LE FUTUR DU DROIT ADMINISTRATIF / *THE FUTURE OF ADMINISTRATIVE LAW*

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330229YLH_FUTURDRADM.indb 7 16/08/2019 13:27:34

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330229YLH_FUTURDRADM.indb 8 16/08/2019 13:27:34

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330229YLH_FUTURDRADM.indb 12 16/08/2019 13:27:34

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330229YLH_FUTURDRADM.indb 13 16/08/2019 13:27:34

330229YLH_FUTURDRADM.indb 14 16/08/2019 13:27:34

Servant of two masters or Trojan horse?

Independent regulators in EU Member States, the principal-agent problem and the attempt for an undercover federalization of the European Union

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Introduction

Is it possible to promote European integration in such a way that important decisions can be taken within the institutional framework of the European Union as it is the case in a federal system? The Union has not developed a mechanism operating in its Member States and dedicated to the implementation of those decisions. Everything starts and ends mostly in Brussels and Luxembourg, with a dash of Strasbourg and Frankfurt on the side. The European Union has always been a head without a body; the equivalent of military headquarters without any army units deployed in the territory where it is supposed to exercise its dominance. There is no European Court (in the sense of a "Federal Court") in Tallinn, Sofia or Athens; nor administrative bodies to independently apply the norms and policies of the Union. Nor is such an institutional development expected in the near future. On the contrary, the components of the Union, namely the States and their people, prefer the *status quo*; even worse, critical and evading voices seem to echo louder after the Lisbon Treaty.

Such a catalytic structural invalidity can only be tackled indirectly, by using national public institutions (since there are no others) for EU purposes. It has been imperative for the EEC, even more for the EU, to become "hosts" in the "organisms" of the Member States, "transmuting" specific domestic bodies to representatives of the European and not of the national agenda. Such transformation may remind to some the gloomy themes of sci-fi movies, such as "Alien". Nevertheless, the undercover capture of a State institution so as to serve the legal system of the Union rather than that of its country, could be a positive move; just as some treatments that change the patient's DNA to cure him from his illness. In the context examined here, the disease consists in the risk of an incomplete or distorted application of the *acquis communautaire*; the rules and choices that we all Europeans (supposedly) have agreed to be our duty to superimpose and

330229YLH_FUTURDRADM.indb 181 16/08/2019 13:27:41

uniformly implement. Sometimes we need a Trojan horse in our castle to do a job that we are reluctant to undertake.

When seeking for representatives within the institutional structure of its members, the EU attempts to intervene in the relationship which, by definition, imposes to domestic authorities to act as agents of their own national legal system. The EU goal is to undermine such principal-agent relationships, in order to address the complications created by the pathologies of another principal-agent relationship: the one between the Union itself and its Member States. The latter, with their accession to the Union and due to the absence of a federal mechanism operating within their territory, undertook to faithfully comply with European decisions. When they do not do so – a situation that, unfortunately, is often recorded – they poorly fulfill their role as representatives of Union's legal order. They breach the principal-agent relationship that links them to the Union. Conversely, the Union is trying to redirect some State bodies and persuade them to observe European imperatives; even by violating the mandate that connects them to domestic political institutions (Parliament, President, Government). In one phrase, to operate as EU's assignees instead of acting on behalf of their "natural" assignor; who is none other than the public institutions of the national Constitution to which they owe faith. To become the missing Trojan horse that will open the gates of the national order to European rules and policies. *A "white Trojan knight", for Union's sake*.

The situation described above constitutes a power game between two decision-making structures (domestic and European) and one body originating from the national legal system (courts, administration, independent authorities) which is called upon to implement decisions even when they are conflicting. In my opinion, this game is crucial to understand how European integration has developed over time and is still advancing, most notably in the field of public regulation. To understand the process of institutional development within the EU, one should turn to economic theory and to the doctrine of the so-called "principal-agent problem"(1). This doctrine illustrates and examines the inherent pathologies in the relationship between a person giving commands and his addressees. Economic analysis of law – in particular, one of its most famous Schools, Public Choice – constantly refers to principal-agent relationships when studying public and especially administrative institutions(2). The dynamics and the difficulties of mandate relations, especially when these are multi-level and potentially conflicting, may illuminate the reasons why the Union legislator promotes the organizational model of independent regulators; not only in areas where he intervenes emphatically (competition, financial

(1) E. Maskin and J. Tirole, *The Principal-Agent Relationship with an Informed Principal: The case of Private Values: Econometrica* 1990, 379. – B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics*, vol. 1, Edward Elgar Publishing, 2000. – G. Dari-Mattiacci and G. De Geest, *Carrots* vs. *Sticks*, *in* F. Parisi (ed.), *The Oxford Handbook of Law and Economics*, vol. 1: *Methodology and Concepts*, Oxford University Press, 2017, p. 439 *et seq*.

(2) J. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, Yale University Press, 1997. – J.R. Macey, *Public choice and the law*, *in* P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law*, vol. 3, Macmillan, 1998, p. 171 *et seq*. – L. Van den Hauwe, *Public Choice, Constitutional Political Economy and Law and Economics*, *in* B. Bouckaert, G. De Geest (eds.), *Encyclopedia of Law and Economics*, vol. 1, Edward Elgar Publishing, 2000, p. 603 *et seq*. – J. Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* D.A. Farber and A.J. O'Connell (eds.), *Research Handbook on Public Choice and Public Law*, Edward Elgar Publishing, 2010, p. 19 *et seq*.

330229YLH_FUTURDRADM.indb 182 16/08/2019 13:27:41

sector, liberalization of markets, personal data), but more generally. Such institutional preference should be examined under the light of the economic theory on the principal-agent problem. The outcome of this assessment may even reveal the broader image of the future of European integration: a dissimulated attempt to promote a quasi-federalization without directly establishing federal organs at the national level.

I. – Principal-agent relationship and problems, a crucial factor that affects the proper functioning of public institutions

In economics, the principal-agent problem is one major factor that prevents rational choices and effective decision-making. It is an inefficiency that increases transaction costs in any relationship, economic or otherwise. The rationale is simple. Often a decision cannot be taken or executed directly by the person concerned. It needs to be done through third parties acting on his behalf. This is necessary, either because of the increased specialization of agents ("*I need a lawyer for my lawsuits and a realtor to find a new apartment*") or because of the fact that the person in charge of an activity may need executive assistants ("*the employees in my store*"). However, the interests of the representative are not necessarily the same as those of the principal. The lawyer, rationally acting, has an incentive to urge his client to chase a lost case to increase his fees. The employee will try not to serve an additional customer entering the shop at closing time; he will not be paid extra for his services. Even worse, usually the agent is in possession of critical information that his principal is unaware of: he has no legal expertise to control his lawyer, nor knows how hard his employee will work when he is absent from the shop. This information asymmetry places the agent in a state of moral hazard and conflict of interest. Why should the realtor suggest the ideal home for his client rather than the one that will increase his commission, since the client will never know that such an ideal home was available?

The principal-agent problem is also one of the main causes of ineffective action by public and, especially, administrative institutions. In fact, almost all institutions governed by public law are connected and operating through a complex and multi-level network of representation relationships: MPs represent the People; the Government is the representative of the House in parliamentary systems; the Administration executes orders from the government officials; lower administrative staff (the term public "*servants*" is not without meaning) are assignees of their hierarchical supervisors and at the same time owe faith to the Government, to the legislator (by implementing norms) and finally to the People itself. In brief, public law is mostly governing the relationship between various principals and agents[3]. Moreover, all persons to whom public power is attributed fall under

(3) R.A. Posner, *The Behavior of Administrative Agencies: The Journal of Legal Studies* 1972, 305. – J. Tirole, *Hierarchies and Bureaucracies: On the Role of Collusion in Organizations*: *Journal of Law, Economics, & Organization* 1986, 181. – P. Dunleavy, *Democracy, Bureaucracy and Public Choice: Economic Approaches in Political Science*, Routledge, 1991. – O.E. Williamson, *The Mechanisms of Governance*, Oxford University Press, 1996. – O.E. Williamson, *Public and Private Bureaucracies: A Transaction Cost Economics Perspective: Journal of Law, Economics, & Organization*

330229YLH_FUTURDRADM.indb 183 16/08/2019 13:27:41

the vast category of "agents". Therefore, it is "*rational*" for them not to necessarily act on behalf of "*what is legal*" or "*what forms the general interest*". They will promote, if they can, their own agenda, whatever it is. More generally, the delegation of competences by the Parliament or the President (depending on the political system) to administrative bodies resembles a game between a principal and a trustee: the commander has an incentive to delegate only when it is impossible for him to act on his own and only to the point which he can exercise effective control over the trustee[4]. Conversely, the trustee has an incentive to faithfully adhere to the mandate only if it coincides with his own interests or in case there is a risk of being disclosed and punished if he does not. That is the reason why, in the first steps of modern Democracy (which is both representative and liberal), Parliament decided almost on everything and the delegation of normative powers was in principle prohibited.

Nevertheless, since the State has multiplied its policies and fields of intervention, the delegation of public decisions from the political institutions to administrative bodies became inevitable. Such an evolution exacerbated the principal-agent problem, which is inherent to the relationship between political and administrative institutions. In the United States, this problem has been linked to the expansion of the State and to the increase of its regulatory powers, a phenomenon that is called "*Administrative*" or "*Regulatory*" State[5]. Furthermore, the organization of public regulators in the form of independent agencies and the procedural rules governing the action of those agencies constitute strategic choices through which the American legal system tried to deal with the principal-agent problem generated by the establishment and the strengthening of such authorities. The model of independent agencies for the exercise of public powers was preferred by Congress to reduce the dependence of those institutions on the President. Since it is independent, this body is not in a hierarchical relationship with the President; thus, it will not act solely as the agent of the latter. In the American system of checks and balances, the independent agencies became servants of two masters; together with Congress and the President, they make an interesting *ménage à trois*[6]. This also

1999, 306. – T.M. Moe, *Political Control and the Power of the Agent: Journal of Law, Economics, & Organization* 2006, 1. – G. Napolitano and M. Abrescia, *Analisi economica del diritto pubblico*, Il Mulino, 2009. – S. Gailmard, *Politics, Principal–Agent problems, and Public Service Motivation: International Public Management Journal* 2010, 35. – F.L. Smith and J. Otto, *Principal-Agent Problem Meets the Public Sector*, *Competitive Enterprise Institute*, Op Ed., 2011.

(4) M. Thatcher and A. Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions: West European Politics* 2002, 1, p. 9 *et seq*. – O. Bar-Gill and C.R. Sunstein, *Regulation as Delegation: Journal of Legal Analysis* 2015, 1, p. 11 *et seq*.

(5) J.R. Macey, *Organizational design and political control of administrative agencies: Journal of Law, Economics, & Organization* 1992, 93. – C.R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State*, Harvard University Press, 1993. – G. Majone, *The rise of the regulatory state in Europe: West European Politics* 1994, 77. – J.L. Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, Yale University Press, 1997. – D. Oliver, T. Prosser and R. Rawlings (eds.), *The Regulatory State: Constitutional Implications*, Oxford University Press, 2010. – L.S. Bressman, E.L. Rubin and K.M. Stack, *The Regulatory State*, Wolters Kluwer, 2010. – A. Von Bogdandy, P.M. Huber and S. Cassese (eds.), *The Max Planck Handbooks in European Public Law*, vol. 1: *The Administrative State*, Oxford University Press, Oxford, 2017.

(6) W.A. Niskanen, *Bureaucracy and representative government*, Aldine, Atherton 1971. – W. Niskanen, *Bureaucrats and Politicians: The Journal of Law and Economics* 1975, 617. – J.L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions: Journal of Law, Economics, & Organization* 1985, 81. – McNollGast (M.D. McCubbins, R.G. Noll and B.R. Weingast), *Structure and process, politics and policy: Administrative arrangements and the political control of agencies: Virginia Law Review*, 1989, 431. – W. Niskanen, *Bureaucracy and Public Economics*, Edward Elgar Publishing,

330229YLH_FUTURDRADM.indb 184 16/08/2019 13:27:41

explains the importance given in the US to the procedures for selecting independent authority officials and to the accountability mechanisms set up to control these bodies. The increased duty of transparency of regulators, as well as their obligation to conduct consultation procedures before making their decisions and to scientifically document their choices through regulatory impact assessment tools is intended to reduce the information asymmetry in favor of the agent/regulator. It makes her more controllable as to whether he adheres to the instructions of her democratically legitimate principals (Congress and/or the President).

II. – Transforming the principal-agent problem into an instrument for European integration. The model of the national judges as agents of the EU legal order and its limits

It is now time to examine in what ways the previous analysis is related to European integration.

From the early days of its creation, the European Economic Community had to face the absence of a vertically integrated apparatus that would faithfully implement its rules throughout Europe[7]. The primacy of EU law, its direct effect and its uniform application rely almost completely on Member States; that is, on agents that are not merely independent and hardly controllable, but sovereign. A sovereign agent is an obvious disadvantage for a principal with conferred powers, such as the European Union[8]. This is the reason why, in the process of the evolution of EU primary law, additional means aiming to apply stricter control on Member States and impose effective sanctions were introduced: pecuniary sanctions for repeated infringements of EU law under art. 260.2 TFEU; suspending the rights of Member States for serious violations of EU core values under art. 7.3 TEU[9]. After all, the combination of supervision and sanctions is a key tool to address the principal-agent problem according to economic theory[10]. However, the merit of this tool remains relative when the agent is a sovereign State, as noted above. Anyway, such direct sanctions of pecuniary or political nature did not exist in the initial Treaties.

Therefore, a different solution was needed to overcome that inherent impotence. Up until the adoption of the Single European Act and the Maastricht Treaty, EU law evolved particularly through the dialogue between the national courts and

1994. – McNollGast (M.D. McCubbins, R.G. Noll and B.R. Weingast), *The Political Economy of Law: Decision-Making by Judicial, Legislative, Executive and Administrative Agencies*, *in* M. Polinsky and S. Shavell (eds.), *Handbook of Law and Economics*, vol. 2, Elsevier, 2007, p. 1651 *et seq.* – D. Rodriguez and McNollGast (M.D. McCubbins, R.G. Noll and B.R. Weingast), *Administrative Law Agonistes: Columbia Law Review*, 2008, 15.

(7) P. Dann, *The Political Institutions*, *in* A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, Hart, Oxford 2006, p. 229 *et seq.*

(8) J. Tallberg, *European Governance and Supranational Institutions. Making States comply*, Routledge, 2003, p. 29. – B. De Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, *in* J.H.H. Weiler, A.M. Slaughter and A. Stone Sweet (eds.), *The European Court and National Courts–Doctrine and Jurisprudence. Legal Change in Its Social Context*, Hart, Oxford, 1998, p. 277 *et seq.*

(9) L.W. Gormley, *Infringement Proceedings*, *in* A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance*, Oxford University Press, 2017, p. 65 *et seq.*

(10) ■■*Supra*, fn. 1.■■ Also, *see* J. Tallberg, *European Governance and Supranational Institutions. Making States comply*, Routledge, 2003, p. 72 *et seq.*

330229YLH_FUTURDRADM.indb 185 16/08/2019 13:27:41

the European Court of Justice[11]. Usually, we tend to insist on the constitutional conflicts that emerged in the framework of that judicial discourse. By doing so, we overlook the fact that 99% of the time there was no dispute but a rather harmonic coexistence. The national judge became the "common" European judge, disregarding national laws when necessary; or compensating by interpretation for the deficiencies in the domestic legal order[12]. The contribution of the preliminary questions model provided for in article 177 TEC was crucial in that process. It established a direct relationship between the national judiciaries and their European colleagues in Luxembourg. Preliminary referrals made it also possible for lower court judges to circumvent the pyramid of their internal judicial system and their supreme courts. The latter are more likely (in some cases) to support choices made by the national authorities, especially when it comes to Constitutional Courts. By sending the case to Luxemburg, national judges made it possible for the ECJ to determine the way EU law should be properly applied in delicate situations. The *acquis communautaire* in the first decades of European integration was in its greatest part the fruit of answers to preliminary questions (in cases such as *Costa/Enel*, *Johnston*, *Factortame*, *Francovich*, *Bosman*[13], to cite only a few of them).

The transformation of the national judge into a faithful agent of the European integration has been made possible thanks to a crucial feature that differentiates the judiciary from all other public institutions. In accordance with the principle of separation of powers, which holds the status of a common constitutional tradition among the Member- States, the judiciary is independent; it is (in principle) fully insulated from the influence of the two other State functions, the legislature and the executive[14]. The judges owe allegiance solely to the Constitution and to the hierarchy of legal norms. They cannot be held accountable for interpreting and applying the law. National judges are fully aware that the accession of their States to the European legal order automatically transposes a corpus of higher-ranking norms in their internal legal system. Their function is to draw all the legal consequences of that evolution; even if this may not be well received by the political institutions in their States (Parliament, Government, President).

In short, the development of European integration process – one of the most successful paradigms in the history of legal institutions – forms an innovative application of the lessons drawn on the principal-agent problem by economic theory. Problems arising from recalcitrant States/agents are tackled when the EU/principal manages to turn into its most faithful representatives the least dependent institutions within the agent's structure; namely, the national judges. The judiciary's independence was cleverly used to make the judges "betray" the choices decided in the

(11) J.H.H. Weiler, A.M. Slaughter and A. Stone Sweet (eds.), *The European Court and National Courts–Doctrine and Jurisprudence. Legal Change in Its Social Context*, Hart, Oxford, 1998. – B. de Witte, J.A. Mayoral, U. Jaremba, M. Wind, and K. Podstawa (eds.), *National Courts and EU Law. New Issues, Theories and Methods*, Edward Elgar, 2016.

(12) M. Claes, *The National Courts' Mandate in the European Constitution*, Hart, 2006, p. 58 *et seq*.

(13) ECJ Cases C-6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 1141; C-222/84, *Johnston* v. *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; C-221/89, *The Queen* v. *Secretary of State for Transport, ex parte Factortame* [1991] ECR I-03905; C-6/90, *Francovich and Bonifaci* v. *Italy* [1991] ECR I- 05357 and C-415/93, *Union royale belge des sociétés de football association and Others* v. *Bosman and Others* [1995] ECR I-04921.

(14) B. Stirn and E. Bjorge, *Towards a European Public Law*, Oxford, 2017, p. 127 *et seq*.

330229YLH_FUTURDRADM.indb 186 16/08/2019 13:27:41

name of the State when such choices constitute a "betrayal" of those opted at a European level.

However, this brilliant stratagem has its limits. It is functional insofar as European integration may be effectively supported through normative instruments. In other words, for as long as reliance on fundamental principles and instruments of secondary EU law interpreted and implemented in courtrooms is sufficient. Indeed, in the initial phases of the European project and during the early years, nothing else was needed: the compliance through judgments with the principles of equal treatment, free movement and free competition together with norms for the harmonization of national legislations – the *acquis communautaire* was limited to that – was a sufficient means for a European internal market to be established and function properly. After all, this was the European Communities objective, wasn't it?

Nevertheless, since the European Community evolved into a Union with significantly broader scope, the aforementioned equilibrium could not be maintained. The European project does not only amount to *rules*, but involves complex *policies*, some of them of non-economic nature (*e.g.*, social cohesion, environment, migration). The promotion of modern policies cannot be carried out solely through norms applied by judges. It requires other types of action, use of resources and, most notably, political and technocratic choices. These choices require the best available technical expertise on the respective policy field. However, in shaping and monitoring policy choices, the judiciary's role is limited by definition: it is well beyond the judge's competence to engage with policy issues; she does not possess the technical and scientific expertise to do so. Respectively, proper implementation of European policies at Member State level – whether it is rail transport, liberalization of energy or personal data protection – cannot be ensured solely through sincere cooperation between the national judges and their European counterparts in Luxembourg. The key player at national level is not the judge but the authority assigned to regulate a specific sector within the internal legal order. If that authority is an ordinary one (for instance, a Ministry), integrated into the structure of public administration and subject to hierarchical control or supervision by political institutions, the risk of inadequate application of EU policies would be grave. Such an authority would never forsake its immediate national principal. It would collaborate with the latter in order to whitewash the Member State's irregularities[15].

That is exactly the kind of problem that the EU legislature attempted to contain by promoting the model of independent agencies.

III. – The establishment of independent regulators as a means to ensure the observance of EU policies at national level

Entrusting national independent regulatory authorities with the implementation of a specific field of EU law is currently an institutional pattern increasingly endorsed by the European legislature. Yet, this development was not self-evident

(15) E. Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur*, Brussels, Larcier, 2018.

330229YLH_FUTURDRADM.indb 187 16/08/2019 13:27:41

in the past[16]. An essential principle governing the relation between EU and its Member States is their procedural and organizational autonomy. Member- States enjoy of power to adopt their own institutional design in their domestic orders[17]. Although the procedural autonomy of Member States is subject to limitations when uniform interpretation and effective application of EU law are at stake, these restrictions constitute an exception. Domestic institutional autonomy should be in principle preserved.

This is the reason why EU secondary law on Services of General Economic Interest (in short, SGEIs[18]), when provides for the creation of national regulatory authorities, it also states that the institutional features of these authorities are a matter of organizational discretion for the Member States. By virtue of art. 2.18 of Directive 1997/67/EC on postal services[19], the Member State "*entrusts*" the regulatory functions falling within the scope of the Directive. Similarly, art. 23 and 25 of Directives 2003/54/EC on electricity markets[20] and 2003/55/EC on natural gas markets[21] provide that "*Member States shall designate*" the competent regulatory authorities. Some Directives allow even wider discretion to Member- States, granting them leeway to assign regulatory tasks to more than one national authority if they wish so[22].

Despite the wide margins of discretion left in favor of Member States, the fact that EU legislation requests the existence of a domestic regulatory body or authority constitutes a significant development. The European legislator has realized that promoting integration in sensitive sectors cannot be achieved solely by normative harmonization through common rules. It requires the creation of an appropriate institutional framework at the national level so that the harmonization process is not left to rot. Such evolution, both political, ideological and methodical, is particularly noticeable in the field of telecommunications. As early as the late 80s, there were rules in place concerning the market for telecommunications terminal equipment[23] and for the abolition of exclusive rights in fixed telephony[24] (Directives 90/387/EEC and 90/388/EEC), satellite communications (Directive 94/46/EC) and mobile telephony (96/2/EC). However, at that time, no specific reference was made to domestic regulatory authorities that would ensure compliance through a set of powers (rulemaking, licensing, adjudication, market assessment, supervision, sanctioning, arbitration). Whilst recognizing the need for more liberalization, the 1994 Green Paper on the liberalization of telecommunications[25] omits any reference to the importance of setting-up regulatory authorities. Yet, less than a decade later, Directive 2002/21/EC implementing the

(16) S. De Somer, *Autonomous Public Bodies and the Law. A European Perspective*, Edward Elgar, 2017, p. 30 *et seq.*

(17) D.U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, Springer, 2010.

(18) Ch. Vlachou, *Autorités européennes de régulation*, *in* M. Bazex, G. Eckert, R. Lanneau, C. Le Berre, B. du Marais and A. Sée (ss dir.), *Dictionnaire des régulations*, Paris, LexisNexis, 2016. – E. Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur*, Brussels, Larcier, 2018.

(19) OJ L 15, 21 Jan. 1998, p. 14-25.

(20) OJ L 176, 15 July 2003, p. 37-56.

(21) OJ L 176, 15 July 2003, p. 57-78.

(22) For instance, *see* art. 2(g) of Dir. 2002/21/EC on electronic communications (OJ L 108, 24 Apr. 2002, p. 33-50), art. 21.1 of Dir. 2004/49/EC on railway safety (OJ L 164, 30 Apr. 2004, p. 44-113), art. 23.1 of Dir. 2003/54/EC on electricity markets and art. 25.1 of Dir. 2003/55 on natural gas markets.

(23) Dir. 88/301/EEC (OJ L 131, 27 May 1988, p. 73-77) and 91/263/EEC (OJ L 128, 23 May 1991, p. 1-18).

(24) Dir. 90/387/EEC (OJ L 192, 24 July 1990, p. 1-9) and 90/388/EEC (OJ L 192, 24 July 1990, p. 10-16).

(25) COM/94/440/final.

330229YLH_FUTURDRADM.indb 188 16/08/2019 13:27:41

Green Paper lays down an obligation for Member States to establish one or more national regulators in the field of telecommunications. A similar path was followed in the energy sector. Departing from the silence of Directives 90/547/EEC[26], 90/377/EEC[27] and 96/92/EC[28], the successive Directives 2003/54/EC and 2003/55/EC directly refer to national regulators. The wording in recital 15 of Directive 2003/54/EC is revelatory: "*(T)he existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network. Member States specify the functions, competences and administrative powers of the regulatory authorities. It is important that the regulatory authorities in all Member States share the same minimum set of competences*". An effective energy policy cannot exist in the absence of regulatory authorities with specific characteristics established in each Member State.

The explicit reference to the need of establishing a "*regulator*" constitutes a significant institutional step. An aftermath of that significance is conferring upon the regulators all the powers necessary to effectively exercise their function. It transforms national regulators into privileged agents of the legal order of the EU and establishes a successful principal-agent relationship between them and European institutions. In that context, art. 23 of Directive 2003/54/EC lists specific powers and regulatory instruments that must be awarded to national energy regulators. Relevant and even more extensive powers are assigned to telecommunications regulators: recital 11 of Directive 2002/21/EC on electronic communications[29] declares that "*(N)ational regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks*", while art. 3 *et seq*. of the Directive go on and specify these powers and guarantees.

One of these essential guarantees is the regulator's independence. In this regard, the EU legislature proceeded with caution. In the beginning, it did not require "general" independence vis-à-vis all actors involved, neither did it impose the model of "independent authorities". Otherwise, such an explicit obligation could have been considered as an infringement of the procedural autonomy of Member States. EU law merely stated the obvious, requesting the national regulator to be independent vis-à-vis the economic actors in the sector concerned. In that respect, art. 23 of Directive 2003/54/EC provides that "*(T)hese authorities shall be wholly independent from the interests of the electricity industry*". In the same vain, recital 11 of Directive 2002/21/EC states that: "*(I)n accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty*". Thus, art. 3.2 of the Directive provides that "*(M)ember States shall guarantee the independence*

(26) OJ L 313, 13 Nov.1990, p. 30-33.
(27) OJ L 185, 17 July 1990, p. 16-24.
(28) OJ L 27, 30 Jan. 1997, p. 20-29.
(29) OJ L 108, 24 Apr. 2002, p. 33-50.

330229YLH_FUTURDRADM.indb 189 16/08/2019 13:27:41

of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organizations providing electronic communications networks, equipment or services".

Economic theory emphasizes the need for a clear distinction between the competent regulator and the economic players within the relevant sector. If the regulator is not clearly and sufficiently separated from those falling under his authority, he will *de facto* find himself in a position of conflict of interest. As a result, he will water down or distort the proper observance of EU law in order to accommodate certain private interests; in the same way that an unfaithful agent will violate the instructions of his principal so as to promote his personal agenda. In practice, however, the difference between an authority independent only vis-à-vis the relevant market stakeholders and an authority independent vis-à-vis all other public institutions is of lesser importance. In sectors under liberalization, such as railway transportations, energy, electronic communications or postal services, the incumbent operator of those activities was, in the vast majority of the Member States, an historical monopoly under public control. In other terms, the State was (and in many cases, still is) the owner of an entity that, before liberalization, was exclusively providing those services of general interest. Therefore, the regulator should be independent not only from private stakeholders but also from the State itself; the latter acting as a businessman controlling a regulated firm.

Nevertheless, since State sovereign and entrepreneurial functions are often intertwined, the safest way available to apply the principle of independence is to insulate the regulator from the influence of any other public authority integrated in the pyramid of the State. In other words, even when European secondary legislation does not require that the regulator takes the form of an independent authority, it virtually outlines that solution. This has been reaffirmed in practice. In most Member States sectoral regulators took the form of independent authorities(30). When EU law provides that "*(M)ember States shall ensure that national regulatory authorities exercise their powers impartially and transparently*"(31), it indicates – indirectly but firmly – the institutional paradigm of independent authorities(32).

The shift towards that direction is particularly noticeable in the field of energy law. In Directive 2009/72/EC(33), successor to the abovementioned Directive 2003/54/EC, the European legislature is considerably explicit and strict. The Directive requires from each Member State to designate only a single regulatory authority at national level. Moreover, "*Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers*

(30) G. Majone, *Independent Agencies and the Delegation Problem: Theoretical and Normative Dimensions*, *in* B. Steunenberg and F. Van Vught (eds.), *Political Institutions and Public Policy: Perspectives on European Decision Making*, Springer, Dordrecht, 1997, p. 139 *et seq.* – M. Thatcher, *Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Mediation*: *West European Politics* 2002, 125, p. 8 *et seq.* – J.M. Ackerman, *Understanding independent accountability agencies*, *in* S. Rose-Ackerman and P.L. Lindseth (eds.), *Comparative Administrative Law*, Edward Elgar Publishing, 2010, p. 265 *et seq.* – J.L. Autin, *Autorités administratives indépendentes, démocratie et État de droit: Dr. et société* 2016, 285.

(31) Dir. 2002/21/EC, Art. 3.3.

(32) Accordingly, *see* Dir. 2001/14/EC, Art. 30.1 on railway transportation and Reg. (EC) 549/2004, Art. 5 on airway transportations (OJ L 96, 31 March 2004, p. 1-9).

(33) OJ L 211, 14 Aug. 2009, p. 55-93.

330229YLH_FUTURDRADM.indb 190 16/08/2019 13:27:41

impartially and transparently"[34]. On top of that, the Directive lays down specific requirements for the regulators' independence: "*Member State[s] shall ensure that… the regulatory authority… is legally distinct and functionally independent from any other public or private entity*" and that "*its staff… do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks*"[35]. It is obvious that independence is not required only towards the stakeholders operating in the regulated market but vis-à-vis all potential sources of influence. Finally, the Directive introduces the Member States' obligation to ensure that the regulatory authority can take decisions independently from any political body, has sufficient human and financial resources, and enjoys autonomy regarding the implementation of its budget. Moreover, that the members of the authority are appointed for a fixed term and may be relieved from office during their term only on very exceptional grounds[36].

The abovementioned provisions of secondary EU law triggered a crucial institutional development. They resulted in an equation between the notions of the national regulator with that of an independent authority. Those notions constitute almost a tautology nowadays. That development allowed for the gradual separation of these bodies assigned to safeguard the observance of EU law from all other State authorities. Although independent agencies are institutions vested with executive and administrative functions at a domestic level, they are different from all other governmental or administrative bodies; they are not subject to any kind of direct control on the manner in which they exercise their competences. They do not receive government orders nor instructions, their acts are not subject to legality review or scrutiny from other administrative agencies and their members enjoy guarantees of functional and personal independence during their mandate. Their status of independence distinguishes them from other State authorities and resembles to that of the judiciary. At the same time, their independence enables them to become proper and effective agents of the EU legal system, as is the case with Member State judiciaries.

Such a goal may be even better achieved, if structures are set so that these national authorities may cooperate with each other within a European Network and foster a preferential and direct relation with the competent EU administration. In other words, if an apparatus equivalent to that of federal agencies within a Federal State is set in place.

IV. – Taking independence further. The network of national independent authorities as an *ersatz* for the lack of federal institutions within EU

Creating a favorable environment and establishing appropriate structures to achieve network organization and effective cooperation between independent regulators is

(34) Dir. 2009/72/EC, Art. 35.4.
(35) Dir. 2009/72/EC, Art. 35.4 (a, b).
(36) Dir. 2009/72/EC, Art. 35.5.

330229YLH_FUTURDRADM.indb 191 16/08/2019 13:27:41

indispensable in molding them into loyal agents of the EU[37]. It is not by chance that the EU Directives establishing independent regulators usually provide for networking and cooperation mechanisms. The significance of this development for the process of European integration is illustrated in recital 16 of the preamble to the Directive 2003/54/EC: "*(T)he Commission has indicated its intention to set up a European Regulators Group for Electricity and Gas which would constitute a suitable advisory mechanism for encouraging cooperation and coordination of national regulatory authorities, in order to promote the development of the internal market for electricity and gas, and to contribute to the consistent application, in all Member States, of the provisions set out in this Directive*". Accordingly, art. 7.2 of Directive 2002/21/EC expressly states that "*(N)ational regulatory authorities shall contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives*". Such European cooperation structures currently exist both in the energy and telecommunications sectors, as well as in other fields. For instance, Regulation (EC) 713/2009 establishes an "*Agency for the Cooperation of Energy Regulators*" (ACER)[38], whose task, among others, is to "*provide a framework within which national regulatory authorities can cooperate. It shall promote cooperation between the national regulatory authorities and between regulatory authorities at regional and Community level and shall take due account of the outcome of such cooperation when formulating its opinions, recommendations and decisions. Where the Agency considers that binding rules on such cooperation are required, it shall make the appropriate recommendations to the Commission*"[39].

In a more sophisticated version, this arrangement is in place in the financial services sector, through the institutional framework of central banks. The independence of the regulators, both national and European, and the co-operational structure of the mechanism are set out in the Treaty itself. According to art. 130 TFEU "*(W)hen 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*". Protocol n° 4 to the Lisbon Treaty on the Statute of the European System of Central Banks and the

(37) D. Coen and M. Thatcher, *Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies: Journal of Public Policy* 2008, 49.

(38) ACER was the successor to ERGEG and was established by Commission Decision 2003/796/EC pursuant to Directive 2003/54/EC. When the 3rd Legislative Package for the liberation of the Energy Market was introduced, Regulation 713/2009 created ACER, which gradually took up most of ERGEG's competences. ERGEG was dissolved by Commission Decision 2011/280/EU, which repealed Decision 2003/796/EC.

(39) Reg. (EC) 713/2009, Art. 7.3 (OJ L 211, 14 Aug. 2009, p. 1-14), which was adopted under the third legislative package for the liberation of the energy market, along with the aforementioned Directive 2009/72/EC. Respectively, on the field of telecommunications, Regulation (EC) 1211/2009 (OJ L 337, 18 Dec. 2009, p. 1-10) established a Body of European Regulators for Electronic Communications (BEREC), as an independent body assigned to promote cooperation between NRAs, and between NRAs and the Commission.

330229YLH_FUTURDRADM.indb 192 16/08/2019 13:27:41

ECB insists on the independence of central banks and their members[40]. Protocol n° 7 on the Privileges and Immunities of the European Union lays down guaranties that are explicitly applied to the ECB, to the members of its organs and to its staff[41].

It would be an exaggeration to argue that such a form of organization is the equivalent to a system of federal authorities. To set up a federal system, it would be necessary to provide for a hierarchical relationship between a central body, acting on behalf of the federal governance, and those applying central policy at a local level. Formally speaking, national regulators are not integrated in a pyramid having on top either the European Commission or another EU body; they operate in a network of, at least in principle, various autonomous players. Nevertheless, such a network is good enough for ensuring, in most cases, a faithful implementation of EU provisions. Even if the Commission or its equivalents in EU headquarters do not have the power to review the choices made by national regulators (there are, yet, some exceptions[42]), the latter regularly ask for guidance and implicitly acknowledge the supremacy of the former; at least in cases where proper interpretation of the relevant regulatory framework is concerned. In addition, national regulators acting as a group within "institutional hubs" – the ACER is one of them – may achieve enhanced harmonization of their action through cooperation. Even in cases that such cooperation does not match with the policy agenda of Commission officials, it promotes European integration through an institutional framework that bends national barriers.

V. – Could it be the future? The institutional perspectives of the recent legislation on data protection and national competition authorities

Recently, the European legislature applied the institutional model outlined above in two emblematic fields, data protection regulation and national competition authorities' status.

In April 2016, Regulation (EU) 2016/679 on personal data protection (General Data Protection Regulation, in short "GDPR")[43] was adopted, replacing Directive 95/46/EC (Data Protection Directive)[44]. Among the innovations introduced[45],

(40) Protocol n° 4 to the Lisbon Treaty, Art. 7 and 14.

(41) Protocol n° 7 to the Lisbon Treaty, Art. 22.

(42) For instance, in the field of competition, art. 11.6 of Regulation (EC) 1/2003 provides that the Commission may initiate infringement proceedings under art. 101 and 102 TFEU on a case pending before a national competition authority after consulting with the latter, thus relieving it of its competence. Even more pronounced are the Commission's powers in the telecommunications sector; according to art. 7.4,5 of Directive 2002/21/EC, the Commission may take a decision requiring a national regulatory authority to withdraw an intended measure regarding market definition or SMP designation, on the grounds that it creates barriers to the single marker or is incompatible to EU law. The underlying rationale is the coherence and consistent application of EU law; *see* W. Sauter, *Coherence in EU Competition Law*, Oxford University Press, 2016 p. 54 *et seq.*, 71 *et seq.*, 120 *et seq.*, 231 *et seq.* – A. Almășan and P. Whelan (eds.), *The Consistent Application of EU Competition Law. Substantive and Procedural Challenges*, Springer International, 2017, p. 114 *et seq.*
In a more recent example in the field of data protection, art. 65 of Regulation (EU) 2016/679 (GDPR) empowers the European Data Protection Board to adopt binding decisions in the context of dispute resolution between the national supervising authorities. For more on the GDPR institutional set-up, ■■*infra*, fn. 45.■■

(43) OJ L 119, 4 May 2016, p. 1-88.

(44) OJ L 281, 23 Nov. 1995, p. 31-50.

(45) For an overview of the GDPR, *see* P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide*, Springer International, 2017. – T.-E. Synodinou, P. Jougleux, C. Markou and T. Prastitou

330229YLH_FUTURDRADM.indb 193 16/08/2019 13:27:41

the GDPR creates a novel institutional framework. Firstly, art. 51 of the GDPR provides for the designation of one or more regulatory authorities at Member State level ("*Supervising Authorities*") entrusted with "*the consistent application of this Regulation throughout the Union*"[46] and "*empowered to perform their tasks and exercise their powers with complete independence" as "an essential component*"[47] of personal data protection. Especially with regard to the supervising authorities' independence, art. 52.1,2 lays down specific guarantees, asserting that members of the supervisory authorities "*remain free from external influence, whether direct or indirect*" and "*shall neither seek nor take instructions from anybody*". Accordingly, Member States are required to safeguard the supervising authorities' independence[48] and provide them with all essential resources, namely "*the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board*"[49]. Moreover, having in mind the increasingly often cross-border aspects of data processing, the GDPR provides for a general duty of cooperation, information sharing and mutual assistance between supervising authorities[50]. It establishes a "*Consistency Mechanism*" and creates an EU independent body to secure its functioning, namely the "*European Data Protection Board*" (in short, the "Board")[51]. Thus, all supervising authorities are required to provide each other with information and mutual assistance, to put in place measures of effective cooperation and conduct joint operations when necessary[52]. Furthermore, in cases of cross-border data processing, all the supervising authorities concerned, including the lead supervising authority[53], are called upon to exchange information and cooperate with each other[54]. To ensure the effective functioning of the mechanism and the uniform application of the Regulation, the Board[55] has the authority to issue opinions on its own accord or at the request of a supervising authority[56] ; it also adopts legally binding decisions in cases where there are conflicting views among supervisory authorities[57].

(eds.), *EU Internet Law. Regulation and Enforcement*, Springer International, 2017. For a Law and Economics oriented approach, *see* E. Erdemoglu, *A Law and Economics Approach to the New EU Privacy Regulation: Analysing the European General Data Protection Regulation*, *in* J. de Zwaan, M. Lak, A. Makinwa and P. Willems (eds.), *Governance and Security Issues of the European Union. Challenges Ahead*, T.M.C. Asser Press, 2016, p. 109 *et seq.*

(46) GDPR, Art. 51.1,2.

(47) GDPR, Recital 117.

(48) GDPR, Art. 52.3.

(49) GDPR, Art. 52.4.

(50) GDPR, Art. 51.2 and 63.

(51) GDPR, Art. 60 *et seq.*

(52) GDPR, Art. 61.1 and 62.2.

(53) Namely, the supervisory authority of the main establishment or of the single establishment of the controller or processor (GDPR, art. 56.1).

(54) GDPR, Art. 60.1.

(55) The Board is established as an EU independent authority and has a legal personality (GDPR, art. 68, 69). It replaces the Working Party created under art. 29 of Directive 95/46/EC and works closely with the existing European Data Protection Supervisor (GDPR, art. 75). For an overview of the Consistency mechanism and the Board, *see* P. Voigt and A. von dem Bussche, *The EU General Data Protection Regulation (GDPR). A Practical Guide*, Springer International, 2017, p. 197 *et seq.* – T.-E. Synodinou, P. Jougleux, C. Markou and T. Prastitou (eds.), *EU Internet Law. Regulation and Enforcement*, Springer International, 2017, p. 12 *et seq.*

(56) GDPR, Art. 64.

(57) GDPR, Art. 65.

330229YLH_FUTURDRADM.indb 194 16/08/2019 13:27:41

Moreover, the EU legislature adopted Directive (EU) 2019/1 "*to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*"[58]. The Directive aims to grant National Competition Authorities (NCAs) "*the necessary guarantees of independence, resources, and enforcement and fining powers to be able to effectively apply Articles 101 and 102 TFEU so that competition in the internal market is not distorted and that consumers and undertakings are not put at a disadvantage by national laws and measures which prevent national competition authorities from being effective enforcers*" (art. 1.1). Independence is the most essential characteristic of those authorities. Member States shall ensure that the staff and members of NCAs "*are able to perform their duties and to exercise their powers for the application of Articles 101 and 102 TFEU independently from political and other external influence*" and "*neither seek nor take any instructions from government or any other public or private entity*" (art. 4.2.a, b). Additional guaranties, similar to those attributed by directive 2009/72/EC in the energy sector, ensure that NCAs will "*have a sufficient number of qualified staff and sufficient financial, technical and technological resources that are necessary for the effective performance of their duties, and for the effective exercise of their powers for the application of Articles 101 and 102 TFEU*" (art. 5.1). Strengthening the NCAs also aims at improving their functioning within a common European Competition Network. This mechanism ("*European Competition Network*" – ECN) was established by Regulation (EC) 1/2003); it is operational since 2004 and enables the Commission to tackle many competition related issues in close cooperation with national authorities[59]. The Directive sets common rules regarding mutual assistance between national authorities (art. 24); it provides for covering the costs for the maintenance and the development of the European Competition Network System through the EU Budget (art. 33).

VI. – The game is on

These developments are significant. They reaffirm the institutional design outlined above and highlight the common features of an organizational pattern for domestic authorities entrusted with the duty to transpose European regulation within national borders. Such a pattern is two-folded. Firstly, the national agency should be guaranteed sufficient independence vis-à-vis all concerned players (especially towards State institutions and officials), the powers required to fulfill its supervisory and decision-making functions, as well as all necessary resources. Secondly, those agencies are called to cooperate with their counterparts at cross-border and EU level, usually within a network; joint action should be made possible through that network. At this stage, emphasis is put on effective guarantees of independence and on procedures ensuring the possibility (not a clear obligation) of a more advanced cooperation. Whether the cooperative model will be successful or not remains to be seen. Success depends on the action, the productivity and the

(58) OJ L 11, 14 Jan. 2019, p. 3-33.

(59) For an in-depth analysis on the ECN, *see* C. Vlachou, *The European Competition Network – Challenges and Perspectives*, European Public Law Organization, 2010.

330229YLH_FUTURDRADM.indb 195 16/08/2019 13:27:42

audacity of the agencies operating as hubs for national regulators, such as ACER, the ECN and the Board established by the GDPR.

It seems that even the wise men in Luxemburg feel comfortable with such an evolution. In 2014, the CEU rendered a judgment (C-270/12, ESMA case) that smoothened the strict non-delegation doctrine established for decades by the *Meroni* ruling[60]. According to *Meroni*, European agencies created beyond the institutional framework provided for in the Treaties may not be granted "*discretionary power implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy*"; the Court held that such a delegation improperly "*replaces the choices of the delegator by the choices of the delegate*" and leads to an "*actual transfer of responsibility*". In *ESMA*, the Court opted for a pro-delegation interpretation of what constitutes "*wide margin of discretion*"; it rejected the complaints against Regulation (EU) 236/2012 conferring quite extensive powers to the European Securities and Markets Authority in the field of supervising (and indirectly regulating) financial behaviors[61]. After *ESMA*, bodies at a European level, including those composed by national independent regulators, may claim an enhanced role. By adopting a loose approach on the principle of procedural autonomy of the Member States on the one hand and on the non-delegation doctrine on the other, the Court seems to prepare the path for a quasi-federal European network through the collaboration of independent agencies. Such path will become wider if (or it is more accurate to say "when") European judges will insist in a more demanding way on the guaranties that safeguard a truly independent national regulator.

The institutional design described above has the potential to claim general applicability. After being implemented in the field of data protection, one could argue that it may be used in other areas of risk regulation, such as food safety, pharmaceuticals, prevention of natural catastrophes, eventually environmental protection. A European legislation imposing the establishment of independent regulators in those fields of public action is not inconceivable. Moreover, promoting enhanced independence and cooperation between regulators on competition law through the system of ECN+ has also a symbolic importance. For EU, free competition is the cornerstone of economic regulation. Until now, the fact that national competition authorities did not enjoy the same guaranties established by EU secondary legislation as the sectoral regulators in the fields of energy or rail transport, constituted an institutional flaw that needed to be corrected. Based on the ECN+ Directive and on the Regulation on Data Protection, it can be argued that the model of independent and powerful domestic authorities operating in a European network will sooner or later dominate all various sectors of economic and social regulation.

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(60) ECJ Case C-9/56, *Meroni* v. *High Authority* [1958] ECR 11. Also, *see* K. St. Clair Bradley, *Comitology and the Law: Through a Glass, Darkly: Common Market Law Review* 1992, 693. – M. Chamon, *EU Agencies: Does the Meroni Doctrine Make Sens: Maastricht Journal of European and Comparative Law*, 2010, 281. – M. Chamon, *EU Agencies between Meroni and Romano or the Devil and the Deep Blue Sea: Common Market Law Review* 2011, 1055. – M. Simoncini, *Administrative Regulation Beyond the Non-Delegation Doctrine. A Study on EU Agencies*, Hart, 2018.

(61) CJEU Case C-270/12, *United Kingdom* v. *Parliament and Council* [Digital Reports].

330229YLH_FUTURDRADM.indb 196 16/08/2019 13:27:42

Eventually, it could become the preferred form for organizing any kinds of domestic authorities entrusted with competences that are significant for taking European integration further. Such competences are often more vulnerable to the principal-agent problem if left to the full discretion of the Member States. For example, in the field of statistics, which is crucial for supervising and monitoring the economic governance at both national and European scale. Regulation (EC) 2015/759 inserted article 5a in the Regulation (EC) 223/2009 on European Statistics, providing that "*(W)ithin their national statistical system, Member States shall ensure the professional independence of officials responsible for the tasks set out in this Regulation*". To that end, the head of the "*National Statistic Authorities*" (NSIs) shall be empowered to decide on all matters regarding the internal management of the NSI, act in an independent manner and "*neither seek nor take instructions from any government or other institution, body, office or entity*". The Regulation insists as well on the transparency of the procedures for the recruitment, transfer and dismissal of the members of such bodies (art. 5a.5).

Last but not least, it is useful to refer to another recent example, even if it does not concern all Member States. The lenders of the Greek State together with the European Commission decided to impose to the Hellenic Republic to transform its central administration on the collection of public revenues – which was a General Secretariat within the Ministry of Finance, as in many other domestic legal systems – into an independent authority. In 2017, the Hellenic Parliament was forced (it's the correct term) to pass a law establishing an "*Independent Agency on Public Revenues*", which is responsible for fiscal controls, the collection of taxes and all relevant issues in this area. The institutional framework for that Agency is similar to the one governing domestic regulators in the fields we examined above. With an important addition: European Commission is not left outside the selection of the individuals running the Agency nor the monitoring of its action. An "*Expert*" is appointed to the Agency with consultative powers on the most crucial matters; she is chosen by the Ministry of Finance from a list of three candidates drafted by… the European Commission (62). In addition, the members of the Board of Directors of the Agency are selected by a seven-seat Committee, two of them being chosen by the European Commission (63). Participating in the selection process of the members of the domestic authorities responsible for the application of EU policies seems to be the hidden desire of the European Institutions. Such eagerness to be involved in that process is fully understandable. From the day that the appointment of national officials would cease to be exclusively governed by internal norms and procedures, such authorities would become less national and more "quasi-federal". The principal-agent problem that is inherent to the functioning of those authorities would then affect more considerably the relationship between them and their domestic principals rather than their relations with EU institutions. In other terms, the Union would strengthen its position in this *ménage à trois* power game to the detriment of its Member States.

(62) Greek Law n° 4389/2016, Art. 10.
(63) *Ibid.*, art. 15.

330229YLH_FUTURDRADM.indb 197 16/08/2019 13:27:42

Hence, such institutional experiments could provide solutions to the institutional *inertia* regarding the future of European integration and the obstacles impeding the transformation of the Union in a more federal structure. Yet, there is no reason to be overoptimistic. The Member States will not remain inactive in those attempts to reduce their organizational sovereignty. Apart from blocking European legislative initiatives for transmuting domestic authorities to agents loyal to Brussels, they may use the means of pressure they still possess in order to punish officials who are unfaithful to them. Criminal proceedings are an old and well tasted recipe. The head of the Greek Central Bank, the former head of the Hellenic Statistic Agency and the President of the Greek Competition Commission are (or have been) under scrutiny before the criminal Justice in proceedings initiated by political authorities. The game of controlling servants oscillating between two conflicting masters is hard. It's about to become harder. And Trojan horses may be the only solution in situations in which the war may not be ended other way.

330229YLH_FUTURDRADM.indb 198 16/08/2019 13:27:42