointed member votes only on certain issues. The Board is guided by a Chairperson (and a Vice-Chairperson) elected within the Board, while (according to Article 12(10) thereof) observers can take part in its meetings (including, in particular, the Director of the Institute).

⁷⁹ See Article 12(1) of the EU FRA Regulation (*emphasis added*). As a general requirement, the same provision states that members of the Management Board are to be “persons with appropriate experience in the management of public or private sector organisations and, in addition, knowledge in the field of fundamental rights”; indeed, recital 20 thereof refers to them as “independent expert[s]” and adds that, having regard to the Paris Principles, “the composition of that Board should ensure the Agency’s independence from both Community institutions and [MS] governments and assemble the broadest possible expertise in the field of fundamental rights”. See also Article 14 of the Agency rules of procedure.

⁸⁰ On the one hand, Article 12(4) of the EU FRA Regulation states that, regarding the Board members’ terms of office, apart from the expiry of a five year (non-renewable) period (or death), their mandate ends when they resign. However, “where a member or an alternate member no longer meets the criteria of independence, he or she shall forthwith inform the Commission and the Director of the Agency. The party concerned shall appoint a new member or a new alternate member for the remaining term of office. The party concerned shall also appoint a new member or a new alternate member for the remaining term of office, if the Management Board has established, based on a proposal of one third of its members or of the Commission, that the respective member or alternate member no longer meets the criteria of independence. Where the remaining term of office is less than two years, the mandate of the new member or alternate member may be extended for a full term of five years”. It is interesting to note that, concerning their wording, these rules seem to apply equally to all Board members, although Article 12(1) does not apply the independence requirement to the two Commission-appointed members. On the other hand, Article 12(6)(l) thereof does provide for the Board to “establish that a member or an alternate member [...] no longer meets the criteria of independence”, in accordance with the cited para. (4), which, however, sees a ‘right of initiative’ also on the part of the Commission to start the procedure to ascertain the member’s independence.

⁸¹ See Article 13 of the EU FRA Regulation, which provides for the Executive Board to assist and advise the Director and make its “decisions” by simple majority. Interestingly, the Executive Board can conduct certain tasks when they are delegated to it by the Management Board (see Article 12(7) thereof, which also provides for some exceptions to the delegation of responsibilities to the Executive Board).

in the original Commission Proposal, is the “guarantor of the scientific quality of the Agency’s work, guiding the work to that effect”,⁸² giving opinions on its projects and outputs, and thus constituting a crucial body, albeit a peculiar one, for the functioning of the EU FRA. As for the Committee’s composition, the EU FRA Regulation indicates specific requirements to be possessed by its eleven members, to be appointed by the Management Board (not from among its own members). In particular, the members of the Scientific Committee must be “*independent persons*, highly qualified in the field of fundamental rights[, to be nominated] following a transparent call for applications and selection procedure after having consulted the competent committee of the European Parliament[, ensuring] even geographical representation”.⁸³ Their independence is underpinned by ad hoc rules that closely mirror those (cited above) set for the members of the Management Board.⁸⁴ Last but not least, the Director, who is the head of the Agency and is responsible for its day-to-day running as well as for preparing and implementing relevant administrative acts, is appointed “on the basis of his or her personal merit, experience in the field of fundamental rights and administrative and management skills” following a “cooperation (consultation) procedure” whereby, in essence, the nomination made by the Management Board has to take into account the opinions (and order of preference) provided by the European Parliament and Council on candidates selected by the Commission, following an open call for interest and transparent selection procedure, the candidates also having been heard by the Council itself and a competent European Parliament committee.⁸⁵ This somewhat cumbersome procedure brings to the fore, at least, the strong influence exerted, to varying extents, by the three institutions mentioned, without this

⁸² See Article 14(5) of the EU FRA Regulation.

⁸³ See Article 14(1) of the EU FRA Regulation (*emphasis added*). See also Article 27 of the Agency’s rules of procedure.

⁸⁴ See Article 14(3) of the EU FRA Regulation, which resembles Article 12(4) thereof, cited in fn 80 above. It is curious to note that para. (3) of Article 14 restates that the “members of the Scientific Committee shall be independent”, while para. (1) of the same Article already imposes a personal independence requirement.

⁸⁵ See Article 15 of the EU FRA Regulation. It is interesting to observe that recital 23 thereof indicates that, considering “the significant role played by the [EP] in the defence, mainstreaming and promotion of fundamental rights, it should be involved in the activities of the Agency, including [...], given the exceptional nature and task of the Agency, the selection of the candidates proposed for the post of the Director of the Agency without setting a precedent for other Agencies”. While neither the Council nor the Commission are mentioned, although they are actively involved in the procedure of appointing the Director, a Declaration (of 27 February 2007, 6396/07 ADD 1) on this topic made by the two institutions together with the EP stresses the “exceptional nature, in comparison to other agencies, of the [EU FRA], the objective of which is to provide the institutions of the Union with assistance and expertise within a domain where the legislature has been given significant powers”, and that this exceptional nature justifies “that the solutions generally followed in the nomination of directors for agencies are not, in their entirety, followed in the nomination of the [Director of the Agency, where] a more prominent role is given to the [EP] and to the Council under Article 13” of the EU FRA Regulation, also adding (again) that this “solution cannot in any way be regarded as constituting a precedent which could be referred to when nominating the director of any other agency, nor for the extension of his or her mandate”.

being counterbalanced by any specific independence requirement for the person to be appointed as Director, thus running the risk of creating a close (personal) connection between this key organ of the Agency and the institutions, and in turn adversely affecting the operative independence of the EU FRA vis-à-vis the latter.⁸⁶

In fact, whereas the Agency has autonomous legal personality and the statutory duty to act “in complete independence” in the public interest,⁸⁷ and whereas accountability arrangements are set forth by its establishing Regulation,⁸⁸ its institutional operations are encapsulated within the (broad) boundaries set by the so-called Multiannual Framework, to be adopted by the Council based on a proposal from the Commission, after having consulted the European Parliament, while the EU FRA can only express its opinion (via its Management Board) on the proposal formulated by the Commission.⁸⁹ These conditions, together with the abovementioned institutional arrangements (as well as the limited powers and limited discretion to act on its own initiative, as noted above), could compromise the Agency’s independence as they seem capable of allowing powerful external actors to interfere in its

⁸⁶ In fact, the only reference to the (functional) independence of the Director is to be found in Article 15(5) of the EU FRA Regulation, where it is stated that he/she has to “perform his/her tasks independently”. The same provision indicates that the Director is accountable to the Management Board (and participates in its meetings, without voting rights). Nevertheless, the Director can be called upon by the EP or by the Council at any time to attend hearings on matters linked to the activities of the Agency (see Article 15(6) thereof) and he/she can be dismissed (by the Management Board) before his/her term of office expires, on the basis of a proposal coming not only from a third of the Board’s members, but also from the Commission (see para. (7) therein, where no specific grounds for the dismissal are listed).

⁸⁷ See respectively Articles 23 and 16 of the EU FRA Regulation. The latter establish the duty of the members (and alternate members) of the Management Board, the members of the Scientific Committee and the Director to make a statement of interests indicating “either the absence of any interests which might be considered prejudicial to their independence or any direct or indirect interests which might be considered prejudicial to their independence”.

⁸⁸ In this respect, the Agency has to report on its activities annually (see Article 4(1)(g) of the EU FRA Regulation). Moreover, the ECJ has jurisdiction in cases brought against it, under the conditions provided for by former Articles 230 and 232 EC (now, Articles 263 and 265 TFEU; see Article 27(3) thereof), which, however, seems somewhat curious, as the Agency does not seem to have any power to adopt binding acts that could be challenged under the conditions set forth by those provisions.

⁸⁹ See Article 5 of the EU FRA Regulation. Recital 11 thereof justifies the involvement of these institutions because of the “political significance” of the Multiannual Framework. This also constitutes the grounds for the adoption of the Annual Work Programme, which is based on “the draft submitted by the Agency’s Director after the Commission and the Scientific Committee have delivered an opinion” (see Article 12(6)(a) thereof). So far, two Multiannual Frameworks have been adopted, following a proper legislative procedure: see Council Decision No 2008/203/EC, of 28 February 2008, implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012 (OJ [2008] L 63/14); and Council Decision No 252/2013/EU, of 11 March 2013, establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights (OJ [2013] L 79/1). These establish the thematic areas of the Agency’s activity. The legislators are not completely free to shape the content of the Multiannual Framework at their wish, as Article 5(2) thereof dictates some conditions they have to abide by to that end (such as, for instance, the compulsory inclusion of the fight against racism, xenophobia and related intolerance, and other more general and structural requirements). Although the statutory conditions could contribute to preserving the Agency’s autonomy, none of them expressly sets out to do so.

functioning, whereas the Agency should actually be guarding its autonomy (also) from these very actors.

To conclude, as remarked above, the establishment of the EU FRA and its institutional features – among them notably the independence requirement that characterises national human rights institutions as well as equality bodies (albeit with some weaknesses in the case of the EU FRA) – is a significant example of the “administrative rights promotion” that supplements (and complements) other forms of rights protection, such as that afforded by courts.⁹⁰ The establishment of the Agency has its roots in the ‘institutionalisation’ of the responses provided in the quest for the greater and sounder protection and promotion of fundamental rights within the EU legal order, which already started with the setting-up of the Centre and proliferated afterwards, as the Agency does not operate alone, but cooperates with other similar relevant institutions, such as the Institute. Notwithstanding the EU FRA’s ‘soft powers’, it is at the forefront of the “EU administrative law of fundamental rights protection and promotion”,⁹¹ especially thanks to its broad remit and rich institutional structure. Nowadays, the Agency is definitely part of the institutional *acquis* that characterises this field of law and can serve as a useful (albeit ameliorable) example in structuring similar institutional safeguards in other areas touched upon by the EU integration process.

⁹⁰ See VAN BOGDANDY, cited, p. 1037.

⁹¹ See VAN BOGDANDY, cited, p. 1068.

1.3 IAAs and regulated sectors: the case of electronic communications regulation

1.3.1 EU legislative intervention in the field of electronic communications: the background

Despite the lack of any explicit reference to “electronic communications” in primary EU law, even after the entry into force of the Lisbon Treaty, it is apparent from the significant bulk of (secondary) legislation adopted on the matter over the past three decades that they represent one of the main sectors of the internal market. Indeed, since the ‘80s, the EU has repeatedly intervened in what has long been (and sometimes still is) referred to as the “telecommunications” sector, in view of its “critical importance to economic, social and cultural development in Europe” and its (now) clear cross-border dimension.¹

Concerning EU intervention in this sector, (at least) four stages can be identified in the development of the relative legislation.² The first one dates back to the ‘80s and ‘90s and refers to a time when this sector, originally characterised by strong national markets dominated by publicly-owned monopoly operators, progressively started opening up towards privatisation and some competition. This was mainly due to the (technical) revolution brought about by the increasing application and use of information technologies and the related enhanced potentialities for new players to enter the market. In this context, action was taken

¹ See the Commission Green Paper on the development of the common market for telecommunications services and equipment: “Towards a dynamic European economy” (COM(87) 290 final, of 30 June 1987). It should be pointed out here that the Treaties refer (only and still) to “telecommunications”: Article 170 TFEU (former Article 154 EC), introduced in its original wording by the Treaty of Maastricht, provides for the EU to “contribute to the establishment and development of trans-European networks in the areas of transport, *telecommunications* and energy infrastructures” (*emphasis added*). The semantic shift from “telecommunications” to “electronic communications” took place in secondary legislation, mainly at the time of the adoption of the so-called “2002 Regulatory Framework”, for the reasons that will be mentioned below.

² The description below is not by any means exhaustive and the literature on the matter (as well as on specific topics touched upon in these background notes) is extremely rich: for further references and a more detailed account of the many legislative measures that have been enacted in this field and the issue at stake, see L. HOU, *Competition law and regulation of the EU electronic communications sector: a comparative legal approach*, Alphen aan den Rijn, Kluwer Law International, 2012; P. IBÁÑEZ COLOMO, *European communications law and technological convergence: deregulation, re-regulation and regulatory convergence in television and telecommunications*, Alphen aan den Rijn, Kluwer Law International, 2012; P. NIHOUL, P. RODFORD, *EU electronic communications law: competition and regulation in the European telecommunications market*, OUP, Oxford, 2011; M.H. RYAN (ed.), *The EU regulatory framework for electronic communications*, London, Bloomsbury Professional, 2010; F. BASSAN (ed.), *Diritto delle comunicazioni elettroniche: telecomunicazioni e televisione dopo la terza riforma comunitaria del 2009*, Milano, Giuffrè Editore, 2010; L. GARZANITI, M. O’REGAN (eds.), *Telecommunications, broadcasting and the Internet: EU competition law and regulation*, London, Sweet & Maxwell, 2010; F. DONATI, *L’ordinamento amministrativo delle comunicazioni*, Torino, Giappichelli, 2007; I. CHIEFFI, *L’integrazione amministrativa europea nelle comunicazioni elettroniche*, Torino, Giappichelli, 2006; N.TH. NIKOLINAKOS, *EU competition law and regulation in the converging telecommunications, media and IT sectors*, Alphen aan den Rijn, Kluwer Law International, 2006.

at EU level to support and boost competition in order to sustain economic growth and favour consumer interests, combining liberalisation with harmonisation, as well as with the application of competition rules,³ in order to maximise the opportunities offered by a single European market in the telecommunications sector. Thus, regarding liberalisation, following targeted intervention to remove and abolish the exclusive and/or special rights of incumbent operators over the importation, marketing, implementation and maintenance of terminal equipment, as well as over the supply of some telecommunications services, further measures were adopted to achieve this goal across the whole sector, in particular regarding voice telephony (as well as cable television and mobile communications) services and infrastructures.⁴ Concerning the harmonisation of national regulatory measures, this also covered terminal equipment and telecommunications networks and services. Intervention was targeted at removing technical obstacles to the development of the internal market, especially by introducing the principle of Open Network Provision (ONP), which provided the basis for the establishment of a set of harmonised conditions (mainly addressed to incumbent operators) aimed at ensuring open and efficient access to, and use of, public telecommunications networks (and services) on fair, transparent and non-discriminatory grounds.⁵

³ The ECJ, in its judgment of 25 March 1985 on Case 41/83, *Italy v. Commission* [1985] ECR 873, affirmed that competition provisions set forth by the Treaties were indeed applicable to telecommunications undertakings.

⁴ See Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets for telecommunications terminal equipment (OJ [1988] L 131/73); Commission Directive 90/388/EEC, of 28 June 1990, on competition in the markets for telecommunications services (OJ [1990] L 192/10); Commission Directive 94/46/EC, of 13 October 1994, amending Directive 88/301/EEC and Directive 90/388/EEC in particular with regard to satellite communications (OJ [1994] L 268/15); Commission Directive 95/51/EC, of 18 October 1995, amending Directive 90/388/EEC with regard to the abolition of the restrictions on the use of cable television networks for the provision of already liberalized telecommunications services (OJ [1995] L 256/49); Commission Directive 96/2/EC, of 16 January 1996, amending Directive 90/388/EEC with regard to mobile and personal communications (OJ [1996] L 20/59); Commission Directive 96/19/EC, of 13 March 1996, amending Directive 90/388/EEC with regard to the implementation of full competition in telecommunications markets (OJ [1996] L 74/13), setting, *inter alia*, 1st January 1998 as the deadline for the complete liberalisation of all telecommunications services and networks; and also Commission Directive 1999/64/EC, of 23 June 1999, amending Directive 90/388/EEC in order to ensure that telecommunications networks and cable TV networks owned by a single operator are separate legal entities (OJ [1999] L 175/39).

⁵ See notably Council Directive 90/387/EEC, of 28 June 1990, on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ [1990] L 192/1), as later amended. Open network provision (ONP) was then implemented in specific domains relating to telecommunications by several other harmonization Directives, among which see: Council Directive 92/44/EEC, of 5 June 1992, on the application of open network provision to leased lines (OJ [1992] L 165/27), as later amended; Directive 95/62/EC of the EP and of the Council, of 13 December 1995, on the application of open network provision (ONP) to voice telephony (OJ [1995] L 321/6), as later modified; Directive 97/33/EC of the EP and of the Council, of 30 June 1997, on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ [1997] L 199/32), as later amended; and Directive 97/13/EC of the EP and of the Council, of 10 April 1997, on a common framework for general authorizations and individual licences in the field of telecommunications services (OJ [1997] L 117/15). See also Regulation (EC) No 2887/2000 of the EP and of the Council, of 18

In 1999, taking into account the significant developments affecting this sector in terms of both technological innovations and full market liberalisation (almost accomplished), the Commission launched a review of the measures in place.⁶ Compared (and in contrast) to the piecemeal interventions that characterised the first stage, this second round of EU intervention in telecommunications is mainly represented by the regulatory package adopted in 2002 as the result of the Commission's review (hereinafter referred to simply as the "2002 Regulatory Framework", or just the "Regulatory Framework"), comprising four key harmonisation Directives and complemented by other measures, codifying the existing measures on liberalisation, as well as some new ones on other significant related matters, such as data protection and the privacy of communications users.⁷ The four Directives aimed not only to establish a common regulatory framework for "electronic communications" networks and services (i.e., Directive 2002/21/EC, the so-called "Framework Directive")⁸, but also to regulate some more specific and crucial aspects, such as: access to, and the interconnection of, those networks and associated facilities (i.e., Directive 2002/19/EC, the "Access Directive")⁹; authorisation of the same networks and services (i.e., Directive 2002/20/EC, the "Authorisation Directive")¹⁰; and the provision of universal services in electronic

December 2000, on unbundled access to the local loop (OJ [2000] L 336/4), the "local loop" representing "the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network" (Article 2(c) therein). Together with those measures concerning harmonization of telecommunications networks and services, others were adopted regarding terminal equipment: see, among the many, Council Directive 86/361/EEC, of 24 July 1986, on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (OJ [1986] L 217/21), later supplemented and amended.

⁶ See the Communication from the Commission to the Council, the EP, the Economic and Social Committee and the Committee of the Regions, of 10 November 1999, "Towards a new framework for Electronic Communications infrastructure and associated services - The 1999 Communications Review" (COM(1999) 539 final, of 10 November 1999).

⁷ See Commission Directive 2002/77/EC, of 16 September 2002, on competition in the markets for electronic communications networks and services (OJ [2002] L 249/21); and Directive 2002/58/EC of the EP and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (OJ [2002] L 201/37). See also Commission Directive 2008/63/EC, of 20 June 2008, on competition in the markets in telecommunications terminal equipment (OJ [2008] L 162/20). Moreover, within this context, see Decision 676/2002/EC of the EP and of the Council, of 7 March 2002, on a regulatory framework for radio spectrum policy in the European Community (OJ [2002] L 108/1), the "radio spectrum" being a finite national asset consisting of the range of radio waves used to transmit music, conversations, pictures and data invisibly through the air.

⁸ Directive of the EP and of the Council, of 7 March 2002, on a common regulatory framework for electronic communications networks and services (OJ [2002] L 108/33).

⁹ Directive of the EP and of the Council, of 7 March 2002, on access to, and interconnection of, electronic communications networks and associated facilities (OJ [2002] L 108/7).

¹⁰ Directive of the EP and of the Council, of 7 March 2002, on the authorization for the networks and the services of electronic communications (OJ [2002] L 108/22).

communications (i.e., Directive 2002/22/EC, the “Universal Service Directive”)¹¹. As mentioned above, the rationale underlying this second set of EU measures was essentially to adapt the regulations to technological changes, represented in particular by the increasing phenomenon of technological convergence among telecommunications, broadcasting and information society services, mainly brought about by ongoing digitisation. Indeed, due to the effects of technological convergence, those services are no longer restricted to a particular infrastructure and no particular infrastructure is devoted exclusively to one type of service. This phenomenon has, in turn, brought about a tendency towards “regulatory convergence”, whereby, as regards infrastructure regulation, technology-neutral rules have been established to govern all “electronic communications” (and no longer only telecommunications or broadcasting transmission), while at the same time ‘bridges’ have been built between this type of regulation and content-related sets of measures (such as audiovisual regulation) that nevertheless remained separated from the former.¹² Moreover, as already mentioned above, the overall approach of the 2002 Regulatory Framework was also aimed at strengthening the internal market by levelling the playing field and allowing undistorted competition among network and service providers. In this respect, the regulatory package, shaped around principles and tools pertaining to competition law, provided for instruments of “ex-ante regulation”, according to which competent national authorities are allowed to intervene, under the Commission’s guidance and oversight, to impose obligations (so-called “remedies”) on

¹¹ Directive of the EP and of the Council, of 7 March 2002, on universal service and users’ right relating to electronic communications networks and services (OJ [2002] L 108/51). In essence, “universal service” obligations refer to the need to provide “the minimum set of services of specified quality to which all end-users have access [regardless of their geographical location], at an affordable price in the light of specific national conditions, without distorting competition” (Article 1 thereof): this minimum set of services encompasses, for example, a connection to the public telephone network at a fixed location and at an affordable price, capable of enabling end-users to take charge of voice communications and data communications in a way that permits functional Internet access.

¹² In the wording of recital 5 of the Framework Directive, the “convergence of the telecommunications, media and information technology sectors means that all transmission networks and services should be covered by a single regulatory framework [and that it] is necessary to separate the regulation of transmission from the regulation of content. [The Regulatory Framework] does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services, and is therefore without prejudice to measures taken at [EU] or national level in respect of such services, in compliance with [EU law], in order to promote cultural and linguistic diversity and to ensure the defence of media pluralism. [However, the] separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”. Moreover, within this context, a technology-neutral regulatory approach means that regulation should not impose, nor discriminate in favour of, the use of a particular type of technology, but ensure that the service is regulated in an equivalent manner, irrespective of the means by which it is delivered. Thus, the use of terms such as “electronic communications” networks, instead of “telecommunications”, designating all those networks in a neutral and comprehensive way, irrespective of the type of information conveyed or offered (as well as, *mutatis mutandi*, “audiovisual media” services and content, instead of “broadcasting”), is a consequence (and a clear example) of that approach.

market operators with “significant market power” (SMP) in order to achieve effective competition.¹³

The 2002 Regulatory Framework, which still represents the main legislation in force on the matter, was later affected by some amendments seeking to ensure the most effective implementation of its provisions without changing its rationale and approach. Within this context, and with the aim of adjusting the regulations to the increasing competition, while also entrusting the competent authorities with sharper regulatory tools to strengthen such a trend, reinforcing users and citizens’ rights relating to electronic communications, as well as designing new institutional arrangements to govern the sector in question, two Directives (i.e. Directive 2009/140/EC, the “Better Regulation Directive”; and Directive 2009/136/EC, the “Citizens’ Rights Directive”)¹⁴ and a Regulation (i.e. Regulation (EU) No 1211/2009, the so-called BEREC Regulation, which will be discussed at length below)¹⁵ were adopted, marking a third round of EU regulation on the matter.¹⁶ As regards this third set of measures, it is

¹³ In particular – according to the 2002 Regulatory Framework (and notably Articles 14-16 of the Framework Directive), also following the instructions of the Commission Recommendation 2007/879 of 17 December 2007 on relevant product and service markets within the electronic communications sector which are susceptible to ex-ante regulation, in accordance with Directive 2002/21/EC of the EP and of the Council on a common regulatory framework for electronic communications networks and services (OJ [2007] L 344/65), replacing the original Commission Recommendation 2003/311 of 11 February 2003 (OJ [2003] L 114/45) – national competent authorities have to define “relevant markets” (that is to say, those product and service markets in the electronic communications sector where it is presumed that competition problems might persist) and analyse them in order to intervene, in case of findings of no effective competition, via the imposition (maintenance or modification) of remedies (that is to say, the obligations provided for by the Regulatory Framework, such as accounting separation, compulsory network access for competitors, regulation of access prices, etc.). Regarding operators enjoying SMP, this position is equivalent to the concept of “dominance” proper to competition law. In this respect, see also the Commission guidelines of 11 July 2002 on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (OJ [2002] C 165/6). Overall, it transpires that the Commission does not have direct regulatory powers across electronic communications, but can influence regulation through soft law measures (such as the abovementioned Recommendations) and its involvement in the process leading to the adoption of regulatory measures by NRAs, as envisaged by the Framework Directive (see fn 30 below).

¹⁴ See, respectively, the Directive of the EP and of the Council, of 25 November 2009, amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (OJ [2009] L 337/37). See also the Directive of the EP and of the Council of 25 November 2009, amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ [2009] L 337/11).

¹⁵ See fn 61 below.

¹⁶ In a nutshell, on the one hand, the amendments brought about by the Better Regulation Directive on the Framework, Access and Authorisation Directives aimed to simplify electronic communications regulation. They created the preconditions for applying ex-ante regulatory measures only where needed, leaving more room for the application of competition law provisions, while ensuring more consistency by reinforcing the ‘regulatory’ role of the Commission, entrusting it with a veto power on (certain) regulatory measures proposed by national competent authorities within the framework of the so-called “Article 7 procedure” (the procedure referred to by

worth highlighting that much of the debate between the co-legislators during the process leading to their adoption was centred on a specific provision introduced in the Framework Directive, commonly referred to as the “Internet Freedom Provision”, which mandated respect for the fundamental rights and freedoms of natural persons in relation to their access to or use of services and applications through electronic communications, thus clearly bringing to the fore the interrelationship between the regulation of electronic communications and the protection and promotion of those rights and freedoms.¹⁷

Finally, and most recently, the Commission proposed a further (but still limited) review of the 2002 Regulatory Framework (already modified in 2009), thus marking a fourth stage of legislative intervention concerning electronic communications on the part of the EU.¹⁸ In the

Article 7 of the Framework Directive, for which see fn 30 below) and, last but not least, including among the regulatory remedies a powerful new tool, the so-called “Functional Separation Remedy”. According to this remedy, an incumbent operator can be obliged to functionally separate its network infrastructure from the units offering services on top of this infrastructure into different business entities, leaving the overall ownership unchanged, but paving the way for that operator to supply all other operators under non-discriminatory conditions and prevent traditional incumbents from unfairly discriminating against new entrants. On the other hand, the Citizen’s Rights’ Directive reinforced consumers’ rights, notably by underpinning the guarantees for an open and “neutral” Internet and strengthening the protection of personal data. Moreover, together with the abovementioned two Directives and the BEREC Regulation, the Commission also adopted the Recommendation 2002/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector that are susceptible to ex-ante regulation in accordance with Directive 2002/21/EC of the EP and of the Council on a common regulatory framework for electronic communications networks and services (OJ [2007] L 344/65), substantially reducing the number of those markets.

¹⁷ The provision, contained in Article 1(3) of the Framework Directive, as amended, is mainly intended to protect individual rights against measures taken by MS aiming to restrict access to and the use of the Internet, by setting conditions (essentially, the respect of the proportionality principle and judicial safeguards) for the adoption of those measures. In particular, the Internet Freedom Provision was discussed (and finally adopted, on the basis of the agreement reached in the Conciliation Committee) against the background of the French “HADOPI Act”: a legislative act aimed at furthering the diffusion and protection of creation on the Internet, which established the French independent administrative “*Haute Autorité pour la Diffusion des œuvres et la Protection des droits d’auteur sur Internet*”. This Authority was entrusted with the power to sanction infringements of copyright law by means of new warning mechanisms and related administrative penalties, following a so-called “graduated response”. This consists of a “three-strike procedure” according to which, after an e-mail message and (if the violation persists) a certified letter sent to the offending Internet subscriber, in the event of further non-compliance, Internet access is suspended for a prescribed time. In its first version, the HADOPI Law provided, the independent authority with the power to restrict the Internet access of individuals without any prior judicial review in such cases, but after the ruling of the *Conseil constitutionnel* of 10 June 2009 (decision No 2009-580 DC), which recognised that freedom of expression implies the right to access the Internet (para. 12) and that the abovementioned procedure did not offer adequate (judicial) protection of such a fundamental freedom (para. 16), the law was amended accordingly, entering into force (Law No 2009-669, of 12 June 2009, JORF of 13 June 2009, p. 9666), although the Internet cut-off penalty was subsequently suppressed (by Decree No 2013-596, of 8 July 2013, JORF of 9 July 2013, p. 11428). The Internet Freedom Provision should also be read in conjunction with the other measures introduced in the Framework Directive, empowering the national competent authorities to set minimum quality standards for network transmission services so as to promote “net neutrality” and “freedoms”.

¹⁸ See the Communication from the Commission to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market (COM(2013) 634 final, of 11 November 2013), launching the so-called “Connected Continent Proposal 2013-2014” for the reform of the 2002 Regulatory Framework.

view of the Commission, this currently ongoing review (still) represents an “intermediate step towards the ultimate goal” of realising a “fully integrated” and “pan-European” single market for electronic communications. The measures proposed appear to consist of further amendments to the key instruments of the Regulatory Framework. Indeed, they seem to be essentially focused on simplifying and reducing regulatory intervention while enhancing administrative coordination (for example, by providing for a single EU authorisation mechanism based on a single notification system), strengthening the legal protection for an “open Internet” by reinforcing the guarantees for “net neutrality”, as well as envisaging more harmonisation in radio spectrum management and consumers’ rights.¹⁹

1.3.2 EU law and the institutional settings for the governance of electronic communications

From the very first stage of EU intervention in the regulation of electronic communications, besides the substantive measures adopted in this field, institutional arrangements were also established at supranational level to govern the application of those measures. Indeed, several provisions of the abovementioned acts of secondary legislation deal with institutional issues related to the governance of electronic communications, either at national or at EU level. These arrangements will be dealt with at some length below.

a) Institutional guarantees at the national level

It should be remembered that, from the outset, it has been Member States’ task to implement and enforce the relevant substantive EU provisions enacted through the many Directives mentioned above. Nevertheless, it should also be noted that EU legislation has also provided for Member States themselves to establish institutional arrangements to achieve those objectives. Thus, within the various Directives extending the scope of application of ONP across the entire telecommunications sector, so as to favour the process of liberalisation,

¹⁹ For an overview of the key issues in this latest review proposal, see the Commission press release, “Commission proposes major step forward for telecoms single market”, of 11 September 2013 (IP/13/828). All the amendments proposed are contained in a single legislative instrument, notably a (Proposal for a) Regulation of the EP and of the Council, laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013) 627 final, of 11 September 2013), accompanied by a Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment (C(2013) 5761 final, of 11 September 2013).

provisions were introduced to ensure that regulatory functions were separate from operational ones, and that the exercise of the first was entrusted to a national body (or bodies) “legally distinct and functionally independent of the telecommunications organisations” (which were normally former Member State-owned incumbent operators), to be defined as “national regulatory authority” (NRA).²⁰ However, apart from this definition, focusing only on their functions, and a piecemeal description of their tasks, no further details were given about the institutional features of NRAs.²¹

On this basis, the 2002 Regulatory Framework confirmed and reinforced the crucial role of NRAs in the implementation and enforcement of EU electronic communications law. Indeed, the Framework Directive imposes upon Member States the establishment and functioning of NRAs, along with responsibility for ensuring the effective application of the regulatory provisions, devolving them the ex-ante regulation of national markets.²²

i) The establishment and main features of National Regulatory Authorities (NRAs)

In identifying NRAs, the Framework Directive (once again) provides a functional definition. According to its Article 2(g), for the purposes of the Regulatory Framework, a NRA is “the body or bodies charged by a [Member State] with any of the regulatory tasks assigned” in the

²⁰ See Article 2(2) of the already cited Directive 95/62/EC. See also, in the same context, the above cited: Directive 97/13/EC, providing the same definition to be applied within its context; Directive 97/33/EC; Directive 90/387/EC (as modified by Directive 97/51/EC of the EP and Council, of 6 October 1997, OJ [1997] L 295/23); as well as Directive 98/10/EC of the EP and of the Council, of 26 February 1998, on the application of open network provision (ONP) to voice telephony and on universal service for telecommunications in a competitive environment (OJ [1998] L 101/24), also providing the same definition.

²¹ Many of the provisions of Directive 95/62/EC (and later on, also of Directive 90/387/EC, as amended, as well as of the other Directives mentioned above) detailed the specific functions of NRAs. In a more general vein, recital 10 of the already cited Directive 95/62/EC stated that NRAs “should play an important role in [its] implementation, [and] have the necessary means to carry out [the assigned tasks] fully”.

²² As made clear by Article 1(1) of the Framework Directive (as modified in 2009), it is (part of) the scope and aim of the Framework Directive itself to lay down the tasks of NRAs and establish a set of procedures to ensure the harmonised application of the Regulatory Framework throughout the EU. Thus, most of the provisions of the Regulatory Framework (in particular those of the Framework Directive) directly invest NRAs with powers and competences, while others provide for MS to “ensure” or “guarantee” that NRAs are able to perform the tasks assigned to them by EU law. As for the obligation to establish NRAs, some commentators have pointed to the fact that, in sectors such as this, the phenomenon of independent regulatory agencies developed quite independently of EU law requirements as, in many cases, those agencies were established even before the enactment of such requirements (see the study, carried out for CERRE, Centre on Regulation in Europe, by C. HANRETTY, P. LAROUCHE, A. REINDL, “Independence, accountability and perceived quality of regulators”, 2012, available at: <http://www.cerre.eu/publications/independence-accountability-and-perceived-quality-regulators>, pp. 15-16). However, it should be noted that, as will emerge from the following analysis, EU law has not only actively supported such a trend, but, in mandating the establishment of those bodies, it has dictated (or codified) certain (minimum) common conditions capable of being legally enforced, and this constitutes an added value.

Framework Directive and the other specific Directives composing the Regulatory Framework.²³ Thus, from such a general and broad definition it appears that, to respect (somewhat) their institutional autonomy, Member States are free not only to designate as NRA more than just one body, but they also have a wide margin of manoeuvre for that purpose.

The case-law of the ECJ has undoubtedly (albeit not undisputedly) confirmed and supported an extensive interpretation of the above-quoted definition, leaving room even for the possibility, for instance, for the national legislator to act as a NRA, although it has also set (rather, highlighted) relevant limits in that context.²⁴ Indeed, some boundaries to Member States' broad discretion are to be found in the Framework Directive itself, which dictates

²³ The definition of NRA contained in the Framework Directive is in fact equivalent to that provided by the abovementioned liberalisation Directives adopted in the initial stage of the EU regulation of telecommunications.

²⁴ In its judgment of 6 March 2008, in Case C-82/07, *Comisión del Mercado de las Telecomunicaciones* [2008] ECR I-1265, concerning the allocation (in Spain) of regulatory functions in relation to the assignment of national numbering resources and the management of national numbering plans to different (and separate) bodies, the ECJ, by approving this institutional arrangement, pointed out, on the one hand, the “potentially pluralist nature” of NRAs, resorting clearly from the abovementioned definition provided by the Framework Directive, and on the other hand, the need for MS to exercise their institutional autonomy in organising and structuring their NRAs “only in accordance with the objectives and obligations laid down in the [Framework Directive]” (see, respectively, paras. 19 and 24 therein). Subsequently, in its judgment of 3 December 2009 on Case C-424/07, *Commission v. Germany* [2009] ECR I-11431, the ECJ recognised an infringement of EU law arising from national legislation limiting the discretion of the German NRA by giving priority to particular regulatory objectives (namely, the promotion of investment and innovation) among those provided by the Regulatory Framework (on which see the text, below), while according to the Framework Directive “such a weighting exercise is a matter for the NRA when carrying out the regulatory tasks assigned to it” (para. 93). This confirmed the Opinion of AG Poiares Maduro on this same case (delivered on 23 April 2009), especially where he asserts that it was the deliberate choice of the EU legislature to grant discretion in balancing the Regulatory Framework’s objectives to NRAs, which “have been set up and given particular powers [by the Regulatory Framework itself, as] they are expected to be insulated from certain interests and to reach their decisions governed only by the criteria established in that [Framework]”, while “the task of the national legislature is limited to ensuring that NRAs take all necessary measures to pursue those objectives” (paras. 63 and 65 therein). Lastly, in its judgment of 6 October 2010, in Case C-389/08, *Base and Others* [2010] ECR I-9073, originating from Belgium, where the national legislature was (self-)designated to act as the NRA for the purpose of governing the application of certain provisions concerning universal service obligations, the ECJ affirmed that a MS can in fact “assign to the national legislature the tasks incumbent on [NRAs under the Regulatory Framework] only if the legislative body, in the exercise of those tasks, meets the organisational and operational requirements to which [that Framework] subject[s] those authorities” (para. 27; but see also para. 30 therein, where it is stated that the Universal Service Directive “does not in principle preclude, by itself, the national legislature from acting as [a NRA] within the meaning of the Framework Directive”, provided that it meets those requirements, as well as para. 46 of AG Cruz Villalón’s Opinion, delivered on the same Case on 22 June 2010, where he affirms that, under certain conditions, “the legislature is not excluded from occasionally taking on some of the tasks assigned to NRAs where the [MS] concerned considers it appropriate”). However, critical remarks on that connection have been raised not only in the literature, where some tensions have been highlighted between that judgment and the one rendered in the abovementioned Case *Commission v. Germany* (see notably M. SZYDŁO, in CMLR [2012] 49, pp. 1141-1162), but also – it seems – by the EU legislator: see recital 13 of the abovementioned Directive 2009/140/EC, where the national legislator is found “unsuited” to act as NRA. Overall, this case-law reinforces the claim that institutional autonomy of MS in setting up NRAs is very much oriented and confined by EU law: see S. LAVRIJSSEN, A. OTTOW, “The legality of independent regulatory authorities”, in L. BASSELINK, F. PENNING, S. PRECHAL (eds.), *The eclipse of the legality principle in the European Union*, The Hague, Kluwer Law International, 2010, pp. 73-96.

several requirements to be observed when identifying (or establishing) NRAs, in order to ensure the effectiveness of EU law provisions. This is the case of Article 3 (entitled “National regulatory authorities”) of that Directive, whose paragraph 1 obliges Member States to ensure that the designated NRA is a “competent body”, that is to say – one may assume – a body with the specialist technical knowledge necessary to perform the tasks assigned. Moreover, paragraph 2 of that Article provides for Member States to guarantee that NRAs are “independent” (as will be clarified and discussed below), while the following paragraph 3 dictates that they must exercise their powers with “impartiality, transparently and in a timely manner”, as well as have “adequate financial and human resources” to carry out their tasks.²⁵ Further to these requirements, the Framework Directive also mandates Member States to guarantee a right of appeal against NRAs’ decisions affecting users or providers of electronic communications networks and/or services, to be exercised in front of an expert appeal body that is independent in relation to the parties involved.²⁶

ii) Objectives and functioning of NRAs

Overall, the Framework Directive offers a blueprint for the institutional structure of NRAs.²⁷ Thus, apart from establishing some key institutional features (such as those recalled above, and in particular the independence requirement, to be discussed below), the Framework Directive indicates the objectives of NRAs’ actions, identifies their key functions, and details some procedural arrangements concerning their operations.

As for the policy objectives, whose pursuit is directly conferred upon NRAs, they are listed in Article 8 of the Framework Directive and can be divided into three sets: the first connected to

²⁵ As regards the transparency requirement (and the related objective of ensuring legal certainty and predictability), Article 3(4) of the Framework Directive provides for MS to publish the tasks to be undertaken by NRAs in an easily accessible form, “in particular when those tasks are assigned to more than one body”, while according to para. 6 of the same Article, they also have to notify to the Commission the names of the NRAs entrusted with carrying out those tasks, and their respective responsibilities.

²⁶ As stated by the same provision, the appeal body can also be a court. If, however, such a body “is not judicial in character, written reasons for its decisions shall always be given”, and those decisions have to “be subject to review by a court or a tribunal within the meaning of Article [267 TFEU]”. Generally, MS have to ensure that the appeal body functions effectively and that the appeal mechanism is effective.

²⁷ The provisions of the Framework Directive are therefore supplemented by those of the other specific Directives, which detail not only the other tasks of NRAs but also the substantive regulatory measures (i.e., remedies) to be adopted by the latter when necessary.

safeguarding competition; the second aimed at further promoting the internal market; and the third relating to the protection of the interests of EU citizens.²⁸

Concerning NRAs' functions, besides the general assignments related to market definition and analysis in order to identify undertakings having SMP and hence impose regulatory remedies, the Framework Directive also provides for more specific tasks to be performed, such as: gathering information from market players (and exchanging it with the Commission and other NRAs when necessary for the application of the Regulatory Framework); allocating and assigning radio frequencies for radio-based electronic communications services; managing national numbering plans; and resolving disputes between electronic communications undertakings arising in connection with the obligations imposed under the Regulatory Framework.²⁹

In relation to the procedural arrangements, the Framework Directive not only imposes upon NRAs the duty to consult interested parties on proposed decisions and take their comments into account before adopting final acts, but also provides for a detailed procedure to be followed before certain decisions are adopted, in order to avoid adverse effects on the internal market or other Treaty objectives and ensure consistency among regulatory solutions (the so-called and already-mentioned "Article 7 procedure").³⁰ More generally, the Framework

²⁸ See, respectively, paragraphs 2, 3 and 4 therein. Among the specific objectives within these three sets, reference could be made in particular to the need for NRAs to (again respectively): ensure that there is no distortion or restriction of competition in the electronic communications sector, "including the transmission of content" (paragraph 2(b)); cooperate with each other, with the Commission and BEREC so as to ensure the development of consistent regulatory practice and the consistent application of the Regulatory Framework (para. 3(d)); and promote the ability of end-users to access and distribute information or run applications and services of their choice (para. 4(g)). According to the following paragraph 5, the pursuit of all the policy objectives listed in Article 8 of the Framework Directive is also supplemented (after the 2009 Review) by some objective, transparent, non-discriminatory and proportionate regulatory principles (such as promoting regulatory predictability, or ensuring equal treatment among market players), which NRAs are required to apply to that end.

²⁹ See, apart from the general provisions of the already mentioned Articles 14-16, the specific provisions of Articles 5, 9, 10 and 20-21 therein, respectively.

³⁰ See, respectively, Articles 6 and 7 of the Framework Directive. As regards the Article 7 procedure, in brief, this provides for NRAs to inform their counterparts in other MS, BEREC and the Commission of their draft decisions on market definitions and analysis, including the designation of undertakings having SMP that would affect trade between MS, regarding which comments and advice can be made by the addressees (especially BEREC) of the measures notified, within given time limits. If the Commission raises serious doubts about the decisions proposed (whether it thinks that the measures envisaged are likely to create obstacles to the single market or are not compatible with EU law), further investigations are conducted within a new timeframe, at the end of which the NRA may be required to amend or withdraw the measures proposed. Following the 2009 Review, a similar procedure has also been shaped for the adoption of regulatory remedies: this is the so-called "Article 7a procedure" (as a consequence of a new Article being introduced into the Framework Directive by the Better Regulation Directive). Among the (institutional) differences between the two procedures, it could be noted that Article 7a procedure provides for an increased role of BEREC (on which see below) as well as for no veto power for the Commission in that respect. See also the Commission Recommendation of 15 October 2008 on the notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the EP and of the Council on a common regulatory framework for electronic communications networks and services (OJ [2008] L 301/23).

Directive also requires Member States to ensure, “where appropriate”, consultation and cooperation between their NRAs and competition authorities, as well as the authorities entrusted with the implementation of consumer law, on matters of common interest.³¹

In this context, as far as the institutional design of NRAs is concerned, the Regulatory Framework does not contain any prescriptions or express indications about the appropriateness of having a single convergent regulator, which would deal at the same time with electronic communications and audiovisual media regulation, rather than two separate bodies, each responsible for one of these two branches of regulation. However, as already noted above, the Framework Directive does refer to the interrelationship and overlap between electronic communications and audiovisual media regulation, as well as to some broader policies related to both of them. Hence, this Directive recognises, in general terms, that the activities of NRAs “contribute to the fulfilment”, *inter alia*, of cultural policies and, more specifically, that NRAs “may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism”.³² Moreover, further provisions of the Framework Directive (as well as the specific Directives) focus on the impact of the operations of electronic communications networks and services on audiovisual content regulation, with particular regard to the role of NRAs. In this context, reference could be made, for example, to: the policy objective assigned to NRAs, consisting of encouraging the interoperability of pan-European services, especially those related to digital interactive television, which is seen as instrumental “to promote the free flow of information, media pluralism and cultural diversity”,³³ the strategic planning and coordination of radio spectrum policy, for which Member States should cooperate with each other and with the Commission, taking into account, *inter alia*, the “freedom of expression [and] cultural [...] aspects of EU policies”,³⁴ the management of radio frequencies for

³¹ See Article 3(4) of the Framework Directive.

³² See, respectively, recital 17 and Article 8(1) of the Framework Directive.

³³ See Article 8(3)(b) in conjunction with Article 18 of the Framework Directive (and its recital 31). See also, under a similar perspective, the policy objectives referred to in fn 28 above.

³⁴ See Article 8a of the Framework Directive, introduced by the Better Regulation Directive. It should be noted, however, that the obligations related to the planning and coordination of radio spectrum policy are addressed to MS, without mentioning NRAs in this respect. Nevertheless, it could be recalled that, while the Framework Directive (after the amendments introduced in 2009) states the need for MS to ensure that NRAs place the greatest emphasis on the desirability of making regulations technologically neutral, recital 18 of the same Directive makes it clear that such a requirement “does not preclude the taking of proportionate steps [on the part of NRAs] to promote certain specific services where this is justified, for example digital television as a means for increasing spectrum efficiency”, as well as the free flow of information, media pluralism and cultural diversity, as could be argued with regard, for instance, to the abovementioned provisions on the interoperability of digital interactive television services.

electronic communications services, which must be conducted ensuring the fulfilment of general interest objectives, such as “the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services”;³⁵ and the encouragement on the part of NRAs (and other relevant authorities) of cooperation between undertakings providing electronic communications networks and/or services and sectors interested in the promotion of lawful content in electronic communication networks and services, without “prejudice to national rules in conformity with [EU] law promoting cultural and media policy objectives, such as cultural and linguistic diversity and media pluralism”.³⁶ Therefore, it could be argued that, at least implicitly, a preference is expressed for the convergent institutional model of a regulatory authority, since it objectively appears to be the most capable of effectively taking into account all the aforementioned regulatory implications between the electronic communications and audiovisual sectors. Whatever the choices made by Member States regarding the institutional design of their NRAs, it is nevertheless clear from the foregoing that the latter are expected to deal with aspects of audiovisual media regulation as well as the protection and promotion of related policy objectives (such as media pluralism), as their actions can certainly have an impact in that respect.

iii) A key institutional feature: the independence of NRAs

Concerning the institutional design of NRAs, as already mentioned above, the Regulatory Framework, and especially the Framework Directive, dictates some specific features that should characterise these authorities, the central one appearing to be their independence.³⁷

³⁵ See Article 9(4)(d) of the Framework Directive, which could be read in conjunction with Article 8(2)(d) of the same Directive, whereby “encouraging efficient use and ensuring the effective management of radio frequencies” is set as an NRA objective. Furthermore, recital 19 of the Framework Directive indicates that radio frequencies, as an essential input for radio-based electronic communications services, in so far as they relate to such services, should be allocated and assigned by NRAs, not only according to a set of harmonised objectives and principles governing their action, and to objective, transparent and non-discriminatory criteria, but also “taking into account the democratic, social, linguistic and cultural interests related to the use of frequency”.

³⁶ See Article 33(3) of the Universal Service Directive (as introduced by the Citizens’ Rights Directive). The Universal Service Directive also contains other provisions that have an impact on the pursuit of general interest objectives related to audiovisual policy, albeit not directly addressed to NRAs but more generally to MS, such as the one (recalled in Part I above) on the so-called “must-carry obligations” (see Article 31 of the Universal Service Directive).

³⁷ Most of the requirements referred to above can be read in the light of reinforcing the independence of NRAs. Also (and, perhaps, above all) the wide margin of discretion that NRAs have in exercising their powers, as recognised by the ECJ (see fn 24 above), can play an important role in reinforcing independence. Other aspects relating to NRAs’ independence are envisaged by the Framework Directive, such as the prescription contained in the new paragraph 3a of Article 3 therein, whereby MS have to ensure that NRAs have a separate annual budget,

Although no specific definition of NRAs' "independence" is offered by the Regulatory Framework, some key Framework Directive provisions shape the notion.

In this respect, a distinction could be made between independence from market participants and independence from political influence. Both dimensions are now encompassed within the Framework Directive: the former since its origin (and even before that, as related provisions can also be found in previous pertinent Directives), and the latter following the amendments made in 2009, specifically aimed at reinforcing the independence requirement. Both dimensions are intended to ensure that NRAs effectively apply the Regulatory Framework, relying on the impartial assessment of matters coming before them, while also increasing the authority and predictability of their decisions.³⁸

As far as independence from the market is concerned, Article 3(2) of the Framework Directive requires Member States to ensure that NRAs are "legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services". Thus, on the one hand, NRAs have to be structured as autonomous legal persons, separate from electronic communications undertakings. On the other hand, they have to operate under (institutional) conditions that grant them independence from market players' interference and influence.³⁹

As for independence from political pressure (and from external intervention in general), a new paragraph added to Article 3 of the Framework Directive states that NRAs have to "act independently" and "not seek or take instructions from any other body in relation to the exercise of [the] tasks assigned to them under national law implementing [EU] law".⁴⁰ The Framework Directive leaves a significant margin of manoeuvre for Member States to provide detailed measures aimed at ensuring NRAs' independence from political influence. The only further precisions in this regard, contained in the same provision – although to opposite extents – are that these requirements do not prevent Member States from establishing the supervision of NRAs in accordance with their national constitutional law, and that only

to be made public, which should allow them, in particular, to recruit a sufficient number of qualified staff (see also recital 13 of the Better Regulation Directive).

³⁸ See, on this respect, recital 13 of the Better Regulation Directive.

³⁹ In order to reinforce these requirements, the same provision adds that MS owing or controlling electronic communications undertakings have to "ensure effective structural separation of the regulatory function from activities associated with ownership or control", thus avoiding any conflict of interests between regulatory and operational functions, so to guarantee the impartiality of the NRAs' decisions and consequently ensure a level playing field for all operators. The Commission has opened several infringement proceedings against MS for failure to comply, in particular, with this obligation (see fn 43 below).

⁴⁰ See Article 3(3a) of the Framework Directive, as amended in 2009.

appeal bodies set up in conformity with the already recalled Article 4 of the Framework Directive have the power to suspend or overturn decisions taken by the NRAs. Moreover, detailed prescriptions are also laid down for the dismissal of the heads of NRAs, to take place “only if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance in national law”, and by a decision rendered public and accompanied by a statement of the reasons justifying the dismissal.⁴¹ Besides this, however, nothing in the Framework Directive (nor in the specific Directives) is said about the criteria for the appointment of NRA members, the rules governing the duration of their mandate, incompatibilities with other posts, the need to have internal codes of conduct, accountability mechanisms (apart from the judicial review of NRA decisions), and so forth.⁴² It therefore seems that Member States could (or should) adopt and develop such measures themselves in order to give substance and concrete application to the independence requirement. In fact, their actual and effective implementation of the EU law provisions is tested on the basis of such measures. In this regard, it should be recalled that the Commission has initiated and conducted several infringement proceedings against Member States for not complying with the independence requirements set forth by the Framework Directive.⁴³

⁴¹ In the words of recital 13 of the Better Regulation Directive, the rules for the protection against the arbitrary dismissal of the head of a NRA are decisive “in order to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors”.

⁴² It is somewhat striking that the Framework Directive now contains extremely detailed provisions on the dismissal of the heads of NRAs, but lacks specific provisions related, for instance, to their appointment or to any of the aspects referred to above. As observed, this could be explained by the “reactive nature” of EU legislation, whereby specific elements conducive to independence are elaborated and added in response to particular events occurring in MS that have seen attacks on independence of NRAs: see the study carried out for CERRE, cited at fn 22 above, pp. 25-25. As for the rules against the dismissal of the heads of NRAs heads, the ‘triggering event’ could have been, for instance, the situation that occurred in Slovakia in 2008, when the chairman of the NRA was dismissed by the national Parliament, exercising a wide discretionary power according to the Commission (see the Commission press releases of 14 May 2009, IP/09/775, and of 24 June 2010, IP/10/806), which launched infringement proceedings against that MS. It is also interesting to note that these infringement proceedings were based on the original version of the Framework Directive, which did not contain any specific rule against arbitrary dismissal. And, of course, similar infringement proceedings have been brought against MS (also) after the enactment of the ad hoc rules against dismissal (for example, against Slovenia: see the Commission press release of 18 March 2010, IP/10/321).

⁴³ Some of these proceedings have already been mentioned above (see fns 39 and 42 below). In others, the Commission has challenged, for example: the lack of any precision in indicating the length of the mandate for the NRA in Poland (see the Commission press release of 27 June 2007, MEMO/07/255); the conflict of interest for the chairman of the Bulgarian NRA, who was at the same time member of the incumbent telecom operator’s board (see the Commission press release of 28 November 2007, IP/07/1786); or the absence of a stable legislative framework guaranteeing the independence of the NRA in Romania (see the Commission press release of 5 May 2010, IP/10/519). Most recently, the Commission seems to have decided to refer Belgium to the ECJ for failing to guarantee the independence of its NRA (challenging, in particular, the power of the Belgian Council of Ministers to suspend, under certain circumstances, decisions of the Belgian NRA and to approve its multiannual strategy: see the Commission press release of 16 October 2014, IP/14/1145). These types of proceedings show the broad scope of application of the independence requirement, at least as interpreted by the

A further and final point to be made regarding the independence of NRAs as prescribed by EU law is that this requirement is not only important *per se*, but is also essential to ensure the proper independence of EU bodies as mandated by the statutory provisions governing their establishment and functioning, when these bodies are composed of members of NRAs. In other words, ensuring the independence of NRAs through sound criteria provided for by and enforced on the basis of EU law could in turn make a precious and positive contribution to ensuring the independence of the relevant EU bodies (such as the ones considered at length in the following paragraph), as long as they consist in part of (members of) NRAs.⁴⁴ Nevertheless, even if it could be claimed that the more NRAs are independent at national level, the more EU bodies themselves will be so, the independence of the latter cannot depend on this alone. Indeed, a particular and further dimension of the independence of EU bodies may be represented by their (independent) relationship with NRAs. This issue could and should be dealt with specifically by the provisions establishing EU bodies, as it may prove to be particularly important in order to grant a proper independent status to these bodies.

b) Institutional guarantees at EU level

Since the first pieces of specific EU legislation on electronic communications were enacted, measures have also been adopted to provide for cooperation among NRAs themselves (and between them and the Commission) on the one hand,⁴⁵ and, on the other hand, for the establishment of institutions ensuring the consistent application of that legislation, and generally steering the liberalization process in the sector at stake by favouring such cooperation and coordination at supranational level. The following observations will focus on such measures.

Commission. For a complete account of the status of these (and other) infringement proceedings, see <https://ec.europa.eu/digital-agenda/en/infringement-procedures>.

⁴⁴ See S. LAVRIJSSEN, A. OTTOW, “Independent Supervisory Authorities: A Fragile Concept”, in *Legal Issues of Economic Integration* [2012] 4, pp. 419-446, notably at p. 431.

⁴⁵ See, in particular, Article 7(2) and recital 36 of the Framework Directive, imposing a duty on NRAs to contribute to the development of the internal market by cooperating with each other and with the Commission. But see also, from this perspective, the Article 7 procedure, providing for such cooperation in the adoption of certain measures (fn 30 above).

i) The rise and decline of the European Regulators Group (ERG)

In this context, a series of bodies have been created to support the Commission and NRAs' activities. Among them, first and foremost, one could recall the European Regulators Group (ERG). Indeed, at the time of the 1999 review of the regulation of EU electronic communications, the EU legislator believed that the creation of an EU level institution with the task of consolidating harmonised practices for the implementation of electronic communications regulations was an essential part of the regulatory (and liberalisation) process.⁴⁶ This took place with the adoption of Commission Decision 2002/627/EC, of 29 July 2002, establishing the ERG.⁴⁷

As is apparent from Decision 2002/627, the institutional structure and functioning of the ERG were rather simple. Indeed, the ERG consisted of a body composed of the heads of “independent” NRAs (or their representatives) established in each Member State with primary responsibility for overseeing the day-to-day operation of the market for electronic communications networks and services (every Member State being allowed to appoint one member to the ERG), as well as a representative of the Commission, and a secretariat provided by the latter.⁴⁸

⁴⁶ See, for example, recital 36 of the Framework Directive.

⁴⁷ OJ [2002] L 200/38. The Decision has subsequently been amended twice: first by Commission Decision 2004/641/EC of 14 September 2004 (OJ [2004] L 293/30), and then by Commission Decision 2007/804/EC of 6 December 2007 (OJ [2007], L 323/43). Unless otherwise stated, references are to the text of Decision 2002/627, as amended. It could be pointed out here that, before the adoption of Decision 2002/627, the original Commission Proposal for the Framework Directive (COM(2000) 393 final, of 23 August 2000 and specifically Article 21 therein) envisaged the establishment of a “High Level Group” composed of NRAs, whose primary function should have been to assist the Commission in securing the uniform application of the Framework Directive and the other specific Directives, in order to ensure consistency among MS, while also allowing for the establishment within it of expert groups to consider specific issues (e.g., in relation to consumer protection). However, while the Commission Amended Proposal (COM(2001) 380 final, of 4 July 2001) essentially only changed the name of this a body to the “Advisory Communications Group” and deleted the proposed duty to report on its activities to the EP, the Council entirely rejected the proposal in its Common Position (10420/01, of 20 July 2001), as it did not consider it “necessary or appropriate to establish such a group, which [would have felt] *outside of the types of committees envisaged by the new Comitology decision* [i.e., Council Decision 1999/468/EC, OJ (1999) L 184/23], in a Community act” (*emphasis added*). Eventually, in substance, the ERG established very closely resembled the proposed High Level/Advisory Communications Group and did not have much in common with the functioning of a Comitology committee.

⁴⁸ See Article 4 of Decision 2002/627. It is interesting to note that the original text of Article 4 referred more generally to the heads of “of each relevant [NRA] in each [MS]”. This wording was changed as reported above with the amending Decision 2004/641. The change was justified by the fact that sector-specific regulatory authorities with responsibilities for day-to-day oversight of the market for electronic communications were established in all MS and that, in the meantime, the operational experience of the ERG had highlighted the “need to clarify” issues concerning its membership and focus its work on the tasks linked to the day-to-day supervision of implementation of the regulatory framework for electronic communications (see, respectively, recitals 3 and 2 of Decision 2004/641). Moreover, again for the sake of clarification (one assumes), the relevant national authorities referred to in Article 4 were identified in the Annex added by Decision 2004/641 (later amended by Decision 2007/804), containing a list of them to be reviewed by the Commission, according to the same

As for the operational arrangements of the ERG, according to Decision 2002/627, these worked as follows: a chairperson was to be appointed from among the ERG members with the (main) task of convening its meetings “in agreement with the Commission”, the latter being represented at all of them; subgroups and expert working groups were to be set up, as appropriate, to organize its work, while the Commission had to be able to attend their meetings; rules of procedure were to be adopted by the ERG itself, “subject to the approval of the Commission”.⁴⁹

Moreover, Decision 2002/627 designated the ERG as an “advisory” body.⁵⁰ As for its aims, it comes as no great surprise that its role was identified, first and foremost, as “advis[ing] and assist[ing] the Commission in consolidating the internal market for electronic communications networks and services”.⁵¹ Thus, on the basis of the same Decision, the ERG had to act as “an interface” between the Commission and NRAs in order to allow their cooperation, and thus contributing to the successful development of the internal market and to the consistent application of the Regulatory Framework in all Member States.⁵² While performing such a role, the ERG was also to “consult extensively and at an early stage” with stakeholders (namely: market participants, consumers and end-users) in an open and transparent manner.⁵³

In accomplishing its mission and contributing to the achievement of the objectives mentioned above, the ERG was not supposed to operate alone. Indeed, aside from the Commission (and NRAs), the ERG was intended to coordinate its activities and cooperate with other existing bodies having specific and (perhaps) more technical tasks to perform, such as the Radio Spectrum Committee, the Radio Spectrum Policy Group and the Television Without Frontiers

provision, in the light of any changes introduced by MS to the names or responsibilities of these authorities (as happened, indeed, with the adoption of the abovementioned Decision 2007/804). Finally, Decision 2004/641 provided the possibility for experts from EEA States (not members of the EU) and candidate States for accession to participate as “observers” in the ERG, which could also to invite “other experts and observers” to attend its meetings (see the last paragraph of Article 5 of Decision 2002/627).

⁴⁹ See Article 5 of Decision 2002/627.

⁵⁰ See Article 1 of Decision 2002/627.

⁵¹ Article 3 of Decision 2002/627. As para. 3 of Article 3 clearly states (and as already stated, in substance, by Article 5(1) of the original Decision 2002/627), the ERG was to advise and assist the Commission “on any matter related to electronic communications networks and services within its competence, either at *its own initiative* or *at the Commission’s request*” (*emphasis added*).

⁵² See again Article 3 of Decision 2002/627 (as well recitals 4, 5 and 6 therein and recital 37 of the Framework Directive). According to recital 7 of this Decision, the ERG was also to “serve as a body for reflection, debate and advice for the Commission in the electronic communications field”.

⁵³ See Article 6 of Decision 2002/627.

Contact Committee.⁵⁴ Moreover, the ERG had to take into account the work conducted by other bodies having (extremely) similar structures and roles, but operating at different (and broader) levels, the main example of which is certainly the Independent Regulators Group (IRG), which predated and outlived the ERG.⁵⁵

Thus, as specified in Decision 2002/627, the ERG was designed and intended to operate at three different but complementary levels.⁵⁶ The first was purely supranational and consisted in the advising and assisting functions it had to perform in relation to the Commission. The second level was also supranational, although closely related to the national level: this was made apparent by the requirement for the ERG to act as a forum to facilitate cooperation between NRAs. The third level was cross-dimensional, as it brought together both the supranational level and the national one and was represented by the ERG's role as a sort of medium for facilitating similar cooperation between the Commission on the one hand, and NRAs on the other. The complementarity of these three dimensions of the ERG's action derived from the overall goal it was to pursue: i.e. contribute to the establishment of consistent regulatory practice in the internal electronic communications market.

In this context, two remarks can be made. First, looking at the institutional features of the ERG, it is clear that this autonomous body was not originally entrusted with sound independence (if any at all). In fact, the ERG seems to have been designed to be closely linked to the Commission (and NRAs). Many of the abovementioned provisions can indeed

⁵⁴ These were established, respectively, by: Decision 676/2002/EC of the EP and Council of 7 March 2002, on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision) (OJ [2002] L 108/1); Commission Decision 2002/622/EC of 26 July 2002, establishing a Radio Spectrum Policy Group (OJ [2002] L 198/49); and Directive 97/36/EC of the EP and of the Council of 30 June 1997, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ [1997] L 202/60). According to recital 8 of Decision 2002/627, close cooperation should be maintained between the ERG and the Communications Committee established under Article 22 of the abovementioned Framework Directive (i.e., the comitology committee responsible for electronic communications), nevertheless making sure that the work of the first does not "interfere" with the work of the latter.

⁵⁵ The IRG is a registered not-for-profit organisation under Belgian law (ASBL), having its headquarters in Brussels, where its secretariat is also based. The purpose of the IRG is to coordinate regulatory practices among its member countries. The IRG was established (on a voluntary basis) in 1997 for an indefinite duration and, in contrast to the ERG, is still working. Its statutes are available at http://www.irg.eu/streaming/IRG-tatutes_EN_090402FINAL.pdf?contentId=545921&field=ATTACHED_FILE and provide for a very detailed regulation of its structure and mission. In particular, as far as its composition is concerned, membership of the IRG (virtually unlimited in number, and certainly broader than that of the ERG) is open to any NRA operating in the electronic communications sector ("but not more than one from any country"), which responds to the requirements of its statutes (and in particular, Article 7 therein), one of which is independence from governments and market participants. The current IRG members are 36, corresponding to the 28 EU MS, 4 EFTA members and 5 candidate countries to the EU, each of which has to contribute to the IRG budget. Thus, an inevitable overlap appears between the ERG and IRG (and now BEREC). However, it should also be noted that, in contrast to the ERG, the IRG does not envisage any participation on the part of the Commission.

⁵⁶ In this respect see, for instance, recital 2 of Decision 2010/299.

be taken as indicators in this respect: in particular, those attributing to the Commission the power to obtain an opinion from the ERG; to agree on the convocation of its meetings; to approve its rules of procedure; and so forth. No proper guarantees appear to have been established to encourage the independence of the ERG, as nothing to this end is to be detected in its founding act (or other relevant legal provisions).⁵⁷ On the contrary, Decision 2002/627 emphasises the independence of NRAs, which are members of the ERG.⁵⁸ One could therefore argue that the lack of proper independence affected the ERG's autonomy from its members (and related parties) and, especially if coupled with other (absent) features (such as the lack of any power for the ERG to take binding decisions) inevitably had an impact of its activity.

The second remark, strictly related to the first, is that the ERG seems to have been conceived above all as an instrument to allow the Commission to better perform its tasks in such a highly technical and specific domain as the electronic communications sector. The ERG undoubtedly helped the Commission to make informed choices and take decisions accordingly, while also being reassured about their smooth acceptance and implementation, as they pertained, to a significant extent, to the same subjects that composed the ERG. However, the Commission always had the 'last word', which easily led to departures from common ERG approaches and positions.⁵⁹

Despite these critical remarks, the role played by the ERG in structuring administrative cooperation at EU level should not be underestimated. Indeed, the ERG represented an important step in institution setting, which proved to be not just a significant achievement in itself, but the beginning of a trend leading to the greater and more in-depth

⁵⁷ Set aside the fact that, within Decision 2002/627, the word 'independence' is never used in relation to the ERG, no proper measure to create it is provided by this Decision itself. If one looks, for instance, at accountability mechanisms, while Article 8 of Decisions 2002/627 imposed upon the ERG the duty to report annually on its activities, it also provided for the Commission, as the addressee of the report, as well as for the ERG, to transmit the report to the EP and Council, "where appropriate with comments".

⁵⁸ As recalled above, Article 1 of Decision 2002/627 states that the ERG is an advisory group of "*independent* [NRAs] on electronic communications networks and services" (*emphasis added*); see also Article 4 of the same Decision. In the same vein, see recital 2 of Decision 2002/627, where it is written that, in accordance with the abovementioned Framework Directive, "MS must 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" (*emphasis added*).

⁵⁹ As AG Poiares Maduro noted in his Opinion delivered on 1st October 2009, on Case C-58/08, *Vodafone and Others* [2010] ECR I-4999 – concerning a reference for a preliminary ruling on the validity (eventually upheld by the Court, in its judgment of 8 June 2010) of Regulation (EC) No 717/2007 of the EP and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ [2007] L 171/32; now repealed by Regulation (EU) No 531/2012 of the EP and of the Council, of 13 June 2012, on roaming on public mobile communications networks within the Union, OJ [2012] L 172/10) – the EU legislature was "not required to adopt all of the advice of [the ERG]"...although in that case it effectively did.

‘institutionalisation’ of administrative cooperation at EU level in the field of electronic communications.

ii) The establishment of the Body of European Regulators on Electronic Communications (BEREC)

Some years later, within the context of the abovementioned amendments to the 2002 Regulatory Framework, new measures were adopted which were intended (also) to strengthen the institutional framework of this sector, and thus encourage the consistent application of the relevant substantive regulations, as well as the further development of the internal market in this respect.⁶⁰ With these objectives in mind, the status and tasks of the ERG were thoroughly reviewed, resulting in the creation of a new entity to replace it. This entity is the Body of European Regulators on Electronic Communications (BEREC), established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council, of 25 November 2009 (henceforth: the BEREC Regulation).⁶¹

It is interesting to note that the need to establish a new entity in this field arose from two main findings.⁶² One was that closer and more effective cooperation among NRAs at the supranational level can significantly improve the functioning of the internal market in electronic communications, especially given its contribution to bringing about consistency in

⁶⁰ It is interesting to note that, while the Commission proved to be very much in favour of stronger new institutional arrangements, some resistance (or, at least, scepticism) in this respect appeared on the part of the ERG: see the letter of (former) Commissioner Reding, of 30 November 2006, advocating an “enhanced ERG”, that is to say “a closer [and] more integrated form of cooperation among national regulators [...] that would transform the ERG into a more efficient and more accountable permanent body with *independent powers* for ensuring consistency in the application of the [Regulatory Framework]” (*emphasis added*), and the ERG response/advice of 27 February 2007, where some doubts were put forward in relation to the legal and practical feasibility of a more centralised decision-making system involving an enhanced ERG (especially in the light of the subsidiarity principle), also taking into account possible problems arising from the “different regulatory remits” of the NRAs involved in the ERG in relation to areas in which an enhanced ERG could intervene (namely, spectrum management and content regulation). As made clear in the Joint Statement of the Commissioner and the ERG Chairman accompanying the public release of these exchanges of views, the options proposed by the Commission and discussed with the ERG to improve their cooperation and strengthen the ERG as an efficient and integrated system of independent regulators consisted of “an enhanced role for the ERG in existing regulatory and legislative processes, the strengthening of the internal market powers of the Commission, and the transformation of the ERG into a ‘federal system’ of National Regulators (possibly modelled on the European System of Central Banks), or a combination of these” (see the Commission Press Release of 27 February 2007, MEMO/07/87).

⁶¹ OJ [2009] L 337/1. The legal basis of the BEREC Regulation is former Article 95 EC (now Article 114 TFEU), which clearly makes this Regulation an Internal Market measure.

⁶² See, in particular, the “Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority” (COM(2007) 699 final, of 13 November 2007; hereinafter, the EECMA Proposal), which was also based on former Article 95 EC (now Article 114 TFEU).

the application of relevant EU rules and in the definition of regulatory approaches adopted to this end at the national level. The other finding was the need to turn the positive (institutional) experience of the ERG “into a formal cooperation structure”.⁶³ If this latter finding derives from the acknowledgment of the valuable experience of the ERG “as a means of facilitating consultation, coordination and cooperation among [NRAs] and between these authorities and the Commission”,⁶⁴ it nevertheless also takes into account the weaknesses of the ERG in terms of its structure and functioning.⁶⁵

In this context, among the different options put forward,⁶⁶ the Commission concluded that the best solution to meet the expectations and overcome the shortcomings was the establishment of a new body, called European Electronic Communications Market Authority (EECMA).⁶⁷ In the Commission’s view, EECMA would have been an independent EU agency, having legal personality and being accountable to the European Parliament.⁶⁸ It would have been governed by a board of regulators consisting of the heads of NRAs (acting by simple majority voting) and managed by a director (assisted by a smaller administrative board, composed of twelve members appointed half by the Council and half by the Commission)⁶⁹. The EECMA was

⁶³ See para. 3.1 of the EECMA Proposal.

⁶⁴ Ibid.

⁶⁵ In the EECMA Proposal, the Commission clearly (and quite critically) states that “all ERG common approaches [were] factually based on consensus, making such common approaches difficult and slow to achieve” if not “impossible” in the case of substantial differences of opinion or interest between NRAs, thus determining a “loose cooperation” which resulted in ERG documents not going “beyond rather general statements in a number of important and controversial issues” (ibid.). The Commission also overtly criticizes the relationship between the ERG and the IRG, affirming that the latter, “while it influences [EU] regulatory approaches, it has neither any obligation to implement [EU law] nor any duty to report to the Commission” (ibid). It concluded that the ERG’s structure did not produce “sufficient results” because of “a sub-optimal organisation not only as regards the speed and efficiency of achieving consistent EU approaches, but also as regards accountability and transparency” (ibid).

⁶⁶ See the impact assessment related to the EECMA Proposal (Commission Staff Working Document, SEC(2007) 1472 final, of 13 November 2007).

⁶⁷ See the Commission proposal mentioned in fn 61 above.

⁶⁸ As made clear by M. SELMAYR, “The European Commission’s Proposal for a Reform of the Electronic Communications Sector: Towards a Single Market for Telecoms Operators and Consumers”, in G. MORBIDELLI, F. DONATI (eds.), *La nuova disciplina delle comunicazioni elettroniche*, Torino, Giappichelli, 2009, pp. 11-38, in the Commission’s view, the EECMA should not have replaced NRAs, “but work[ed] together with them and the Commission in a kind of ‘federal’ regulatory system[, activating] the expertise of [NRAs] in the Community interest, thereby giving them an independent say in the Community decision-making process. In the interests of efficiency and legal certainty, the creation of the new Authority should [have been] combined with a stronger Commission say on the remedies imposed by [NRAs], which would [have allowed] the Commission, assisted by the new Authority, to determine, if necessary, also the ‘when’ and ‘how’ of regulatory intervention by national telecoms regulators”, always requesting EECMA advice before taking such decisions (p. 24).

⁶⁹ See, for details, Articles 24-30 of the EECMA Proposal, which also provided for a Chief Network Security Officer, responsible for EECMA’s tasks relating to network and information security, assisted by a Permanent Stakeholders’ Group composed of experts representing the relevant stakeholders, in particular from the information and communication technologies industry, consumer groups and academic experts in network and

intended to replace both the ERG and the European Network Security Agency (ENISA)⁷⁰ at the same time, while its mission was essentially to provide expert advice to the Commission (working under its oversight), notably by monitoring technical and regulatory developments, as well as by preparing regulatory decisions, and to further the internal market by improving consistency in the application of EU rules.⁷¹ However, during the (ordinary) legislative

information security, with advisory functions (see, respectively, the following Articles 31 and 32). Regarding the EECMA's independence, as noted by G. NAPOLITANO, "La strategia dei controlli nella governance comunitaria delle comunicazioni elettroniche", in MORBIDELLI & DONATI, cited, pp. 49-68, and notably p. 65, the Commission would have maintained a "notevole margine d'influenza" on the Authority being established, not only because it would have appointed (a substantial part of) its managing panel, but also because it could have exerted some concrete influence on the EECMA's governing bodies, as explicitly provided in the EECMA Proposal: see, on the one hand, Article 27(6) of the EECMA Proposal, stating that the board of regulators should act independently, without seeking or taking instructions from "any government of a [MS] or from any public or private interest" but not independently of EU institutions, including the Commission; and, on the other hand, Article 29(1) thereof, affirming that the EECMA director should also not seek nor accept any instruction "from any government or from any body", without "prejudice to the [...] powers of the Commission".

⁷⁰ See Regulation (EC) No 460/2004 of the EP and of the Council, of 10 March 2004 (OJ [2004] L 77/1), establishing ENISA (based in Crete). The activities of ENISA consist of providing advice and recommendations, data analysis, as well as supporting awareness-raising and cooperation among the EU bodies and MS, with the goal of ensuring a high and effective level of network and information security within the EU. The EECMA Proposal identified a "natural synergy" between EECMA itself and ENISA, given that both bodies fall under the provisions of the regulatory framework. In particular, Article 8(4) of Directive 2002/21 (Framework Directive) provides for NRAs to ensure that the integrity and security of public communications networks are maintained. This 'synergy' was further reinforced by the ECJ in its judgment of 2 May 2006, in a case that (unsuccessfully) challenged the legal basis for the adoption of that Regulation (again former Article 95 EC; now Article 114 TFEU), where the Court highlighted the close connection between the work of ENISA and the regulatory framework for electronic communications by stating, inter alia, that "the tasks conferred on [ENISA by its establishing Regulation] are closely linked to the objectives pursued by the Framework Directive and the specific directives in the area of network and information security" (Case C-217/04, *UK v. Parliament and Council* [2006] ECR I-3771, § 58). It is interesting to note that ENISA (which is still operative) was originally established for a limited period of five years (see Article 27 of Regulation 460/2004), which was further extended (first by Regulation (EU) No 580/2011 of the EP and the Council, of 18 June 2011, OJ [2011] L 165/3), lastly by Regulation (EU) No 526/2013 of the EP and the Council of 21 May 2013 (OJ [2013] L 165/41; see Article 36 therein), which also states that the exercise of ENISA's tasks "should reinforce, but not interfere with, the competences, nor should it pre-empt, impede or overlap with the relevant powers and tasks, of [NRAs], as well as those of [BEREC] and the independent supervisory authorities of the [MS] as set out in Directive 95/46/EC" (see its recital 37).

⁷¹ In the words of the Commission, the EECMA would have been "a specialised and independent expert body assisting the Commission in assessing the technological complexities of future markets" and "would [have established] an effective coordination between the Commission and the NRAs on issues where European consistency is needed [and provided] a cost effective platform for addressing pan-European issues that reach beyond those that are within the purview even of an enhanced ERG", giving a robust and transparent foundation in EU law for coordination and cooperation mechanisms (paras. 1 and 3.1 of the EECMA Proposal). It is interesting to note that the EECMA Proposal envisaged endowing this new would-be agency with some decision-making powers, albeit in very specific/technical matters (such as numbering issues), subject to the review of an ad hoc and independent Board of Appeal (composed of six members and six alternates, selected from among current or former senior staff of NRAs, competition authorities or other national or EU institutions with relevant experience in the electronic communications sector), and possible scrutiny by the ECJ (see Articles 33-35 of the EECMA Proposal). The EECMA would also have had powers to mediate and resolve cross-border disputes between NRAs (see Article 18 of the EECMA Proposal). Last but not least, the EECMA Proposal provided for the promotion of cooperation with third countries, allowing their participation in the work of the EECMA (and even their representation in its governing body, but without any right to vote; see Article 53 of the EECMA Proposal). As recognised by F. BASSAN, "L'evoluzione della struttura istituzionale nelle comunicazioni elettroniche: una rete non ha bisogno d'un centro", in F. BASSAN (ed.), *Diritto delle comunicazioni elettroniche*,

procedure, the Commission's proposal was strongly opposed by the European Parliament and (even more by) the Council, who both argued for simpler and 'lighter' institutional arrangements, while supporting the need to reinforce the existing ones.⁷² The Commission then presented an amended proposal taking on board most of the European Parliament's suggestions, including a change in the name of the entity to be established.⁷³ During the Parliament's second reading, and on the basis of a compromise reached with the Council, the agreement was found to set up BEREC as it actually stands.⁷⁴

iii) BEREC structure, duties and powers

According to the BEREC Regulation, BEREC was established to contribute to the further development and better functioning of the internal market for electronic communications networks and services, by aiming to ensure the consistent application of the relevant Regulatory Framework.⁷⁵ To this end, the role of BEREC essentially consists, on the one

Milano, Giuffrè Editore, 2010, all these features resulted in "riproporre sul piano comunitario lo schema collaudato – con successo altalenante negli Stati membri – di un ente dotato di poteri regolatori (con la possibilità di adottare anche decisioni individuali), amministrativi e (para)giurisdizionali" (p. 43). As will emerge in the following pages, all these aspects are not addressed by the BEREC Regulation.

⁷² The debate in the Council of June 2008 showed that many MS objected to the creation of a new EU body such as the proposed EECMA. As for the EP, its position (as expressed during the first reading, between July and September of the same year) was more nuanced, as it did not stand against the creation of a new institutional entity, arguing instead for the need to better take into account the subsidiarity principle and avoid "taking power away from [MS] and NRAs who are on the field". The Parliament proposed embedding the ERG into an EU law formally-constituted independent expert "advisory body" as an alternative to the EECMA (without any merger with ENISA), named the "Body of European Regulators in Telecom" (BERT), "which would [have] take[en] on many of the functions of the EECMA without taking on the nature of a heavy agency and would [have] be based upon the good practice of [the ERG] whilst streamlining its functioning and working methods, and strengthening the Commission's obligation to consult this new body and take the utmost account of its views" (see the explanatory statement accompanying the draft EP Legislative Resolution on the EECMA Proposal, adopted on 24 September 2008). Having regard to the EP's BERT proposal, however, the similarities with the EECMA (e.g. both having legal personality, being governed by a board of regulators composed of the heads of NRAs, and relying on their own staff) appear greater than the differences (e.g. BERT having an enhanced advisory role also in relation to NRAs, but being deprived of any power to take decisions; not having an administrative board, but only a board of regulators, acting by qualified majority, and a managing director; being mandatorily consulted by the Commission in given cases; benefitting from financial resources coming predominantly from NRAs, etc.).

⁷³ In the amended proposal (COM(2008) 720 final, of 5 November 2008), the Commission suggested the new entity be called the "Body of European Telecoms Regulators" ("the Body").

⁷⁴ This compromise was grounded on the Council's common position (EC) No 14/2009, adopted on 16 February 2009 (OJ [2009] C 75E/67). In this position, the Council itself suggested another name for the new body, the "Group of European Regulators in Telecoms" (GERT), to be designed as an "independent flexible body with a private-law support structure", and not having the characteristics of an EU agency, nor legal personality, nor being funded from the EU budget, that eventually would not have differed much from the ERG, except in its establishing act (a Regulation adopted under the explicit basis of former Article 95 EC), a better defined role, a (qualified) majority-voting arrangement, as well as the express duty to carry out its tasks independently, impartially and transparently.

⁷⁵ See Article 1(3) of the BEREC Regulation.

hand, of fostering and intensifying cooperation among NRAs, and between NRAs and the Commission, in the exercise of the full range of their responsibilities under the Regulatory Framework.⁷⁶ On the other hand, BEREC is required to provide consultation and offer advice, both to NRAs and to key EU institutions, such as the Commission, the Council and the European Parliament, either on its own initiative or at their request, by delivering opinions and advising them on issues related to the implementation of the Regulatory Framework, while also acting to develop and disseminate regulatory best practices (such as common approaches, methodologies or guidelines) in this sector.⁷⁷

Apart from a more general “monitoring and reporting” mandate, the tasks assigned to BEREC closely correspond to such a role. These tasks are listed in detail by the BEREC Regulation with specific reference to the relevant provisions of the abovementioned Regulatory Framework, which, in fact, limits the scope of BEREC’s action.⁷⁸ Within this framework, BEREC has no power to adopt binding acts. It is stated, however, that “NRAs and the Commission shall *take the utmost account* of any *opinion, recommendation, guidelines, advice or regulatory best practice* adopted by BEREC”.⁷⁹ It emerges from the tasks and the nature of the acts that BEREC has predominantly advisory functions, which can nevertheless be incisive, as long as the obligation to take the abovementioned acts into the greatest account is effectively respected by its addressees (and possibly even enforced against them, when necessary).

As for the institutional structure designed to allow BEREC to accomplish its role and perform its functions, the BEREC Regulation provides for the establishment of two complementary

⁷⁶ See recital 6 of the BEREC Regulation, where it is stated that BEREC should act as “an exclusive forum” in that respect. See also recital 14 of this same Regulation.

⁷⁷ See Article 2 of the BEREC Regulation.

⁷⁸ See Articles 1(2) and 3 of the BEREC Regulation: in particular, the latter provides for the BEREC to “deliver opinions”, “to provide assistance” and “to be consulted” on different acts or issues, all related to the 2002 Regulatory Framework. It is interesting to note that, while listing the specific tasks of BEREC, Article 3 also states, at paragraph (2), that “BEREC may, upon a reasoned request from the Commission, decide unanimously to take on other specific tasks necessary for the accomplishment of its role” within the limits of its competence. For a possible mapping of the different forms of acts that BEREC can adopt, see M. ZINZANI, *Market integration through “network governance”: the role of European agencies and networks of regulators*, Cambridge, Intersentia, 2012, p. 210. It also should be pointed out that some other specific legislative instruments can directly confer certain tasks upon BEREC: this is the case, for instance, of the abovementioned ‘Roaming Regulation’ (see, in particular, Article 3 of Regulation 531/2012). Finally, it should be highlighted that the approach of the BEREC Regulation, listing in detail the remit and tasks of BEREC, differs from that of Decision 2002/627 establishing the ERG, as the latter identified them in very general and broad terms (as mentioned above).

⁷⁹ See Article 3(3) of the BEREC Regulation (*emphasis added*). In this respect, see also the Framework Directive, as amended in 2009, whose Article 3(3c) provides for MS to “ensure that [NRAs] take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets”.

entities: the first is BEREC itself, and the second is known as “the Office” (hereinafter: the BEREC Office).

BEREC itself is composed of a Board of Regulators, consisting of one member per Member State. The BEREC Regulation expressly states that members of the Board can only be “the head or nominated high-level representative of the NRA established in each [Member State] with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services”.⁸⁰ The Commission, represented at an appropriate level, participates in BEREC meetings with the status of observer.⁸¹ The Board has the power to adopt BEREC’s rules of procedure.⁸² These set out detailed provisions governing its functioning, with particular regard to the operation of the Board of Regulators, including, first and foremost, rules on the appointment of the Chair and Vice-Chairs; the running of plenary (as well as extraordinary) meetings; the voting procedure; the establishment of Expert Working Groups, open to all members and observers, to assist BEREC with the performance of its tasks and functions; and so forth.⁸³ Acting within this

⁸⁰ See Article 4(2) of the BEREC Regulation. According to this provision, NRAs have to appoint one alternate member per MS to attend, if necessary, the meetings of the Board.

⁸¹ Ibid. The same applies to NRAs from European Economic Area (EEA) States and States that are candidates for accession to the EU, as well as to the EFTA Surveillance Authority, while BEREC may invite “other experts and observers” to attend its meetings: see Article 4(3) of the BEREC Regulation. It is interesting to highlight that the BEREC Rules of procedure clearly state that a net distinction should be made between experts on the one hand, and interested parties (i.e., market participants, consumers and end-users or their representatives) on the other hand (whose participation in BEREC’s work has to take place through consultations and/or public hearings): see Article 1 of the Rules of procedure.

⁸² See Article 4(10) of the BEREC Regulation. For their most recent version, see BoR (14) 67, of 6 June 2014, available at http://berec.europa.eu/eng/document_register/subject_matter/berec/rules_of_procedure/4462-rules-of-procedure-of-the-board-of-regulators (which is a revised version of the first one adopted in 2010, already amended in 2011).

⁸³ In particular, as emerges from Article 4(4) of the BEREC Regulation and Article 2 of the BEREC Rules of procedure, the Board of Regulators appoints its Chair and Vice-Chairs from among its members to serve a one-year mandate. A sort of rotation mechanism is set up to that end. According to this mechanism, before serving her/his term as Chair for one year, the Chair has first to serve one year as a Vice-Chair. To ensure the continuity of BEREC’s work, the Chair has then to serve as a Vice-Chair for the year following her/his term as Chair. The Chair, in particular, is responsible for calling the plenary meetings of the Board, which should occur “at least four times a year in ordinary session” (which the Commission has the right to attend), as well as “extraordinary meetings” which can be summoned either at the initiative of the Chair himself/herself, or at the request of the Commission, or also at the request of at least one third of the Board’s members, while also setting the agenda for those meetings, which must be made public (see Article 4(6) of the BEREC Regulation). As for the voting arrangements, apart from the detailed provisions contained in the Rules of procedure, the BEREC Regulation (namely Article 4(9)) mandates the Board to act normally by a two-thirds majority of its all members, each member (or alternate member) having one vote, while it allows the acts adopted accordingly by the Board to indicate any reservation of a NRA, at its request. Finally, as for the Expert Working Groups, which are generally mentioned by Article 4(7) of the BEREC Regulation, the Rules of procedure provide in detail for the Board to set them up, indicating in particular two specific types of Groups that have to be created: one is the so-called Contact Network, composed of senior representatives of all members and chaired by a representative of the Board’s Chair, with the main task of preparing the work of the Board, thus acting as a sort of Secretariat to the Board itself, while also operating as “an informal network whose members are the key contact points between

framework, the Board of Regulators has the duty to fulfil the tasks of BEREC and “take all decisions relating to the performance of its functions”: in particular, it has to adopt BEREC’s annual working programme as well as an annual report on its activities.⁸⁴

In order to support BEREC’s work, as mentioned above, the BEREC Regulation provides for a specific EU body, named the BEREC Office. In contrast to BEREC itself, the BEREC Office has legal personality and can be classified (per se) as a European agency.⁸⁵ It comprises a Management Committee and an Administrative Manager. The first, similarly to the BEREC Board of Regulators, is composed of one member per Member State who is the head or nominated high-level representative of the independent NRA established in each Member State, with primary responsibility for overseeing the day-to-day operation of the markets for electronic communications networks and services: the only difference from the Board being that the EU Commission is also a (full status) member of the BEREC Office’s Management Committee, having one vote like every other member.⁸⁶ The Administrative

NRAs for seeking and exchanging information on regulatory issues” (see Article 12 of the Rules of procedure, and notably its paragraph 4); and the other group is the so-called Article 7 and 7a Expert Working Group, which has the particular task of taking care of the Article 7 procedure (see Article 13 of the Rules of procedure and fn 30 below). This creates a sort of three-tier structure within BEREC, with the Board of Regulators at the top, the Contact Network in the middle and Expert Working Groups at the bottom, with the aim of ensuring a three-step approach in BEREC’s decision-making process, whereby technical issues are first discussed before Expert Working Groups, then addressed and filtered by the Contact Network, before approaching, when relevant, the Board of Regulators.

⁸⁴ See Articles 5(4) and (5) of the BEREC Regulation.

⁸⁵ See recitals 6 and 11 of the BEREC Regulation, where it is made clear that while BEREC is not an EU agency, nor does it have legal personality, both qualifications pertain instead to the BEREC Office. The latter is based in Riga (see Decision 2010/349/EU of 31 May 2010, taken by common accord between the Representatives of the Governments of the Member States, on the location of the seat of the Office of the Body of European Regulators for Electronic Communications (BEREC), OJ [2010] L 156/12).

⁸⁶ See Article 7 of the BEREC Regulation, which indeed provides for the application to the Management Committee “*mutatis mutandi*” of the rules established by Article 4 for the Board of Regulators. Thus, for instance, in applying Article 4(10) of the BEREC Regulation to the Management Committee, the latter has established its own Rules of procedure (MC (14) 70, of 6 June 2014, available at http://berec.europa.eu/eng/document_register/subject_matter/berec_office/rules_of_procedure/4461-rules-of-procedure-of-the-management-committee-of-the-berec-office, which are a revised version of the first ones adopted in 2010, already amended in 2011), which essentially mirror those adopted by the Board of Regulators (regarding, in particular, the appointment of a Chair and Vice Chair, the running of its meetings, the voting procedure, and so forth). However, it is interesting to note that, in contrast to the Rules of Procedure of the Board of Regulators, Article 4 of the Rules of procedure of the Management Committee provides, on the one hand, that its meetings, convened by the Chair in consultation with the Administrative Manager, “will be held at the same date and venue as the meetings of the Board of Regulators” and, on the other hand, as far as extraordinary meetings are concerned, that these can take place also at the request of the Commission “when [its] specific financial and administrative obligations are concerned”. Moreover, the Rules of procedure of the Management Committee do not mention Expert Working Groups, apart from the Contact Network.

Manager, who is the head of the BEREC Office, is appointed by the Management Committee following a public competition, to serve for a three-year mandate (renewable once).⁸⁷

The BEREC Office's main responsibility is to provide professional and administrative support services to BEREC.⁸⁸ To this end, and under the guidance of the Board of Regulators, the BEREC Office has several statutory duties to perform, such as, in particular: collecting, exchanging and transmitting information from NRAs, especially in relation to the role and tasks of BEREC; disseminating regulatory best practices among NRAs; assisting the Board's Chair in the preparation of the work of the Board itself; and setting-up Expert Working Groups, upon request of the Board, while also providing support to ensure their smooth functioning.⁸⁹ Within this context, and under the guidance either of the Management Committee or of the Board of Regulators, as the case may be, the Administrative Manager performs the specific tasks entrusted upon him/her by the BEREC Regulation, notably: assisting with the preparation of the agenda of the Board of Regulators, the Management Committee and the Expert Working Groups, while also participating (without the right to vote) in the work of the first two; assisting the Management Committee with the preparation of the draft annual work programme of the BEREC Office, as well as supervising its implementation under the guidance of the Board of Regulators; taking the administrative measures necessary for the functioning of the BEREC Office; and implementing its budget.⁹⁰

The BEREC Regulation also provides for BEREC to pursue its tasks in cooperation with other existing entities, both at supranational and Member State level. Indeed, it lists a series of groups and committees operating at EU level in the same or neighbouring fields to BEREC activities, as well as encouraging BEREC to consult the relevant national competition authorities where appropriate (namely, before issuing opinions to the Commission).⁹¹ On a

⁸⁷ The Management Committee is also responsible for the appointment of staff "strictly limited to the number required to carry out" the duties of the BEREC Office (see Article 6(5) of the BEREC Regulation; see also Article 10 therein).

⁸⁸ See Article 4(11) of the BEREC Regulation.

⁸⁹ Regarding the information necessary for the BEREC Office and BEREC to perform their tasks, see also Article 19 of the BEREC Regulation, ensuring that NRAs transmit the information requested to them.

⁹⁰ See Article 9 of the BEREC Regulation.

⁹¹ See, respectively, recital 10 and Article 3(3) of the BEREC Regulation. As for the (non-exhaustive) list of the entities contained in recital 10, this encompasses: the Communications Committee (established under Directive 2002/21/EC (Framework Directive)); the Radio Spectrum Committee (established under Decision No 676/2002/EC of the EP and of the Council of 7 March 2002 on a regulatory framework for radio spectrum policy in the European Community (Radio Spectrum Decision; OJ [2002] L 108/1); the Radio Spectrum Policy Group (established under Commission Decision 2002/622/EC of 26 July 2002 (OJ [2002] L 198/49); and the Contact Committee (established under Directive 97/36/EC of the EP and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities) (OJ [1997] L

different plane, consultation with stakeholders is also provided for in order to support BEREC in carrying out its activities.⁹²

From this broad picture, it is apparent that the BEREC Regulation has designed (and established) two entities – BEREC itself and the BEREC Office – which are distinct from each other in terms of both their institutional features and the specific functions entrusted upon them, even though they are intended to be closely related and interdependent.⁹³ In particular, having regard to the BEREC Regulation, it seems that the existence and functioning of the BEREC Office is essential to BEREC, as the latter cannot properly accomplish its role without the organization and means provided by the former. Nevertheless, the opposite may not be true. In fact, with reference to the same Regulation, and setting aside the allocation of powers and functions it determines, it could be claimed that the BEREC Office would be able to stand alone, without BEREC, especially considering the many similarities between the two entities' main components, that is to say the BEREC Office Management Committee on the one hand, and the BEREC Board of Regulators on the other, notably in terms of their institutional settings and functioning, and especially (as highlighted above) their composition and organization.⁹⁴ In particular, the composition of the two entities'

202/60). Moreover, in the light of global and cross-sector developments, BEREC itself has stressed the importance of cooperation with other institutional actors: in order to discuss these developments, the impact on consumers' choices and regulation, "BEREC is increasing its co-operation with other regulatory authorities [e.g. the US Federal Communications Commission] as well as regional regulatory networks [e.g. the Euro-Mediterranean Regulators Group]. Similarly BEREC aims to co-operate with other European organisations and regulatory platforms in related sectors [such as ENISA (security), RSPG (spectrum), EPRA (content)], as well as other international institutions dealing with communications matters (e.g. OECD and ITU)" (see BEREC Medium Term Strategy Outlook, BoR (12) 09, of 23 February 2012). Such broad cooperation is thus also clearly oriented towards tackling the convergence phenomenon (discussed above), showing the interrelation between content and network/services regulation. Similar statements are also to be found in the BEREC 2013 Report of its activities (BoR (14) 60, of 5 June 2014).

⁹² See Article 17 of the BEREC Regulation, stating that, where appropriate and before adopting opinions, regulatory best practice or reports, BEREC has to "consult interested parties and give them the opportunity to comment within a reasonable period".

⁹³ The somewhat complex (and peculiar) institutional structure designed by the BEREC Regulation appears to be the result of a compromise among the legislators. At the time of adoption of the abovementioned Regulation, the EU legislators shared the need (recalled above) to strengthen (pre)existing institutional mechanisms for furthering the internal market for electronic communications services, but they had different views on the way to achieve this objective. While the Commission proposed the setting-up of a (single) body having legal personality, similarly to other EU regulatory agencies, the EP and Council were oriented towards the establishment of an entity deprived of such a status. Neither of these two options has entirely prevailed, as the outcome of the legislative process is in fact represented by the establishment of the "highly original" and double-faceted entity discussed above (see also ZINZANI, cited, p. 193). It should not be excluded that, in revising BEREC and the BEREC Office, some changes could be made to that institutional structure.

⁹⁴ As noted above, the Management Committee mirrors the BEREC Board of Regulators: indeed, as far as the Management Committee is concerned, Article 7 of the BEREC Regulation refers directly to the provision governing the composition and functioning of the BEREC Board of Regulators (see Article 4 of the BEREC Regulation).

governing organs is entirely squared around NRAs, as only members of these authorities are entitled to be part of those organs. This could imply (or increase) a risk of BEREC (and the BEREC Office) not having an autonomous voice, but reproducing (or perhaps, at least, synthesizing) those of NRAs, thus undermining BEREC's specific role as laid down by the BEREC Regulation.

iv) A key BEREC institutional feature: its independence

The issue of the independence of BEREC and its Office is therefore a crucial one.⁹⁵ Looking at the BEREC Regulation as it stands at present (that is, as it was enacted, although it is currently under review, as mentioned below), the independence requirement is expressly mandated by two of its provisions, namely Articles 1(3) and 4(2). Both provisions require BEREC to carry out the tasks allocated to it by the BEREC Regulation "independently".⁹⁶

Apart from this, however, the BEREC Regulation does not clarify what the independence of BEREC (and its Office) should actually consist of. Rather than defining the scope of the independence requirement, the BEREC Regulation opts to underpin it by laying down conditions addressed to its members, the observance of which can serve to ensure BEREC's independence. Indeed, the BEREC Regulation mandates the independence of the members of the BEREC Board of Regulators, as well as that of the members of the Management Committee of the BEREC Office. Thus, according to the BEREC Regulation, the members of the Board of Regulators (and of the Management Committee) must refrain from seeking or accepting any instruction from any government, from the Commission, or from any public or private entity.⁹⁷ This personal requirement is further reinforced for the Chair of the Board of

⁹⁵ Recital 6 of the BEREC Regulation enounces that it is "by virtue of its independence" (as well as the quality of its advice and information, the transparency of its procedures and methods of operation, and its diligence in performing its tasks) that BEREC should provide expertise and establish confidence.

⁹⁶ It should also be made clear here that, while both provisions are expressively addressed solely to BEREC, the need to act independently also refers to the BEREC Office, as Article 7(1) of the BEREC Regulation renders the provisions of Article 4 in general applicable to the Management Committee of the BEREC Office.

⁹⁷ See again Article 4(2) of the BEREC Regulation, combined with its Article 7(1). See also Article 21 of the BEREC Regulation, providing for the members of the Board of Regulators and of the Management Committee (as well as the Administrative Manager and the staff of the Office) to make an annual written declaration of commitments and a declaration of interests (to be made public, except for staff declarations) indicating "any direct or indirect interests, which might be considered prejudicial to their independence". In this respect see also Article 19 of the Rules of procedure of the Board of Regulators and Article 11 of the Rules of procedure of the Management Committee, both adding the requirement for each member of the two governing panels to declare, at each meeting of the panels, any interest that could be considered to be prejudicial to their independence with respect to any point of the meeting's agenda, and to refrain accordingly from participating in any vote on the relevant point. As indicated in identical terms in the annexes of both sets of Rules of procedure, for the purpose of applying these provisions, "[a] conflict of interest exists when a person appointed to a function has a personal

Regulators, as a specific provision states that, “[w]ithout prejudice to the role of the Board of Regulators in relation to the tasks of the Chair, the Chair shall neither seek nor accept any instruction from any government *or* NRA, from the Commission, or from any other public or private entity”.⁹⁸ A similar provision is also established for the Administrative Manager.⁹⁹ In this context, it is interesting to note that, when mandating the independence of the Chair (and the Administrative Manager), these provisions add a further requirement to those applicable to all members of the Board of Regulators and of the Management Committee (thus including the BEREC Chair and its Office Administrative Manager), as they also refer to independence from NRA instructions.

Moreover, the legal, administrative and financial autonomy of the BEREC Office contributes to the independence of BEREC itself. While its legal autonomy essentially lies in the BEREC Office having legal personality,¹⁰⁰ and its administrative autonomy refers to the power of the BEREC Office as an EU agency to engage its own staff,¹⁰¹ its financial autonomy is granted by the BEREC Regulation, which provides for the revenues and resources of the BEREC Office to consist, “in particular”, of an EU subsidy coming from its general budget and voluntary financial contributions made by Member States or their NRAs, subject to the approval of the Board of Regulators.¹⁰² However, it is important to observe that the BEREC Office manages its financial resources under the supervision of the European Parliament (as well as the Council: together, they constitute the budgetary authority for the purposes of the BEREC Regulation), which plays a powerful role in this respect, namely through the procedure of budget discharge.¹⁰³

or vested interest in the outcome of decisions resulting from that function. Consequently, a person must not be involved in any decision during the course of his/her duties with the knowledge that there is an opportunity to further his/her personal interests”. Therefore the measures at stake envisage more the preservation of impartiality (on which see Article 1(3) of the BEREC Regulation) rather than the independence of the member concerned.

⁹⁸ See Article 4(5) of the BEREC Regulation (*emphasis added*).

⁹⁹ See Article 8(1) of the BEREC Regulation, stating that, in the performance of his/her functions, “the Administrative Manager shall neither seek nor accept any instruction from any [MS], any NRA, the Commission or any third party”.

¹⁰⁰ On this respect, one could also consider the possibility for BEREC to adopt (non-binding) measures as well as the procedural requirements concerning their adoption, such the above-described voting rules: as regard the latter, one could claim that, since every member of the BEREC Board of Regulators (and the Management Committee) has one vote and acts are adopted by a two-thirds majority (unless otherwise stated), no weighing of votes, as provided for by Article 16 (4) TEU and Protocol No 36 annexed to the Treaties, applies, thus contributing to rendering the decisions of BEREC and its Office independent of intergovernmental ones.

¹⁰¹ See Article 10(3) and (4) and Article 6(5) of the BEREC Regulation.

¹⁰² See, in particular, Articles 11 and 5(2) of the BEREC Regulation.

¹⁰³ See, notably, among the “Financial provisions” contained in (Chapter III of) the BEREC Regulation, Articles 12 and 13 thereof, dealing respectively with the establishment of the BEREC Office budget and its

Last but not least, transparency and accountability requirements can also be seen as instrumental in supporting the independence of BEREC and its Office. Thus, the BEREC Regulation states, albeit in rather general terms, that “BEREC and the [BEREC] Office shall carry out their activities with a high level of transparency [and] ensure that the public and any interested parties are given objective, reliable and easily accessible information, in particular in relation to the results of their work”.¹⁰⁴ This transparency essentially refers to the procedures and methods of operation of the two entities and is substantiated by the application of the general EU rules on access to documents, including those held by BEREC and its Office.¹⁰⁵ As for the accountability requirement, a duty to report annually on the year’s activities to the European Parliament (as well as to the Council, the Commission, the European Economic and Social Committee, and the Court of Auditors) is set by the BEREC Regulation and attributed to the BEREC Board of Regulators.¹⁰⁶

Thus, although there is no precise definition of what the independence of BEREC and its Office should concretely consist of, one could argue that it nonetheless has a threefold dimension, as it could be considered in relation to EU institutions, Member States and stakeholders. While the independence of these two entities vis-à-vis EU institutions (and in particular, the Commission) emerges from their autonomous organisational structure, composition and operations, and their independence from stakeholders can be inferred from the merely external and consultative role the latter have in relation to the two entities, the independence of BEREC and its Office from Member States appears more problematic to identify.

Considering, in particular, the independence of BEREC and its Office from Member States, a distinction could be made between their independence from national governments and from NRAs. As for the former, on the one hand (as noted above) the BEREC Regulation contains

implementation and control. The BEREC Office has recently been under close scrutiny by the EP, which has not (yet) discharged its 2012 budget and postponed the decision on the closure of its accounts for the same financial year (this may be the only case that has emerged so far, for 2012, of financial maladministration by an EU agency): see EP Decision of 3 April 2014 on discharge in respect of the implementation of the BEREC budget for the financial year 2012 (C7-0329/2013 – 2013/2241(DEC)); and *Agence Europe* No 11041, of 19 March 2014).

¹⁰⁴ See Article 18 of the BEREC Regulation (as well as Article 1(3) and recital 6 therein).

¹⁰⁵ See recital 6 and EP and of the Council, of 30 May 2001, regarding public access to EP, Council and Commission documents (OJ [2001] L 145/43) applicable to BEREC and its Office.

¹⁰⁶ See Article 5(5) of the BEREC Regulation. The report, prepared with the assistance of the Administrative Manager (see Article 9(7) of the BEREC Regulation), is normally based on the relevant annual work programme that the BEREC Board of Regulators has to transmit to the EP, the Council and the Commission as soon as it is adopted, according to Article 5(4) of the BEREC Regulation. The abovementioned Article 5(5) also allows the EP, if necessary, to request the Chair of the Board of Regulators to address it on relevant issues relating to BEREC activities.

provisions mandating the members of the Board of Regulators and those of the Management Committee to avoid any governmental instruction.¹⁰⁷ On the other hand, as long as the members of these two panels are also members of NRAs and, as such, have to be independent of governmental instructions, the actual degree and effectiveness of such independence is important to avoid any national governmental interference in the accomplishment of their duties within BEREC and the BEREC Office. However, the BEREC Regulation is rather silent in this respect, as it does not emphasise the independence of NRAs as such.¹⁰⁸ As for the independence of BEREC and the BEREC Office from NRAs, some hints appear within the BEREC Regulation, especially with reference to the abovementioned need for the heads of BEREC and its Office to avoid any instruction from NRAs in the accomplishment of their tasks. However, this type of independence, if ever specifically envisaged by the BEREC Regulation, comes up against certain obstacles within the Regulation itself, not only because BEREC (as well as its Office) is structured to be heavily centred on NRAs, but especially because it provides for BEREC to pursue, in all its activities, “the same objectives as those of the [NRAs], as set out in Article 8 of Directive 2002/21/EC (Framework Directive)”.¹⁰⁹ Thus, it may be legitimate to fear that BEREC will be institutionally oriented towards representing national interests at EU level, rather than promoting solid EU interests, while the latter would appear necessary if BEREC is to effectively perform its mission, that is – it is worth recalling here – to “contribute to the development and better functioning of the internal market for

¹⁰⁷ Moreover, the appointment procedure concerning BEREC and its Office members does not envisage any particular national government interference. Nor do national governments have any role in the functioning of these two entities.

¹⁰⁸ The BEREC Regulation contains almost no reference to the independence of NRAs. The only clear one is to be found in the wording of Article 7(1) thereof, stating that the members of the BEREC Office Management Committee are the heads or nominated high level representatives of the competent “*independent* NRA[s]” (*emphasis added*), which curiously differs from the corresponding provision addressed to the members of the BEREC Board of Regulators (i.e., Article 4(2) of the BEREC Regulation), simply referring to NRAs, without any indication of their independence. Another reference (albeit indirect) to NRAs’ independence could be read into the provision of Article 11(1)(b) of the BEREC Regulation, as it obliges MS to ensure that NRAs have the adequate financial resources to participate in the work of the BEREC Office, reaffirming thus what is already stated in the Framework Directive, as amended in 2009, with almost the same wording (see Article 3(3a) therein, which refers moreover to “adequate human resources [necessary to enable NRAs] to actively participate in and contribute to [BEREC].”). On the contrary, Decision 2002/627 establishing the ERG almost constantly referred to “*independent* national regulatory authorities on electronic communications networks and services” (*emphasis added*), especially in the provisions concerning its membership (see in particular Articles 1 and 4 of Decision 2002/627). As the institutional structure of BEREC stands nowadays, it is important to ensure that competent NRAs are truly independent, as their independence can in turn strengthen that of BEREC. This is particularly true if one considers that the fundamental (and almost sole) condition necessary for a person to be appointed as a member of the governing panels of BEREC and its Office is membership of the competent NRA. Thus one could easily claim that the more NRAs are independent, the more BEREC and its Office will be so.

¹⁰⁹ See Article 1(3) of the BEREC Regulation. It is interesting to note, in this light, that Article 3(3b) of the Framework Directive (as amended in 2009) provides for MS to “ensure that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective [NRAs]”.

electronic communications networks and services, by aiming to ensure a consistent application of the EU regulatory framework for electronic communications”.¹¹⁰

It comes, then, as no great surprise that the Commission, in considering the review of the BEREC Regulation, following the opinion of the European Parliament, pointed in particular (if not almost exclusively) to the need to reinforce the independence of BEREC and its Office vis-à-vis NRAs.¹¹¹ In this context, with the aim of strengthening the role and the structure of BEREC and its Office, and within the framework of the ongoing fourth review of the legislative package on electronic communications, the Commission proposed the creation of the position of a single Chairperson for both entities, to be held by “a full-time *independent* professional” (therefore no longer one of the members of the Board of Regulator and Management Committee) appointed following an open selection procedure.¹¹²

¹¹⁰ Ibid.

¹¹¹ Article 25 of the BEREC Regulation provides for an evaluation report on BEREC and its Office to be published by the Commission within three years of the effective start of their operations, followed by an opinion of the EP: see, respectively, the Commission Staff Working Document SWD(2013) 152 final, of 23 April 2013 and the EP Resolution of 10 December 2013 (2013/2053(INI)). In particular, in endorsing the Commission orientation, the EP has underlined that BEREC has been “created to contribute to shaping technical and policy orientations for the completion of the internal market, with the twin aims of giving regulators the utmost possible independence and making their implementation of the regulatory framework more consistent throughout the EU”, and it “can only be effective if its independence from the [MS] and the EU institutions is guaranteed”, thus calling upon MS and the Commission “to ensure that the independence of NRAs at national and European level is strengthened, not weakened, as this is the only way to ensure the overall independence of BEREC”, and the Commission again “to guarantee BEREC’s independence from the EU institutions in future proposals relating to the scope and mission of BEREC”. Within this context, see also the document issued by the Board of Regulators, “BEREC Evaluation: Recommendations and Follow-up Actions – Report 2014” (BoR (14) 61, of 6 June 2014), which questions the Commission’s orientation and affirms that “the internal market is a continual project, best served by increasing the quality of regulation across individual national markets, and the most robust and sustainable way of achieving this (ensuring that regulatory decisions are seen as having legitimacy within the national markets) is through the ‘bottom up’ approach currently represented by BEREC”, meaning the need to not undermine the role of NRAs within the latter.

¹¹² See the Proposal for a Regulation of the EP and of the Council, laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012 (COM(2013) 627 final, of 11 September 2013), already mentioned above, and in particular its Article 38 (*emphasis added*). According to the proposed amendment, the Chairperson, who will be elected for a three-year mandate, renewable once, and assisted by a Vice-Chair elected from among the Board of Regulators’ members, will be responsible for preparing the work of the Board of Regulators and will chair its meetings (and those of the Management Committee) without having any right to vote. It is also interesting to note that the proposed amendment envisages the introduction of rules concerning the removal of the Chairperson from office, which will take place “only upon a decision of the Board of Regulators acting on a proposal from the Commission and after approval of the Management Committee”. While rules on the removal of the Chairperson could also reinforce his/her independence, for the very same reason it appears questionable that, as envisaged by the cited proposal, the removal should result from a Commission proposal. Anyway, it is interesting to note that in the Communication from the Commission to the EP, the Council, the European Economic and Social Committee and the Committee of the Regions on the Telecommunications Single Market (COM(2013) 634 final, of 11 November 2013), already mentioned above, launching the fourth review of the electronic communications legislative package, the Commission affirmed that a genuine single market “will require a single EU regulator responsible for interpreting and implementing a harmonised legal framework”, and that strengthening the role of the BEREC Chair so to ensure more strategic planning and greater continuity (while also reinforcing the

v) Some concluding remarks

Overall, it is apparent that the establishment of BEREC and the BEREC Office has not replaced NRAs. Neither is this envisaged by the relevant EU legislation, which not only provides NRAs with a central role to play in the institutional arrangements of these two entities, but also reinforces the institutional features of the former and their role in the implementation of EU measures on electronic communications networks and services at the national level. Indeed, BEREC does not duplicate, but complements the regulatory activities performed by NRAs. It could also be pointed out that the institutional design adopted by the BEREC Regulation, centred on the inputs of NRAs in the functioning of the supranational entities (commonly referred to as a “bottom-up approach”) has some advantages, as it ensures not only the representation of national situations at EU level via NRAs, but also a smoother implementation of EU positions at national level by the same actors, leaving room and flexibility for them to take into account the specific circumstances that characterise their national markets. However, as mentioned above, the question remains open as to whether the independence of BEREC vis-à-vis its members, as representatives of NRAs and therefore national interests, is effectively ensured.

On the basis of all the foregoing considerations, it could be concluded that, especially in comparison to the ERG, BEREC certainly represents a significant evolution in the cooperation and coordination at EU level among national institutional actors within the internal market for electronic communications, while leaving room for further improvement.¹¹³

Having regard to the picture sketched above, while it is hard to define BEREC (together with the BEREC Office) as an autonomous EU regulator, given not only its institutional structure and position, which is heavily dependent on NRAs, but also the lack of proper regulatory powers, it is, however, hardly disputable that BEREC’s work has an impact on the regulation of electronic communications. In this respect, focusing on the arrangements set down by the

European dimension of the current system of NRAs and increasing their cooperation) is “an intermediate step” in that respect.

¹¹³ According to P.L. PARCU, V. SILVESTRI, *Electronic Communications Regulation in Europe: An Overview of Past and Future Problems*, EUI Working Papers, RSCAS 2013/92, the “institution of BEREC can be interpreted as a step towards a more centralised and cooperative structure of electronic communications regulation in Europe and also as an instrument to strengthen peer review activity that would continuously monitor the status and the functioning of regulation in the [MS]” (pp. 14-15). More generally, compared to the ERG, BEREC has certainly acquired greater visibility in the Regulatory Framework.

BEREC Regulation, which created a structure comprising two interrelated entities (BEREC and its Office) with specific missions and tasks, in more precise and incisive terms than those employed by Decision 2002/627, thus enabling them to operate more transparently and with increased accountability, two aspects that will demand further attention could nonetheless be highlighted.

On the one hand, in terms of institutional requirements, the independence of BEREC and its Office, while representing not only a novelty in comparison to the ERG,¹¹⁴ but also a precondition of their success, as it determines the autonomy and authority of the actions they take, will possibly need some adjustments in order to be more effective. Apart from strengthening the current requirements in order to make them more precise and enforceable, this will also imply focusing on the institutional role and position of NRAs within BEREC and its Office, enhancing ‘safeguards’ that will allow these two entities to represent, when necessary, positions that are independent of national specificities (or at least not just a mere synthesis of them), and take a more proactive stance in relation to supranational interests.

On the other hand, for the purposes of this study, it should be highlighted that almost no mention of audiovisual regulatory aspects is to be found in the BEREC Regulation (apart from the reference to the Contact Committee, as noted above). Despite the trend towards the convergence of regulatory provisions on electronic communications and audiovisual content that is accompanying the ongoing technological convergence between these two sectors (as recalled above), this seems to have had little impact on the design of the supranational institutional settings discussed in the previous pages. In this context, it is striking to note that no serious and concrete attempt (indeed, no attempt at all) has been made to take issues related to audiovisual content regulation into account, even in the preparatory stages leading to the establishment of the ERG and then, in particular, BEREC and the BEREC Office. It is true that, (as noted in Part I, above) although dialoguing with one another, the substantive provisions on electronic communications and audiovisual content also currently remain confined to different legislative instruments, which could be (and sometimes are) rendered operational and applied by different institutional entities. Nevertheless, it has also been seen (in Part II, above) that, at least at national level, it is precisely in institutional settings that the strongest interrelationship between these two branches of information society services and content regulation has taken place, namely via the establishment of convergent independent authorities. It is questionable, therefore, why the convergent institutional model, while

¹¹⁴ Decision 2002/627 does not contain any requirement of, or reference to, the independence of the ERG, while only mentioning the independence of NRAs that are part of it.

apparently very strongly endorsed at the supranational level, has not succeeded to the point where the EU legislator has opted to strengthen the institutional arrangements for the governance of electronic communications.

Chapter II

Institutional Governance of the Audiovisual Media: an Incipient European Dimension?

2.1 Institutional cooperation and coordination in audiovisual matters at supranational level: the *acquis*

Looking at the normative framework established at the supranational level in the field of audiovisual media regulation, one may note that, besides the different substantive measures that touch upon various aspects of this field of regulation, the institutional provisions (that is to say, provisions establishing institutional arrangements for the implementation of the substantive measures and, more broadly, for the governance of the sector in question) are rather few and weak, but at the same time significant. Nevertheless, it emerges from this framework that the adoption of substantive measures has been accompanied by the establishment, at the EU or international stage, of bodies (or institutional fora) to steer the implementation of those measures, as well as contribute to increasing their incidence and effectiveness in order to achieve the objectives they pursue. Moreover, possibly filling a vacuum left by the institutional arrangements grounded in hard law, other entities have been created spontaneously by relevant national (institutional) actors in order to perform these (or similar) missions.

In the following pages, the focus will be first on the institutions established and operating within the EU legal order on the basis of hard law provisions, namely the so-called Contact Committee provided for by the (now) AVMS Directive, and then on the most prominent institutions at international level (that were or are still) active outside the EU, such as the so-called Standing Committee on Transfrontier Television established within the pertinent CoE conventional framework, as well as the European Platform of Regulatory Authorities (EPRA).

2.1.1 The Contact Committee

Starting with the EU legal order, it is worth recalling that the establishment of the Contact Committee, which is now provided for by Article 29 of the AVMS Directive, dates back to the first amendment of the original TWF Directive, introduced by Directive 97/36 through the insertion into the latter of Article 23a (of what was then the amended TWF Directive). In fact,

the original TWF Directive did not mention such institutional arrangements, and neither did the Commission envisage any such arrangements in the original legislative proposal of Directive 97/36. Nevertheless, it was during the legislative procedure leading to the adoption of the latter Directive, and hence the amendment of the original TWF Directive, that the Council suggested providing for the establishment of the Contact Committee as a forum for consultation between Member States and the Commission on the application of the TWF Directive and the development of rules in the field of television broadcasting. To this end it drafted a provision that was subsequently incorporated, without any significant changes, into the amended TWF Directive and then brought forward into the AVMS Directive.¹

Regarding Article 29 of the AVMS Directive, while the Contact Committee appears as a formal and permanent body consisting of the representatives of the “competent authorities” of the Member States, who are normally government officials, it nevertheless depends essentially on the Commission, by mostly acting like one of its expert groups.² Indeed, not only is the Contact Committee established “under the aegis” of the Commission, it is also chaired by a Commission representative, entitled to convene its meetings at his own initiative,

¹ See the Council Common Position (EC) No 49/96, adopted on 8 July 1996 (OJ [1996] C 264/52), notably Article 1(31) thereof, which contains a draft of Article 23a of the amended TWF Directive. Subsequently, the EP proposed (at the second reading) some amendments affecting the suggested provision, one of them envisaging for the EP itself to be part of the establishing Contact Committee (see the EP Decision on the Council Common Position, adopted on 16 November 2006, OJ [1996] C 362/56). This specific amendment was rejected (by the following Conciliation Committee), but compensated somewhat by a Declaration of the Commission, attached to Directive 97/36 (as regards Article 23a(1) of the amended TWF Directive), by which the latter undertook, “at its own responsibility, to inform the [EP]’s competent committee of the outcome of the meetings of the Contact Committee [and] provide that information in good time and in an appropriate manner” (see OJ [1997] L 202/71). For a detailed account on the establishment (and functioning) of the Contact Committee (sometimes also referred to simply as CC), see C. PALZER, A. SCHEUER, “Article 23a TWFD”, in O. CASTENDYK, E. DOMMERING, A. SCHEUER (eds.), *European media law*, Alphen aan den Rijn, Kluwer Law International, 2008, pp. 759-778, as well as C. PALZER, A. SCHEUER, “Article 23a AVMSD”, *ivi*, pp. 991-994.

² No definition of the “competent authorities” of the MS is provided by the AVMS Directive (nor was it by the amended TWF Directive). Looking at the text of the Directive, there seems to be a distinction between “competent [national] authorities” and “competent independent regulatory [or supervising] bodies” of the MS, as these two expressions are in fact different and are employed in different parts of that Directive (to different ends). However, in particular, nothing seems to prevent “regulatory bodies” from (also) acting as “competent authorities”. As is apparent in particular from the Third Commission Report on the application of the TWF Directive (COM(2001) 9 final, of 15 January 2001), MS delegations in the Contact Committee can consist of national ministries and/or independent regulatory authorities (see para. 4.6 thereof). Looking at the current composition of the Contact Committee, as disclosed by the Commission (see <http://ec.europa.eu/transparency/regexpert/>), it appears in fact that, while each MS decides how to be represented within it (as no individual members are appointed), in most cases it is composed of officials of the competent ministries, even if some delegations also include a representative of the national media regulatory authority (this is now, for instance, the case of France, and used to be the case of Italy and the UK). The information the Commission discloses through the web-site mentioned above, containing a register that lists both “Commission expert groups and other similar entities, i.e. consultative groups which were not set up by the Commission, but which have a similar or identical role to a Commission expert group and are administered and financially managed by the Commission”, shows that the Contact Committee belongs to this second category; see also fn 129 below.

even if they could also take place at the request of the delegation of a Member State.³ The pivotal role of the Commission, which uses the Contact Committee to coordinate (and exchange views with) Member States, is further confirmed in the practical arrangements set down by the Rules of Procedure adopted by the Contact Committee itself.⁴

Moreover, the tasks of the Contact Committee, as listed by Article 29 of the AVMS Directive, with (almost) the same wording as Article 23a of the amended TWF Directive, show that its functioning is strongly influenced by the Commission. These tasks include: delivering opinions requested by the latter on Member States' application of the AVMS Directive, which in certain cases provides for mandatory consultation of the Contact Committee;⁵ discussing

³ See Article 29(1) of the AVMS Directive. Meetings of the Contact Committee seem to occur (roughly, at more or less regular intervals) a couple of times per year: see the Contact Committee web-site (hosted now by the Commission web-portal) at <https://ec.europa.eu/digital-agenda/en/avmsd-contact-committee>. According to Article 1 of the Contact Committee's Rules of Procedure (mentioned in fn 4 below), MS delegations participating in the meetings can consist of a maximum of three members (with the Commission reimbursing travel expenses for a maximum of two members per delegation and per meeting). Besides the Chairman and MS delegations, representatives of the EFTA countries party to the EEA agreement may also attend Contact Committee meetings.

⁴ See Doc CC TVSF (1997) 2 (as amended on 21 October 2004). The Rules of Procedure state, notably, that: the Commission's departments shall provide secretarial services for the Contact Committee and organise its work (see Article 2(1) thereof); the meetings are normally held at the headquarters of the Commission (see Article 2(3) thereof); the Chairman (i.e., the Commission representative) can invite representatives of the relevant Commission departments to attend the meetings of the Contact Committee, as well as representatives of the associated countries, particularly those of central and eastern Europe and representatives of the CoE Secretariat-General (in these latter two cases, depending on the items on the agenda and after the Committee has been consulted), or even "experts" (who can also be invited by a member of the Committee, again depending on the items on the agenda, provided that the Chairman is informed of the invitation before the meeting takes place (see Article 2(4) and (5) thereof); the (draft) agenda of the Contact Committee is prepared by its Chairman who "may" include therein matters submitted to him/her by MS delegations (Article 3 (1) thereof); the Contact Committee's decisions are valid only if the Commission is present (together with at least two thirds of the MS delegations; see Article 6(1) thereof).

⁵ See notably Article 14(2) of the AVMS Directive, on the verification procedure to be carried out by the Commission concerning MS measures related to the drawing up of the so-called list of events of major importance for society, during which the Contact Committee has to deliver (to the Commission) its opinion on those measures, allowing the Commission to approve those measures (this approval constitutes a decision within the meaning of Article 288 TFEU, which could hence be challenged according to the provisions of Article 263 TFEU: see Case T-33/01, *Infront WM v. Commission* [2005] ECR II-5897). While, in this case, consultation with the Contact Committee is compulsory, the content of the opinions delivered does not appear to be binding on the Commission. However, as emerges from the Commission reports on the application of the TWF Directive, in all its opinions delivered (so far) within that framework, the Contact Committee has not raised any objection and the Commission has followed its assessment (all such opinions are available at <http://ec.europa.eu/digital-agenda/avmsd-list-major-events>; the relevant Commission reports on the application of the TWF Directive are available at <http://ec.europa.eu/digital-agenda/avmsd-application-reports>). More broadly, it should also be noted that, as regards the opinions of the Contact Committee, they are to be adopted by a majority of the MS delegations and contain a statement of reasons (including minority opinions, if members of the minority so request; see Article 6(3) and (4) of the Rules of Procedure). In this respect, it should be noted that, following the amendment in 2004 of its Rules of Procedure (which, in their original version, mandated the confidentiality of the Contact Committee's "proceedings" and reserved publicity only to its "opinions", leaving the Commission with responsibility for informing the EP of the outcome of the meetings in an appropriate and timely manner), while Article 7(1) and (2) thereof provides, in general, for the "agenda, documents and minutes" of the Contact Committee to be made public (in electronic form) according to the provisions of Regulation (EC) No 1049/2001 of the EP and of the Council, of 30 May 2001 (regarding access to documents; OJ [2001] L 145/43), it also

the outcome of regular consultations that the Commission holds with stakeholders (such as representatives of broadcasting organisations, producers, consumers, manufacturers, service providers, trade unions, and the creative community); and (especially) facilitating the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding audiovisual media services, taking into account the Union's audiovisual policy, as well as relevant developments in the technical field.⁶

Thus the Contact Committee does not appear to be an independent body, but neither does it seem to be designed, or intended, to work exclusively for the Commission. On the one hand, although one of its key tasks is “to facilitate [the] effective implementation” of the AVMS Directive,⁷ the Contact Committee does not resemble one of the so-called “comitology committees” that are expressly (and exclusively) set up to provide assistance to as well as allow Member States control of the Commission in cases where it exercises powers to implement binding EU acts, conferred upon it within the framework of Article 291 TFEU.⁸

specifies that the Committee can decide in accordance with Article 4 of that Regulation, by a simple majority of the MS delegations, on proposals to declare a document confidential. The overall activity of the Contact Committee is publicized through the various Commission reports on the application of the TWF/AVMS Directive (available again at <http://ec.europa.eu/digital-agenda/avmsd-application-reports>) and through the Contact Committee web-site (mentioned at fn 3 above).

⁶ See, respectively, Article 29(2)(b), (d) and (e), of the AVMS Directive.

⁷ See Article 29(2)(a) of the AVMS Directive. As indicated therein, this task should be accomplished through regular consultation among the Contact Committee members on any practical problems arising from the application of that Directive (and, in particular, its Article 2, setting the general ‘country of origin control’ principle), as well as on any other matters on which exchanges of views are deemed useful.

⁸ The relationship between the Commission and the comitology committees is (now) governed by Regulation (EU) No 182/2011 of the EP and of the Council, of 16 February 2011, laying down the rules and general principles concerning mechanisms for control by MS of the Commission's exercise of implementing powers (OJ [2011] L 55/13). If one looks at the list of committees established by the Commission according to Article 10(1)(a) of that Regulation (available at <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=List.list>), one will not find the Contact Committee therein; nor one will find it in any of the previous lists (or reports on the working) of committees drawn up according to the requirements of the former Comitology Decision, i.e. Council Decision 1999/468/EC, of 28 June 1999, laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ [1999] L 184/23, amended by Council Decision 2006/512/EC, of 17 July 2006, OJ [2006] L 200/11: see notably Article 7(4) thereof and the list published in OJ [2000] C 225/2). More substantially, one could argue that the Contact Committee is not a comitology committee (also) because the AVMS Directive does not actually provide for the Commission to adopt measures for its implementation, for the purposes of Article 291 TFEU. In fact, recital 94 of that Directive makes it clear that, in “accordance with the duties imposed on [MS] by the [TFEU], they are responsible for the effective implementation of [the AVMS] Directive”. Thus, in this perspective, it is quite surprising to read in the Opinion of AG Jääskinen, delivered on 12 December 2012, on Cases C-201/11 P, *UEFA v. Commission*, C-204/11 P, *FIFA v. Commission*, and C-205/11 P, *FIFA v. Commission* (where the issues at stake were, essentially, the scope of the examination that the Commission must carry out in relation to the national lists of events of major importance for society established according to Article 14 of the AVMS Directive, recalled at fn 5 above, as well as the protection of the freedom to provide services, freedom of competition and right to property of the parties involved as regards the television broadcasting of sporting competitions in respect of the drafting of that list), that the procedure for the release of the list of events of major importance for society pursuant to Article 14(2) of the AVMS Directive is a

On the other hand, also in relation to these remarks, some tasks highlight a role for the Committee as a forum for cooperation, especially among Member States. Indeed, through the Contact Committee Member States can examine any developments arising in the audiovisual media sector on which an exchange of views appears useful. More specifically, they can also engage in exchanges of views regarding the matters to be dealt with (and the methodology to be used) in the (preparatory) reports on the application of provisions concerning the promotion of European works and independent productions in EU television services,⁹ which Member States themselves must submit pursuant to Article 16(3) of that Directive.¹⁰ Moreover, the Contact Committee can contribute by offering early solutions in cases where a Member State intends to take action against alleged circumventions of the more detailed and stricter rules it has set in the fields coordinated by the AVMS Directive, when such circumventions arise from broadcasters established in other Member States, and (hence) subject to the jurisdiction of the latter, but providing television broadcasts that are wholly or mostly directed towards the territory of the former.¹¹ Furthermore, the Contact Committee can also issue opinions on its own initiative, on virtually any matter relating to the application of

“ ‘comitology’ procedure” (§ 24 of the Opinion), and hence that the Contact Committee would perform the role of a ‘comitology’ committee. For other remarks on the nature of the Contact Committee as a non-comitology committee, see PALZER & SCHEUER, “Article 23a TWF D”, cited, pp. 763-766.

⁹ See Articles 16 and 17 of the AVMS Directive. Moreover, to assist the MS with their monitoring responsibilities, the Contact Committee has drawn up guidelines (which entered into force in 1999) for the implementation of former Articles 4 and 5 of the TWF Directive, intended to clarify certain definitions so as to avoid differences in the interpretation and application of the Directive in that regard.

¹⁰ See, respectively, Article 29(2)(f) and (c) of the AVMS Directive. According to the provision of Article 23a(2)(c) of the amended TWF Directive, the Contact Committee also provided a forum for the exchange of views on the terms of reference for the independent study, referred to in Article 25a of that Directive, on the impact of the measures concerning the promotion of the distribution and production of TV programmes at both Community and national level (as well as on the evaluation of tenders for this and on the study itself, which is available at http://ec.europa.eu/archives/information_society/avpolicy/reg/tvwf/implementation/promotion/index_en.htm). The national preparatory reports are evaluated by the Commission, which then publishes its own report taking into account the information provided in them and issuing, where appropriate, its opinion (for the last one available, see COM(2012) 522 final, of 24 September 2012).

¹¹ See Article 4(2) of the AVMS Directive. In these circumstances, according to this provision, either MS can “invite [the Contact Committee] to examine the case”. This provision, which envisages the involvement of the Contact Committee in such cases, is a result of the amendment brought to the amended TWF Directive by the AVMS Directive (i.e., Directive 2007/65), although it seems to echo a suggestion already made to that end by the Council in its Common Position for the adoption of Directive 97/36 (cited at fn 1 above). No precisions are given however on the actual scope of the Contact Committee’s involvement in such cases, as regards, for instance, the type of examination it should engage in and the powers to be exerted in those circumstances. For some examples of such cases referred to the attention of the Contact Committee (even before its involvement was ‘officially’ provided for by the aforementioned provisions) see the minutes of its 23rd and 24th meetings (respectively, of 14 October 2005 and 15 November 2006; see Doc CC TVWF (2005) 4 and Doc CC TVSF (2006) 6) available at <http://ec.europa.eu/digital-agenda/en/avmsd-contact-committee>.

the AVMS Directive.¹² Last but not least, certain procedural norms concerning the (ordinary) functioning of the Contact Committee, such as those on voting arrangements, also reveal the importance of the Member States' cooperation within it.¹³

Overall, it could be said that the Contact Committee certainly represents one of the first formally established bodies (for a long time it was almost the only one)¹⁴ to ensure institutional cooperation, essentially at governmental level, among Member States and with the Commission for the application of the (now) AVMS Directive's provisions and their development,¹⁵ although, as emerges from what is described above, it does not possess solid institutional features.¹⁶ However, the Contact Committee, while undoubtedly playing an important role,¹⁷ is not intended to represent the exclusive forum for such cooperation, as it continues to exist (at least, up until now) alongside other more specific and more institutionalised entities with similar objectives, also beyond the boundaries of the EU legal order (although still with some connection to it), which will be focused on below.

¹² See Article 29(2)(b) of the AVMS Directive. For an account of the broad range of topics addressed in the discussions within the Contact Committee, see the minutes of its meetings (available at the web-site mentioned in fn 11 above): it is interesting to observe there that the issue of institutional cooperation among national regulatory bodies has been approached frequently.

¹³ See notably Article 6(3) and (5) of the Rules of Procedure, according to which only MS delegations have the right to vote in the Contact Committee (and not the Chairman, nor any other participant invited to the meetings): each MS delegation has one vote and the opinions are adopted by a majority of the delegations.

¹⁴ As it appears from the Second Commission Report on the application of the TWF Directive (COM(97) 523 final, of 24 October 1997), a path for the work of the Contact Committee was staked out by the pre-existing ad hoc Group of representatives of the MS, set up within the Commission on its own initiative to facilitate administrative cooperation with national governments in order to pool information on the application of that Directive in the different countries and contribute to the interpretation of its provisions (see para. 4.1 thereof; no further precisions on this ad hoc Group are to be found other than therein).

¹⁵ Moreover, the Contact Committee has also favored cooperation (and consultation) with third countries: see, for instance, the minutes of its 22nd meeting, of 6 April 2005 (Doc CC TVSF (2005) 2, available at the web-site mentioned in fn 11 above).

¹⁶ The Contact Committee does not seem to have solid institutional autonomy and, thus, does not resemble any sort of EU agency: it does not have a clear autonomous legal personality, nor particular accountability arrangements, nor financial autonomy, and so forth.

¹⁷ In almost all Commission reports on the application of the TWF Directive (all available at <http://ec.europa.eu/digital-agenda/avmsd-application-reports>), it is written that, for the periods concerned, the Contact Committee "has fulfilled the tasks conferred on it by [that] Directive", facilitating in particular the effective implementation of the Directive. Moreover, notably in the (Annex to the) Fourth Commission Report (COM(2002) 778 final, of 6 January 2003), it is stated that the Contact Committee "constitutes an ideal forum for exchanges of views and information between the Commission and the [MS] and between the [MS] themselves" and that the Commission intended to consider strengthening its powers in the context of the implementation of (what now is) Article 14 of the AVMS Directive, concerning access to events of major importance for society (p. 37 thereof). Lastly, it could also be recalled that, already during the legislative process leading to the adoption of Directive 97/36, namely in the Commission Communication (SEC(96)1292 final, of 11 July 1996) on the Council Common Position (cited at fn 1 above), the setting up of the Contact Committee represented a substantial "improvement" for the implementation of the TWF Directive.

2.1.2 The Standing Committee on Transfrontier Television

Outside the EU legal order (although still closely related to it, as will be observed below), and specifically within the context of the Council of Europe (CoE), an important legal framework applicable to audiovisual media services has been available for quite some time, in the (already seen in Part I) European Convention on Transfrontier Television (ECTT, or “the Convention”).¹⁸ It is worth recalling here that the CoE member States negotiated this international treaty (almost at the same time as the original TWF Directive was enacted) in order to promote fundamental common values (such as media pluralism), essentially by favouring the unhindered circulation beyond national borders of television broadcasting programmes and services complying with the conditions provided by the Convention. To this end, again in brief, the ECTT set common (minimum) substantive standards (as well as procedural norms) in fields such as programming, advertising, sponsorship and the protection of certain individual rights. What is particularly interesting to observe now is that since its adoption (in 1989), the ECTT provided for specific institutional cooperation arrangements, which were deepened and strengthened on the occasion of its later amendment (in 1998).

In this context, it should be pointed out that the ECTT itself established a body, called the “Standing Committee on Transfrontier Television” (henceforth, the Standing Committee), which was basically in charge of ensuring its implementation and monitoring its application.¹⁹

¹⁸ The ECTT (ETS No 132) was done (at Strasbourg) and opened for signatures on 5 May 1989 by the CoE Committee of Ministers. It entered into force on 1 May 1993. Later, it was amended by a Protocol (ETS No 171) adopted by the Committee of Ministers on 9 September 1998 and opened for acceptance by the Parties to the Convention on 1 October 1998, entering into force on 1 March 2002 (for a detailed account of the ECCT signatures and ratifications, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=132&CM=8&DF=10/28/2008&CL=ENG>, where it emerges that, among the EU MS, Greece, Luxembourg and Sweden have only signed but not ratified the Convention; as regards the amending Protocol, see <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=171&CM=8&DF=29/11/2014&CL=ENG>). As far as, in particular, the 1998 amendment of the ECTT is concerned, in the words of the Commission, given “the major technical and economic developments occurring in television broadcasting and the appearance of new communication services in Europe since the Convention was adopted in 1989, and bearing in mind that the [EC amended, in 1997, the original TSF Directive, the CoE] saw an urgent need to amend [as well] some of the [ECTT] provisions in order to develop a coherent approach to transfrontier television between [that] and the [amended TWF Directive]” (see the Third Commission Report on the application of the TWF Directive, cited at fn 2 above, para. 6).

¹⁹ The Standing Committee was established and started operating in June 1993. All relevant documents related its activities are available at http://www.coe.int/t/dghl/standardsetting/media/T-TT/default_en.asp (where the usual CoE abbreviation employed for the Standing Committee is T-TT). It should be mentioned here that, beyond the ECTT, again within the CoE framework, there are other institutional (standard-setting) bodies dealing with media issues: the most important one is (now) the Steering Committee on Media and Information Society (known by the abbreviation CDMSI), whose activities are in turn supported by other ad hoc expert bodies (for details, see http://www.coe.int/t/dghl/standardsetting/media/CDMSI/default_en.asp).

Thus, first, according to Article 20 ECTT, this Standing Committee consists of representatives of the States Party to the ECTT and (potentially) also to the EU (with full member status), since the latter is also allowed to become a Party to the Convention.²⁰ The same Article dictates the specific rules related to the functioning of the Standing Committee, having regard not only to the convening of its meetings and the quorum for holding them,²¹ but also to the participation of observers in the meetings and use of expert advice,²² voting rights and arrangements,²³ as well as the Standing Committee's general power to draw up its Rules of Procedure subject to the (already quite detailed) Convention provisions.²⁴

Article 21 ECTT, then, establishes the Standing Committee's general responsibility to monitor the application of the Convention, and specifies its functions in an exhaustive list,

²⁰ As provided for by Article 20(2) ECTT, each Party can be represented in the Standing Committee by one or more delegates. Moreover, the same provision contains the (institutional) rules applicable to the (would-be full-member status) participation of the EU in the meetings of the Standing Committee. In this context, as clarified by the Explanatory Report to the (amended) ECTT (the draft of which was drawn up, in fact, by the Standing Committee itself: see <http://conventions.coe.int/Treaty/EN/Reports/Html/132.htm>), "since [Article 29(1) ECTT allow the EU] to become a Party to the Convention, [Article 20(2) ECTT] further specifies that, within its areas of competence, the [EU would] exercise its right to vote with a number of votes equal to the number of its [MS]s which are Parties to the Convention", while the former could not vote in cases where the MS concerned have exercised their right to vote and vice-versa (see para. 305 thereof). These arrangements have never become operational in practice, since the EU (or the former EC) has not acceded to the ECTT. Nevertheless, according to Article 20(3) ECTT, which allows the CoE States that are not party to the ECTT, as well as non-CoE States that are party to the European Cultural Convention (ETS No 18, done at Paris on 15 December 1954 and entered into force on 5 May 1955) to participate in the Standing Committee as observers, *mutatis mutandi*, the EU holds this status within the meetings of the latter. The actual (and frequently changing) composition of the delegations participating in the meetings of the Standing Committee is disclosed in the reports of those meetings, available at http://www.coe.int/t/dghl/standardsetting/media/T-TT/default_en.asp: from last meetings it results that delegations normally consist of government officials, but for some States (like Italy) there is only a representative of the regulatory authority.

²¹ See, respectively, Article 20(5) and (6) ECTT. Thus, meetings of the Standing Committee can take place either whenever one-third of the Parties or the CoE Committee of Ministers so requests, or on the initiative of the Secretary General of the CoE to discuss parties proposed amendments to the Convention, or also at the request of one or more Parties when a dispute arising from the application of that Convention needs to be resolved, as well as when questions concerning the Convention's interpretation need to be examined (but in both these latter two cases, under the conditions set forth by the relevant provisions of the ECTT). Normally, meetings seem to occur twice (or at least once) per year. As for the quorum for holding a meeting, this consists of the majority of the Parties to the Convention.

²² See (besides what has been noted in fn 20 above) Article 20(4) ECTT. In particular, as regard observers, this provision states that the Standing Committee can "on its own initiative or at the request of the body concerned, invite any international or national, governmental or non-governmental body technically qualified in the fields covered by [the ECTT] to be represented by an observer at one or part of one of its meetings".

²³ See Article 20(2) and (7) ECTT. Each delegation has one vote and, subject to specific Convention provisions, the decisions of the Standing Committee have to be taken by a majority of three-quarters of the members present at the meetings, this requirement being provided to ensure that the decisions adopted are representative of the Parties' views (see para. 309 of the Explanatory Report to the Convention mentioned at fn 20 above).

²⁴ See Article 20(8) ECTT: the latest version of the Rules of Procedure adopted by the Standing Committee (T-TT(2006)024, of 26 July 2006) is available at http://www.coe.int/t/dghl/standardsetting/media/t-tt/T-TT%282006%29024_en.pdf.

which was further extended as an effect of the 1998 amendment of the Convention.²⁵ Thus, the Standing Committee's functions encompass not only general powers to make formal recommendations to the Parties to the ECTT concerning the application of the Convention, to suggest any necessary amendment of the latter or examine modifications proposed in accordance with the Convention itself as well as questions concerning its interpretation,²⁶ but also more specific competences, such as issuing opinions on alleged abusive behaviours on the part of broadcasters,²⁷ or carrying out certain tasks in relation to the drawing up of Parties' lists of events of major importance for society.²⁸

Finally, Article 22 ECTT, which is contained, together with the two previous Articles, in an ad hoc Chapter of the Convention, dictates the obligation for the Standing Committee to report on the discussions and the decisions taken, both to the Parties to the ECTT and to the CoE's Committee of Ministers.

Comparing the Standing Committee established by the ECTT with the TWF/AVMS Directive Contact Committee, some significant institutional differences between them appear. In fact, the institutional provisions related to the Standing Committee are more detailed than those concerning the Contact Committee, especially as regards their respective duties and powers. Furthermore, the role and tasks of the Standing Committee are more incisive in ensuring the interpretation and application of the Convention than those of the Contact Committee in relation to the provisions of the TWF/AVMS Directive.²⁹ As observed previously, these

²⁵ The exhaustive nature of the list is affirmed in the Explanatory Report to the Convention (mentioned at fn 20 above; see para. 310 thereof).

²⁶ See Article 21(1)(a)-(c) of the ECTT: for instance, the important role played by the Standing Committee in the 1998 amendment of the ECTT clearly emerges from the Explanatory Report to the Convention (mentioned at fn 20 above; see notably paras. 41-73 thereof). To complete the picture of the Standing Committee's tasks, one should also recall letters (d) and (e) of that Article, providing (since 1989) for it to use "its best endeavours" to secure friendly dispute settlements among Parties to the Convention (in particular, by favouring conciliation, as set down by Article 25 ECTT) and to make recommendations to the CoE Committee of Ministers concerning the invitation of other States to accede to the ECTT.

²⁷ See Article 21(1)(f) ECTT: more precisely, following the 1998 amendment of the Convention, the Standing Committee has been given the task of determining, on a case by case basis, whether a broadcaster has abused the rights granted by the ECTT by establishing itself on the territory of a Party with a view to directing its programme service or services to another Party to evade the laws which would have applied to it in the areas covered by the Convention, had it been established on the territory of the receiving Party (see para. 314 of the Explanatory Report to the Convention, mentioned at fn 20 above).

²⁸ See Article 21(2) ECTT, following the 1998 amendment of the Convention. Interestingly, that provision specifies, *inter alia*, that the Standing Committee has to "draw up [guidelines] in order to avoid differences between the implementation of the rules of this Convention concerning access of the public to events of major importance for society and that of corresponding [EU law]" (letter (a) thereof).

²⁹ As for the Standing Committee, in particular, its crucial position in ensuring the effective application of the ECTT is clearly portrayed in the Explanatory Report to the Convention (mentioned at fn 20 above): according to para. 303 thereof, it "was considered that the aims of the Convention would be more easily achieved if the representatives of the Parties were given the possibility of meeting at regular intervals with a view to following

differences are almost certainly related to the diverse legal frameworks to which the two bodies belong, having regard in particular to the fact that the ECTT lacks any formal means of enforcement similar to those provided by EU law to ensure the application of the (now) AVMS Directive.³⁰

Having said that, the two bodies also resemble each other to some extent, especially in relation to their function as fora for cooperation and the exchange of views among their members, as well as in their actual composition (in both cases involving government officials). There seems to be no real indication of the possible concrete influence that the pre-existing Standing Committee could have had in the amendment of the original TWF Directive, which led to the setting up of the Contact Committee to perform such a similar function. Undoubtedly, links (and almost parallel developments, at least until recently) exist between the TWF/AVMS Directive and the ECTT. As for the latter, besides some specific provisions, the most evident link is represented by the general “disconnection clause” that provides, in substance, for the application of the (now) AVMS Directive, instead of the Convention, in cases concerning States to which both instruments are relevant.³¹ Besides generally mentioning the Convention and referring to it in one specific case,³² the AVMS Directive contains a somewhat complementary provision to the aforementioned disconnection clause, stating that, in “fields which [the] Directive does not coordinate, it shall not affect the rights and obligations of Member States resulting from existing conventions dealing with telecommunications or broadcasting”.³³ Thus, against this background of a sort of ‘dialogue’

[its application], taking into account any developments in transfrontier television broadcasting and the experience gained from the implementation of the Convention’s provisions [and] that much of the responsibility for the functioning of the Convention should be left to those representatives meeting in the Standing Committee so that the Convention would have the capacity to respond to new situations brought about by technical developments”.

³⁰ See PALZER & SCHEUER, “Article 23a TWF D”, cited, pp. 768-772, where some detailed examples are offered. See also the First Commission Report on the application of the (original) TWF Directive (COM(95) 86 final, of 31 May 1985), notably at para. 3.1 of Part C thereof, where the institutional comparison with the CoE is carried out at a time when the Contact Committee was not established yet.

³¹ According to Article 27(1) ECTT, in their mutual relations, Parties which are members of the EU have to apply EU rules and not therefore those arising from the Convention, except when there is no EU rule governing the particular subject concerned. As specified by the Explanatory Report to the Convention (mentioned at fn 20 above), since this provision governs exclusively the internal relations between Parties which are (also) EU MS, it is without prejudice to the application of the ECTT between those Parties and Parties which are not (EU) MS (see para. 362 thereof).

³² See, respectively, recital 3 of the AVMS Directive (simply stating that “[the CoE] has adopted the [ECTT]”) and Article 1(1)(n)(ii) thereof (providing a definition of “European works” for the purposes of the Directive, which encompasses also “works originating in European third States party to the [ECTT]” and fulfilling the conditions set forth in that Article).

³³ See Article 31 of the AVMS Directive.

between the two different legal instruments, which effectively takes place within the two abovementioned bodies,³⁴ it is quite possible to claim that the drafters of the TWF/AVMS Directive were inspired by the ECTT to establish institutionalised arrangements within the EU legal framework regarding cooperation among the authorities charged with the application of that Directive.

In fact, the ECTT essentially relies on cooperation between the Parties to the Convention for its implementation. Thus, since its first version, besides setting up the Standing Committee,³⁵ the Convention also includes general provisions, encapsulated in Article 19 ECTT, regarding a commitment of mutual assistance between those Parties to ensure this objective.³⁶ In this context, in particular, these provisions mandate all Parties to first designate “one or more authorities”.³⁷ Then, they urge each Party to cooperate with the others, on a general level, “whenever useful, and notably where this would enhance the effectiveness of measures taken

³⁴ From the reports/minutes of the Standing Committee and Contact Committee meetings, it is clear that the participation of CoE representatives in the meetings of the EU body and of EU representatives in those of the CoE body is conducive to exchanges of information that imply (or are intended to imply) aligning the interpretation and application of the two relevant legal instruments: see in this context, for example, the Third Commission Report on the application of the TWF Directive, cited at fn 2 above, para. 6 (or the Fifth Commission Report on the application of the TWF Directive, COM(2006) 49 final, of 10 January 2006, para. 5.2), and the report of the 45th meeting of the Standing Committee (T-TT(2010)2, of 21 July 2010, available at http://www.coe.int/t/dghl/standardsetting/media/T-TT/T-TT%282010%292_en%20Report.asp#TopOfPage).

³⁵ Although the Standing Committee represents an institutionalised form of cooperation between the Parties to the ECTT, it is not intended to be exhaustive to this end. In fact, Article 19 ECTT, which is located in a different and ad hoc Chapter, sets a general principle of “mutual assistance” that is certainly echoed at the level of the Standing Committee (having regard especially to its functions in securing the friendly settlement of any difficulty referred to it: see fn 26 above), but also further developed by that Article, as will be described below (see para. 313 of the Explanatory Report to the Convention, mentioned at fn 20 above).

³⁶ See Article 19(1) ECTT. According to the Explanatory Report to the Convention (mentioned at fn 20 above), this Article “aims to reduce as far as possible the risk of possible conflicts arising between Parties as a result of the transfrontier transmission of television programme services [and is] inspired by similar provisions in the Convention for the Protection of individuals with regard to Automatic Processing of Personal Data [(ETS No108, done at Strasbourg on 28 January 1981, and entered into force on 1 October 1985), although] adapted to meet the requirements arising from the subject matter of the Convention” (paras. 297-298 thereof).

³⁷ See Article 19(2)(a) ECTT, whereby the Parties are also required to communicate the name and address of each authority to the CoE Secretary General at the time of depositing the instrument of ratification, acceptance, approval or accession. Furthermore, in the case of multiple designations, the Parties have to specify the competence of each authority designated (see Article 19(2)(b) ECTT; a list of all designated authorities is available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=132&CM=1&DF=1/15/2007&CL=ENG&VL=1>, where it can be seen, for instance, that while Italy has designated the competent Ministry, France has chosen both the Ministry and the sector-specific regulatory authorities, and the UK has indicated not only the competent regulator(s) for broadcasters, but also a broadcaster itself, the BBC). It is important to note that, as emerges from the Explanatory Report to the Convention (mentioned at fn 20 above), there is no specific indication of the requirements that these authorities should possess: while in several States that are members of the CoE “specialised authorities in broadcasting matters have been set up [and could in fact] be chosen for the purpose of the Convention[, this latter] does not, however, require the institution of such specialised authorities where they do not yet exist” (para. 299 thereof).

in implementation of [the] Convention”,³⁸ as well as in other specific directions, such as in furnishing information on broadcasters (pursuant to Article 6(2) ECTT), in providing information (at the request of one Party) on the domestic law and practices in the fields covered by the Convention, and in considering any difficulty arising from its application brought to the attention by one of those authorities.³⁹

Having said this, the analysis above, while inspiring and instructive as an institutional model for further reference, should nevertheless be placed in an almost historical perspective, as the ECTT is currently in a sort of deadlock. Indeed, while the adoption of the AVMS Directive prompted a need within the CoE to revise the Convention to ensure legal certainty and its coherence with the EU legal framework for audiovisual media services, as well as to cope with technological changes affecting the sector, and while a draft second Protocol amending the Convention was launched, developed and almost completed (with the substantial contribution of the Standing Committee),⁴⁰ the review process now seems to have been abandoned. The decision to discontinue work on the revision of the ECTT mainly appears to be the consequence of the position adopted by the Commission vis-à-vis the EU Member States Party to the Convention.⁴¹ In substance, the Commission has claimed that (most of) the matters covered by the Convention are (now) largely dealt with by the AVMS Directive, and are therefore subject to the (exclusive) external competence of the EU, although it does not envisage any foreseeable accession to the Convention on the part of the EU.⁴² This situation

³⁸ See Article 19(3)(c) ECTT.

³⁹ See, respectively, Article 19(3)(a), (b) and (d) ECTT. As regards the last case in particular, the Explanatory Report to the Convention (mentioned at fn 20 above) underscores that this “reflects the important idea of co-operation underlying Article 19 [ECTT] as a whole in the particular case of a difficulty arising in the application of the Convention, and it should be read in conjunction with [Article 25(1) ECTT], which embodies the principle of the friendly settlement of any such difficulty. It is clear that such co-operation presupposes that, in many instances, contacts between the broadcasters concerned or between the broadcasters and the competent national authorities concerned will have been instigated in the initial stages” (para. 302 thereof).

⁴⁰ See the Standing Committee web-site (http://www.coe.int/t/dghl/standardsetting/media/T-TT/default_en.asp) for relevant documents and further references. Moreover, it is interesting to observe that the issues at stake were discussed (also) in several Contact Committee meetings: see notably the minutes of the 31st, 32nd, 33rd and 34th meetings (respectively: of 3 November 2009, Doc CC TVSF (2009) 6; of 16 June 2010, Doc CC AVMSD (2010) 2; of 20 October 2010, Doc CC AVMSD (2010) 4; and of 24 May 2011, Doc CC AVMSD (2011) 3; all available at <http://ec.europa.eu/digital-agenda/en/avmsd-contact-committee>).

⁴¹ For an overview of the key dates and events, as well as an analysis of the most relevant legal issues at stake, see D. MAC SÍTHIGH, “Death of a Convention: Competition between the Council of Europe and European Union in the Regulation of Broadcasting”, in *Journal of Media Law* [2013] 5(1), pp. 133-155. On these issues, see notably also the CoE, see the CoE Committee of Ministers Reply to the Parliamentary Assembly Recommendation 2036 (2014), of 31 January 2014 (Doc. 13605, of 23 September 2014, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=21152&lang=en>).

⁴² The argument was grounded on the ECJ’s case-law (notably Case C-466/98, *Commission v. UK* [2002] ECR I-9427, so-called “Open-Skies”), and found new strength on the basis of Article 3(2) TFEU, according to which the EU has “exclusive competence for the conclusion of an international agreement when its conclusion is

appears to have been debated repeatedly both within the Standing Committee and the Contact Committee.⁴³ It is interesting to note in these debates, inter alia, that on the part of both the CoE and the EU (as well as Member States) certain issues have been identified as relevant to audiovisual media regulation, but potentially falling outside one legal framework (i.e. EU law) and possibly within the other (i.e. that of the CoE). Among other issues, they were deemed to include the independence of regulators and media pluralism.⁴⁴ While it could be claimed, on the basis of the analysis conducted here, that such findings are not straightforward nor entirely consistent with current and prospective legal developments (especially within the EU legal order), they at least prove the strong interrelationship between the two systems and the importance of their developments in structuring an effective policy in the sector at stake, thus fostering the achievement of commonly recognised objectives such as the two mentioned above.

2.1.3 The European Platform of Regulatory Authorities (EPRA)

Another relevant and institutionally interesting forum for cooperation in the regulation of audiovisual media services, established and active at supranational level, is the European Platform of Regulatory Authorities (EPRA).⁴⁵

provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”. For a recent interpretation of this Article in a neighbouring field to that of transfrontier television, also involving the CoE, and thus proving to be extremely interesting in relation to the development of the arguments at stake here (and, in the view of the outcome of the case, possibly further supporting the Commission’s position), see Case C-114/12, *Commission v. Council* [2014], in which the Court decided to annul the Decision of the Council and the Representatives of the Governments of the MS meeting within the Council, of 19 December 2011, on the participation of the EU and its MS in negotiations for a Convention of the CoE on the protection of the rights of broadcasting organisations, as this was found in breach of that Article, essentially on the grounds that the content of the negotiations for that Convention fell “within an area covered to a large extent by common EU rules and that those negotiations [could] affect common EU rules or alter their scope”, their subject matter therefore being encompassed within the exclusive competence of the EU (para. 102 of the judgment rendered on 4 September 2014).

⁴³ See, in particular, the report of the 45th (and last) Standing Committee meeting (T-TT(2010)2, of 21 July 2010) and the minutes of Contact Committee meetings mentioned in fn 40 above.

⁴⁴ See again the documents mentioned in fn 43 above: from all of them, it emerges that the Commission indicated a possible option for MS to negotiate a convention based on issues falling outside EU competence, which are deemed not to be (entirely) covered by EU law, or to develop a convention in association with the EU to consolidate the case-law on Article 10 ECHR in the context of audiovisual media services (although, even in the first case, it reserved for itself the right to verify if MS could act alone or if it could be a mixed agreement).

⁴⁵ Most of the information on EPRA can be found at its web-site: <http://www.epra.org/>. However, the following considerations are based also on interviews with Mrs Emmanuelle Machet, working for EPRA. It could be said here that other fora for cooperation among regulatory authorities for the media have emerged in the wake of EPRA: (to mention just one case) reference could be made to the Mediterranean Network of Media Regulatory Authorities (MNRA), established in 1997 (see <http://www.rirm.org/>). For other examples (and interesting

This body was spontaneously established in 1995 (in Malta) by the interested parties, that is to say by representatives of broadcasting regulatory authorities. When EPRA was established (which happened very informally, in a meeting among the few founding members), it appears to have been the only forum specifically dedicated to cooperation among regulatory bodies alone. In fact, it was the very absence of such a forum that surely prompted the founding members to launch EPRA.

Concerning its (actual) composition, EPRA consists of fifty-two members from forty-four different States. Indeed, as results from the EPRA Statutes currently in force,⁴⁶ its members are drawn from “national or regional European regulatory authorities, operating in their respective countries or regions”⁴⁷. Thus, on the one hand, EPRA membership is not restricted to EU Member States alone (nor has it been since the outset), but currently encompasses almost all CoE countries and even goes beyond them,⁴⁸ with the EU (or rather, the Commission) and the CoE themselves holding the status of permanent observers within it.⁴⁹ On the other hand, more than one authority from the same State may belong to EPRA.⁵⁰ As provided for by the EPRA Statutes, for a national or regional European regulatory authority to be member of EPRA, it must have at least one of the functions listed therein, which are: licensing radio and/or television services; making rules; monitoring of programmes (TV

reflections on them), see J. BOTELLA I CORRAL, E. MACHET, “Co-ordination and Co-operation between Regulatory Authorities in the Field of Broadcasting”, in S. NIKOLTCHEV (ed.), *Audiovisual Media Services Without Frontiers – Implementing the Rules*, Strasbourg, European Audiovisual Observatory, 2006, pp. 13-20.

⁴⁶ The Statutes, in the version currently in force, are available at <http://www.epra.org/articles/statutes-of-the-european-platform-of-regulatory-authorities-epra>. They appear to be the result of some amendments introduced (over time) to the original version of the Statutes (dated 23 April 1997): some interesting differences between the first version and the current one will be highlighted below.

⁴⁷ See Article 2(1) thereof: for a list of all (current) EPRA member authorities, whose numbers have almost always increased over the years, see <http://www.epra.org/organisations>.

⁴⁸ In fact, some CoE States (i.e., Andorra, Liechtenstein, Monaco, the Russian Federation and San Marino) are not currently represented within EPRA, while some EPRA members are related to countries that are not CoE States (such as Kosovo and Israel, although the latter is an observer in the CoE).

⁴⁹ See Article 4(3) of EPRA Statutes. Interestingly, having regard to the Commission’s role in EPRA (as a permanent observer), as affirmed by the Commission itself (notably, in the Third Commission Report on the application of the TWF Directive, cited at fn 2 above, para. 4.6), it consists in “actively participat[ing] in [EPRA] meetings and activities, chiefly in order to boost cooperation among the European regulatory authorities”.

⁵⁰ Article 2 of the EPRA Statutes no longer envisages a requirement for only one authority per State to be represented within it (as was provided by their original version, possibly to avoid applications for membership by all the regulatory authorities of the German *Länder*: in fact Germany is currently represented in EPRA by only the federal media authority). Thus, multiple memberships are possible, as is actually the case of Belgium, Israel, Spain and Switzerland. Moreover, it is interesting to note that some territories with a particular international status, such as Gibraltar and the Isle of Man, are also represented autonomously. For details, see the list of EPRA members, available at the web-site mentioned at fn 47.

and/or radio); imposing sanctions; exerting quasi-judicial powers.⁵¹ No other condition for membership seems to be imposed. However, it is interesting to observe that, while the original version of the EPRA Statutes (also) required members to be “independent” regulatory authorities, this provision is no longer present. Moreover, whereas the same original version of the Statutes identified EPRA as “a platform of independent regulatory agencies”, in those now in force this wording has undergone a slight change, as the independence requirement is no longer referred to EPRA members but to EPRA itself, which is now defined as “an independent platform of regulatory authorities”.⁵² It may be remarked that this small semantic shift nevertheless bears some potentially substantive consequences as regards EPRA membership, since the Statutes no longer expressly foresee any kind of control whatsoever regarding the independence of a national regulatory authority joining EPRA.⁵³ However, it could also be claimed that, since the Statutes do require EPRA to be “independent”, this requirement could be fulfilled by, and thus imply, its member authorities in turn being independent.⁵⁴

⁵¹ See again Article 2(1) of the EPRA Statutes. Although not explicitly stated, in the light of EPRA’s mission, the making of rules, imposing of sanctions and exerting quasi-judicial powers type of functions are evidently to be related to audiovisual media. Overall, by referring to the authorities’ functions, the requirements for membership as defined in that provision appear quite broad and thus easy to comply with: see, for instance, the case of Spain, where the recently established national authority for markets and competition (the *Comisión Nacional de Mercados y Competencia* - CNMC), in charge of both competition and regulatory matters, with competences that go even beyond audiovisual media to cover sectors such as electronic communications, energy, postal and transport services, is a member of EPRA.

⁵² See Article 1 of the EPRA Statutes in force in comparison with the original version, prior to their very first (relevant) amendment. The removal of the independence requirement for member authorities appears have been a consequence of discussions (within EPRA, in 1998, on the occasion of its 7th meeting in Fredrikstad, Norway) on the difficulties of making it an easily ‘enforceable’ requirement in practice, as well as a sign of the very essence of EPRA as an open forum which encourages the most (and focuses on) free cooperation among regulatory authorities.

⁵³ It should be known that, although the Statutes do not explicitly regulate the procedure for (new) members to join EPRA, it is regulated by customary rules, established by EPRA through constant practice. According to these ‘rules’ (in essence), first, an application has to be sent by the authority interested in membership, describing its institutional features and functions (as well as providing some background information on the regulatory regime within which it operates). The application then undergoes a *prima facie* assessment on the part of the Executive Board, conducted on the basis of the EPRA Statutes. Once this assessment is completed, the Board makes recommendations to the plenary assembly of all EPRA members on whether or not to take a positive decision on the new accession. Finally, the plenary assembly decides on applications for membership, pursuant to the simple voting arrangements mentioned below. In any case, it could be pointed out that the EPRA Statutes provide for termination of membership by resignation (in writing) on the part of the members wishing to do so: see Article 2(2) thereof. No provision, however, is set therein regarding possible expulsions in cases where membership requirements are no longer met, although no such case seems to have ever occurred: all (the few) terminations of membership that have taken place are deemed to be a consequence of the ‘dismantling’ of the relative (former) members’ authorities (which in some cases have been replaced by new ones from the same State/territory, which have also gone through the procedure described above, from the beginning, as in the case of Luxembourg).

⁵⁴ These findings seem to be confirmed by some practical examples regarding applications for EPRA membership. In particular, in 2006, at a time when the Statutes no longer contained an explicit independence

That said, it should be pointed out that EPRA's independence, while affirmed, is not precisely defined by its Statutes, nor was it in the presence of the explicit requirement for EPRA members to be "independent". Thus, the institutional and operational arrangements set forth therein (also) seem important in giving substance to that constituent feature. As regards these arrangements, it should be noted that EPRA can count on its own Executive Board as well as a Secretariat. The Executive Board consists of a Chairperson and a maximum of four Vice-Chairpersons elected, for a period of two years, by EPRA members among the members (or employees) of their respective regulatory authorities, following the procedure set forth by the Statutes.⁵⁵ An independent Secretariat is provided for, to support EPRA,⁵⁶ and is now hosted by the European Audiovisual Observatory (EAO).⁵⁷ Its costs are covered by EPRA's

requirement addressed to joining members, an application from the Spanish *Secretaría de Estado de telecomunicaciones y sociedad de la información* was in fact rejected, essentially on the ground of non-compliance with that requirement on the part of the applicant entity (which was evidently fully dependent on, or actually part of, the national government). Another application, from the Turkish Republic of Northern Cyprus, also seems to have been rejected, although in this case the ground for dismissal appears to be related to a more political approach, based on the international community's non-recognition of that Republic, which is considered to be part of Turkey. Probably because of this, in a sort of compromise solution, among the representatives of the Turkish authority member of EPRA attending its meetings, one usually comes from that region.

⁵⁵ See Articles 3 and 5(2) of EPRA Statutes.

⁵⁶ See Article 7 of EPRA Statutes, which explicitly provides for guaranteeing the independence of the Secretariat as regards hosting arrangements (for which see fn 57 below) and lists (some of) its tasks (which are detailed in other provisions of the Statutes). Moreover, as can be seen from the EPRA web-page, a non-profit association is established under Alsatian law (the "EPRA Board Association") and registered at the Association Registry of the Court of First Instance in Strasbourg, to administer and legally represent EPRA in its daily business.

⁵⁷ The EAO is a public service organization established (in Strasbourg) as part of the CoE, by the CoE Committee of Ministers Resolution (92) 7, of 15 December 1992 (and continued by the CoE Committee of Ministers Resolution (97) 4, of 20 March 1997; see also the CoE Committee of Ministers Resolution Res (2000) 7, of 21 September 2000, concerning amendments to the EAO Statute appended to the previous Resolutions), in order to collect and distribute information about the audiovisual industries in Europe, thus promoting greater transparency as well as a better economic and legal understanding of the sector at stake: for all information concerning the EAO structure, functioning and membership (which includes the EU, represented by the Commission: see first Council Decision 1999/784/EC, of 22 November 1999, concerning Community participation in the EAO, OJ [1999] L 307/61, as successively amended by Council Decision 1999/784/EC, of 17 November 2004, OJ [2004] L 390/1; then Article 17 of Decision No 1718/2006/EC of the EP and of the Council, of 15 November 2006, concerning the implementation of a programme of support for the European audiovisual sector (MEDIA 2007), OJ [2006] L 327/12; and lastly, Article 11 of Regulation (EU) No 1295/2013 of the EP and of the Council, of 11 December 2013, establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC OJ [2013] L 347/221), see <http://www.obs.coe.int/web/obs-portal/home>. The hosting conditions of the are contained in a MoU between the EAO and EPRA: for the latest version, see http://www.epra.org/news_items/epra-and-eao-signed-revised-memorandum-of-understanding. Moreover, the EAO (together with the OSCE Representative on Freedom of the Media, as well as the Commission and the CoE, as mentioned above) is a permanent observer in EPRA (while the latter is a member of the EAO Advisory Committee). Before moving to the EAO (in 2005), EPRA was hosted by the European Institute for the Media (in Düsseldorf), with which a basic MoU was established (then replaced by the 1997 Statutes), and had the status of a non-registered association under German law.

autonomous budget, which is composed of the annual fees that EPRA members are obliged to pay, decided on a yearly basis, in advance, by a simple majority.⁵⁸

The Executive Board and the Secretariat essentially work to organise and run EPRA meetings, which take place (as a rule) twice a year, on the basis of an agenda prepared by the Secretariat, under the responsibility of the Chairperson, and consist of a plenary session and working groups.⁵⁹ During the plenary sessions in particular, the (plenary) assembly makes decisions concerning the organisational aspects of EPRA (such as elections to the Board, the setting of membership fees, amendments to the Statutes, and so forth), normally by simple majority of all voting members, each member of EPRA having one vote.⁶⁰ Observers, as well as other approved participants, can also join EPRA meetings, according to the provisions of the Statutes.⁶¹

Above all, the meetings and working groups fulfil EPRA's mission, which is to provide a forum for the regulatory authorities in the field of media, for informal discussions and exchanges of views among themselves, to share information about common issues of national and European media regulation, and to debate practical solutions to legal problems regarding the interpretation and application of that regulation.⁶² From its longstanding activities, it emerges that EPRA has provided opportunities for intensive and fruitful interaction, almost always fuelled (especially, most recently) by a rich presentation of data and comparative and thematic analysis of the issues that regulatory authorities have encountered (and still encounter), not only on the basis of the evolving EU media regulation, but also, having regard to the broader geographical reach of EPRA, beyond the EU legal order, thus touching several times upon topics such as the promotion and protection of media pluralism as well as

⁵⁸ See notably Article 2(2) and (3) of the EPRA Statutes. Other details (and guarantees) on budgetary autonomy are contained in the ad hoc Article 8 thereof. Interestingly, in the past, EPRA benefited from (limited) targeted financial support from the (EU) Commission for the setting up of its web-site (see the Third Commission Report on the application of the TWF Directive, cited at fn 2 above, para. 4.6), which itself operates as a platform for exchanges of information among EPRA members.

⁵⁹ See Article 3(3) and, in particular, Article 6 of the EPRA Statutes.

⁶⁰ See Article 5 of EPRA Statutes, which also confers a casting vote to the Chairperson in certain cases. According to Article 11 thereof, qualified majority voting (i.e., two-thirds of voting members) is needed to amend the Statutes.

⁶¹ See Article 4 of the EPRA Statutes: apart from the standing observers (already mentioned above), this Article makes provisions for the Board to invite not only "representatives of governments, or regulatory authorities which are not members, to a meeting of [EPRA] if their participation is considered useful for the meeting or in order to allow them to attain an overview of the activities of the platform for a possible future membership", but also "participants other than regulatory authorities for a specific presentation".

⁶² See Article 1(1) of the EPRA Statutes, which, in this respect, has remained unchanged since its first version.

guarantees of the independence of regulators.⁶³ In this context, having regard to its core aims and functions, it is important to point out that EPRA's mission excludes "the making of common declarations and the pursuit of national goals".⁶⁴ Thus, it is part of EPRA's remit not to take any formal decision nor make any policy statement that could be perceived as 'informally binding' – one could say – for its member authorities (and EPRA itself). Interestingly, one partial (and possibly the only) significant exception appears in the agenda of the 21st EPRA meeting (in Naples), where an extremely short and almost declaratory "Statement" was adopted on the independence of broadcasting regulators.⁶⁵ Apart from this (isolated and anecdotal) episode, it seems that the strength and added value of EPRA lies in its informal character as a platform for free discussion, mutual learning and open exchanges of best practices, keeping the formalities and procedures to minimum, and even adapting them to achieve this result (for instance by sacrificing transparency to a certain extent),⁶⁶ although some structural (substantive) planning of the activities has been introduced, notably through the adoption of an "Annual Work Programme".⁶⁷

⁶³ The importance of dealing with these issues in similar fora for the exchange of best practices and mutual learning is clearly depicted (more broadly than in only the audiovisual media field) by S. DE SOMER, "The Europeanisation of the Law on National Independent Regulatory Authorities from a Vertical and Horizontal Perspective", in *Review of European Administrative Law*, 5 [2012] 2, pp. 93-130.

⁶⁴ See Article 1(2) of the EPRA Statutes, which is identical to the corresponding provision contained in the original version of the Statutes.

⁶⁵ The Statement (dated 9 May 2003) is available at <http://www.epra.org/attachments/naples-statement-on-independence-of-ras>. It should be emphasized that the Statement is constructed and appears as a document attributable to the individual EPRA members that signed it, and not to EPRA itself.

⁶⁶ Indeed, Article 9 of the EPRA Statutes sets forth a 'confidentiality rule', whereby the minutes of EPRA meetings are not public and related press releases are issued (as appears to be almost always the case) with the consent of the Chairperson, but contain only basic information regarding the content of the meetings. On the contrary, it is (now) expressly stated therein that "working papers and documents" (related to the meetings) are normally published (see *ex in fn 63* above). All other aforementioned provisions of the Statutes must therefore be interpreted in the light of EPRA's objectives.

⁶⁷ The first EPRA Annual Work Programme dates back to 2011. The introduction of planning the year's activities was done notably to facilitate and "enhance the contribution of EPRA members, allowing them to anticipate and prepare the timing and modalities of their involvement in meetings and work throughout the year" as well as to "increase EPRA's visibility for both members and stakeholders". Each Annual Work Programme is drafted and then adopted by the EPRA Board, after a wide-ranging consultation process among EPRA members: for details, see <http://www.epra.org/articles/epra-annual-work-programme>.

2.2 EU law (soft) support for (national) independent media regulators and their cooperation: the case of the AVMS Directive

As emerges from the considerations above (as well as from the specific national cases analysed in Part II), the governance and regulation of audiovisual media (and of broadcasters in particular), especially within the EU, now relies considerably on the activity of ad hoc monitoring and regulatory bodies operating at the national level as well as increasingly cooperating at the supranational level. This has certainly been taken into account by the EU legislator, notably at the time of the adoption of the AVMS Directive. Indeed, it is in this context that a specific provision on cooperation between Member States' competent independent regulatory bodies was inserted into this Directive. The following analysis will focus specifically on this provision – that is to say on Article 30 of the AVMS Directive – to highlight its strengths and shortcomings. The focus will initially be on the legislative genesis and current scope of Article 30. Then, the content of this provision and the institutional arrangements it establishes will be compared to those provided for in other fields of EU law, namely data protection legislation, equality law, and electronic communications regulation, where the issues of the establishment and cooperation of independent bodies under the aegis of EU law are also at stake (as discussed at length in the Chapter above), to show commonalities as well as differences in approaches and outcomes. Finally, the requirement of independence for media regulatory bodies will be considered, looking at its specific implications in this particular field of law and policy, and focusing on the objectives underpinning it (especially, media pluralism).

2.2.1 Institutional cooperation under Article 30 of the AVMS Directive

Article 30 of the AVMS Directive is a completely new provision, born of the 2007 amendment of the TWF Directive (notably, as Article 23b of Directive 2007/65, later codified into the text of the AVMS Directive now in force, i.e. Directive 2010/13). Indeed, no similar provision existed in the original TWF Directive, nor in its amended 1997 version. This Article, included in an ad hoc Chapter (namely, what is now Chapter XI of the AVMS Directive) under the heading “Cooperation between Regulatory Bodies of the Member States”, states that:

“Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.”

In order to highlight the implications of this provision, it seems useful to retrace its ‘legislative history’ from the originally proposed text, through all the subsequent stages of its drafting process as part of the co-decision procedure (now, the ordinary legislative procedure, according to Article 294 TFEU), leading to the adoption of the AVMS Directive. In fact, it is interesting to note that quite different versions of what now is Article 30 of the AVMS Directive have emerged during the legislative procedure. These different draft versions, especially if read in conjunction with the pertinent recitals proposed, appear to be the consequences of the different viewpoints of the co-legislators on the issues dealt with by this provision.

In this context, if one looks first at the text of the provision under examination as it was originally conceived and proposed by the Commission, one may note that there are quite significant substantive differences between it and the version adopted. Indeed, the Commission’s draft provision consisted of two paragraphs: the first stated that “*Member States shall guarantee the independence of national regulatory authorities* and ensure that they exercise their powers impartially and transparently”, while the second added that “[*n*]ational regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of the [would-be AVMS] Directive” in general.⁶⁸ The mandatory language employed in the proposed text cited here clearly shows that the Commission envisaged the imposition of certain precise obligations. Indeed, it is apparent from this text that, on the one hand, the Commission intended to place upon Member States a duty to confer effective independence upon their regulatory authorities for the media, especially (as clarified by the related recital) “from national governments as well as from audiovisual media service providers.”⁶⁹ It remains doubtful, however, whether the above-quoted proposed text also implied a commitment for the Member States themselves to establish such authorities where lacking.⁷⁰ On the other hand, it appears clear that, with its

⁶⁸ See the Commission Proposal for a Directive of the EP and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in MS concerning the pursuit of television broadcasting activities (COM(2005) 646 final, OJ [2006] C 49/37; *emphasis added*).

⁶⁹ See the text of recital 47 of the Commission Proposal (mentioned in fn 68 above), the content of which remained almost unchanged, in this respect, until the Council Common position (mentioned in fn 75 below).

⁷⁰ Mrs. Viviane Reding, at the time Commissioner for Information Society and Media, whose DG prepared the legislative proposal, in a speech on the “Audiovisual Media Services Directive: the right instrument to provide

draft provision, the Commission also aimed to address an obligation directly to the regulatory authorities themselves, to work in close cooperation with each other, albeit only for the exchange of information. As a justification for the imposition of the aforementioned obligations, the Commission suggested in particular (elsewhere) that the cooperation among independent national regulatory authorities could effectively contribute to securing “the consistent application of the EU regulatory framework”.⁷¹

Turning to the text of what is now Article 30 of the AVMS Directive, following the European Parliament’s first reading, one may note that this institution not only largely supported the Commission’s approach, but also went somewhat further.⁷² Indeed, through its amendments, the Parliament essentially proposed explicitly laying down the duty for Member States to set up independent regulatory entities, although it made use of a slightly more intricate formula. In the phrasing suggested by the Parliament, “Member States shall take appropriate measures to establish national regulatory bodies and institutions in accordance with national law [and] to guarantee their independence”.⁷³ Thus, the term “authority”, employed in Commission’s draft text, was changed into the wider-ranging expression “bodies and institutions”. Most importantly, the obligation was anchored to national law. Furthermore, the European Parliament proposed rendering explicit the somewhat general duty placed upon national regulatory bodies to “cooperate more closely”, in the operative part of the Directive.⁷⁴

Finally, looking at the provision in question as developed (and finalised) by the Council, one may note that the latter, possibly also taking advantage of the little ‘*vulnus*’, so to speak, opened by the European Parliament with the insertion of the reference to national law,

legal certainty for Europe’s media business in the next decade” delivered on 7 June 2006, on the occasion of a seminar on “Regulating the new media landscape”, stated that the proposed provision required MS “to guarantee the independence of national regulatory authorities, without entailing the obligation for [them] to create such authorities”; the text of this speech is available at http://europa.eu/rapid/press-release_SPEECH-06-352_en.htm?locale=en.

⁷¹ See the Fifth Commission Report on the application of the TWF Directive (mentioned in fn 34 above), notably at para. 3.7.2.

⁷² This corresponds to the Commission’s view on the EP’s position, expressed in the response the former gave on the text adopted in plenary (for which see fn 73 below): see the Commission document SP(2007)0303, of 24 January 2007. Moreover, the Commission, in its amended proposal (COM(2007) 170 final, OJ [2007] C 181/12), endorsed most of the EP’s suggestions, while also confirming its original (and consistent) approach.

⁷³ The Commission proposal passed the EP’s first reading on 13 December 2006, when it was approved with amendments (see Bulletin of the European Union 12-2006, point 1.14.4.): for the amended text, see EP P6_TA-PRO V(2006)0559, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0559&language=EN&ring=A6-2006-0399>.

⁷⁴ See the EP amendments (contained in the text mentioned in fn 73 above).

determined the adoption of a downward compromise.⁷⁵ Indeed, the solution enshrined in the partially, but significantly, reframed new version of the provision demonstrates Member States' reluctance to allow any EU interference by dictating the instruments and forms of (national) implementation of EU law provisions. This reluctance is clear not only in the significant deletion of any reference in the draft Directive to the scope of the independence of regulatory authorities,⁷⁶ but also in the insertion of a new recital in the final text of the AVMS Directive, recalling (at its outset) a generally established principle of EU law, namely that the implementation of EU legislation is Member States' duty, to be performed by the latter by freely choosing "the appropriate instruments according to their legal traditions and established structures".⁷⁷

The effect of the Council's approach to the subject matter of Article 30 of the AVMS Directive and the compromise that followed led this provision to be phrased in its vague and watered-down wording. The only obligation contained in this Article is addressed to Member States and states their duty to adopt "appropriate measures" to cooperate in providing each other and the Commission with the information necessary for the application of the

⁷⁵ See, on the one hand, the Council General Approach, agreed on 13 November 2006 (document 15277/06, of 15 November 2006), according to which the provision at stake, inserted into an ad hoc Chapter headed "Cooperation between National Regulatory Authorities", should have been phrased (in one single paragraph) as simply stating that "[n]ational regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular [as regards, in substance, issues of jurisdiction and abusive behaviors on the part of broadcasters]", with no reference to the independence requirement. On the other hand, see the conclusion of the Statement of the Council's reasons (document 10076/6/07 REV 6 ADD 1, of 15 October 2007), accompanying the Council Common Position (EC) No 18/2007 adopted by the Council on 15 October 2007 with a view to adopting Directive 2007/.../EC of the EP and of the Council of ... amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ [2007] C 307E/1), where it is first stated that the text contained in the Common Position (and eventually adopted) "reflects a sensitive compromise between the [EP] and the Council on [the role of regulatory authorities, the] heart of this compromise [being] the new [text] dealing with cooperation and the exchange of information", and then concluded that this text is the result of "important adjustments [on such a] sensitive" question. Finally, Further evidence of the compromise solution comes from the Communication from the Commission to the EP pursuant to the second subparagraph of (former) Article 251(2) EC concerning the Common Position of the Council on the adoption of a proposal for a Directive of the EP and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Audiovisual Media Services Directive), where it is stated that "the Presidency proposed reference in a recital referring to the faculty for [MS] to create independent national regulatory bodies. These should be independent from national governments as well as from operators. The [EP] and the Commission found it necessary that the reference to such bodies be included in the operative part of the Directive" (see COM(2007) 639 final, of 18 October 2007).

⁷⁶ See fn 69 above.

⁷⁷ See former recital 65 of Directive 2007/65 (now recital 94 of the AVMS Directive). At a closer look, this recital appears to be a reworking of (part of) recital 47 of the original Commission Proposal (see fn 69 above), which (for the remaining part) became (with some other changes) former recital 66 (now recital 95 of the AVMS Directive).

Directive's provisions, especially the general ones (focusing on issues of jurisdiction).⁷⁸ Compared to the text originally proposed by the Commission, the focus has shifted. National "competent independent regulatory bodies" are now simply a means by which Member States are "notably" ("in particular", in the codified AVMS Directive in force) invited to exchange the information necessary for the application of the Directive. Certainly, national regulatory authorities are no longer the direct addressees of the duty to cooperate. This rests upon Member States and seems to echo the general principle/obligation of sincere cooperation (now) enshrined in Article 4(3) TEU. Even the word "cooperation", referring to the relationship to be established among those regulatory bodies, does not appear (any more) in the text of Article 30 of the AVMS Directive, but only in the heading of the related Chapter. Last, but not least, the reference to the independence of regulatory authorities as a clear-cut binding requirement has been somewhat reappraised.

To conclude this excursus, it could safely be remarked that, from the EU law perspective, the existence, role and characteristics of national regulatory authorities for the media represented a point of contention among the co-legislators in drafting Article 30 of the AVMS Directive.⁷⁹ As a consequence of this contention, as shown above, the compromise reached lacks a strong prescriptive force and is rather vague in its actual content. Thus, it is difficult to venture into any solid interpretation of the provision examined. Nevertheless, in this context, having regard to the text of Article 30 of the AVMS Directive as it was finally adopted, within the broader context of the Directive itself, and especially looking once again at the relevant recitals of the latter, the following two brief remarks could be made.

First and foremost, the AVMS Directive appears to support the establishment of national independent regulatory authorities for the media, but leaves open the issue of the existence of any duty imposed by EU law regarding their actual establishment. In fact, the ambiguity of the wording in Article 30 of the AVMS Directive allows opposing claims to be raised. On the one hand, especially in the light of the legislative history of this provision, it could be argued that the setting-up of such national bodies does not stem from the provision as a duty, but as

⁷⁸ As argued by R. MASTROIANNI, "Monitoring of compliance through Member States' national regulatory bodies and co-regulatory bodies", in S. NIKOLTCHEV (ed.), *Ready, set ... go?: the Audiovisual Media Services Directive*, Strasbourg, European Audiovisual Observatory, 2009, pp. 115-121, Article 30 of the AVMS Directive "imposes on [MS] an *obligation de résultat*: indeed, if the measures they devise turn out to be unsuitable or inappropriate, they may be held responsible for acting in violation of [that Article]", read in combination with Article 4(3) TEU (see p. 119 therein). Moreover, it could be added here that no definition of what is to be intended as "necessary information" for the purposes of Article 30 of the AVMS Directive is provided anywhere in the Directive itself.

⁷⁹ See again Bulletin of the European Union 12-2006, point 1.14.4.

an option for fulfilling the real obligation established therein, consisting in Member States' cooperation in exchanging information among themselves and with the Commission for the purposes of the application of the Directive's provisions.⁸⁰ On the other hand, it could also be argued that the reference to independent regulatory bodies for the media contained in this Directive presupposes their existence, as the Directive itself almost appears to take it for granted.⁸¹ In both cases, however, it seems undisputable that, according to the AVMS Directive, the established (or future) regulatory bodies for the media must be independent.⁸² Second, mostly in connection with (and possibly in favour of) the latter claim, the AVMS Directive seems to establish a strong link between effective regulation (or rather, the effective implementation of the EU regulatory framework for audiovisual media services) and (the existence and functioning of) independent national regulatory bodies for the media, which appear to represent institutional guarantees for the achievement of that end. This link is clearly portrayed in the already recalled recital 94 of the AVMS Directive. It is true, as noted above, that that recital essentially (and immediately) recalls Member States' institutional (and procedural) autonomy in implementing the Directive, taking into account their legal traditions and established structures. However, the same recital affirms Member States' responsibility for the "effective implementation" of the Directive itself as (also) a common EU objective, to the realisation of which their institutional (and procedural) freedom is bound. From this perspective, it does not appear (excessively) paradoxical that, according to recital 94 of the AVMS Directive, Member States are 'free', "in particular, [to choose] the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing [the] Directive impartially and transparently".⁸³ This limited freedom is

⁸⁰ See R. MASTROIANNI, "Monitoring of compliance through Member States' national regulatory bodies and co-regulatory bodies", cited, notably at p. 120.

⁸¹ Article 30 of the AVMS Directive refers to the "competent independent regulatory bodies" of the MS, as if they were already established. Similarly, see recital 94 of that Directive (and fn 83 below). See also R. MASTROIANNI, *La direttiva sui servizi di media audiovisivi e la sua attuazione nell'ordinamento italiano*, Torino, Giappichelli, 2011, notably at p.139.

⁸² See, notably, A. SCHEUER, C. PALZER, "Article 23b AVMSD", in O. CASTENDYK, E. DOMMERING, A. SCHEUER (eds.), *European media law*, cited, pp. 995-1000, where it is claimed that the main implication of the provision at stake is that "regulatory bodies, where they exist, have to be independent" (ivi, p. 996). In other words, MS will be free to decide whether or not to establish regulatory bodies for the media, but if they opt to do so (or have already done so), those bodies have to be independent.

⁸³ Here as well, similarly to what was noted in fn 81 above, it seems that the Directive presupposes the existence, in national legal orders, of "regulatory bodies" operating for its correct implementation, as well as that these bodies have to be "independent", the only leeway for MS intervention in this context being the "form" of these bodies. See also SCHEUER & PALZER, "Article 23b AVMSD", cited, who interprets the freedom for MS to choose the "form" of the national independent regulatory bodies as the possibility for them to ensure their independence through measures that are consistent with their own different experiences and cultural factors.

justified in particular on the ground that, for the EU legislator, the implementation of the EU regulatory provisions on audiovisual media services through such bodies, also through cooperation with each other (as well as with the Commission) to that end (especially, but not only, in exchanging relevant information),⁸⁴ appears to be a particularly effective institutional solution, towards which Member States should therefore orient themselves.

2.2.2 Article 30 of the AVMS Directive compared to other EU law institutional provisions on the establishment of national independent administrative bodies

The provision contained in Article 30 of the AVMS Directive is not only somewhat weak, for the reasons highlighted above, but also falls short of the expectations related to the strengthening of the institutional settings in order to secure the policy objectives of audiovisual media regulation.⁸⁵ The shortcomings of this provision become particularly apparent if one compares the institutional arrangements set forth therein with the similar ones adopted in other fields of EU law. Indeed, if, through Article 30 of the AVMS Directive (read in conjunction with the relevant recitals, mentioned above), the EU legislator has made explicit the duty to cooperate (notably, in exchanging information) in securing the Directive's effective application, it has also referred to specific institutions, such as independent regulatory bodies, for the achievement of that result. This recalls other provisions, enacted in other fields of EU law, where the application of the relevant EU legislation has been entrusted, directly by EU law itself, to similar bodies (with supervisory and/or regulatory functions), and their cooperation has been provided for (in certain cases, also institutionalised). This has happened both in fields where fundamental rights are at stake and need to be safeguarded, as well as in sectors where market liberalisation has taken place and needs to be underpinned. Some of these cases, relating namely to EU data protection, equal treatment and electronic communications law, have been considered at length in the Chapter

⁸⁴ See recital 95 of the AVMS Directive, where it is affirmed not only that close cooperation between “competent regulatory bodies of the [MS] and the Commission is necessary to ensure the correct application of [the] Directive”, but also, significantly, that “close cooperation between [MS] regulatory bodies is particularly important with regard to the impact which broadcasters established in one [MS] might have on another [MS]”; and even more precisely that, where “licensing procedures are provided for in national law and if more than one [MS] is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted”; while it is concluded that this “cooperation should cover all fields coordinated by [the] Directive”. Interestingly, the word “independent”, which (as already noted) is used with reference to regulatory bodies in both recital 94 and Article 30 of the AVMS Directive, does not appear in recital 94 thereof.

⁸⁵ See, notably, C. PALZER, A. SCHEUER, “Article 23a AVMSD”, in O. CASTENDYK, E. DOMMERING, A. SCHEUER (eds.), *European media law*, cited, pp. 991-994.

above. Thus, it seems interesting to offer here a brief comparative overview of what has (and has not) taken place to date in the EU's institutional regulation of audiovisual media services, in relation to what has happened in these other fields.

Comparing, in particular, the provision of Article 30 of the AVMS Directive with the specific institutional measures contained in the EU data protection legislation, equality law and electronic communications regulation, regarding the setting up of independent administrative bodies (as discussed in the Chapter above),⁸⁶ certain significant differences, as well as some similarities, come to light.

As for the main differences, it is worth highlighting that, first and foremost, while the AVMS Directive does not provide a clear-cut formal obligation to establish independent (regulatory) administrative bodies at the national level, with responsibility for ensuring its correct application, this is precisely what has happened, *mutatis mutandi*, in all the other three sectors mentioned above. Indeed, the relevant EU Directives adopted in the fields of data protection, equal treatment and electronic communications do contain precise obligations addressed to Member States to set up independent administrative institutions. Interestingly, in all these cases, including the field of audiovisual media service regulation, the Directives considered have started from the pre-existence, within (some) national legal orders, of bodies similar to the ones whose establishment they mandate. Moreover, almost all these Directives, apart from possibly the AVMS one, have not embraced a single-institution model, but have left to Member States the decision to set up "one or more" bodies to fulfil the established requirements.⁸⁷

Second, in contrast to the provisions in the fields of EU data protection, equal treatment and electronic communications, the AVMS Directive does not contain any clear indication of the tasks and powers with which national independent regulatory bodies for the media should be entrusted, apart from mentioning a general "regulatory" competence, as well as identifying these bodies specifically as vehicles for information exchange. In contrast, the EU Directives on data protection, equal treatment and electronic communications all comprise, to different extents, some (more or less) detailed indications and guidance on the tasks and powers to be

⁸⁶ See the considerations made in the Chapter above: for EU data protection law, and DPAs, Para. 1.1.2, a), thereof; for EU equality law, and equality bodies, Para. 1.2.2, a), thereof; for EU electronic communications law, and NRAs, Para. 1.3.2, a), thereof.

⁸⁷ In fact, in the AVMS Directive, there is no such explicit option, although something similar was envisaged in the EP-proposed text of Article 30 thereof (cited above). However, nothing excludes either an interpretation of that Article (read in conjunction with recitals 94 and 95 thereof) leading to the possibility for MS to establish more than one body, pursuant to Article 30 AVMS Directive itself.

conferred upon the relative national independent authorities.⁸⁸ In particular, in the case of electronic communications, the pertinent Directive not only qualifies the role of national independent authorities as “regulatory”, but also describes their specific related competences at length.⁸⁹ The absence in the AVMS Directive (and, notably, in its Article 30) of any clear provision in this respect could be linked to the very lack therein of an evident duty for Member States to establish such institutions.

As for the main similarities between the provision on independent regulatory bodies embodied in Article 30 of the AVMS Directive and the ones on independent administrative institutions included in the respective Directives on data protection, equal treatment and electronic communications, one could first point to the fact that, in all these cases, such provisions are contained in Directives (at least, until now):⁹⁰ that is to say in legal acts that, according to Article 288 TFEU, are binding in relation to the result to be achieved, upon all Member States to which they are addressed, but leave to the Member States the choice of the forms and methods for their effective implementation. As observed above, however, the actual leeway left to Member States in virtually all such cases (except perhaps the very case of the AVMS Directive) is per se significantly reduced, as almost all these Directives identify the basic (or, for EU data protection and electronic communications law, more than basic) institutional “form and methods” necessary to ensure their effective application, precisely by imposing (inter alia) the setting-up and functioning of independent ad hoc institutions. Interestingly, having regard to such independent bodies, the AVMS Directive and the relevant norms of EU electronic communications legislation provide for the respect of national “legal traditions and established structures” (the former), as well as of Member States’ “institutional autonomy and constitutional obligations” (the latter).⁹¹

⁸⁸ As mentioned above, for instance, in the case of DPAs, their powers are extremely detailed by Article 28 of Directive 95/46 itself, as regards both their nature and actual scope.

⁸⁹ See notably Para. 1.3.2, a), ii), of the Chapter above. Moreover, as highlighted there, the other legal acts comprising the EU Regulatory Framework for electronic communications add further (and sector-specific) regulatory tasks for NRAs to those already enshrined in the (general) Framework Directive. DPAs and equality bodies do not have proper regulatory functions: as regards the first, their functions are essentially “supervisory” ones, while as far as the second are concerned, they mainly perform monitoring functions.

⁹⁰ See, indeed, the proposals aimed at replacing Directive 95/46 with a Regulation, mentioned at Para. 1.1.1 of the Chapter above.

⁹¹ See, respectively, recital 94 of the AVMS Directive and recital 11 of the Framework Directive. It should be highlighted that, in the second case, respect for the national institutional autonomy and constitutional obligations is directly related to the (need to ensure) the independence of NRAs, while in the case of the AVMS Directive the statement is more generally related to “the form of [MS] competent independent regulatory bodies”, rather than to their independence as such.

Second, excluding the equal treatment Directives, it is worth recalling here that all the other Directives examined were enacted as internal market legislation. In particular, the EU measures on data protection and electronic communications, which include the establishment of independent administrative bodies, are grounded on the general provision of (now) Article 114 TFEU, regarding the establishment and functioning of the internal market, while the AVMS Directive rests upon the specific legal basis that allows for the coordination of divergent national measures in order to ensure the freedom to provide services within the internal market (i.e., Article 62 TFEU in conjunction with Article 53(1) TFEU).

Third, and more specifically, cooperation for the exchange of information among the relevant independent authorities is explicitly mandated in all the different sectors considered.⁹² In this context, however, it should be pointed out that, in all cases except for the AVMS Directive, the duty to cooperate is substantially placed directly upon the independent bodies. In fact, as highlighted above, Article 30 of the AVMS Directive bestows that duty essentially upon the Member States, although the Directive also refers (somewhere else and more broadly) to cooperation directly among national competent regulators.⁹³

Forth, and finally, a very common (institutional) feature of the different national ad hoc bodies envisaged by the Directives examined is the independence requirement. This requirement is indeed laid down in all the Directives considered and is related to those ad hoc national institutions. However, as observed, these Directives do not detail the independence requirement in the same way. In fact, while in the case of EU data protection legislation and electronic communications regulation this requirement is strongly underpinned by the relevant Directives themselves, by setting some important (institutional, functional and personal) guarantees to that end (which have also been judicially enforced, and enriched), this is not the case for the independence of equality bodies, and even less so for that of national regulatory authorities for the media, since in these latter two cases the independence requirement is barely mentioned. Thus, looking at the various pertinent legislative provisions, a sort of classification can be established, based on the level of protection of the independence

⁹² It should be highlighted, however, that in the case of the equality bodies, according to the Consolidated Equal Treatment Directive, such cooperation is explicitly deemed to take place in an already identified supranational dimension: according to Article 20(2)(d) of Directive 2006/54, equality bodies should indeed cooperate in “exchanging available information *with corresponding European bodies*” at the appropriate level (*emphasis added*).

⁹³ Indeed, while Article 30 of the AVMS Directive assigned the obligation to cooperate in exchanging relevant information to [MS], which can perform it through their competent national regulatory bodies, recital 94 thereof identifies in the “close cooperation between competent regulatory bodies” of the MS a need to ensure the correct application of the Directive.

of national supervisory and/or regulatory bodies afforded (and required) by EU law.⁹⁴ Moreover, looking again at the Directives' different provisions, read also (some of them, especially those in the field of data protection) in the light of their judicial interpretation and application, while it emerges that this requirement is almost always intended to safeguard the impartiality of the bodies concerned in their decision-making and/or supervisory activities, it is also apparent that it can fulfil various functions according to the specific legislative frameworks within which the independent authorities are set to operate, depending on the peculiarities as well as the objectives of these frameworks. Thus, it could be asked what the independence of regulatory authorities for the media actually means, especially for the purposes of the AVMS Directive, within which it is established, and why its effective enforceability and actual enforcement take on particular relevance within the field of audiovisual media regulation. The following analysis will focus on precisely these issues.

2.2.3 The role of regulatory bodies and, in particular, of their independence in securing media pluralism

Looking more closely at the specific policy domain within which the AVMS Directive is embedded, the (soft) support it manifests for the establishment of (national) independent regulatory bodies does not seem to be strictly confined to the need (recalled above) to ensure the effective implementation of its provisions through them. In fact, the Directive also appears to rely on the conviction that, while performing such a mission, these bodies can contribute to guaranteeing and fostering a fundamental and sector-specific policy objective: media pluralism. The important role that independent regulatory bodies can play in securing this objective is essentially grounded in their key constituent feature, which is their independence. In other words, if the effective implementation of the AVMS Directive implies (or, at least, strongly encourages) the establishment and functioning of independent regulatory authorities, it is their very independence that, in turn, allows them to contribute to safeguarding and

⁹⁴ See A. OTTOW, "The Different Levels of Protection of National Supervisors' Independence in the European Landscape", in S. COMTOIS, K.J. DE GRAAF (eds.), *On Judicial and Quasi-Judicial Independence*, Den Haag, BJU, 2013, pp. 139-155, where it is affirmed that "overlooking the European landscape of [...] regulated areas, three levels of protection [of the independence requirement] can be distinguished": the first is "the area of data protection, where the [EU] legislator and [the ECJ] have recognised the importance of independence and have secured a high level of protection of independence"; a "middle category is the [electronic] communications area, with legal requirements, which qualify as a medium level of protection of independence"; finally, "there are sectors, such as the media sector, where so far the level of protection is low" (p. 155).

promoting media pluralism. Thus, the independence of media regulators should be construed within this perspective, rather than being envisaged as an end in itself.⁹⁵

The need consequently arises to clarify the scope of the independence of media regulatory bodies, as well as the conditions for enforcing it. As the independence requirement is itself contained in the AVMS Directive, and is thus part of (a provision of) EU law, it must be interpreted as an EU law notion. However, reading the AVMS Directive, one will not find many useful elements in this respect therein. In fact, no straightforward definition (indeed no definition at all) of that requirement is provided. Thus, in interpreting the notion and clarifying its scope of application, the more detailed EU law provisions guaranteeing the independence of (other) national supervisory/regulatory authorities, such as those in the (more or less closely related) fields of data protection, equal treatment and electronic communications, can certainly offer some support (as highlighted in the Chapter above).

However, in view of the aforementioned specificities inherent in the independence requirement for media regulators, it may also be useful to look first at the developments within the CoE, where particular attention has been paid to the very issues at stake here, specifically in relation to broadcasting regulation. Indeed, not only has the CoE dealt with these issues in the broadcasting field well ahead their appearance within EU law, but relevant legal texts adopted within the CoE in this same regulatory field have served to clarify the interpretation of certain equivalent EU law provisions.⁹⁶ Thus, the EU approach to these issues will be illustrated, highlighting in particular the main developments that have (preceded and) followed the enactment of the AVMS Directive.

a) The view of the Council of Europe (CoE)

Having regard to the activity of the CoE, some significant soft law instruments have indeed been adopted within it, dealing in particular with the role of independent regulatory

⁹⁵ Academic literature, independent studies and policy discussions on the issue of the independence of regulatory bodies for the media have flourished considerably over the last few years, especially after the enactment of the AVMS Directive. As regards independent studies and policy discussions, proper account will be given below, in the text. As for the former: see W. SCHULZ, P. VALCKE, K. IRION (eds.), *The Independence of the Media and its Regulatory Agencies*, Bristol, Intellect, 2013.

⁹⁶ The reference here is to the ECTT and related documents (such as the Explanatory Reports to the Convention, mentioned extensively above regarding, in particular, the role and functioning of the Standing Committee), which have been used to support/clarify the interpretation of certain provisions of the TWF Directive: see, for instance, Case C-89/04, *Mediakabel* [2005] ECR I-4891, § 41; Case C-245/01, *RTL Television* [2003] ECR I-12489, § 63; Joint Cases C-320/94, C-328/94, C-329/94, C-337/94, C-338/94 and C-339/94, *RTI and Others* [1996] ECR I-6471, § 33.

authorities in relation to media pluralism, while some interesting lessons on the matter can also be learnt from the case-law of the ECtHR.⁹⁷

Focusing in particular on such instruments, with reference to Article 10 ECHR, they mainly consist of a Recommendation (No (2000) 23) and a Declaration, both concerning the independence and functions of regulatory authorities for the broadcasting sector, adopted by the CoE's Committee of Ministers on 20 December 2000 and 26 March 2008 respectively (henceforth, the Recommendation and the Declaration).⁹⁸ In brief, both the Recommendation and the Declaration strongly encourage the establishment of "independent regulatory authorities for the broadcasting sector", as they have an important role to play, "within the framework of the law", in ensuring media pluralism.⁹⁹ The Recommendation, in particular, provides detailed guidance on the elements that should form part of the framework for guaranteeing the genuine independence of the media regulators from "political and economic interference".¹⁰⁰ These elements are grouped into four broad categories, encompassing: measures on the appointment, composition and functions of the regulators (such as incompatibility rules, transparent appointing procedures and measures against the arbitrary

⁹⁷ On these topics, see, more recently, P. VALCKE, D. VOORHOOF, E. LIEVENS, "Independent media regulators: *conditio sine qua non* for freedom of expression?", in W. SCHULZ, P. VALCKE, K. IRION, *The Independence of the Media and its Regulatory Agencies*, cited, pp. 57-82, where the soft law documents mentioned and the relevant cases of the ECtHR are discussed at length. As for the latter, in particular, it is noted that the ECtHR has significantly contributed to clarifying how the "ECHR imposes various obligations [...] regarding the organization and functioning" of the independent regulatory bodies for the media; and that although no clear obligation to set them up is established in the ECHR (or through the ECtHR case-law), nevertheless a set of principles spring out of it, echoing, clarifying and enforcing the indications contained in those soft law documents (see pp. 77-78).

⁹⁸ See, respectively, [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(2000\)023&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)023&expmem_EN.asp) and <https://wcd.coe.int/ViewDoc.jsp?id=1266737&Site=CM>. Both documents contain appendixes providing, in the first case, guidelines concerning the independence of the media regulators, and in the second case, an overview of the implementation of these guidelines in the CoE States.

⁹⁹ In the Explanatory Memorandum to the Recommendation (also available at [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec\(2000\)023&expmem_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec(2000)023&expmem_EN.asp)), which clarifies at its outset that the Recommendation is "the first international instrument in the field", it is affirmed that the "main purpose of the regulation of broadcasters' activities by independent bodies is to ensure that the broadcasting sector functions smoothly in a fair and pluralist manner". Moreover, as regards the particular function of granting transmission licenses that independent broadcasting regulators should be entrusted with, the same document explain that this "entails a heavy burden of responsibility [for the latter], given that the choice of operators entitled to establish broadcasting services would determine the degree of balance and pluralism in the broadcasting sector". Furthermore, it is stated therein that such authorities "should monitor compliance with rules on media pluralism". The Declaration, in particular, contains an invitation to the independent regulatory authorities "to be conscious of their particular role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape" (para. IV thereof).

¹⁰⁰ See para. III of the Declaration.

dismissal of their members);¹⁰¹ financial autonomy arrangements; rules on competences and powers (especially regarding regulatory and monitoring functions, as well as the more specific task of granting broadcasting licences); and measures regarding public (and legal) accountability. The Declaration supplements all these indications, highlighting the importance of observing the independence of the media regulators as expert bodies, also in practice, and of ensuring a general “culture of independence” around them, thus going beyond mere legal requirements, which are instrumental to the achievement of their effective and proper independence.

On a different level and more recently, but still in the context of the CoE, it should also be noted that the draft second Protocol amending the ECTT, which has not yet entered into force (and probably never will, for the reasons explained above),¹⁰² contains some (minor) adjustments to its provisions on the institutional cooperation arrangements laid down by the Convention (and described above), one of which is particularly significant in relation to the issues at stake here. Indeed, in modifying Article 19 ECTT, which requires for the Parties to the Convention to take appropriate measures to provide each other with the information necessary for its application, the draft second Protocol proposes that the Parties should cooperate “notably through their competent independent regulatory bodies”.¹⁰³ Evidently, this provision mirrors that of Article 30 of the AVMS Directive and, as in the latter case, (unfortunately) does not in itself contain any specification of the notion of independence for the purpose of its application. However, in the case of the ECTT, it seems that the elements offered by the (soft law) instruments recalled above could provide a concrete basis upon which to reconstruct this notion,¹⁰⁴ as well as predictably having an impact on the

¹⁰¹ Interestingly, the Explanatory Memorandum to the Recommendation (mentioned in fn 99 above) indicates that, concerning the composition of the independent regulatory authorities, they must “respect the principle of pluralism and must not be dominated by any particular group or political party”.

¹⁰² See fn 40 above.

¹⁰³ For the (latest) text of the draft second Protocol, see document T-TT(2009)007FIN, of 24 September 2009, finalised by the Standing Committee at its 44th meeting (T-TT(2009)12, of 10 July 2009), available at the website mentioned at fn 40 above. It could be highlighted here that the proposed adjuncts envisage that the authorities designated pursuant to Article 19 ECTT (corresponding to Article 23 of the proposed new text) should also “where appropriate seek the views of the authorities designated by another Party prior to issuing an authorisation, registering or concluding a contract with a broadcaster whose programme service is to be wholly or principally directed at the territory of that other Party”.

¹⁰⁴ In this context, see para. 379 of the Draft Explanatory Report related to the (draft second) Protocol amending the ECTT (T-TT(2009)009, of 27 February 2009), where it is affirmed that “in most cases the authorities?? designated [for cooperating] will be national or regional regulatory authorities whose status and functions comply with the principles contained in [the Recommendation and the Declaration]”, but it is also (re)affirmed that “the Convention does not require a State Party to institute a specialised broadcasting authority if it does not already have one” (see, on this, also fn 37 above).

development of the same notion in the AVMS Directive (although the fact that work on the review of the ECTT has been abandoned confines this last remark to a rather theoretical speculation).

b) The EU approach

On the part of the EU, the need to interpret and define the independence requirement for media regulatory authorities in relation to media pluralism has clearly arisen within the legislative debate and various other (policy) initiatives surrounding the adoption and application of the AVMS Directive.

As regards the position of the EU institutions involved in the adoption of the latter Directive, it should indeed be acknowledged that both the Commission and the European Parliament in particular plainly endorsed such an approach. The Commission originally envisaged establishing in the Directive that media regulatory authorities should be “independent from national governments as well as from audiovisual media service providers *in order to* be able to carry out their work impartially and transparently and *to contribute to pluralism*”¹⁰⁵. The European Parliament, in its amendments to the Commission text, proposed, furthermore, to strengthen the connection between the establishment of such authorities and their contribution to media pluralism, even in the operative part of the Directive.¹⁰⁶ Although its final text, as now in force, does not contain any of the aforementioned specifications, it nevertheless reflects the interconnection between the role of the independent regulatory authorities and securing media pluralism. Indeed, the Directive indicates that the instruments chosen by

¹⁰⁵ This is the wording of recital 47 (already partially recalled, with *emphases added*) of the original Commission Proposal: see fn 69 above. In this context, see also the speech delivered by former Commissioner Reding (mentioned in fn 70 above), in which she affirmed that an “important aim of [that] legislative proposal – next to consumer protection – is to ensure media pluralism” and that a “means to achieve this is the proper exercise of independent regulatory powers. Therefore the proposal introduces an Article which requires [MS] to guarantee the independence of national regulatory authorities [that] may not be part of a governmental administration and shall also be independent of audiovisual media service providers in order to be able to carry out their work impartially and transparently and thereby to contribute to media pluralism. This proposed obligation to guarantee the independence of national regulatory authorities reinforces the democratic dimension of the proposal”.

¹⁰⁶ For the texts of the EP’s proposed amendments, see fn 73 above: for the EP, the second paragraph of what is now Article 30 AVMS Directive should have stated that MS have “to entrust to national regulatory authorities the task of ensuring that media service providers comply with the provisions of [the] Directive, in particular those relating to freedom of expression, media pluralism, human dignity, the principle of non-discrimination, [etc.]”. Moreover, the EP proposals envisaged affirming in the Directive’s recitals (notably, in what was recital 13), that the Directive “enhances compliance with fundamental rights and seeks to incorporate the principles, rights and freedoms laid down in [the EU Charter of Fundamental Rights], in particular Article 11 thereof” and that, in this context, MS “should set up one or more independent regulatory authorities, if they have not already done so[, which] should act as the guarantors of fundamental rights in the provision of audiovisual media services”.

Member States for its implementation, which are identified as their competent independent regulatory bodies, should more specifically “contribute to the promotion of media pluralism”.¹⁰⁷

Following the enactment of the AVMS Directive, and having regard to its application, the Commission has opened up to (and supported) a number of initiatives, varying in nature, some of which focus on the very issues of national regulatory authorities’ independence and media pluralism. Thus, a study was commissioned (in 2009) on the “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive (INDIREG)”, the concluding report of which was released in February 2011 and contains very detailed theoretical and practical suggestions on this subject matter.¹⁰⁸ Among the various interesting findings, the report states that, for the purpose of the Directive in question, a crucial feature of the independence of regulatory bodies for the media is their effective impartiality against influences from the government (or other political actors) as well as from the media sector, in order to avoid biased supervision and regulation, which hinder media pluralism and diversity.¹⁰⁹

Pending the finalisation of this study, it appears that the Commission has also made some attempt to enforce the independence requirement of a particular national media regulatory authority, as set forth by the AVMS Directive, in order to ensure media pluralism. This occurred against Hungary, where new legislation was passed (at the end of 2010) that, according to the Commission, raised serious concerns of non-compliance with the AVMS Directive, as well as, more broadly, threats to the freedom of expression and media pluralism,

¹⁰⁷ This is now the wording of the last sentence of recital 94 of the AVMS Directive.

¹⁰⁸ For all information concerning the INDIREG study, included the text of the final report, see <http://www.indireg.eu/>. As indicated therein, it had three general objectives: providing a detailed legal description and analysis of the audiovisual media services’ regulatory bodies in the MS, in candidate and potential candidate countries to the EU, and in the EFTA countries, as well as in four non-European countries; analysing the effective implementation of the legal framework in these countries; and identifying the key characteristics constituting an “independent regulatory body” in the light of the AVMS Directive.

¹⁰⁹ See, notably, the INDIREG study’s final report, at para. 4.2.8, where it is also indicated that, for the purposes of the AVMS Directive, a functional rather than an organisational understanding of the independence of media regulators should be adopted. In a nutshell, the report adopts a functional (working) definition of the notion of independence of regulatory bodies in general, whereby a “regulator is independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary”, acknowledging the distinction between formal (or legal) and de facto (or operational) independence, as well the efficient-functioning dimension of that notion. The study did not assess the effective independence of the regulatory bodies in the different countries taken into account (also beyond the EU MS), but provided a tool for the self-assessment of their (formal and de facto) independence (and efficient functioning), which is essentially based on a series of indicators grouped into five sets (or “dimensions”), i.e.: status and powers (such as criteria allowing sufficient autonomy in the exercise of their competences); financial autonomy; autonomy of decision-makers (consisting mainly in appointing criteria); knowledge; and accountability and transparency mechanisms”.

and to the independence of the national media regulator.¹¹⁰ However, the Commission's related investigations were rapidly closed, following agreement on the part of the Hungarian authorities to amend the national legislation in relation to several issues raised by the Commission, which apparently, in the end, did not touch upon the independence of the national regulator.¹¹¹

In the aftermath of the Hungarian 'media pluralism crisis', so to speak, the Commission launched other initiatives to broaden the debate (also beyond the EU law domain). Thus, a High Level Group on Media Freedom and Pluralism (henceforth, the High Level Group), composed of independent experts, was convened with the aim of providing recommendations for its respect, protection, support and promotion in Europe.¹¹² Almost at the same time, a

¹¹⁰ See the Commission Press Release of 11 January 2011 (SPEECH/11/6), reporting a speech of former Commissioner Kroes, in charge of the Digital Agenda, where the subjection of the national media authority to political control through the appointment of its members is indicated among the highlighted problems of the (new) Hungarian legislation on the media, together with the commitment of the Commission in "looking at the difficult issue of criteria for media authority independence". For an exhaustive appraisal of this legislation and all the critical issues, see the report on "Hungarian Media Laws in Europe: An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms", by the Centre for Media and Communication Studies (CMCS) of the Central European University (of 2012, available at <http://cmds.ceu.hu/>). It should be noted here that that Commission initiative ran (to start with) in parallel with other inquiries leading to the opening of infringement proceedings against the same MS on issues concerning also, for instance, the independence of the national DPAs (which eventually reached the ECJ): for the details, see the Chapter above.

¹¹¹ See the Commission Press Release of 16 February 2011 (MEMO/11/89), where it is stated that "all four issues" on which the Commission raised its concerns (i.e.: a general, and hence disproportionate, requirement applicable to all sorts of media to provide balanced coverage of national and European events; the sanctioning of broadcasters falling outside national jurisdiction, contrary to the 'country of origin' principle; a general obligation of registration for all media service providers; and a broadly framed requirement applicable to all content providers not to "cause offence") were addressed by the proposed amendments agreed by the Hungarian authorities, and no trace is to be found therein of the issue of the independence of the media regulator. In its Resolution (P7_TA(2011)0094, of 10 March 2011) on "Media law in Hungary", the EP welcomed the Commission's cooperation with the Hungarian authorities to bring their national media law into conformity with EU law and the commencement of the process of amending the contested legislation, expressing nonetheless its disappointment (also) on the "Commission's decision to target only [some] points in connection with the implementation of the *acquis communautaire* by Hungary and the lack of any reference to Article 30 of the [AVMS Directive], which has the effect of limiting the Commission's own competence to scrutinise Hungary's compliance with the Charter of Fundamental Rights when implementing EU law" (see para. 3 thereof). It should be observed that, apparently, following the CoE's subsequent involvement in the matter, the issue of the media regulator's independence was also tackled and the related rules modified: see G. POLYÁK, "New Criteria for Nomination and Appointment of Media Authority's President" (IRIS 2013-8:1/25, available at <http://merlin.obs.coe.int/iris/2013/8/article25.en.html>).

¹¹² As appears from the words of former Commissioner Kroes, the Commission decided to follow up its "legal demands on Hungary with an EU-wide high level group [...] examining what media pluralism and freedom means in practice, and what can be done to improve the culture and law that supports it", reflecting as well on "whether the EU has sufficient powers in this area to meet public expectations about the defence of media pluralism", while also acknowledging the fundamental role of MS and civil society in this respect (see the former Commissioner's blog post, *Defending media pluralism in Hungary*, of 5 January 2012, at <http://blogs.ec.europa.eu/neelie-kroes/media-pluralism-hungary/>). The High Level Group held its first meeting in October 2011 (see the Commission Press Release, of 11 October 2011, IP/11/1173). All relevant information on the composition and mission of the High Level Group are (also) available at <http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>.

Centre on Media Pluralism and Media Freedom (hereafter, the Centre) was established to develop new and quality thinking on the ways to ensure a highly diverse and free European media landscape.¹¹³ As regards the High Level Group in particular, it is interesting to note that one of its (many) recommendations, contained in the report it issued in January 2013, focuses on the need to strengthen the independence requirements of media regulators in EU law, as well as to establish a network among them.¹¹⁴ A similar proposal was also contained in the policy report released by the Centre in the same period.¹¹⁵

Moving on, the Commission launched a targeted public consultation on the independence of audiovisual regulatory bodies,¹¹⁶ which was run in parallel with another broader consultation covering the whole (or rather, the rest) of the report of the High Level Group.¹¹⁷ By the

¹¹³ For the Commission, the setting-up of the Centre is “a further step in [its] ongoing commitment to improve the protection of media pluralism and media freedom in Europe and establish whether further action needs to be taken at European or national and regional level” (see the Commission Press Release of 7 November 2011, IP/11/1307, where reference is again made to the Hungarian situation mentioned above). All information about the Centre (established in Florence and operating from December 2011) is available at <http://cmpf.eui.eu>.

¹¹⁴ See Recommendation 6 of the High Level Group report (available at <http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>). This Recommendation is part of the section of the report that deals with the role of the EU as regards media freedom and pluralism: after a preliminary finding that “Article 11 of the Charter of Fundamental Rights of the [EU] states that freedom and pluralism of the media should be respected as essential elements of the common vision of a democratic Europe [and that this] means that the EU has a responsibility to observe its adequate implementation and to actively defend basic democratic values, including media freedom and pluralism”, and having regard notably to cross-border issues within the Single Market, it is highlighted that an “area where there is a need for some degree of harmonisation is in defining the composition and role of [audiovisual media] regulators” (see, respectively, section 2, p. 17, and sub-section 2.3, p. 22 thereof).

¹¹⁵ See the Centre’s policy report on “European Union Competencies in Respect of Media Pluralism and Media Freedom”, of January 2013, available through the Centre web-site (mentioned at fn 113 above), where it is notably affirmed that the “possibility of legislative and structural intervention [on the part of the EU] that could help fostering media freedom and media pluralism relates to the governance of the audiovisual media services and, so, to the role of the national regulatory authorities in the audiovisual sector” (see chapter 4, section 6, p. 113 thereof).

¹¹⁶ The consultation was launched on 22 March 2013 and closed on 14 June 2013: the text of the consultation and the responses received are available at <https://ec.europa.eu/digital-agenda/en/news/public-consultation-independence-audiovisual-regulatory-bodies-read-contributions>.

¹¹⁷ This broader consultation was also launched on 22 March 2013 and closed on 14 June 2013: the text of the consultation and the contributions received, as well as a summary of the latter, are available at <https://ec.europa.eu/digital-agenda/en/news/public-consultation-independent-report-hlg-media-freedom-and-pluralism---read-contributions>. Interestingly, in the text of the consultation, the Commission mentioned that the “decision on any possible follow-up actions will be based on an in-depth analysis of the competences of the [EU, recalling that], following its Article 51(2), the Charter of Fundamental Rights does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. Moreover, it should be noted that the two aforementioned consultations were accompanied by another one, also run at almost the same time (notably, from 24 April 2013 to 30 September 2013), centred on the Commission Green Paper on “Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values” (COM(2013) 231 final, of 24 April 2013; for the responses received by the Commission, see <http://ec.europa.eu/digital-agenda/en/news/consultation-green-paper-preparing-fully-converged-audiovisual-world-growth-creation-and-values>): in the intentions of the Commission, inputs from the first two consultations “will also feed into the debate on convergence” as opened by this third consultation (see the Commission Press Release of 24 April 2013, MEMO/13/371).

Commission's own admission, the first specific consultation did not foresee, nor imply, any possible amendment or extension to the substantive rules provided for by the AVMS Directive, but focused exclusively on the functioning of independent media authorities (notably, their organisation, status, competences and resources) when acting within the scope of that Directive. Indeed, it aimed to explore which of the options put forward by the Commission itself was best suited to the recommendation of the High Level Group, which was not only supported by the (abovementioned) policy observations of the Centre and the inputs of the INDIREG study (referred to above), but also arose from other studies conducted over the same period,¹¹⁸ as well as from a proposal to adopt a legislative act (namely, a Directive) on media pluralism, made by citizens pursuant to Article 11(4) TEU (and Article 24 TFEU),¹¹⁹ and even from a resolution adopted by the European Parliament.¹²⁰ Against the background of the role that independent media regulatory bodies can play in preserving the freedom and pluralism of the media, and taking into account the limitations of Article of the 30 AVMS Directive that have clearly emerged partly from its (difficult) enforcement,¹²¹

¹¹⁸ See, in particular, and most recently, the project on "European Media Policies Revisited: Valuing and Reclaiming Free and Independent Media in Contemporary Democratic Systems" (so-called MEDIADDEM project, which was run from April 2010 to March 2013, within the Seventh EU Framework Programme, and covered a series of EU MS and candidate countries), and notably its final policy brief (of March 2013) where, among the recommendations for policy-makers, it was suggested to improve governance arrangements on the part of EU institutions, which should assist the MS "in developing mechanisms that promote regulatory independence and effective policy-making processes more broadly" and should "carefully consider the imposition of a requirement for the independence of public regulators" when reviewing the AVMS Directive (see p. 8 thereof). In this context see also, among the various documents elaborated within that project, the "Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the MEDIADDEM countries" (of September 2012) and the comparative report on "The regulatory quest for free and independent media" (of July 2012; notably section 7 thereof), all available (as the final policy brief) at <http://www.mediadem.eliamep.gr/>. It should be mentioned that the consultation document also recalls the study on "Indicators for Media Pluralism in the Member States – Towards a risk based approach", referred to in Part I.

¹¹⁹ The object of the so-called "European Initiative for Media Pluralism" (the details of which are available at <http://www.mediainitiative.eu/>), introduced according to Regulation (EU) No 211/2011 of the EP and of the Council, of 16 February 2011 on the citizens' initiative (OJ [2011] L 65/1), was to amend the AVMS Directive (to adopt a new Directive) "aiming at a partial harmonisation of national rules on media ownership and transparency, and setting EU standards for the sufficient independence of the media supervisory bodies, also as necessary steps towards the correct functioning of the internal market", and had among its objectives the setting of clear rules requiring MS "to invest independent authorities with the necessary powers to apply the rules, and therefore guarantee their independence vis-à-vis economic and political influence". The initiative was (re)registered with the Commission in August 2013 [but did not obtain the necessary support (in terms of number of signatures) to go through the whole procedure]: see <http://ec.europa.eu/citizens-initiative/public/initiatives/finalised/details/2013/000007/en?lg=en>. It could be added here that, in its 2011 Resolution on the Hungarian situation (mentioned above, at fn 111 above), the EP also called on the Commission to propose a legislative initiative on media freedom, pluralism and "independent governance".

¹²⁰ See the EP Resolution of 21 May 2013 on the "EU Charter: standard settings for media freedom across the EU" (P7_TA(2013)0203), notably paras. 36-37 thereof.

¹²¹ Interestingly, in the consultation text (notably, para. 3 thereof), the Commission indicates that Article 30 AVMS Directive "does not specifically address how the independence of audiovisual regulatory bodies should

almost all of these options (apart from the one on maintaining the status-quo) consisted in calls to intervene either through legislative or non-legislative instruments.¹²² In all cases they (also) envisaged the possibility of providing for the “formalisation” of cooperation between the national audiovisual regulatory bodies. It does not come then as a great surprise that an outcome of that consultation was in fact the formalisation of such cooperation, the analysis of which will be developed below.

2.3 The creation of the European Regulators Group for Audiovisual Media Services (ERGA) and prospective institutional developments in EU audiovisual media law

The picture that emerges from the considerations above is extremely rich and in (almost) constant development. In fact, as mentioned, especially following the (most recent) initiatives and debates, significant institutional changes have been introduced with the aim of strengthening cooperation among national regulatory authorities within the EU legal order. In the following and concluding pages, the most significant of these innovations – the establishment of a formal network of regulatory authorities for the media operating at supranational (EU) level – will be considered first. Then, against that background, a critical appraisal will be performed and possible future developments in institution setting in the field of audiovisual media regulation on the part of the EU will be considered, in the broader context of events taking place in connected sectors.

2.3.1 The formalisation of cooperation among independent media regulators within the EU: the case of ERGA

As recalled above, the 2013 report of the High Level Group recommended (amongst other things) the formalisation of cooperation between regulatory bodies in the field of audiovisual media services “to share common good practice and setting quality standards”.¹²³ As

be ensured” (in contrast to other sectors), and as such “does not oblige [MS] to guarantee [their] independence” (sic!).

¹²² The Commission assumed, as alternatives, either reinforcing its existing instruments (such as its monitoring of the quality of MS’ regulatory independence), or setting explicit legal requirements for MS to guarantee the independence of the national regulatory bodies (without, however, giving precise guidance on that and leaving discretion to MS themselves), or providing through EU law detailed characteristics to be observed by those bodies (taking inspiration from the rules in place in the field of electronic communications).

¹²³ See Recommendation 6 thereof (mentioned at fn 114 above).

acknowledged by the Commission, the public consultation on the independence of audiovisual regulatory bodies that followed the release of that report (referred to above) revealed a conviction, among the majority of the respondents, about the importance of cooperation between such bodies in the convergent environment and (prospectively) their “legally mandated gathering” at EU level.¹²⁴ Moreover, in the meantime, the Council, noting that the EU regulatory framework for audiovisual media services (i.e., the AVMS Directive) “contributes to the fostering of media freedom and pluralism [and that a] crucial role in the enforcement of this framework lies with competent audiovisual regulatory authorities in Member States”, not only called on the latter to ensure the independence of these authorities, but also invited the Commission to strengthen cooperation among them.¹²⁵ It is against this backdrop that the Commission adopted a Decision establishing the European Regulators Group for Audiovisual Media Services (or the ERGA; henceforth, the “ERGA Decision”).¹²⁶ As a starting point, it is interesting to speculate about the (legal) nature of the ERGA Decision. In fact, besides what has been noted above (about the previously mentioned public consultation), even before the adoption of this Decision, the legal form of the action to be taken in order to strengthen cooperation between Member States’ audiovisual regulatory authorities constituted a point of contention, especially between the Council and the Commission. Indeed, while the Council invited the Commission, within its competences, to achieve this result “through non-legislative actions”, the latter manifested its disagreement towards such a formula and indicated its preference for “a more open wording”.¹²⁷ The ERGA Decision was ultimately adopted in response to this invitation (and the aforementioned similar recommendations) is based directly on the Treaties (notably, the TFEU), and makes specific reference in the recitals to the AVMS Directive and its Article 30.¹²⁸ It does not, however,

¹²⁴ See the Commission Press Release of 3 February 2014 (IP/14/101).

¹²⁵ See the “Council Conclusions and of the representatives of the Governments of the Member States, meeting within the Council, on media freedom and pluralism in the digital environment”, adopted at the “Education, Youth, Culture and Sport Council meeting” (held in Brussels, on 25-26 November 2013), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/139725.pdf (notably, paras. 6, 18 and 24 thereof), in which the Council also agrees that “cooperation and sharing of best practice among audiovisual regulatory authorities and other relevant competent authorities contributes to the functioning of the EU single market and to an open and pluralistic media landscape” (para. 14 thereof).

¹²⁶ See the Commission Decision, of 3 February 2014, C(2014) 462 final (available, together with all other information and documents concerning the ERGA, at <https://ec.europa.eu/digital-agenda/en/avmsd-audiovisual-regulators>, but not published in the OJ). See also the Commission Press Release IP/14/101, mentioned at fn 124 above. Any further simple reference to “the group” is to be intended as to the ERGA.

¹²⁷ See the Council Conclusions (mentioned at fn 125 above), again para. 24.

¹²⁸ See notably recitals 1 and 2 of the ERGA Decision. In this context, see also the public consultation document (mentioned at fn 116 above), where it is affirmed that, at “the moment, Article 30 [of the AVMS Directive]

seem to be a legislative act, but rather a sort of organisational decision on the part of the Commission, establishing a formal expert group for the purpose of providing itself with advice and expertise (in the sector at stake), within the broad framework adopted by that institution for the setting-up of similar groups.¹²⁹

Thus, ERGA appears to be a permanent advisory body to the Commission,¹³⁰ which is deprived *de facto* (and also *de jure*) of any proper independence from the latter, although its formal establishment implies some autonomy, especially if compared to similar pre-existing entities. Indeed, although nothing of this emerges from the ERGA Decision, informal groups encompassing, notably, the national audiovisual regulators did exist prior to ERGA (and have now been terminated and substantially replaced by ERGA itself). In particular, starting from 2003, the Commission convened informal (and normally) annual meetings of what was called at the time the “High Level Group of Regulatory Authorities in the field of Broadcasting”, and later (apparently, from 2005) the “Working Group of EU Audiovisual Regulatory Authorities”. Given its informal character, little information is available about the functioning of this High Level/Working Group, and there are few traces of its activities¹³¹. From a reconstruction of the information available, it seems that this Group, whose existence did not stem from the EU regulatory framework on audiovisual media services (nor from the old Community one on television broadcasting), and whose operation (without any codified rules of procedure) was entirely subject to the Commission organising its meetings and setting the agenda, was intended to provide the latter (as well as the regulators who were members of the Group) with an opportunity to discuss the implementation of specific provisions in the

constitutes the basis for strengthened cooperation between regulatory authorities and the Commission in order to promote better enforcement of the rules of the Directive” (para. 4 thereof).

¹²⁹ See the Communication from the President to the Commission on the “Framework for Commission expert groups: horizontal rules and public Register” (C(2010) 7649 final, of 10 November 2010); see also the Commission Staff Working Document (SEC(2010) 1360 final, of 10 November 2010), accompanying that Communication (which followed other actions adopted as consequences of the notorious Commission White Paper on “European Governance”, COM(2001) 428 final, of 25 July 2001). In brief, it results from these documents that Commission expert groups (divided into formal and informal ones, depending on whether they are established, respectively, on the basis of a Commission Decision or by action of a Commission Service with the agreement of the Secretariat General of that institution) are consultative entities set up for the purpose of providing advice and expertise notably for the preparation of legislative proposals and policy initiatives (in the framework of the Commission’s right of initiative), the preparation of delegated acts (for the purposes of Article 290 TFEU), or the implementation of existing EU legislation, programmes and policies as well as coordination and cooperation with MS and stakeholders in that regard. Besides (but somewhat different from) expert groups, “other similar entities” are also envisaged to operate to a similar extent: see fn 2 above.

¹³⁰ See Article 1 of the ERGA Decision.

¹³¹ Some information is to be found in the Commission reports on the application of the TWF Directive and also in the very first one on the AVMS Directive, which will be mentioned in fn 132 below. As regard the Working Group, see the information accessible through the Register of Commission expert groups and other similar entities (for which see fn 2 above) and (also) the public consultation document mentioned at fn 116 above.

regulatory framework, especially in relation to particular events involving their application, although it may have also laid the foundations for broader cooperation among the regulators (as well as with the Commission).¹³²

In order to appreciate the institutional improvements brought about by the formalisation of this cooperation, especially in relation to the role and functioning of the ERGA and its (more autonomous) margin of manoeuvre – despite it being pervasively overseen by the Commission – it is useful to analyse the content of the ERGA Decision, as supplemented by the ERGA Rules of Procedure adopted by the Group.¹³³

In this respect, regarding the provisions on membership, the ERGA is indeed composed of the national independent regulatory bodies in the field of audiovisual media services, represented by their heads (or the nominated high level representatives of the national regulatory body with primary responsibility for overseeing audiovisual media services, “or[,] in cases where there is no national regulatory body[,] by other representatives as chosen through their procedures”).¹³⁴ However, a Commission representative participates in its meetings, which

¹³² See the Fifth Commission Report on the application of the TWF Directive (mentioned in fn 34 above), where it is affirmed that, although the latter “does not explicitly refer to the national regulatory authorities, the Commission organised on 27 March 2003 the inaugural meeting of the High Level Group of Regulatory Authorities, which [brought] together the [MS] authorities responsible for the enforcement of broadcasting regulation. These meetings, which [were] held on average twice a year, [were] aimed at reinforcing cooperation between national regulatory authorities so as to ensure the consistent application of the EU regulatory framework” (para. 3.7.2 thereof). See also the Sixth Commission Report on the application of the TWF Directive (COM(2007) 452 final, of 24 October 2007), where it is mentioned that, further to “the meeting in March 2005 on the issue of incitement to hatred in broadcasts from outside the [EU, former] Commissioner Reding convened the [Group] for an annual meeting in March 2006[, during which several] issues were discussed, in particular the follow-up to some of the commitments undertaken in March 2005 to safeguard the fundamental freedoms enshrined in the [EU] Charter of Fundamental Rights and in the [ECHR]” (para. 2.6 thereof; for both these meetings, the interesting conclusions are available at http://ec.europa.eu/archives/information_society/avpolicy/info_centre/library/legal/index_en.htm#Other). And again, see the Seventh Commission Report on the application of the TWF Directive (COM(2009) 309 final, of 26 June 2009), where it is generally said, without any specific reference, that meetings “with the regulators took place [twice] to have an exchange of views on the new provisions contained in the now re-named [AVMS Directive] and to update regulators through discussions held with the Contact Committee” (para. 2.7.2 thereof). Finally, see the First Commission Report on the AVMS Directive (COM(2012) 203 final, of 4 May 2012), where it is simply mentioned that discussions took place with the [then] Working Group to closely follow technological developments.

¹³³ The (detailed) ERGA Rules of Procedure (of 4 March 2014) were adopted by the group itself, pursuant to Article 5(3) of the ERGA Decision, upon a proposal from the Commission made on the basis of the standard rules of procedure contained in (an annexed to) the Commission Staff Working Document mentioned in fn 129 above. From the minutes of the ERGA inaugural meetings (held that same date), it results that the ERGA Rules of Procedure do not depart very much from their general draft model, although they could be (further) amended (as provided for by Article 20 thereof), but “subject to the approval of the Commission” (sic!; *ibid.*). Lastly, it could be noted that, in general, according to the cited Commission Staff Working Document, the adoption of rules of procedure for formal expert groups is not mandatory.

¹³⁴ See Article 4(1) of the ERGA Decision. See also recital 6 thereof, where it is affirmed that for the MS “where there is no regulatory body in the field of audiovisual media services at national level, but where regulatory bodies exist at other levels, it will be up to those regulatory bodies within one [MS] to decide on their single representation in the [ERGA].” The list of the ERGA-nominated members is available, pursuant to Article 4(2)

can also be attended by invited observers and experts.¹³⁵ The Commission representative and observers participate in the discussions but do not have voting rights, which are only bestowed upon the ERGA members, with one for each of them (or rather, for “each Member State”).¹³⁶

Concerning the ERGA’s tasks, the ERGA Decision not only requires (evidently, because of its nature as a Commission expert group) the group to advise and assist the Commission in the (achievement of consistent) implementation of the EU regulatory framework for audiovisual media services, as well as in “any matter” related to these services “within the Commission’s competence”, but also, more broadly and in common with other expert groups, “to provide for an exchange of experience and good practice” regarding the application of that regulatory framework and, more specifically to the ERGA, to cooperate and provide its members with the information necessary for the application of the AVMS Directive, as entailed by Article 30 thereof.¹³⁷

Finally, as for the operational and functioning arrangements of the ERGA, the Group elects its Chairperson (and up to two Vice-Chairpersons) from amongst its members by a two-thirds majority vote of all members, for a one-year mandate.¹³⁸ The Chairperson is responsible, in

of the ERGA Decision through the Register of Commission expert groups and other similar entities (for which see fn 2 above): for the practical arrangements on the representation of the delegations, see Article 1 of the ERGA Rules of Procedure. It could be noted here that the ERGA Decision seems to presuppose the existence in all MS of an independent media regulator (either at national or at a different level) and this in fact would seem to be the case, as every MS is represented in the ERGA.

¹³⁵ See notably Article 5(4) of the ERGA Decision and Article 2 of the ERGA Rules of Procedure. As regards observers (all to be invited by the Commission), the EEA/EFTA States do have this status (*ex officio*), while candidate countries for accession to the EU, as well as (representatives of) the EP, “may” be invited in fact as observers (as it is actually the case). In principle, observer status can also be given to individuals. The Commission may also invite “organisations” as observers (either following a proposal of the group or at its own initiative): this is the case (expressly mentioned in the ERGA Rules of Procedure) of the EAO and EPRA. As regards experts, the Commission may invite them, on ad hoc basis, following a proposal by the group. Finally, it could be observed that, according to Article 5(7) of the ERGA Decision, “Commission officials with an interest in the proceedings” may attend ERGA meeting.

¹³⁶ See recital 6 of the ERGA Decision, as well as Article 1(1) and (4) and Article 2(2) of the ERGA Rules of Procedure. Clearly invited experts also do not have voting rights, as they have to withdraw when the group moves to a vote (see Article 2(3) of the ERGA Decision).

¹³⁷ See Article 2 of the ERGA Decision (mirrored by Article 3 of the ERGA Rules of Procedure). See also Article 3 thereof, stating that the Commission “may consult the group on any matter relating to audiovisual media services”, while the group “may advise the Commission to consult [it] on a specific question”. As results from the model rules of procedure (mentioned in fn 133 above), this last provision is intended for cases where the Commission does not chair the expert group.

¹³⁸ See Article 5(1) of the ERGA Decision in conjunction with Article 4 of the ERGA Rules of Procedure, which provides detailed arrangements for the election of the Chairperson and Vice-Chairpersons, including a system of rotation between these two posts. It specifies that the Commission representative cannot become Chairperson of the ERGA.

particular, for drawing up the agenda for meetings, in consultation with the Commission,¹³⁹ and convening them, in agreement with the Commission representative,¹⁴⁰ with the support of the ERGA Secretariat, which is also provided by the Commission.¹⁴¹ Moreover, on the one hand, (again) in agreement with the Commission representative, the ERGA can set up thematic sub-groups to examine specific questions on the basis of pre-defined terms of reference endorsed by a plenary meeting of its members.¹⁴² On the other hand, the ERGA can establish a “Contact Network” of representatives of all its members and observers on its own, to facilitate the coordination of proposals to be discussed at the ERGA meetings.¹⁴³ Furthermore, to fulfil its task, it is provided for the ERGA to set an “Annual Work Programme”;¹⁴⁴ to organise (“in justified cases”) public consultations in order to collect input and comments from stakeholders to (better) advise the Commission;¹⁴⁵ as well as generally, and most significantly, to adopt “opinions, recommendations or reports” (i.e., non-binding acts),¹⁴⁶ as far as possible by consensus, or otherwise by a two-thirds majority of the

¹³⁹ See Article 6 of the ERGA Rules of Procedure, where the role of members in agenda setting is also emphasised.

¹⁴⁰ See Article 5(2) of the ERGA Decision and Article 7 of the ERGA Rules of Procedure, where in particular it is stated that meetings can take place at the initiative of the Chairperson, or at the request of a simple majority of the ERGA members, and that there will normally be two meetings each year (while extraordinary meetings may be convened when necessary), with a necessary quorum of at least two-thirds of all voting members (present or represented by other members). Interestingly, the latter provision takes into account and dictates procedural norms on possible conflicts of interests arising in relation to a member of the ERGA (basically, providing for the abstention from discussion and voting on the conflicting item). According to Article 5(7) of the ERGA Decision, meetings have to be held on Commission premises.

¹⁴¹ See Article 5(7) of the ERGA Decision and Article 5 of the ERGA Rules of Procedure. The specific tasks of the Secretariat are detailed in several provisions scattered throughout the ERGA Rules of Procedure: among the many, for instance, the Secretariat drafts (under the responsibility of the Chairperson) the summary minutes of the meetings, which are then normally made publicly available through the ERGA web-site (mentioned in fn 126 above).

¹⁴² See Article 5(5) of the ERGA Decision and Article 13 of the ERGA Rules of Procedure. In particular, sub-groups consist of experts from the MS and can also include observers. Such groups have to be disbanded as soon as their mandate is fulfilled.

¹⁴³ See Article 14 of the ERGA Rules of Procedure, where it is also provided for the Contact Network (which is not mentioned in the ERGA Decision), to act as a platform for cooperation and the exchange of information itself sometimes.

¹⁴⁴ See Article 12 of the ERGA Rules of Procedure, detailing the various steps for the adoption of the Annual Work Programme (not mentioned in the ERGA Decision), a draft of which is to be prepared by the Chairperson, “in agreement with the Commission”.

¹⁴⁵ See Articles 9(1)(c) and 15 of the ERGA Rules of Procedure.

¹⁴⁶ See Article 5(8) of the ERGA Decision and Articles 9-10 of the ERGA Rules of Procedure. Regarding the adoption of the three types of acts, as specified in Article 9(1)(a) of the ERGA Rules of Procedure, it is interesting to highlight that no reference is made therein to the Commission: in this respect, it appears from the minutes of the ERGA inaugural meeting (when its rules of procedure were adopted) that the Commission made reservations on the formulation of that provision, as it would have preferred (but did not obtain, in the end) a wording clarifying that the ERGA “can only adopt acts at the request of the Commission, given its status as an expert group”.

members' votes, in (usually) confidential deliberations,¹⁴⁷ while (in principle) all relevant documents are made publicly available.¹⁴⁸

Last but not least, it should be pointed out that the ERGA is intended to work within a context where other fora for cooperation already exist and continue to operate: not only within the EU legal order,¹⁴⁹ but also beyond it. In the EU in particular, the enduring functioning of the Contact Committee, established pursuant to (now) Article 29 of the AVMS Directive (and analysed above),¹⁵⁰ should be taken into account, notably in view of its (material) scope of action, which overlaps with that of the ERGA, as well as their similar status.¹⁵¹ In this context, the ERGA Decision makes it clear that the work of the latter “should be distinct” from that of the Contact Committee.¹⁵² However, this distinction does not entail either incommunicability or the absence of any link between the two. In fact, the (institutional) relationship between (the work of) the ERGA and the Contact Committee could be seen in terms of complementarity, especially if one considers that their respective tasks are (partially) different and the actors involved in these two entities are not the same, as the national independent regulators for audiovisual media services composing the former are not (necessarily, or rather normally) part of the latter, which is (mostly) intended to foster cooperation at governmental

¹⁴⁷ See Article 10 of the ERGA Rules of Procedure, headed “Decision making procedure”, where, besides the practical arrangements, it is also provided that, in “addition to the possibility to attach dissenting opinions, any member [of the ERGA] has the right to include its individual views as an annex in the opinions, recommendations and reports adopted”. See also Article 18 thereof, where (by way of derogation) it is provided that, in “agreement with the Commission [...], the group may, by a simple majority of its members, decide to open its deliberations to the public”.

¹⁴⁸ See Article 5(9) of the ERGA Decision.

¹⁴⁹ Besides what will be specifically addressed below, one could also note that, among the relevant cooperation fora with an impact on the EU regulatory framework for audiovisual media services, the ERGA Decision itself refers to an “enforcement cooperation network [already existing in EU] legislation for the protection of consumer economic interests, which is also competent for matters pertaining to the enforcement of consumer protection rules laid down in the [AVMS] Directive[, so that the ERGA] should cooperate as appropriate with the competent authorities” in that network (for which see Regulation (EC) No 2006/2004 of the EP and of the Council, of 27 October 2004, on cooperation between national authorities responsible for the enforcement of consumer protection laws, also indicated as “the Regulation on consumer protection cooperation”, OJ [2004] L 364/1, as amended).

¹⁵⁰ The disbanding of the Contact Committee does not seem to have ever been considered so far (as its foundations continue to be provided for by the AVMS Directive). On the contrary, in the text of the public consultation on the independence of audiovisual regulatory bodies (mentioned at fn 116 above), it is affirmed that the formalisation of cooperation between these bodies “would not have any impact on the existence and functioning of the Contact Committee, [as the latter] proved very useful for the exchange of information and opinions between the [MS] and the Commission”.

¹⁵¹ It should be recalled indeed that, while the ERGA is qualified as a “Commission expert group”, the Contact Committee is classified as a “similar entity” to such groups: see fn 2 and 129 above.

¹⁵² See recital 7 of the ERGA Decision.

level.¹⁵³ Thus, the ERGA and the Contact Committee may, in view of the different roles and competences of their respective members, deal with different matters or, even when possibly tackling the same issues, offer different perspectives, fostering enriched solutions.¹⁵⁴ Certainly, for the sake of achieving consistency in the implementation of EU law, the Commission can contribute to ensuring some connection and coherence between the work of those two entities, given its crucial, albeit somewhat different, role in both of them.

Beyond the EU legal order, even more interaction can be imagined to take place between the ERGA and EPRA, which has long been almost the only forum for cooperation specifically among media regulators at the European level (see above). Indeed, the members of these two entities are the same (i.e., exclusively the national independent regulatory authorities for the media), at least if only the representatives of the EU Member States' competent bodies are considered, as EPRA has a much broader geographical scope than the EU. Nonetheless, the more ample scope of action of EPRA in relation to that of the ERGA may in itself entail different approaches on the part of these two entities, especially taking into account the fact that the former does not only deal with issues regarding the application of the EU regulatory framework for audiovisual media services. Moreover, these differences increase when the different institutional setups are considered: EPRA having a more informal character in comparison to the ERGA. Furthermore, and finally, the remits of these two entities differ, as EPRA does not engage in making common statements or adopting any formal act that could be attributed directly to it, while this is precisely (one of) the desired output(s) stemming from the formalisation of cooperation among media regulators at EU level. It therefore seems that the relationship between the ERGA and EPRA can be depicted and envisaged, for the near future, in terms of complementarity in the work of the two cooperation fora.¹⁵⁵

¹⁵³ Curiously, the aforementioned recital 7 of the ERGA Decision describes the Contact Committee as “composed of representatives of the [national] *competent independent regulatory bodies*” (*emphasis added*), while it appears that this is actually the case of only a few MS delegations, where those bodies are represented together with governmental officials (very few being the MS that have chosen to be represented in the Contact Committee only by the former): see also fn 2 above.

¹⁵⁴ A hint on this is dropped by the AVMS Directive itself: see notably recital 95 (already cited, partially, at fn 84 above), where it is affirmed that “close cooperation between [MS] *and* between their regulatory bodies is particularly important [for instance] with regard to the impact which broadcasters established in one [MS] might have on another [MS]” as well as in “all fields” coordinated by the Directive (*emphasis added*).

¹⁵⁵ See again, for instance, the text of the public consultation on the independence of audiovisual regulatory bodies (mentioned at fn 116 above), where it is affirmed that the formalisation of cooperation among media regulators at EU level “could provide added coherence inside the Internal Market and a more harmonious application of [EU] law than a voluntary cooperation at the international level, as it already exists in the form of [EPRA]”.

2.3.2 Some concluding remarks: what for the (near) future?

Against this background, it could be claimed that the very formalisation into the ERGA of (the pre-existing rather informal) cooperation experience among national independent media regulators within the EU could have an impact on the effectiveness of that cooperation, and in turn on the delivery of efficient and quality results. To that end, institutional arrangements prove to be important. In this respect, as a Commission expert group, the ERGA does not appear to possess excessively strong and particular institutional settings. However, on the one hand, the ERGA represents a significant evolution from previous single-issue-solving and entirely Commission-dependent basic cooperation schemes (such as the “High Level”/“Working Group” type of fora, mentioned above). On the other hand, in comparison to the standards set for those groups, the ERGA does have some interesting and distinctive features. In fact, as noted above, it has a Chairperson elected internally from among (its members, i.e. the representatives of) the national regulators, with responsibility for setting the agenda and running the meetings. The ERGA also has its own rules of procedure containing some peculiar provisions, such as the one allowing it to adopt its own Annual Work Programme (albeit prepared in agreement with the Commission) and, significantly, the one providing for the ERGA to adopt opinions, recommendations and reports, in general, even when not requested by the Commission. In this context, however, it is made clear that neither the national independent media regulators which are members of the ERGA, nor the Commission, are bound by these acts, although they all have to “take the utmost account of such documents”.¹⁵⁶

Overall, on the basis of all the foregoing considerations, it seems that, while the ERGA is intended to function essentially as a catalyst to feed the Commission with expertise gathered from its own members’ experiences, as well as from those of stakeholders (in the latter case through public consultations), it undoubtedly also constitutes a forum for the identification of collective concerns, discussion of shared solutions and agreement on common approaches among its members. This takes place especially regarding issues falling within the EU regulatory framework for audiovisual media services, and potentially also in relation to matters that are not directly addressed by the latter but fall within the competences of

¹⁵⁶ See Article 9(2) of the ERGA Rules of Procedure. In this respect, it should be noted that, according to the standards for Commission expert groups (as results from the Commission documents mentioned at fn 129 above), it is in fact a common feature of the latter not to take binding decisions, while the same standards provide that they “may” formulate opinions and recommendations or submit reports.

independent regulatory authorities in the audiovisual media field, such as media pluralism.¹⁵⁷ The ERGA could therefore be seen to be laying the foundations for possible coordination, besides cooperation, among national independent regulators for the media, especially through some sort of policy making, or at least by impacting policy choices, which can result from an officially recognised entity, even if the terms of its participation in the policy/decision making process are not clearly, nor strongly, defined.¹⁵⁸ These features appear really quite distinctive in relation to those of other existing cooperation fora both within and outside the EU (such as, respectively, the Contact Committee and EPRA, taking into account their differences).¹⁵⁹ Moreover, the further cooperation (or even coordination) fostered by the ERGA could prove particularly interesting as long as it (also) touches upon matters that are not directly, nor completely, covered by EU law, such as media pluralism and the independence of media regulatory authorities. It is important to note that both topics have already attracted the attention of the ERGA and led, especially in the second case, to some (preliminary policy) results. As regards media pluralism, while it is not mentioned in the ERGA Decision, since its first meeting proposals (from the ERGA Chairperson) have been made for it to be included as a topic for the ERGA Annual Work Programme (for 2014 and 2015).¹⁶⁰ In fact, it appears that discussions in the ERGA on media pluralism are/will be related to the other topic mentioned above, that is to the independence of media regulatory bodies. It is in this context that the ERGA set up one of its first sub-groups, which has already delivered an ad hoc “Statement”

¹⁵⁷ These are indeed also the auspices, or at least the indications (of the Commission) emerging (once again) from the text of the public consultation on the independence of audiovisual regulatory bodies (mentioned at fn 116 above): see notably para. 4 thereof.

¹⁵⁸ See, in particular, recital 4 of the ERGA Decision where it is affirmed not only that that group “should serve as an advisory body to the Commission in its implementation activities concerning areas coordinated by the [AVMS Directive]”, but also that, by taking into account enforcement practices and practical problems arising from the application of [that Directive] and facilitating *coordination* and cooperation between the national regulatory bodies in the [MS], and between those bodies and the Commission, it would contribute to the consolidation of the internal market for audiovisual media services” (*emphasis added*). In this last regard, recital 3 of the ERGA Decision specifies that, in order “to achieve a successful development of an internal market for audiovisual media services notably in view of increased cross-border distribution and the regulatory challenges linked to on-demand services, a coherent application of [the AVMS Directive] in all [MS] is essential” and that in turn to achieve “this goal it is crucial to facilitate a closer and more regular cooperation between the competent independent regulatory bodies of the [MS] and the Commission”.

¹⁵⁹ As regards notably EPRA (which is more closely comparable to the ERGA, in view of their partially identical composition), it is in fact within its remit not to engage in policy making (as noted above).

¹⁶⁰ The minutes of the inaugural meeting, as well as the ERGA work programmes, are available through the website mentioned in fn 126 above. Interestingly, it emerges from the former document that the meeting’s discussion on the introduction of the topic of media pluralism in the first ERGA Annual Working Programme (2014) followed an exchange of views with EPRA (Chairperson).

on the issue, subsequently adopted by the whole ERGA (by a large majority vote, following some discussion and compromise).¹⁶¹

Of course, remaining within the institutional perspective, one could argue that the ERGA's 'voice' could be better heard, and the impact of its work could be more significant, if it evolved towards a more autonomous and institutionally sound status, grounded in EU law.¹⁶² In fact, comparing the developments that have taken place in neighbouring (legal) domains to that of audiovisual media services, such as in the fields of electronic communications regulation and data protection legislation, setting aside the case of equality law (all discussed at length above), it becomes apparent that institutional cooperation at EU level among the respective national bodies has been significantly strengthened. Considering, for instance, the case of electronic communications regulation, which is intrinsically and increasingly connected with the regulatory framework for audiovisual media (especially for technological reasons, as discussed above), it is clear that a very similar institutional set-up to the ERGA, such as the ERG, which did exist for a long time, was later transformed into a more sophisticated (albeit peculiar, as discussed above) EU agency (such as BEREC, or rather the BEREC Office), which has not in any way replaced national independent regulatory authorities, the latter being constituent parts of this (complex) entity. Although suggestions have been made in support of structuring and aligning a network of national independent audiovisual media regulatory authorities somewhat along the lines of EU electronic

¹⁶¹ See the minutes of the ERGA second meeting (of 21 October 2014; ERGA(2014) 14, available through the web-site mentioned in fn 126 above). See also the (brief) text of the "ERGA statement on the independence of NRAs in the audiovisual sector" (ERGA(2014) 03; available through the same web-site), where it is stated, *inter alia*, that in "the audiovisual field, in particular, the principle of independence is central to enable regulators to have effective oversight of the sector and to carry out their regulatory functions efficiently in areas covered by the European audiovisual framework such as audience protection, including the protection of minors, freedom of expression, diversity, pluralism and other areas such as media ownership", and added that, based on regulatory best practice in related sectors, the key characteristics to fulfil that requirement encompass: "independence both from private parties (including regulated entities) and public authorities; transparent decision-making processes and accountability to relevant stakeholders; open and transparent procedures for the nomination, appointment and removal of Board Members; knowledge and expertise of human resources; financial, operational and decision making autonomy; effective enforcement powers; availability of dispute resolution mechanisms; the possibility only for judicial power to review the NRAs' decisions"; while it concludes by asking the Commission, "as the initiator of [EU] legislation, to take the considerations [made in the Statement] and the following ERGA work into account in the context" of any future review of the AVMS Directive.

¹⁶² As noted above, any room for autonomy of the ERGA is severely affected by the Commission's role and presence within it. Moreover, the ERGA does not appear to have any financial independence (in fact, the costs for its functioning are covered by the Commission: see notably Article 6 of the ERGA Decision), nor any particular feature supporting any form of independence whatsoever (a requirement that is never mentioned with reference to the ERGA itself in the founding Decision), such as a clear legal personality, accountability arrangements, and so forth.

communications regulation,¹⁶³ these seem not to have been fully endorsed, as the ERGA unquestionably represents a much softer institutional arrangement to the one currently in place in the latter regulatory field.¹⁶⁴ Nor has any hypothesis to merge the supranational cooperation set-ups for electronic communications and audiovisual media services into a sole entity/forum, in the name of technological (and, at present, incomplete regulatory) convergence, been properly considered.¹⁶⁵

The issue, then, is whether a prospective development for the ERGA, like the development that transformed the ERG into BEREC and the BEREC Office, may be imaginable, or rather feasible, from a legal viewpoint (or not desirable at all, from a more political stance). In other words, the question here is whether a single independent EU regulator for audiovisual media, or even more, institutionally stronger and binding cooperation among national independent audiovisual media regulators than currently takes place in the ERGA, could see the light under EU law. At present, the answer seems to be negative, since no hypothesis in this sense has even reached the stage of a draft proposal.¹⁶⁶ In legal terms, the difficulties in envisaging such an evolution of the ERGA in the future stem not only, and in general, from the constitutional limits to the establishment of (independent) EU authorities/agencies with a broad mandate and not merely executive powers,¹⁶⁷ although these limits may not be

¹⁶³ See, for instance, the recommendations of the High Level Group, notably Recommendation 6 (mentioned at fn 114 above). See also the policy report of the Centre (mentioned at fn 115 above), notably at chapter 4, section 6, therein.

¹⁶⁴ According to the text of the public consultation on the independence of audiovisual regulatory bodies (mentioned at fn 116 above, notably para. 4 thereof), the formalisation of cooperation among national independent regulatory authorities for the media “could [have] provid[ed] a setting for agreeing collective approaches to enforcement questions in a *mutually obliging* manner” (*emphasis added*), which is not exactly what the ERGA can ensure, as discussed above.

¹⁶⁵ As has been (partially) noted above, this option does not appear to have ever been taken into account at the time of the establishment of the BEREC and the BEREC Office, which could have been entrusted with competences also in respect of audiovisual media matters especially if national regulators were all convergent ones. As this is not case, since EU law does not indicate any preference for a convergent model of regulatory authorities at national level (although neither the relevant provisions of the EU electronic communications regulatory framework, nor Article 30 of the AVMS Directive preclude it), it is not very surprising that such a model has not been taken as a point of reference also at the EU stage.

¹⁶⁶ Ideas regarding the establishment of an EU standing (and stronger) body (one, *mutatis mutandi*, that could be modelled on BEREC and the BEREC Office) were not welcomed at the time of the adoption of the AVMS Directive: see, notably, A. SCHEUER, C. PALZER, “Article 23b AVMSD”, cited, pp. 995-1000, especially p. 996.

¹⁶⁷ The issue of the setting-up of EU agencies (as well as their structuring, powers, functioning, etc.) has attracted considerable scholarly interest over the years, almost since the (still) leading Case on the matter was decided by the ECJ (i.e., the notorious Case C-9/56, *Meroni v. High Authority* [1958] ECR 133). The literature in the field is thus extremely rich: among the most recent (and most relevant) references, see M. EVERSON, C. MONDA, E. VOS (eds.), *European Agencies in between Institutions and Member States*, Alphen aan den Rijn, Kluwer Law International, 2014; P. CRAIG, *EU Administrative Law*, Oxford, OUP, 2012 (notably, pp. 140-180); D. CURTIN, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford, OUP, 2009 (notably, pp. 135-174); D. GERADIN, R. MUÑOZ, N. PETIT (eds.), *Regulation through agencies in the EU: a*

absolutely insurmountable, given the current trend that appears not to stand in the way of the establishment of similar powerful bodies, especially with an internal market-making remit.¹⁶⁸ The difficulties derive also, and perhaps above all, from the softer degree of (minimum) harmonisation that characterises audiovisual media regulation in comparison to the tighter and more detailed norms set forth by the EU in the field of electronic communications (as well as, for instance, in the domain of data protection legislation), as the former leaves considerable leeway for Member States, and hence national regulators, to intervene, which can in turn imply difficulties in cooperation (or even coordination).

Thus, it is somewhat safer to predict that it is, in fact, the cooperation in itself among national independent regulators for the audiovisual media at a supranational level that could continue and perhaps even develop further, notably through the strengthening of its institutional preconditions. In this respect, it could be asserted that, for such cooperation to function more effectively, these national independent regulators should be structured around a similar model and share similar characteristics. Thus, when EU law provides for cooperation among these regulators, it should also clearly mandate the establishment of such bodies at the national level, dictating (at least some of) their constituent features: first and foremost, the independence requirement, which is important for media pluralism, and respect for which could then be controlled and enforced through EU law itself, thus guaranteeing common institutional preconditions for the safeguard and promotion of this policy objective. There seems to be lack of competence on the part of the EU in this respect. However, no specific substantive competence would be needed in order to set such a requirement in EU law. The legal basis of the internal market would be sufficient to that end, as has been the case of data protection legislation and electronic communications regulation. Even non-internal market provisions, such as those on non-discrimination, have allowed EU law to dictate the structure and features of specific national administrative institutions (such as equality bodies) to safeguard and promote fundamental rights (as discussed above).

new paradigm of European governance, Cheltenham, Edward Elgar, 2005; G. DELLA CANANEA (ed.), *European Regulatory Agencies*, Paris, Rive Droite, 2004; E. CHITI, *Le agenzie europee*, Padova, CEDAM, 2002.

¹⁶⁸ See Case C-217/04, *UK v. Parliament and Council* [2006] ECR I-3771, on the establishment of the European Network and Information Security Agency (ENISA), already mentioned above; and Case C-270/12, *UK v. Parliament and Council*, of 22 January 2014, on the establishment of the European Securities and Markets Authority (ESMA) (as well as, to some extent, Case C-66/04, *UK v. Parliament and Council* [2005] ECR I-10553, on the powers of the European Food Safety Authority, EFSA). In all these cases (more directly, in the first two) the ECJ has upheld the validity of the respective Regulations establishing those Authorities (notably on the basis of, now, Article 114 TFEU), which (especially in the case of ESMA) do have significant powers allowing for the adoption of more than mere executive acts.

Before this could happen and any (further) institutional change can occur in this domain of EU law, as it stands at present, momentum for further underpinning and reinforcing the independence requirement of the national regulatory authorities for audiovisual media, and even more (in connection) further development of common approaches to key substantive issues such as media pluralism, could be provided by their cooperation (now, in the ERGA), especially through the exchange and development of best practices and agreement on common solutions. It is early to say whether or not the ERGA in itself is capable of meeting these expectations/challenges. More time is needed to assess its role and functioning, as well as the desirability of further institutional evolutions.

CONCLUSIONS

“Media pluralism” is a rich and complex notion, lying at the very heart of media law and policy, which is difficult to encapsulate in a clear definition and then mechanically apply in practice. However, there is general consensus that this notion implies something more than a mere quantitative multiplicity of viewpoints and voices represented in and offered by the media. In fact, the notion of media pluralism indicates the effective and qualitative variety and diversity of contents that should have access to the media and should be accessible through the media, in order to satisfy people’s fundamental right to receive or seek information and, hence, guarantee the freedom of expression, and ensure a thriving and well-functioning democratic society. This justifies public regulatory interventions aimed at securing both the general availability of diverse media contents (i.e., internal pluralism) and the operation of a plurality of autonomous and independent media outlets delivering such contents (i.e., external pluralism). These objectives all go beyond what the continuous developments in technology and the refinements of market mechanisms in and of themselves are capable of providing.

From the European Union (EU) perspective, as the law stands to date, it is first and foremost within the competence of the Member States to deal with media regulation and, hence, to secure media pluralism. Nevertheless, the interplay between different factors has increasingly prompted the development of forms of audiovisual media regulation at the supranational (European) level too. In fact, technological, economic and social factors, coupled with the growing market, legal and political integration among Member States, are determining the emergence of a truly European audiovisual media space, beyond national ones. As a response to this, traditional hard-law approaches have been imposed and prevailed so far on the part of the EU in dealing with such matters at the supranational level, almost in parallel with international initiatives on television broadcasting, such as those conducted (in the late ’80s) within the framework of the Council of Europe (CoE), and especially under the impetus of the case-law of the EU Court of Justice (ECJ), thus linking the internal market-making process to the need to protect the fundamental rights involved. In this context, the original cornerstone was the former “Television Without Frontiers” (TWF) Directive, adopted in 1989, subsequently amended, and now encompassed within and updated by the so-called “Audiovisual Media Services” (AVMS) Directive. While the latter mostly aims to facilitate the free circulation of television broadcasts, or audiovisual media services in general, within the EU, it does not deal directly with media pluralism. In fact, although advanced in different

forms, no (EU) legislative proposals specifically targeted at media pluralism have been adopted (yet). Moreover, other classic EU legal instruments such as competition law tools, which also apply to the media, are not, by their very nature, apt to fully take media pluralism concerns into account, as they are oriented to and driven by other rationales, not always reconcilable with that aim. Similar considerations could also be made as regards electronic communications (formerly telecommunications) regulation, on which the EU has acquired and expanded its competences: given the process of technological convergence, issues are at stake that can – and do – have an impact on media (and especially broadcasting) regulatory objectives, such as media pluralism, and should consequently be taken into account in that context. Furthermore, and more generally, media pluralism itself is now enshrined in the EU Charter of Fundamental Rights, which mandates its respect within the field of application of EU law.

Despite the general and diverse limitations of such hard-law approaches, the EU's commitment to media pluralism has been manifested with increasing force in recent years: mainly in studies, debates and other public policy initiatives launched by the Commission, as well as in recurrent calls for action made by the European Parliament and – more recently, also – in positions adopted by the Council. In this context, the issue has arisen of whether alternative and complementary forms and modes of intervention can help to refine an effective and consistent European approach to governing the cross-border audiovisual space, and eventually secure the fundamental objective of media pluralism within it.

In this respect, the focus here has been placed on the role and functioning of independent administrative authorities (IAAs), dealing specifically with the media, as institutional safeguards of media pluralism at the national level, but also (potentially) at the supranational level, essentially through their cooperation.

IAAs have proliferated in many economic and even non-economic sectors also within Europe – first and foremost at the national level – with mostly common, as well as some distinctive, structural and operative features. In the field of the media these authorities have been established not only in order to steer the process of liberalization and provide economic governance for the broadcasting markets newly opened up to competition, but also and especially to ensure that such a process does not undermine the protection of the fundamental rights and values at stake in this specific sector. Although there is no single model of an IAA for the media, there are certain significant institutional and substantive similarities, as well as some important differences, among the national bodies established to date. In order to highlight the most relevant similarities and differences, as well as to appreciate the extent of

these bodies' contribution to securing media pluralism through their expertise and ad hoc regulatory and supervisory actions, three paradigmatic cases have been selected and looked at in depth in this dissertation. In this regard, the focus has been placed, in particular, on the French *Conseil supérieur de l'audiovisuel* (CSA), the UK Office of Communications (Ofcom) and the Italian *Autorità per le garanzie nelle comunicazioni* (AGCom), also taking into account the historical and legal processes that led to their establishment – at different times, i.e. respectively in 1989, 2003 and 1997 – and the specific contexts in which they operate.

Against this background, a key institutional feature of all three authorities, which pertains to their very nature and proves to be crucial for the successful and effective exercise of their substantive mission and competences, is the independence requirement. This formal requirement, mandated by their respective establishing statutes, and (to be) complemented by its concrete ('de facto') application in the everyday work of these authorities, aims to ensure that they are free from political and especially government influence and from the interference of regulated market participants when carrying out their multifarious duties and functions. To this end, in all three national legal orders examined, albeit with specific nuances, detailed appointment-related rules and conflict of interest measures are addressed to the members of these bodies, and transparency and accountability requirements and other relevant institutional provisions relating to their operation are in place, such as those adopted by the independent authorities themselves, regarding their internal structures and procedures, or concerning their financial arrangements. These rules and measures constitute fundamental preconditions to guarantee the accomplishment of the tasks assigned to these bodies.

In this respect, although coexisting and necessarily interacting with other almost always pre-existing relevant institutional actors with different, concurrent or even overlapping/competing powers, the CSA, AGCom and Ofcom are the key players in the regulation of the audiovisual sector within their respective legal orders (the latter two also in the electronic communications sector). Indeed, all of them are entrusted with considerable sets of competences regarding various aspects of both private and (much less extensively) public service broadcasting, such as: managing radio-spectrum transmission resources; licensing/authorising relevant services; setting content-related as well as technical standards; adopting binding decisions; fulfilling advisory functions; monitoring compliance; handling individual complaints; and settling disputes, as well as issuing sanctions, where appropriate. In certain cases, notably as regards the first two aforementioned authorities, they also have

direct competences beyond traditional linear television services, covering new types of audiovisual services.

Beyond these similarities, one significant institutional difference that clearly emerges from the cases considered resides in the convergent nature of AGCom and Ofcom, which deal with both the audiovisual media and electronic communications fields at the same time; while the CSA has statutory powers only in relation to the former sector. It is difficult, and perhaps not even feasible, to assess in general terms which of these two models can better deliver substantive results, since the specific conditions in which they each operate can affect any such assessment. However, on a broader plane, the choice to establish convergent regulators appears to better respond to, as well as support, the evolution of the pertinent (substantive) regulatory framework, towards an approach – developing, in particular, at EU level – that takes into account the phenomenon of digital-technology driven convergence and its related effects on the increased availability of audiovisual content through different distribution networks and platforms, beyond the traditional delivery patterns: thus allowing these bodies a broader scope of action in their protection and promotion of media pluralism in a ‘convergent way’, so to speak.

Similar considerations could be put forward, *mutatis mutandi*, regarding the differences between bodies such as Ofcom, which combine ‘pure’ regulatory powers with the application of competition law tools, and those like the CSA and AGCom, which instead are only entrusted with the former powers and have to interact with competition authorities when dealing with relevant cases arising in the field of the media. In this respect, the ability to rely on a broader and cross-sector range of powers could facilitate the achievement of a better balance between concurrent, but also somewhat competing, rules and connected rationales, thus taking into due account citizens’ broad interest in a pluralistic media landscape and (not only) consumers’ specific economic expectations, which are satisfied by an economically efficient functioning market.

Against this institutional background, as regards their functioning, the CSA, Ofcom and AGCom effectively play a fundamental role in securing media pluralism in their respective operational contexts. Indeed, by fulfilling their functions, and especially by adopting general regulatory measures and enforcing them, but also by setting specific and targeted conditions applicable to certain operators, they all contribute to making (policy) choices that implement and give substance to this substantive principle. In fact, in all three cases considered, it is normally up to statutory provisions to ‘set the scene’ within which these bodies are called upon to act (inter alia) as guardians and promoters of media pluralism in all its constituent

external and internal dimensions, by making concrete decisions regarding the application of this fundamental policy objective. Thus, although they have statutorily limited powers and a restricted margin of manoeuvre in exercising them, these independent regulatory authorities perform a crucial role in shaping media pluralism. Beyond the somewhat mechanistic monitoring of respect for the media ownership provisions in place in all three countries considered, the activity of the three aforementioned regulators focuses on several matters and delivers important results that are more than mere transpositions of general principles, as they tangibly develop these very principles. There are several examples to which reference could be made in this regard. Among them, it is worth mentioning the CSA's role in ensuring the representation of political pluralism through audiovisual broadcasting, which implies choosing the not only quantitative, but also qualitative criteria for measuring it, before undertaking any assessment of its respect or (need of) promotion. As regards Ofcom, particular relevance should be attached to its role in bringing media pluralism (or plurality) concerns to the fore, when involved in the application of the so-called "public interest test" in cases of media mergers. Concerning AGCom, emphasis could be placed on its role in applying media pluralism rationales in network regulation, notably through the imposition of measures aimed at favoring access to transmission resources for independent content providers.

All these types of intervention, together with many others and more specific ones, bring to the fore not only the strengths but also the limits that characterize the functioning of independent media authorities such as the three considered. Once again, these strengths and limits are, in part, peculiar to each of them, notably relating to the specific rules and conditions governing their institutional aspects, as well as the particular contexts in which they operate. Overall, however, their multifarious actions in the protection and promotion of media pluralism are increasingly perceived and effectively set as a *conditio sine qua non* to guarantee and enhance the realization of this objective. Thus, calls have been made to further reinforce their roles in that respect. This issue could certainly be tackled at the national level, given that – as recalled above – competence regarding media pluralism and the (substantive and institutional) measures to secure it is first and foremost national. However, as media pluralism represents a fundamental objective that could well be enshrined in the constitutional traditions common to the EU Member States, the EU also has a stake in that regard. Moreover, media regulatory authorities – such as the three examined here – are actively involved in the implementation of relevant EU law provisions that impact media pluralism (like, for example, those on broadcasting quotas, listed events and short news reports, although this generally occurs

through the preliminary filter of statutory measures). Thus, further consolidation and improvement of the role and contribution of national media regulators in securing media pluralism could well (eventually) come from the EU itself and also bring about their (more incisive) recognition at supranational level.

Indeed, at both Member State and supranational level (although with different intensity), the EU has devoted great attention to, and been concretely involved in, the establishment and development of institutional preconditions to ensure the achievement of the substantive goals set (more or less exhaustively, also) by EU law and guarantee the effective and consistent implementation of the latter. Several fields can be mentioned in this respect. Among them, data protection legislation, equality law and electronic communications regulation represent three domains of particularly intense legislative activity on the part of the EU that are closely related to the domain of audiovisual media and are – in different respects – of comparable constitutional and structural relevance in this latter sector, although the dissimilar degrees of supranational harmonisation must not be underestimated. Indeed, in the first two domains, other fundamental rights are at stake (such as data protection and equality/non-discrimination), for the safeguard of which institutional settings have been provided for directly through EU law itself. As for electronic communications law, its increasing technological, economic and regulatory connection and interaction with audiovisual media law – as recalled above – render the institutional developments that characterise that sector of particular interest in exploring those (current and incipient) in the field of audiovisual media regulation, under the impulse of EU law.

Taking first EU data protection law into account, Member States have the duty to establish and operate ad hoc independent administrative bodies, such as data protection authorities (DPAs), to ensure its implementation and enforcement, and especially to guarantee the fundamental right(s) at stake: although now stated (also, in essence) even in primary law, this duty was formerly only established in secondary legislation, when (notably, in the mid '90s) the EU did not yet have a clear competence to adopt hard-law measures in that domain. The internal market-making rationale then offered the basis for legislative intervention in the field of data protection. Within this context, the provisions on the establishment of national independent authorities, introduced together with substantive ones, seem to have been conceived not so much (or not exclusively) as internal market measures, but rather as instruments to ensure the protection of fundamental rights, by reinforcing their guarantees (directly) at the national and (indirectly) at the EU level. These provisions are fairly rich and detailed as regards the institutional conditions they dictate for national DPAs to comply with,

notably concerning the independence requirement. This crucial constituent institutional feature, somewhat (re)shaped and reinforced by EU law, together with other related ones, is thus apt to be enforced in practice and has in fact been interpreted and applied to concrete cases, against the backdrop of the ECJ's developing case-law on this issue. Overall, following EU (law-making) action in the field in question, although DPAs are established and run according to national law, they are not, or no longer only, national organs governed solely by national rules. In fact, they fulfil functions directly attributed to them by EU law, while their status is governed by both national and EU law. Moreover, cooperation among these bodies is formally established at supranational level, notably through the so-called Working Party on the Protection of Individuals with regard to the Processing of Personal Data. This body is essentially entrusted with consultative functions, mainly exercised vis-à-vis the Commission, with the aim of providing a forum for the exchange of useful information and best practices among national DPAs. The outcomes of its work (notably, the emerging best practices) are then usually transposed into recommendations and opinions, intended to reflect the general consensus among its members on the relevant issues it deals with, so as to improve and implement a consistent and uniform EU approach to data protection, which could prove to be beneficial at both national and supranational levels in the promotion and safeguard of this fundamental right. Moreover, the EU has also set up a specific supranational independent supervisory authority, the so-called European Data Protection Supervisor (EDPS), which is responsible for monitoring the application of data protection provisions by EU institutions and bodies, working as a sort of DPA but on the supranational plane, and thus completing the institutional framework for the protection of that right at all different levels.

As regards EU equality law, quite similar developments have taken place, especially concerning the establishment of independent administrative institutions at national level – known as equality bodies – to operate as safeguards in delivering effective protection against discrimination. Several Directives adopted since the early 2000s to tackle different aspects of discrimination (on the grounds of racial or ethnic origin, sex, or in relation to employment and social security) have provided, in almost identical terms (although less pervasively than in the domain of data protection), for national institutional settings to be adopted to that end or to be adapted, when pre-existing. In this context, while equality bodies are substantially national institutions, grounded within Member States' legal orders and governed predominantly by national law, some of their competences and the manner in which they should be exercised are directly identified and imposed by EU law, albeit to a minimum extent. Thus, their structure and functioning can be tested against EU law and appropriate actions taken to

enforce the minimum requirements provided for, among which, notably, their (eminently functional) independence. Moreover, by means of such equality bodies, EU law has identified a sort of alternative way to ‘intrude’ into national legal orders to ensure the effective and consistent implementation of the equality principle, as well as to broaden its scope of action within the human rights domain, thus paving the way for the development of a European approach to equal treatment, rooted in the necessarily common and consistent protection of EU citizens’ fundamental rights. However, in this case, little has been done to project such institutional safeguards to the EU level. Indeed, no formal supranational cooperation among national equality bodies has been established, although a self-organised arrangement, the European Network of Equality Bodies (EQUINET), was set up outside the EU legal framework (in 2007) to that end. The EU Fundamental Rights Agency (EU FRA, also established in 2007) has distinctive institutional features – among which, notably, the independence requirement – and a broad material scope of action, but limited competences, amounting essentially to providing information and expert advice to EU institutions as well as to Member States. Nonetheless the EU FRA represents an interesting example of how to contribute to the promotion and protection of fundamental rights at the EU level through administrative settings that reinforce and complement other more traditional forms of protection.

Lastly, as far as EU electronic communications regulation is concerned, besides substantive provisions, institutional provisions have been laid down here too (since the mid ‘90s, and significantly reinforced in 2002 with the adoption of a set of Directives composing the so-called Regulatory Framework on electronic communications), with the aim of ensuring the setting up of national regulatory authorities (NRAs) as bodies that are legally and functionally independent, especially in relation to regulated entities, in order to exercise key tasks aimed essentially (in contrast to the two aforementioned legal domains) at guaranteeing the competitive functioning of the related market, notably by governing the liberalisation process taking place within it, but also at further promoting the internal market and protecting EU consumers/citizens’ interests. The provisions enacted in this context by EU law establish specific features for the institutional aspects of NRAs – among which the already recalled independence requirement appears of utmost importance – as well the objectives of their actions, their key functions and some detailed procedural arrangements concerning their operation, consequently severely limiting Member States’ margin of intervention in the institutional design of these bodies. Moreover, to further ensure the effective and consistent implementation of relevant EU legislation, cooperation and some coordination among NRAs

has long been established, and has evolved over the years towards increasingly formalised settings, notably through the transformation of the so-called European Regulators Group (ERG), created in 2002, into the Body of European Regulators on Electronic Communications (BEREC) and its Office, set up in 2009, functioning as an independent EU agency that complements the regulatory work of NRAs, which form constituent parts of BEREC, without replacing them. In this context it is interesting to highlight that, despite the already recalled trend towards the convergence of regulatory provisions on electronic communications and audiovisual content, especially as regards the institutional settings to deal with such a primarily technological phenomenon, no substantial mention (indeed, no mention at all) of audiovisual regulatory aspects is to be found in relation to the establishment and functioning of BEREC, although some of its members (such as AGCom and Ofcom) are convergent regulators fulfilling a remit that does go beyond electronic communications. It is questionable, therefore, why the convergent institutional model, while apparently endorsed at the supranational level, has not succeeded to the point where the EU legislator has opted to use it to strengthen the institutional arrangements for the governance of electronic communications.

Against this background, the institutional governance of audiovisual media beyond national borders appears quite weak. However, looking more broadly at the international scene, achievements have been made in this respect, especially within the related legal framework set up by the CoE, or in connection with it. For example, the so-called Standing Committee on Transfrontier Television was established within the context of the (CoE's) European Convention on Transfrontier Television (ECTT) and has been operating since 1993 to ensure its implementation and monitor its application, although it has now fallen into a sort of 'limbo' due to a standstill affecting the (re)negotiations of the ECTT. Furthermore, the more dynamic European Platform of Regulatory Authorities (EPRA) was spontaneously founded by national media regulatory authorities themselves in 1995 and is still very active as a 'semi-formalised' forum for the exchange of information and cooperation among them. On the part of the EU, instead, little has been achieved in this context, at least until recently, when this issue gained fresh momentum. Indeed, on the one hand, the establishment of national media regulators such as the CSA, Ofcom and AGCom (for the latter two, from the point of view of their audiovisual media-related competences) did not stem from the need to abide by any specific provision embodied in EU law. However, the AVMS Directive has finally made explicit – albeit, apparently but arguably, legally 'soft' – reference to such bodies, highlighting their contribution not only to ensuring its effective implementation in an

impartial and transparent manner, especially through their cooperation, but also to securing media pluralism. On the other hand, their cooperation specifically within the EU legal order is developing from institutionalised forms where their presence is rather marginal, such as the case of the still-existing so-called Contact Committee, established (in 1997) by the renovated TWF Directive, with the purpose of facilitating its implementation by bringing together mostly government representatives of Member States to discuss the matter under the aegis of the Commission. In fact, new and more stable arrangements have arisen directly involving national media regulators, such as the European Regulators Group for Audiovisual Media Services (ERGA), founded on pre-existing informal cooperation schemes but remaining very much within the orbit of the Commission. The ERGA in particular appears to constitute an important new forum for the identification of collective concerns, discussion of shared solutions and agreement on common approaches among its members. While this especially regards issues falling within the EU regulatory framework for audiovisual media services, due to its nature as a Commission expert group, this entity for institutional cooperation also has the potential to carry out similar activities in relation to substantive matters that, although not supposed to be directly addressed by it, fall within the competences of independent regulatory authorities in the audiovisual media field, such as media pluralism. However, no concrete initiative has been undertaken to date regarding this substantive issue, despite suggestions and calls to use and strengthen such administrative cooperation settings to further the pursuit of media pluralism and construct a European approach in that context.

To conclude, regarding the findings above and within the broad context explored by this Thesis, further developments could well be expected to occur, notably within the EU legal order, allowing for institutional preconditions in the field of audiovisual media to acquire deeper roots and gain strength in order to favour the sound and consistent promotion and protection of media pluralism in the various national legal orders as well as that of the EU. Thus, on the one hand, considering the developments that have taken place in related sectors, EU law could better define the institutional features of independent regulatory and supervisory institutions for the media already established (or to be established), with specific regard to the independence requirement and the related safeguards, which is of paramount importance in that context. Indeed, to ensure effective media pluralism, biased (private and public/political) influences in the relevant regulation and its enforcement should be prevented by any means, to avoid satisfying sectorial and personal interests instead of the general and collective right to diverse and free media, capable of effectively meeting the needs of a democratic society. The autonomy and impartiality in decision making ensured by IAAs for

the media could certainly serve as a guarantee in that respect and, in turn, can guarantee the achievement of the substantive objective at stake. On the other hand, the better definition and application of common institutional features, as well as of some common tasks, could favour improved dialogue and sounder cooperation among those bodies at the supranational level (especially, but not exclusively, in implementing relevant EU law provisions). In this context, a long running idea that has never enjoyed a decisive momentum, but which could nevertheless possibly be re-launched and further explored, is to establish not just a network, but a special independent – in relation to the Commission and market players – European broadcasting authority. Such an authority would coexist with national independent media regulators and foster strengthened and coordinated action between them at the supranational level, notably in the implementation of EU media law to reinforce the internal market in broadcasting and its competitiveness (within and) outside EU borders. In any case, whatever form they could take, dialogue and cooperation among national IAAs for the media should be incentivised, against the backdrop of a ‘European administrative law for the media’, as they can potentially form the basis for the development of a European approach to media pluralism.

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