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## Institutional Design of National Competition Authorities: EU Requirements

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This paper tackles the ongoing debate over the adoption of EU legislation on institutional design requirements for NCAs by clarifying the status quo. It is argued that EU law already imposes wide-ranging obligations upon Member States when deciding how to set up their NCAs, especially on the basis of the principle of effectiveness. To arrive at that conclusion, a summary of existing institutional design requirements for national regulators in other areas of EU law is provided, and the legal basis for the imposition of such requirements is discussed. By extrapolating and drawing analogies from EU case-law relating to competition law and other areas of EU law, it will be shown that we already have a vast body of judicial clarifications of the precise extent of institutional design requirements for NCAs. Nonetheless, it will also be argued that secondary legislation on this issue is crucial for legal certainty and effectiveness.

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**1. INTRODUCTION**

In this paper, I will focus on points of law regarding the imposition by the EU legal order of requirements on the institutional design of National Competition Authorities (NCAs). To tackle this task, I will begin by analyzing and discussing EU rules applicable to the institutional design of national authorities in sectors other than the enforcement of competition law, so as to provide a valuable frame of reference for the subsequent discussion. Once this is established, I will move on to my view on the institutional obligations that EU Law, as it stands, already imposes on Member States when deciding how to set up their NCAs. In the final section, I compare my findings with the Commission's proposed Directive on NCAs,<sup>1</sup> as a backdrop for a conclusion on the desirability of this Directive.

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<sup>1</sup> Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017)142 final, 22 March 2017 ("Commission's proposed Directive on NCAs"). See also: European Commission, *Communication from the Commission to the European Parliament and the Council: ten years of antitrust enforcement under regulation 1/2003: achievements and future perspectives*, COM(2014)453 final, 9 July 2014. Framework, replies and summary of the public consultation that followed are available at: [http://ec.europa.eu/competition/consultations/2015\\_effective\\_enforcers/index\\_en.html](http://ec.europa.eu/competition/consultations/2015_effective_enforcers/index_en.html).

## 2. EU LAW APPLICABLE TO OTHER NATIONAL AUTHORITIES

### 2.1. Institutional design obligations for national authorities in other areas of EU Law

EU Law establishes obligations for the institutional design of national authorities in a number of areas. These obligations vary in intensity. The listing that follows is meant to provide an overall view of this type of requirements in a sample of sectors subject to EU legislation, chosen on the basis of the existence of provisions in EU primary or secondary law imposing specific institutional design obligations for the respective national regulators which included independence requirements, specifically: the European System of Central Banks (ESCB), telecommunications, energy, railway, data protection, and nuclear safety and radiological protection.

This section does not provide an exhaustive enumeration of requirements within the sectors that have been analyzed.

The institutional design requirements can, fundamentally, be divided up into two groups. One set of obligations limits (or not) the right of Member States to distribute the relevant competences by more than one national authority. The other, larger, set of obligations is aimed at guaranteeing the independence of the authorities designated as national regulators.

#### (i) Number of authorities

EU law requires an explicit designation of the national authority which will carry out the functions decentralized to the MS by the European legislator.

In 3 out of 6 sectors – telecommunications, data protection, nuclear safety and radiological protection – MS are allowed the freedom to decide to assign tasks to one or more authorities.<sup>2</sup>

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<sup>2</sup> Telecommunications: Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108/33, 24/04/2002), amended by Regulation (EC) 717/2007, Regulation (EC) 544/2009 and Directive 2009/140/EC (hereinafter “Directive 2002/21/EC”), Arts. 2(g) and 3(1) and (6); see also, e.g., Case C-82/07 *Commission v Germany* EU:C:2010:125, §§17-19 and 23; and Case C-288/12 *Commission v Hungary* EU:C:2014:237, §47. Data Protection: Directive 95/46/EC, Art. 28(1); Regulation (EU) 2016/679, Art. 51(1). Nuclear: Council Directive 2011/70/Euratom of 19 July 2011 establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste (OJ L 199/48, 02/08/2011) (hereinafter “Directive 2011/70/Euratom”), Art. 3(2); Council Directive 2009/71/Euratom of 25 June 2009 establishing a Community framework for the nuclear safety of nuclear installations (OJ L 172/18, 02/07/2009), amended by Directive 2014/87/Euratom (hereinafter “Directive 2009/71/Euratom”), Art. 3(3); Council Directive 2013/59/Euratom of 5 December 2013 laying down basic safety standards for protection against the dangers arising from exposure to ionising radiation, and repealing Directives 89/618/Euratom, 90/641/Euratom, 96/29/Euratom, 97/43/Euratom and 2003/122/Euratom (OJ L 13/1, 17/01/2014 (hereinafter “Directive 2013/59/Euratom”), Art. 4(16).

In the 3 other sectors – ESCB, energy, railway – EU law imposes the option of a single authority (with the limitation of having to comply with national constitutional requirements associated to powers granted to federated States or regions).<sup>3</sup>

There is no obvious single criterion which can be used to distinguish between the two groups, nor is it clear, for example, why energy is deemed to require a single regulator, but telecommunications is not.

## (ii) Independence

A review of EU institutional design requirements, in the above-mentioned sectors, highlights that there are many different approaches to the attempt to ensure the independence of national regulators and guarantee democratic and judicial review. Once again, there is a clear absence of homogeneity and harmonization of requirements across the various sectors, which is, in my view, unexplained by factual differences requiring different solutions. While in some Member States, as in Portugal,<sup>4</sup> the institutional design of independent regulators has been harmonized through the adoption of framework laws that lay out cross-sector institutional rules, the EU approach continues to be piecemeal.

In what concerns their organic and functional independence, some NRAs must:<sup>5</sup>

- [5 in 5] be legally separate and functionally independent from all regulated entities (or from any other public or private entity);<sup>6</sup>
- [5 in 5] not seek or take instructions from any other body in relation to regulatory tasks (but may be subject to general policy guidelines and to supervision in accordance with national constitutional law);<sup>7</sup>
- [5 in 5] have adequate financial and human resources;<sup>8</sup>

<sup>3</sup> ESCB: Art. 131 TFEU; Energy: 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, 14/08/2009) (hereinafter “Directive 2009/72”, Art. 35(1) and (2). See also the exception provided for in Art. 35(3). Railway: Directive 2012/34 of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L343/32, 14/12/2012) (hereinafter “Directive 2012/34”), Art. 55(1).

<sup>4</sup> See Portuguese Law no. 67/2013, of 28 August.

<sup>5</sup> Each requirement begins with the indication of the number of sectors in which the requirement is present, out of the total of five. The ECSB is not included in this summary and will be discussed separately below.

<sup>6</sup> Telecommunications: Directive 2002/21/EC, Art. 3(2). For a discussion of the consequences of this requirement, see, e.g.: case C-82/07, §§12-21. Energy: Directive 2009/72, Art. 35(4). Railway: Directive 2012/34, Art. 55(1). Data Protection: Regulation (EU) 2016/679, Art. 52(1). Nuclear: Directive 2011/70/Euratom, Art. 6(2); Directive 2009/71/Euratom, Art. 5(2) (as revised in 2014); Directive 2013/59/Euratom, Art. 76(1)(a).

<sup>7</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3a) (after 2009). Energy: Directive 2009/72, Art. 35(4). Railway: Directive 2012/34, Art. 55(3). Data Protection: contrast the succinct independence requirement in Directive 95/46/EC, Art. 28(1), to the new requirements in Regulation (EU) 2016/679, Art. 52(2) and (5). Nuclear: Directive 2009/71/Euratom, Art. 5(2) (as revised in 2014).

<sup>8</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3) and (3a) (after 2009). Energy: Directive 2009/72, Art. 35(5). Railway: Directive 2012/34, Art. 55(3). Data Protection: Regulation (EU) 2016/679, Art. 52(4) (which is more specific, referring to “*human, technical and financial resources, premises and infrastructure necessary for the effective*”

- [4 in 5] have separate annual budget, made public;<sup>9</sup>
- [4 in 5] have their Board appointed with guarantees that they may only be dismissed if they no longer fulfil the previously defined conditions required for the performance of their duties (for energy and data protection, rules on length and renewability of mandates are set; and in the railway and data protection sectors, the manner and criteria for appointment of decision-makers is also regulated);<sup>10</sup> and,
- [2 in 5] not be subject to suspension or overturning of their decisions by any authority, other than independent appeal bodies.<sup>11</sup>

In what concerns behavioural obligations, some NRAs are required to:

- [5 in 5] act impartially (including, for railway and data protection, the requirement of an incompatibility regime and, for railway, a cooling-off period);<sup>12</sup>
- [3 in 5] act transparently;<sup>13</sup>
- [3 in 5] protect confidentiality of information;<sup>14</sup> and,
- [2 in 5] act in a timely / efficient manner.<sup>15</sup>

In what concerns their accountability and judicial review, some NRAs are explicitly required to:

- [1 in 5] be accountable - in some cases, EU law also imposes reporting obligations;<sup>16</sup> and,
- [1 in 5] have their decisions subject to independent judicial review.<sup>17</sup>

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*performance of its tasks and exercise of its powers*”). Nuclear: Directive 2011/70/Euratom, Art. 6(3); Directive 2009/71/Euratom, Art. 5(2)(c) and (d) (as revised in 2014); Directive 2013/59/Euratom, Art. 76(1)(b).

<sup>9</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3a) (after 2009). Energy: Directive 2009/72, Art. 35(5). Data Protection: Regulation (EU) 2016/679, Art. 52(6). Nuclear: Directive 2009/71/Euratom, Art. 5(2)(c) (as revised in 2014).

<sup>10</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3a) (after 2009). Energy: Directive 2009/72, Art. 35(5). Railway: Directive 2012/34, Art. 55(3). Data Protection: Regulation (EU) 2016/679, Art. 52(3) and 53(1)(d) and (e).

<sup>11</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3a) (after 2009). Energy: Directive 2009/72, Art. 35(5).

<sup>12</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3). Energy: Directive 2009/72, Art. 35(4) (including ensuring that staff and managers act “independently from any market interests”). Railway: Directive 2012/34, Art. 55(3). Data Protection: Regulation (EU) 2016/679, Art. 52(3). Nuclear: Directive 2009/71/Euratom, Art. 5(2)(e) (as revised in 2014).

<sup>13</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3) and (4). Energy: Directive 2009/72, Art. 35(4). Nuclear: Directive 2009/71/Euratom, Art. 5(2)(b) and (f) (as revised in 2014); Directive 2013/59/Euratom, Art. 77.

<sup>14</sup> Telecommunications: Directive 2002/21/EC, Arts. 3(5) and 5(3). Energy: Directive 2009/72, e.g. Arts. 8(5) and 10(8). Data Protection: Regulation (EU) 2016/679, Art. 54(2).

<sup>15</sup> Telecommunications: Directive 2002/21/EC, Art. 3(3) (after 2009). Energy: Directive 2009/72, Art. 36.

<sup>16</sup> Energy: Directive 2009/72, Art. 37(1)(e).

<sup>17</sup> Telecommunications: Directive 2002/21/EC, Art. 4.

A special case, which should be considered autonomously (due to the special framework arising directly from primary EU Law), is that of the European System of Central Banks and the institutional design requirements imposed by the EU legal order on national central banks.

In this case, the Treaty itself imposes the independence of the national regulator when acting under EU law:

“When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks” (Art 130 TFEU).<sup>18</sup>

This broader framework for independence is then specified in secondary legislation, in specific contexts.<sup>19</sup>

The Treaty also imposes a minimum term of office and establishes particularly strict guarantees against undue removal from office.<sup>20</sup> This includes a right of appeal to the ECJ and right of initiative of the affected person or the ECB, giving the EU jurisdiction direct control over compliance with these rules.

Given that several Member States have opted to merge NCAs and some sectoral regulators into a single enforcer, and that others are debating doing so, it is worth noting that there is a precedent in the EU for prohibiting the accumulation of regulatory functions, if doing so may jeopardize the effectiveness of EU Law. The ECB has the right to prevent the national central banks from carrying out other functions, if they interfere with the objectives and tasks of the ESCB.<sup>21</sup>

## 2.2. Justifying such requirements and their varying intensity

Even the brief analysis summarized in the previous section makes evident that EU law imposes institutional design requirements on national regulators in some sectors, but not in others. Today, there is virtually no branch of the law, no field of national administrative

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<sup>18</sup> See also Art. 131 TFEU and Art. 7 of TFEU Protocol 4.

<sup>19</sup> See, e.g.: Regulation (EU) 1024/2013, Art. 19; and Regulation (EU) 468/2014.

<sup>20</sup> Art. 14(2) of TFEU Protocol 4: “The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years. A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be”.

<sup>21</sup> Art. 14(4) of TFEU Protocol 4.

activity which is untouched by EU law. And yet, in the majority of cases, the EU legal order does not explicitly include requirements for the institutional design of national administrative authorities.

Looking at the areas where such requirements have been imposed, we are able to broadly identify certain commonalities. In all of the cases mentioned above, the enforcement of certain European rules has been, at least partly, entrusted to national authorities (decentralization) and MS have been required to designate one or more authorities who will carry out those tasks. This process of decentralization can be seen as a manifestation of the principle of loyal cooperation and of the principle of subsidiarity: even though certain matters have been regulated at EU level, and thus a transfer of sovereign power from the MS to the EU has occurred in that sphere, it is found that national authorities will be in a better position than the Commission to enforce certain provisions, in certain contexts.

A first finding is that there is no obvious reason why significant institutional design requirements have been explicitly imposed in some areas (the sectors mentioned above) but not in others (e.g., competition law or pharmaceuticals). The reasoning that led to the adoption of those provisions for some sectoral regulation could equally be applied to others. The very fact that these requirements have developed and changed with time stresses their non-inevitability for the areas in which they have been introduced, and their possibility for areas in which they have not yet been introduced.

Why is the EU's stipulation of institutional design requirements for national authorities legitimate? Except in the case of the ESCB<sup>22</sup> and data protection,<sup>23</sup> the Treaty does not include such requirements or provide an explicit legal basis for their adoption by European institutions. Since the EU may only act to the extent that it has been given powers to do so by the Treaties, and considering the principle of procedural autonomy of the MS, it may indeed be expected that, if the EU does choose to entrust the enforcement of EU law to national authorities, it must leave their organization and design up to the MS.

But such a position could lead to the EU provisions whose enforcement has been entrusted to the national regulators to be deprived of their *effet utile*. It is hard to overstate the importance of the principle of effectiveness in the EU legal order and, specifically, in the delineation of the EU's sphere of competences. Throughout the years, it has been the tool that allowed the Court to take enormous steps in furthering European integration, from the praetorian creation of direct effect to the affirmation of the EU's competence to require the imposition of criminal sanctions, to name only a couple of examples.

Fundamentally, it is, in my view, the principle of effectiveness that allows the EU to impose institutional design requirements, as it has, in sectors such as telecommunications, energy, nuclear and data protection. This is true even for obligations that are specifically

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<sup>22</sup> Arts. 130 and 131 TFEU and Art. 7 of TFEU Protocol 4.

<sup>23</sup> Art. 16(2) TFEU and Art. 8(3) of the EU Charter on Fundamental Rights.

provided for in the Treaty.<sup>24</sup> And in one sector where these requirements were only created in secondary legislation, when looking at the deepening of requirements in the 2009 revision of the Telecommunications Framework Directive, the ECJ stressed that: “the intention of the EU legislature was ... to strengthen the independence of NRAs in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions”.<sup>25</sup>

This being said, we must now turn our attention to the variation in the specificity and degree of the institutional design requirements. These vary from sector to sector but, and perhaps most interestingly, they also vary in time.

There is a clear trend for EU institutional design requirements in the sectors discussed in the previous section to become further detailed. 2009 was a notable turning point, with new legislation and amendments adopted after that time including a greater level of detail and being more restrictive of the autonomy of MS in designing their national regulators.

This is extremely telling. It highlights that effectiveness is a matter of degree, not a yes/no test. It would be hard to argue, for example, that telecom NRAs or nuclear NRAs were not guaranteeing the effectiveness of the EU rules enforced by them prior to the legislative reforms that increased their independence requirements. These reforms were not motivated by a finding that EU law was being deprived of its *effet utile*, but rather by a finding that its effectiveness could be guaranteed to a greater degree.

This raises an interesting problem for the judicial review of the EU legislator’s competence to impose such requirements. Since competence is deriving from the principle of effectiveness, would the Court allow the legislator a discretionary margin in the assessment of the degree of effectiveness which is required or justified? Surely, there must be some upper limit to how far you can stretch the effectiveness argument. Other than the will of the qualified majority of MS, what is to prevent the EU legislator from finding that EU control over the appointment of NRA Board members is required in order to adequately protect the effectiveness of EU law?

National central banks are an integral part of the ESCB. Not only do they apply EU law and carry out tasks fundamental to European integration, but their governors actually have a seat on the ECB’s Governing Council. The right of appeal against undue dismissal of a national central bank governor to the ECJ perfectly demonstrates the extent to which these banks are considered, in part, as an integral part of the EU’s administration. In the recent *ISTAT* case, the ECJ stated that, because of their “fundamentally different functions”, electronic communications NRAs could not claim to be subject to the same independence regime as national central banks.<sup>26</sup>

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<sup>24</sup> In this sense, see, e.g., Case C-518/07 *Commission v Germany* EU:C:2010:125, §25 (“The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data”); reaffirmed, e.g., in Case C-362/14 *Schrems* EU:C:2015:650, §41.

<sup>25</sup> Case C-424/15 *Ormaetxea Garai and Lorenzo Almendros* EU:C:2016:780, §45.

<sup>26</sup> Case C-240/15 *Autorità per le Garanzie nelle Comunicazioni* EU:C:2016:608, §43. In this case, national rules limiting the financial autonomy of the NRA were at stake. The Court discussed, *inter alia*, whether these NRAs

But there are many areas which have gotten closer to this reality of integration between EU and national bodies, and it is expectable that this tendency will continue in coming years. And, in any case, knowing that, in other areas, the independence requirements cannot go quite so far as in the ESCB does not tell us exactly how far they can or should go.

The inclusion of institutional design requirements in primary EU law does not seem to be a decisive factor of distinction between the degree of those requirements.<sup>27</sup> In the data protection sector, the requirement of an independent authority is included in Art 8(3) of the EU Charter of Fundamental Rights and Art 16(2) TFEU, and yet the institutional design requirements set out in secondary legislation are not significantly different from those imposed in other sectors where the requirement of independence appears only in secondary legislation. Also, we should consider that, in a way, institutional design requirements are always based on primary EU law, since there are always Treaty provisions whose effectiveness is being invoked to justify the adoption of these provisions.

What limits the EU legislator's right to impose institutional design requirements in these cases? Personally, I would argue that this is an eminently non-judiciable issue, and that the Court would only deliver a negative finding in an extreme situation, where it would be manifestly unreasonable to argue that the EU institutional design requirements in question would not be necessary to ensure the *effet utile* of the EU rules applied by the national authorities in question. The very nature of the European legislative process makes the occurrence of such a scenario highly unlikely.

This may also help to understand how we can have such different (legitimate) institutional design regimes in different areas. Ideally, there should be convergence and harmonization between EU institutional design requirements for the different regulators, unless a difference is explicitly justified by differences in the tasks assigned to them or the challenges involved in carrying them out. Looking at the different regimes mentioned in the previous section, it is not always obvious that such justifications are present.

At the end of the day, the variation between the different regimes may simply be owed to the different times at which they were adopted (and the tendencies then prevailing), but also to a “feudal”, sectoral approach to the legislative process, which leaves little room for horizontal dialogue and cross-sectoral harmonization.

### **3. EU LAW CURRENTLY APPLICABLE TO NATIONAL COMPETITION AUTHORITIES**

The ECN is a network of EU and national authorities in which we find legal relationships very similar to those found in the sectors analyzed in Section 2. NCAs are obliged to enforce Arts 101 and 102 TFEU whenever anticompetitive practices have an effect on

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should benefit from the same degree of protection of their independence, under EU Law, as provided for the national central banks.

<sup>27</sup> This was seemingly suggested by AG Campos Sánchez-Bordona in his Opinion in Case C-240/15 *Autorità per le Garanzie nelle Comunicazioni* EU:C:2016:308, §§48-50.

trade between Member States. They are subject to obligations of cooperation with the European Commission and the allocation of cases within the ECN is based upon criteria determined by EU hard and soft law and by *ad hoc* EC decisions<sup>28</sup>. They are also subject to a certain degree of hierarchical subordination to the Commission. To a large extent, they are as much a part of the EU administrative machine for the enforcement of EU law as the NRAs discussed above.

In this section, I will argue that EU law already provides for a wide range of institutional design obligations for NCAs, even if they may be difficult to identify precisely. These obligations derive, firstly, from more or less implicit consequences of secondary EU competition rules and, secondly, from Arts 101 and 102 TFEU together with general principles of EU law.

For the first part, Regulation (EC) 1/2003 includes several provisions with consequences for the institutional design of NCAs:

- (i) Arts 5, 12, 15(3), 22, 25(3), and 29: whatever form and design is chosen, it must be such as to allow the NCA, under fundamental rights and national constitutional law, to be able to make the decisions listed in Arts 5 and 25(3) (e.g., imposing fines and behavioural obligations, sending written requests for information, initiating proceedings and sending statements of objections); to be able to submit written or oral observations to national courts; to use evidence; to be able to carry out inspections and other fact-finding measures under national law in order to establish an infringement of competition law; to adopt measures that legally interrupt the limitation period; and, to adopt decisions withdrawing the benefits of a category exemption for a specific practice in the territory of the MS in question.
- (ii) Arts 11, 12 and 28: the design of the NCA must be such as to allow it to comply (directly) with obligations of cooperation with the European Commission (need for intermediation by another State body in these contacts would, arguably, not meet Reg 1/2003 requirements) and keeping information confidential within the NCA exclusively. In itself, this requires some degree of independence and non-hierarchical subordination, in order to ensure compliance with the exclusivity obligations set out in Art 12.
- (iii) Art 35(2) to (4) explicitly sets out that the institutional design may include the distribution of enforcement tasks between national administrative and judicial authorities, and that the phase of prosecution can be separate from decision.<sup>29</sup>

For the second part, the obligations arising for MS from Arts 101 and 102 TFEU can only be correctly assessed if general principles of EU law are taken into account.

One such principle is the well-established principle of equivalence. While undoubtedly applicable, its relevance here seems to be null in practice. It would only be relevant, for our discussion, if different institutional options were put in place for the enforcement of

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<sup>28</sup> See, e.g., the procedures provided for in Arts 11, 13 and 22(2) of Regulation (EC) 1/2003, and in Arts 4(4) and (5) and 9 of Reg (EC) 139/2004.

<sup>29</sup> Confirmed in Case C-439/08 *VEBIC* EU:C:2010:739.

national and of EU competition law (and the latter were treated less favourably). To my knowledge, this has not occurred in any MS.

Also relevant is the principle of loyal/sincere cooperation, which should be taken into account as requiring Member States to use their sovereign powers and discretionary margin in such a way as to, not only guarantee, but to maximize the effectiveness and uniformity of the enforcement of Arts 101 and 102, which certainly has implications for the institutional design of NCAs.<sup>30</sup>

But the crucial principle, for reasons that have already been discussed in Section 2.2, is the principle of effectiveness (which should be considered hand-in-hand with the principle of loyal cooperation). It is not just that the principle of effectiveness was the original justification of the legal basis for the adoption of the independence requirements this case-law refers to. It is, perhaps more relevantly, that the Court is determining the precise content and extent of those independence requirements with a teleological approach centered around the principle of effectiveness, making its logic perfectly extendable to any other area of EU law where independence of national regulators entrusted with the enforcement of EU law is deemed to be demanded by the European legal order.

To the extent that they apply Arts 101 and 102 TFEU, NCA's institutional design must be made with the effectiveness of those provisions in mind. This is explicitly provided for in Art 35(1) of Reg 1/2003: "The Member States shall designate the competition authority or authorities responsible for the application of Articles 81 and 82 of the Treaty in such a way that the provisions of this regulation are effectively complied with".<sup>31</sup> As stated by the ECJ, the "authorities so designated must, in accordance with the regulation, ensure that those Treaty articles are applied effectively in the general interest".<sup>32</sup>

While the ECJ has not yet specifically discussed the institutional design requirements arising from EU law for NCAs,<sup>33</sup> I would argue that we can find in its case-law relating to competition law and to sectoral regulators a very broad ensemble of clarifications of the consequences of the principle of effectiveness in this context. Indeed, the Court's reasoning in many cases is applicable by analogy to the institutional design of NCAs. Thus, the Court's *dictums* in other sectors provide an accurate view of the implications of the principle of effectiveness for the institutional design of NCAs.

In the previous section, it has been argued that the source of the EU's competence to impose institutional design requirements in areas such as telecom, energy, railway, and nuclear is the principle of effectiveness. In that sense, it must be recognized that the rationale used to justify the legislator's imposition of rules in those areas must equally be

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<sup>30</sup> The Court has pointed to the cooperation obligations in Regulation (EC) 1/2003 as manifestations of this principle (see, e.g., Case C-429/07 X EU:C:2009:359).

<sup>31</sup> See European Commission, SWD(2014) 231 final, §9.

<sup>32</sup> *VEBIC*, n 29, §56.

<sup>33</sup> In *VEBIC*, *ibid*, the ECJ clarified that Art 35 of Regulation (EC) 1/2003 requires Member States to allow their NCAs to participate in judicial proceedings brought against decisions which they adopted, but this judgment did not go into institutional design requirements *per se*.

valid for the need to impose the same requirements on NCAs, to the extent that the underlying premises remain true.

As repeatedly affirmed by AG Mengozzi:

“an arrangement providing for the decentralised implementation of the Community competition rules, as established by Regulation No 1/2003, requires the establishment of mechanisms to ensure the ‘effective’, ‘efficient’, ‘uniform’ and/or ‘coherent’ application of the provisions of Articles [101 and 102 TFEU]. ... Together with the Commission, those authorities therefore form a network of public authorities applying the Community competition rules in close cooperation”.<sup>34</sup>

It is settled case-law (affirmed, namely, in what concerns the institutional design of NRAs in the telecoms sector) that:

“Member States are required, when transposing a Directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of ways and means of ensuring that the directive is implemented. That freedom of choice does not affect the obligation imposed on all Member States to which the directive is addressed to adopt all the measures necessary to ensure that the directive concerned is fully effective in accordance with the objective which it seeks to attain”.<sup>35</sup>

“Therefore, although, in those circumstances, Member States enjoy institutional autonomy as regards the organisation and the structuring of their NRAs ... , that autonomy may be exercised only in accordance with the objectives and obligations laid down in that directive”.<sup>36</sup>

The same must be true for other sources of EU law (e.g. primary law, Regulations). If EU law entrusts the Member States with ensuring enforcement and compliance with certain obligations arising from the EU legal order, their freedom to choose the institutional design for the national enforcement bodies is necessarily limited by the obligation to ensure the effectiveness of those European provisions.

Specifically in the context of competition law, the Court has already affirmed a parallel limitation of national legislative power, arising from the principle of effectiveness, in what concerns the obligation to grant the NCAs the right to intervene in appeals regarding their own decisions:

“Although Article 35(1) of the Regulation [(EC) 1/2003] leaves it to the domestic legal order of each Member State to determine the detailed procedural rules for legal proceedings brought against decisions of the competition authorities designated thereunder, such rules must not jeopardise the attainment of the objective of the

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<sup>34</sup> Opinion in Case C-439/08 *VEBIC* EU:C:2010:166, §§47-48.

<sup>35</sup> *Ormaetxea*, n 25, §29. See also Case C-389/08 *Base* EU:C:2010:584, §§24-25.

<sup>36</sup> *Ormaetxea*, *ibid*, §30. See also Case C-82/07 *Comisión del Mercado de las Telecomunicaciones* EU:C:2008:143, §24; C-389/08, §26; and C-85/14, §53.

regulation, which is to ensure that Articles 101 TFEU and 102 TFEU are applied effectively by those authorities”.<sup>37</sup>

The same must be true for the institutional design of the competition authorities. If an NCA is not independent, and it can be influenced by pressure from politicians or undertakings, the effectiveness of EU law and the attainment of the objectives of Arts 101 and 102 TFEU and of Regulation (EC) 1/2003 is clearly at risk.

As noted by the ECJ:

“if the national competition authority is not afforded rights as a party to proceedings and is thus prevented from defending a decision that it has adopted in the general interest, there is a risk that the court before which the proceedings have been brought might be wholly ‘captive’ to the pleas in law and arguments put forward by the undertaking(s) bringing the proceedings. In a field such as that of establishing infringements of the competition rules and imposing fines, which involves complex legal and economic assessments, the very existence of such a risk is likely to compromise the exercise of the specific obligation on national competition authorities under the Regulation to ensure the effective application of Articles 101 TFEU and 102 TFEU”.<sup>38</sup>

“A national competition authority’s obligation to ensure that Articles 101 TFEU and 102 TFEU are applied effectively therefore requires that the authority should be entitled to participate, as a defendant or respondent, in proceedings before a national court which challenge a decision that the authority itself has taken”.<sup>39</sup>

The same logic applies to the identification of the obligation to set up NCAs in a manner that ensures their effective independence of the NCA. The principle of effectiveness means that any national institutional framework for an NCA must not be such as to render in practice impossible or excessively difficult the exercise of rights conferred by Arts 101 and 102 TFEU, and fundamental rights associated to their enforcement. If an NCA is subject to distortion of its decision-making criteria by political or economic pressure, both the exercise of the rights of the defense and the right of petition of complainants (which includes the right to have their petitions effectively considered and to obtain a reply) may be frustrated in practice, with the NCA arriving at decisions that do not reflect legality and/or general interest.

Thus, I believe the effectiveness of Arts 101 and 102 TFEU can only be guaranteed if NCAs are independent, which means that this independence must result from its institutional design. The issue then becomes determining, with some precision, the obligations thus imposed on MS. How must they ensure the independence of NCAs? How much does this principle limit national institutional autonomy?

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<sup>37</sup> *VEBIC*, n 29, §57.

<sup>38</sup> *Ibid*, §58.

<sup>39</sup> *Ibid*, §59.

Again, I believe that the answer to these questions can be found by analogy in the case-law of the Court which has interpreted the consequences of the principle of effectiveness for institutional design requirements in other areas.

It should also be kept in mind that the Court has shown a willingness to integrate *lacunae* in EU rules relating to institutional requirements for national regulators by resorting, subject to the limits of analogy, to EU provisions governing European institutions and bodies<sup>40</sup>.

Precisely because the EU's institutional design requirements for other NRAs were built on the basis of the principle of effectiveness, the analysis that follows concludes that, fundamentally, the principle of effectiveness may be seen as requiring MS to create and organize their NCAs in accordance with very much the same rules that have come to be imposed by the EU legislator in the sectors analyzed in Section 2.

(i) Number of authorities (and merger with NRAs)

While compliance with Regulation (EC) 1/2003 and the principle of effectiveness of EU law clearly require the MS to explicitly designate an NCA, the MS remain free to designate more than one NCA, unless the distribution of competences between them is such as to jeopardize the effectiveness of the national enforcement of Arts. 101 and 102 TFEU.

The possibility of distributing the competences of the NCA by more than one entity seems to be beyond dispute.<sup>41</sup> It occurs, in practice, in several MS, particularly in those which establish a functional separation between the investigative and decision-making activities.

EU law allows MS to designate as NCA a body which has also been entrusted with ensuring compliance with one or more areas of EU Regulatory Law. However, this body must be set up in such a way as to guarantee respect for all the requirements imposed upon it by EU law.

In the *Ormaetxea & Lorenzo* case, asked about the compatibility with EU law of the dismissal of two Board Members of the Spanish telco NRA, in the context of a merger of several national regulatory authorities, the ECJ clarified that Member States may create multi-sectoral regulators, subject to compliance with the organizational and operational requirements applicable under EU law to each sector (including taking due account of the various functions attributed to each NRA), and to the existence of independent judicial review.<sup>42</sup>

<sup>40</sup> See, e.g., Case C-288/12 *Commission v Hungary* EU:C:2014:237, where the Court used the EU Regulation on the independence of the EU regulator to draw analogies for the interpretation of independence requirements for NRAs (§56).

<sup>41</sup> The Commission acknowledges this possibility – see: SWD(2014) 231 final, §9.

<sup>42</sup> *Ormaetxea*, n 25, §36: “the Framework Directive does not preclude, in principle, an NRA ... merging with other national regulatory authorities or all those entities coming together to form a single multisectoral regulatory body, provided that, in performing the tasks entrusted to NRAs by the Framework Directive and the Specific Directives, that body meets the requirements of competence, independence, impartiality and transparency laid down by the Framework Directive and that an effective right of appeal is available against its decisions to a body independent of the parties involved” (see also: *Base*, n 35, §30; and Case C-85/14, *KPN*

The precise implications of this case-law are still up for debate. For example, the judgment may be read as suggesting that, while MS are free to merge NRAs (including the NCA), they will have to ensure that decisions are taken by Board members who have the required authority and professional expertise in the relevant field. It may not be easy to ensure that this is so in the context of multi-sectoral regulators, unless Board chambers are set up for the different sectors.

In at least one case, this case-law of the ECJ has already been integrated into an EU Directive's institutional design requirements for an NRA, and it specifically mentions the possibility of merger with the NCA.<sup>43</sup> Whenever the merged entities are subject to different degrees of independence requirements, the less rigorously regulated areas will necessarily "benefit from a spill over effect of the sectoral requirements".<sup>44</sup>

The Commission has given signs that it is worried about these mergers, although it believes it has little to say on the matter, subject to limit of effectiveness.<sup>45</sup>

(ii) Legally separate and functionally independent

The provisions of Regulation (EC) 1/2003 mentioned above already have far-reaching implications for the legal personality and capacity of the NCA.

But there is also clear support in the case-law for the idea that, as a result of the principle of effectiveness, the NCA must be legally separate and functionally independent from all other bodies.

Because a regulator, such as an NCA, must be independent from the entities it regulates, it is enough for the Government to have control over any body that carries out at least one economic activity for it not to be possible for a governmental department or any entity subject to Government control to be entrusted with some or all of the functions of an NCA under EU law.<sup>46</sup>

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EU:C:2015:245, §57). *Ormaetxea*, n 25, §31: "a Member State may assign to a multisectoral regulatory body the tasks incumbent on NRAs under the Framework Directive and the Specific Directives only if that body, in the performance of those tasks, meets the organisational and operational requirements to which those directives subject NRAs" (see also: *Base*, n 35, §27 and 31). *Ormaetxea*, n 25, §37: [it should be assessed whether the NRA] "is structured in such a way that due account may be taken of the various functions attributed to it, that its decision-making bodies are composed of members whose authority and professional expertise are recognised in the areas for which the CNMC is responsible and that it has its own assets which are independent of those of the general Spanish administrative authorities as well as sufficient autonomy and the legal capacity necessary to manage its resources".

<sup>43</sup> In the railway sector – see Directive 2012/34, Art 55(2).

<sup>44</sup> European Commission, SWD(2014) 231 final, §32 (referring to the solution adopted in the above quoted Railway Directive).

<sup>45</sup> European Commission, COM(2014) 453, §26 ("The Commission has closely followed instances where NCAs were merged with other regulators. Such amalgamation of competences should not lead to a weakening of competition enforcement or a reduction in the means assigned to competition supervision"); European Commission, SWD(2014) 231, §§23-26.

<sup>46</sup> By analogy, in *Comisión del Mercado de las Telecomunicaciones*, n 36, before the 2009 amendments to Directive 2002/21/EC, the ECJ stated that some of the NRA functions could be carried out by ministerial authorities if they met the requirements of independence: "each Member State must ensure that those authorities are neither directly nor indirectly involved in 'operational functions' within the meaning of the Framework

And functional independence means that NCAs cannot be subject to State scrutiny, even if this is limited to a control of legality. As noted by the Court in the *Commission v Germany* case:

“State scrutiny, whatever form it takes, in principle allows the government ... to influence, directly or indirectly, the decisions of the supervisory authorities or, as the case may be, to cancel and replace those decisions. ... [Even if] the State seeks only to guarantee that acts of the supervisory authorities comply with the applicable national and European Community provisions, and that it therefore does not aim to oblige those authorities potentially to pursue political objectives inconsistent with the protection of individuals with regard to the processing of personal data and with fundamental rights, [h]owever, the possibility remains that the scrutinising authorities, which are part of the general administration and therefore under the control of the government ... , are not able to act objectively when they interpret and apply the provisions relating to the processing of personal data. ... the government ... may have an interest in not complying with the provisions of [EU data protection law] ... . That government may itself be an interested party”.<sup>47</sup>

In *Commission v Austria*, the data protection national regulator was structurally integrated with Government departments and its members and staff were deemed to be subject to hierarchical power of superiors within the Government structure. This led the Court to conclude that the regulator was not independent.<sup>48</sup> Even a possibility of outside influence over promotions was indicated as jeopardizing independence.<sup>49</sup>

(iii) Not subject to instructions

In order for NCAs to be independent, they must not seek or take instructions from any other body in relation to the enforcement of Arts 101 and 102 TFEU.

This issue was discussed in some detail in three cases relating to the European Data Protection Directive (Directive 95/46/EC).

In the *Commission v Hungary* case, the Court found that Hungary had failed to meet its obligations under the Directive, by prematurely dismissing the head of the Hungarian data protection supervisory authority.<sup>50</sup> According to the ECJ, the Directive’s requirement that the national supervisory authorities, “shall act with complete

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Directive” (§26). In case *Base*, n 35, a similar finding was reached relating to the national legislature: “Directive 2002/22 does not in principle preclude, by itself, the national legislature from acting as national regulatory authority within the meaning of the Framework Directive provided that, in the exercise of that function, it meets the requirements of competence, independence, impartiality and transparency laid down by those directives and that its decisions in the exercise of that function can be made the object of an effective appeal to a body independent of the parties involved” (§30; see also §27). This issue was also raised in the infringement proceedings of Case C-493/13 *Commission v Estonia* EU:C:2014:274, which did not lead to a judgment.

<sup>47</sup> Case C-518/07 *Commission v Germany* EU:C:2010:125, §§32-35.

<sup>48</sup> Case C-614/10 *Commission v Austria* EU:C:2012:631.

<sup>49</sup> *Ibid*, §51.

<sup>50</sup> *Commission v Hungary*, n 40.

independence in exercising the functions entrusted to them”<sup>51</sup> meant that they “must enjoy an independence allowing them to perform their duties free from external influence”, which “precludes inter alia any directions or any other external influence in whatever form, whether direct or indirect, which may have an effect on their decisions and which could call into question the performance by those authorities of their task”.<sup>52</sup> Specifically, the:

“operational independence of supervisory authorities, in that their members are not bound by instructions of any kind in the performance of their duties, is thus an essential condition that must be met if those authorities are to satisfy the criterion of independence”.<sup>53</sup>

In *Commission v Germany*, the Court found that it is not enough to be independent from influence from the regulated bodies, the supervisory authorities must also be independent from influence from the State itself, because independence is an instrument for the protection of individuals.<sup>54</sup> Thus, even if only the regulators for the private sector were subject to State scrutiny, this was an infringement of the Directive.

In *Commission v Austria*, the Member State was also found to have infringed the same Directive, because the Austrian supervisory authority was a Governmental department, its managing member was a federal official subject to supervision, and the Federal Chancellor had an unconditional right to information on all aspects of the authority’s activities. The Court noted that, in these circumstances, the affirmation of “functional independence” in a national provision, which stated that the members of the authority were independent and not bound by instructions of any kind, was insufficient.<sup>55</sup>

This being said, it is clear from secondary EU law on sectoral regulators and from the associated case-law that some behavioural rules and guidelines may be imposed. A good example of this is found in what concerns budgetary matters (see below, on adequate financial resources).

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<sup>51</sup> Article 28(1) of Directive 95/46/EC.

<sup>52</sup> *Commission v Hungary*, n 40, §51.

<sup>53</sup> *Ibid*, §52. See also *Commission v Austria*, n 48, §42; and *Commission v Germany*, n 47, §25.

<sup>54</sup> *Commission v Germany*, *ibid*, §25: “The guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data and must be interpreted in the light of that aim. It was established not to grant a special status to those authorities themselves as well as their agents, but in order to strengthen the protection of individuals and bodies affected by their decisions. It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the Länder, and not of the influence only of the supervised bodies”. Reaffirmed in *Commission v Austria*, n 48, §41.

<sup>55</sup> *Commission v Austria*, n 48, §§42-43: “such functional independence is not by itself sufficient to protect that supervisory authority from all external influence. The independence required (...) 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”.

It seems to me to be beyond dispute that national law may establish rules to prohibit, impose or guide certain behaviours by the NCAs. It is extremely difficult, however, to identify the precise limits for such rules.

I would argue that MS are not only allowed to, but are actually required to, impose upon NCAs any and all rules necessary to guarantee that the NCA is legally obliged to conduct itself in a manner that complies with the obligations imposed upon it directly, or upon the MS more broadly, by EU law.

But, if they have to fall short of directly or indirectly influencing the independent regulator, how far can Member States go in imposing behavioural obligations or limits upon NCAs?

Setting enforcement priorities, for example, would seem to go too far. There is no example, in any area of sectoral regulation, where the national legislator is allowed to interfere in this manner with the operation of the independent regulator.

On the other hand, requiring an NCA to request and take due account of the opinion of other authorities (*maxime*, sectoral regulators), would seem to be a legitimate requirement, unless it could be shown that this leads in practice to reduced independence or would jeopardise the effectiveness of its action (e.g., because it imposes substantial delays on the proceedings which may deprive them of their *effet utile*). This type of obligation can also be imposed directly by EU law, as is the case of obligations to cooperate with the European Commission established in Regulation (EC) 1/2003, or requirements of cooperation with BEREC and other NRAs for electronic communications NRAs.<sup>56</sup>

An interesting associated discussion relates to the principle of opportunity versus principle of legality.<sup>57</sup> Under the principle of legality, the enforcement authority has a legal obligation to investigate and to pursue any and all cases brought to its attention. It can only refuse to investigate or to adopt an infringement decision if it finds that there was no infringement or if there is insufficient evidence thereof. Differently, under the principle of opportunity (applicable to antitrust cases before the European Commission), the enforcement authority may set its own enforcement priorities and only go after cases which it deems most likely to succeed and to contribute to the goals it is bound to pursue.

In Portugal, for example, until the new Competition Act adopted in 2012, the PCA was arguably subject to the principle of legality, because of the subsidiary application of criminal procedural law.

It could be argued that this would be one example of how limits could be imposed upon the conduct of an NCA as a result of general constitutional obligations and principles. On the other hand, this requirement could easily lead to an NCA being overwhelmed with cases. Without a right to assign priority and to decide how best to allocate its limited resources, it would not be in a position to effectively enforce EU competition law. In the very least, the potential impact of its enforcement would be significantly reduced.

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<sup>56</sup> See, e.g.: Directive 2002/21/EC, Arts 3(3b), (3c) and (4).

<sup>57</sup> This issue could have been discussed in Case C-192/15 *Rease and Willems* EU:C:2015:861, but the case was removed from the register.

Thus, I believe the principle of effectiveness also requires MS to allow NCAs the use of the principle of opportunity when deciding which cases to pursue, so that it can focus on those which will most contribute to the protection of the general interests safeguarded by Arts 101 and 102 TFEU.

(iv) Not subject to overturning of decisions

No authority can be considered independent if its decisions can be suspended or overturned by another administrative public authority.<sup>58</sup> The only exceptions which can be made for this are judicial review and the creation of an administrative instance of appeal.<sup>59</sup> In any of these cases, however, the appellate bodies must comply with the same institutional requirements imposed upon NCAs, or the effectiveness of EU law will be in danger.

In the above mentioned *Commission v Hungary* case, the Court noted that an independent regulator must be protected “from all external influence”, and that the “mere risk that the State scrutinising authorities could exercise a political influence over the decisions” of the regulator “is enough to hinder the latter in the independent performance of their tasks”. The national regulator must remain above all suspicion of partiality, even if it is in the form of a perceived tendency for “prior compliance”, i.e. deciding as they believe to be in accordance with the wishes of the scrutinising authority.<sup>60</sup>

In the more recent *Europa Way* case, the ECJ clarified that the independence of the telecoms NRA is not respected if the Governments suspends a decision of the NRA and the legislature then adopts a law which replaces that decision with a different procedure (in this case, a selection procedure for the allocation of radio frequencies).<sup>61</sup> The ECJ noted that this also infringes the distribution of competences under the Framework Directive, which entrusts the adoption of such decisions to the NRA, not to the Government or legislator.<sup>62</sup>

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<sup>58</sup> Several Member States, as is the case of Germany and Portugal, provide for a right of Governmental veto over NCAs decisions in merger control. To the extent that these decisions are taken exclusively under national law, the legitimacy of such mechanisms is not restricted by EU Law.

<sup>59</sup> In Case C-560/15 *Europa Way and Persidera* EU:C:2017:593, §53, the ECJ noted that electronic communications NRAs may be subject to “supervision in accordance with national constitutional law”, but only “that only appeal bodies set up in accordance with Article 4 of the Framework Directive are to have the power to suspend or overturn decisions by the NRAs”.

<sup>60</sup> *Commission v Hungary*, n 40, §§52-53. See also *Commission v Germany*, n 24, §36; and *Commission v Austria*, n 48, §52.

<sup>61</sup> *Europa Way*, n 59, §§49-58. See, especially, §57: “It is clear from the documents submitted to the Court that, in the circumstances of the case in the main proceedings, following the Ministry of Economic Development, the Italian legislature intervened in an on-going selection procedure conducted by the AGCOM and discontinued that procedure. It is common ground that the legislature and ministry did not act as appeal bodies within the meaning of Article 4 of the Framework Directive, which have, under Article 3(3a) of the directive, the exclusive power to suspend or overturn decisions by the NRAs. The requirements relating to the independence of NRAs therefore preclude such intervention”.

<sup>62</sup> *Ibid*, §§54-55.

## (v) Adequate financial and human resources and financial autonomy

An NCA could never be effective in pursuing the tasks entrusted to it by EU law if it were not given adequate human and financial resources. It must also be free to manage those resources as it deems appropriate.

The principles at stake require the NCA to be set up in such a way that:

“it has its own assets which are independent of those of the general [MS] administrative authorities as well as sufficient autonomy and the legal capacity necessary to manage its resources”.<sup>63</sup>

That being said, NCAs may, up to a point, be subject to budgetary restraints generally imposed by the State on all public bodies. As the Court has noted in the *Autorità per le Garanzie nelle Comunicazioni* case, relating to the electronic communications NRA, EU requirements of independence leave room for rules such as those imposed by several MS during the financial crisis, requiring public bodies to reduce by a given amount certain types of expenses, and not to increase others more than a given percentage, as long as they do not encroach on their freedom to decide how to attain these horizontal public sector goals.<sup>64</sup>

While the Court notes that such restrictions may not jeopardize the effectiveness of the application of EU law by the national regulator, it seems fair to argue that, under general principles of law, the test of lawfulness for these restrictions will always have to take into account the reality of funds available to the Government, the existence of overriding general interests and the principle of proportionality.

In any case, the available precedent shows that it will not be sufficient for the party alleging the infringement of these obligations to make vague assertions about the insufficiency of the resources made available to the NCA. The burden of proof is upon it to demonstrate that indeed the effectiveness of EU law is jeopardized. Additionally, the ECJ seemed to suggest that when such measures are drawn in general terms that leave

<sup>63</sup> *Ormaetxea*, n 25, §37.

<sup>64</sup> Case C-240/15, EU:C:2016:608, §§36 and 39: “It is apparent from those provisions that the Framework Directive now imposes the requirement that, in order to guarantee the independence and the impartiality of NRAs, the Member States are to ensure, in essence, that the NRAs, as a whole, are to have adequate financial and human resources to enable them to carry out the tasks assigned to them and, with respect to NRAs responsible for ex ante market regulation or for the resolution of disputes between undertakings, that they act independently. However, there is nothing in those provisions to indicate that compliance with those requirements precludes, as a matter of principle, an NRA being subject to provisions of national law applicable to public finances, and, in particular, to provisions for limiting and streamlining public authority spending, such as those at issue in the main proceedings. (...)”

Such control measures cannot, therefore, be deemed to impair the independence and impartiality of NRAs, as guaranteed by the Framework Directive, and, accordingly, to be incompatible with Article 3 of that directive, unless it can be established that such measures may prevent the NRAs concerned from satisfactorily carrying out the tasks assigned to them by the Framework Directive and the Specific Directives, or that they are contrary to the conditions that the Framework Directive imposes on the Member States to ensure that the NRAs have to a sufficient degree the independence and impartiality that that directive requires”.

See also §§37-38; and §18 for the argument of the NRA. This idea has been reflected in the Data Protection sector, in Regulation (EU) 2016/679, Art 52(6).

a large discretionary margin to the NCA on how to implement the cuts in expenses, this will reduce the likelihood that effectiveness will be endangered.<sup>65</sup>

(vi) Impartiality and incompatibility regime

The independence of any regulator is necessarily endangered if its decision-makers are allowed to take part in decisions that involve their personal business interests or those of relatives. It thus seems reasonable to argue that the principle of effectiveness of EU law requires the NCA to be established with an incompatibility regime.

While there does not yet seem to be case-law on this issue, there are several examples of this type of requirements in the secondary legislation applicable to the sectors discussed in Section 2.1, which I believe should be seen as examples of the form which such an incompatibility regime should take.<sup>66</sup>

(vii) Appointment of Board members (and staff)

The appointment of members of the Board and of directors of NCAs must be subject to requirements of adequate qualifications, skills and experience. Indeed, even though in fields such as telecommunications, EU Directives contain no specific requirements of qualifications for such persons, but only requirements of independence (together with the principle of effectiveness of EU law), the ECJ has not hesitated to affirm that these provisions also require the national institutional options to ensure the “*competence*” of the NRA.<sup>67</sup> It should be noted that this conclusion was arrived at by the Court even before the Directive had been revised to include a requirement of adequate human resources.

In the recent judgment in the *Ormaetxea & Lorenzo* case, interpreting the rules applicable to the electronic communications NRAs, the ECJ concluded that the NRA must be “structured in such a way that ... its decision-making bodies are composed of members

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<sup>65</sup> Ibid, §§40-41.

<sup>66</sup> Directive 2012/34 (Railway Directive), Art 55(3): “Member States shall ensure that these persons act independently from any market interest related to the railway sector, and shall therefore not have any interest or business relationship with any of the regulated undertakings or entities. To this effect, these persons shall make annually a declaration of commitment and a declaration of interests, indicating any direct or indirect interests that may be considered prejudicial to their independence and which might influence their performance of any function. These persons shall withdraw from decision-making in cases which concern an undertaking with which they had a direct or indirect connection during the year before the launch of a procedure”. Regulation (EU) 2016/679 (Data Protection Regulation), Art 52(3): “Member or members of each supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not”; and Art 54(1)(f): Member States must “set prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office”. Directive 2009/71/Euratom (Nuclear Safety Directive), Art 5(2)(e) (as revised in 2014): MS must “establish procedures for the prevention and resolution of any conflicts of interest”. The Railway Directive goes even further, imposing a cooling-off period of at least one year, during which Board members may not work for regulated entities (Directive 2012/34, Art 55(3)). It may be argued that, without such a restriction, at the very least, there could be a social perception of absent or reduced impartiality of the decision-makers.

<sup>67</sup> See, e.g.: Case C-398/08 *Audi v OHIM* EU:C:2010:29, §29; *KPN*, n 42, §54; *Ormaetxea*, n 25.

whose authority and professional expertise are recognised in the areas for which [the NRA] is responsible”.<sup>68</sup>

It seems, therefore, that national law does not comply with EU law if it does not ensure that the members of the Board and leading decision-makers of the NCA have an academic and professional background adequate to ensuring the effective pursuit of the tasks entrusted to the NCA under EU law.

We should also take into account that institutional requirements adopted by the EU legislator in 2012 and thereafter have tended to become far more detailed in this regard than those adopted in 2009.

The Railway Directive requires the Board members of the NRA to be:

“appointed under clear and transparent rules which guarantee their independence by the national cabinet or council of ministers or by any other public authority which does not directly exert ownership rights over regulated undertakings”; “[t]hey shall be selected in a transparent procedure on the basis of their merit, including appropriate competence and relevant experience, preferably in the field of railways or other network industries”.<sup>69</sup>

And the new Data Protection Regulation also regulates who can appoint Board members, through a necessarily transparent procedure and subject to the assessment of required qualifications, experiences and skills.<sup>70</sup> Requirements of adequate expertise and skills are also naturally extendable to the staff.<sup>71</sup>

As was recently stressed by Francisco Marcos,<sup>72</sup> the moment of appointment of new Board members is the most crucial for the determination of the real degree of independence that the NCA will have. Spain and Portugal both have examples in their history of how a politically sensitive appointment may change the direction of the decision-making practice and public positioning of an NCA. It can certainly jeopardize, at least in part, the effectiveness of Arts 101 and 102 TFEU in the respective MS.

Theoretically, we could therefore argue for the need for some kind of EU mechanism of supervision or control over the qualifications and profile of NCA Board members. The fact such mechanisms have not yet been adopted by the EU legislator for any of the NRAs discussed in Section 2 underlines the academic nature of this specific discussion.

On the other hand, there may be less restrictive options that could lead to a positive outcome. Such might be the case of a system of prior consultation and publication of a Commission opinion on NCA Board candidates, which could at least create media

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<sup>68</sup> *Ormaetxea*, n 25, §37.

<sup>69</sup> Directive 2012/34, Art 55(3).

<sup>70</sup> Regulation (EU) 2016/679, Arts 53(1) and (2) and 54(1)(b).

<sup>71</sup> See, e.g., in the nuclear sector, Directive 2009/71/Euratom, Art 5(2)(d) (as revised in 2014).

<sup>72</sup> Francisco Marcos, “Independencia de las Autoridades de Competencia”, IX Jornadas Nacionales de Defensa de la Competencia, 21 October 2016.

attention and bring some public pressure on national governments, making it less likely that persons with no specialized skills or relevant experience would be appointed.

(viii) Dismissal of Board members

It has now been clearly established in the case-law that, in order for a national regulator to be truly independent, national law must set a term for Board members to serve and must protect them against dismissal before that term is up, unless they no longer meet the requirements for the exercise of their functions. MS are entitled to carry out institutional reforms in the exercise of their autonomy, such as mergers of previously existing regulators, but this may not lead to the circumvention of this protection against dismissal before term.

This issue was addressed, primarily, in the *Ormaetxea & Lorenzo* case. The Court found that the dismissal of these two NRA Board members, as a result of the extinction of the previous NRA and the creation of a new regulator, merging several sectors, did not meet the requirements of Article 3(3a) of the Framework Directive, “as they came about for a reason other than the fact that those appellants no longer fulfilled the conditions required for the performance of their duties, which are laid down in advance in national law”.<sup>73</sup>

According to the ECJ, it would be impossible to guarantee the independence of national regulators if Member States were able to dismiss their Board Members at any time by carrying out an institutional reform.<sup>74</sup> At the same time, Member States do not have to wait until the end of the term of office of current Board Members to merge or split their national regulators.<sup>75</sup>

It is not easy to understand how the ECJ envisaged the finding of a compromise solution in such cases. But AG Bot explicitly mentioned the possibility of transitional arrangements,<sup>76</sup> apparently suggesting that the members of the Board should be kept in place until the end of their term, after which the decision-making structure could be changed and new persons appointed.

That being said, this suggested approach still leaves room for institutional reforms which can deprive the independence requirement of its *effet utile*. A Member State may, for example, be able to achieve its objective of changing the decision-making practice of an

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<sup>73</sup> *Ormaetxea*, n 25, §43. A different formulation of these same ideas may be found in *Commission v Hungary*, n 40, §§54-55 and 62.

<sup>74</sup> *Ormaetxea*, *ibid*, §47: “The attainment of that objective of strengthening the independence and impartiality of NRAs now pursued by the Framework Directive, which finds expression in Article 3(3a) thereof, would be jeopardised if, merely as a result of an institutional reform such as that at issue in the main proceedings, it were possible to bring to an immediate and premature end the term of office of one or more members of the collegiate body running the NRA in question. If that were permissible, the risk of immediate dismissal on grounds other than those laid down in advance by national law, which may be faced by even a single member of such a collegiate body, may give rise to reasonable doubt as to the neutrality of the NRA concerned and its imperviousness to external factors and jeopardise its independence, impartiality and authority”.

<sup>75</sup> *Ibid*, §§50-51.

<sup>76</sup> AG Opinion in Case C-424/15 *Ormaetxea* EU:C:2016:503, §54.

NRA by implementing an institutional reform which increases the number of Board Members and dilutes the votes of the pre-existing (unwanted) Board Members.

We can find this type of institutional design requirement in the most recent EU legislation, as is the case of the Data Protection Regulation.<sup>77</sup>

#### (ix) Accountability

The rule of law and democracy imply that independence must go hand-in-hand with accountability, to the extent that it does not endanger it.

It is natural and expectable for publicity and reporting obligations to be set up, a typical example thereof being a periodical obligation of presenting a report to Parliament or to another public body.<sup>78</sup>

In the *Commission v Germany* case, although the Data Protection Directive was silent on the matter, the ECJ, balancing the principles of independence and the need for accountability, and drawing a comparison with the general obligation, set out in the Directive, for the NRA to draw up public periodical reports, concluded that:

“the legislator may impose an obligation on the supervisory authorities to report their activities to the parliament. ... In view of the foregoing, conferring a status independent of the general administration on the supervisory authorities ... does not in itself deprive those authorities of their democratic legitimacy”.<sup>79</sup>

As long as this reporting mechanism is not set up in such a way, *de jure* or *de facto*, to pressure or create the appearance of reduced decision-making power or distorted decision-making criteria, it can actually reinforce the perception of the NCA's independence.

#### (x) Judicial review of NCA decisions

The principle of effectiveness, general principles of EU law and fundamental rights recognised by the EU legal order mean that legal remedies must be available against the decisions of the national regulator.<sup>80</sup> The same must be true for decisions of the NCAs.

An often overlooked consequence of the principle of effectiveness of EU law and the principle of loyal cooperation is that the national courts which exercise judicial review over NCA decisions must also comply with much the same requirements that we have discussed above as applying to the NCAs themselves. Indeed, it would do little good for the administrative body to be independent and have adequate financial and human resources, etc., if then the judicial body which controls its decisions is not independent or does not have the skills and resources to appropriately guarantee the effective and uniform application of Arts 101 and 102 TFEU.

<sup>77</sup> Regulation (EU) 2016/679, Art. 53(3) and (4).

<sup>78</sup> See European Commission, SWD(2014) 231 final, §§13 and 29.

<sup>79</sup> See *Commission v Germany*, n 47, §45-46.

<sup>80</sup> *Ormaetxea*, n 25, §37.

This is a very real concern in practice. While it may be very difficult for the Commission ever to act on this matter, due to the political sensitivity of arguing that a national court is not competent or capable (e.g., due to its resources) of carrying out appropriate judicial control, often the greatest obstacle to the uniform application of Arts 101 and 102 TFEU is likely to be found at the stage of judicial review of NCA decisions.

(xi) Judicial review of compliance with EU institutional design requirements

National courts may be called on to assess whether the institutional design of an NCA complies with all or some of the EU requirements applicable thereto, in the framework of a dispute placed before them. In these cases, the ECJ may provide some guidance and hint at its inclination, in the context of a referral, but it will leave the decision up to the national court.<sup>81</sup>

But the ECJ may also have to carry out this assessment itself, in the context of infringement proceedings. Indeed, in *Commission v Hungary*, the Court agreed with the Commission that some consequences of the institutional design requirements of EU Data Protection Law had not been complied with by Hungary and declared an infringement of EU law.<sup>82</sup> The same had also occurred in *Commission v Austria*.<sup>83</sup>

And in *Commission v Estonia* it was argued that the Ministry of the Economy and Communications, which had been designated, in part, as NRA, did not guarantee effective structural separation from regulated activities.<sup>84</sup> This case did not lead to a judgment.

Ultimately, such findings of infringements could lead to sanctions. This means that EU institutions do have at their disposal, if they choose to use it, a large measure of control over the way MS set up their NCAs.

#### **4. REVISING EU LAW TO INCLUDE SPECIFIC INSTITUTIONAL DESIGN OBLIGATIONS FOR NCAS**

The European Commission initiated a process which led to the proposal of new EU secondary legislation setting out institutional design requirements for NCAs.

While it is not yet known which obligations will be in the final version of the Directive, if it is adopted, the proposed Directive is often quite unprecise and does not go as far as it could theoretically go, and there may still be some obligations of Member States arising from the principle of effectiveness which will not be codified in this Directive. And perhaps they should be.

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<sup>81</sup> As happened in *Ormaetxea*, n 25, §37; in *Autorità per le Garanzie nelle Comunicazioni*, n 26, §40; and in *Europa Way*, n 59, §58.

<sup>82</sup> See *Commission v Hungary*, n 40.

<sup>83</sup> See *Commission v Austria*, n 48.

<sup>84</sup> See *Commission v Estonia*, n 46.

## (i) Number of authorities (and merger with NRAs)

Art 2(1) of the proposed Directive reproduces the solution already arising from Reg (EC) 1/2003 (see also Art 28), meaning that Member States will continue to be free to concentrate competition enforcement in a single authority or to award the powers of prosecution and decision to different authorities. This solution duly respects the autonomy of the Member States, as the effectiveness of EU law does not require the imposition of a specific option in this regard.

Nothing is said in relation to the possibility of multi-competence authorities. Arguably, therefore, this means that the Directive will allow merging NCAs with sectoral NRAs, when the respective sectoral EU law allows it, or with other functions (e.g., consumer protection).

NCAs may thus, in principle, be merged, for example, with the NRAs entrusted with regulating telecommunications, data protection or nuclear safety and radiological protection, but not with the regulators for energy or railway. Since there is no logical explanation for this asymmetry between the regulated sectors, it should not be tolerated within the EU legal order. A horizontal review of this requirement for all regulators that have institutional design requirements under EU law should be carried out.

Furthermore, the apparent freedom to merge the NCA with NRAs is actually quite limited, in practice, by the requirement (arising from the principle of effectiveness, as discussed above) that the members of the Board have an academic and professional background adequate to ensuring the effective pursuit of the tasks entrusted to the NCA/NRA. Allowing decisions on competition enforcement to be taken by a Board made up of a majority of members without the required specialized background would risk depriving Arts 101 and 102 TFEU of their *effet utile*.

Unless Member States opt for a system of chambers – a subdivision of the Board, specialized in competition law – problems are likely to arise in ensuring compliance with the principle of effectiveness, in this regard, in a multi-competence regulator.

## (ii) Legally separate and functionally independent, not subject to instructions nor to overturning of decisions

Art 4(1) and (2) of the proposed Directive require Member States to guarantee the independence and impartiality of the NCA, that they not be subject to political and other external influence, and that they neither seek nor take instructions from any government or other public or private entity. They must also have the power to set their own priorities in the enforcement of Arts 101 and 102 TFEU, in an explicit reference to the need to apply the principle of opportunity.

Overall, this seems to meet the requirements of the principle of effectiveness, as discussed in the previous Section. But, as in most things, the devil will be in the details.

To truly comply with these requirements, NCAs must not be integrated into or subject to the supervision or scrutiny of any governmental department or body. Their members must also not be part of the civil service, in such a way as to make their career dependent on decisions by other public authorities.

The Directive should probably have been more specific in setting out the consequences of these principles. Some of the already existing case-law clarifications could have been taken on, such as the fact that giving the Government an unconditional right to information on the authority's activities is an infringement of its independence. It would also be useful to clarify to what extent general guidelines or budgetary restraints may be imposed by Government or Parliament. Perhaps most surprising is the absence of a rule expressly prohibiting the possibility of suspension or overturning of NCA decisions by other public authorities, other than in the context of judicial review.

(iii) Adequate financial and human resources and financial autonomy

Art 5(1) of the proposed Directive requires MS to ensure that NCAs, "have the human, financial and technical resources that are necessary for the effective performance of their duties and exercise of their powers".

The wording could have clarified that these resources must be its own (independent of those of other administrative authorities, as clarified by the ECJ), and could probably also have taken the opportunity to address the issue of general budgetary restraints imposed by the State and the conditions under which they are compatible with these requirements (a reference is made to this issue in Recital 16).

In practice, this requirement can only be deemed to be infringed in particularly glaring situations. There must be a manifest insufficiency of the human or financial resources, or a manifest lack of competence of the staff or Board members, in order for an infringement of this obligation to be identified. While improbable, it is possible for the ECJ (or a national court) to find an infringement of this requirement as a result of the appointment of Board Members who do not have the necessary expertise.

(iv) Impartiality and incompatibility regime

Art 4(1) of the proposed Directive imposes a duty of impartiality. Art 4(2)(c) requires NCA staff and Board Members to, "refrain from any action which is incompatible with the performance of their duties and exercise of their powers".

While it arguable that complying with these requirements means that Member States must ensure that decision makers cannot take part in decisions that involve their business interests or those of relatives, the specific contours of this obligation are unclear, and their interpretation may vary widely between Member States. Regrettably, the current drafting will make it possible for Member States to claim to comply with these principles by transposing them into national law, without actually establishing an incompatibility regime for NCA Board Members. It would have been useful for the Directive to include provisions similar to Art 55(3) of the Railway Directive or to Arts 52(3) and 54(1)(f) of the Data Protection Regulation.

(v) Appointment and dismissal of Board members (and staff)

The proposed Directive contains no requirements relating to the appointment of Board Members.

That being said, as mentioned above, the requirement of adequate human resources already implies that the Board Members and staff of the NCA should have the expertise necessary (the competence) to effectively apply Arts 101 and 102 TFEU. As clarified by the ECJ in relation to telecoms NRAs, this expertise must relate to the area for which the authority is responsible. A more explicit provision in the Directive, on this subject, would provide a more effective basis for judicial review of the adequacy of the expertise of the persons appointed to these positions.

Setting aside the possibility of going even further (e.g., establishing a consultation mechanism with the European Commission prior to appointment), the Directive could at least have reproduced the requirements in the Railway and Data Protection sectors, that Board Members be appointed through a transparent procedure.

It would also have been useful to set, even in general terms, a requirement for a duration of the mandate which is long enough to guarantee the independence of the Board Members. Some Governments may be tempted to use short renewable mandates to incentivize “prior compliance”.

As for dismissal, Art 4(2)(d) requires Member States to ensure that Board Members may only be dismissed:

“if they no longer fulfil the conditions required for the performance of their duties or have been guilty of serious misconduct under national law. The grounds for dismissal should be laid down in advance in national law. They shall not be dismissed for reasons related to the proper performance of their duties and exercise of their powers”.

The *Ormaetxea & Lorenzo* case-law will, of course, apply here as well.

#### (vi) Accountability

Art 4(1) of the proposed Directive states that NCAs should be subject to “proportionate accountability requirements”. Recital 16 specifies, in accordance with the case-law, that such requirements “include the publication by NCAs of periodic reports on their activities to a governmental or parliamentary body”.

#### (vii) Judicial review of NCA decisions

The proposed Directive is silent on the need for effective judicial review of NCA decisions (mentioned only in Recital 16). However, the omission is irrelevant, as this already derives from the general principles of the EU legal order and of the constitutional orders of the Member States.

On the other hand, the Directive – and, indeed, all EU rules on institutional design requirements for NRAs – should be criticised for imposing requirements on the administrative bodies aimed at guaranteeing the effectiveness of EU law, while completely ignoring the need to apply similar requirements to the judicial review bodies. If the decision of an NCA can be overturned by a court, it is not enough to guarantee that the NCA have adequate financial and human resources, the first instance and appeal courts must also have adequate resources. While politically it may not yet be feasible to discuss this issue, I would argue that the principle of effectiveness of EU law requires

Member States to ensure that these courts are staffed and organized in such a way as to ensure the *effet utile* of Arts 101 and 102 of the TFEU. This would not be the case, for example, if a court is drastically overworked, or if its judges repeatedly arrive at erroneous interpretations of EU competition law, due to insufficient expertise in the field.

## 5. CONCLUSION

The analysis carried out in this paper leads to the conclusion that virtually all obligations which are likely to be imposed in the new Directive on NCAs can already be said to derive from the principles of effectiveness and loyal cooperation, together with Arts 101 and 102 TFEU.

But if that is the case, is it necessary to adopt specific EU rules in this respect? Absolutely.

First, as argued in Section 2.2, the EU legislator has a wide discretionary margin when deciding which degree of institutional design requirements is justified by the need to guarantee the effectiveness of Arts 101 and 102 TFEU. But the scenario is quite different if the ECJ or a national court is asked to interpret the precise consequences of the principle of effectiveness in a specific context, when the European legislator has not imposed institutional design requirements, or has done so only in vague terms which the court is called on to flesh out.

While courts certainly have at their disposal the tools they need to derive very specific institutional design requirements from the principle of effectiveness and the principle of loyal cooperation, and they can draw on a large number of precedents to do so, they will naturally be hesitant to do so, all the more so the more specific and the more demanding the requirement.

Leaving it up to courts to flesh out the consequences of the principle of effectiveness is just simply not good enough. It provides no legal certainty whatsoever. Such a mechanism is insufficient to guarantee that the *effet utile* of EU law. Indeed, it was this realization that led, to a large extent, to the introduction of a number of provisions in the EU Private Enforcement Directive, even though many of them already were obligations of the MS as a result of the principle of effectiveness. That was demonstrably not enough, in practice, to ensure awareness thereof and compliance. And, in what concerns the institutional design of NCAs, the disparity of choices and the several grounds for concern over national options and their impact on the *effet utile* of Arts 101-102 TFEU, as identified by the Commission, is incontrovertible evidence that a “mere principle” approach has been insufficient.

Second, even if a “mere principle” approach were actually to be applied in practice and lead to a revision of the institutional design of NCAs, such an approach is far less likely to lead to homogenous institutional design in all the MS and it is not capable, in fact, of leading to the same degree of requirements which could be imposed by the EU legislator.

Third, from a political and diplomatic perspective, the negotiation of EU legislation is much likelier to arrive at a result that is acceptable to MS, having been heard in the determination of their future precise obligations, thus promoting “social peace”. Even if a MS disagrees with the need to go so far in a certain detail, it is much less likely to litigate

or to resist implementation of a law in whose discussion it participated, than of an EU or national judgment that interprets the debatable implications of a general principle.

Fourth, EU legislative intervention in this regard would allow the elimination of a particularly undesirable asymmetry that has been put in place. The MS which were targets of financial assistance programmes by the EU had to comply with a number of conditions in return for that assistance, under respective MoU.<sup>85</sup> This included the strengthening of the independence and the assurance of provision of adequate financial and human resources for NCAs. Thus, the financial instability of some MS has been used to impose upon them stricter requirements than have been imposed on other MS, in a situation reminiscent of the asymmetries imposed on new Member States at the time of the 2004 and 2007 enlargements. This is not in line with the spirit of the EU nor conducive to the uniform interpretation and application of EU law, much less to peace in the Union, as it can lead to resentment by those who are made to feel like second-class States.

Another asymmetry which should be discussed, eventually, is the imposition of different requirements for EU and Member State regulators. Since the European Commission is not an independent regulator but rather the executive branch of the European Union, it is fair to ask why the enforcement of Arts 101 and 102 TFEU at national law requires independence, but at EU level it may be effectively carried out by a political body.

Finally, this paper has highlighted that the proposed Directive could go further in the imposition of institutional design requirements, falling short, in some cases, even of the requirements imposed for some sectoral NRAs.

Ideally, there should be an overall assessment of the institutional design requirements for all national authorities, under EU law, with a view to promoting harmonization. There is no logical explanation for why different NRAs and NCAs should be subject to different institutional requirements that are meant to ensure the same objectives.

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<sup>85</sup> See, e.g.: Memorandum of Understanding on Specific Economic Policy Conditionality – Portugal, 17 May 2011, available at: [http://ec.europa.eu/economy\\_finance/eu\\_borrower/mou/2011-05-18-mou-portugal\\_en.pdf](http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf), §§7.19 – 7.21.