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# Independent Supervisory Authorities: A Fragile Concept

Saskia Lavrijssen & Annetje Ottow*

*This article highlights the development of the legal (de jure) independence requirements of national and European supervisory authorities in European law. The European legislator recently strengthened the legal and political independence of national supervisors in the telecommunications and energy sectors. Moreover, European supervisors in the telecommunications, energy and financial sectors have been created. The national supervisors are represented in these new European bodies through their participation in the European supervisors' regulatory boards. The independence principle is one of the legal safeguards to prevent independence problems at the national level being transferred to the European level or vice versa, and has been laid down as a cornerstone of the regulations establishing the new European supervisors. These developments illustrate that the independence of supervisors has gained importance in European law. However, the specification of the independence principle has taken place in an ad hoc and piecemeal way and the different European provisions leave room for controversies. Therefore, it is too early to argue that the principle of the independence of European and national supervisors has acquired the status of a general principle of European law. Instead this article provides some suggestions as to how the European independence requirements could be interpreted in the light of recent case law of the European Court of Justice reconciling a sufficient degree of independence on the one hand with the need for adequate provisions for transparency and political and legal accountability on the other hand.*

## 1 INTRODUCTION

Inspired by the success of independent supervisory agencies in the USA, there has been a tremendous growth in the number of 'independent' supervisory authorities at the level of the EU Member States, such as competition authorities, energy regulators, data protection supervisors and financial authorities, since the 1980s,

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partly under the influence of EU law.[1] The number of 'independent' European supervisors (usually referred to as 'European agencies' in EU law) has also grown at the European level, but then since the 1990s.[2]

The aim of this paper is to focus on the development of the legal (de jure) independence requirements in European law for European and national supervisors.[3] It should be noted at the outset, that contrary to what the word 'independent' suggests, European and national supervisory authorities are never completely independent of the political arena.[4] Unlike independent tribunals in the sense of Article 267 TFEU, national and European supervisory authorities are subject to a variety of formal and informal public control and accountability mechanisms that may affect the way they act.[5] Some therefore argue that it is linguistically more correct to refer to the national and European supervisory authorities as bodies that are 'autonomous' or 'semi-independent' rather than 'independent'.[6] This paper chooses to use the word 'independence', as most frequently used in legal texts and literature when referring to any degree of independence from public bodies.[7]

In analysing the background of the existence and role of independent supervisors, it becomes evident that the independent position of national and European supervisors is related to a myriad of deeper regulatory issues. First, the EU institutions and Member States have been struggling to fit independent supervisory authorities into their constitutional and legal structures ever since they came into existence.[8] Member States invoke the democracy principle to prevent broad discretionary powers being delegated to independent authorities.[9] By

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1 See Yataganas, *Delegation of Regulatory Authority in the European Union – The Relevance of the American Model of Independent Agencies* (Harvard Jean Monnet, Working Paper No. 3/2001), available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/01/010301.html. For an overview of the development in different EU Member States see the various contributions in Caranta, Andenas & Fairgrieve (eds.), *Independent Administrative Authorities* (British Institute for International and Comparative Law 2004) and Verhey & Zwart (eds), *Agencies in European and Comparative Perspective* (Intersentia 2003).

2 See Busuioc, *The Accountability of European Agencies, Legal Provisions and Ongoing Practices* (Eburon 2010), 11 *ff*. For an analysis and typology of EU agencies see Chiti, *An Important Part of the EU's Institutional Machinery: Features, Problems and Perspectives of European Agencies*, 46 CML Rev. (2009).

3 For an analysis of the de facto independence of agencies see Yesilkagit & Van Thiel, *Political Influence and Bureaucratic Autonomy*, 8 Pub. Org. Rev. 137–153 (2008), and Groenleer, *The Autonomy of the European Union Agencies: A Comparative Study of Institutional Development* (Eburon 2009).

4 Chiti, *supra* n. 2, 1397 and Scholten, *Independence vs. Accountability: Dilemma or misperception*, 4/1 Rev. Eur. Admin. L. (2011) and Vos, *Regulation through Agencies in the EU: A New Paradigm of Governance* 126 (Geradin et al. eds., Edward Elgar 2005).

5 Chiti, *supra* n. 2, 1397. Compare Case C-517/09, *RTL Belgium*, judgment of Dec. 22, 2010, nyr, and Case C-53/03, *Syfait and others,* [2005] ECR I-4609.

6 Scholten, *supra* n. 4, 18. See also Groenleer, *supra* n. 3, 29.

7 See e.g. Case C-518/07, *European Commission v. Federal Republic of Germany*, [2010] ECR I-01885.

8 Quintyn, *Independent Agencies: More than a Cheap Copy of Independent Central Banks?*, 20 Const. Political Economy 276 (2009).

9 Lavrijssen & Ottow, *The Eclipse of the Legality Principle in the European Union* 74–75 (Besselink et al. eds., Kluwer 2010).

limiting the agencies' independence, Member States try to control the setting of priorities and strategic choices in politically sensitive sectors. Equally, at the European level, the Commission and the Council continue to invoke the *Meroni* doctrine, implying that only purely executive powers can be delegated to European agencies but not powers to make policy decisions or complex legal, economic or scientific assessments.[10] Although various academics have challenged the restrictive interpretation of the *Meroni* case law,[11] European supervisory agencies typically have well-circumscribed tasks and limited powers to adopt binding decisions.[12]

The core academic and policy issue is that a balance needs to be struck between a sufficient degree of independence to guarantee objective and consistent decision-making on the one hand and the creation of adequate and effective accountability mechanisms to ensure that the supervisory authorities exercise their powers in accordance with their legal mandates on the other hand. Accountability and independence are not mutually exclusive but two sides of the same coin. Where effective accountability mechanisms are in place, the delegating authorities (Member States and/or the EU legislator) and other stakeholders can be more confident that the independent supervisory authorities will exercise the delegated tasks in accordance with the delegator's original intention. A greater trust in the way the independent supervisory authorities perform their tasks may result in these authorities functioning more independently in practice.[13] This seems also be the thrust of the new European provisions relating to the functioning of the European and national supervisors in the electronic communications, energy and financial sectors.[14] The introduction of requirements of political independence of the supervisors in these areas goes hand-in-hand with stricter requirements relating to the accountability of the national supervisors, such as transparency requirements, enhanced cooperation between the NRAs of the Member States and stricter control by the European Commission of the national supervisors.[15] Furthermore, the new European supervisors in the energy, electronic communications and financial sectors have to comply with extensive transparency and consultation requirements and their activities are subject to procedures for political and judicial accountability.[16] In the banking sector the independence

[10] Case 9/56, *Meroni v. High Authority* [1957-1958] ECR 133. For a discussion see Chiti 2009, 1404.
[11] Chiti, *supra* n. 2, 1422, and Lavrijssen & Hancher, *Networks on Track, From European Regulatory Networks to Regulatory Network Agencies*, 1 LIEI 23–55 (2009).
[12] Chiti, *supra* n. 2, 1404.
[13] Compare Quintyn, *supra* n. 8, 279–280.
[14] Hanretty, Larouche & Reindl, *Independence, Accountability and Perceived Quality of Regulators*, a CERRE Study 15 (2012).
[15] Lavrijssen & Ottow, *supra* n. 9, 74–75.
[16] Ottow, *Europeanization of the Supervision of Competitive Markets*, 1 EPL 7–9 (2012).

seems even more guaranteed, if the new plans to give the European Central Bank (ECB) also supervisory powers over national banks will be realized.

This paper will focus on the independence requirements of European and/or national supervisory authorities in the energy, electronic communications and financial sectors, as they are at a fairly developed stage. Those independence requirements will be compared with the independence requirements for European and national supervisors in the data protection sector, which were the subject of interpretation by the ECJ in a recent landmark case.[17] The significance of this Case C-518/07, *European Commission v. Federal Republic of Germany*, exceeds the data protection sector, as the ECJ has interpreted the European independence requirements regarding the European and national data protection supervisors in a broad and teleological way. The article will be concluded with some observations regarding the role European law so far has played in strengthening the political independence of national and European supervisors, and provides some indications as to how European law in this regard may develop in the future.

## 2 BACKGROUND

### 2.1 Types of Supervisory Authorities

In order to grasp the concept of independence and the legal requirements concerning independence, it should first be made clear which type of European and national supervisory authorities have been granted an independent status and what were the reasons for this position.

At the national level, it is possible to distinguish roughly between economic regulators, such as energy regulators and electronic communications regulators, and other independent supervisory authorities, such as data protection authorities and consumer protection authorities. Both have powers to monitor whether market parties or private individuals comply with legal norms and whether the law is being violated, and to enforce the law by imposing fines or periodic penalties. The main difference between economic regulators in the liberalized network sectors and other supervisory authorities is that national regulatory authorities (which the European liberalization directives refer to as 'NRAs') have the power to regulate the behaviour of market parties *ex ante* – which other authorities usually do not have. The task of the NRAs is to supervise and regulate the relevant markets in order to stimulate and promote competition. To this end, they must be entrusted with various powers to regulate certain matters, including tariffs and access rights

[17] Case C-518/07, *European Commission v. Federal Republic of Germany*, *supra* n. 7, with case note by Ottow & Aelen, 6 *European Human Rights Cases*, (Sdu Uitgevers, Jun. 8, 2010) and with case note by Kranenborg, 10 *SEW (*2010), 419–423.

to dominant infrastructures, as well as the power to settle disputes between network operators and new market entrants.[18]

A further distinction can be made within the category of economic regulators between the economic regulators set up to promote and protect competition (NRAs) and financial supervisory authorities. Though financial supervisory authorities are also involved in supervising and regulating companies, they can be distinguished from other economic regulators, in that their main task is not to create competition in previously monopolistic markets. In the financial sector, two types of regulators must be distinguished. On the one hand, are the financial supervisors which focus on the transparency of the financial markets and protect consumers against unfair competition and trade practices for example, by enforcing financial regulations. On the other hand, are the central banks, which must ensure the stability of the (national) financial systems and the solvability of the financial institutions.

This paper treats EU agencies as European supervisory authorities if they are involved in supervising and regulating markets or market parties, especially if they advise on the adoption of new European legislation and policies and monitor the uniform application of EU law by the Member States and/or their national supervisory authorities.[19] These agencies may have the power to produce extensive scientific and technical evaluations on the basis of which the European Commission updates current and develops new legislation, issues authorizations or adopts technical standards. [20] This paper will not discuss the position of the European and national central banks, as regards their monetary function, relating

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[18] For electronic communications see Cave, *Broadband Regulation in Europe – Present and Future*, 4 Competition & Reg. in Network Industries 405–424 (2007).

[19] Examples include the European Medicines Agency, the European Network and Information Security Agency, the European Chemicals Agency, the European Railway Agency and the Office for Harmonisation in the Internal Market (Trade Marks and Designs). For another distinction of EU agencies, see Chiti, *supra* n. 2, 1405–1406: he distinguishes between agencies involved in the production and dissemination of information in specific sectors, agencies carrying out advisory or technical assistance and agencies with decision-making administrative powers. Chamon, *EU Agencies between Meroni and Romano of the Devil and the Deep Blue Sea*, 48 CML Rev. 1055–1056 (2011), quoting Griller and Orator, also distinguishes between three types of agencies: ordinary agencies involved purely in gathering and disseminating information and in coordinating a network, pre-decision agencies which provide the Commission with non-binding opinions and decision-making agencies which make the binding decisions themselves without involving the Commission.

[20] See e.g. European Medicines Agency (responsible for the scientific evaluation of applications for European marketing authorizations for both human and veterinary medicines which are subsequently granted by the European Commission), the European Railway Agency (the agency's Interoperability Unit produces proposals for the Technical Specifications for Interoperability (TSIs) related to subsystems such as Infrastructure, Energy, Rolling Stock, Telematic Applications and Operation in accordance with mandates given by the Commission) and the European Maritime Safety Agency (which provides the Commission with technical and scientific advice on maritime safety and prevention of pollution by ships).

to the financial stability of the EU and the Member States. If the recently announced plan to place commercial banks in financial difficulties under supervision of the ECB will be brought into practice, the ECB will also have its own operational supervisory function in the future. As this plan still needs to be drafted by the Commission, it is too early to discuss this proposal in this stage. However, it can be expected that the independence requirements of the ECB, as laid down in Article 130 of Treaty on the functioning of the European Union, might also be applicable to this new role of the ECB (see also *The development of the concept of independence in European law).*

### 2.2 The Reasons for Creating National Supervisory Authorities

Legal and political science literature cite four main reasons for creating different categories of independent supervisory authorities that were identified above. These arguments also play a role in the development of the independence requirements for national and European supervisory authorities in European law and are therefore important for understanding the significance and goals of the European independence requirements.

First, NRAs were created to ensure that European and national liberalization legislation was applied impartially and independently of the interests of the market parties, including the financial interests of the national governments in the former monopolists (incumbents).[21] The independence of NRAs from the market parties is necessary to create a level playing field in the internal market and to ensure market confidence in impartial decision-making. Independent NRAs were accordingly established in the general field of competition law under Regulation 1/2003, and in the telecommunications, energy and railway sectors.[22]

A second argument for some degree of the supervisory authority's independence is the 'credibility hypothesis' which finds its origins in political science.[23] This hypothesis assumes that, by delegating regulatory powers to independent supervisory authorities, the political authorities commit themselves to the goals, principles and provisions of the relevant regulatory framework.[24] The credibility hypothesis is frequently put forward as theoretical support to justify the

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[21] Tridimas, *Community Agencies, Competition Law and ESCB Initiatives on Securities Clearing and Settlement*, 28 Y.B. of Eur. L. 216–307 (OUP 2009).

[22] *Ibid*., 232 and Geradin & Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* (Jean Monnet Working Paper 01/04), available at http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040101.pdf.

[23] See e.g. Gilardi, *The Same, But Different: Central Banks, Regulatory Agencies and the Politics of Delegation to Independent Authorities*, 5 Comp. Eur. Pol. 306 (2007); G. Majone, *Regulating Europe*, (Routledge 1996); Gilardi, *Policy Credibility and Delegation to Independent Regulatory Agencies; a Comparative Analysis*, 6 J. Eur. Pub. Policy 873–893 (2002); and Larsen, Pedersen, Sørensen & Olsen, *Independent Regulatory Authorities in European Electricity Markets*, 34 Energy Policy 2858–2870 (2006).

[24] Quintyn, *supra* n. 8, 269 *ff.*

independence of central banks in maintaining price stability and a low inflation rate.[25] The (partial) political independence of NRAs is seen as relevant for realizing the goals of promoting the internal market and the interests of consumers which are laid down in the European liberalization directives in the energy and electronic communications sectors.

A third argument for delegating powers to independent supervisory authorities is that these may have specific expertise and provide much-needed flexibility for making complex economic, legal and technical assessments when concrete decisions or regulatory measures need to be adopted.[26] Regulatory procedures within independent supervisors are more flexible than parliamentary procedures; they can be dovetailed to the specific circumstances of the case and provide leeway to extensively consult the representatives of the various stakeholders.

A fourth argument relates to the protection of human rights.[27] The idea is that an independent supervisory authority, such as independent broadcasting authorities and data protection supervisors, can provide adequate safeguards that individual human rights will be protected if these conflict with government policy. For instance, the European legislator has decided that independent data protection agencies must safeguard the right to privacy and ensure that the ensuing provisions on the protection of individuals with regard to the processing of data are applied reliably and effectively, both at the European and national levels.

### 2.3 The Reasons for Creating European Supervisory Authorities

Although the reasons for the rise of European agencies overlap to some extent with the growth of national supervisory authorities, there is no full congruency. As Tridimas explains, the principal reason for the expansion of national supervisors was to separate market regulation and supervision from the States' financial interests in the incumbents, while the main reason for creating the European agencies was the need for specialization and expertise and was associated with the completion of the internal market.[28] In addition to the need for specialization and expertise, various other arguments were put forward for the creation of European agencies,[29] including a credible commitment to the implementation of

[25] Quintyn, *supra* n. 8, 269 *ff*.
[26] Larsen, Pedersen, Sørensen & Olsen., *supra* n. 23, 2859.
[27] See Prosser, *The Regulatory Enterprise – Government, Regulation and Legitimacy* 13 (OUP 2010).
[28] Tridimas, *supra* n. 21, 232.
[29] For a clear analysis of these arguments, see Busuioc, *supra* n. 2, 15–23.

Community policies,[30] better compliance with EU law by Member States, increased networking and participation[31] and inter-institutional politics.

European agencies were often created as a result of the top-down delegation of powers by the Commission. The European Food Safety Authority (EFSA) is an example of such an agency created mainly by top-down influences.[32] The BSE-crisis speeded up the reform of the EU's food policy and the EFSA was established as a result of this process.[33] Key in this process was the Medina Ortega Report[34] by the European Parliament's Temporary Committee of Inquiry into the BSE-crisis, that stressed the Commission's shortcomings before and during the crisis. Amongst others, the lack of transparency in decision-making procedures, poor internal management and the blurred relationship between scientific and political decisions led the Committee to the conclusion of serious failings on the Commission's part.[35] After a new food crisis in 1999, the publication of a scientific report at the Commission's request[36] and the White Paper on Food Safety,[37] the EFSA was set up in 2002[38] based on the delegation of powers by the Commission.[39]

The European landscape of agencies has changed in the 2009–2010 period in that new European agencies have been created.[40] Unlike the older agencies, bottom-up influences played a crucial role in establishing these new European agencies.[41] These bottom-up influences resulted in an important characteristic of the new European agencies in the energy, communications and financial sectors,

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30 See e.g. Majone, *The Credibility Crisis of Community Regulation*, 2 JCMS 273–302 (2000).

31 See Heringa & Verhey, *Independent Agencies and Political Control*, in Verhey & Zwart (eds.), *supra* n. 1,158.

32 Groenleer, *supra* n. 3, 181–182 and Vos, *supra* n. 4, 124, state in this respect that few EU organizations can claim as much formal autonomy as EFSA.

33 Groenleer, *supra* n. 3, 178, and Vos, *Experimentalist governance in the European Union* 153 (Sabel & Zeitlin eds., OUP 2010).

34 European Parliament, *Report on Alleged Contraventions or Maladministration in the Implementation of Community Law in Relation to BSE, without Prejudice to the Jurisdiction of the Community and the National Court* (Strasbourg 1997).

35 Groenleer, *supra* n. 3, 179, and Vos, *supra* n. 33, 153.

36 James, Kemper & Pascal, *A European Food and Public Health Authority: The Future of Scientific Advice in the EU* Report commissioned by the Director General of DG XXIV (1999).

37 European Commission, *White Paper on Food Safety* COM 719 (1999).

38 The EFSA was established by Regulation 178/2002 of the European Parliament and of the Council of Jan. 28, 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31/1 (2002).

39 Groenleer, *supra* n. 3, 178–181.

40 Ottow, *supra* n. 16. New European agencies are the ACER in the energy sector, the BEREC in the communications sector, and the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Systemic Risk Board (ERSB) in the financial sector.

41 However, top-down delegation still played an important role as well in the creation of those new European agencies.

which is that they are 'transformed' networks of NRAs – the new European agencies originate from the former European-wide networks of national regulators and therefore have a very strong national basis.[42] The creation of the new authorities has been an evolutionary process, where more and more coordination between the national practices of national regulators became necessary to ensure a consistent application of European law and to promote market integration. Diverging national practices were no longer acceptable in a world which was becoming increasingly European-oriented, being the main reason for the Commission to spur the formalization of the informal cooperation structures into European supervisory bodies.

## 3 THE MAIN ELEMENTS OF INDEPENDENCE

### 3.1 Market Independence and Political Independence

After having elaborated on the reasons for creating independent supervisory authorities, which are important for understanding the meaning and interpretation of the legal independence requirements, it has to be specified which elements the legal concept of independence encompasses. Two types of independence can be distinguished when discussing the legal independence requirements regarding national and European supervisory authorities.[43] The first is uncontroversial and entails that national and European supervisors should be independent of the market parties to create a level playing field. This element of independence was, for instance, laid down in older versions of the European liberalization directives[44] and has been accepted and specified in ECJ case law.[45]

The second type of independence is more controversial in European and national law and entails that national and European supervisors should, to some

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[42] Based on this it could be argued that there is no centralized, European control. In support of this view see Ottow, *supra* n. 16, 20. See also Lavrijssen & Hancher, *supra* n. 11, 28–29, who describe these new entities as 'network plus'.

[43] Hancher, Larouche & Lavrijssen, *Principles of Good Market Governance*, 4 J. Network Industries 355–389 (2003), Ottow, *Telecommunicatietoezicht – de invloed van het Europese en Nederlandse bestuurs(proces)recht*, 62–66 (Sdu Uitgevers 2006).

[44] See e.g. Art. 3 of Directive 2002/21/EC of the European Parliament and of the Council of Mar. 7, 2002 on a common regulatory framework for electronic communications networks and services, OJ L 108/33 (2002); Art. 23 of Directive 2003/54/EC of the European Parliament of the Council of June 26, 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176/37 (2003); Art. 25 of Directive 2003/55/EC of the European Parliament and of the Council of June 26, 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ L 176/57 (2003).

[45] Lavrijssen & Ottow, *supra* n. 9, 80–82, and Hancher, Larouche & Lavrijssen, *supra* n. 43, 360–361. See also Case C-202/88, *France v. Commission*, [1991] ECR I-01223; Case C-69/91, *Decoster,* [1993] ECR I-05335; Case C-18/88, *GB-Inno*, [1991] ECR I-0594, and Case C-82/07, *Comisión del Mercado de las Telecomunicaciones*, [2008] ECR I-1265.

extent, also be independent of the political arena. Within OECD countries, independence usually does not refer to complete autonomy from government policy,[46] but means that national supervisors are able to implement regulations and policies independently, without intervention from the executive, while still being required to abide by general government policy.[47] Indeed, in practice, no independent supervisor is completely independent of the political arena, if for no other reason than that they were created in legislation which they must apply when exercising their powers.

There are various aspects to a supervisory authority's political independence, viz. its legal, functional, staffing and financial independence.[48] Institutional independence means that national supervisors are created as legal entities that are separate and distinct from any Ministry or other government body[49] while for European agencies it means that they are institutionally separate from the Commission or the Council. Staffing independence refers to the degree of independence of that authority's staff members – their control over their relations with market parties, lobby groups and political bodies and the extent to which they can be exposed to external pressure.[50] Financial independence is the extent to which independent supervisors can freely dispose of and allocate financial means.[51]

Functional independence refers to the degree of autonomy which the supervisory body has in making and implementing policy without interference of or requiring approval from other authorities.[52] Scholten suggests that functional independence is 'more equal' than the other aspects of political independence: *Without functional independence, an agency would lack its 'real' independence.*[53] In essence, the degree of functional independence can be established by determining the nature of the supervisor's powers and the degree of discretion it enjoys when exercising them.[54] The next section will examine what is meant by 'functional independence' in more detail.

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46 OECD, *Telecommunications Regulations: Institutional Structures and Responsibilities*, DSI/ICCP (99) 15/FINAL, 14.

47 Hancher, Larouche & Lavrijssen, *supra* n. 43, 344.

48 See for a discussion, Smits, *International Monetary Law. Issues for the New Millennium* 245–266 (Giovanoli ed., OUP 2000). See also Van der Meulen, *Toezicht op markten* 51–55 (Van der Meulen & Ottow eds., Boom juridische uitgevers 2003), Groenleer, *supra* n. 3, 32 and Scholten, *supra* n. 4, 4–13.

49 Scholten, *supra* n. 4, 5 and Commission Staff Working Paper, *Interpretative Note to Directive 2009/72/EC concerning Common Rules for the Internal Market in Electricity and 2009/73 EC concerning Common Rules for the Internal Market in Natural Gas 6* (The Regulatory Authorities, Brussels 2010), available at http://ec.europa.eu/energy/gas_electricity/interpretative_notes/doc/implementation_notes/2010_01_21_the_regulatory_authorities.pdf

50 Van der Meulen, *supra* n. 48, 55.

51 Scholten, *supra* n. 4, 11.

52 Van der Meulen, *supra* n. 48, 52 and Scholten, *supra* n. 4, 13–18.

53 Scholten, *supra* n. 4, 13.

54 *Ibid.*, 15.

### 3.2 A Closer Look at Functional Independence

When defining a supervisor's functional independence, which is an important measure of its political independence, it is important to note that independent supervisors which have their own autonomous decision-making powers, enjoy more independence than supervisors with mere advisory powers. Supervisors that have the power to make policy decisions or complex legal, economic or scientific assessments may enjoy more autonomy than supervisors whose powers are circumscribed in detail in law. However, the autonomy to make policy decisions may be restricted by policy guidelines that are adopted by the government and that the supervisor has to take into account. Indeed, after powers have been delegated to independent supervisors, the government and parliament usually retain certain responsibilities for activities in the policy area in which the supervisors operate, and they remain responsible for the supervisors' overall performance.[55] National government's responsibility for the performance of the national supervisors is reflected in the government's and parliament's powers to oversee, control and influence the way the supervisors exercise their powers or in their powers to hold them to account, including reporting obligations, the powers to appoint and dismiss board members, the power to adopt policy guidelines and budgetary powers.[56]

In comparison to the NRAs, European supervisory authorities generally have limited functional independence. The delegation of powers to European agencies is governed in the Commission and Council practice by the *Meroni* doctrine.[57] Also the new European supervisors in the financial, energy and communications sectors typically have well-circumscribed tasks and limited formal powers to adopt binding decisions (see further section *Independence from the Commission*).[58]

Like national supervisors, European supervisors are subject to various checks and balances, which constrain the European supervisors in exercising their powers in practice. Their nature is more complex, because it is not always clear which body delegated the powers to the supervisor and various delegating bodies are involved at the European level.[59] This is reflected by the fact that the Commission, the Member States and the European Parliament may have the power or the scope to influence how the supervisors exercise their powers via a great variety of public control and accountability instruments to which they are subjected, depending on

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55 Hanretty & Koop, *Comparing Regulatory Agencies: Report on the Results of a Worldwide Survey* 13 (European Uni. Inst., Working Paper No. RSCAS 2009/63), available at http://cadmus.eui.eu/bitstream/handle/1814/12877/RSCAS_2009_63.pdf?sequence=1.

56 For an overview of those powers see *ibid*. 13 *ff.*

57 Case 9/56, *Meroni v. High Authority*, *supra* n. 10. For a discussion see Chiti, *supra* n. 2, 1404.

58 Chiti, *supra* n. 2, 1404. Various academics, including Chiti, have challenged the restrictive interpretation of the *Meroni* case law, Chiti, *supra* n. 2, 1422.

59 Curtin, *Holding (Quasi-)Autonomous EU Administrative Actors to Public Account*, 4 ELJ 523–541 (2007).

the nature of their activities.[60] For instance, European supervisors typically have an administrative or management board, an executive director and one or more technical or scientific committees.[61] The management boards include representatives from the Member States, one or more Commission representatives and sometimes members appointed by the European Parliament or employers' and employees' representatives.[62] The management boards may decide on the agency's work programme, annual reports and budget and are also responsible for monitoring the agency's and the director's work.[63] Typically, the European Commission has a series of extra prerogatives,[64] such as the right to give its opinion on the agency's work programme,[65] to nominate candidates for the shortlist for the agency's director[66] and to conduct evaluations.[67]

European supervisors are subject to reporting obligations vis-à-vis the European Parliament, the European Commission and the Council.[68] The European Parliament may use the discharge procedure to obtain additional information from the supervisor and may also postpone a discharge decision in order to force a supervisor to take appropriate steps to comply with the Parliament's recommendations and requests.[69]

### 3.3 Observations

It may be observed, that the constitutional landscape of national and European supervisory authorities differs and this is reflected in the European and/or national independence requirements and procedures for political and judicial accountability

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60 Scholten, *supra* n. 4, 16, and Chiti, *supra* n. 2, 1416 *ff.*

61 Tridimas, *supra* n. 21, 237, and Busuioc, *supra* n. 2, 60.

62 Tridimas, *supra* n. 21, 237.

63 Busuioc, *supra* n. 2, 61.

64 Chiti, *supra* n. 2, 1397.

65 See e.g. Art. 10(d) of Regulation 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208/1 (2002) and Art. 8 of Regulation 401/2009 of the European Parliament and of the Council of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation network, OJ L 126/13 (2009).

66 See e.g. Art. 64 of Regulation 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency, OJ L 136/1 (2004); Art. 16 of Regulation 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211/1 (2009); and Art. 7 of Regulation 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency OJ L 77/1 (2004).

67 See e.g. Art. 25 of Regulation 460/2004, *supra* n. 66; and Art. 34 of Regulation 713/2009, *supra* n. 66.

68 See e.g. Art. 119(2) of Regulation 40/94 of Dec. 20, 1993 on the Community trade mark, OJ L 11/1 (1994); Art. 13(12) of Regulation 713/2009, *supra* n. 66; and Art. 65(10) of Regulation 726/2004, *supra* n. 66.

69 Scholten, *supra* n. 4, 24 *ff.*

relating to the European supervisory authorities on the one hand and national supervisory authorities on the other hand. As a consequence of the bottom-up influences described above, EU law has formalized and harmonized the cooperation between the national supervisors of the EU Member States by creating new European supervisors, in which the NRAs have to deliberate with, explain to and are being made accountable to their peers.[70] As the national supervisors form part of the main decision-making bodies of the European supervisors (through their participation in the Regulatory or Supervisory Boards of the European bodies) the independent status of the national supervisors directly affects the independence of the European supervisory authorities and vice versa. In order to understand how the independence of NRAs can influence decision-making procedures at the level of the European supervisors, it will first be analysed why the European legislator has deemed it important to impose stricter (political) independence requirements on national supervisory authorities in the energy and communications sectors, and how these requirements should be interpreted in the light of recent case law of the European Court of Justice.

## 4 THE FRAGILITY OF INDEPENDENCE

Looking at the national level, it is clear from the diversity of the independent authority models in the Member States that it is difficult – or nigh on impossible – to identify a common idea of an independent agency. Degrees of supervisor independence vary according to the sector of industry and national boundaries, the legal and political context and the specific institutional design of the supervisors and their relationship with the delegators and other actors. [71] This means there is no one-cap-fits-all model.[72]

The Member States' acceptance of the concept and the position of independent supervisory authorities is fragile. Especially in the area of economic and financial regulation, the significance of the concept of independence and its effect on the distribution of powers between government departments and independent regulators have not yet emerged in practice. Traditional distinctions between policy-making decisions that must be adopted by governments and their executive branches, or policy-implementing decisions that must be adopted by regulators are of little use. For instance, even where decisions appear to be purely

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70 CERRE, *supra* n. 14, 85–86. See Ottow, *supra* n. 16.

71 Quintyn, *supra* n. 8, 268.

72 Quintyn, *supra* n. 8, 268. See also Gilardi, *supra* n. 23, 873–893, Gilardi, *The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors*, 11, no. 4 Swiss Pol. Sci. Rev. 139–167 (2005) and Thatcher, *Regulation after Delegation: Independent Regulatory Agencies in Europe* 9, no. 6 J. Eur. Pub. Policy 954–972 (2002).

concerned with the implementation of policy, the complexity of the economic and legal analysis that must be carried out before a decision on, for example, tariff regulation can be made, means that an implementing regulator must often make difficult socio-economic choices.

Recent examples in various Member States illustrate that in politically sensitive issues or sectors, governments tend to interfere in the regulators' legal and political independence. Notable was the proposal for a legislative amendment by the French Minister for Industry according to which a government commissioner was to be appointed to the French telecommunications regulator (*Autorité de régulation des communications électroniques et des postes; ARCEP*)[73] who would have had the power to inform the regulator of the government's position on developments in the electronic communications and postal sectors. He would also have had the power to put relevant problems on the ARCEP agenda, and the authority would then have been required to examine them. The European Commission had grave doubts on the legality of this amendment and threatened to closely monitor whether ARCEP would still be able to exercise its powers independently and impartially, as required by the amended electronic communications directives (see section *The development of the concept of independence in European law)*. In the end, the French Senate rejected the amendment.

Recently, in Case C-424/07, *Commission v. Federal Republic of Germany*, the European Court of Justice declared that Germany had unlawfully limited the discretion of the German telecommunications regulator by establishing the principle of the non-regulation of new markets, essentially leading to a non-regulation policy favouring Deutsche Telecom.[74] The ECJ recognized that the NRAs enjoy a wide discretion to decide whether a market needs to be regulated according to each situation and on a case-by-case basis. This discretion for example entails that it is up to the NRAs, and not the national legislatures, to balance the regulatory objectives of the European directives when defining and analysing a relevant market which may qualify for regulation. The NRAs are guided by two legal instruments based on European directives (guidelines and a recommendation), prescribed by the European Commission, when defining and analysing the relevant markets to determine whether they should be subject to *ex ante* regulation. The national legislatures should respect both the NRAs' discretion and the Commission's guiding powers.

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[73] Assemblée Nationale, Amendement no. 29 Rect., présenté par le Gouvernement, 10 janvier 2011. See also: 'Les députés valident la création du commissaire du gouvernement à l'Arcep', *Le Monde* 14 janvier 2011.

[74] Case C-424/07, *Commission v. Federal Republic of Germany, supra* n. 7.

The Dutch Trade and Industry Appeals Tribunal annulled a decision by the Dutch energy regulator on the grounds that the Minister of Economic Affairs had unduly interfered in the decision-making process when regulating the gas transmission network tariffs.[75] By giving the energy regulator specific instructions, the Minister had violated legal requirements safeguarding the independence of the energy regulator to adopt autonomous decisions in individual cases. Prosser has shown that the UK government has been more actively involved in how UK regulators have been required to promote social and environmental objectives since the Millennium, for instance by setting specific output requirements for water and railway companies.[76] In the light of these fairly detailed government interventions, Prosser argues that one of the biggest challenges for regulators and governments in the future will be to develop a clear and transparent framework for regulatory partnership in policy matters alongside the regulatory independence in decisions entrusted to the regulators themselves.[77]

The abovementioned examples show, that to date, due to the ambiguities surrounding the concept of independence, there have been insufficient legal safeguards to ensure that the decision-making by national supervisory authorities when applying European law is impartial and objective. As will be discussed below, the European legislator believed recent legislative amendments to the European liberalization directives were necessary to strengthen the supervisors' legal and political independence and to reinforce the independent functioning of the national supervisors.

## 5 THE DEVELOPMENT OF THE CONCEPT OF INDEPENDENCE IN EUROPEAN LAW

### 5.1 From Market Independence to Political Independence

Unlike market independence, independence from the legislative and executive branches of government is more complicated as the creation of independent NRAs at the national level curtails the institutional autonomy of the EU Member States and may be in tension with their constitutional traditions.[78] This explains that the principle of independence of national supervisors has so far not been recognized as a general principle of EU law by the European legislator and/or the

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[75] College van Beroep voor het bedrijfsleven (CBb), AWB 09/162 AWB 09/163 AWB 09/164 AWB 09/169 AWB 09/170 AWB 09/417, *EnergieNed and VEMW v. Raad van Bestuur van de NMa*, with Gas Transport Services as third party, LJN: BM9470.

[76] Prosser, *supra* n. 27, Ch. 9.

[77] *Ibid.*, 200.

[78] CERRE, *supra* n. 14, 16 *ff*; Lavrijssen & Ottow, *supra* n. 9.

Court of Justice.[79] However, the independence principle is increasingly being laid down by several specific European directives and sometimes specified by rather detailed provisions, though in a quite piecemeal fashion.[80]

One of the oldest examples of independence requirements being imposed on the Member States by European law can be found in Article 28 of Directive 95/94/EC which requires that the national data protection supervisors charged with applying the European data protection directives *shall act with complete independence in exercising the functions entrusted to them.*[81] The importance of the national data protection supervisors' independence is also confirmed by Article 8 of the EU Charter on Human Rights and Article 16 TFEU. In a recent case, the ECJ confirmed that the independence requirements of the data protection directive refer to both independence from political influences and from market interests (see section *A broad or a narrow interpretation of the concept of independence?*).

Recital 94 and Article 30 of the audiovisual media services directive refer to competent independent supervisory bodies in the audiovisual media services sector.[82] However, this directive does not impose a formal legal obligation on Member States to create an independent supervisor where these do not yet exist.[83]

For the financial sectors, the directives do not provide separate provisions regarding the independence of the national supervisory authorities, although in some recitals and articles reference is made to 'independent' authorities, without further explanation or definition.[84] The European financial regulations and financial directives provide for several indirect references that stress the importance of the independence of the financial supervisors. However, for the ECB and the

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79 In order to be accepted as a general principle of European law, there must be a degree of general acceptance of the principle, and this must be reflected in written EU law or acceptance by Member States. Tridimas, *The general principles of EU law* 25–27 (2nd ed., OUP 2006).

80 CERRE, *supra* n. 14.

81 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, OJ L 281/31 (1995). Art. 28 of this directive, entitled 'Supervisory authority', provides:

'(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.'

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

83 See the Preliminary report on *Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing rules in the AVMS Directive (SMART 2009/001)* 323 (Hans Bredow Institute et al., January 2011).

84 See for instance, Regulation 1095/2010 of the European Parliament and the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and Repealing Commission Decision 2009/77/EC, OJ L 331/84, consideration 40 and 44. See also: Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 096/16 (2003). See also Athanassiou, *Financial Sector Supervisors' Accountability. A European perspective* (ECB legal Working paper No. 12, Aug. 2011, 5), available at http://www.ecb.int/pub/pdf/scplps/ecblwp12.pdf.

national central banks, the independency requirement is laid down in the Treaty itself (Article 130 TFEU). Independent monetary policy is considered as an essential element to ensure financial stability, disconnected from the political arena.[85] If the ECB will also be empowered with supervisory functions in the future, the independence requirements might also be applicable for these new tasks. This will strengthen considerably the independent supervision over national banks. It has to be awaited, however, how the governance structure of these new tasks will be designed in the proposals to come.

Until recently, neither ECJ case law nor the European liberalization directives in the network sectors required national regulatory authorities to be *politically* independent. However, the European Commission, a strong proponent and advocate of the NRAs' greater political independence, presented proposals to this effect for the electronic communications and energy sectors in 2007. According to the Commission's proposals, NRAs should have the power to make autonomous decisions, free from political influence, when they apply the relevant regulatory frameworks in a specific case. Basically, the Commission proposed that the NRAs may not seek or take direct instructions from any other body in relation to the day-to-day performance of the tasks assigned to them under national law when implementing EU law.[86]

The European Parliament and the Council have accepted the core of the Commission's proposals, but have also adopted amendments clarifying that the independent supervisors cannot act completely independently from *political and judicial* oversight in accordance with national constitutional traditions. National supervisors must still respect their government's general policy guidelines not directly related to the day-to-day exercise of their powers. Furthermore, their decisions may be suspended or overturned by appeal bodies, ensuring that the citizens affected by those decisions enjoy effective legal protection.[87]

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[85] Case C-11/00, *Commission of the European Communities v. European Central Bank,* [2003] ECR I-7147. See consideration 132 of case C-11/00: 'It should also be observed that the ECB has legal personality; that it has its own resources and budget and its own decision-making bodies and enjoys such privileges and immunities as are necessary for the performance of its tasks; or, further, that only the Court of Justice, on application by the Governing Council or the Executive Board, may retire a member of the ECB's Executive Board, on the conditions laid down in Article 11.4 of the ESCB Statute. Those factors are without doubt conducive to strengthening the independence thus enshrined in Article 108 EC (now Article 130 TFEU).' See further Ziglioli and Selmayr, *The Constitutional Status of the European Central Bank*, 44 CMLRev. 355–399 (2007).

[86] See Art. 2(3) of the Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21 on a common regulatory framework for electronic communications networks and services, COM (2007) 697 final, and Art. 1(12) of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54 concerning common rules for the internal market in electricity, COM (2007) 528 final.

[87] Articles 35 and 37 of Directive 2009/72 of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54, OJ L 211/55 (2009); Art. 39 and 41 of Directive 2009/73 of the European Parliament and of

### 5.2 A Broad or a Narrow Interpretation of the Concept of Independence?

The European independence provisions of the energy and communications directives mention the principle of independence of NRAs towards the government and legislator.[88]

These provisions provide for specific minimum rules on personnel, financial and functional independence, leaving still significant leeway for the Member States to realize the political independence of the NRAs.[89] It is provided that policy rules or government instructions may not deal with how the regulators exercise their regulatory powers. It is not yet clear what the exact legal meaning of these independence requirements will be as in practice regulatory matters can hardly be divided in policy-making and policy-implementation.[90]

It could however be argued that a reasonable interpretation entails that policy guidelines may relate to policy choices that are so general that they do not cause clear controversies among the different market players and do not have direct economic consequences for the different stakeholders.[91] In that line of thinking one can think of the choice, that the NRAs should secure a minimum level of network security, the promotion of environmental and climate goals, and a minimum level of infrastructure investments when exercising their powers. However, the choice for a specific tariff method, the design of regulatory remedies, and the trade-off between different regulatory objectives, is the responsibility of the NRAs. This interpretation, which is also advocated by the Commission seems to be in line with the abovementioned ECJ judgment in Case C-424/07, *Commission v. Federal Republic of Germany,* in which the Court interpreted the NRAs' discretion in a broad and teleological way.[92]

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the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55, OJ L 211/94 (2009) and Art. 3 of Directive 2002/21/EC, *supra* n. 44, as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services, OJ L 337/37 (2009).

88 Article 35 of Directive 2009/72/EC, *supra* n. 87, Art. 39 of Directive 2009/73/EC, *supra* n. 87 and Art. 3 of Directive 2002/21/EC, *supra* n. 44. CERRE, *supra* n. 14, 17. The Energy directives are most explicit in formulating the independence principle.

89 For instance, the European energy and electronic communications directives do not provide for specific rules regarding the appointment procedure of board members of the supervisors, or rules for sanctioning staff that has violated the independence rules. The electronic communications directive does not provide for specific rules on the length of the term of the board members nor on the renewability of the terms.

90 CERRE, *supra* n. 14, 14.

91 CERRE, *supra* n. 14, 15. Hancher, Larouche & Lavrijssen, *supra* n. 43.

92 Commission Staff Working Paper, *Interpretative Note to Directive 2009/72/EC*, *supra* n. 49, 5–11.

As regards the interpretation of the independence requirements vis-à-vis national governments, it is important to note that in Case C-518/07, *Commission v. Federal Republic of Germany,* the ECJ gave a broad and teleological interpretation of the independence requirements relating to national data protection supervisors provided by Directive 95/94/EC.[93] In this case, the Grand Chamber of the ECJ ruled that the concept of 'complete independence' in the second subparagraph of Article 28(1) of Directive 95/46/EC, seen in the light of the wording of this provision and the aims of the Directive, must be interpreted as meaning that the authorities responsible for supervising the processing of personal data outside the public sector must enjoy a degree of independence allowing them to perform their duties completely free of external influence. That independence not only precludes any influence exercised by the supervised bodies, but also any directions or other external influence, whether direct or indirect, which could undermine those supervisors' performance of their task to establish a fair balance between the protection of the right to privacy and the free movement of personal data.[94]

While the Court's ruling in Case C-518/07, *Commission v. Germany,* related to the interpretation of the concept of 'complete independence' in Article 28 of Directive 95/46/EC, some of this judgment's other considerations are formulated more generally and may also be relevant for how to interpret European independence requirements in other sectors.[95] This indicates that the relevance of the ECJ's judgment exceeds the data protection sector. By putting a broad and teleological interpretation on the European independence requirements, the Court has acknowledged the importance of objective and impartial decision-making as a necessary prerequisite for the authorities to exercise their powers effectively. However, it should be observed that this independence is not unlimited, as the NRAs have to abide by the law and their actions are subject to judicial review. Furthermore, the European Commission has acquired powers to give general or specific guidance to the NRAs on the basis of European law, for example by adopting binding or non-binding general measures to provide or specify regulatory principles or to issue direct instructions on how to apply European law in specific cases.[96] These powers have been extended by the recent amendments of the energy and electronic communications directives, and are illustrative for the tendency that the growing independence of NRAs from national governments is counter-balanced by the more controlling powers of the European Commission.[97]

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93 Case C-518/07, *European Commission v. Federal Republic of Germany*, *supra* n. 7, with case note by Ottow & Aelen, *supra* n. 17 and with case note by Kranenborg, *supra* n. 17.

94 Case C-518/07, *European Commission v. Federal Republic of Germany*, *supra* n. 7, para. 30.

95 *Ibid.*, para. 42.

96 Lavrijssen & Ottow, *supra* n. 9, 88 *ff* and Ottow, *supra* n. 16, 7–9.

97 *Ibid.*

## 6 THE DEVELOPMENT OF THE INDEPENDENCE REQUIREMENTS OF EUROPEAN SUPERVISORY AUTHORITIES

### 6.1 New European Supervisors: From Networks to Agencies

After having discussed the European independence requirements for national supervisors in the communications, financial and energy sectors, it will now be elaborated how European law aims to safeguard the independence of these supervisors when acting together in the newly created European supervisory bodies. The Commission played an important role in the process of creating new supervisors in its drive for greater harmonization, but it is clear from the different governance structures of the new European supervisory authorities that the metamorphosis from the informal networks of the national authorities into European authorities has not followed the same trajectory in all three sectors.[98]

As a result of the subsidiarity principle and the principle of institutional and procedural autonomy, Member States and their respective NRAs have been reluctant to relinquish too many powers to the European level in the communications, energy and financial sectors. The NRAs (and the Member States) have always taken a sceptical stance on the creation of an independent European supervisor.[99] However, there was cautious support among the national authorities for further developing the role and powers of European regulatory networks in the shape of a kind of 'European network plus'.[100] The newly created European supervisors can therefore be seen as a compromise between the need for centralization on the one hand and Member State autonomy for the application of European law on the other.

This applies in particular to the Body of European Regulators for Electronic Communications (BEREC). As such, BEREC is not an EU agency, but a body of NRAs. Only the BEREC office is a EU body with legal personality, but this administrative body only supports the BEREC activities. The Board of Regulators consists of one member from each Member State and the same member, in its turn, also heads the national regulator in its own Member State.[101] The Board of

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98 See Ottow, *supra* n. 16.

99 See ERG, Advice in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services, Feb. 27, 2007 and ERGEG's response to the European Commission's Communication *An Energy Policy for Europe*, ref. C06-BM-09-05, Feb. 6, 2007. See also Thatcher & Coen, *Reshaping European Regulatory Space: an Evolutionary Analysis*, 31, no. 4 W. Eur. Pol. 806–836 (2008).

100 Lavrijssen & Hancher, *supra* n. 11, 5 *ff*., ERGEG, *3rd Legislative Package Input, Paper 2: Legal and Regulatory Framework for a European System of Energy Regulation, an ERGEG public document*, Ref: C07-SER-13-06-02-PD (June 2007). and ERG Working programme 2006.

101 Articles 4(1) and (2) of Regulation 1211/2009 of the European Parliament and of the Council of Nov. 25, 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1 (2009).

Regulators can adopt resolutions on the basis of a two-thirds majority,[102] while the Commission can only attend the BEREC meetings as an observer.[103]

The influence of the Commission, the Council and the European Parliament is more substantial in the case of the energy regulators, given that they can appoint members (with voting rights) to the Administrative Board of the Agency for the Cooperation of Energy Regulators (ACER) directly.[104] The Administrative Board is responsible for ACER's general management, including the adoption of its work programme and budget and the supervision of its performance and of its director.[105] In addition, according to Article 14 of Regulation 713/2009, ACER has a Board of Regulators consisting of representatives from the national regulators and the Commission (although the latter has no voting rights).[106] This Board of Regulators is ACER's main regulatory body and is responsible for its recommendations, opinions and decisions[107] and adopts resolutions by a qualified majority, giving the individual NRAs more power to block ACER's decisions than if it voted by a simple majority.

The ESAs' supervisory boards are made up of the heads of the NRAs (with voting rights) and one representative from the Commission, the European Central Bank, the ESRB and the other European Financial Supervisors, none of which have voting rights. The EU bodies therefore have more influence on the boards as they are represented formally, but lack voting rights.[108] In principle, the boards can adopt decisions by a simple majority, giving the individual NRAs less individual power within these European supervisors.[109]

It can be concluded from the above that in the European context, these new European supervisors must serve two masters: their respective NRAs and the EU bodies. This 'double-hattedness'[110] is reflected in their complex governance structure. They are part of a multi-level administration: the national administration and the EU administration. Conflicts of interest are possible and could put the European agencies and their respective NRAs in a difficult position. The next

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102 *Ibid.*, Art. 4(9), unless otherwise provided for in the respective directives.
103 *Ibid.*, Art. 4(2).
104 Art. 12 of Regulation 713/2009, *supra* n. 66.
105 *Ibid.*, Art. 13.
106 The relationship between the Administrative Board and the Board of Regulators is not entirely clear from the Regulation.
107 Art. 15 of Regulation 713/2009, *supra* n. 66.
108 See e.g. Art. 40(1) of Regulation 1093/2010 of the European Parliament and of the Council of Nov. 24, 2010 establishing a European Supervisory Authority (European Banking Authority) amending Decision No. 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331/12 (2010).
109 *Ibid.*, Art. 44(1).
110 In literature, this term has largely been used so far to identify the NRAs' two masters: they serve their respective national ministries and the European institutions. Egeberg (ed.), *Multilevel Union Administration: the Transformation of Executive Politics in Europe* (Palgrave Macmillan 2006), and Curtin & Egeberg, *Tradition and Innovation: Europe's Accumulated Executive Order*, 31, no. 4 W. Eur. Pol. 649–650 (2008).

section analyses the position of the European supervisors vis-à-vis the European Commission as well as their positions vis-à-vis the NRAs and the Member States and the corresponding independence provisions in more detail.

### 6.2 Independence Requirements

It has been shown above that the NRAs have a substantial influence on the new European authorities via the Boards of supervisors or regulators, which are the European supervisors' main decision-making bodies. Therefore, powers are and remain concentrated at the level of the national regulators, though differences remain between the communications, energy and financial agencies.[111] Due to these bottom-up influences, the links between these new European authorities and the national institutional context are still strong. Given the influence of the national supervisors, one could wonder how 'European' the new supervisors will actually prove to be. This question will have to be assessed in the light of their future performance.

The independence principle is one of the legal safeguards to prevent problems at the national level being transferred to the European level and vice versa, and has been laid down as a cornerstone of the regulations establishing the new European agencies. The independence principle has two different aspects: the independence from the Member States, to prevent a focus on national interests, and the independence from the Commission and Council as political bodies of the EU.[112] Thus, for example the financial regulations contain the following instruction to the Member States and Union institutions: 'Neither the Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks'.[113] Similar provisions are found in the Regulations concerning BEREC and ACER.[114]

### 6.3 Independence from the Member States

The need for independence from the Member States is obvious, as this must ensure that national interests will not prevail. The new European supervisors must

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111 Ottow, *supra* n. 16.

112 Ottow, *Europeanisering van het economisch toezicht* (The Europa Institute, Working Paper No. 01/10, http://www.uu.nl/faculty/leg/NL/organisatie/departementen/departementrechtsgeleerdheid/organisatie/onderdelen/europainstituut/publicaties/Documents/Working%20Paper;%20Ottow-1-10.pdf) 3–5 (last visited Jun. 25, 2012). On the subject of independence from EU institutions see Curtin & Wessel (eds.), *Good Governance and the European Union* 134 (Intersentia 2005).

113 See Art. 42 of Regulation 1093/2010, *supra* n. 108.

114 See Art. 4(2) Regulation. 1211/2009, *supra* n. 101 and Art. 14(5) of Regulation 713/2009, *supra* n. 66.

ensure better harmonization and enforcement of European rules, which may not be frustrated by a Member State's non-compliance. The new supervisors' powers must ensure that this goal is realized without intervention from any individual Member State. The success of these new supervisors will have to be measured on the basis of their achievements: are they able to issue harmonized guidelines, technical codes, and other opinions which lead to more convergence of the various national practices?[115]

The regulations establishing the new European supervisors in the financial sector introduce an important new instrument to ensure that the NRAs comply with EU rules: these new financial European supervisors have direct powers to issue a decision that is binding on a financial institution and can thereby overstep the NRA if the latter fails to take action and thus infringes directly-applicable EU law. [116] This is an innovative instrument and a significant development. This instrument can strengthen the independence of the European supervisor, but this system can only work effectively if the European supervisor can operate truly independently from a failing national regulator and its government. If not, the system will become no more than an empty shell.

### 6.4 Independence from the Commission

The independence requirements at the European level also include the independence of the European supervisors vis-à-vis the Commission. This aspect of the independence principle is less straightforward and can conflict with the institutional balance laid down in the EU Treaties. There is a tension between the independence of the European supervisors on the one hand and the powers of the Commission as the primary executive body of the EU on the other. Although the regulations provide that the boards of regulators or the supervisors should act independently of the Commission, this independence can only be relative. The European supervisors necessarily have limited decision-making powers (and therefore limited functional independence) as a result of a restrictive reading of the *Meroni* case law by the Commission and the Council.

In general, it can be stated that, de jure, the abovementioned new European supervisors have powers of a purely technical and advisory nature, but no powers to adopt policy decisions. Moreover, the agencies will be formally dependent on the Commission to endorse a great deal of their recommendations via the

[115] See on this subject the interview with BEREC's current chair (Chris Fonteijn) referring to these desired effects: 'Regulating the Regulators' *mLex Magazine*, Telecom, Media & IT, (Oct.–Dec. 2011), 14–17.

[116] Article 17(6) of Regulation 1093/2010, *supra* n. 108. This power can only be executed in the case of relevant requirements, which are 'directly applicable to financial institutions'.

adoption of binding legal measures. The Commission has clearly been mindful not to grant any regulatory powers to the European financial authorities, for example, in the light of the *Meroni* case. Instead, the financial European supervisors can only propose draft rules (such as technical standards) and submit them to the Commission, which can then decide whether to endorse them.[117] Despite the fact that it is up to the Commission to endorse the draft rules, the financial European Supervisors will however have a substantial influence on the Commission's measures, as the Commission can only derogate from their proposals under certain specific circumstances. In this respect, Chamon notes that the legal fiction that the Commission retains all the decision-making powers has now also been partially abandoned and that the European financial supervisors wield quasi-legislative powers, subject to the limited scrutiny of the Commission, which also still – formally – adopts the delegated acts.[118] These quasi-legislative powers of the European supervisors, which strengthen their functional independence, seem to be at odds with the *Meroni* doctrine.[119]

However, it is very well possible that the ECJ will revise the *Meroni* doctrine in the light of the changes in the legal and political context in which the European supervisors operate these days, compared with the legal situation of the private law bodies of the *Meroni* case.[120] Lavrijssen and Hancher have argued elsewhere that the *Meroni* principle can indeed be reinterpreted, in that independent European supervisors may be attributed (quasi)-regulatory powers, provided that the European supervisors are made politically and legally accountable in a manner comparable to the European Commission.[121] The

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117 See Arts. 10–15 of Regulation 1093/2010, *supra* n. 108. The Commission can amend the draft rules only in certain specific circumstances. The European Parliament and the Council may object to the Commission's endorsement of these standards (Art. 13).

118 Chamon, *supra* n. 19, 1069. This is particularly the case for the new financial authorities. BEREC can only give opinions on regulatory measures or issue non-binding guidelines. However, the Commission must take utmost account of such opinions (see e.g. Art. 3(3) of Regulation 1211/2009, *supra* n. 101) and cannot derogate from them too easily. In the case of ACER, the Commission must provide reasons if it is unwilling to endorse the network codes proposed by ACER, see Art. 6 of Regulation 714/2009 of the European Parliament and of the Council of July 13, 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003, OJ L 211/15 (2009).

119 *Ibid*., 1060–1061: Chamon argues that the *Romano* case (Case 98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, [1981] ECR 1259) is more relevant for European agencies than *Meroni*. The reasoning in *Romano* (Case 98/80, *Giuseppe Romano v. Institut national d'assurance maladie-invalidité*, [1981] ECR 1259) is even more restrictive than *Meroni*.

120 Hancher & Lavrijssen, *supra* n. 11, 35–36. See otherwise Chamon: According to Chamon, even though the *Meroni*-doctrine is frequently cited and analysed in the legal debate on agencies, the *Romano* judgment (*G. Romano v. Institut national dássurance maladie-invalidité*, C-98/80 [1981] ECR 1259), seems to be more relevant for current day agencies. By applying the reasoning in *Romano* (which is even more restrictive than *Meroni*) to the EU agencies he argues that the on-going agencification rests on very shaky legal grounds.

121 Hancher & Lavrijssen, *supra* n. 11, 35–36.

European regulations include important new provisions to ensure transparency and accountability, although not always to the same extent.[122] Overall, the establishment of these new bodies cannot be compared with the situation in the *Meroni* case, because of which various safeguards have been put in place to compensate for the substantial independence of the European Commission and the quasi-regulatory powers of these authorities. An important question which therefore remains is whether the new provisions for the greater transparency and accountability of the European authorities are sufficient to resolve the problems identified in the *Meroni* case.[123]

## 7 CONCLUSION

Though the role of independent supervisors at the national and European levels has grown, their independent status is fragile. This article has shown, that European law has strengthened the political independence of national supervisors, though so far in a piecemeal way. A recent report of the Centre on Regulation in Europe, concluded that a general *legal concept of independence with uniformly applicable legal requirements to safeguard independence is lacking.*[124] Indeed, the independence principle has not (yet) acquired the status of a general principle of European law. The new energy and electronic communications directives mention the independence principle and specify the minimum requirements for personnel, institutional, functional and financial independence. Relevant case law of the ECJ, indicates that these requirements have to be interpreted in a broad and teleological way in order to ensure an impartial and effective application of European law by the national supervisors.

By discussing these new European independence requirements for national supervisors it became apparent that the independence of supervisors is a relative concept, and that the exact contours of the new European independence requirements have not yet emerged. Especially in politically sensitive sectors, such as the energy and the financial sectors where independent supervisors have the power to make policy choices and complex legal and economic assessments, there is a great deal of controversy as to which policy-making powers should be reserved for the ministerial departments and which day-to-day implementing powers can be exercised independently by the national supervisors. This article has given some

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[122] See for example Art. 15(5), Art. 16(8), Art. 19 and Art. 20 of Regulation 713/2009, *supra* n. 66 and Art. 5(5) and Art. 13 of Regulation 1211/2009, *supra* n. 101. See for a discussion of the accountability arrangements regarding the new agencies: Ottow, *supra* n. 16, 20.

[123] A good discussion of *Meroni* from an accountability perspective can be found at: http://www.eu-newgov.org/database/DELIV/D04D40_WP_Meroni_Revisited.pdf (last visited Jun. 25, 2012).

[124] CERRE, *supra* n. 14, 14.

suggestions for dealing with these controversies by making a distinction between issues that are hardly controversial among stakeholders, for example, issues relating to the protection of public interests at a general level, such as the realization of the EU climate goals on the one hand and decisions implementing these policy choices having direct economic consequences for the stakeholders on the other hand. The ECJ will have to shed light on this problem, for instance in a preliminary ruling concerning the interpretation of the independence requirements of the European liberalization directives or in an infringement procedure ex Article 258 TFEU.

Furthermore, the relativity of the legal independence of supervisors is illustrated by the fact that stricter European legal requirements concerning the national supervisors' independence from national governments in the energy and electronic communications sectors go hand-in-hand with the European Commission's greater powers to give general and specific directions to the national supervisors on how to apply European law. Furthermore, NRAs are subject to enhanced European requirements to ensure an effective application of European law by cooperating with their European peers within the context of the newly created European supervisors. If national supervisors cannot function independently as a result of undue influences by their national governments, national supervisors can adversely affect the independent functioning of the European supervisors in which they participate. And if European supervisors cannot operate independently as a result of undue influences of the Council or the Commission, they in turn can undermine the independence of national supervisors, for instance when applying regulatory measures that have been prepared by their European supervisory counterpart. Especially, the position of the new European supervisory bodies vis-à-vis the European Commission is complex and controversial. Moloney rightly concludes that these European supervisors *may struggle to develop a robust and independent institutional voice*.[125] The European supervisors largely depend on the Commission while at the same time are required to operate independently and without conflicting with the *Meroni* judgment.[126] Furthermore, the exact legal base of their quasi-regulatory powers is uncertain, as the ECJ has not yet had the opportunity to clarify the significance and interpretation of the *Meroni p*rinciple in the current legal, social and economic context. Only time will tell how the new European authorities will develop in

[125] Moloney, *EU Financial Market Regulation after the Global Financial Crisis: 'More Europe' or More Risks?*, 47 CML Rev. 1352 (2010).

[126] BEREC has already proved that it acts independently of the Commission in its advice to the European Parliament regarding the roaming regulation. See: http://berec.europa.eu/doc/berec/ip_roaming_ep.pdf (last visited Jun. 25, 2012), http://berec.europa.eu/doc/berec/text_voting.pdf (last visited Jun. 25, 2012) and http://berec.europa.eu/doc/berec/itre_roaming.pdf (last visited Jun. 25, 2012).

practice, and future research will have to analyse the de facto independence of European supervisors vis-à-vis the Commission, clarify the factors that may contribute to their more or less independent functioning and how they influence the exercise of powers by the national supervisors.

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