



The Fragility of Independent Agencies in the European Union

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Consumer and Markets Authority

- Who is the consumer?
 - Consumer protection law: households.
 - Competition law: wholesalers, retailers, final consumers.
 - Regulated sectors: end-users, customers, consumers, households, small business and enterprises, vulnerable customers, citizens.

Consumer and Markets Authority

- Which consumer interests?
 - Competition law
 - Competitive prices, quality, no restriction of output.
 - Sector-specific law
 - Affordability, quality, security of supply, sustainability, universal service.

Consumer and Markets Authority

- More leeway for non-competition arguments after Lisbon?
- Monti (2008): more independence → more leeway for public policy arguments?
- Should the Deutsche Telecom case law be nuanced?
- How to ensure consistency?

Independence and consumer interests

- Protect level playing field
 - Independence of market parties and financial interests of the states.
- Credible commitment
 - Predictability is condition for sound investment climate.
- Expertise and efficiency

Social Relevance

- Commission v. Germany (regulatory holidays)
- Gas Transmission Services-case in NL
- Government Commissioner in France
- Regulation of access to cable in NL

Elements of independence

- Market independence
 - Recognized in European law;
 - Legal and functional separation between state and market.

- Political independence
 - Autonomy in taking decisions in specific cases;
 - Relative concept;
 - Fragile (new European legal requirements).

Independence requirements(I)

Article 3, par. 3 bis, Directive 2009/140/EC

(..) national regulatory authorities responsible for ex-ante market regulation or for the resolution of disputes between undertakings in accordance with Article 20 or 21 of this Directive shall act independently and shall not seek or take instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. This shall not prevent supervision in accordance with national constitutional law.

Independence requirements(II)

Article 35, par. 4, Directive 2009/72/EC

- *is legally distinct and functionally independent from any other public or private entity;*
- *(....)*
- *do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 37.*

Comparison with NCAs

- Article 35 Regulation 1/2003 (designation of competition authorities)
- No explicit independence requirements
- Assumption of independence (see article 14, par. 2, Regulation 1/2003 and Larouche 2003)
- Commission formulates competition policy and coordinates and supervises NCAs through ECN

Questions

- How to interpret the European independence requirements?
- Under what conditions are policy guidelines allowed?
 - Commission: “General policy guidelines may not be formulated in such a way that they curtail the national authorities’ autonomy”.
- Need for more specific criteria?

Teleological interpretation

- Two German cases
 - Case C-518/07, Commission v. Germany
 - Complete independence of data protection authorities.
 - Case C-424/07, Commission v. Germany
 - ECJ confirms broad discretionary powers of NRAs that may not be restricted by national legislators.
- ECJ interprets independence requirements and discretionary powers in a broad way

Case C-518/07

Article 28, par. 1 of Directive 95/46/EC, entitled ‘Supervisory authority’, provides:

- *Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.*
- *These authorities shall act with complete independence in exercising the functions entrusted to them.*

Case C-518/07

The ECJ considers in par. 25 and further:

*“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 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.”

Case C-518/07

The ECJ considers in par. 42:

“That principle (principle of democracy; SL) does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts”.

Case C-424/07

The ECJ considers in par. 61:

“In carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis (see, to that effect, Case C-55/06 Arcor [2008] ECR I-2931, paragraphs 153 to 156)”.

Interpretation in the Netherlands

- Starting point: primacy of legislator
 - Separation between policy-making and policy-implementation;
 - “Klein zbo” (no legal personality and staff is on payroll minister);
 - How does arrangement of “Klein zbo” affects independence?
- Example: implementation third generation energy directives
 - Minister EL & I does not want to restrict his policy making powers;
 - Ministerial rules regarding technical codes and tariff structures.
- Article 51 Mw

Observations

- European law has a crucial role in guarding the independence of agencies.
- Exact interpretation of independence requirements is not clear yet.
- Parliamentary control will partly be taken over by new national and European checks and balances.
- Will consumers have access to European and national regulatory procedures and legal protection?