

Study on the NRA independence Final Report

December 2022

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The study was implemented by



and

Authors: Dr. Olga Batura and Dr. Malgorzata Kozak.

The study team included: Alessandro Gasparotti, Anne Havermans and Roel Peeters (Ecorys) and Dr. Mira Scholten (University of Utrecht)

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Executive summary

Independence is a complex and multi-dimensional concept. It refers to the capacity of national regulatory authorities (NRAs) to resist pressure, in other words, to act without interference or influence from politics (both in government and outside it) and autonomously from other stakeholders such as regulated entities. Independence of the NRA comprises what is embodied in the framing of its legal system (*de jure*) and in the practices of the NRA and relevant stakeholders (*de facto*).

The independence of NRAs is not an end in itself. Rather, it is a means of ensuring the effective functioning of authority in pursuing relevant policy objectives, e.g. market supervision, impartial decision-making and the creation of a level playing field.

NRA independence can be understood through different dimensions, reflecting different areas of NRA's activities. The report focuses on three broad categories: operational, financial and personnel. We have added the dimension of systemic independence in order to reveal the foundation of NRA independence. Accountability and monitoring have also been included, enabling us to verify actions taken by NRAs. Finally, we have analysed a dimension relevant to future challenges for NRA independence.

NRA independence in legal frameworks for electronic communications

The concept of an independent NRA in the electronic communications sector was introduced in the earliest legislation regulating liberalised markets. The initial focus on functional separation quickly developed to add the independence of NRAs from regulated market participants more generally. Gradually, safeguards protecting NRAs from the influence of governments were added (political independence). With every amendment of the EU regulatory framework, legal independence safeguards for electronic communications NRAs have been increased – with a wider scope and strengthened by additional legal requirements.

The current legislation – the European Electronic Communications Code (EECC) – contains comprehensive provisions covering various aspects of NRA independence compared with the previous legislation. Provisions on systemic independence are largely unchanged, but the EECC expands the requirement that NRAs 'shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law'. It also requires them to act independently and objectively in all matters, although this does not preclude supervision in accordance with national constitutional law.

Requirements for operational independence were introduced requiring NRAs to be able to develop internal procedures and decide on the organisation of staff autonomously. In respect of financial independence, in addition to the requirement that NRAs should have their own budget, the EECC required that NRA should manage their financial and human resources freely within the limits of the budget, e.g. by being able to recruit a sufficient number of qualified staff. New provisions were introduced to strengthen the independence of personnel: the EECC has requirements not only for the dismissal but also for the appointment of the NRA head and members of the NRA board. The EECC contains conditions to the procedure of appointment, lists minimum requirements for the candidate for the NRA head and board member and fixes the minimum term of office. The EECC does not contain any rules on the code of conduct or conflict of interest for

the NRA head, board members or NRA staff and does not require or recommend that such measures are introduced. The EECC reiterates that general national and Union rules on commercial confidentiality and data protection apply to NRAs. The EECC introduced the notion of and provisions on the accountability of NRAs and enhanced transparency requirements.

Comparison of the EECC to other sectoral legislation

The extent and quality of the EECC provisions on NRA independence are put in perspective through an overview of independence-related provisions at EU-level legislation for NRAs in all other sectors (postal, energy, rail, data protection, audiovisual media services, financial services) and for the national competition authorities (NCAs). We noted that there is no unified terminology across EU-level legal frameworks and the interpretive case law is not yet sufficient, which makes comparisons difficult.

The safeguards for the systemic independence of electronic communications NRAs are highly advanced and extensive compared with other sectors. They guarantee that the NRA is legally distinct and functionally independent from any public or private entity. They require a structural separation between regulatory function and the provision of electronic communications services, if applicable. They also require that NRAs exercise their powers in an impartial, transparent and timely manner. These safeguards are on a par with the energy and audio-visual media sectors, but less clear and precise than those for the rail sector. Rail NRAs must be independent in organisational, functional, hierarchical and decision-making terms from any public or private entity. If rail NRAs are part of a multi-sector regulator, the whole regulator must fulfil these high independence standards.

Safeguards for *de jure* financial independence are very high for electronic communications and energy NRAs. Besides the requirement to have necessary resources and a separate annual budget, these NRAs also have autonomy in budget implementation. Only NCAs have a more complete regulation of financial independence, which includes a recommendation to have other funding sources, alternative to the state budget.

With regard to the independence of NRA personnel, the EECC can be placed in the middle ground. On the one hand, it contains important independence safeguards such as an open appointment procedure for NRA leadership, requirements for leadership candidates, a minimum mandate duration and guarantees against arbitrary premature dismissal. The requirement that a decision on premature dismissal is subject to judicial review on facts and on law is unique. On the other hand, the EECC does not require that NRAs are able to hire other NRA staff independently and does not contain rules of conduct for NRA personnel (or a requirement to have such rules). Furthermore, some provisions of the EECC remain vague. For example, the legislation on data protection and rail provides more elaborate safeguards for premature dismissal and states that such dismissal is only possible in the case of serious misconduct and not possible in relation to decision-making.

The EECC's provisions on transparency are strongest because they require the highest number of various documents to be published by NRAs. The legal rules on appeals of NRA decisions have remained the same in the last three legal frameworks for electronic

communications, and they are very similar to those for the energy and postal sector. However, they are not as precise as the rules for the rail sector.

Overall, the EU-level legal framework for the independence of NRAs in the electronic communications sector provides very high safeguards across almost all dimensions of independence. To close remaining gaps and render the legal framework more precise, inspiration can be taken from the rail sector (for systemic independence, independence of personnel and appeals) and ECN+ Directive (for financial independence).

Transposition of the EECC and practice of NRA independence

Based on survey responses from 34 NRAs and follow-up interviews, the report analysed the implementation of the EECC and *de facto* independence in the electronic communications sector.¹ The aim was to analyse practices influencing NRA independence. The report typified all practices in two categories: 1) practices that are conducive to independence (i.e. enhancing independence of NRAs, best practices) and 2) practices that are detrimental to independence (i.e. hindering the independent functioning of NRAs, bad practices). On the basis of these practices, two hypothetical models were created: 1) NRA with the biggest challenges to its independence (worst-case scenario) and 2) NRA that are fully independent within the limitations of the law (best-case scenario).

Full independence should be understood as the unity of best practices related to *de jure* and *de facto* independence, meaning that the NRA is properly established, empowered, resourced, effectively functioning and accountable. While the best-case scenario can be considered a benchmark for the fully independent NRA, there is no such benchmark for the worst case. NRA independence tapers off with each bad practice so that even one bad practice, in any independence dimension, means that an NRA lacks independence to some extent.

Below, the best and bad practices are presented per dimension of independence, providing a comprehensive overview of practices that can result in different outcomes.

Systemic independence: Institutional setups of the surveyed NRAs vary greatly. In the majority of cases, the EECC has been fully transposed to national legislation; however, not all competences under the EECC may have been correctly assigned to NRAs and other competent authorities by national law, although Member States have some leeway on that. The lack of competences of NRAs presents a serious impediment to their independent functioning and ability to work on achieving the objectives of the EECC. It negatively impacts the consistency of implementation and application of EU law within the internal market.

The analysis of the NRAs' perception of influence on their daily activities indicates that the majority of NRAs experience no or very little influence. The national framework may require NRAs to consult with the government on specific matters with the government but, in general, this does not influence decision-making.

¹ Due to late transposition in some Member States, the European Commission continues with the completeness checks. The European Commission will carry out conformity checks to ensure the full and correct transposition of the EECC into national legislation.

Table 0. 1. Practices related to systemic independence

Best practices	Bad practices
The NRA has all competences to fulfil the mandate imposed on it by law	The NRA lacks competences to effectively execute its mandate or competences are split with other competent bodies in way that makes difficult the execution of the mandate
The line between the policy and regulation is clear to the NRA and responsible ministry. Unclear issues are discussed by both	The responsible ministry regularly oversteps the boundary between policy and regulation. There is no dialogue with the NRA on it
The NRA takes decisions independently, without external influence	The NRA receives instructions and guidelines from the government

Operational independence: Almost all NRAs decide autonomously on their strategies with minor exceptions that seem to follow the strategies of the ministries and do not have own strategies. However, contrary to the requirements of Article 8, para. 1 EECC, several NRAs reported that they cannot decide autonomously on their internal organization: limitations apply in the form of additional governmental approval.

International cooperation, especially in BEREK, strengthens NRA independence, allows for mutual learning and helps finding solutions to face (new) sector challenges, while also providing for an additional level of transparency and accountability. Proper monitoring and support from the European Commission as well as a timely report by NRAs on existing misconducts are crucial to safeguarding the independence of NRAs and ensuring consistent practice.

Table 0. 2. Practices related to operational independence

Best practices	Bad practices
The NRA decides on its internal organisation and strategy independently, based on its needs/ strategy	The ministry/government prescribes or formulates an internal organisation and/or strategy for an NRA without any negotiations/dialogue with it
The NRA consults with various stakeholders on its strategy/internal organisation in public consultation and takes the comments into account	Internal organisation and strategy of NRAs need to be approved by the ministry/government before they can be implemented
The NRA actively participates in the consultations on its organisation/strategy	There is no opportunity for the NRA to present its goals and needs to the responsible ministry

and establishes a dialogue with a relevant ministry	
	The reorganisation of the NRA is an opportunity to dismiss specific officials
The NRA actively participates in international cooperation, especially BEREC's work, on all topics of interest	The NRA cannot cooperate internationally on the topics of interest due to a lack of resources or necessary governmental approval

Financial independence: Clear and transparent procedures that provide for active involvement of NRAs in preparing budgets enhance the independence of authorities. NRAs must also have discretion in how they implement their budgets. This is the case for most surveyed NRAs. However, in several cases, regular and/or lengthy delays of approval is used by governments when approving the budget or subsequent budget spending – negatively impacting the functioning of NRAs. This is a particularly worrying practice where the budget cycle is only one year.

While the majority of NRAs do not depend on a single source of funding and have a mix of public funding, fees paid by regulated entities and other sources, the aforesaid abuse of approval procedures by the government nonetheless results in reduced NRA independence.

The financial statements of most NRAs are subject to external approval and to checks after the financial term. These are usually performed by a national court of auditors, but ministries of finance and parliaments may also be involved in supervising financial statements.

Two-thirds of NRAs indicate that resources are sufficient to fulfil their responsibilities. For most of the remaining cases, financial resources are barely sufficient, especially because of strong competition in salaries from the private sector to attract specific experts. Several NRAs stated that it would be difficult to fulfil their mandate if they were given new tasks and competences.

Table 0. 3. Practices related to financial independence

Best practices	Bad practices
The NRA decides on its budget without approval from other entities	The NRA budget is decided by the government without involving the NRA
The NRA relies on a mix of sources to finance its budget	The NRA relies solely on state budget (the NRA budget is a part of a relevant ministry budget without proper guarantees against using those powers to affect decision-making)

Best practices	Bad practices
The NRA can allocate and execute its budget without additional approvals from other entities	The NRA needs to get additional approvals for shifting the expenditures between different budget lines or for other expenditures
Sufficient resources to fulfil the NRA responsibilities	Insufficient or barely sufficient budgeting for hiring experts and/or to fulfil all the tasks, for which the NRA is responsible
The NRA can make budgetary reserves (within limits defined by law) or otherwise secure its financial sustainability	The process of adopting of NRA budget is lengthy or regularly delayed, hampering the performance of an NRA
The budget adoption process includes a dialogue/negotiation between an NRA and the relevant ministry in relation to the needs/goals of the NRA	New tasks are assigned to an NRA without securing proper resources
	An NRA's budget is systematically approved at a lower level than needed
	Significant budget cuts affecting capacity of an NRA to fulfil its tasks.
Auditing financial statements according to general rules for the public sector	Auditing used to influence an NRA's day-to-day activities

Personnel independence: Contrary to the requirements of the EECC, open competition for an NRA's leadership positions is not mandated by national law or practiced everywhere. In several cases, even though there may be an open call for applications for the leadership positions, the appointment is undertaken by a government in a procedure that is not entirely open or clearly defined. Such practices are harmful for an NRA's independence as they contain a potential for political influence and reduce the credibility of the leadership.

In most cases, national law contains specific professional eligibility requirements both for the leader of an NRA and board members. Where there are no respective legal provisions, the requirements are specified in the vacancy announcements, and the profiles of the candidates are checked or assessed to determine whether they are suitable for a leadership position.

Although in most cases, the duration of the mandate of an NRA's leadership is clearly defined by national law, in a few cases vague provisions are used that are open to interpretation, which may be abused by the appointing institution. A few countries have mandates of just three years (the minimum duration under the EECC), which may be suboptimal for the functioning of NRAs given longer cycles required for some regulatory activities. If an NRA's leadership has short office terms, it may reduce effectiveness. In

such cases, it is important that mandate renewal is possible (which is the case for most NRAs).

A vast majority of jurisdictions indicated that their national legislation foresees protection of the NRA leadership from premature dismissal, meaning it is only possible on the grounds foreseen by law. National approaches on defining the grounds for premature dismissal of NRA leadership differ significantly by country. Some countries have only very general provisions on premature dismissal, which is not conducive to independence because vague legal provisions are open to arbitrary interpretation by the dismissing authority and can be used to put political pressure on an NRA's leadership.

A small majority of NRAs have the autonomy to decide on the number of employees, recruitment and promotions. Where approval is necessary, instances of delays and rejections were reported that hamper an NRA's functioning and independence. Salaries scales applicable to NRAs in many jurisdictions represent another constraint: it is difficult for NRAs to compete for highly-qualified staff if they cannot offer market-level salaries.

All NRAs reported that they can offer training for their staff. Almost all provide regular external training, and the vast majority give regular internal training. However, for nearly a third of NRAs, the resources available for training are not adequate to ensure the professional development of employees.

Most jurisdictions have legal rules to prevent conflicts of interest in relation to NRA leadership. However, these legal rules do not always extend to relatives of an NRA's leadership team. Furthermore, not all jurisdictions prohibit an NRA's leadership to hold other offices in a government or even in the regulated industry simultaneously. Almost all NRAs put in place additional internal mechanisms to tackle conflicts of interest, going beyond the requirements of national law.

Table 0. 4. Practices related to personnel independence

Best practices	Bad practices
Open competition for NRA leadership positions, with the decision-making procedure clearly outlined and the assessment of candidate requirements clearly explained	The rules of the selection and appointment of NRA leadership are defined only in general terms. Much leeway is left to the decision-maker
Appointment procedure involves several actors, preferably an independent committee and parliament.	Decisions on the appointment are made by one actor, such as a responsible minister or prime minister.
The mandate duration is stated in law unequivocally, especially if it is five or more years	The mandate duration is not explicitly stated
If the mandate is short or medium (up to 6 years), renewal is possible	No mandate renewal is possible in the case of shorter mandates.

Best practices	Bad practices
The reasons for premature dismissal are listed exactly in law allowing for a minimum leeway in interpreting them	Reasons for premature dismissal are formulated very broadly, using vague, ill-defined terms
Dismissal procedure involves several actors (e.g. an independent committee) allowing for a solid assessment of the situation	Dismissal decision is made by one actor, the one who decided on the appointment (e.g. the responsible minister)
NRAs can take independent decisions on the number of staff, hiring new staff and staff remuneration and promotion. The decisions are based on an NRA's needs and do not require prior approvals from other bodies	NRAs need prior approval from other bodies on their staff-related decisions
NRAs have rules of behaviour for their staff (e.g. codes of ethics, conflict-of-interest rules) that are tailored to their needs and apply to all staff and relatives of an NRA's leadership team	No rules of behaviour apply to any NRA personnel

Accountability and transparency: Strong public accountability and transparency measures strengthen the independence of NRAs. Making the information relating to regulatory processes public is a key instrument of transparency that also helps hold NRAs accountable. NRAs are required by the law to publish important documents and decisions, but most make information public beyond the legal requirements. Almost all NRAs need to submit a periodic report, which is an important instrument of accountability of independent authorities in the democratic system. Besides reporting, auditing is used to check an NRAs' activities in the majority of cases. For appeals of an NRAs' decisions, in majority of cases (but not all), there is a specialised appeal body. However, a government can change an NRA's decision in some jurisdictions. This is contrary to the requirements of the EECC: an independent court or tribunal with expertise in electronic communications.

Table 0. 5. Practices related to accountability and transparency

Best practices	Bad practices
Independent and specialised court reviews NRA decisions	Ministry can change NRA decisions
Publication of all important documents and decisions	Ministry approves an NRA's documents before publication

Publication of more information than is required by law	No documents are published
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Future-proofing: Given that the independence of regulatory authorities is not a static quality – it varies over time and across sectors – the report also discusses the question of how to maintain or enhance independence of NRAs in future.

The capability to attract and retain talent and specialised expertise is considered one of the biggest challenges of NRAs to fulfil their mandate and, hence, the most important tool for future-proofing themselves. It refers to technical, economic and legal staff. NRAs face strong competition from the private sector in securing such skilled professionals. Holistic digital market expertise could be beneficial both for electronic communications NRAs and those dealing with issues such as competition and consumer protection.

Another measure noted by some NRAs is the timely acquisition of new competences and tasks in the context of fast-changing markets. In some cases, legislators are not able to keep up with market and technological developments, and NRAs may lack powers to regulate the market(s) effectively. Some NRAs anticipate legislative and market changes and develop the necessary knowledge and expertise in advance (within the available budget and strategy).

Some NRAs note tendencies of governments to centralise resources and reduce the number of NRAs in a detrimental way for their independence. NRAs need to stay vigilant of such developments and seek solutions such as increasing their media work, dialogues with government or litigation. The international aspect also plays a crucial role. Participation in BEREC working groups and workshops and international cooperation are a great opportunity to prepare for new functions and competences. Through formal and informal exchanges with other NRAs, they can keep up to date, discuss possible solutions and learn from each other. Monitoring by the European Commission and the timely use of the EU law mechanisms also supports NRA independence.

List of acronyms

AVMSD	Audiovisual Media Services Directive
BEREC	Body of European Regulators for Electronic Communications
CJEU	Court of Justice of the European Union
DSA	Digital Services Act
ECJ	European Court of Justice
EECC	European Electronic Communications Code
EU	European Union
GDPR	General Data Protection Regulation
ICT	Information and communication technologies
IT	Information technology
NCA	National competition authority
NRA	National regulatory authority
OECD	Organisation for Economic Co-operation and Development
ONP	Open Network Provision
Q&A	Questions and answers session
TFEU	Treaty on the Functioning of the European Union

1 Introduction

Market regulators such as national regulatory authorities (NRAs), (regulatory authorities or agencies are used interchangeably in this report) for electronic communications are often compared to ‘referees’ as they supervise the functioning of the markets.² Effective market surveillance requires that this referee is free from undue influence, which can originate in the executive and legislative branches of government or come directly from politicians or local or international business interests. The referee must be sufficiently independent to make decisions – ensuring that all market participants compete and carry out their economic activity under the same conditions. This is a prerequisite for proper regulatory work, and it provides confidence and trust that regulatory decisions are made with integrity.

However, the question of what makes a regulator independent is not an easy one to answer. Experts maintain that it is necessary to look at both the legal provisions on independence (*de jure*) and the practice of independence (*de facto*). Within these broad categories objectivity, transparency, impartiality, integrity, expertise, professionalism and good governance can be described as components of independence.³ At the same time, the independence of regulatory authorities is not absolute, often presented in such terms as autonomy or interdependence, and comes in many forms across different sectors and jurisdictions.

This report presents the results of the study into *de jure* and *de facto* independence of electronic communications NRAs and is structured as follows. Chapter 2 contains a methodological note on the scope and methods of data collection employed for this study and briefly discusses their limitations. Chapter 3 presents the results of the literature review conducted for this study. It also introduces the notion of independence used by the study and the dimensions of independence used as an analytical tool. Chapter 4 provides an analytical overview of the legal provisions on independence for the sectoral legislation in the scope of the study (*de jure* independence). This overview includes the CJEU case law as it is inextricably linked to specific provisions.

Section 4.1 looks at the development of the legal framework for NRA independence in the core sector of this study, namely electronic communications, and provides a historical perspective on it followed by the analysis of the current legal framework. Section 4.2 analyses the provisions on NRA independence in other sectoral legislation at the EU level. Chapter 5 explores mainly the *de facto* independence of electronic communications NRAs. For each dimension of independence, various relevant national practices are discussed. Finally, Chapter 6 outlines the conclusions of the study, first on the comparison of *de jure* independence (Section 6.1), then on best and bad practices for *de facto* independence (6.2. Section). Chapter 6 ends with a discussion of other factors impacting NRA independence.

² OECD, Being an Independent Regulator, The Governance of Regulators, OECD Publishing, Paris, 2016, <https://doi.org/10.1787/9789264255401-en>, p. 3.

³ OECD, The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, Paris, 2014, <https://doi.org/10.1787/9789264209015-en>.

2 Methodology

This chapter outlines the scope and methodology for the study. Both were based on the tender specifications for the project.

2.1 Objectives of the study

To analyse and understand NRA independence in the electronic communications sector, this report aims to provide a reasoned recollection of the relevant theoretical research on NRAs' independence, analyse the relevant legal provisions (*de jure* independence) and reveal how the NRAs' independence actually operates (*de facto* independence). The report aims to map the methods and practices influencing independence rather than comparing levels of NRA independence across countries. These high-level aims were channelled into four objectives for the purposes of this report:

1. to provide an overview of the theoretical knowledge on NRAs' independence;
2. to provide an overview of the legal provisions on NRAs' independence for several sectors, including the interpretation of the legal requirements on independence by the Court of Justice of the European Union (CJEU);
3. to analyse the development of the NRAs' independence in the legal frameworks for electronic communications; and
4. to analyse the implementation and practice of NRAs' independence across EU Member States, including potential threats and challenges.

2.2 Scope of the study

The **geographical** scope encompassed all members of the Body of European Regulators for Electronic Communications (BEREC) - electronic communications NRAs from 27 EU Member States as well as BEREC participants without voting rights (NRAs from Albania, Iceland, Liechtenstein, Montenegro, Norway, Republic of North Macedonia, Serbia and Turkey).

The **subject-matter** scope covered seven sectoral frameworks that establish an independent national regulatory authority:

1. electronic communications
2. postal services
3. energy
4. rail
5. data protection
6. audiovisual media services
7. financial services

In addition, the study also looked at the regulation of national competition authorities (NCAs) because, next to data protection, competition is of utmost importance for the functioning of all sectors listed above and the independence of NCAs has been litigated in the EU courts.

For the NRAs in seven sectors and NCAs, relevant legal frameworks at the EU level were analysed. For the electronic communications sector, a more in-depth investigation was conducted into the implementation of the EU-level legislation and practice of NRA independence.

Data collection for the study was completed in September 2022.

2.3 Literature review

A review of academic and other relevant literature was mostly conducted during the first months of the study. The main objectives of the literature review were to:

- understand why independence is important for NRAs;
- identify the main terminology and definitions used in order to develop, among other things, a concept/ definition of NRAs' independence for this study;
- identify how NRAs' independence is exercised or expressed and whether these categories, dimensions or characteristics of independence can serve as indicators; and
- describe these categories, dimensions or characteristics of independence and investigate whether they can be measured in a meaningful way to be applied across sectors and across jurisdictions.

Various publications were reviewed, based on desk research and advice from the expert interviews (see Section 2.5). Thematically, the focus was on the independence of NRA in the sectors within the scope of this study or more theoretical and comparative studies on the independence of regulators. The following publicly-available sources were included:

- publications by the European Commission and EU-level agencies and studies conducted on their behalf;
- studies and documents by international organisations (e.g. OECD);
- academic research, especially in the field of law, political science and economics as these disciplines predominantly deal with the question of the independence of regulators, including the analysis of the relevant EU legal frameworks and case law;
- other research (e.g. by think tanks); and
- 'grey' literature (e.g. university and academic blog entries).

Annex 1 to this report contains the list of all literature used for this study.

2.4 Comparative analysis of relevant legal frameworks

The report reviewed the EU-level legal frameworks that established independent NRAs in the sectors selected for this study and that regulated NCAs. In addition, a review of the relevant case law of the Court of Justice of the EU (CJEU) is included, interpreting the provisions on NRA independence in the sectoral legal frameworks. Only the closed cases were considered (i.e. no pending cases).

Based on these sources, a comparative analysis of the sectoral provisions on NRA independence was carried out focusing on two aspects:

- differences and similarities of the legal provisions related to independence indicators across different sectors; and
- the extent to which different sectoral rules cover all or some of the independence indicators.

Given that electronic communications is central to this study, we have included a historical comparative analysis of the EU-level legal frameworks for this sector, examining how the provisions on independence have developed. In particular, changes in the regulation of NRAs' independence were analysed along with the level of coverage of the independence indicators.

The full list of the legislation and case law reviewed is included in Annex 1 of this study.

2.5 Interviews

Two rounds of interviews with experts on NRA independence and NRAs were conducted.

The first round took place at the beginning of the study, when most of the literature review had been completed. The aim of these expert interviews was to:

- validate the findings from the literature review; and
- gather information, including recommendations of additional sources.

The following experts were interviewed:

1. Mark Thatcher, LUISS, Rome
2. Annetje Ottow, Leiden University
3. Saskia Lavrijssen, Tilburg University
4. Koen Verhoest, Antwerp University
5. Jaime Almenar
6. Alexia Gonzalez Fanfalone, Lauren Crean and Verena Weber, OECD

The second round of interviews was conducted towards the end of the study, following the survey of NRAs (see next Section). These were conducted with selected NRAs, with the aim of clarifying their survey responses or investigating some of the issues raised in the responses to the survey. In total, 10 interviews were conducted online with NRAs from the following countries: Cyprus, Czechia, Denmark, Germany, Malta, The Netherlands, Serbia, Slovakia, Slovenia and Spain. The questionnaires were sent to respondents beforehand. They were factual questions drafted specifically for each interview.⁴

⁴ Bryman, A., *Social research method*, Oxford University Press, 2001, pp. 212 – 213.

2.6 Survey of BEREC members

A survey of electronic communications NRAs was conducted collecting factual information directly from stakeholders, with the objective of analysing the transposition of the EU-level rules on independence and practice of NRAs' independence across the EU.

For this, in cooperation with BEREC and on the basis of the literature review, a questionnaire with 123 questions was developed. It was divided into seven sections reflecting the defined indicators of independence. In each section, the more general questions were asked first, followed by more specific ones. Most were close-ended questions. When there was an open answer, e.g. other, the space for the answer was provided. Specific questions followed specific answers. The questions on the NRAs' perception of their own independence were asked at the beginning of the survey. Once the questionnaire had been successfully tested, the survey was launched in an online tool, and NRAs were invited to participate, with the help of the BEREC Office. The survey was open between 15 July and 15 September 2022.

Extensive responses were received from 34 NRAs from 33 countries (one of the responding countries has two NRAs). Annex 2 contains a full descriptive report on all questions and responses (in aggregated form).

2.7 Workshop with NRA experts

After the NRA survey was completed and when the first analysis of the survey data had been undertaken, we organised a workshop with experts from NRAs. The workshop was held in a hybrid format with over 49 participants joining online and 22 participants physically present.

The aim of the workshop was to present the first findings from the survey and discuss some of the aspects of independence in depth. The discussion took the form of Q&A sessions and was substantiated by five case studies presented by NRA experts.

The workshop followed the Chatham House rules; a short summary of the workshop proceedings is included in Annex 3 of this report.

2.8 Limitations of the methodology

The methodology used for this report has a few limitations presented below together with the approaches used by the study team to overcome them.

Firstly, NRAs (as represented through BEREC) were both the client and the subject of this research. To avoid a 'client capture', the study authors adhered to the academic standards of research and subjected the final report to quality control by a person who was not a member of the study team. Any comments from the client were thoroughly considered, discussed, fact-checked and implemented where appropriate to improve the quality of the final report (e.g. suggestions of clarification to improve readability, pointing out additional facts and sources). The analysis presented is the sole responsibility of the report authors.

Secondly, interviews and surveys as data collection tools are prone to the bias of self-reporting. To reduce this, mainly factual questions were asked rather than perception questions, which can be answered subjectively. Where possible, the respondents were asked to provide evidence in the form of links to publicly available sources (e.g. legal texts, press releases, news items) so that the information could be double-checked.

Lastly, the scope of the study was determined by the tender specifications. Thus, some of the interesting issues of NRA independence were left unexplored (e.g. independence of NRAs vis-à-vis the European Commission, culture of independence). Also, based on the requirements of the tender specifications, the study focused on the legislation currently in force, largely leaving aside the legislative developments or legislative history on how the provisions on NRA independence have come into being. These issues should become the subject of further research by different disciplines. NRA independence is a multi-faceted and dynamic subject that warrants further scholarly attention that would add more nuance and depth to the already rich existing scholarship to be presented in Chapter 3 of this study.

3 Review of literature on NRA independence

3.1 Concept of independence

In general, independence is understood as the ‘freedom to make laws or decisions without being governed or controlled by another organization’.⁵ It is often used as a synonym for the notion of autonomy.⁶

With respect to regulatory agencies, the concept of independence in literature is used to qualify for the NRA, because such an authority needs some, even minimal, degree of independence.⁷ As indicated by Thatcher, the minimum requirements for categorization as an *independent regulatory authority* comprise ‘(1) that the agency has its own powers and responsibilities given under public law; (2) that it is organizationally separated from ministries or their main executives; and (3) that it be neither directly elected nor managed by elected officials’.⁸

Traditionally, the research on the independence of agencies was inspired by the research on the independence of central banks, which in turn was focused on independence from politics. Similarly, the development of agencies was linked with the requirement of them being largely independent from politics.⁹ In the literature, it is shown that an increase of *de jure* political independence can lead to better quality work by the regulatory authority.¹⁰ In this context, there is a positive correlation between regulatory quality, reduction of short-termism and the independence of the regulatory authority,¹¹ which is useful when responding to market failures such as externalities and lack of commitment, time inconsistency, political uncertainty or state presence in the market.¹² Another theory refers to the role of interest groups in formulating public policy (capture or interest group theory) by governments and market participants.¹³

⁵ Cambridge Dictionary Online. <https://dictionary.cambridge.org/dictionary/english/independence>

⁶ Scholten M., Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive, *Review of European Administrative Law* 2011, Vol. 5, p. 7. Groenleer, M., *The Autonomy of European Union Agencies. A Comparative Study of Institutional Development*, Eburon 2009. Verhoest, K., Guy Peters, B., Bouckaert, G., Bram Verschuere, B., *The study of organisational autonomy: a conceptual review*, *Public administration and development*, Vol. 24, 2004, p.101, online in Wiley InterScience, DOI: 10.1002/pad.316

⁷ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, *Comparative Political Studies*, Vol. 38, No 1, 2018.

⁸ Thatcher, M., *The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe*, *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 18, No. 3, July 2005 p. 352.

⁹ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, *Comparative Political Studies*, Vol. 38, No 1, 2018, p. 41.

¹⁰ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, *Comparative Political Studies*, Vol. 38, No 1, 2018, p. 64.

¹¹ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, *Comparative Political Studies*, Vol. 38, No 1, 2018, pp. 43 – 44, 46.

¹² OECD, *Being an independent regulator, The Governance of Regulators*, OECD Publishing, Paris 2016, p. 35 <http://dx.doi.org/10.1787/9789264255401-en>. Stone Sweet, A., Thatcher, M., *The Politics of Delegation*, Frank Cass. London 2003, p. 4.

¹³ Laffont, J-J., Tirole, J., *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, *The Quarterly Journal of Economics*, Vol. 106, No. 4, 1991, p. 1089.

In respect to market supervision within the EU context, the independence of regulatory authorities does not limit itself to independence from politicians but also includes independence from market players and promotes a 'level playing field'.¹⁴

Although safeguards against undue influence must be provided for NRAs, there is neither uniform normative meaning of the concept of independence of regulatory authorities nor what it means in practice. In the literature, the concept of independence of NRAs has been under discussion for some time but so far, there is no agreement on how it should be framed.¹⁵ Gilardi and Maggetti¹⁶ propose that it requires at least two components: self-determination,¹⁷ understood as 'the faculty of actors to judge their own interests and values', and the 'ownership of one's actions'.¹⁸

Recently, the concept of independence is often conceived in the context of **interdependence** meaning a 'relationship among the various (...) authorities in the EU'.¹⁹ As discussed by Maggetti, there is a link between a higher level of independence of an agency and its belonging to a network at the European level. It strengthens especially their independence from the regulatees.²⁰ Participation in the network is supported by the diffusion of expertise and exchange of information with other regulators.²¹

Agencies are *de facto* highly independent from their regulatees if they are part of networks of agencies at the European level. This is the case, first, when agencies are barely independent from politicians, corroborating the hypothesis about the conceptualization of RAs as intermediary agencies: an agency cannot be a servant of two masters. Second, consistent with theoretical expectations, European networks of agencies reinforce the independence of agencies.

Researchers' attempts to fill in the concept of regulatory independence with specific content and identify its concrete elements are manifold. Ottow distinguishes 'objectivity, impartiality, integrity, expertise, and professionalism' and *de jure* and *de facto* independence as components of independence.²² Thanks to these characteristics, the regulator is independent and can perform its tasks effectively and efficiently. The OECD

¹⁴ Judgment of 27 October 1993, *Decoster*, C-69/91, ECLI:EU:C:1993:853, para. 19; Ottow A., Lavrijssen, S., Independent Supervisory Authorities: a fragile concept, Legal Issues of European Integration, Vol. 39, No. 4, 2012; Lavrijssen, S., Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU' TILEC Discussion Paper 2018 available at SSRN. Geradin, D., and Petit, N., The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform. Available at SSRN: <https://ssrn.com/abstract=489722>.

¹⁵ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010; Verhoest, K., Guy Peters, B., Bouckaert, G., Bram Verschuere, B., The study of organisational autonomy: a conceptual review, Public administration and development, Vol. 24, 2004, p.101, online in Wiley InterScience, DOI: 10.1002/pad.316.

¹⁶ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, p. 3.

¹⁷ Dahl, R. A., Democracy and Its Critics. New Haven: Yale University Press 1989.

¹⁸ Walzer, M., Spheres of Justice: A Defense of Pluralism and Equality. New York: Basic Books, 1983.

¹⁹ Monti, G., Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network, Working Paper, EUI LAW, Volume 1, 2014, p. 1.

²⁰ Maggetti, M., De facto independence after delegation: A fuzzy-set analysis, Regulation & Governance Vol.1, 2007, pp. 281.

²¹ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, p. 11.

²² Ottow, A., Market and Competition Authorities: Good Agency Principles Oxford University Press 2015, p. 73.

recommendation²³ suggested that principles of good regulation are relevant for regulatory independence: transparency of roles, preventing undue influence and maintaining trust, decision-making and management structures for independent agencies, accountability and transparency, commitment, funding and performance evaluation.

It is not absolute but rather a relative concept²⁴ as public-sector authorities, in general, are 'neither fully autonomous from nor fully dependent upon their environment and their preferences and behaviour are always shaped by their social interactions with other actors'.²⁵ Moreover, it is not a static characteristic but a dynamic concept.²⁶

Furthermore, it can be argued that independence is a matter of degree.²⁷ The envisaged degree of independence is reflected in the statutory provisions but also in the actions of authorities. This report is inspired by the idea of independence being more like a ladder as indicated by Advocate General Bobek:

*Independence can hardly be understood as a unitary notion, a sort of 'off-the-rack' single blueprint, that would provide for a set of guarantees universally applicable to all the independent bodies in exactly the same way. Independence is more like a ladder which one can climb up or down and stop at a specific rung, depending on the distance needed from given actor(s) in order to complete one's tasks independently. Thus, the exact guarantees that are needed will be defined in view of the functions that the body in question is supposed to exercise independently.*²⁸

²³ OECD, Being an independent regulator, The Governance of Regulators, OECD Publishing, Paris 2016, <https://www.oecd.org/gov/regulatory-policy/governance-of-regulators.htm>

²⁴ Dreyer, S., Locating a regulator in the governance structure: A theoretical framework for the operationalization of independence' (in) Schulz, Valcke and Irion (eds). The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal Actual Independence Against the National Cases, Intellect 2013, 116.

²⁵ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, p. 3.

²⁶ OECD, Culture of Independence, Practical Guidance Against Undue Influence.

²⁷ Koop, Ch., Hanretty, Ch., Political Independence, Accountability, and the Quality of Regulatory Decision-Making, Comparative Political Studies, Vol. 38, No 1, 2018, p.41.

²⁸ Opinion of Advocate General Bobek delivered on 23 January 2018, European Commission v Poland, C-530/16.

Box 1. The concept of independence used for this study

For this study, we understand the term **independence** to mean the **capacity of NRA to resist pressure, or act without interference, from politicians and their ability to maintain autonomy from stakeholders: mainly market participants**. The independence of regulatory authorities is not limited to a lack of interference from those actors, but also includes a lack of consideration of those actors' preferences.

Based on: Thatcher, M., The Third Force? Independent Regulatory Agencies and Elected Politicians in Europe, *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 18, No. 3, July 2005, pp. 347 – 373; Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) *Handbook of Regulation*, Cheltenham, Edgar Elgar, 2010, p. 4; Elgie, R., McMenamin, I., Credible Commitment, Political Uncertainty or Policy Complexity? Explaining Variations in the Independence of Non-Majoritarian Institutions in France, *British Journal of Political Science*, Jul 2005, No. 3, p. 534; Hanretty, Ch., Koop, Ch., Measuring the formal independence of regulatory agencies, *Journal of European Public Policy*, Vol.19 (2), p. 196.

This conceptualisation of independence points out that the independence of NRAs is not an end in itself. Rather it is the agency's capability to make day-to-day decisions without interference from anyone consisting of threats or offering incentives or consideration of anyone's preferences. It is a means of good market supervision to ensure impartial decision-making in pursuing its policy objectives and consequently, effective market surveillance and a level playing field.²⁹

3.2 Functional approach rather than only a formal one

A need to prevent undue influence means that it is not sufficient to guarantee the independence of regulatory authorities only *formally (de jure)*. The level of independence is also defined through the practice of the regulatory authority and how authorities perceive their independence³⁰ (*de facto*). The law and economics scholarship has studied mainly *de jure* independence since its early days.³¹ The interplay between those two is more difficult to grasp.³²

²⁹ Ottow, A., *Market and Competition Authorities: Good Agency Principles*, Oxford University Press 2015, p. 11. Lavrijssen, S., 'Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU' *OGEL* Vol. 17 No. 1, 2019. Lavrijssen S., *Towards a European Principle of Independence: The Ongoing Constitutionalisation of an Independent Energy Regulator*, *Carbon & Climate Law Review*, Vol. 16, No. 1, 2022.

³⁰ Kleizen, B., Verhoest, K., *Opportunities and threats of agency autonomy in EU governance: integrating separate debates* (in) Scholten, M., Brenninkmeijer, A., *Controlling EU Agencies*, Elgar 2020, p. 41.

³¹ Already in relation to central banks, see Cukierman, A., Webb, S.B., Neyapti, B., *Measuring the Independence of Central Banks and Its Effect on Policy Outcomes*, *The World Bank Economic Review*, Sep., 1992, Vol. 6, No. 3, pp. 353- 398. For a discussion on *de jure* and *de facto* institutions see: Lewkowicz, J., Metelska – Szaniawska K., *De Jure and De Facto Institutions: Implications for Law and Economics*, *Ekonomista* 2022 Vol. 6, p. 752. DOI: 10.52335/dvqigjyfff41

³² Hanretty, Ch, and Koop, Ch., *Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies, Regulation and Governance*, 2013, pp. 195-214.

It has been established that *de jure* independence, though considered the main determinant, is not sufficient for an authority to be independent in practice. Hence, it is important to ensure that principles and guarantees of independence are integrated into the culture of the organisation as well as applied in the everyday practice of the NRAs (*de facto*).³³

However, the relation between formal and factual independence is not well developed in scholarship and is not well understood yet. This study builds on the approach proposed by Gilardi, Maggetti, Thatcher, Hanretty and Koop and other scholars that formal (*de jure*) independence determines the actual autonomy enjoyed day-by-day by the agency³⁴ There are many determinants of actual independence, for example, institutional 'age' of the regulatory authorities, presence of veto players in the context of decision making or relationships with the politicians and regulatees.³⁵

Box 2. *De facto* and *de jure* independence

it is necessary to verify not only statutory provisions formally ensuring independence (*in books*) but also to measure the actual (*de facto*) functioning of relevant authorities. This distinction was taken into account in designing the methodology for this assignment.

Gilardi and Maggetti define *de facto* independence 'as the combination of two necessary components, namely the (relative) self-determination of agencies' preferences and the (relative) lack of restrictions when enacting their regulatory activity, both with respect to elected politicians and regulates'.³⁶

The discussion on aspects of formal independence started with respect to central banks.³⁷ In this respect, it referred to political independence, i.e. 'the lack of influence from the government and the economic independence understood as the ability to use instruments of monetary policy without restrictions'.³⁸ The number of indices was developed to analyse central banks' independence.³⁹Based on this approach, political

³³ Hanretty, Ch, and Koop, Ch., Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies, Regulation and Governance, 2013, pp. 195-214.

³⁴ Hanretty, Ch, and Koop, Ch., Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies, Regulation and Governance, 2013, pp. 195-214.

³⁵ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, pp. 10 -11.

³⁶ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, p.6.

³⁷ Cukierman, A., Webb, S.B., Neyapti, B., Measuring the Independence of Central Banks and Its Effect on Policy Outcomes, The World Bank Economic Review , Sep., 1992, Vol. 6, No. 3, pp. 353- 398; Koop, Ch., Hanretty, Ch., Political Independence, Accountability, and the Quality of Regulatory Decision-Making, Comparative Political Studies, Vol. 38, No. 1, 2018, p. 41.

³⁸ Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar 2010, p.3.

³⁹ Grilli, V., Masciandaro, D., and Tabellini, G., Institutions and policies. Political and monetary institutions and public financial policies in the industrial countries, Economic Policy, 1991, Vol. 6(2), pp. 342–92. Alesina, A., and Lawrence H. S., Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence, Journal of Money, Credit, and Banking, Vol. 25(2), 1991, pp. 151–162. Cukierman, A., Webb, S.B., Neyapti, B., Measuring the Independence of Central Banks and Its Effect on Policy Outcomes, The World Bank Economic Review , Sep., 1992, Vol. 6, No. 3, pp. 353- 398; Elgie, R., Democratic accountability and central bank independence: historical and contemporary, national and European perspectives, West

scientists attempted to quantify different aspects of the independence of NRAs.⁴⁰ Gilardi⁴¹ started to operationalise the independence of regulatory agencies by elaborating on specific indices aimed at measuring particular dimensions of independence. His works were supplemented by the work of Hanretty and Koop, for example, on formal independence from politics.⁴²

Yet, there is **no single model** for distinguishing those **dimensions and indicators** of independence. One could focus on their function or try to quantify them to create a ranking tool. However, this report will map the *de facto* independence of NRAs by building on the work of Gilardi, Koop and Hanretty (see Section 3.2 for a detailed theoretical background) but without measuring and indexing them.

Instead, an overall picture of the independence of NRAs responsible for electronic communications will be analysed through consideration of the worst- and best-case hypothetical scenarios. This analysis will be supplemented by verifying provisions ensuring that independent NRAs can still be held accountable. If effective, these mechanisms will also strengthen the credibility of the authorities and the way they perform their tasks.⁴³

3.3 Accountability and transparency

The other side of the coin in the case of independence is accountability, which can most simply be defined as a system characteristic that allows one to assign a specific action in the system to a person or process and locate it in time. The essence of accountability is the ability to verify the actions taken by the authority. They must provide explanations of their actions that may lead to consequences,⁴⁴ including the possibility to challenge or change their decision.

European Politics, 1998, Vol. 21 No. , pp. 53–76; Cukierman, A., and Webb, S. B., Political influence on the central bank: international evidence, World Bank Economic Review 1995, Vol. 9(3), pp. 397–423. Forder, J., Some methodological issues in the statutory characterisation of central banks, West European Politics, 2001, Vol 24(1), pp. 202–16. Critical approach: Mangano, g., Measuring central bank independence: a tale of subjectivity and of its consequences, Oxford Economic Papers Vol. 50, pp. 468–92. Koop, Ch., Hanretty, Ch., Political Independence, Accountability, and the Quality of Regulatory Decision-Making, Comparative Political Studies, Vol. 38, No. 1, 2018, p. 41. Gilardi, F., Maggetti, M., The independence of regulatory authorities in Levi-Faur, D., (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010, p. 3.

⁴⁰ Hanretty, Ch., Koop, Ch., Measuring the formal independence of regulatory agencies, Journal of European Public Policy, 2012, Vol.19 (2), pp.198-216, DOI:10.1080/13501763.2011.607357

⁴¹ Gilardi, F., Policy Credibility and Delegation to Independent Regulatory Agencies: A Comparative Empirical Analysis, Journal of European Public Policy, 2002, Vol. 9(6), pp. 873–893. Gilardi, F., The Formal Independence of Regulators: A Comparison of 17 Countries and 7 Sectors, Swiss Political Science Review, 2005, Vol. 11(4), pp. 139–167. Gilardi, F., The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe, Annals of the American Academy of Political and Social Sciences, 2005, Vol.598, pp. 84–101.

⁴² E.g. Hanretty, Ch, and Koop, Ch., Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies, Regulation and Governance, 2013, p. 199.

⁴³ For an overview of different indicators, see Irion, K., Ledger, M., Measuring Independence: Approaches, Limitations, and a New Ranking Tool, (in:) The Independence of the Media and Its Regulatory Agencies. Shedding New Light on Formal and Actual Independence Against the National Context, Schulz, Valcke & Irion (eds.), Bristol UK/ Chicago USA: Intellect 2013, pp. 139-184: <https://ssrn.com/abstract=2424711>

⁴⁴ Błachucki, M., Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji) Wydawnictwo INP PAN 2019.

As defined by Bovens, accountability is 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgments, and the actor may face consequences'.⁴⁵ Bovens' approach consists of three stages: 1) when the information comes from the actor to justify their conduct, 2) the question – answer stage between the actor and the forum and 3) the 'rectification' stage where based on the forum's judgment, the consequences are drawn in respect to the actor.⁴⁶ The broader meaning of accountability proposed in the literature includes next to *ex post* process (accountability proper in Boven's terms) two other elements: *ex ante* and ongoing control.⁴⁷

Accountability instruments are mechanisms for informing supervisors, parties and stakeholders. Bovens indicates three objectives of accountability, namely democratic, constitutional, and learning.⁴⁸ Finally, accountability provides for the legitimacy of the actions of NRAs.⁴⁹

The principle of accountability applies to the financial, procedural and substantive layer of the authority's activity. Therefore, accountability concerns the performance of tasks by the authority and the use of resources available to the authority, including transparency of the financial policy. It also concerns adherence to procedural standards that should be fair, transparent and impartial.⁵⁰ Accountability affects the legitimacy of the authority's actions and preserves integrity in the behaviour of both the institution and its employees.

Koop and Hanretty indicate, on the example of competition authorities, that supranational coordination mechanisms within the EU lead to an increase of 'horizontal accountability' which can lead to an increase of NRA independence.⁵¹ Next to horizontal accountability, scholars distinguish vertical (in the presence of hierarchy) and diagonal (the agency accounts to bodies outside of hierarchical structure yet with authority).⁵²

⁴⁵ Bovens, M., *Analysing and Assessing Public Accountability: A Conceptual Framework*, European Law Journal 2007, Vol 4 No. 13, p. 447.

⁴⁶ Bovens, M., *Analysing and Assessing Public Accountability: A Conceptual Framework*, European Law Journal 2007, Vol 4 No. 13, 450.

⁴⁷ Scholten, M., *The Political Accountability of EU and US Independent Regulatory Agencies*, Brill 2014, p. 10. Mulgan, R., *Holding Power to Account: Accountability in Modern Democracies*, Palgrave 2003, p.18.

⁴⁸ Bovens, M., *Analysing and Assessing Public Accountability: A Conceptual Framework*, European Law Journal 2007, Vol 4 No. 13, p. 462; Scholten, M., *The Political Accountability of EU and US Independent Regulatory Agencies*, Brill 2014, p. 7.

⁴⁹ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, Comparative Political Studies, Vol. 38, No 1, 2018, p. 44.

⁵⁰ Ogus, A., *Regulation: Legal Form and Economic Theory*, Clarendon Press 1994.

⁵¹ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, Comparative Political Studies, Vol. 38, No 1, 2018, pp. 65 - 66.

⁵² Bovens, M., *Analysing and Assessing Public Accountability: A Conceptual Framework*, European Law Journal 2007, Vol 4 No. 13, p. 462. Schillemans, T., Overman, S., Flinders, M., Laegreid, P., Maggetti, M., Papadopoulos, Y., & Wood, M., *Public sector accountability styles in Europe comparing accountability and control of agencies in the Netherlands, Norway, Switzerland and the UK*. Public Policy and Administration, 2020: <https://10.1177/09520767221098292>.

Majone indicates that independence and accountability as 'complementary and mutually supporting'.⁵³ Koop and Hanretty also agree that the independence of regulatory authorities does not exclude some degree of accountability.⁵⁴ Thus, an assumption can be made that the capacity of an authority to make informed decisions is not threatened by the *ex post* information and reporting obligations.⁵⁵ Nevertheless, as expectations of third parties could affect the NRA's decision-making, the definition of independence used for this report also includes considerations of preferences.

Accountability linked with independence could strengthen the carrying out of long-term policy objectives as independent authorities could deviate from the politicians' preferences and indications.⁵⁶ Thus, accountability should focus on limiting the potential misuse of power by independent authorities.

3.4 Dimensions of independence

Independence is a multi-dimensional concept⁵⁷ including legal, institutional or functional aspects. Those different aspects of independence can be translated into different areas of NRAs' functioning. They need to be supplemented by a systemic view of how specific authority is embodied within a national administrative and judiciary system. More practically, those aspects show through different dimensions of management and the functioning of NRAs: organisational, judicial, financial and personnel.⁵⁸ Moreover, as highlighted in the OECD Guidance, *Creating a Culture for Independence*, Financial, Staff Behaviour, Leadership and Political (pinch points) are possible entry points for undue influence.⁵⁹

There is no commonly-shared methodology to analyse *de facto* and *de jure* independence despite the empirical research mentioned above. Moreover, the scholarship is not holistic but rather deals with specific issues and goals to which specific criteria are being applied. More generally, the 'threefold categorization approach' is used, focusing on power, money and knowledge,⁶⁰ which leads to different categories of dimensions or indicators.

⁵³ Majone, G., *The Regulatory State and Its Legitimacy Problems*. West European Politics, 1999, Vol.22(1), p. 14

⁵⁴ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, Comparative Political Studies, Vol. 38, No 1, 2018, p. 44.

⁵⁵ Scholten M., *Independent, hence unaccountable?* Review of European Administrative Law, Vol. 4, Number 1, 2011, p. 43.

⁵⁶ Koop, Ch., Hanretty, Ch., *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, Comparative Political Studies, Vol. 38, No 1, 2018, p. 46.

⁵⁷ Verhoest, K., Peters, B.G., Bouckaert G., and Verschuere, B., *The study of organizational autonomy: A conceptual review*, Public Administration and Development, Vol. 24, 2004, pp. 101 – 118, DOI: 10.1002/pad.316.

⁵⁸ Błachucki, M., *Ponadnarodowe sieci organów administracji publicznej oraz ich wpływ na krajowy porządek prawny (na przykładzie ponadnarodowych sieci organów ochrony konkurencji)* Wydawnictwo INP PAN 2019.

⁵⁹ OECD, *Creating a Culture of Independence, Practical Guidance Against Undue Influence*, OECD Publishing, Paris, 2017.

⁶⁰ Dreyer, S., *Locating a regulator in the governance structure: A theoretical framework for the operationalization of independence*(in) Schulz, Valcke and Irion (eds). *The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal Actual Independence Against the National Cases*, Intellect 2013, 116. Verhoest, K., Peters, B.G., Bouckaert G., and Verschuere, B., *The study of*

As mentioned above, **different dimensions** of central banks were initially analysed by scholars. It gave rise to studies on the quantification (measurement) of factors that account for the formal (*de jure*) independence of regulatory authorities. For instance, Gilardi focused on five dimensions: ‘the agency head status, the management board members’ status, the general frame of the relationships with the government and the parliament, financial and organizational autonomy, and the extent of delegated regulatory competencies’.⁶¹ Scholten enumerates four criteria of independence: institutional, personnel, financial and functional independence,⁶² and focuses on three elements (institutional, personal and financial),⁶³ whereas Verhoest and others extricate managerial, policy, financial and legal autonomy.⁶⁴ This is where inspiration was drawn for this report.

In the light of the plethora of features of independence and the usage of different names for specific indicators as well as pinch points and the ‘threefold categorization approach’ and the research mentioned above, to verify *de facto* independence, dimensions covering authorities’ activities are divided into operational, financial and personnel. In order to cover the relevant areas for supervisory independence, systemic independence and accountability and monitoring processes have been included. Finally, the scope has been broadened to include a dimension relevant to the future challenges for the NRAs’ activities.

Box 3. Dimensions of independence used for this analysis

The following dimensions are distinguished:

- systemic independence
- operational independence
- financial independence
- personnel independence
- accountability and monitoring
- (making the authorities) Future proof.

The interplay of the dimensions of independence is visualised in Figure 1.

organizational autonomy: A conceptual review, *Public Administration and Development*, Vol. 24, 2004, pp. 101 – 118, DOI: 10.1002/pad.316.

⁶¹ Gilardi, F., Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis, *Journal of European Public Policy*, Vol. 9:6, 2002, pp. 873-893, DOI: 10.1080/1350176022000046409

⁶² Scholten M., Independent, Hence Unaccountable? – The Need for a Broader Debate on Accountability of the Executive, *Review of European Administrative Law* Vol. 5, 2011, p. 7.

⁶³ Scholten, M., Independence and accountability: proving the negative correlation, *Maastricht Journal of European and Comparative Law*, Volume 21, Issue 1, 2014, p. 198.

⁶⁴ Verhoest, K., Peters, B.G., Bouckaert G., and Verschuere, B., The study of organizational autonomy: A conceptual review, *Public Administration and Development*, Vol. 24, 2004, pp. 101 – 118, DOI: 10.1002/pad.316.

Figure 1. Interplay of dimensions of independence

Those dimensions create an axis for the analysis. They are broader than indices analysed in the literature as the report is not limited to political influence. This report goes beyond formal (*de jure*) independence as it is based on a survey and follow-up interviews with NRAs. Besides, broader features of independence allow for better comparisons across different countries and sectors analysed in the report.

Below, major points of inquiry for each dimension are presented.

3.4.1 Systemic independence

The first dimension of independence of an authority refers to its legal status and rules that frame its establishment. This dimension can be said to determine formal independence.⁶⁵ One of the examples discussed in the literature is a legal personality mentioned as a condition for operating as an independent actor and enabling the agency to enter into agreements or become a member of international networks.⁶⁶

Systemic independence provides a framework for the analysis and it indicates what degree of formal independence was awarded to authorities by national legislators. In the EU context, it also provides information on whether all the requirements of the EECC were transposed at the national level.

⁶⁵ Gilardi, F., Policy credibility and delegation to independent regulatory agencies: a comparative empirical analysis, *Journal of European Public Policy*, Vol. 9:6, 2002, pp. 873-893, DOI: 10.1080/1350176022000046409; Elgie, R., Democratic accountability and central bank independence: historical and contemporary, national and European perspectives, *West European Politics*, 1998, Vol. 21, pp. 53-76;

⁶⁶ Verhoest, K., Guy Peters, B., Bouckaert, G., Bram Verschuere, B., The study of organisational autonomy: a conceptual review, *Public administration and development*, Vol. 24, 2004, p.101, online in Wiley InterScience, DOI: 10.1002/pad.316. Groenleer, M., The Autonomy of European Union Agencies. A Comparative Study of Institutional Development, Eburon 2009.

Thus, the investigated issues under this dimension of independence include:

- the legal structure of the NRA
- type of leadership
- relations with the government
- the way how the NRA sees its own independence and how much external influence they experience on a day-to-day basis
- whether there is an explicit national framework for the NRA's independence
- powers and competences of the NRA
- decision-making processes and what sort of approvals are required formally from the government.

3.4.2 Operational independence

Operational independence means that an organisation can make decisions to achieve policy goals and instruments that can be used without external interference (by its principals or stakeholders).⁶⁷ This dimension also includes independence with respect to the exercise of enforcement powers.

The issues explored under this dimension are:

- what decisions regarding the day-to-day operations of NRAs are taken and by whom, namely:
 - Own strategy of the NRA
 - Internal organisation of the NRA
- to what extent those decisions can these decisions be influenced by other actors;
- in what environment NRAs are operating.

3.4.3 Financial independence

Once authorities can decide on their budgeting and how to spend their resources, they are perceived as having a high level of independence. If there is an influence of a single external institution on the budget, there is a probability that this influence will be used to exert pressure to reach specific interest decisions or restrict the exercise of specific tasks, if not to cancel them via allocating no funding to them.⁶⁸ Restrictions on budget spending or transfers indicate a rather low level of independence. Agencies that generate their own resources in addition to, or instead of, the funding from the state budget have a higher degree of political independence than agencies that strongly rely on public sources for funding.⁶⁹

⁶⁷ Verhoest, K., Peters, B.G., Bouckaert G., and Verschuere, B., The study of organizational autonomy: A conceptual review, *Public Administration and Development*, Vol. 24, 2004, p. 105: DOI: 10.1002/pad.316.

⁶⁸ Dreyer, S., Locating a regulator in the governance structure: A theoretical framework for the operationalization of independence' (in) Schulz, Valcke and Irion (eds). *The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal Actual Independence Against the National Cases*, Intellect 2013, p. 126.

⁶⁹ See Pfeffer, J., and Salancik, G.R., *The External Control of Organizations: A Resource Dependence Perspective*, University of Illinois at Urbana-Champaign's Academy for Entrepreneurial Leadership Historical

Therefore, with respect to this dimension, the analysis shows what authorities can do with the resources at their disposal and how they can use those resources, namely:

- how budget decisions are taken (budget formation) and how specific funding is allocated;
- sources of finances;
- independence of NRAs in the execution of their budgets.

3.4.4 Personnel independence

Another dimension of independence is related to top-level officials (or board members in the case of collegial bodies) and other (senior) staff. The relevant questions are: what appointment procedures and terms of office of senior officials are, whether heads are appointed and dismissed within transparent and clear procedures and whether they are appointed for fixed renewable terms. As the scholarly literature stipulates, 'Independence in personnel matters is usually assumed to be highest when there are long, non-renewable terms of office, arms-length appointment procedures, and very high barriers to the dismissal of central bank authorities'.⁷⁰

Therefore, under this dimension, the following is explored:

- independence of the NRA leadership (head and/or members of the board): appointments, dismissals, rules of behaviour;
- ability to take independent decisions with regard to other NRA staff: number of staff, promotions, salaries, rules of behaviour.

3.4.5 Accountability and transparency

As described above (Section 3.1.2), accountability and transparency are complementary to and supporting independence. At the same time, excessive control by external actors may limit NRAs' independence. Therefore, this dimension includes:

- publishing and reporting policies by NRAs;
- external reviews;
- appealing and changing NRAs decisions.

Research Reference in Entrepreneurship, 1978: <https://ssrn.com/abstract=1496213>; Larsen, A., Pedersen, L. H., Sørensen, E. M., & Olsen, O. J., Independent regulatory authorities in European electricity markets. *Energy Policy*, 34(17), 2006, pp. 2858-2870; Spark, Trinomics and University of Groningen, Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy, Study for the European Commission, 2019, p. 113, doi:10.2833/040652 .

⁷⁰ McNamara, K., Rational Fictions: Central Bank Independence and the Social Logic of Delegation, *West European Politics*, Vol. 25, No.1, 2002, pp. 47-76

3.4.6 Future-proofing NRA independence

In addition to categories/ aspects of independence discussed in the literature, a 'future-proof' category of analysis was added. Its goal is to provide a systemic, forward-looking and durable framework for future challenges. It is especially desired in the case of a fast-moving industry such as electronic communications, which is the focus of this report.⁷¹ Future-proofing in the context of NRAs ensures that authorities 'will not become obsolete or useless because of changes that could have been anticipated ahead of time or because they were not designed with the required flexibility to adapt to new circumstances'.⁷²

Therefore, for this category, the focus is on the expertise of the head(s) of authorities and their staff and the instruments they use to keep up to date with the fast-changing markets.

⁷¹ Ibáñez Colomo, P., Future-Proof Regulation against the Test of Time: The Evolution of European Telecommunications Regulation, *Oxford Journal of Legal Studies*, 2022, p. 1.

⁷² Ranchordas, S., and van 't Schip, M., Future-Proofing Legislation for the Digital Age, S. Ranchordas and Y. Roznai (Eds), *Time, Law, and Change*, Hart, 2020, Forthcoming, University of Groningen Faculty of Law Research Paper No. 36/2019: <http://dx.doi.org/10.2139/ssrn.3466161>

4 EU legal frameworks for NRA independence

This chapter provides an analytical overview of the EU-level provisions on NRA independence that are currently in force for all sectors under review and for the national competition authorities.

It begins with an overview of the legal framework for NRA independence in the electronic communications sector (Section 4.1), because this sector is the focus of the study. It firstly covers the historical perspective (Section 4.1.1), then examines the current EU-level legislation (Section 4.1.2).

After that, Section 4.2 provides an overview of all other sectors (postal, energy, rail, data protection, audio-visual media services, and financial services) and for the national competition authorities. The overview follows the dimensions of independence described in Chapter 3.

4.1 NRA independence in the electronic communications sector

4.1.1 Historical perspective

The concept of an independent regulatory body fulfilling certain functions in the electronic communications (initially called telecommunications) market goes back to the earliest liberalisation Directives of the EU. The first liberalising legislation focused only on functional separation⁷³ and had a very general reference to independence. For instance, Article 6 of the 1988 Terminals Directive⁷⁴ required Member States to ensure that the tasks of drawing technical specifications, monitoring and granting of type-approvals were performed by a 'body independent of public or private undertakings offering goods and/or services in the telecommunications sector'. Article 7 of the 1990 Services Directive⁷⁵ required Member States to provide that a 'body independent of the telecommunications organizations' issues operating licences, controls type-approvals, allocates frequencies and surveys usage conditions.

A focus on functional independence was maintained and complemented by the independence from the industry in general when proper national regulatory authorities in the sector of electronic communications were created in the wake of the full liberalisation of the market. The idea that Member States must establish NRAs that are distinct from telecommunications providers was first expressed by the European Commission in its legislative Proposal to revise the 1990 Open Network Provision Directive (ONP

⁷³ Psygkas, A., From the democratic deficit to a democratic surplus: Constructing administrative democracy in Europe, Oxford University Press, 2017, pp. 41-42.

⁷⁴ Commission Directive 88/301/EEC of 16 May 1988 on competition in the markets in telecommunications terminal equipment, OJ L 131, 27.5.1988: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31988L0301> .

⁷⁵ Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services, OJ L 192, 24.7.1990: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31990L0388> .

Directive).⁷⁶ The purpose of the independence of the NRA was explicitly linked to the principle of separation of regulatory and operational functions, meaning that the regulator was no longer supposed to act as an economic operator, which it regulated.⁷⁷ The Proposal made it clear that the main motivation for the NRA independence was the prevention of influence from the industry, of which the government – as the owner of incumbent telecommunication providers – was an important part and the creation of a level playing field for all market participants.⁷⁸ Recital 9 of the revised ONP Directive⁷⁹ further explains that the NRA independence had the aim to ensure the impartiality of NRA decisions and that NRAs play the key role in implementing the EU regulatory framework. The NRAs should also have all the necessary resources, in terms of staff, expertise and financial means to fulfil their function.⁸⁰ Article 5a para. 2 ONP Directive stated that NRAs should be ‘legally distinct from, and functionally independent of, all organisations providing telecommunications networks, equipment or services’. If Member States retained ownership in the telecommunications providers, they needed to ensure effective structural separation of regulatory function from the activities associated with ownership or control.

The Court of Justice (ECJ) further developed this line of thinking about independence. In 1991, it held that equality of opportunity for different economic operators is one of the conditions for a system of undistorted competition. So, in order to ‘maintain effective competition and to ensure transparency, responsibility for drawing up technical specifications, monitoring their application and granting type-approval should be entrusted to a body independent of public and private undertakings offering competing goods or services in the telecommunications sector’.⁸¹ In the same year, the ECJ decided that it is incompatible with the Treaty provisions ‘to grant to the undertaking which operates the public telecommunications network the power to lay down standards for telephone equipment and to check that economic operators meet those standards

⁷⁶ European Commission, Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications. COM(95) 543, 01.03.1996: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:51995PC0543>.

⁷⁷ The European Commission – based on the settled case law of the ECJ – long regarded the then-extant national telecommunications administrations as economic operators. See one of the earliest discussions in the European Commission, Towards a dynamic European economy: Green Paper on the development of the common market for telecommunications services and equipment, COM(87) 290, 30.06.1987: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A51987DC0290>.

⁷⁸ Psygkas, A., From the democratic deficit to a democratic surplus: Constructing administrative democracy in Europe, Oxford University Press 2017, pp. 43-44; Geradin, D., and Petit, N., The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform, Jean Monnet Working Paper 01/2004, p. 24: <https://ssrn.com/abstract=489722>.

⁷⁹ Directive 97/51/EC of the European Parliament and of the Council of 6 October 1997 amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications, OJ L 295, 29.10.1997: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997L0051>.

⁸⁰ The European Parliament suggested to include in Article 5a para. 2 of the ONP Directive the obligation that the NRAs should have all necessary resources, in terms of staff, expertise and financial means to fulfil their mission in full autonomy as these were necessary to ‘assert the formal and operational independence’. But at the end, it was included only in Recital 9. European Parliament, Report on the proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaptation to a competitive environment in telecommunications (COM(95)0543 - C4-0001/96 - 95/0280(COD)) of 30.04.1996: https://www.europarl.europa.eu/doceo/document/A-4-1996-0144_EN.html#_section2.

⁸¹ Judgment of 19 March 1991, *France v Commission*, C-202/88, ECLI:EU:C:1991:120, para. 51.

when it is itself competing with those operators on the market for that equipment'.⁸² Then in 1993, the ECJ emphasised the importance of independence of the regulatory body, stating that national rules could not punish commercial operators lacking type-approvals if, at the same time, the Member States did not establish independent authorities for issuing such type-approvals.⁸³ The Court further explained an NRA could not be considered independent if it was merely a different directorate of the same authority that owns a public market operator.⁸⁴

Although the legal framework of the 1990s brought significant changes to the market and the regulation of telecommunications, it began to appear inadequate for the achievement of the single market in telecommunications in light of technological and economic developments. Already in 1999, the European Commission started a review of the legal framework.⁸⁵ Among the legal provisions that needed enhancement, the European Commission identified those related to the NRA independence. For the first time, the European Commission emphasised the necessity for NRAs to be independent of 'political interference' in order to undertake their 'role of supervision of the market'.⁸⁶ To strengthen the NRA independence in this regard, the European Commission proposed to review the old legal framework.

The result of the review was the 2002 telecommunications package, which included, among other things, the Framework Directive.⁸⁷ However, the Framework Directive did not change the scope of NRA independence to include protections from political influence. It did not contain stronger or significantly different wording on the NRA independence from that of its predecessor (i.e. the ONP Directive). Recital 11 Framework Directive had exactly the same wording as its predecessor Recital 9 ONP Directive. Article 3 para. 2 Framework Directive was also almost identical to Article 5a para. 2 ONP Directive – the only difference being that it spoke of electronic communications and not telecommunications anymore.

A new requirement was introduced to ensure that NRAs exercise their powers impartially and transparently (Article 3 para. 3 Framework Directive). However, further substantiation of the transparency requirement was very light: Article 3 para. 4 Framework Directive merely required that all tasks assigned to the NRA were published and information provided in an easily accessible form where there was more than one NRA designated. A general requirement of transparency was quite vague: Article 5 (4) Framework Directive merely stated that NRAs 'should publish such information as would contribute to an open and competitive market' without specifying further what this information might be. However, in the specific Directives, there were concrete requirements to publish certain decisions and documents, for example, decisions to limit

⁸² Judgment of 13 December 1991, *Régie des télégraphes et des téléphones v GB-Inno-BM*, C-18/88, ECLI:EU:C:1991:474, para. 28.

⁸³ Judgment of 27 October 1993, *Decoster*, C-69/91, ECLI:EU:C:1993:853, para. 22.

⁸⁴ Judgment of 27 October 1993, *Decoster*, C-69/91, ECLI:EU:C:1993:853, para. 16.

⁸⁵ European Commission (1999). Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review, COM(99)539 final of 10.11.1999: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999DC0539&from=EN>.

⁸⁶ European Commission, Towards a New Framework for Electronic Communications Infrastructure and Associated Services: The 1999 Communications Review, COM(99)539, 10.11.1999, p. 58.

⁸⁷ 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, OJ L 108, 24.4.2002: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002L0021>.

the granting of rights of use of radio frequencies (Article 7 para. 1 lit. c) Authorisation Directive⁸⁸) or principles for cost-sharing and details on the universal service fund (Article 14 Universal Service Directive⁸⁹).

Another new requirement conducive to NRA independence was the possibility of cooperation between NRAs as well as between NRAs and competition and consumer protection authorities on the points of interest (Article 3 para. 4 Framework Directive).

In the context of the 2002 Framework Directive, the ECJ considered the question of what institution can act in the capacity of the NRA or, more specifically, whether the national legislator can play such a role.⁹⁰ The Court found that nothing in the Framework Directive precludes the national legislator from acting as an NRA, provided it meets the requirements of 'competence, independence, impartiality and transparency' when doing so and that its decisions can be effectively appealed to an independent body.⁹¹ It should be noted, however, that this question was answered in relation to the competence to determine the calculation of the net costs of the universal service provider, and in different circumstances, the Court's interpretation might have been different.

More substantial changes to the scope of the regulation of the NRA independence were introduced with the 2009 review of the legal framework for electronic communications. In its proposal⁹² and accompanying documents,⁹³ the European Commission pointed out once again that the NRA independence needed to be strengthened because it is a prerequisite for the speedy and effective implementation of the regulatory framework. Independence remained an issue in some Member States due to political influence on the NRAs' regulatory decision-making.⁹⁴ Hence the European Commission proposed to revise Article 3 of the Framework Directive to set standards for the dismissal of the head of the NRA, limiting possible political influence on the NRAs and ensuring that NRAs have independent budgets and staff.

⁸⁸ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ L 108, 24.4.2002: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002L0020> .

⁸⁹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24.4.2002: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0022>

⁹⁰ Judgment of 6 October 2010, *Base and Others*, C-389/08, ECLI:EU:C:2010:584.

⁹¹ Judgment of 6 October 2010, *Base and Others*, C-389/08, ECLI:EU:C:2010:584, para. 30.

⁹² European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM(2007)697, 13.11.2007: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0140> .

⁹³ European Commission, Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007) 696, 13.11.2007: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52007DC0696>; Commission Staff Working Document, Impact Assessment accompanying document to the Proposal for a Directive of the European Parliament and of the Council amending European Parliament and Council Directives 2002/19/EC, 2002/20/EC and 202/21/EC, Proposal for a Directive of the European Parliament and of the Council amending European Parliament and Council Directives 2002/22/EC and 2002/58/EC and Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Markets Authority, SEC(2007) 1472, 13.11.2007: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007SC1473> .

⁹⁴ For examples, see Psygkas, A., From the democratic deficit to a democratic surplus: Constructing administrative democracy in Europe, Oxford University Press, 2017, p. 44.

The resulting Directive 2009/140/EC⁹⁵ contained an elaborate explanation of the importance of protecting NRA independence to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decision-making. Directive 2009/140/EU aims to protect NRA independence from 'external intervention or political pressure', shifting the focus of independence provisions towards the political independence of NRAs.⁹⁶ Recital 13 Directive 2009/140/EC called on Member States to introduce express provisions in their national laws to this effect. To strengthen the NRA independence, Member States needed to introduce rules on the grounds for the dismissal of the NRA head 'to remove any reasonable doubt as to the neutrality of that body and its imperviousness to external factors'. Recital 13 also called on Member States to grant NRAs their own budget, allowing them in particular to hire a sufficient number of qualified staff. As a transparency measure, the NRA budget should be published annually.

Article 3 Framework Directive was amended to include specific provisions on financial and operational independence and personnel independence. Article 3 para. 3 was replaced with new wording, now containing a legal obligation for Member States to ensure 'adequate financial and human resources to carry out the tasks assigned to them'. The new Article 3 para. 3a Framework Directive also required Member States to ensure that NRAs have their own budget, which is published, and that they have enough financial and human resources to participate in the work of the Body of European Regulators for Electronic Communications (BEREC). However, NRA independence does not preclude supervision under national constitutional law.

The Court of Justice of the EU (CJEU) explained that, usually, budgetary monitoring by the national parliament (including *ex ante* public spending control) does not impair the independence and impartiality of NRAs guaranteed by the EU legal framework.⁹⁷ Budgetary controls can only be deemed inadmissible if they prevent the NRAs from satisfactorily carrying out their tasks or if they are contrary to the conditions for independence imposed by the EU-level legislation. Yet, if significant budgetary discretion of the NRA persists within the limits of national law (though the CJEU did not define the precise extent of this discretion), the NRA's independence is not jeopardised.⁹⁸

The new Article 3 para. 3a stated that NRAs should act independently and not seek or take instructions from any other body in relation to the exercise of their tasks under EU law. Only independent appeal bodies should have the powers to suspend or overturn NRAs' decisions. Interpreting this legal provision, the CJEU explained that the phrase 'any other body' includes not only a national ministry but also a national parliament. If any of these bodies were permitted to suspend or annul an ongoing regulatory procedure

⁹⁵ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337, 18.12.2009: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32009L0140>.

⁹⁶ Psygkas, A., *From the democratic deficit to a democratic surplus: Constructing administrative democracy in Europe*, Oxford University Press, 2017, p. 45.

⁹⁷ Judgment of 14 September 2015, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, ECLI:EU:C:2016:608, para. 39.

⁹⁸ Judgment of 14 September 2015, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, ECLI:EU:C:2016:608, para. 41.

decided by the NRA within its regulatory competences, the independence of such NRA would be jeopardised.⁹⁹

Under Article 3 para. 3a Framework Directive, Member States must introduce national laws outlining grounds for dismissal of the NRA head or members of the collegiate body (NRA board). These grounds should relate only to their inability to fulfil conditions required for the performance of their duties. The dismissal decisions must be made public, and reasons for dismissal should be stated clearly to the dismissed. The provision on the dismissals was further interpreted by the CJEU when the president and a board member were prematurely dismissed due to the re-organisation of the NRA in Spain.¹⁰⁰ The Court found that a dismissal that is merely a result of an institutional reform may jeopardise the attainment of the objectives of strengthening the independence and impartiality of the NRA and may give rise to 'reasonable doubt as to the neutrality of the NRA concerned and its imperviousness to external factors'.¹⁰¹ Member States must lay down safeguards that premature dismissals do not jeopardise the independence and impartiality of the persons concerned.¹⁰²

4.1.2 NRA independence in the European Electronic Communications Code

The European Electronic Communications Code (EECC)¹⁰³ – the EU-level sectoral legislation that is currently in force – has built on the 2009 reforms concerning NRA independence and rendered more precise the relevant legal requirements. The initial proposal by the European Commission¹⁰⁴ highlighted the need to harmonise NRAs' competences and to enhance NRA independence. Harmonisation of competences was necessary because the 2009 framework harmonised very few competences assigned to NRAs responsible for ex ante market regulation and allowed Member States to assign many competences under the framework to other authorities that did not meet the same independence requirements as NRAs. Recital 34 of the initially proposed EECC stated that "it is necessary to provide for a list of tasks that Member States may assign only to bodies which they designate as national regulatory authorities whose political independence and regulatory capacity is guaranteed". In line with this, the initially proposed Article 5 contained a list of 11 competences reserved for NRAs. The adopted Article 5 EECC provides more flexibility to Member States to decide which authority (i.e. NRA or other competent authority) should be assigned which competences. The competences reserved only for NRAs are mainly those related to ex ante regulation (in

⁹⁹ Judgment of 26 July 2017, *Europa Way Srl and Persidera SpA v Autorità per le Garanzie nelle Comunicazioni (AGCOM) and Others*, C-560/15, ECLI:EU:C:2017:593, para. 56.

¹⁰⁰ Judgment of 19 October 2016, *Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v Administración del Estado*, C-424/15, ECLI:EU:C:2016:780.

¹⁰¹ Judgment of 19 October 2016, *Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v Administración del Estado*, C-424/15, ECLI:EU:C:2016:780, para. 47.

¹⁰² Judgment of 19 October 2016, *Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v Administración del Estado*, C-424/15, ECLI:EU:C:2016:780, para. 51.

¹⁰³ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast), OJ L 321, 17.12.2018: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L1972>.

¹⁰⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast), COM(2016) 590 final/2, 12.10.2016, especially p. 7: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52016PC0590>.

the first line access regulation).¹⁰⁵ Also, the NRA competences on the list of Article 5 EECC are at times weaker or narrower than what was originally proposed.¹⁰⁶

At the same time, the basic requirements to independence were introduced for other competent authorities. Article 6 EECC requires that other competent authorities are functionally independent from market participants and that they exercise their powers impartially, transparently and in a timely manner. However, the EECC does not require them to be politically independent.

The legal provisions on NRA independence have been extended and strengthened considerably. Instead of one Article, the EECC contains four Articles covering various aspects of NRA independence in a structured and detailed manner, which signifies the enhancing of NRA independence by anchoring it in EU-level legal provisions. In particular, the political independence of NRAs is strengthened with Article 8 EECC pertaining specifically to it, though the relevant Recitals 35, 37 and 38 EECC make it clear that all legal provisions have the same aim.

The legal provisions on the **systemic independence** of NRAs were enhanced by the explicit requirement of political independence in Article 8 EECC that expresses itself in the ability to operate independently and to shield the NRA leadership from external pressure, especially in appointment and dismissal procedures (see further below). The rest of legal provisions on the systemic independence remain the same as in the preceding legislation, including the requirement that NRAs 'shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law' (Article 8 para. 1 EECC). Article 6 para. 1 EECC requires that Member States guarantee the NRA independence by ensuring that they are 'legally distinct from, and functionally independent of, any natural or legal person providing electronic communications networks, equipment or services'. If Member States continue own or control electronic communications providers, they must ensure 'effective structural separation of the regulatory function from activities associated with ownership or control'. Recital 35 EECC recommends that certain regulatory tasks (i.e. *ex ante* market regulation and resolution of disputes between companies) should be performed only by an independent NRA, i.e. bodies that are independent both from the sector, political pressure or any external intervention.

In terms of **operational independence**, Article 6 para. 2 EECC states that Member States shall ensure that NRAs exercise their powers impartially, transparently and in a timely manner and have adequate technical, financial and human resources for this. Article 8 para 1. EECC requires that the operational independence of NRAs includes that they are able to develop autonomously internal procedures and decide on the organisation of staff (Article 8 para 1. EECC), which is a unique requirement among all

¹⁰⁵ See an explanation of the compromised reach in Council of the EU, Proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast) - Preparation for the first informal trilogue, 12797/1/17 REV 1, p. 7: <https://www.statewatch.org/media/documents/news/2017/oct/eu-council-telecom-code-trilogue-12797-rev-1-17.pdf>.

¹⁰⁶ For example, the initially proposed Article 5 contained the following competences reserved for NRAs: resolution of disputes between undertakings and consumers; determining the mechanisms for the financing regime for universal service; dealing with issues related to open internet access; granting general authorisation; ensuring consumer protection and end-user rights in the electronic communications sector; granting numbering resources and managing numbering plans. All these competences were not included in the adopted Article 5 EECC.

sectoral legislation. Just like all other sectoral legislation, the EECC requires that electronic communications NRAs are able to cooperate with their peers and other national authorities, of which competition and consumer authorities are mentioned explicitly (Articles 5 paras. 2, 3 and 11 EECC). Similar to the legal requirements for energy NRAs, the EECC requires Member States to ensure that NRAs can participate in the work of the EU-level sectoral agency (Article 10 EECC) and have sufficient financial and human resources for this (Article 9 para. 3 EECC).

The provisions on the **financial independence** of NRAs are very similar to those of the 2009 legal framework but contain important specifications. In addition to the requirement that NRAs should have their own budget, Article 9 para. 1 EECC introduced the requirement that they also must have ‘autonomy in the implementation of the allocated budget’, which means that NRA should manage their financial and human resources freely within the limits of the budget, e.g. by being able to recruit a sufficient number of qualified staff (Recital 37 EECC). This ‘financial autonomy’ does not preclude supervision or control as required by national constitutional law, and such supervisory or control activities must be carried out transparently and made public (Article 9 para. 2 EECC). The financial and human resources of NRAs should be sufficient to enable their active participation in the work of BEREC (Article 9 para. 3 EECC). Recital 37 EECC recommends that the NRA budget should be published annually.

New provisions were introduced to strengthen the **independence of the personnel**: the EECC has requirements not only for dismissal but also for the appointment of the NRA head and members of the NRA board. The relevant provisions are not, however, as extensive as those of the GDPR and Rail Directive. In particular, the rules on the appointment procedure go only slightly beyond the general requirements, but the rules on dismissal are typical for all sectors.

Article 7 para. 1 EECC contains conditions to the appointment procedure, lists minimum requirements for the candidate for the NRA head of board member and states the minimum term of office. The appointment procedure must be ‘open and transparent’, whereas the requirement of the open procedure is unique among the reviewed sectoral legislation. The candidates should have ‘recognised standing and professional experience’ and be selected ‘on the basis of merit, skills, knowledge and experience’. The minimum term of office is three years. Member States also need to ensure continuity of decision-making by having a possibility of mandate renewal and setting up a rotation scheme for the board and top management (Recital 38 EECC). At the same time, Recital 38 EECC cautions against the possibility of regulatory capture and recommends limiting the possible number of mandate renewals.

Article 7 para. 2 EECC repeats the 2009 provisions that the NRA head of board members can be dismissed only ‘if they no longer fulfil the conditions required for the performance of their duties’ and that such conditions must be laid down in national law before their appointment. The requirements for the publication of the decision on the dismissal and its reasons are also the same (Article 7 para. 3 EECC). A new requirement is that the dismissal decision must be subject to review by a court – both on points of fact and law (Article 7 para. 3 EECC).

The EECC does not contain any rules on the code of conduct or conflict of interest for the NRA head, board members or NRA staff and does not require or recommend that such measures are introduced. The EECC reiterates that general national and Union

rules on commercial confidentiality and data protection apply to NRAs (e.g. Article 20 paras. 3 and 4, Article 23 para. 4, Article 91 para. 2 EECC), which relates mainly to the information provided to NRAs by undertakings and not to investigations and proceedings of NRAs. But the EECC does not indicate that professional secrecy rules apply or that confidentiality obligations should apply after the staff's term of office

The EECC introduced the notion of and provisions on the **accountability** of NRAs and enhanced **transparency** requirements. Both accountability and transparency of NRAs are regulated in the same Articles as independence, indicating that the EU legislators see an inextricable connection between the two. As repeatedly mentioned above, NRAs should be acting in a transparent manner, and many of the independence prerogatives are conditioned on making things public or on supervision in accordance with national constitutional law.

The EECC requires a lot of information to be published by NRAs to increase transparency, which is comparable with the extensive transparency requirements of the GDPR and ECN+ Directive. Member States shall publish tasks of NRAs in an easily accessible form, especially where there is more than one NRA is endowed with them (Article 5 para. 3 EECC). There is no general legal requirement that NRAs publish all their decisions, but many Articles require that certain NRA decisions are made public, for example, an annual overview of administrative costs and the total sum of the charges collected (Article 16 para. 2 EECC); decisions on granting rights of use of radio spectrum (Article 48 para. 6 EECC) and decisions on general authorisations, rights of use, rights to install facilities and obligations imposed on undertakings (Article 120 paras. 3 and 5 EECC).

Article 9 para. 1 EECC requires the NRA budget to be published. Article 9 para. 2 EECC stipulates that any budgetary control of NRA must be done in a transparent manner and made public. However, the EECC does not explicitly require or permit audit or other types of financial control of NRAs expenditures and does not include strong guarantees that such controls do not become too excessive and impinge on NRA independence. In particular, in addition to the transparency of budgetary controls, Article 8 para. 2 EECC introduced the requirement for NRAs to publish annual reports on their activities. Recital 39 EECC explains that extensive or unconditional reporting obligations may impact NRA independence and hinder NRAs in exercising their tasks, therefore the specific requirement of only annual reporting and an exemplary list of the reporting items should prevent such unfavourable consequences. The minimum content of the annual reports shall include not only decisions made, human and financial resources of the NRA and how they are attributed, but also future plans of NRA (Article 8 para. 2 EECC) – the latter being a unique requirement among the sectoral legislation.

The regulation of the **right to appeal** by the EECC is very elaborate and, in some aspects, goes even further in guarantees of independence than other sectoral legislation. Article 8 para. 1 EECC reiterates the requirement that only independent appeal bodies, set up according to the requirements of the EECC, shall have the power to suspend or overturn NRA decisions. Article 31 para. 1 EECC contains specific requirements to the independence of the appeal bodies that are more extensive than those in other sectoral legislation. The appeal bodies that can review decisions of electronic communications NRAs shall be independent not only from the parties involved but also of 'any external intervention or political pressure liable to jeopardise its independent assessment of

matters coming before it'. This is quite a high standard of independence that in most cases will be fulfilled only by a court, although Article 31 para. 1 EECC states that it can be a different body as well. In addition, the appeal body must have an 'appropriate expertise' to carry out its functions effectively. If the appeal body is not a court, its decision must be reasoned in writing and subject to judicial review (Article 31 para. 2 EECC).

Like most other sectoral frameworks, Article 31 para. 1 EECC stipulates that the appealed NRA decision must stand unless an interim measure is granted under national law.

Table 1. Comparison of provisions on NRA independence: 2002 - 2022

	2002 legal framework	2009 legal framework	EECC
Systemic independence	<ul style="list-style-type: none"> • Legally distinct from and functionally independent of all e-comms providers • Effective structural separation between regulatory function and service provision 	<ul style="list-style-type: none"> • Legally distinct from, and functionally independent of, any market participant • Effective structural separation between regulatory function and service provision • Ability to act independently and not seek or take instructions from any other body when exercising NRA tasks 	<ul style="list-style-type: none"> • Legally distinct from, and functionally independent of, any market participant • Effective structural separation between regulatory function and service provision • Ability to act independently and not seek or take instructions from any other body when exercising NRA tasks
Operational independence	<ul style="list-style-type: none"> • Member States to ensure that NRA exercise its powers 'impartially, transparently' 	<ul style="list-style-type: none"> • Member States to ensure that NRA exercise its powers 'impartially, transparently and in timely manner' 	<ul style="list-style-type: none"> • Member States to ensure that NRA exercise its powers 'impartially, transparently and in timely manner' • Ability to develop autonomously NRA internal procedures and decide on the organisation of staff
Financial independence	<i>Recital</i> speaks of necessary financial resources for the performance of NRA tasks	Requirement to provide adequate financial means and a separate annual budget	<ul style="list-style-type: none"> • Requirement to provide necessary financial resources and a separate annual budget • Autonomy in budget implementation • Budget to be subject to budgetary control
Independence of personnel	--		<ul style="list-style-type: none"> • Appointment procedure for NRA leadership must be transparent, non-discriminatory and open • Specific requirements to candidates for NRA leadership

	2002 legal framework	2009 legal framework	EECC
		Premature dismissal only if no longer fulfil the conditions required for the performance of duties which are laid down by law in advance	<ul style="list-style-type: none"> • Minimum mandate duration • General requirement to act independently from any public and private entities • Premature dismissal only if no longer fulfil the conditions required for the performance of duties which are laid down by law in advance • Dismissal decision is subject to judicial review (on facts and on law)
Appeals	<ul style="list-style-type: none"> • Appellate body is a court or other independent body with appropriate expertise • Parties affected by NRA decision can appeal • Suspension of decision if appellate body decides so based on national law (no default suspension) 	<ul style="list-style-type: none"> • Appellate body is a court or other independent body with appropriate expertise • Parties affected by NRA decision can appeal • Suspension of decision if appellate body decides so based on national law (no default suspension) 	<ul style="list-style-type: none"> • Appellate body is a court or other independent body with appropriate expertise • Parties affected by NRA decision can appeal • Suspension of decision if appellate body decides so based on national law (no default suspension)
Accountability	<ul style="list-style-type: none"> • Publication of 'such information as would contribute to an open and competitive market' • Requirement to publish certain decisions and documents 	Requirement to publish the budget and certain decisions and documents	<ul style="list-style-type: none"> • Requirement to publish budgets, annual reports and certain decisions and documents • Budgetary control to be performed transparently and made public

4.2 Legal frameworks for NRA independence in other sectors

4.2.1 Systemic independence

Systemic independence of NRAs is regulated in the EU-level legal frameworks in a quite diverse manner. For example, the legal framework for the **postal** sector is the oldest one under review, and the regulation of systemic independence of NRA there is the most basic and not very nuanced. The systemic independence of **data protection** NRAs is regulated concisely, while the regulation on the systemic independence of NRA in the **rail** sector is very elaborate and precise.

With respect to various aspects of independence, there is no unified language, which makes the comparisons between legal frameworks difficult. Various acts refer to different concepts and benchmarks that are discussed in more detail below.

4.2.1.1 Scope of independence

In the case of the **postal sector**, independence is required in case Member States own post-service providers, then structural separation between the regulatory function and the services-provision function needs to be guaranteed (Article 22 para. 1 Postal Services Directive).¹⁰⁷

In the **audiovisual media** sector,¹⁰⁸ the focus seems to be more on the separation (and functional independence) from the government. Article 30 para. 1 AVMSD¹⁰⁹ states first that NRAs must be legally distinct from the government. Recital 53 AVMSD provides a benchmark for the ‘requisite degree of independence’ of NRAs that is broader: namely if they are ‘functionally and effectively independent of their respective governments and of any other public or private body’, but does not explain how this can be effectively achieved or measured. The catalogue of the competences and powers of audio-visual media NRAs must be clearly set out in law (Article 30 para. 3 AVMSD). NRAs shall not seek or take instructions from any other body when exercising their tasks under the Union law (Article 30 para. 2 AVMSD). NRAs must exercise their power guided by the objectives of the AVMSD, namely media pluralism, cultural and linguistic diversity,

¹⁰⁷ Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, OJ L 15, 21.1.1998, p. 14–25 (in consolidated version of Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:01997L0067-20080227&from=EN> .

¹⁰⁸ We note that the EU Media Freedom Act that is currently in the proposal stage stipulates that the already existing audio-visual media NRAs shall be responsible for its application. It does not foresee any new requirements to the independence of NRAs, but reiterates that NRAs guarantees of Article 30 AVMSD apply. See the proposed Article 7 of the Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM(2022) 457, 16.09.2022.

¹⁰⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 095, 15.4.2010 (codified version of 2018): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218&from=EN> .

consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition (Article 30 para. 2 AVMSD).

In the case of the **rail sector**, the extensive relevant legal provisions set out conditions for the NRA independence both from the market and the government. Article 55 para. 1 Rail Directive¹¹⁰ requires Member States to establish just one NRA, which must be a stand-alone body. This seems to refer mainly to the independence from the government as the legal provision further specifies that it must be an independent authority in 'organisational, functional, hierarchical and decision-making terms' and also 'legally distinct and independent from any other public or private entity'.

With respect to the rail sector, the CJEU had an opportunity to adjudicate several times on the independent status of a regulator. In 2013, the CJEU analysed whether all regulatory functions under the relevant EU law were entrusted to independent regulatory entities in France.¹¹¹ France had a railway infrastructure manager that was independent of the rail services operator, the Société nationale des chemins de fer français (SNCF). However, the Court found that certain essential regulatory functions (relating to the allocation of train paths) were given to a department within the SNCF. The CJEU ruled such an arrangement contrary to EU law because this department was not independent from the market operator in its legal form, organisation or decision-making functions, as it had no separate legal personality, own bodies and resources. In the same year, 2013, the Court dealt with the independence of a railway infrastructure manager in Austria.¹¹² For this particular case, the CJEU established that having own personnel and premises was not a necessary requirement for an independent authority.

In 2018, the CJEU considered the obligation of Poland to confer an independent status on the rail safety authority. The CJEU found that the responsible minister had broad discretion to dismiss members of the authority and that the authority had no legal personality and was structurally integrated into the ministry responsible for transport matters. The same minister was simultaneously responsible for both: the authority controlling an infrastructure manager and a railway undertaking. The Court established that such arrangements had implications for other dimensions of independence: a separate budget was not guaranteed and there was a risk of conflicts of interest of ad hoc members of the authority.¹¹³

Data protection and **energy** legal frameworks adopt the terminology of 'complete' or 'full' independence of NRAs, which is not further qualified and left for the courts to be filled with meaning. The CJEU already interpreted the phrase 'with complete independence' in the case of the previous Data Protection Directive.¹¹⁴ The CJEU explained that it means that the data protection NRAs 'must enjoy an independence

¹¹⁰ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast), OJ L 343 14.12.2012 (consolidated version of 2019): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012L0034-20190101>.

¹¹¹ Judgment of 18 April 2013, *Commission v. France*, C-625/10, ECLI:EU:C:2013:243.

¹¹² Judgment of 28 February 2013, *Commission v. Austria*, C-555/10, ECLI:EU:C:2013:115.

¹¹³ Judgement of 13 June 2018, *European Commission v. Poland*, C-530/16, ECLI:EU:C:2018:430.

¹¹⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31995L0046>.

which allows them to perform their duties free from external influence¹¹⁵ and that the NRAs ‘can act completely freely, without taking any instructions or being put under any pressure’.¹¹⁶ It also means that the NRAs must remain free from any external influence, direct or indirect, which is liable to have an effect on their decisions.¹¹⁷ For the energy sector, the CJEU reviewed the independence and powers of NRAs but did not interpret the term ‘complete independence’. In the Belgian case concerning the powers of the King in respect to some gas and electricity operations,¹¹⁸ the CJEU considered that the King’s involvement in fixing specific conditions which should be within the realm of the NRA is contrary to the principles that a regulatory authority ‘should be able to adopt its decisions autonomously, solely on the basis of the public interest, in order to ensure compliance with the objectives pursued by that directive, and should not be subject to external instructions from other bodies, such as the King’.¹¹⁹ Thus, it seems that the scope of ‘full’ and ‘complete’ independence is similar, although the sectoral legislation should use uniform notions.

The competences and tasks of **data protection** NRAs are set out in the GDPR,¹²⁰ which serves as a solid anchor and a transparency tool. Article 51 GDPR states that Member States must establish one or more independent public authorities, and Article 52 para. 1 GDPR requires that these NRAs ‘act with complete independence’ in performing their tasks and exercising their powers assigned by the GDPR, but an interpretation of ‘complete independence’ is not provided. Article 52 para. 2 GDPR further states that the members of the authority remain free from direct or indirect external influence and neither seek nor take instructions from anybody.¹²¹ Other provisions of Article 52 GDPR outline further elements of independence of data protection NRA (e.g. staff recruitment, budget implementation, freedom from the external influence of the staff, etc.). However, the GDPR does not require that data protection NRAs are legally or functionally distinct or separate from the government or other public or private bodies.

In the **energy** legal framework, there are indications that independence from the government has been the main focus. Recital 29 Gas Directive¹²² speaks of ‘lack of

¹¹⁵ Judgment of 16 October 2012, *European Commission v Republic of Austria*, C-614/10, ECLI:EU:C:2012:631, para. 41.

¹¹⁶ Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECLI:EU:C:2010:125, para. 18.

¹¹⁷ Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECLI:EU:C:2010:125, paras. 19, 25, 30 and 50.

¹¹⁸ Judgment of 3 December 2020, *European Commission v. Belgium*, C-767/19, ECLI:EU:C:2020:984, paras. 99 – 115.

¹¹⁹ Judgment of 3 December 2020, *European Commission v. Belgium*, C-767/19, ECLI:EU:C:2020:984, para. 110.

¹²⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119. 04.05.2016: <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

¹²¹ We note that Article 52 paras. 1 and 2 GDPR are almost identical to the newly adopted Article 50 para. 2 Digital Services Act (DSA). This provision refers to the new regulatory body – Digital Services Coordinators – to be created under the DSA. The wording of Article 50 para. 2 DSA is almost identical to that of the referenced provisions of the GDPR, but contained all in one paragraph. See Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC, OJ L 277, 27.10.2022: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32022R2065>.

¹²² Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211, 14.8.2009: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0073&from=EN>.

independence of regulators from government, and insufficient powers and discretion' as a reason to enhance the independence guarantees at the EU level – for both gas and electricity segments. Indeed, the legislation contains special provisions in this regard. Recital 87 Electricity Directive¹²³ aims to explain the interplay between the governments' competence to define political guidelines for the energy sector (both for electricity and gas)¹²⁴ and the competences of the energy NRA. Depending on national constitutional arrangements, the NRA independence does not preclude Member States from setting up an energy policy framework, within which the NRA operates. However, such a policy framework should not impinge on the NRA independence or autonomy.

Recital 30 Gas Directive seems to point in a similar direction on the division of policy and regulation when it explains that energy NRAs must 'be able to take decisions in relation to all relevant regulatory issues'. Article 57 para. 7 Electricity Directive can be interpreted as an additional guarantee of NRA independence, as this provision requires the Commission to submit a report on the compliance of NRAs with the principle of independence by July 2022.

In general, for energy NRAs, Member States must guarantee the NRA independence and ensure that it can exercise its powers impartially and transparently (Article 57 para. 4 Electricity Directive, Article 39 para. 4 Gas Directive). The NRA shall be legally distinct and functionally independent from other public and private entities. Recital 80 Electricity Directive and Recital 30 Gas Directive explain that the energy NRA should be 'fully independent' from any public or private interests. There is no interpretation of what 'full' independence means, so it is impossible to say how it differs from the 'complete independence' of data protection NRAs.

In the case of **National Competition Authorities** (NCAs), while the ECN+ Directive¹²⁵ does not explicitly state that NCAs should be independent from political influence, it indicates that EU-level rules are put in place to enhance the NRA independence by comparison to their position under national law. Recital 5 ECN+ Directive explains that the EU-level anchoring is necessary because 'national law prevents many NCAs from having the necessary guarantees of independence', which in practice may lead to different outcomes of antitrust investigations and hence endanger the effective competition and single market. At the same time, Recital 10 ECN+ Directive states that the EU-level independence guarantees are minimum harmonisation: Member States can go beyond them and introduce more extensive independence guarantees for their NCAs, in particular by endowing them with additional powers. Lastly, Article 4 para. 1 ECN+ Directive does not state that NCAs should be independent from public and private influence.

¹²³ Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, OJ L 158, 14.6.2019: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0944&from=EN>.

¹²⁴ Recital 87 Electricity Directive refers both to the Electricity Directive itself and the Gas Directive.

¹²⁵ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.01.2019: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001>.

4.2.1.2 Guarantees against regulatory capture

While most legal frameworks cover both the independence from political and regulated market participants, the emphasis that they put on each element varies. Some frameworks (e.g. audiovisual media NRAs, NCAs) also focus on the principles and interests that must guide the exercise of the NRA's powers.

In some frameworks (**postal**), the emphasis is put on the principle of separation of regulatory and operational functions. It is premised on the division of the regulatory and operational functions (Recital 47 Postal Services Directive), meaning it is independent from the regulated sector in the first line. Independence from the national government or political influence must be considered and ensured only in so far as Member States may still own the national postal services providers (Article 22 para. 1 Postal Services Directive). In the case of the **financial sector**, the functions of supervision must be separate and independent from the functions related to resolution (Art. 4 para. 7 Directive 2013/36¹²⁶).

The independence from the government is further strengthened by the requirement that the **rail** NRA must be functionally independent from any authorities involved in awarding public service contracts. Article 55 para. 1 Rail Directive provides for independence from the regulated sector as well and requires that NRA must also be independent in 'its organisation, funding decisions, legal structure and decision-making' from any market actor. Functional independence is also included in the design of NRA in the **energy** sector. In the case of the **audiovisual media** sector, functional independence shall be ensured not only from the government but also from any other public or private body.

Even though many NRAs in the EU are responsible for more than one sector (**multi-sector NRAs**), it is surprising that only the legal frameworks for audiovisual media and rail touch upon this issue, and only the Rail Directive directly handles the question of independence standards for such an arrangement (Article 55 para. 2 Rail Directive) The incorporation of the rail NRA in a multi-sector regulator is only possible if the latter as a whole fulfils the high independence standards outlined in the same Article for the rail NRA. This is a unique requirement among the sectoral legal frameworks under review for this study. Recital 53 AVMSD only states that the audiovisual NRA could be part of an NRA responsible for several sectors but does not explain further whether this is always possible or what conditions the multi-sector NRA needs to fulfil.

In the case of **data protection and competition**, a clear link with the internal market is provided. NRAs should contribute to the consistent application of the GDPR within the EU. Moreover, in the case of both frameworks, instead of describing characteristics of independence, the reference is made to authorities acting or performing their tasks. For **NCAs**, the guarantees of independence in the EU-level legislation in the first line serve the purpose to ensure effective and consistent application of the Union competition law (Recital 3 ECN+ Directive). NCAs must perform their duties and exercise their powers impartially and in the interests of the effective and uniform application of the Union law.

¹²⁶ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176 27.6.2013 (consolidated version of 2021): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02013L0036-20220101&from=EN>.

In the case of **data protection**, the GDPR states that authorities need to act with ‘complete independence in performing’ their tasks.

Moreover, thanks to the CJEU case law concerning data protection NRAs, the safeguards on political independence have become clearer. In particular, state scrutiny of NRAs, which are part of the general administration and therefore under the control of the government, is likely to impede the NRAs’ ability to act objectively when they exercise their functions.¹²⁷ A mere risk that scrutinising authorities could exercise a political influence over the decisions of NRAs is enough to curb NRA independence because there could be prior compliance on the part of the NRAs. In addition, for the NRAs to be able to work effectively, they need to remain above any suspicion of partiality.¹²⁸

In Austria, the data protection officer was located within the Federal Chancellery and staffed with Chancellery officials. The Court ruled that such an arrangement is not contrary to the EU law requirements per se, provided the NRA still can act ‘with complete independence’. This is, however, not the case if the staff are subject to supervision by the Federal Chancellery.¹²⁹ In such a case, the NRA is not above all suspicion of partiality as there is a risk of influencing NRA’s decisions by the Chancellery.¹³⁰

Table 2. Summary of the sectoral legal rules related to systemic independence of NRAs

Sector of NRA	Extent of regulation of systemic independence
Postal	Mainly independence from the sector; structural separation between regulatory function and service provision
Data protection	NRA shall act with ‘complete independence’
Competition	NCA shall act ‘impartially and in the interests of the effective and uniform application of the Union law’
Audiovisual media services	Legally distinct from the government; functionally independent any from public and private bodies; can be part of a multi-sector NRA
Energy	Legally distinct and functionally independent from other public and private entities; Member States to guarantee the NRA independence and ensure that it can exercise its powers ‘impartially and transparently’
Electronic communications	Legally distinct from, and functionally independent of, any market player; effective structural separation between regulatory function and service provision; Member States to ensure that NRA exercise its powers ‘impartially, transparently and in timely manner’

¹²⁷ Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECLI:EU:C:2010:125, para. 34.

¹²⁸ Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECLI:EU:C:2010:125, para. 36.

¹²⁹ Judgment of 16 October 2012, *European Commission v Republic of Austria*, C-614/10, ECLI:EU:C:2012:631, paras. 58-59.

¹³⁰ Judgment of 16 October 2012, *European Commission v Republic of Austria*, C-614/10, ECLI:EU:C:2012:631, para. 61.

Sector of NRA	Extent of regulation of systemic independence
Rail	NRA as a stand-alone body; independent authority in 'organisational, functional, hierarchical and decision-making terms'; legally distinct and independent from any public or private body; functionally independent from any authorities involved in awarding public service contracts; independent in 'its organisation, funding decisions, legal structure and decision-making' from any market actor; can be part of multi-sector NRA only if such body fulfils the above standards

4.2.2 Operational independence

4.2.2.1 Scope

Operational independence is covered by the legal frameworks for NRAs only marginally. The topics of the self-organisation of NRAs, the adoption of their own strategies or policies are not addressed at all.

The provisions on independent decision-making and other types of NRAs' activities are rather general and vague in most of the legislation under review. In particular, the framework in **postal** services (Article 22 Postal Service Directive) refers to the requirement of the NRA should be 'operationally independent of the postal operators' although no further specification in this regard is provided. In the **rail** sector, the reference is made to independent decision-making (Article 55 para. 1 Rail Directive). Article 3 para. 3 of the Directive 2014/59 (resolution and recovery of **credit institutions**) states that 'adequate structural arrangements shall be in place to ensure operational independence'. Article 4 para. 4 of Directive 2013/36 (**credit institutions and prudential supervision**), provides for the wide requirement on the independence 'necessary to carry out the functions relating to prudential supervision, investigations and penalties' set in the directive and Regulation 575/2013.

The legal frameworks for the audio-visual and energy sectors are slightly more specific. **Audiovisual media** NRAs should not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law (Article 30 para. 2 AVMSD).

In the case of **energy**, under Article 57 Electricity Directive and Article 39 para. 5 Gas Directive, Member States are obliged to make sure that NRA staff and management act independently from any market interest and do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks and that the regulatory authority can take autonomous decisions, independently from any political body.

The requirements for independence from political influence in the context of the Electricity Directive were interpreted by the CJEU in several cases. In Slovenia,¹³¹ ministers took part in the tariff regulation procedure of the NRA, supposedly to defend

¹³¹ Judgement of 11 June 2020, *Prezident Slovenske republike*, C-378/19, ECLI:EU:C:2020:462.

the public interest. The Court stated that independence in decision-making implies that NRAs take their decisions autonomously (i.e. without instruction from public or private actors) and solely in the public interest while ensuring compliance with the objectives of the EU-level legislation.¹³² The Court ruled that Member States may allow the participation of ministers in the specific decision procedure in question, however this shall not impair the NRA independence.

In particular, ministers must not be able to use their participation in the procedure to put pressure on the NRA or give instructions that might influence NRA's decision.¹³³ Ministers may express their positions on how the public interest should be taken into account by the NRA, but such a view cannot be binding on the NRA or regarded as compulsory instructions by the NRA.¹³⁴ The rules of the ministers' participation in the specific decision-making procedure cannot affect the scope of the NRA's decisions or the mandatory nature and direct applicability of NRA's decisions (i.e. they cannot require additional approval or authorisation by the ministry).¹³⁵

In Germany, a national law conferred on the Federal Government powers to fix transmission and distribution tariffs, even though under the energy Directives, those powers were reserved for the NRA. The Court considered the question of whether such an arrangement was permissible. It found that while the government can provide general guidelines, but they must not concern the tasks or regulatory powers reserved for the NRA under the two energy Directives because independence conferred on NRAs by the EU-legal framework to exclusively exercise certain powers cannot be limited by regulations of Member States.¹³⁶ The Court explained that the powers in question are executive powers based on the technical and specialist assessment of factual realities and, when exercising them, NRAs are subject to principles and rules established by a detailed legislative framework at the EU level. The EU legal framework is the one that limits NRAs' discretion and prevents them from making political choices,¹³⁷

The **ECN+** Directive is the only one that clearly states that NCAs shall be able to set their own priorities for carrying out the tasks assigned to them (Recital 23 and Article 4 para. 5 ECN+ Directive). Specifically, NCAs can decide what their enforcement priorities are and reject formal complaints that do not correspond to the set priorities.

The CJEU reviewed the scope of operational independence in the context of **data protection** under the previous Data Protection Directive. In the *Schrems* case,¹³⁸ the Court considered the relevance of decisions adopted by the European Commission to the powers exercised by independent NRAs. After establishing that the NRA is responsible for the oversight of the data processing within its jurisdiction, the Court ruled that the NRA must be able to examine independently whether the transfer of a person's data to a third country complies with the requirements of the relevant Directive,¹³⁹ even

¹³² Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462, para. 54.

¹³³ Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462, para. 62.

¹³⁴ Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462, para. 63.

¹³⁵ Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462, para. 64.

¹³⁶ Judgment of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, ECLI:EU:C:2021:662, paras. 110 and 116.

¹³⁷ Judgment of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, ECLI:EU:C:2021:662, para. 132.

¹³⁸ Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650.

¹³⁹ Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, para. 57.

if there is a Commission's decision in place. Moreover, NRAs must diligently examine claims of individuals related to the compatibility of a Commission decision with the protection of privacy and of the fundamental rights and freedoms of individuals.¹⁴⁰ At the same time, NRAs cannot take measures contrary to the Commission's decision, which enjoys the presumption of legality. The NRA must start proceedings at the national court in order to effectuate an examination of the validity of the Commission's decision by the CJEU through the preliminary ruling procedure.¹⁴¹

4.2.2.2 Cooperation with other NRAs

By contrast, **all sectoral legal frameworks** contain provisions on the cooperation of NRAs among themselves and with their peers in other Member States.¹⁴² Some sectoral legislation explicitly names other public authorities with which NRAs shall cooperate on a specific basis. In particular, **postal** NRAs should cooperate with authorities entrusted with the application of competition law and consumer protection law (Article 22 para. 1 Postal Services Directive). **Rail** NRAs shall cooperate with the rail safety authority (Article 57 Rail Directive). In the **financial** sector, even cooperation with competent authorities from third countries is regulated (Article 97 of the Directive 2014/59/EU on resolution authorities, Article 48 of the Directive 2013/36/EU on prudential supervision). **Energy**-sector NRAs shall closely consult and cooperate with each other, in particular within ACER, and exchange information with each other and ACER. NRAs should cooperate at the regional level and be legally able to enter into cooperative arrangements with each other to foster regulatory cooperation (Article 58 Electricity Directive, Article 41 Gas Directive). In the case of the **GDPR**, mutual assistance, cooperation and participation in the European Data Protection Board are mentioned as one of the tasks to be fulfilled by NRAs.

Several pieces of legislation make a link between the NRAs' resources and NRAs' possibility to cooperate with their peers. For instance, Article 5 para. 2 ECN+ Directive specifically lists all NRAs' resources (i.e. human, financial, technical and technological) as necessary for cooperation with other authorities. Article 30 para. 4 AVMSD states that the financial and human resources of audiovisual media NRAs shall be adequate for them to contribute to the work of the EU-level agency (European Regulators Group for Audiovisual Media, ERGA). Article 52 para. 4 GDPR explicates that NRAs should have sufficient human, technical and financial resources for mutual assistance and cooperation.

The CJEU case law related to data protection discussed the important question of the interplay between NRAs' cooperation and their independence. The Court explained that while the EU-level legislation requires NRAs to cooperate to the extent necessary for the performance of their duties, it does not establish criteria for the order of intervention by

¹⁴⁰ Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, para. 63.

¹⁴¹ Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, para. 65.

¹⁴² See Article 22 para. 2 Postal Services Directive, Recital 95 and Article 30 AVMSD, Article 57 Rail Directive, Recital 120 and Articles 60-62 GDPR, Article 3 paras. 4 and 10 of the Directive 2014/59/EU on resolution authorities, Articles 4-6, 24, 56, 104c, 115 and 117 of the Directive 2013/36/EU on prudential supervision, Recital 68 and Articles 24-27 ECN+ Directive, Articles 58-59 and 61 Electricity Directive, Article 41 Gas Directive.

different NRAs and it does not require them to comply with each other's positions.¹⁴³ This means that every NRA can decide whether and when to start a regulatory intervention. Even in an analogous situation, one NRA is not obliged to adopt the conclusion reached by another NRA.¹⁴⁴ Rather, every NRA can make its own independent assessment of a situation in its jurisdiction and is not obliged to call on another NRA.¹⁴⁵

4.2.3 Financial independence

The regulation of the financial independence of NRAs is very uneven at the EU level: some of the legal frameworks are completely silent on the matter, while others have very elaborate rules. Moreover, many frameworks use different open-to-interpretation terms with respect to financial guarantees as discussed below in more detail.

The EU-level framework for the NRAs in the **postal** sector does not contain any legally binding rules that directly or indirectly allude to financial or budgetary resources or procedures. Even the preamble of the Postal Services Directive has no mention of financial considerations that would help to interpret the general rules on NRA independence in this regard.

The EU-level legal frameworks for **rail and financial services** are only slightly more specific than the postal one. Directive 2012/34/EU and Directive 2013/36/EU also do not mention financial independence directly or have requirements to ensure that NRAs have their own budgets, of which they can dispose. However, they require Member States to ensure that NRAs have the necessary resources. In particular, Article 4 para. 4 of the Directive 2013/36/EU requires that NRAs (competent authorities) have, among other things, resources to carry out their functions set out in the relevant legislation. There is also no requirement for autonomous management of such resources.¹⁴⁶ In a similar manner, Article 56 para. 5 of the Directive 2012/34/EU states that NRAs shall have 'necessary organisational capacity in terms of human and material resources, which shall be proportionate to the importance of the rail sector in the Member State'. Recital 77 of the Directive 2012/34/EU explains that financing of NRAs should guarantee their independence and come either from the state from compulsory contributions on the sector, respecting principles of fairness, transparency, non-discrimination and proportionality. This underscores the idea that NRA's budget needs to be sufficient for carrying out their tasks independently from the sector. However, this is not a legal provision as such; in addition, there is no requirement that such resources should be autonomously decided and/or spent.

The EU legal framework for the NRAs in the **audiovisual media** sector is more specific yet very concise on financial independence. Article 30 para. 4 AVMSD requires that NRAs have their own annual budgets that shall be published. The financial resources

¹⁴³ Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, ECLI:EU:C:2018:388, para. 69.

¹⁴⁴ Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, ECLI:EU:C:2018:388, para. 70.

¹⁴⁵ Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, ECLI:EU:C:2018:388, para. 74.

¹⁴⁶ The newly adopted DSA has similar provisions for Digital Services Coordinators. Article 50 para. 1 DSA requires that this new authority is provided with sufficient financial resources to supervise all providers falling within its competence, but does not require a separate annual budget. It merely states that Digital Services Coordinators have sufficient autonomy in managing their budgets within the budget's overall limits.

must be 'adequate' for the NRAs to carry out their functions effectively. However, the AVMSD does not contain any guarantees for the autonomous formation and management of the budget by NRAs.

The EU-level provisions on the budgetary means of national **data protection** supervisory authorities are similar to those of the NRAs in the audiovisual media sector but are slightly more detailed. The financial resources of the NRAs should be in the amount necessary 'to effectively perform' all tasks assigned to the NRAs under the GDPR. However, the GDPR does not explicitly regulate that the NRAs should have autonomous sources for their budget or be able to dispose of it autonomously. Under Article 52 para. 6 GDPR, Member States must ensure that each NRA has a separate annual budget, which may be part of the overall state or national budget. These budgets must be published and subjected to financial control, which must not affect the independence of the authorities.

The EU legal framework for the **energy** sector goes one step further: the concise legal provisions of Article 57 para. 5 lit. c) of the Electricity Directive and Article 39 para. 5 lit. a) Gas Directive require that NRAs have a separate annual budget allocation and autonomy in the implementation of the allocated budget. Besides the legal framework for electronic communications (see Chapter 5 below), this is the only sectoral legal framework that explicitly requires that NRAs implement their budget autonomously. Recital 80 of the Electricity Directive and Recital 30 Gas Directive explain in more detail what the budgetary autonomy of energy NRAs means. In particular, neither the approval of the NRA budget by the national legislator, nor national budgetary law on the implementation of the budget constitute obstacles to the autonomy of NRAs. Article 57 para. 5 lit. b) of the Electricity Directive and Article 39 para. 5 lit. a) Gas Directive also require that the financial means of NRAs are adequate to carry out their duties.

The EU legal framework on national **competition** authorities (NCAs) has the most elaborate rules related to financial independence.

First, Recital 25 ECN+ Directive provides for the independence of NCAs to be strengthened by making it possible for them to choose how to spend their budget 'for the purposes of carrying out their duties'. Recital 26 ECN+ Directive recommends that other sources of financing are considered, besides the state budget, in order to ensure that NCAs have the necessary resources to perform their tasks. At the same time, the ECN+ Directive recognises that using fines imposed by NCAs as a source of funding for their budgets may create wrong incentives for the authority and impinge its impartiality. Therefore, Recital 17 ECN+ Directive states that such fines should not be used to finance NCAs directly. Second, Article 5 para. 3 ECN+ Directive states that NCAs must be able to decide independently on the spending of the budget allocations for the purpose of carrying out their duties under the EU legal framework. These safeguards of the NCA independence should not constitute an obstacle to national budgetary rules and procedures. Article 5 para. 4 ECN+ Directive requires that NCAs report to the government or parliament annually on their resources and changes in them compared with previous years. These reports must be published.

Table 3. Summary of the sectoral legal rules related to financial independence of NRAs

Sector of NRA	Extent of regulation of financial independence
Postal	No provisions
Rail	Only general provisions referring to necessary or adequate resources (not specifying financial)
Financial	Only general provisions referring to necessary or adequate resources (not specifying financial)
Audiovisual media services	Requirement to provide necessary resources and a separate annual budget
Data protection	Requirement to provide necessary resources and a separate annual budget; budget to be subjected to budgetary control
Energy	Requirement to provide necessary resources and a separate annual budget; autonomy in budget implementation; budget to be subjected to budgetary control
Electronic communications	Requirement to provide necessary resources and a separate annual budget; autonomy in budget implementation; budget to be subjected to budgetary control
Competition	Requirement to provide necessary resources and a separate annual budget; recommendation to have alternative financing sources; autonomy in budget implementation; budget to be subjected to budgetary control

4.2.4 Independence of NRA personnel

Except for the legal framework for the postal sector NRAs, EU-level rules related to the independence of the NRA's decision-making personnel are quite detailed. The EU legal framework for the postal sector does not contain any rules related to NRAs' staff. All other sectoral legal frameworks require that NRAs have sufficient, necessary or adequate human resources to fulfil their tasks. Most legal frameworks (i.e. legal frameworks for the audiovisual media, rail, prudential supervision of financial institutions, data protection and NCAs) specify that this requirement relates not only to the quantity of the staff but also its quality, i.e. in terms of expertise and/ or experience.

4.2.4.1 Legal requirements to the appointment of the NRA head and board members

In the case of Directive 2013/36 (**prudential supervision**) and Directive 2014/59 (recovery and resolution of **credit institutions**), there are no requirements for the appointment of the head of the authority.

The EU-level legal frameworks for the **audiovisual media, rail, data protection and electricity** sectors and NCAs contain legal requirements for the procedures of the

appointment of the NRA head and board members. Member States are typically required to lay down in law appointment procedures that are clear, transparent, non-discriminatory and contribute to guaranteeing their independence.¹⁴⁷ The **ECN+** Directive and **Rail Directive** in addition state that the appointment procedure must be clear, and the **Electricity Directive** states that the procedure must be independent and impartial. None of the reviewed sectoral legislation (except for the EECC as mentioned above) contains a legal requirement that the appointment procedure must be an open one.

In the case of the ECN+ Directive and GDPR, the national rules on appointments must be adopted before the appointments take place. The Energy Directive refers to published criteria.

The EU sectoral legislation for the NRAs in the **rail sector and data protection** has the most elaborate and detailed rules regarding the appointment of the NRA head and board members and the recruitment of other staff. No other sectoral legislation contains comparable guarantees for the NRA independence in this regard.

The EU sectoral legislation for the rail sector and data protection specifies how the appointment procedures of NRA head and board members can be organised. According to Article 55 para. 3 Rail Directive, the appointments can be made by the executive branch of the government (e.g. President, Prime Minister), by the Parliament or by any other public authority 'which does not directly exert ownership rights over regulated undertakings'. The latter condition is important to ensure the impartiality of the appointment decisions. The GDPR has a similar level of detail, stating that NRA members can be appointed by the parliament, government, head of State or an 'independent body entrusted with the appointment under Member State law' (Article 53 para. 1 and Recital 121 GDPR).

The appointment (and dismissal) of NRA leadership has been interpreted by the CJEU in the context of the **Electricity Directive**. Regarding the question of which institution or branch of power (i.e. executive or legislative) shall be responsible for the appointment and dismissal, the CJEU explained that this lies within the discretion of Member States. It is, however, important that the exercise of the power of appointment and dismissal does not impair the NRA independence, in the sense that all requirements of the EU rules must be observed, including that the NRAs are shielded from any instructions or pressure and the conditions for the appointment and dismissal are objective and are set in the national law in advance.¹⁴⁸

The EU sectoral legal frameworks for the **rail and energy sectors and data protection** also contain specific requirements for the candidates that seek appointment for the positions of NRA head or board member. Article 57 para. 5 lit. e) Electricity Directive stipulates that the appointment procedure shall ensure that candidates have the necessary skills and experience for the relevant position in the NRA. Article 55 para. 3 Rail Directive contains the requirement that such persons shall be selected based on their merit, which includes 'appropriate competence and relevant experience, preferably in the field of railways or other network industries'. Article 54 para. 1 GDPR requires that Member States adopt a national law outlining the qualifications and eligibility conditions

¹⁴⁷ See Article 30 para. 5 AVMSD, Article 55 Rail Directive, Article 53 GDPR, Article 4 para. 4 ECN+ Directive, Article 57 para. 5 letter e) Electricity Directive.

¹⁴⁸ Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462, paras. 32, 35-36 and 40.

for the members of NRAs. Article 53 para. 2 GDPR specifies that such persons need to have ‘qualifications, experience and skills, in particular in the area of the protection of personal data’ that are necessary to perform duties of a particular position of the NRA member.

4.2.4.2 Appointment of NRA staff

The **GDPR** and the **Rail Directive** are the only pieces of legislation that contain provisions on the independent recruitment of the NRA staff, other than the head and board members. Article 52 para. 5 GDPR states that the NRA shall be able to choose and have its own staff. Similarly, Article 55 para. 3 Rail Directive requires that NRAs have ‘full authority’ over the recruitment and management of their staff.

4.2.4.3 Mandate duration of the NRA head and board members

Sectoral legislation for **rail, data protection and energy** has provisions on the duration of the mandate of the NRA head and board members.

The provisions of the Rail Directive leave it up to the national legislation to decide whether the office term of the NRA head and board members is a fixed and renewable one or whether it is permanent (Article 55 para. 3 Rail Directive). This needs to be established by national law before the appointment.

The data protection and energy legislation harmonise the duration of the mandate. Article 54 para. 1 GDPR establishes a minimum mandate duration (no less than 4 years) but allows Member States to decide whether reappointments are possible and for how many terms. Article 57 para. 5 lit. d) Electricity Directive and Article 39 para. 4 lit. b) Gas Directive state that the mandate shall be for a fixed term between 5 to 7 years and renewable only once. Both provisions of the energy Directives also require that Member States ensure a rotation scheme for the top management.

4.2.4.4 Dismissal of the NRA head and board members

Except for the postal sector, which has no respective provisions, **almost all sectoral frameworks** have similar rules on the dismissal of the NRA head and board members. The typical rules are as follows.¹⁴⁹ The conditions for dismissal shall be laid down in the national law in advance. The dismissal is only possible if the NRA head and board members no longer fulfil the conditions required for the performance of the duties of their relevant position. The dismissal must be published, and the reasons for the dismissal must be outlined and made available to the public.

Some legal frameworks are more specific on when dismissal of the NRA head or board member is possible. Article 55 para. 3 **Rail Directive** states that they can be dismissed only ‘for disciplinary reasons not related to their decision-making’.

¹⁴⁹ See Article 30 para. 5 AVMSD, Article 53 para. 4 GDPR, Article 4 para. 3 ECN+ Directive, Article 57 para. 5 Electricity Directive and Article 39 para. 5 Gas Directive.

The legal frameworks for **data protection, energy and NCAs** contain additional grounds for dismissal. Article 57 para. 5 Electricity Directive and Article 39 para. 4 Gas Directive state that the NRA head or board member can be dismissed if found guilty of misconduct under national law. Article 53 para. 4 GDPR gives an additional reason for dismissal as 'serious misconduct'. Neither legislation specify any further on what this misconduct or serious misconduct could be.

The CJEU heard a case on premature dismissal under the previous Data Protection Directive.¹⁵⁰ In Hungary, the office of the data privacy ombudsman was closed down and the office holder was dismissed mid-term, after which a new data protection NRA was constituted with a different person in charge.¹⁵¹ The Court found that the ombudsman was forced to vacate his office in contravention to the safeguards of national law and stated: 'If it were permissible for every Member State to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of premature termination to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence'.¹⁵² While Member States are free to change the institutional model of the NRA, they must ensure that NRA independence is not impaired in the process (e.g. by providing transitional measures).¹⁵³

Article 4 para. 3 **ECN+** Directive contains the most extensive provision related to dismissals. Dismissals of the decision-makers are not allowed for reasons related to the proper performance of their duties or the proper exercise of their powers under the relevant legal framework. The dismissals are only possible if they no longer fulfil the conditions required to exercise their duties or were found guilty of serious misconduct under national law. What those conditions are and what constitutes serious misconduct must be laid down by law in advance.

4.2.4.5 Rules of behaviour for NRA staff

Most of the EU sectoral legislation¹⁵⁴ contains at least the general requirements to the behaviour of the NRA head and board members. The typical provisions state that, when carrying out regulatory tasks, they must not seek or take instructions from any public or private party and act independently and impartially of any interests. However, several pieces of sectoral legislation set out very specific and varying requirements, both in scope, in detail and in content, for the behaviour of the NRA staff.

¹⁵⁰ For the relevant case law in the electronic communications sector, see Section 5.1.

¹⁵¹ Judgment of 8 April 2014, *European Commission v Hungary*, C-288/12, ECLI:EU:C:2014:237.

¹⁵² Judgment of 8 April 2014, *European Commission v Hungary*, C-288/12, ECLI:EU:C:2014:237, para. 54.

¹⁵³ Judgment of 8 April 2014, *European Commission v Hungary*, C-288/12, ECLI:EU:C:2014:237, paras. 60-61.

¹⁵⁴ Article 55 para. 3 Rail Directive, Article 57 para. 4 letter b) Electricity Directive and Article 39 para. 4 letter b) Gas Directive

4.2.4.5.1 Conflict of interest

EU-level legal frameworks for the **energy sector and data protection** require the adoption of conflict-of-interest rules but leave all the specifics to the national legislator.

Art. 52 para. 3 GDPR requires members of supervisory authorities to refrain from any action incompatible with their duties. They should not engage in any incompatible occupation, irrelevant whether remunerated or not. Article 54 para. 1 GDPR does not establish what would constitute a conflict of interest for NRA staff but requires Member States to outline what actions, occupations and benefits are incompatible with holding an NRA office. Such rules should be outlined both for the time in office and afterwards.

In the energy sector, only the Electricity Directive has provisions related the conflict of interest of staff; no equivalent rules can be found in the Gas Directive. Article 57 para. 5 lit. f) Electricity Directive only requires that Member States ensure that conflict of interest rules are in place, but nothing beyond this.

The legislation of **rail NRAs and NCAs** has very elaborate rules on the conflict of interest related to the time in office and afterwards.

Article 55 para. 3 Rail Directive requires that the NRA head and board members have no 'interest or business relationship with any of the regulated undertakings or entities'. To control for this, they must make annually a declaration of commitment and a declaration of interest, where they must list any direct or indirect interest that might be considered prejudicial and influence the performance of their tasks. They also must recuse themselves from the cases involving an undertaking, with which they had a direct or indirect connection in the previous year. The Rail Directive also aims to prevent a revolving door with the industry prohibiting the former NRA head and board members to take a professional position or responsibility with the regulated undertaking for at least one year after their term of office.

The conflict-of-interest rules of Article 4 para. 2 ECN+ Directive refer to those **NCA** staff who take decisions under the relevant legal frameworks and well as, in some cases, to their relatives. The NCA staff 'should not be able' to deal with the proceedings regarding undertakings, by which they were employed or otherwise professionally engaged, if this can impact the staff's impartiality. If the staff is involved in Article 101-102 TFEU proceedings, they and their relatives should not have any interest in undertakings under this investigation, if this can impact the staff's impartiality. Recital 19 ECN+ Directive provides guidance on how to determine whether the staff's impartiality can be impaired: the relevant assessment needs to take into account the nature and the magnitude of the interest and the level of involvement or engagement of each individual concerned on a case-by-case basis. To ensure the impartiality of the investigation, the staff may be required to recuse themselves.

For a reasonable period after leaving their term of office, the former NCA staff must refrain from dealing with enforcement proceedings that could give rise to conflicts of interest. The length of this period of time is also determined on a case-by-case basis, taking into account the nature of the new occupation, the level of their involvement and responsibility in the former proceedings while at the NCA (Recital 20 ECN+ Directive).

The ECN+ Directive is the only piece of legislation under review that recommends NCAs adopting and publishing a code of conduct that covers conflict of interest (Recital 21 ECN+ Directive).

4.2.4.5.2 Confidentiality obligations

The legal frameworks for **energy and data protection** contain confidentiality obligations for the NRA staff, during and after their term of office. Article 57 para. 5 letter f) Electricity Directive requires Member States to ensure that confidentiality obligations of all staff extend beyond their mandate. There is no equivalent provision in the Gas Directive. Article 54 para. 2 GDPR requires that all staff is subject to 'duty of professional secrecy' during their term of office and afterwards, and even stipulates specific information that shall be kept secret.

Directive 2014/59/EU on the resolution authorities in the **financial** sector requires strict separation – in terms of structure and reporting – between the staff working on resolution and staff working on prudential supervision (Article 3 para. 3 Directive 2014/59/EU). Member States must also adopt relevant professional secrecy rules and rules on information exchanges between different areas of supervision.

Table 4. Summary of the sectoral legal rules on the independence of NRA personnel

Sector	Appointment rules	Mandate duration	Rules of behaviour	Dismissal rules
Postal	None	None	None	None
Financial	None	None	General requirements to act independently from any public and private entities Separation between regulatory functions, professional secrecy rules and rules on information exchange	None
Audiovisual media	General requirements to the procedure to be transparent and non-discriminatory	None	None	General rules on dismissal
Competition	General requirements to the procedure to be transparent and non-discriminatory	None	General requirements to act independently from any public and private entities Detailed conflict of interest rules during and after the term of office, for decision-making staff and their relatives Recommendation to draw a code of conduct	General rules on dismissal If guilty of serious misconduct
Energy	General requirements to the procedure to be transparent and non-discriminatory	Harmonised mandate duration	General requirements to act independently from any public and private entities	General rules on dismissal Electricity: if guilty of misconduct

Sector	Appointment rules	Mandate duration	Rules of behaviour	Dismissal rules
			<p>General requirement to adopt conflict of interest rules</p> <p>Confidentiality obligations during and after terms of office</p>	
Electronic communications	<p>Appointment procedure for NRA leadership must be transparent, non-discriminatory and open</p> <p>Specific requirements to candidates for NRA leadership</p>	Minimum mandate duration	General requirement to act independently from any public and private entities	<p>Premature dismissal only if no longer fulfil the conditions required for the performance of duties which are laid down by law in advance</p> <p>Dismissal decision is subject to judicial review (on facts and on law)</p>
Data protection	<p>General requirements to the procedure to be transparent and non-discriminatory</p> <p>Specification of the appointment procedure</p> <p>Independent recruitment of other NRA staff</p> <p>Specific requirements to the candidates</p>	Minimum mandate duration	<p>General requirements to act independently from any public and private entities</p> <p>General requirement to adopt conflict of interest rules</p> <p>Confidentiality obligations during and after terms of office</p>	<p>General rules on dismissal</p> <p>If guilty of serious misconduct</p>
Rail	General requirements to the procedure to be transparent and non-discriminatory	Requirement for the national law	General requirements to act independently from any public and private entities	Dismissal only for disciplinary reasons not related to decision-making

Sector	Appointment rules	Mandate duration	Rules of behaviour	Dismissal rules
	Specification of the appointment procedure Independent recruitment of other NRA staff Specific requirements to the candidates	to establish mandate duration	Detailed conflict of interest rules during and after the term of office, for decision-making staff	

4.2.5 Accountability and transparency

4.2.5.1 Transparency requirements

The regulation of transparency and accountability concerning NRAs is very uneven across the legal frameworks under review for this study. Several pieces of legislation¹⁵⁵ state explicitly that NRA independence does not preclude Member States from supervising such NRAs in accordance with the requirement of national constitutional law. However, the legislation for the postal, rail and financial sector (Directive 2013/36/EU and Directive 2014/59/EU) do not contain any requirements on publishing annual activity reports by NRAs, accountability to national governments or parliaments, publication of NRAs' budgets or independent audit of NRAs. The AVMSD contains only rudimentary provisions on accountability: Article 30 para. 3 AVMSD requires that Member States clearly define in national law how audiovisual media NRAs can be held accountable. It does not provide further explanation about the scope or procedures for accountability.

Energy legislation, **GDPR** and the **ECN+ Directive** contain the most extensive requirements for transparency and accountability of NRAs.

Article 52 para. 6 GDPR states specifically that NRAs shall be subject to financial control, but this should not affect their independence. **Data protection** NRAs must draft annual activity reports. Article 59 GDPR prescribes the minimum requirements for the content of these reports and names the government institutions that are the recipients of them (parliament, government and other authorities according to national law).

NCAs must publish periodic reports, though the ECN+ Directive does not regulate the period of reporting. Article 5 para. 4 ECN+ Directive lists the minimum content of the periodic reports: they must include information on the NCAs' activities, appointments and dismissals of members of the decision-making body, amount of resources allocated in the relevant year, and any changes in that amount compared with the previous year. Member States can decide whether the supervisory authority for NCAs is a governmental or parliamentary body. Recital 22 ECN+ Directive explains that financial control or monitoring of NCAs is allowed if it does not affect their independence.

Energy NRAs must report annually on their activities and the fulfilment of their duties under the Electricity Directive, including steps taken and results obtained (Article 59 para. 1 letter i) Electricity Directive, Article 41 para. 1 lit. e) Gas Directive). The Member States decide to which authorities these reports must be submitted. Article 59 para. 1 lit. i) Electricity Directive and Article 41 para. 1 lit. e) Gas Directive require to submit them also to the European Commission and the respective EU-level agencies. Article 57 para. 6 Electricity Directive allows Member States to institute ex-post financial control of the NRAs by an independent auditor; the Gas Directive does not have an equivalent provision. The Commission is obliged to submit a report to the European Parliament and the Council on the compliance of national authorities with the principle of independence.

¹⁵⁵ Article 30 para. 2 AVMSD, Article 60 para. 8 Electricity Directive, Recital 30 Gas Directive.

Table 5. Summary of transparency requirements to sectoral NRAs and NCAs

Sector	Legal requirement to make public		
	Budget	All decisions	Annual reports
Postal	None	None	None
Financial	None	✓*	None
Rail	None	✓	None
Audiovisual media services	✓	None	None
Data protection	✓	None	✓
Energy	None	✓	✓ (only Electricity Directive)
Competition	✓	✓**	✓
Electronic communications	✓***	✓*	✓

Note: * Requirement to publish only certain decisions but not all

** The ECN+ Directive does not contain a legal requirement, but a Recital in the Preamble.

*** The EEC also requires the budget control of NRAs to be made public.

4.2.5.2 Appeal of NRA decisions

All sectoral legislation¹⁵⁶ under review for this study stipulates that there must be an appeal mechanism for decisions taken by NRA at the national level. The appellate body must be independent from the parties involved. While most legislation foresees that this body should be a court or another judicial body, Article 22 para. 3 Postal Services Directive and Article 30 para. 6 AVMSD are less specific and leave a possibility for another administrative body fulfilling this function.

The **Postal Services Directive** and the **AVMSD** regulate the consequences of an appeal in a similar way. By default, the appeal does not suspend the application of the NRA decision, unless the appellate body may decide otherwise according to the national law (Article 22 para. 3 Postal Services Directive; Article 30 para. 6 AVMSD). Article 22 para. 3 Postal Services Directive foresees that the parties affected by the NRA decision (i.e. user or postal service provider) have the right to appeal.

Decisions of **NCAs and financial** authorities under Directive 2013/36/EU and Directive 2014/59/EU can be appealed only to the court, but otherwise the relevant legislation is not very specific on the right to appeal and consequences. Only Recital 90 of the Directive 2014/59/EU mentions that an appeal should not result in an automatic suspension of the NRA decision.

¹⁵⁶ Article 22 para. 3 Postal Directive, Article 30 para. 6 AVMSD, Article 56 para. 10 Rail Directive, Article 72 Directive 2013/36/EU, Recital 88 Directive 2014/59/EU, Recital 33 Gas Directive.

The GDPR allows only judicial review of the legally binding decisions taken by **data protection** authorities in the exercise of their powers (Article 58 para. 4 GDPR). Recital 129 GDPR provides further explanations on requirements to NRAs' legally binding decisions that aim to ensure due process. Such legally binding decisions 'should be in writing, be clear and unambiguous, indicate the supervisory authority which has issued the measure, the date of issue of the measure, bear the signature of the head, or a member of the supervisory authority authorised by him or her, give the reasons for the measure, and refer to the right of an effective remedy'.

By contrast, the legal rules on appeals for rail and energy sectors are very detailed.

According to Article 56 para. 10 Rail Directive, decisions of **rail** NRAs are subject only to judicial review. Furthermore, Article 56 para. 1 Rail Directive lays out several conditions under which an appeal against the NRA decision is justified. The party has the right to appeal if it believes that 'it has been unfairly treated, discriminated against or is in any other way aggrieved'. The Rail Directive also precisely regulates the effects of an appeal. According to Article 56 para. 10 Rail Directive, a suspension of the NRA decision under appeal is possible only if the immediate effect of the NRA decision may cause 'irretrievable or manifestly excessive damages for the appellant'.

The rules on the appeal of decisions of **energy** NRAs are the most elaborate. To allow for judicial review, NRA decisions must be fully reasoned and justified (Article 60 para. 7 Electricity Directive, Article 41 para. 16 Gas Directive). While most NRA decisions can be appealed to an independent body by an affected party, certain NRA decisions (i.e. decisions on complaints against a transmission or distribution system operator, decisions on methodologies – for electricity; decisions on complaints against a transmission, storage, LNG or distribution system operator, decision on methodologies – for gas) are subject only to judicial review. The binding effect of the latter decisions is not suspended by the appeal (Article 60 paras. 2 and 3 Electricity Directive, Article 41 paras. 11 and 12 Gas Directive).

Table 6. Summary of regulation of the right to appeal against NRA decisions

Sector	Type of appellate body	Who has the right to appeal	Effects of appeal
Data protection	Only judicial body	Not specified	Not specified
Competition	Only judicial body	Not specified	Not specified
Financial	Only judicial body	Not specified	No automatic suspension*
Audiovisual media	Judicial or other independent body	Not specified	Suspension if appellate body decides so based on national law
Postal	Judicial or other independent body	Parties affected by NRA decision	Suspension if appellate body decides so based on national law

Sector	Type of appellate body	Who has the right to appeal	Effects of appeal
Energy	Judicial and other independent body – different competences	Parties affected by NRA decision	No automatic suspension
Electronic communications	Judicial or other independent body with appropriate expertise	Parties affected by NRA decision can appeal	Suspension of decision if appellate body decides so based on national law (no default suspension)
Rail	Only judicial body	Party that believes to be unfairly treated, discriminated against or is in any other way aggrieved by NRA decision	Suspension possible only if the immediate effect of the NRA decision may cause irretrievable or manifestly excessive damages for the appellant

Note: * This provision is only in Recital 90 of the Directive 2014/59/EU.

5 Practice of NRA independence in the electronic communications sector

To contextualise the discussion of the practice of independence by the NRAs in the electronic communications sector, it is necessary to provide some relevant background information. Therefore, this Chapter presents information on how the EECC requirements were implemented in the national law and what practices of NRA independence have developed at the national level. The data for this Chapter was collected through an online survey of NRAs and complemented by insights from the NRA workshop and follow-up interviews. For the NRA survey, out of 38 BEREC Members and participants without voting rights, five did not provide responses (one EU Member State and four non-EU countries). As a result, there are 34 responses from 33 countries in the sample because one country has two responsible authorities.

In the majority of cases, the responding authorities are multi-sector NRAs, i.e., NRAs responsible for more than one sector. Only three out of 34 responding NRAs are competent solely for electronic communications. 28 are also responsible for postal services, in addition to electronic communications. Nine NRAs are responsible for audiovisual media and rail, eight for consumer protection, five for energy and four for competition. None of the NRAs has indicated that they are responsible for data protection. One NRA indicated that an establishment of a multi-sector NRA that also includes competition authority, leads to fewer tensions between competition-law-related issues and electronic communications and provides for more synergies. Another NRA noted that synergies across sectors are more likely in a multi-sector NRA because of the converging or all-permeating nature of technologies. Strong coordination is crucial to achieving cross-sectoral benefits in a multi-sector NRA. On the other hand, it was pointed out during interviews that mergers of NRAs or their restructuring are used in some jurisdictions as opportunities to terminate appointments of current NRA heads or board members.

Table 7. Sectors for which NRAs are responsible

Sector	Nr of respondents
Electronic communications	34
Postal services	28
Rail	9
Audiovisual	9
Consumer protection	8
Energy	5
Competition	4

The transposition of the EECC has not been completed in all countries. 23 respondents said that the transposition of the EECC has been completed in full and one indicated that it was partially completed. Two countries are in the process of transposition and seven countries have not transposed yet. In the case of one country, the government declares full transposition, but the NRA perceives that certain EECC provisions (e. g. separate budget, autonomy on personal, financial and other resources) are still not aligned with the EECC.

5.1 Systemic independence

This section analyses the systemic independence of NRAs, which is based on the transposition of the EECC in national law and, hence, is part of formal (*de jure*) independence. In addition, it discusses how NRAs perceive their independence on the basis of their answers to the survey.

5.1.1 NRAs' competences in light of the EECC

Article 5 para. 1 EECC requires that NRAs have a minimum set of powers for effective functioning. The list of powers in Article 5 para. 1 EECC is a non-exhaustive one and refers to other tasks in the EECC specifically reserved for NRAs. It was impossible to map all powers that NRAs have, and it would have been beyond the scope of the study. However, the survey focused on checking whether at least the powers explicitly listed in Article 5 para. 1 EECC are assigned to NRAs in national law.

Table 8 shows how the competences of NRAs vary across countries – not all have the minimum powers listed in Article 5 para. 1 EECC. Most frequently, the surveyed NRAs are not provided with the following powers:

- carrying out radio spectrum management and decisions (in five countries);
- providing advice regarding the market-shaping and competition elements of national processes related to the rights of use of radio spectrum (in four countries);
- assessing and monitoring closely market-shaping and competition issues regarding open internet access (in four countries);
- assessing the unfair burden and calculating the net cost of the provision of universal service (in four countries);
- issuing general authorisations (in five countries);
- cooperating with other NRAs (in one country).

It shall be noted that powers related to the management of radio spectrum are often assigned to a ministry or a different authority (see also Section 5.1.2) that is not a BEREC Member and therefore did not participate in the survey. Such assignment is within the discretion of Member States and in line with the EECC as long as this other authority conforms with the requirements of independence of Article 6 EECC.

In one country, the powers related to access and interconnection obligations are split between the NRA and the responsible ministry. In another example, while the NRA has all the minimum powers, the assignment of the powers to 'other competent authority' permitted by the EECC seems to have been done in an illogical way. For example, the NRA has all powers of enforcement and litigation, even for those powers that are

assigned to 'other competent authorities'. Such a split of competences is likely to make the exercise of the NRA's powers more difficult and less effective and reduce the legal certainty around its activity (e.g. how to work in BEREC with regard to competences that are not in NRA's scope). Ultimately, it can be argued that this reduces the level of harmonisation across the EU as not all NRAs have the same powers.

Cross-checking the information on the lacking competences with the status of the transposition of the EECC, it is noted that in almost all cases, countries that reported missing competences are those that have already transposed the EECC. The lack of competences presents a serious impediment to the independent functioning of NRAs and their ability to work on achieving the general objectives of Article 3 EECC. Also, it negatively impacts the consistency of implementation and application of EU law across Member States. Division of competences between NRAs and other national competent authorities should be clear under national legislation and appropriate to achieve the objectives of the EECC; otherwise, it can influence the NRA independence negatively.

Table 8. Competences of NRAs (across countries)

Powers (in the order of Article 5 para. 1 EECC)	Nr of countries
Implementing ex ante market regulation, incl. the imposition of access and interconnection obligations	33
Ensuring the resolution of disputes between undertakings	33
Carrying out radio spectrum management and decisions	28
Providing advice regarding the market-shaping and competition elements of national processes related to the rights of use of radio spectrum	29
Contributing to the protection of end-user rights	33
Assessing and monitoring closely market-shaping and competition issues regarding open internet access	29
Assessing the unfair burden and calculating the net cost of the provision of universal service	29
Ensuring number portability between providers	33
Issuing general authorisations	28
Collecting necessary data and other information from market participants	33
Cooperating with other NRAs	32
Others	15

When asked whether the national legal framework provides sufficient powers for NRAs to implement their legal mandate, 30 NRAs replied in the affirmative. However, four NRAs did not consider the powers sufficient. Of these four, two were countries with some problems with the transposition of the EECC (e.g. split competences, the NRA considers the transposition not complete).

Some NRAs indicated that their tasks are constantly growing. They see it as a recognition of the good quality of their work and their good reputation. However, they also emphasise that the increase in competences needs to be accompanied by a corresponding increase in financial and human resources.

5.1.2 Relations with government

All NRAs reported that there is a ministry or minister responsible for the electronic communications sector. However, the profile of the responsible ministry or minister varies across countries (see Table 9).

Table 9. Ministries responsible for electronic communications across countries

Profile of the responsible ministry/ minister	Nr of respondents
Finance and/or economy	8
Communications	8
Digital (policy or transition)	8
Infrastructure and transport	6
Prime minister	2
Other (incl. industry, trade, energy/ utilities)	5

The responsible ministries, in most cases, have competences related to policy and strategy in the area of electronic communications as well as legislative matters (e.g. preparing draft laws). However, in 13 cases, ministries also have competences in relation to radio spectrum management, in 11 cases – to monitoring and implementation of the legal framework, in ten cases – to infrastructure (including geographic broadband mapping), and in five cases – to emergency communication. Individual examples of competences were given in what seems to be more regulatory matters, like designation of universal service providers, decisions on universal service obligation, universal access to high-speed broadband, international roaming, and instruction of the NRA to consider cases within the scope of its activities and supervision of NRA's head. While the precise interplay of ministries' competences and NRAs' competences in individual cases would require a special investigation that is beyond the scope of this report, several interviewees indicated that they have experienced that the ministry oversteps the boundary between policy and regulation. Where such practice is regular, it represents a serious encroachment upon NRA independence. The line between policy and regulation

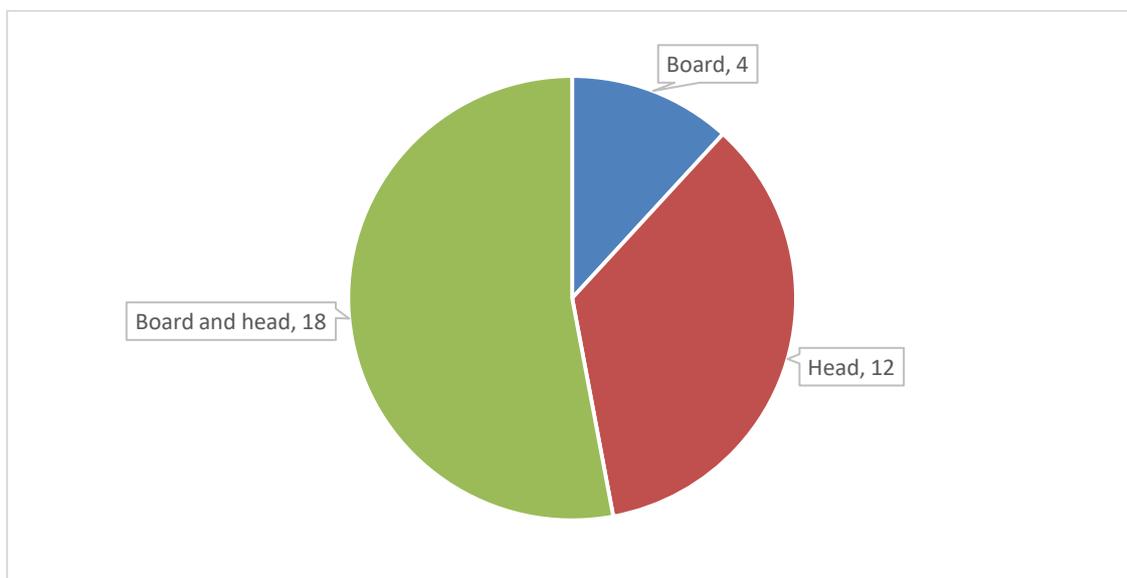
is indeed blurry in some instances, and the best practice would be a dialogue between the responsible ministry and the NRA to discuss and agree on the exact delimitation.

In all, 15 NRAs reported that there is another government body or agency in their country that has regulatory competencies as defined under the EECC, while 19 respondents said that there are no other responsible bodies. Examples of other competent government bodies include audio-visual media authorities, competition authorities, data protection authority (for personal data protection), the body responsible for cyber security and the body responsible for emergency communications as well as certain departments in ministries. In terms of competences, in six cases the other bodies are responsible for radio spectrum – which corresponds to the number of the NRAs who reported not having the respective powers (see Section 5.1.1). In another two cases, the NRAs reported that they must consult or get approval from another body on certain issues (not further specified). In one more case, the other competent body plays the role of coordinator for several regulatory authorities.

5.1.3 NRA leadership and decision-making system

The most common type of NRA leadership is a mixed system including the board (collegial body) and the head (see Figure 2). Collegial bodies most often have five members (eight NRAs) or three members (five NRAs). But there are also cases of seven members (two NRAs) and four members (one NRA).

Figure 2. Types of leadership of the NRAs



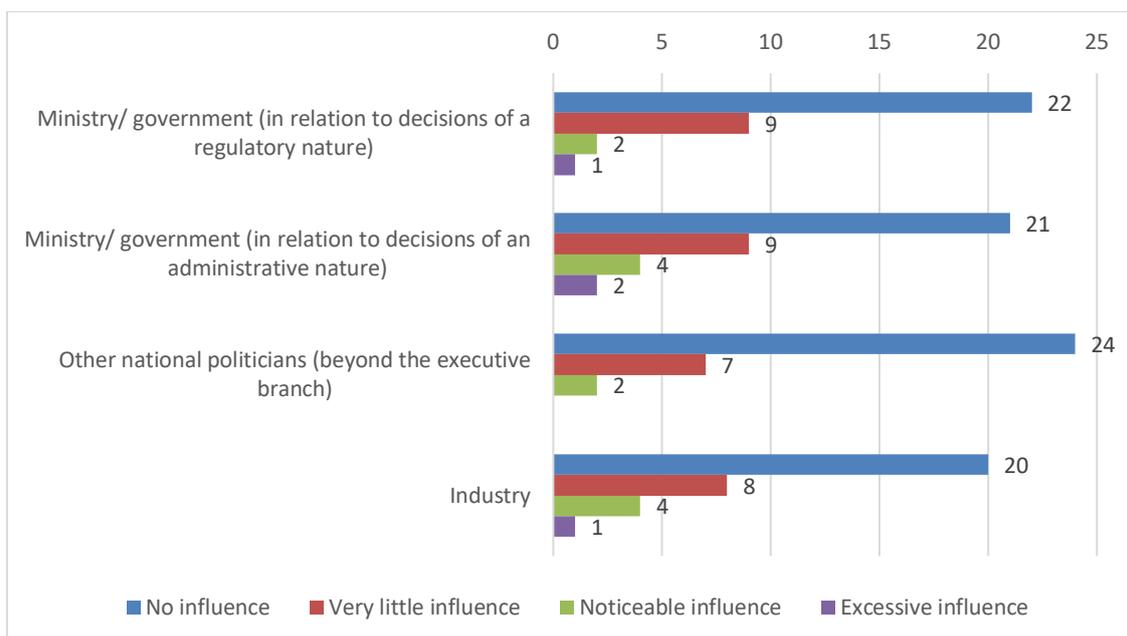
Usually, the NRA head or board are the decision-making body (see Table 10). However, in some cases, another authorised official can take decisions. There are also instances where some decisions are taken by the NRA head and others by the NRA board, or the NRA head takes decisions in consultation with senior NRA experts (e.g. NRA experts investigate the matter and make a decision proposal for the NRA head to adopt), or decisions are divided between the head and other officials. In one case, specialised ruling chambers consisting of senior experts take decisions, and the NRA head cannot change such decisions but may preside over a grand chamber in certain cases.

Table 10. NRAs' units making decisions

Decision-making unit	Nr of respondents
NRA head	19
A collegial body (board)	15
An authorised official other than the NRA Head	7
Other (a combination of the above)	6

In the case of collegial bodies (boards), six NRAs indicated majority voting (different settings) and five NRAs indicated unanimous, collegial, collective or deliberative decision-making.

The analysis of the perception of influence by NRAs experienced on a daily basis indicates that the majority of NRAs do not perceive any or only very little influence (Figure 3 below). The exceptions concern influence from the government in relation to decisions of an administrative nature and influence from the industry, where several NRAs reported noticeable or even excessive influence.

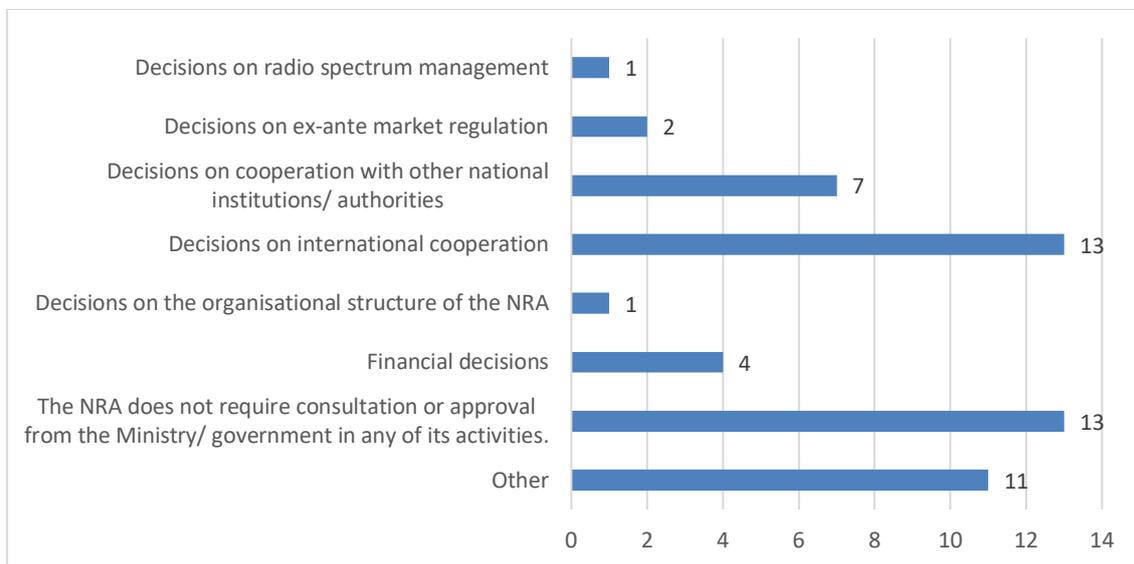
Figure 3. Influence experienced daily on the decision-making

Only in the case of eight NRAs (out of 34), no consultation or approval of any of the NRAs' activities from the ministry or any government branch is required. The most common decisions requiring such approval are decisions on financial or budget-related matters (16 NRAs), on radio spectrum management (11 NRAs) and on the organisational structure of NRAs (10 NRAs). Several authorities must consult or get approval for their decisions on international cooperation, cooperation with other national authorities and frequency licence, frequency plan or national numbering. A few NRAs also need approval for the annual plans and procurement.

Out of 26 NRAs that require consultations or approvals, 17 NRAs indicated that circumstances in which such consultation or approval are required are clear, that the process is sufficiently transparent and the failure to observe procedures and the regulatory decision or outcome is subject to sufficient review to safeguard its integrity. In two cases, the NRAs indicated explicitly that those circumstances are not clear.

To clarify the above situation further, 13 NRAs do not receive any instructions/guidance from the government with respect to any of their activities. For the remaining NRAs, Figure 4 illustrates for which decisions the NRAs receive instructions. Of these NRAs, 14 indicated that they must follow instructions or guidance from the government. Only two NRAs do not need to follow. The consequences for not following guidance vary from budgetary (e.g. budget is not approved) and staff-related (e.g. not having the necessary human resources) to disciplinary or administrative sanctions against the head and the NRA to one case where a specific decision can be held void.

Figure 4. Instructions received from the government



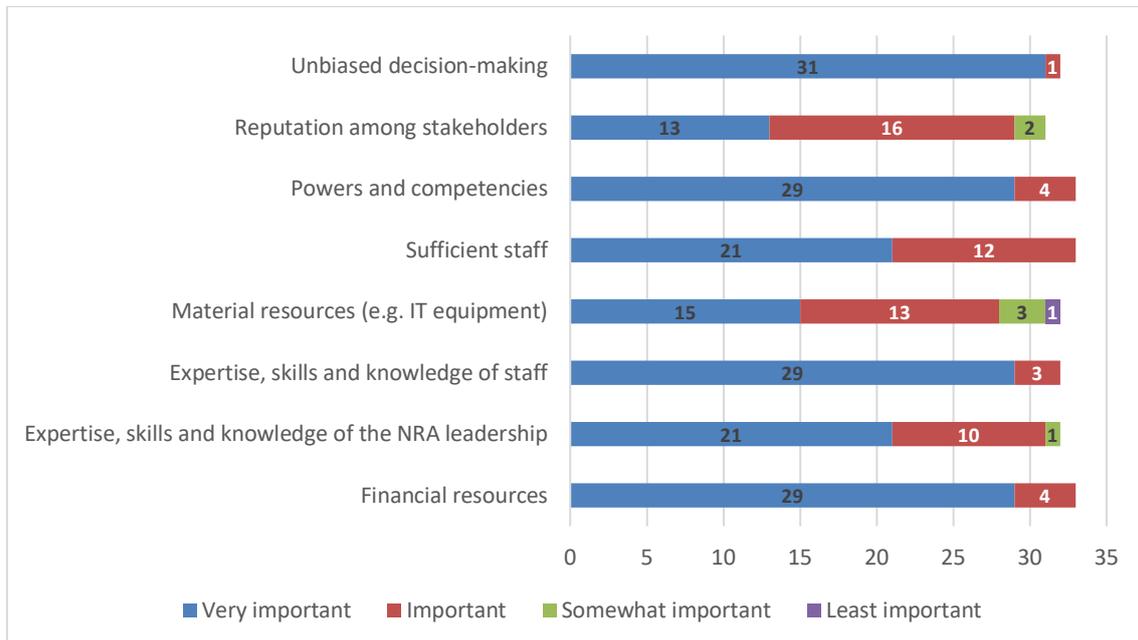
5.1.4 NRAs' perception of their independence

All respondents stated that their national legal framework explicitly provides for the independence of the NRAs. A total of 21 respondents stated that there is a specific definition of independence of the NRAs formulated in the national law. However, upon examining the quotations and explanation provided by the survey respondents, a conclusion can be made that national law – just like the EECC – fails to provide a legal definition. What is usually provided is the description of NRA and the attributes it should have, for example, 'impartial', 'independent' and/or 'autonomous'. Furthermore, national law often prescribes that the NRA must act 'independently', 'impartially', 'transparently' and/or 'not seeking instructions' and provides for guarantees of independence. This part of provisions seem to be fully in line with the EECC, in fact often use similar wording as the EECC.

The NRAs were asked to assess what aspects of their independence are most important. The most estimates of very high importance were given (in that order) to unbiased

decision making, expertise, skills and knowledge of the staff, financial resources, as well as powers and competencies (see Figure 5).

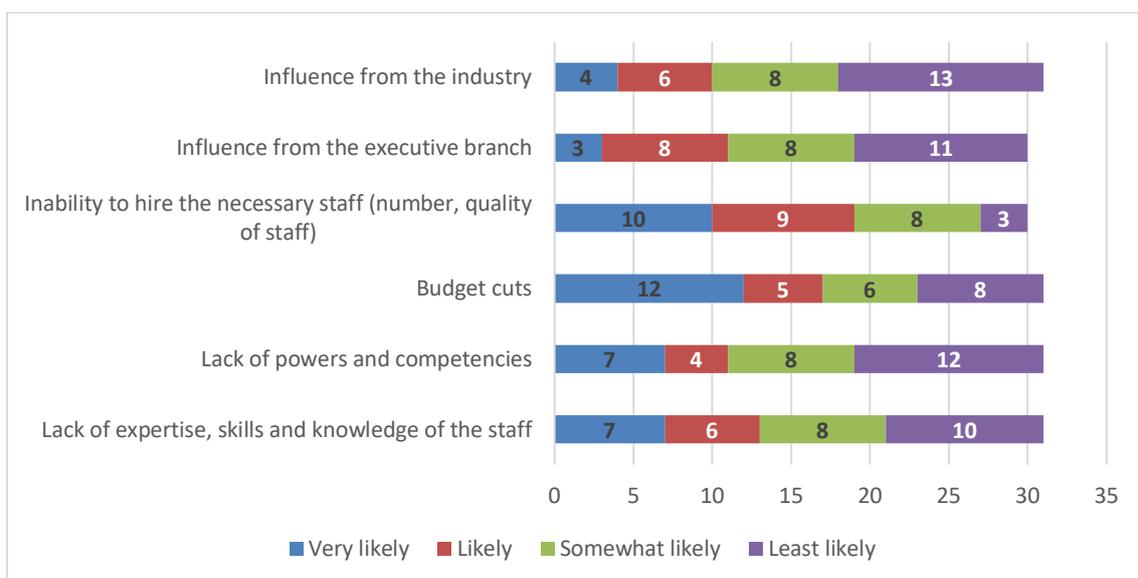
Figure 5. The most important aspects of independence, as perceived by NRAs



The NRAs also named other aspects as very important, in particular, freedom to set salaries, re-structure NRA organisation, and managerial autonomy as a whole.

The NRAs were next asked about the likelihood of challenges or issues threatening their independence with regard to different independence aspects. The aim of this question was to see whether the very important aspects may be at risk. Indeed, the inability to hire the necessary staff and financial resources were perceived as being at higher risk by many respondents. At the same time, lack of powers and competences and influence from the industry and executive branch are perceived as a small risk.

Figure 6. Perceived challenges threatening aspects of NRA independence



Those answers confirm that the functional approach to independence is necessary and crucial, including a capacity to hire qualified staff, guarantees against budget cuts and provision of specific competences and powers.

The NRAs were also asked to compare the level of independence they enjoy with the level of independence of other sectoral NRAs. The majority (21 respondents) said that they enjoy the same level of independence: the treatment by the government is the same and they are required to follow the same rules as other sectoral NRAs. Six NRAs stated that they think their level of independence is higher, but four NRAs said it is lower. The explanations of why the level is lower are very country-specific. They seem to depend on the national legal system (e.g. some countries have different categories of regulatory authorities that act to a different extent at an arm's length from the government). One respondent compared the status of NRAs to the status of the central bank. This last view needs to be contextualised by the interpretation of the CJEU that ruled that, in the light of fundamentally different functions of NRAs and central banks, NRAs 'cannot justifiably claim the same quality of independence' that EU law provides to central banks.¹⁵⁷ This conclusion also confirms the existence of different degrees of independence.

5.1.5 Summary on systemic independence

The above analysis shows a great variety of systemic setups of the NRAs. In the majority of cases, the EECC has been fully transposed to national legislation; however, not all competences under the EECC may have been assigned to the NRAs and other competent authorities correctly by national law. The lack of competences presents a serious impediment to the independent functioning of NRAs and their ability to work on achieving the objectives of the EECC. Also, it negatively impacts the consistency of implementation and application of EU law within the internal market. Overall, in the majority of cases, systemic independence is explicit, defined and included in the legal framework.

The analysis of the NRAs' perception of influence on their daily activities indicates that, overall, the majority of NRAs experience no or very little influence. The major issue in the case of systemic independence is related to financial matters and the lack of resources for the NRA's tasks. The framework may require NRAs to consult with the government on specific matters with the government but, in general, this does not influence directly decision making. Those NRAs' perceptions confirm the perspective of the ladder of independence and different rungs that appear in NRAs' daily activities.

Table 11. Summary of practices related to systemic independence

Best practices	Bad practices
The NRA has all competences to fulfil the mandate imposed on it by law	The NRA lacks competences to effectively execute its mandate or competences are split with other

¹⁵⁷ Judgment of 14 September 2015, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, ECLI:EU:C:2016:608, para. 43.

Best practices	Bad practices
	competent bodies in way that makes difficult the execution of the mandate
The line between the policy and regulation is clear to the NRA and responsible ministry. Unclear issues are discussed by the two	The responsible ministry regularly oversteps the boundary between policy and regulation. There is no dialogue with the NRA on it
The NRA takes decisions independently, without external influence	The NRA receives instructions and guidelines from the government regarding NRA's decisions

5.2 Operational independence

This section investigates to what extent the NRAs can act independently in organising their day-to-day activities.

Almost all NRAs decide autonomously on their own strategies. Two NRAs seem to follow the strategies of the ministries and do not have own strategies. A few NRAs explained that their strategic documents (business plans, work programmes, strategies) need to be followed or be aligned with the policy documents or priorities laid out by the government or Ministry. However, in general, following the government policy cannot be considered a limitation on the NRA independence as NRAs are there to implement the government policy.

17 NRAs do not consult any stakeholders when preparing their strategies, while 4 NRAs consult the ministry or government, four consult industry stakeholders and ten consult both the industry and government stakeholders. The consultation usually takes the form of a public consultation, where comments from stakeholders are collected, and their content is evaluated and reviewed. The draft NRA strategies are then revised based on those comments that are deemed valid and useful by the NRA.

Article 8 para. 1 EEC requires that NRAs can independently develop internal procedures and the organisation of staff. However, ten respondents reported that they cannot decide autonomously on their internal organisation, and four respondents explained that some limitations apply to their internal organisation in the form of additional approval by the government to certain organisational elements or the internal organisation is preconceived by the government. Of these 12 respondents, only four can be explained by the fact that the EEC has not yet been transposed.

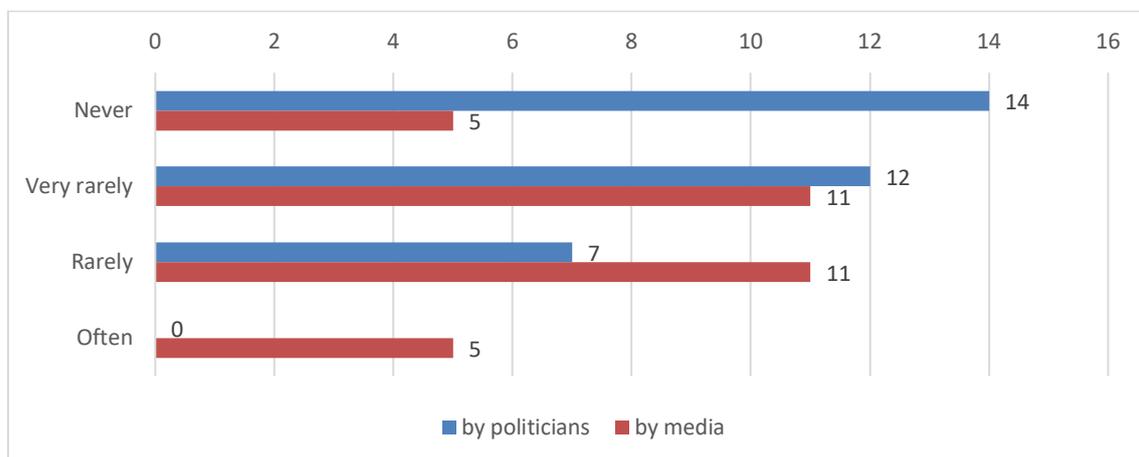
21 NRAs do not consult any stakeholders when deciding on their internal organisation, while eight NRAs consult the ministry or government, and 4 NRAs even need approval from the ministry or government. One NRA reported that the government audits its internal processes and issues instructions to make changes. Such practice seems to be contrary to Article 8 para. 1 EEC which requires NRA to be independent in this regard.

To understand better the environment, in which NRAs operate, NRAs were asked how often they have been criticised by the politicians (from the government or parliament) or

media over the last three years (see Figure 7). Overall, the NRAs seem to operate in a beneficial environment with little criticism of their work, which may be also indicative of the NRAs doing their job well. However, in some jurisdictions, there is a bit more criticism of the NRAs' work, specifically by the media. This cannot be immediately considered a problematic operating environment because it is the task of the media to scrutinise the work of regulators. As noted in one interview, media scrutiny and criticism are aspects of transparency and accountability that improve the functioning of NRAs and their credibility with stakeholders. At the same time, an example was given where a disinformation campaign in media was used to cripple the functioning an NRA for almost a year. The affected NRA reported having spent a considerable amount of its time refuting the accusations in the media, at accountability hearings in the parliament and litigating in courts. This was to the detriment of its normal regulatory activities.

In most cases, reacting to criticism, NRAs reach out to media outlets with interviews and comments or issue comments on their own websites and social media. However, 11 NRAs responded that they simply ignore such criticism.

Figure 7. Frequency of public criticism of NRAs' decisions by the media and politicians



Based on the review of the survey responses, several practices are identified that are likely to impair the NRA independence and may even be contrary to the requirements of the EECC. This is, in particular, the case when, without involving the NRA in a negotiation or dialogue on the matter at hand, the ministry or the government prescribe the internal organisation for the NRA or when the internal organisation cannot be established or changed without prior approval by the ministry/ government.

By contrast, NRAs' independence is strengthened if they can freely decide on their internal organisation based on their needs and strategy or work plan if they have one. In interviews, there were examples of open communication channels of a dialogue between the NRA and a relevant ministry. In such cases, even if there is a requirement of consultation and the relevant ministry is consulted, e.g. on the internal organisation or strategy, those are not imposed on the NRAs but rather result from articulated and agreed-upon needs and goals. The government policy objectives need to be understood and accepted by the ministry and NRA, which requires a proactive role of the relevant NRA, on the one hand, and receptive government officials, on the other. Such dialogue also creates a bridge with accountability and legitimacy as the responsible ministry may be accountable to the parliament for the actions of the NRA. It can be concluded that an

approval system that is practised in the form of open dialogue or communication between the NRA and the relevant ministry and concerned with the general strategy, policy objectives and related necessary resources does not impede independence. However, once this system becomes a means to influence specific decisions, the independence of the NRA is impeded.

Another aspect that emerged from the interviews is the culture of independence. There are jurisdictions where even in the absence of detailed legal provisions, there is an overall understanding of the roles of the NRA and other actors in the electronic communications sector. But also, within the organisations, there should be a culture to defend independence and to feel responsible for decisions.

One NRA indicated that a certain margin of discretion is also necessary, especially in the rigid legal framework. Similarly, NRAs' independence is enhanced if they can adopt their own strategy that outlines how they are going to implement the government policy on electronic communications, what they are going to prioritise in what term and, possibly, what approach(es) they are going to adopt for this.

During interviews, many NRAs indicated that international cooperation strengthens their independence and allows for a broader view, mutual learning and helps meeting sector challenges. Participating in BEREC may work as an additional accountability and transparency measure: NRAs have an opportunity to present their decisions to the sounding board of their peers. Several NRAs indicated that proper monitoring and support from the European Commission is crucial to safeguard the independence of NRAs. None of the NRAs stated that their international cooperation was blocked. This finding confirms scholarly research that international cooperation strengthens the independence of agencies,¹⁵⁸ and it is especially relevant for jurisdictions where the culture of independence is not as well established.

Table 12. Summary of practices related to operational independence

Best practices	Bad practices
The NRA decides on its internal organisation and strategy independently, based on its needs/strategy.	The ministry/government prescribes or formulates an internal organisation and/or strategy for the NRA without any negotiations/dialogue with the NRA.
The NRA consults with various stakeholders on its strategy/internal organisation in public consultation and takes the received comments into account to the extent they are useful.	Internal organisation and strategy of the NRA need to be approved by the ministry/government before they can be implemented.
The NRA actively participates in the consultations on its organisation/strategy and establishes a dialogue with relevant ministry.	There is no opportunity for the NRA to present its goals and needs to the responsible ministry.

¹⁵⁸ Maggetti, M., De facto independence after delegation: A fuzzy-set analysis, Regulation & Governance Vol.1, 2007, p. 281.

	The reorganisation of the NRA is an opportunity to dismiss specific officials
The NRA actively participate in international cooperation, especially BEREC's work, on all topics of its specific interest	The NRA cannot cooperate internationally on the topics of its interest due to lack of resources or necessary approval from the government

5.3 Financial independence

This section analyses financial issues: what are the sources of financing for NRAs, how budget decisions are taken, and how budgets are executed.

5.3.1 Budget formation and approval

Most NRAs are actively involved in the preparation of their budgets. Six NRAs prepare and autonomously decide on their budget, with no approval from any other entity. The majority (22) of NRAs propose a budget that is then approved by the responsible ministry, the parliament, or both. Five NRAs are not involved in the formation of their budget, as this is prepared by the responsible minister and approved by the parliament. The latter form of budgetary formation cannot be considered best practice. It has been noted in other research¹⁵⁹ that it follows from the notion of independence that NRAs should be involved in the process of determining an appropriate level of budget and the role of the NRA should be significant.

Among those that need approval of the budget, four NRAs reported that they experienced delays getting the budget approval from the government and that such delays impacted the NRAs' ability to execute their work programme. One NRA experienced delays in budget approval almost every year, and a few more NRAs reported that delays happen on a regular basis. The reported delays in approvals referred either to the whole budget or specific expenses. The issue of delays often arises not because of general requirements related to financial or, for example, public procurement obligations, but because of very rigid requirements for authorisations. Some NRAs also indicate that there is a need for some flexibility in relation to the allocation of funding, e.g. a possibility to repurpose specific expenses based on rapid market developments or the possibility to repurpose a certain set in advance percentage of expenses.

Approval procedures for NRA budget *per se* do not constitute a bad practice. By contrast, they may be a form of accountability and financial control. However, approval procedures may impede independence if they are not clearly defined, objective and transparent and if they are abused in practice to hamper the functioning of the NRA significantly and/or

¹⁵⁹ ERGA, Report on the independence of NRAs, 2015, p. 30; Hans Bredow Institute for Media Research, Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven, Center for Media and Communication Studies (CMCS), Central European University, Cullen International and Perspective Associates, INDIREG. Indicators for independence and efficient functioning of audio-visual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study conducted on behalf of the European Commission. Final Report, 2011, p. 360.

on a regular basis. For instance, if the approval of the NRA budget is delayed for several months every year, it leaves only few months for the NRA to implement projects (e.g. auction planning, market survey), do procurement and investments – all longer-term activities that need financial stability. Not being able to undertake such activities means that the NRA cannot effectively execute its mandate.

Table 13. Decision-making for NRA budgets

Mode of decision-making for NRA budgets	No. of respondents
Budget is prepared and decided autonomously by the electronic communications NRA, with no approval from any other entity.	6
Budget proposal is made by the electronic communications NRA and then approved by the responsible ministry/ government.	12
Budget proposal is made by the electronic communications NRA and then approved by the parliament.	6
Budget proposal is made by the electronic communications NRA, approved by the ministry, then voted in Parliament.	4
Budget is prepared by the responsible ministry and approved by the parliament.	5

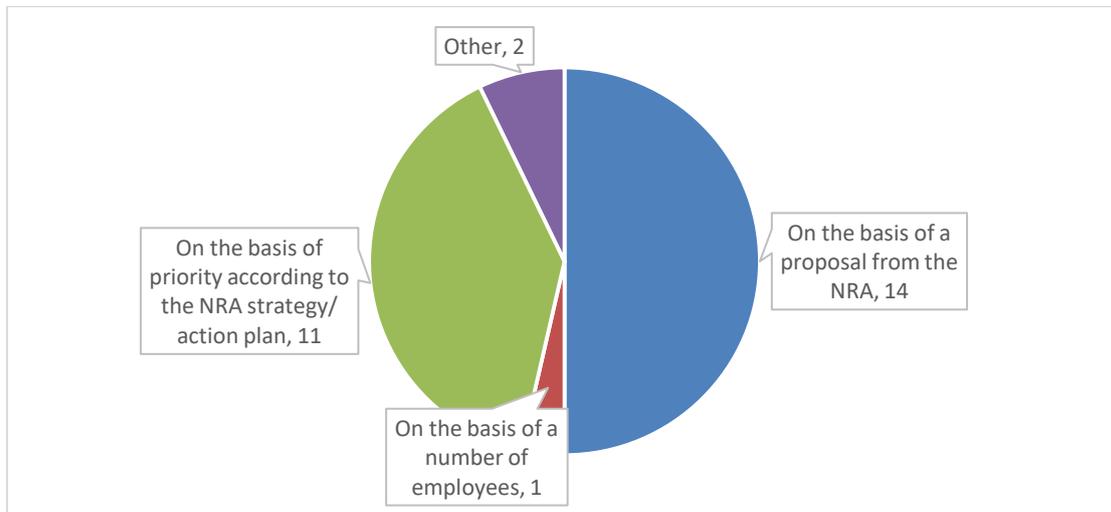
The vast majority of NRAs have a budget that is separate from that of the responsible ministry. Only four NRAs do not have a separate budget. Even though most NRAs have their own budget, no jurisdiction has mechanisms in place against budget cuts imposed by the government. Six NRAs (out of 34) encountered the cancellation of their budget or changes to the budget imposed by the ministry over the past three years. In some countries, there are additional guarantees against budget cuts: as reported by multiple NRAs, the government alone oftentimes cannot impose budget cuts without the parliament's approval. Finally, two NRAs are almost completely financially independent from the government (see Section 5.3.2 below on financing sources).

Most NRAs have one-year budget plans. Forecasts and projections for the upcoming three years are widespread, including annual updates during the yearly budget approval cycle. This is an important practice to guarantee budget stability for NRAs, which increases their independence. Having solely one-year budgets could be more contingent on short-term political goals.¹⁶⁰ Almost three-quarters (73%) of NRAs reported that they plan and execute their budgets in tasks. Nine NRAs do not organise their budgets in this way. The most common criteria used for the distribution of the budget (see Figure 8 below) are on the basis of a proposal from the NRA (14 respondents) or following the

¹⁶⁰ Spark, Trinomics and University of Groningen, Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy, Study for the European Commission, 2019, p. 34, doi:10.2833/040652

priorities elaborated in the NRA strategy or action plan (11 respondents). One NRA's budget is allocated based on the number of employees.

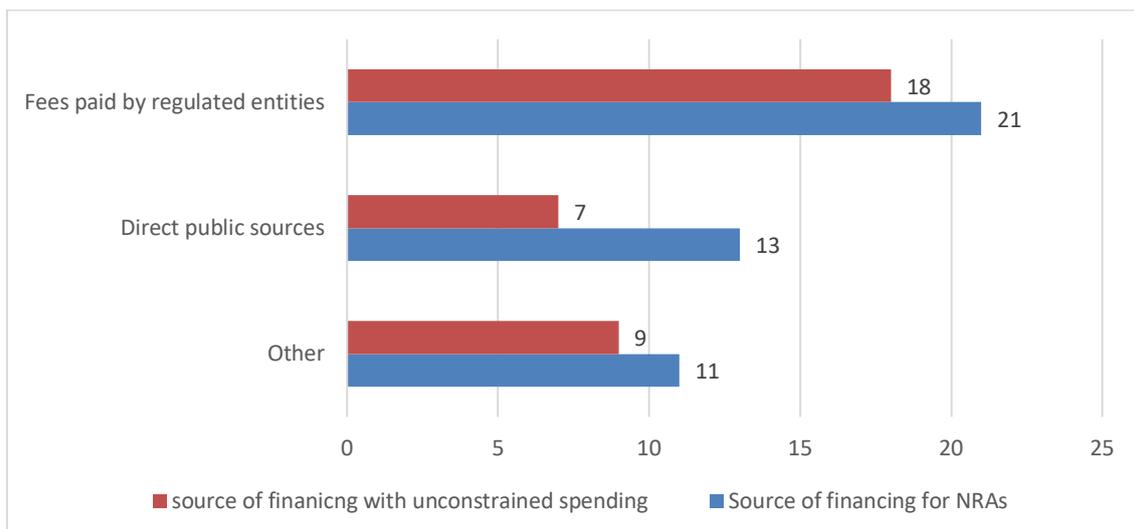
Figure 8. Criteria used for the distribution of NRAs' budgets



5.3.2 Sources of financing

How the NRA's budget is financed could increase NRA's independence, for example, if there are direct sources of budget income that are not coming solely from the government or another single source. Among the survey respondents, 21 NRAs obtain funding via fees paid by regulated entities, 13 NRAs receive direct contributions from the state budget and 11 NRAs also have other sources, including licenses, fines, and confiscated goods¹⁶¹ (see Figure 9).

Figure 9. NRAs' sources of financing



¹⁶¹ Confiscated goods could hypothetically become a part of an NRA's budget, but it has not happened so far.

Eight NRAs rely on several sources of funding, combining direct public funding and fees and/or other sources, while 14 NRAs fund virtually their whole budget via fees paid by regulated entities.¹⁶² Ten NRAs receive all their funding from public sources. This includes situations where revenues from fees, fines, property sanctions and interest on overdue receivables are transferred to either the relevant ministry or the state budget.

Research into NRA independence suggests¹⁶³ that a mix of financing sources is the best practice because it reduces the potential influence of one single player. This report agrees with this but also points out the greater importance of the budget formation procedures and autonomy in budget execution by comparison to the sources of financing. The NRA survey and interview provided several examples of NRAs funded completely from one source – state budget – that nonetheless can be characterised as independent because they made a proposal for their budget based on their needs, negotiated it with the responsible ministry and had complete discretion to implement it. At the same time, there were several examples of NRAs funding themselves fully or largely from the fees but constantly experiencing difficulties due to delays in the approval of their budget or individual expenses by the ministry.

As described in Figure 9 (see the red bars), most jurisdictions have no constraints in allocating and spending fees paid by the regulated entities (this is the case for 18 of the 21 NRAs who directly collect such fees). Seven NRAs, out of the 13 that receive direct public sources, have no constraints in their allocation and expenditure. Where constraints were reported, they may include, for example, the condition that fees levied can only be used for the activity in respect of which it has been levied or that the decisions involving budget expenditures require additional approval by the responsible ministry. Some constraints were also reported by several NRAs regarding the possibility to ‘shift’ the approved money between different expenditures, based on the new needs. In some situations, NRAs need additional approval from the ministry to do so. The practice of approvals, if abused, for example, by delaying such approval, may negatively impact the functioning of the NRA and the exercise of its powers leading to the impediment of the NRA’s independence.

Finally, almost all NRAs have clear budgeting and spending guidelines in place. Only two jurisdictions reported not having such guidelines in place. Guidelines include legislation on financial management applicable to all public entities, decisions by the relevant ministries, state budgets, procurement law, internal guidelines, electronic communication acts. Such guidelines are typical for all public administration and apply across the board; their existence cannot be considered as a limitation of NRAs’ independence unless there are abused in practice to exercise influence on the NRA.

¹⁶² 17 NRAs fund their budget at least at 80% with revenues from fees; the number of NRAs relying on revenues from fees climbs to 21 including NRAs whose budget consists of 70% or more of fees paid by regulated entities.

¹⁶³ For example, ERGA, Report on the independence of NRAs, 2015, p. 30; Spark, Trinomics and University of Groningen, Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy, Study for the European Commission, 2019, p. 113, doi:10.2833/040652

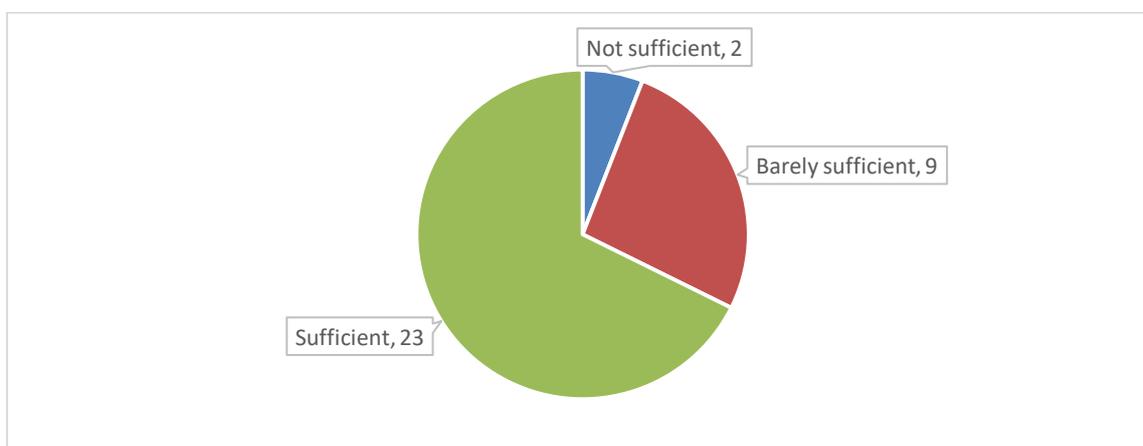
5.3.3 Financial checks and oversight

Financial statements of most NRAs (22 NRAs or 65%) are subject to external approval. 12 NRAs are not subject to such external approval. The financial statements of all NRAs are subject to checks after the financial term. Such checks are usually performed by the national court of auditors, but ministries of finance and parliaments may also be involved in the supervision of financial statements. Most NRAs reported that the financial statements are audited with a view to assessing whether the information declared is correct, i.e. whether government accounting regulations and state budget regulations have been complied with.

The vast majority of NRAs have not been reprimanded for the execution of the budget in the past three years. Four NRAs have been reprimanded: one three times, one two times, and two a single time. On one occasion, such action led to budget cuts for the NRA.

To conclude the investigation into financial autonomy, NRAs were asked whether their current funding is adequate and allow them to fulfil their responsibilities. Two-thirds of NRAs (see Figure 10) indicate that resources are sufficient to fulfil their responsibilities. Two respondents declared that resources are not sufficient. Finally, nine respondents mentioned that financial resources are barely sufficient, explaining that strong competition in salaries from the private sector to attract specific experts or that it will be difficult to fulfil the mandate if new tasks and competencies are to be given to the NRA.

Figure 10. Are NRAs' current financial resources sufficient to fulfil their responsibilities?



5.3.4 Summary on financial independence

The assessment of the survey responses allows to draw some initial conclusions on practices that are likely to impair the NRAs' independence and might undermine their ability to fulfil their mandate. This is particularly the case when the ministry prepares the budget of the NRA without consulting it, and when the NRA's budget is not separated from the responsible ministry's one. By contrast, autonomously deciding on the NRA's budget without external approval strengthens its independence. Similarly, the independence of an NRA is strengthened when it is capable of collecting some of the resources for their budgets autonomously (e.g. through fees paid by regulated entities),

which limits the negative impact of budget cuts imposed on the sources coming from the state budget. At the same time, full reliance on the fees and other sources of funding coming from the regulated sector is not desirable as it may set wrong incentives for the regulator. A mix of funding sources is considered the best practice in this regard,¹⁶⁴ although the clear and transparent procedure of budget adoption that involves the NRA is even more important. Another best practice is that, once the budget is decided, there are no constraints for NRAs to execute them. NRAs should not request any additional approvals of their expenditures. Also, because the situation on the market may change and require a rapid reaction from an NRA, there must be flexibility for repurposing some of the budgetary expenditures. Rigid rules in this regard are likely to diminish the effectiveness and efficiency of an NRAs' functioning as well as their independence.

Table 14. Summary of practices related to financial independence

Best practices	Bad practices
The NRA decides on its budget without approval from other entities	The NRA budget is decided by the government without involving the NRA
The NRA relies on a mix of sources to finance its budget	The NRA relies solely on state budget (the NRA budget is a part of a relevant ministry budget without proper guarantees against using those powers to affect decision making)
The NRA can allocate and execute its budget without additional approvals from other entities	The NRA needs to get additional approvals for shifting the expenditures between different budget lines or for other expenditures
Sufficient resources to fulfil the NRA responsibilities	Not sufficient or barely sufficient budgeting for hiring experts and/or to fulfil all the tasks, for which the NRA is responsible
The NRA can make budgetary reserves (within limits defined by law) or otherwise secure its financial sustainability	The process of adopting of NRA budget is very long or delayed regularly, hampering the performance of NRA's tasks
The budget adoption process includes a dialogue/negotiation between the NRA and the relevant ministry in relation to the needs/goals of the NRA's activities	New tasks are assigned to the NRA without securing proper resources
	The NRA budget is systematically approved at a lower level than needed

¹⁶⁴ Similar opinion in ERGA, Report on the independence of NRAs, 2015, p. 30; Spark, Trinomics and University of Groningen, Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy, Study for the European Commission, 2019, p. 113, doi:10.2833/040652.

Best practices	Bad practices
	Significant budget cuts affecting capacity of the NRA to fulfil its tasks.
Auditing of financial statements according to general rules for the public sector	Auditing used to influence NRA day-to-day activities

5.4 Independence of NRA personnel

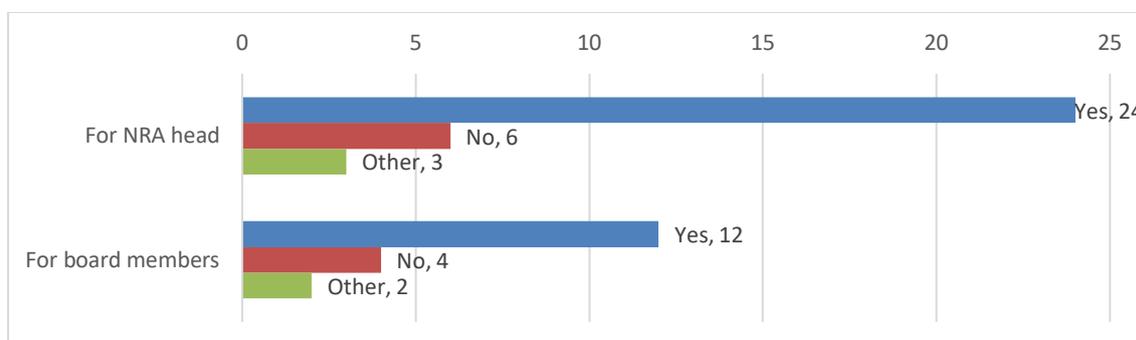
This section explores national legal requirements and practices regarding the appointment and dismissal of the NRA leadership, decisions on other NRA staff and rules on the behaviour of the NRA leadership and staff (e.g. a conflict of interest).

5.4.1 Appointment of NRA leadership

The respondents to the survey reported that open competition for the NRA leadership positions is not mandated by national law everywhere. While the majority of jurisdictions require an open competition for the positions of NRA heads and board members, a few jurisdictions do not have an open procedure (see Figure 11). In the absence of an open procedure, internal procedures apply that are usually not clear to NRAs and they cannot describe them. In several cases, there is an open call for applications for leadership positions, but the selection is done by a minister or a committee in a procedure that is not entirely open or clearly defined (category 'Other' in Figure 11 below).

In the jurisdictions where NRAs have a collegiate body (board), in 12 cases, the members are appointed with a rotation. However, in six cases, all NRA board members are appointed at the same time (though these NRAs also have an NRA head so continuity in the sense of Article 7 para. 2 EEC should be guaranteed).

Figure 11. Presence of open competition for NRA leadership positions (No. of respondents)



In most jurisdictions, the executive branch is the one appointing the NRA head. National parliaments or an independent committee appoint the NRA head in only a few countries.

In countries where there is no open competition procedure, the NRA head is either proposed by the responsible minister or cabinet of ministers and then approved by the

national parliament or appointed by the cabinet of ministers. As mentioned above, no specifics are available on such procedures, they seem to be internal to the appointing body.

In countries where there is an open competition, in the majority of cases, representatives of the executive branch are in charge of the appointment (e.g. responsible minister, the cabinet of ministers, prime minister, president or a committee nominated by the executive branch). However, in at least four countries, parliament is involved in the appointment procedure in some type of advisory role. In only four countries is the appointment of the NRA head undertaken by the national parliament and in another four – by an independent (expert) committee.

In the case of the appointment of NRA board members, the situation is slightly different: here parliaments are more often involved in the procedure. In particular, in about half of the countries where there is an open competition for these positions, all or part of NRA board members are either appointed by the parliament. In one case, NRA board members are appointed jointly by the judiciary and the relevant minister.

In the context of the appointment of NRA leadership, very few NRAs reported that the appointment of a board member, for example, has been delayed. However, they did not specify any adverse effect on the independence or functioning of the NRA. Nonetheless, this is an example of bad practice as delays in the appointment of such key positions as NRA board members may lead to an NRA's inability to function.

Table 15. Institutions responsible for appointing NRA leaders (No. of respondents)

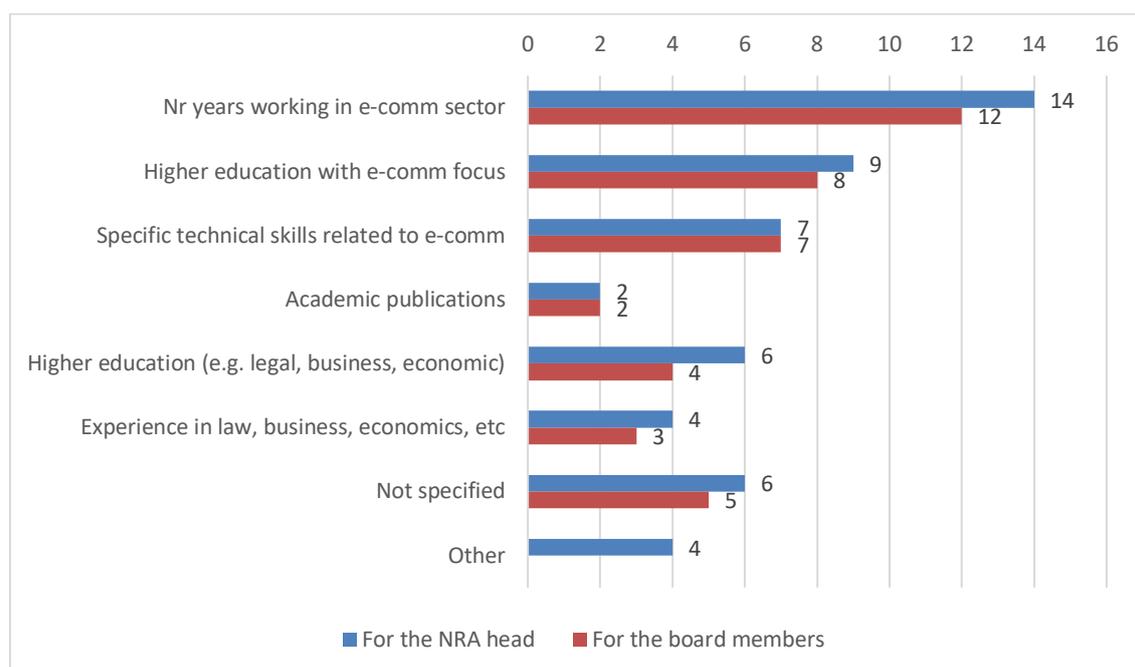
Appointing institution	NRA head	NRA board members
Committee nominated by the executive branch	5	3
Independent committee	4	1
Parliament or parliamentary committee	4	4
Responsible minister	4	--
Cabinet of ministers	4	--
Prime minister or president	5	--
Judiciary and responsible minister	--	1
Parliament and government	--	3

Article 7 para. 1 EECC prescribes that the candidates for the NRA leadership possess 'recognised standing and professional experience'. If national law specifies such professional eligibility requirements to the NRA leadership, it can be a guarantee of higher independence as the leadership is then more likely to be experts in the field, appointed for their expertise and taking their decision based on merits. A majority of

respondents answered that national law contains specific professional eligibility requirements both for the NRA head and board members. However, in eight cases for the NRA heads and in three cases for board members, the respondents said that national law does not contain such specific requirements. The examples of the legal provisions given by the respondents show that national laws are often quite general, sometimes simply repeating the wording of Article 7 para. 1 EECC. Where there are no respective legal provisions, the respondents explain that instead the profiles of the candidates are checked or assessed to determine whether they are suitable for the NRA leadership position. This means that the practice aims to fill the gap of not having proper legal requirements in the national legislation. While this is a welcome solution, it does not provide the guarantee of continuity and consistency (it depends on the practitioners what features are valued in candidates and how they are assessed)

In the latter context, it is necessary to explore what evidence is used as the basis for the assessment of the legally specified expertise of the NRA leadership. As Figure 12 demonstrates, in the majority of cases, higher education, experience and expertise specifically related to electronic communications need to be proven. However, in several cases, other types of higher education or experience in law, business, economics, public administration and the like are considered instead of specialised expertise. The category 'Other' in Figure 12 refers to such evidence as citizenship or aptitude for the position.

In the context of the necessary qualifications for the NRA leadership, it is difficult to determine the best practice that would suit all NRAs. The reason for this is that necessary qualifications are predetermined by the institutional setup of the NRA. For instance, for the head of a multi-sector NRA, it is impossible to have expertise in all sectors covered. In some NRAs, the role of the NRA head and/or board is more administrative or representative, and their participation in decision-making is extremely limited. In such situations, experience in public administration and politics may be a better asset than knowledge of the regulated sector. However, the report maintains that having a clear legal requirement about eligibility criteria is the best practice as it increases the transparency and credibility of the appointment procedures.

Figure 12. Evidence of professional eligibility requirements for NRA leadership

The most common duration of the mandate for the NRA leadership is five or six years. However, a few countries have very long mandate durations of seven or even nine years. By contrast, a few countries have a minimum mandate duration required by the EECC, namely three years. Even though three years is the minimum mandate duration required by Article 7 para. 1 EECC, longer terms of five and more years could be considered the best practice. This is because a number of regulatory activities require at least a five-year cycle, according to the EECC, for example, renewal of individual rights to use harmonised radio spectrum (linked to the need to conduct spectrum auctions, Article 50 EECC), analysis of the relevant market (Article 67 para. 5 lit. a)), and others. If the NRA leadership has shorter office terms, it may reduce the effectiveness of the NRA.

There are also a few outlier jurisdictions in terms of determining the mandate duration in their national law: they have a vague requirement, such as ‘minimum of three years’, ‘not more than six years’, ‘three to six years’ or ‘unlimited’. Vague mandate duration in law can negatively impact NRA independence because it can be used as a pressure or favouritism mechanism on the NRA leadership.

In all jurisdictions, the mandate duration is not tied to the electoral cycle.

Table 16. Duration of mandates for NRA leadership

Mandate duration for	NRA head	NRA board members
No. of years	No. of respondents	No. of respondents
3 years	1	--
4 years	2	2
5 years	12	11

Mandate duration for	NRA head	NRA board members
No. of years	No. of respondents	No. of respondents
6 years	7	4
7 years	2	1
9 years	2	--
Minimum 3 years	1	--
From 3 to 6 years	1	1
Not more than 6 years	1	--
Unlimited	1	--

In most jurisdictions, the mandate of the NRA leadership is renewable, which is a practice enhancing independence. However, in a few jurisdictions, the NRA leadership can only serve one term: the mandate is non-renewable in five cases for the NRA head and in three cases for the NRA board members.

Most jurisdictions allow one mandate renewal. However, for both NRA heads and board members, two jurisdictions allow two renewals, and one jurisdiction has no restrictions on how often the mandate can be renewed.

To enhance the independence of the NRA leadership and, hence, the NRA as a whole, national law can introduce other independence guarantees beyond those foreseen in the EECC and that were discussed above (open competition for the appointment, specific requirements to professional eligibility, clear duration of the mandate, possibility of the mandate renewal). Indeed, 28 respondents said that their national legislation foresees protection of the NRA leadership from premature dismissal (see next Section for more details); five respondents said that special immunity from personal liability is foreseen for the actions that NRA leadership carried out in the official status. Other guarantees include the legal requirement that the NRA leadership acts independently and may not take instructions with respect to the discharge of their duties. In addition, there are rules of professional conduct (see Section 5.4.4 further below).

5.4.2 Dismissal of NRA leadership

Premature dismissal of the NRA leadership is a crucial instrument of political pressure on the NRA impairing its independence. Hence, Article 7 para. 2 EECC requires that such dismissal should be possible only in exceptional circumstances, namely if the NRA leadership 'no longer fulfil the conditions required for the performance of their duties which are laid down in national law before their appointment'. From this perspective, the strongest independence guarantee would be if the NRA leadership cannot be dismissed

before the end of the mandate at all. This is the case in a few jurisdictions: in five cases for the NRA head and in three cases for the NRA board members.

Figure 13. Is it possible to dismiss NRA leadership before the end of its mandate?



However, in the great majority of jurisdictions, a premature dismissal is possible. It is therefore necessary to look at how the exceptional circumstances of such dismissal are defined in national law.

National approaches to how to define the grounds for the premature dismissal of NRA leadership differ significantly across the countries. Interestingly, even such logical reasons as a voluntary resignation, loss of legal capacity or inability to perform functions due to serious mental or physical illness or disability are listed only in a few jurisdictions.

A few countries adopted a very minimalistic approach and have only very general provisions on premature dismissal. For example, in one case, the national law states that the NRA leadership can be dismissed before the end of the mandate on important grounds, in particular, if guilty of gross misconduct. In a few other cases, dismissal is possible for the breach of official duties or mandate. In a few cases, it was reported that some type of individual assessment of the performance of duties can be undertaken, and the leadership can be dismissed if such assessment turns out unsatisfactory. While the exact quote from the national law was not always available for the analysis, in the case where the quotes were provided, they showed that national provisions were quite vague and general, leaving a lot of leeway to the institution in charge of making the dismissal decision. Such situations may be considered counter to the requirement of Article 7 para. 2 EECC as it is not clear from the start what conditions the NRA leadership must fulfil for the performance of their duties.

By contrast, many countries developed detailed lists of grounds for premature dismissal, sometimes going as long as about ten different grounds. The most frequently mentioned ground (by 13 respondents) is incompatibility with the office, which can be acquired (i.e. one of the preconditions for the office seized to apply) or existed from the start but were not known (e.g. because the candidate failed to disclose it during the selection procedure). A special case of this could be considered a situation of conflict of interest that cannot be resolved or was not disclosed (mentioned by seven respondents).

The next common ground for dismissal is a conviction of a crime (10 respondents). Some national rules even specify the type of crime (e.g. fraud, embezzlement or any crime punishable by 6 months imprisonment or more seriously).

The next ground for dismissal is failure to perform the mandate for more than six consecutive months (mentioned by nine respondents). Often this is not further specified and thus may include voluntary or involuntary non-performance. However, in some cases the causes of such non-performance are indicated (for example, prohibition by the court to exercise professional duties).

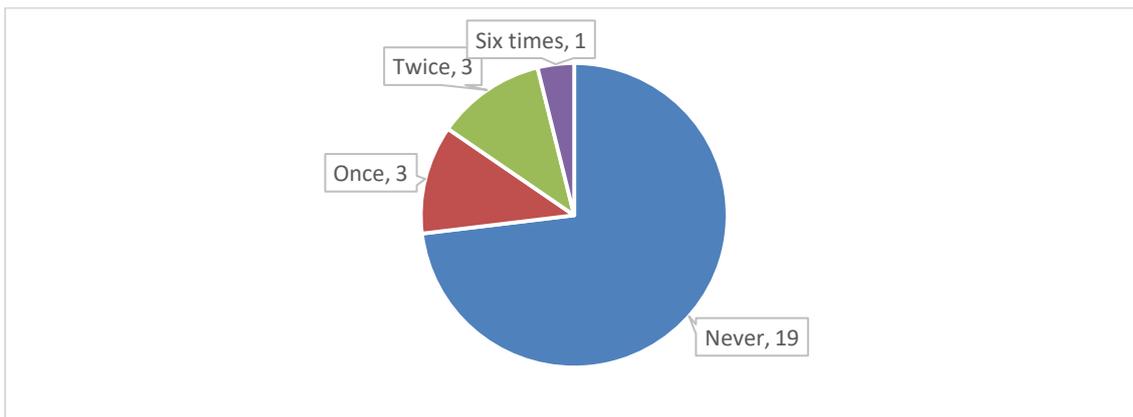
A large group of grounds for dismissal is related to a failure to perform the duties of the NRA head or board member. They can be described very differently in the national law. In several jurisdictions, national law states in great detail what a failure to perform duties entails. Some national laws name specific legal provisions of the electronic communications law, a breach of which can cause dismissal, for example breaches of confidentiality, of the code of ethics or non-compliance with the financial or business plan, or a failure to submit periodic reports.

Such specific lists of grounds for dismissal are the best practice as they provide for legal certainty for the NRA and its leadership - laying out clear rules from the onset on what constitutes such serious wrongdoing that the NRA leadership may lose their job.

However, in many cases, there is only a general provision, such as 'acting in contradiction to the law on electronic communications', 'gross violation of duties under the law on electronic communications', 'serious breach of duties of office', 'systematic absence or negligence in the performance of duties' or 'stated misbehaviour'. It was beyond the scope of this study to investigate whether these terms are sufficiently defined either elsewhere in the applicable national law or in the relevant national case law. However, it goes without saying that they need substantiation because such provisions do not state with certainty what actions of the NRA leadership are punishable by dismissal.

Lastly, it is necessary to see how premature dismissal is handled in practice. The first issue to explore is how often the NRA leadership have not finished their office term. The respondents were asked how often the leadership was dismissed in the last 10 years (not counting the instances where the leadership resigned because they changed to new jobs, or the NRA was re-organised). While in the majority of NRAs, premature dismissal has never been used in practice in the last 10 years, there are seven NRAs that experienced premature dismissals of their leadership. Of the latter, three experienced premature dismissals twice and one NRA – six times over the last 10 years.¹⁶⁵ This is a worrying development that impacts the effectiveness and efficiency of the NRA work. It may also be indicative of (attempts of) undue influence on the NRAs by the government.

¹⁶⁵ It shall be noted that most of the dismissals in the latter case seemed to have been justified. In one problematic case, the dismissed NRA head successfully challenged the dismissal decision in the national court, which led to a premature dismissal of the NRA head who had been appointed in the meantime.

Figure 14. NRA leadership prematurely dismissed since 2012 (No. of responses)

5.4.3 Independence of NRAs: staff matters

The decisions of NRAs with regard to various staff matters are often subject to constraints. Although it was not possible to verify these constraints for all respondents, it seems that often they stem from the general rules of public administration that are also applicable to such regulatory authorities. Hence, when the NRA respondents report that their autonomy with regard to staff is restricted, such constraints are unlikely to amount to an impediment to NRA independence. Nonetheless, in a few cases mentioned further below, restrictions can be considered significant and possibly impairing NRA independence.

To the question of whether the NRA have the autonomy to decide on the number of employees, without approvals by other bodies, 17 NRAs answered in the affirmative. However, 16 NRAs answered that they do not have such autonomy, so that it is likely that they need additional approval from the responsible minister or government on the number of staff.

For the hiring of new employees, a great majority of NRAs (29) use open public competition procedures. However, not all NRAs can decide autonomously, without approval by other bodies, on hiring new employees. Eight NRAs stated that they need additional approval, while 23 NRAs reported that they do not need additional approval. As already mentioned in the context of financial independence (Section 5.3.1), the approval system by itself does not necessarily limit NRA independence. However, a few interviewed NRAs mentioned examples of the approval system being abused, for example, by delaying or withdrawing the necessary approvals without legitimate reasons. This would hamper the NRA's functioning leaving it without the necessary human resources.

The majority of NRAs indicated that their biggest challenge is competing with the private sector for skilled experts. Some pointed out the salary constraints (caps) resulting from public administration employment rules and concluded that those should not be applicable to the NRA or at least to particular specialists the NRA hires because they

make it more difficult to recruit or retain skilled staff. It shall be noted that similar arguments were advanced by the research on the NRA independence in other sectors.¹⁶⁶

Once hired, the staff of most NRAs are civil servants (reported by 23 NRAs).¹⁶⁷ Eight NRAs stated that they use private law contracts. In four NRAs, some type of a mix of staff on private law contracts and civil servants exists (staff on private law contracts and civil servants are employed next to each other). The mix of different contracts in one NRA sometimes leads to difficulties, according to the respondents. Different rules on salaries, dismissals and promotions apply to employees on different contracts, and some positions may be reserved for staff who are civil servants. This may lead to tensions among the staff (due to different job security and perspectives) and make human resources management more challenging, even affecting the functioning of the NRA.

To the question of whether the NRAs have the autonomy to determine the staff salary, without approval by other bodies, 15 NRAs responded that they have such autonomy while 14 NRAs said that they do not have such autonomy, which needs to be considered with caution because a few respondents explained that they have to adhere to a salary scale. In addition, five NRAs explained that they have to adhere to a salary scale. Salary scales are a normal practice for public service contracts, and the necessity to comply with them for salaries should not be considered a restrictive practice as long as there are no further approval procedures by other bodies with regard to salaries offered to employees.

For NRA independence, it is important to be able to hire qualified staff. In the area of electronic communications, this means various IT specialists, telecom engineers, lawyers and economists, all of whom are highly sought-after experts by the industry. One needs also to consider that ICT industry often has very high salaries for specialists. Hence, the salaries offered need to be on par with the market level. Only 11 NRAs reported that they consider their salaries to be at the market level or close. Nine NRAs said that their staff salaries are below the market level. Most of the remaining 12 respondents explained that, depending on the professional and the level at which he/she starts, salaries may be at the market level or below. For example, one NRA said that it experiences difficulties with attracting the right staff if they need to start all new hires at the entry salary level. A few NRAs mentioned that technical and senior staff are paid below the market level.

For retaining qualified staff, it is also important that NRAs can promote them: 22 NRAs reported that they can promote their staff or create new positions without approval by other bodies, although this is within the available budget and pay structure. However, eight NRAs do not have such autonomy and need additional approval. In three NRAs, promotions are possible, by new positions need additional approval or require a change of structure. In one NRA, promotions to senior management need special approval.

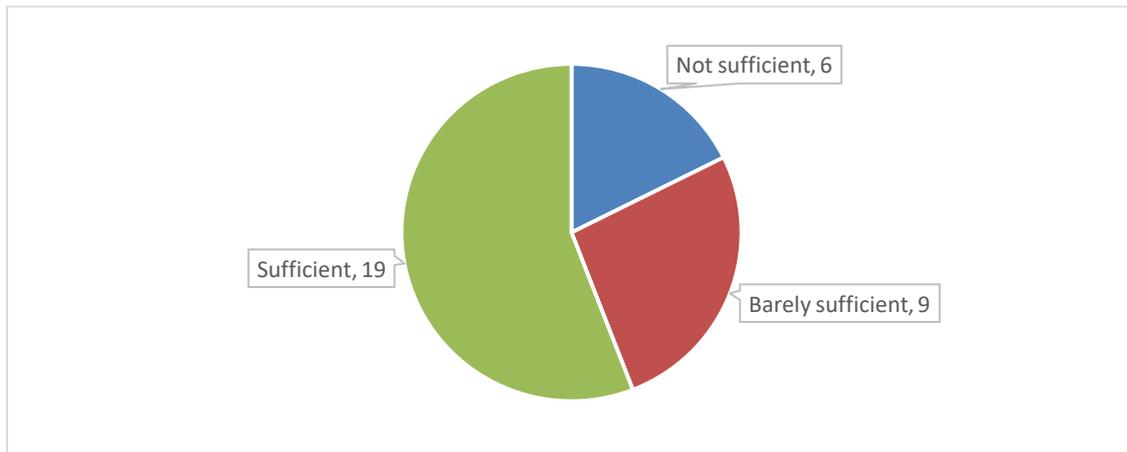
To stay up to date with the technological, market and legal developments, there should be autonomy for the NRA to invest in staff training and equipment. All NRAs reported that they can offer some type of training for their staff. Almost all (33) NRAs provide regular external training, and 28 give regular internal training. Two respondents said they

¹⁶⁶ For example, ERGA, Report on the independence of NRAs, 2015, p. 23.

¹⁶⁷ 'Civil servant' is a generic term that differs from one country to another, making a valid comparison of the legal status impossible.

offer sabbaticals, and one respondent has the possibility to sponsor academic courses. However, one NRA explained that the resources available for training are not adequate to ensure the professional development of employees. Eleven NRAs reported that there are restrictions (e.g. prior approval by the minister or government) on investing in equipment or IT tools, while 19 NRAs did not experience such constraints.

Figure 15. Do NRAs have sufficient human resources?



5.4.4 Rules of behaviour for NRA staff

The existence of rules encouraging independent and unbiased behaviour of the NRA staff strengthens the independence of the regulator overall. Hence, it is necessary to explore whether there are legal and other rules on ethics, conflict of interest and similar.

Almost all respondents said that there are legal rules in place for the prevention of conflict of interest in relation to the NRA leadership (Figure 16). However, these legal rules extend do not always extend to relatives of an NRA's leadership team (Figure 17).

Figure 16. Are there legal rules to prevent conflicts of interest?

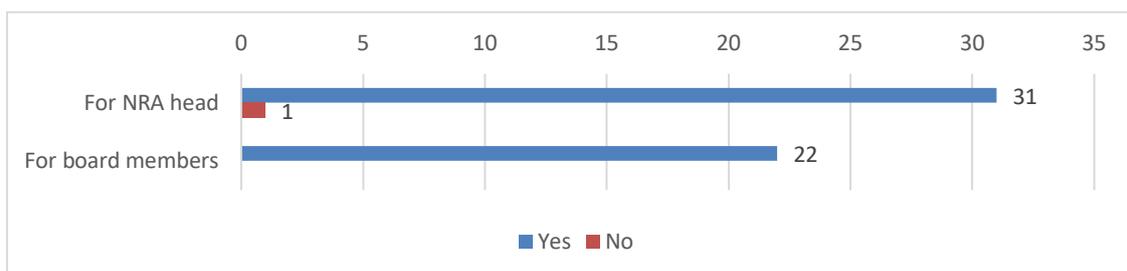
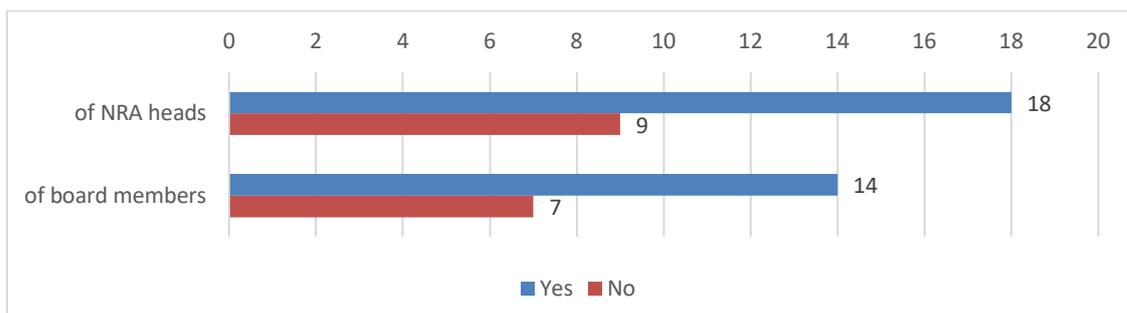


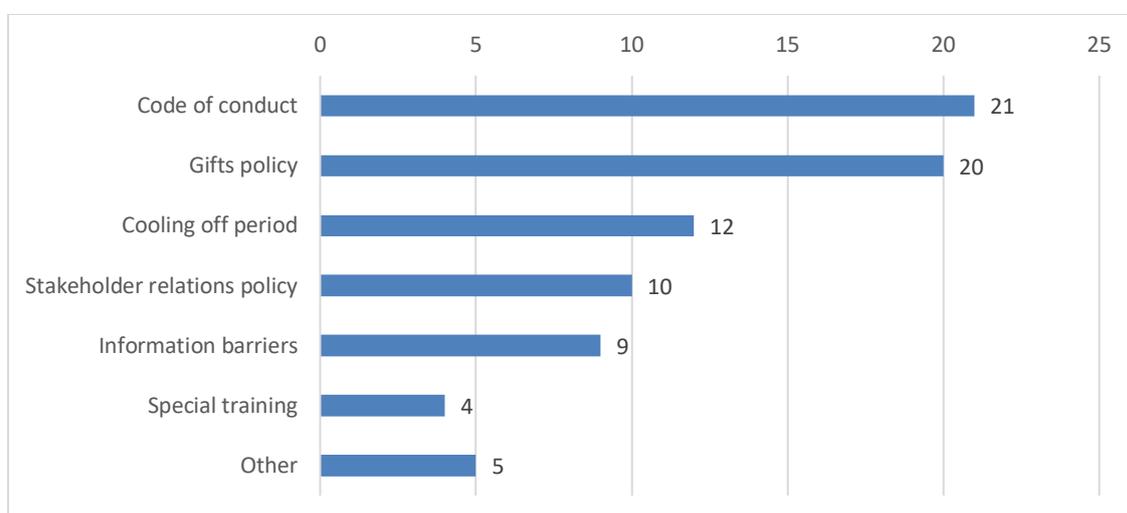
Figure 17. Do the legal rules on conflicts of interest apply to relatives?



Interestingly, not all jurisdictions prohibit the NRA leadership to hold simultaneously other offices in the government or in the regulated industry. In particular, five respondents said that the NRA head can hold another office in the government, and one respondent said that the NRA head also holds an office in the government or in the industry. Two respondents reported that NRA board members can simultaneously hold an office in the government.

NRAs take the independence of their staff seriously as well as their ability to act independently and in an unbiased manner. The evidence of this is that almost all NRAs put in place additional mechanisms to tackle conflicts of interest, going beyond the requirements of the national law. Figure 18 lists the main types of such mechanisms. Among the category 'Other', respondents named code of ethics, special declarations of property and interests, internal revision and control procedures as well as monitoring potential conflict of interest.

Figure 18. Measures to tackle conflicts of interest adopted by NRAs



5.4.5 Summary on independence of NRA personnel

The independence of the NRA personnel (leadership and other staff) is an important guarantee for the NRA independence overall. It needs to be ensured at all steps of the labour relationships: from the appointment through the whole employment to dismissal. Some practices are more conducive to independence than others.

For the appointment of NRA leadership, this includes having an open competition, with requirements to the candidates spelled out in advance and with clear steps, which means explaining by whom the candidates are assessed and how exactly requirements for the job are prioritised. Eligibility requirements for the candidates should be defined clearly in advance, preferably emphasising the specialist knowledge of the candidates in electronic communications, because having experts with technical knowledge in charge makes regulatory capture less likely.

The duration of the mandate needs to be clearly defined in law to avoid favouritism and political pressure. Vague terms such as 'a minimum of three years', 'not more than six years', 'three to six years' or 'unlimited' could be abused and should be avoided. Also, mandates that are longer than three years could enhance the effectiveness of the NRA

leadership and the NRA as a whole because they are better suited for some of the regulatory cycles laid down by the EECC. The possibility of renewing the mandate at least once also helps to increase the independence and effectiveness of an NRA's leadership.

The premature dismissal of an NRA's leadership team is one of the strongest instruments of political influence on an NRA. Hence, the independence of NRAs is highest where no premature dismissal is possible. At the same time, a premature dismissal may be necessary in exceptional circumstances. However, not to be abused, such circumstances need to be precisely defined in law in advance giving little leeway for interpretation in practice. This is the case where good practice follows good law. This will guarantee legal certainty for the NRA leadership and provide a clear framework for their behaviour. The best practices are those that list exactly (i.e. by naming the wrongdoings or referring to violations of specific provisions) what wrongdoings may result in such penalty as dismissal. Any vague terms, such as 'gross misconduct', 'serious violation' and similar, should be avoided or defined.

Both for the appointment and dismissal procedures for NRA leadership, it is better to have more actors involved (e.g. not only the responsible minister but independent committee or parliament) as it diffuses the possibility of strong political influence by one interest group and provides an all-around assessment.

NRA independence is both expressed in and strengthened by the NRAs ability to conduct autonomous staff policies. While national law requirements that are common to all public administration apply, these should not impose restrictions on the NRAs that impair their independent functioning. In particular, within the NRA budget and based on NRA needs, NRAs should be able to define the number of staff, hire new staff and determine remuneration for the staff. Approvals of such processes by other bodies become excessive in practice when they are given with delays impeding NRAs' activities.

To retain its independence in terms of staff expertise, it is important that NRAs can train their staff, promote experts and compete with the industry in attracting talent. The best practices in this context include the possibility for NRAs to take independent relevant decisions, without prior approvals by other bodies. While national constitutional and budgetary rules apply, they should not be abused in practice to delay NRA decisions or render NRAs a less attractive employer.

To reduce the risk of regulatory capture, all NRA staff should observe special rules of behaviour. While general rules on conflict of interest that apply to all public administration provide a good foundation, NRAs may need special conflict of interest rules tailored to their specific situation as a regulator of a recently liberalised network industry. The best practice, therefore, is for NRAs to adopt their own codes of ethics and similar rules and establish internal mechanisms for monitoring conflicts of interest. Such rules should especially apply to the NRA leadership and senior staff who have decision-making powers. Extension of the conflict-of-interest rules to the relatives of NRA leadership is the best practice.

Table 17. Summary of practices related to independence of NRA personnel

Best practices	Bad practices
Open competition for the NRA leadership positions, with the decision-making procedure clearly outlined and the assessment of candidate requirements clearly explained.	The rules of the selection and appointment of NRA leadership are defined only in general terms. A lot of leeway is left to the decision-maker.
Appointment procedure involves several actors, preferably an independent committee and parliament.	Decision on the appointment is made by one actor, like a responsible minister or prime minister.
The mandate duration is stated in law unequivocally, especially if it is five or more years.	The mandate duration is not explicitly stated.
If the mandate is short or mid-term long (up to six years), renewal is possible.	No mandate renewal is possible in the case of shorter mandates.
The reasons for the premature dismissal are listed exactly in law allowing for a minimum leeway in interpreting them.	The reasons for the premature dismissal are formulated very broadly using vague terms that are not defined.
Dismissal procedure involves several actors (e.g. independent committee) allowing for a solid assessment of the situation.	Dismissal decision is made by one actor, especially the same who took the decision on the appointment (e.g. responsible minister).
NRAs can take independent decisions on the number of staff, hiring new staff and staff remuneration and promotion. The decisions are based on the NRA needs and do not require prior approvals from other bodies.	NRAs need prior approval from other bodies on their staff related decisions.
NRAs have rules of behaviour for their staff (e.g. code of ethics, conflict of interest rules) that are tailored to their needs and apply to all staff and relatives of NRA leadership.	No rules of behaviour apply to all of the NRA personnel.

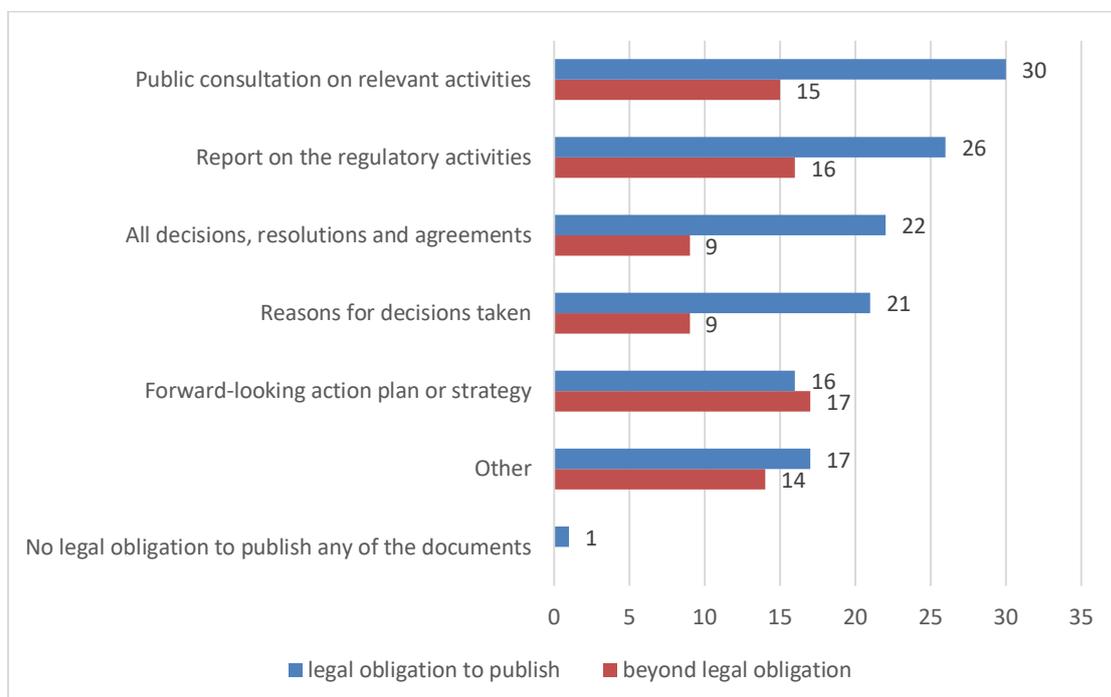
5.5 Accountability and transparency

This section explores what documents NRAs publish, to whom they report, and how NRAs' actions and decisions can be checked, challenged and changed.

5.5.1 Transparency and reporting

Making the information relating to regulatory processes publicly available is a key instrument of transparency and also an essential element of NRA's accountability. It is an important tool to make clear that an NRA's decisions are really its own, to increase the credibility of decisions and to build a strong reputation of the NRA. Most NRAs are required by the law to publish important documents and decisions. In particular, almost all NRAs must publish public consultations on relevant activities. It is also common to publish reports on regulatory activities: 22 NRAs must publish their decisions, resolutions and agreements, and 21 need to publish the reasons for the decision taken. Around half of the surveyed NRAs (16) publish forward-looking strategies or action plans. One NRA has no legal obligation to publish any document. This NRA, nevertheless, voluntarily publishes documents on regulatory activities and consultations, fostering transparency while remaining independent. As shown in Figure 19, NRAs tend to publish more documents than what is required by national law. This is most apparent in terms of forward-looking action plans or strategies, as 17 NRAs publish those documents although they are not required to. One NRA explained that they try to enhance their transparency by using data visualisation to make data and information accessible and understandable for a broad audience. During interviews, one NRA indicated that transparency in decision-making still remains a challenge. Another NRA indicated that they publish only what is required by law (the law in this case provides for an extensive list of documents to be made public). The latter situation shows the importance of a proper framework.

Figure 19. Documents published by NRAs

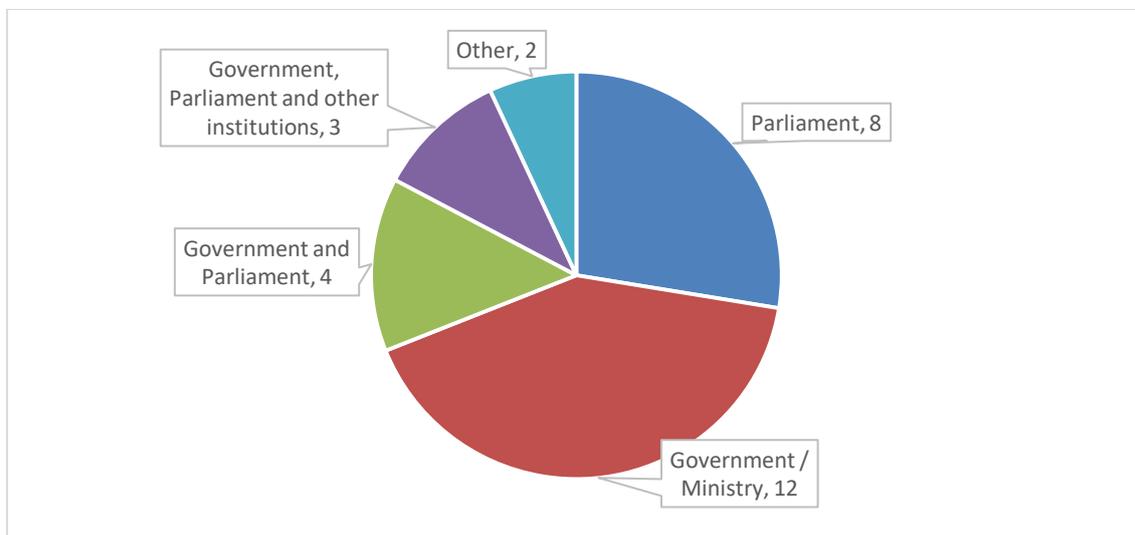


In two different jurisdictions, prior external approval is required before releasing a forward-looking document such as the action plan or NRA strategy. In one case, however, this only refers to the strategy for frequencies. Interestingly, no NRA whose budget is developed based on either a proposal from NRA itself or based on its strategy

(see Section 5.3.1 on the budget formation and approval) needs external approval before releasing such strategy.

Almost all NRAs (31 out of 34) need to submit a periodical report, which is an important instrument of accountability of independent authorities in the democratic system. One NRA that is not required to publish any document, is also exempted from such reporting. Twelve NRAs periodically report to the relevant ministry or government, eight NRAs report to the parliament, four report to both, and additional three report to the aforementioned authorities plus some more, notably the head of state and the court of auditors (see Figure 20 below). In some cases, NRAs reported that they report to the ministry, which in turn then reports to the parliament (indirect accountability to the parliament which is also a means to ensure the legitimacy of NRA activities). In one instance, in the case of the annual activity report, the NRA reports also to the head of state.

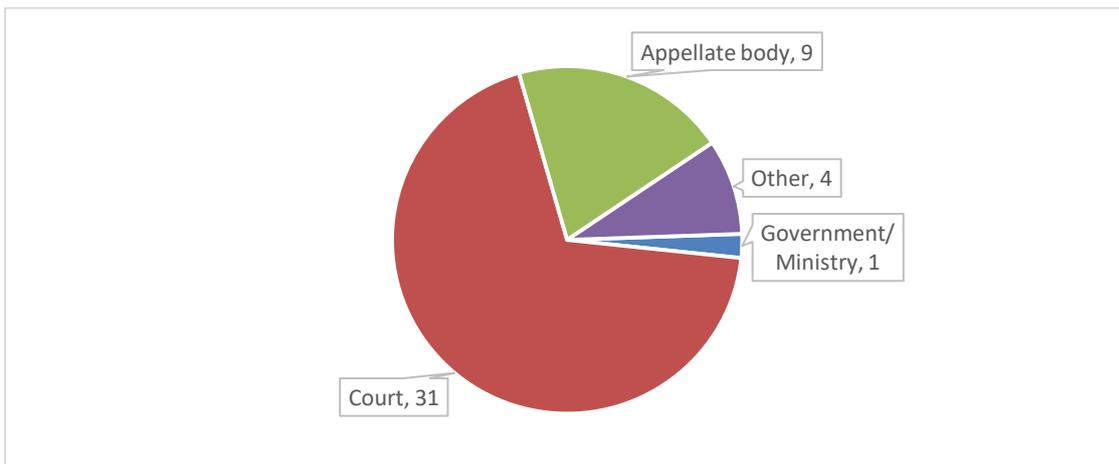
Figure 20 Authorities, to which NRAs report



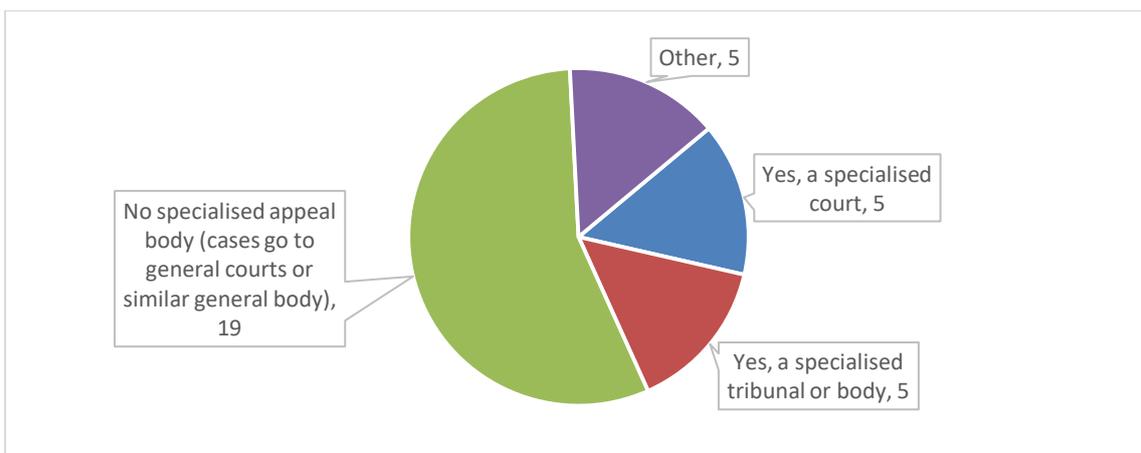
Besides reporting, auditing can be employed to check NRAs' activities for the purposes of accountability. NRAs were asked whether their activity is subject to regular review by external auditors or independent specialised public institutions: 27 NRAs are subject to such reviews, while seven are not. In order to better understand the review of NRAs' activities, the seven NRAs that are not subject to regular reviews were further asked whether they were subject to any external review in the past three years. Five NRAs responded affirmatively to this. In all five instances, the reviews were not initiated by the respective NRAs, and the NRAs could not refuse to be submitted to such an audit. Only two NRAs were not audited over the past three years.

5.5.2 Appeal and oversight

The decisions of NRAs can be changed by a variety of authorities. As shown in Figure 21, a court can change the decision of 31 different NRAs, and an appellate body can change the decision of nine NRAs. One NRA reported that the government can change its decision.

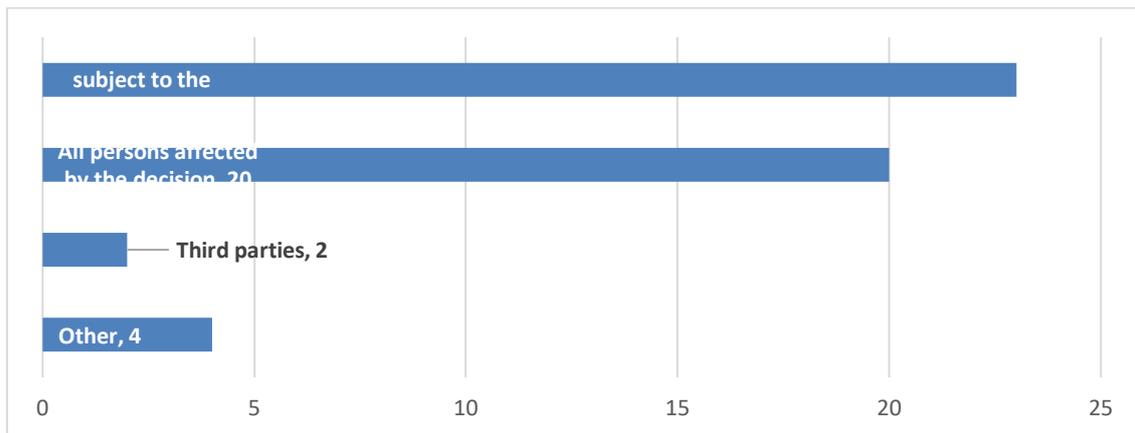
Figure 21. Authorities that can change NRAs' decisions

NRAs were also asked whether a specialised appeal body exists in the country that is set up in accordance with the requirements of Article 31 para. 1 EECC: 19 NRAs reported that no specialised appeal body exists, often meaning that cases go to a (specially designated) general court (see Figure 22).¹⁶⁸ Five NRAs responded that a specialised court exists, and five more reported that a specialised tribunal or body is in place.

Figure 22. Existence of a specialised appeal body

Most commonly the persons who are subject to the decision can appeal it (23 responses) or all persons affected by the decision can appeal it (20 responses). In two jurisdictions, also third parties can also appeal. In one jurisdiction, the minister responsible for electronic communications can appeal. In two cases, parties with a significant interest can also appeal. Finally, one jurisdiction allows for trade and consumer associations to appeal NRA decisions.

¹⁶⁸ In two cases it was explained that the decisions are brought to a specific chamber in a general court, which deal with telecommunication. In two more cases it was noted that appeals are referred to administrative courts.

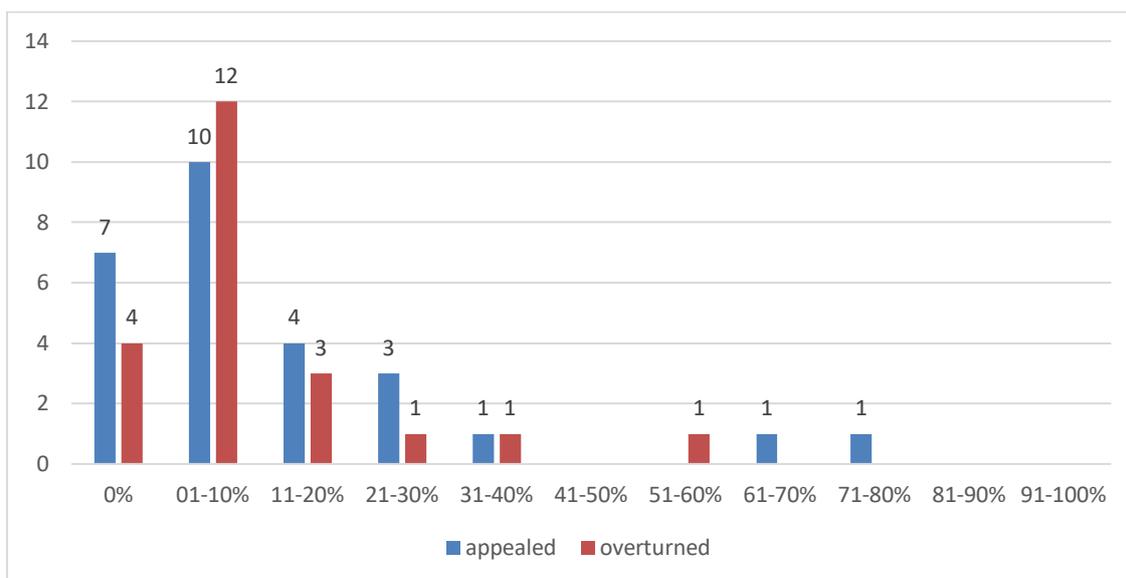
Figure 23. Parties that can appeal NRAs' decisions

With regards to the effects of the filing of an appeal, nine NRAs reported that such filing suspends the effects of the NRA decision, whereas 27 reported that it does not. Almost all NRAs noted that, although often not by default, suspension of the NRA decision can be ordered in most jurisdictions.

Most appellate bodies can overturn or change an NRA decision on merits (31 responses), on procedural issues (30 responses) and order a revision by the NRA (26 responses). In 18 cases, the appellate body can replace the NRA's decision with its own. In one case, the court may declare the NRA decision void.

The survey also collected information on the percentage of NRAs' decisions appealed and overturned in the last three years (distribution across percentiles available in Figure 24). On average, 13% of decisions have been appealed, but there is great variation between Member States. In two jurisdictions, around 70% of decisions have been appealed (70 and 71%). Seven respondents, on the other end of the spectrum, reported that basically none of the decisions was appealed in the past three years. 10 NRAs reported between 1% and 10% of decisions appealed, for a total of 17 NRAs reporting less than 10% of decisions being appealed.

Of these appeals, around 10% have been overturned by a court, again with great variation between Member States. In one jurisdiction 60% of decisions have been overturned, followed by 33% in another, whereas 16 NRAs reported 10% or less of overturned decisions. Of the decisions overturned, on average 43% were overturned on merits and 57% on the procedure.

Figure 24. Share of decisions appealed and overturned since 2019 (%)

5.5.3 Summary on transparency and accountability

Strong public accountability and transparency elements strengthen the independence of NRAs. It is therefore important to have legal requirements for the publication of NRAs' documentation. This is the case in most jurisdictions, and most NRAs follow the best practice of publishing even more than required. *A priori* approval by an external entity for the publication of NRAs' documents reduces transparency and negatively impacts independence.

Another practice that impairs independence is a ministry or government changing NRAs' decisions. It is contrary to the requirements of the EECC that foresees an independent court or tribunal with expertise in electronic communications as an appropriate appeal body.¹⁶⁹

Table 18. Summary on transparency and accountability practices

Best practices	Bad practices
Independent and specialised court reviews NRA decisions	Ministry can change NRA decisions
Publication of all important NRA's documents and decisions	Ministry approves NRA's documents before publication
Publications of more information than required by law	No or very few documents are published

¹⁶⁹ See also Judgment of 26 July 2017, *Europa Way Srl and Persidera SpA v Autorità per le Garanzie nelle Comunicazioni (AGCOM) and Others*, C-560/15, ECLI:EU:C:2017:593, para. 57.

5.6 Future-proofing of NRA independence

The independence of regulatory authorities is not a static quality; as discussed above, it varies over time and across sectors. Hence, the questions of how to preserve the high level of independence that some NRAs currently enjoy and how to increase the level of independence of other NRAs are pertinent. This section discusses strategies and factors that help future-proof NRAs in terms of independence as a means for effective decision-making.

The capability to attract and retain talent and specialised expertise is considered by many NRAs as one of the biggest challenges to fulfilling their mandate, now and especially in the future. It refers to technical, economic, and legal staff. More and more, experience in data analytics, modelling, and IT is required. NRAs face strong competition from the private sector that they regulate in securing such skilled professionals. Some NRAs also noted that the inclusion of (or consideration of) adjacent markets in their investigations is putting more pressure on having holistic digital market expertise. Holistic digital market expertise could be beneficial both for electronic communications NRAs and other NRAs dealing with similar issues (notably competition, consumer protection).

The competition for skilled professionals and the need for specific expertise will become even more prominent in upcoming years, as reliance on more precise and abundant data will increase, coupled with broader – yet specialised – digital expertise. Hence, five NRAs mentioned the importance of financial freedom to attract talent competing with the private sector. Such expertise will need to encompass more prominently AI, IoT, and digital platforms.

In this context, the education or training of NRA staff becomes more important. The staff needs to have opportunities to enhance or update their knowledge, expertise and skills. For this, NRAs need to have sufficient resources: financial to be able to afford paying for the necessary courses and human to be able to substitute for the employees at training. One of the challenges noted by some of the interviewed NRAs is the acquisition of new competences and tasks in the context of the fast-changing markets.

In some cases, the legislators do not catch up fast enough with the market and technological developments, and NRAs may lack the powers to regulate the market(s) effectively. Six NRAs maintain that new powers in the field of the digital economy are necessary to remain effective in the coming years, and five NRAs also mentioned the necessity of more enforcement powers to remain effective in the future. However, six NRAs do not see the need for new powers or competences. A few NRAs discussed that a very proactive approach has been taken in pushing for important competences to be allocated to them whenever needed, anticipating legislative changes. Such proactive attitude is considered conducive to independence, as the government can establish a dialogue on new competences with an authority that already has the expertise and is therefore well positioned to act.

For some NRAs international cooperation and participation in BEREC working groups and workshops are great opportunities to prepare for new functions and competences. The engagement in such international fora allows to stay up to date, learn about new developments and approaches and also improve own expertise. Countries from the same region and with similar legal traditions and/or NRA structures can closely exchange with each other about solutions for common difficulties.

Some NRAs note tendencies of governments to centralise resources and reduce the number of agencies in a detrimental way to NRAs independence. One NRA noted that such discussions are launched cyclically by the government and justified by budgetary saving. Two NRAs reported that merging of NRAs could be detrimental. One of them complains that there are currently regulatory competences in the government that should instead be the NRA's remit. Other jurisdictions, however, reported that the merging of NRA is at times beneficial due to the interconnectedness of the issues they deal with, for example, in the digital economy field. Centralisation is not *per se* considered a threat to independence if the right safeguards are put in place.

Another challenge is the adoption of general laws that may have a negative effect on NRA independence. For example, general laws on public administration, budget or staff can have an adverse effect on NRA's ability to recruit new employees, financial sustainability or functioning overall. NRAs need to remain alert to such possibilities and register their concerns early on with the government, be active in the media or consider other solutions such as a challenge in court.

6 Conclusions

This Chapter presents the report's conclusions with regard to the *de jure* and *de facto* independence of NRAs based on the literature review, analysis of legal frameworks and information received from the NRAs themselves on how they function in practice. The report focuses on the analysis of specific dimensions of independence in the electronic communications sector and practices related to them. It also puts the electronic communications framework in the comparative context with other EU-level sectoral legal frameworks regulating NRA independence.

This Chapter first presents high-level insights into the *de jure* independence as granted by the EU-level legislation to electronic communications NRAs contrasting it with other sectors and NCAs (Section 6.1). Then, it describes some bad and best practices when putting in practice the legal framework on independence of electronic communications NRAs discussed above (Sections 6.2 and 6.3, respectively) describing them as two hypothetical scenarios. It ends with a few observations on other factors that influence NRA independence.

6.1 Comparison of sectoral legislation on NRA independence

The concept of an independent NRA in the electronic communications sector goes back to the earliest legislation for the regulation of the liberalised market. The initial understanding of independence focused more on functional separation, but the legislation quickly added more pronounced independence from the market and later, in a gradual manner, independence from the government (political independence).¹⁷⁰ With every amendment of the regulatory framework, legal independence safeguards for the electronic communications NRAs have been increased and strengthened. Strengthening of safeguards means that the safeguards often were first cautiously introduced to the preambles of the legislation and did not have legally binding force, but gradually were moved to the main body of the legal act and become legal requirements. Increasing the number of safeguards means that gradually more dimensions of independence have been covered. Early legislation covered only systemic independence and partially transparency and accountability (i.e. always the issue of appeals, but weak requirements on the publication of documents). Then some basic safeguards of financial independence and independence of personnel were added that have been elaborated to a greater extent in the most recent legal framework – the EECC.

A comparison of legal provisions on NRA independence in the EECC with other sectoral legislation and ECN+ Directive has proven to be a challenging task. The main challenges are differences in legal terminology and differences in legal rules. The difference in the terminology, even a slight one, means that seemingly similar provisions might be interpreted differently by the EU courts. Different legal rules often mean that the safeguards of independence vary, raising questions about the level of independence granted. The two mentioned challenges do not allow to conclude with clarity and certainty that a particular legal framework provides for the highest safeguards of independence

¹⁷⁰ Hanretty, C., Larouche, P. and Reindl, A., Independence, accountability and perceived quality of regulators, CERRE Study, 2012, pp. 24-25, <http://dx.doi.org/10.2139/ssrn.2063720>.

for NRAs. Every legal framework has its shortcomings, as analysed and compared across different dimensions of independence in Chapter 4.

Nonetheless, looking at individual dimensions of NRA independence, it is possible to compare the completeness of the legal frameworks and the intensity of the safeguards.

The safeguards for the systemic independence of electronic communications NRAs are highly advanced and complete in comparison to other sectors. They guarantee that the NRA is legally distinct and functionally independent from any public or private entity. They require that there is a structural separation between regulatory function and the provision of electronic communications services, if applicable. They also require that NRAs exercise their powers in an impartial, transparent and timely manner. These safeguards are on par with the energy and audio-visual media sectors, but less clear and precise than those for the rail sector. Rail NRAs must be independent in organisational, functional, hierarchical and decision-making terms from any public or private entity. If rail NRAs are part of a multi-sector regulator, the whole regulator must fulfil these high independence standards.

Safeguards for *de jure* financial independence are very high for electronic communications and energy NRAs. Besides the requirement to have necessary resources and a separate annual budget, these NRAs also have autonomy in budget implementation. Only NCAs have a more complete regulation of financial independence, which includes a recommendation to have other sources of funding, alternative to the state budget.

With regard to the independence of NRA personnel, the EECC can be placed somewhere in the middle. On the one hand, it contains such important independence safeguards as an open appointment procedure for NRA leadership, requirements for leadership candidates, minimum mandate duration and some guarantees against arbitrary premature dismissal of the NRA head or board members. The requirement that the decision on premature dismissal is subject to judicial review on facts and on law is unique. On the other hand, the EECC does not require that NRAs are able to hire other NRA staff independently and does not contain rules of conduct for the NRA personnel (or a requirement to have such rules). Also, some provisions of the EECC remain vague. For example, the legislation on data protection and rail provides more elaborate safeguards for premature dismissal and states that such dismissal is only possible in the case of serious misconduct and not possible in relation to decision-making.

The EECC scores the highest on the legal framework for transparency because it requires the highest number of various documents to be published by NRAs. The legal rules on appeals of NRA decisions have remained the same in the last three legal frameworks for electronic communications, and they are very similar to those for the energy and postal sector. However, they are not as precise as the rules for the rail sector.

Overall, the EU-level legal framework for the independence of NRAs in the electronic communications sector provides for very high safeguards across almost all dimensions of independence. To close remaining gaps and render the legal framework more precise, it may be appropriate to take inspiration from the rail sector (for systemic independence, independence of personnel and appeals) and ECN+ Directive (for financial independence).

6.2 Practice of NRA independence

EU-level legal provisions on independence provide for *de jure* independence of NRAs. Yet, they leave a lot of leeway for the states to implement them in the national legislation, thus putting in action the standard stipulated at the EU level. In addition, the practice of NRA independence (*de facto* independence) varies across countries, leading to even more diversity. As a result, although there is a harmonised *de jure* framework at the EU level, there is a diversity of *de jure* and *de facto* independence at the national level.¹⁷¹

The analysis of the NRAs' responses to the survey of BEREC Members and follow-up interviews with 10 NRAs allowed to identify two categories of practices: 1) practices that are conducive to independence (i.e. enhancing the independence of NRAs, best practices) and 2) practices that are detrimental to independence (i.e. hindering their independent functioning of NRAs, bad practices). These practices are included in the summary tables for each independence dimension in Chapter 5. Below, on the basis of these practices, two hypothetical models were created: 1) NRA with the biggest challenges to its independence (worst case scenario) and 2) NRA whose independence is the highest within the limitations of the law (best case scenario).

The aim of these models is to provide NRAs and scholars of independence with a comprehensive overview of practices that can result in different outcomes: full independence and lack of independence. Full independence (i.e. best-case scenario) should be understood as the unity of best practices related to *de jure* and *de facto* independence, meaning that the NRA is properly established, empowered, resourced, effectively functioning and accountable. While the best-case scenario can be considered a benchmark for the fully independent NRA, there is no such benchmark for the worst case. NRA independence tapers off with each bad practice so that even one bad practice, in any independence dimension, means that an NRA lacks independence to some extent.

By comparing the actual situation of an NRA to the situations described in the hypothetical scenarios, one can identify how far the particular NRA is on the continuum between the full independence and one of the worst cases of the lack of independence. The conducted interviews and the survey demonstrate that individual bad practices can sometimes be found even in relation to those NRAs that enjoy a high degree of independence – and *vice versa*, NRAs facing challenges to their independence report best practices in some dimensions of independence. The presented worst-case and best-case scenarios could help NRAs identify areas for improvement to climb up on the ladder to full independence.

6.2.1 Worst-case scenario

In the worst-case scenario, the NRA lacks competences to effectively fulfil its mandate. This can be due to incorrect or incomplete transposition of the EECC in the national law or because the competences are split between several authorities in a suboptimal way (e.g. where on a particular issue regulatory powers are given to the ministry while

¹⁷¹ The European Commission is now conducting the completeness check of late transpositions of the EECC and, subsequently, will carry out the conformity check of all transpositions to confirm full and correct transposition of the EECC into national legislation.

litigation powers on the very same issue are with the NRA) but also due to the lack of a culture of independence within the administrative system.

The influence of the responsible ministry, or even the government more generally, is felt by the NRA both directly and indirectly and affects its integrity and independent decision-making. In particular, the government prescribes or formulates for the NRA an internal organisation, strategy or action plan, without entering into an open dialogue with the NRA and duly considering its needs and the needs of the market. Where the approval system is used, the worst case is when the NRA cannot start implementing the internal structure of strategy without approval, while approvals are delayed. Another bad practice is where reorganisation of the NRA or merger of regulators is used by the government to dismiss the NRA leadership. In general, it is detrimental to the effectiveness and future-proofing of the NRA if regulation by the government is so rigid that it is impossible to create a task force or a working group to study and deal with new challenges.

The worst-case scenario also manifests itself in the excessive government control over the NRA's budget. The government adopts or changes the NRA budget without in-depth discussion with the NRA, not taking into account NRA's mandate (e.g. providing fewer resources than necessary for the (increased) mandate), its reasoned suggestions and justified needs. If the system of budget approval is in place, the worst-case scenario is when delays in approval are regular and/or very long limiting the NRA for several months to its core expenses (e.g. rent, salaries), but preventing the NRA from undertaking planned regulatory projects such as surveys for market analysis and preparation of auctions. The situation becomes especially dire when the NRA cannot make budgetary reserves or use other mechanisms to bridge the period without the approved budget. In all such situations, the government impedes the independent functioning of the NRA and the effective execution of its mandate. The same applies to the cases where the NRA budget is significantly limited or systematically lower than proposed by the NRA without specific justification and without consideration of the NRA's tasks.

Even if the NRA has independent sources of financing (e.g. fees from the regulated sector), the government can hamper the NRA's independence and functioning by withholding the approval of the overall budget. This practice is particularly detrimental to the NRA independence when the government requires the NRA to reduce its fee-based budget (effectively by lowering fees), while simultaneously owning shares in some of the regulated entities. In such a case, the government exercises indirect influence on the NRA's decision-making.

In the worst-case scenario, the NRA also does not have the autonomy to execute its budget. This may take the form of needing to get additional approval on individual expenses, or not being able to adjust the expenses to the changing needs (e.g. by repurposing money from one expenditure to another in line with the requirements of the general budgetary laws), or not obtaining the necessary approvals in time due to unwarranted delays or very formalistic requirements. On top of this, auditing of financial statements is performed often without justification disrupting day-to-day activities.

Overall, in case of financial issues, the NRA often functions in a survival mode without getting into more complex issues and tasks. There is very little space to build a culture of independence.

The appointment procedure for the NRA leadership is neither open nor transparent, so stakeholders do not know how and why particular candidates are selected. This can harm the reputation of the NRA as an independent authority that exercises its tasks impartially.

The term of office for the NRA leadership is not strictly specified in law (e.g. the following terms are used: “at least X years” or “between A and B years”) and can therefore vary based on the determination of the appointing entity. This opens the door to favouritism and reduces the independence of the leadership. Even if there is a specific term duration prescribed in the law, the threat of premature dismissals is used to influence the NRA leadership. This is done by keeping the grounds for premature dismissal broad and vague, only nominally fulfilling the requirements of the EECC. Such vague and broad grounds (e.g. using terms like gross misconduct, or serious misconduct without further definition) can be arbitrarily interpreted by the dismissing authority to include even an undesired, yet unpredictable outcome of a regulatory action (such as unfortunate auction results).

It is also bad practice when the NRA has little or no autonomy in staff policies. This is the case, for example, when the NRA needs additional approvals for each vacancy even where such vacancies are within the NRA budget. If the required approvals are coupled with regular delays or rejections without reasoned justification, the NRA may become crippled in its functioning, not able to hire the necessary staff and at a high risk of losing employees. Another example is the lack of autonomy to adjust salaries to the market values: salaries paid by the NRA are so low that some expert posts remain vacant for a long time. The NRA is not able to compete for experts on the market and can only hire people without significant experience.

Last but not least, in the worst case, the NRA also cannot effectively and autonomously cooperate with other authorities and take part in BEREC’s work and international organisations. This may happen because the NRA is not provided with sufficient resources or does not get approval to use its resources for such activities, or the necessary approvals are delayed to such an extent that these activities become impossible. These practices prevent the NRA from exchanging with and learning from peers, impacting its current and future ability to act independently.

6.2.2 Best-case scenario

Full correct transposition of the EECC is an important precondition for NRA independence as it provides the necessary guarantees and legal certainty against situations of change in practice (e.g. due to new political power following elections).

In the best-case scenario, there is a clear division of roles between the NRA and the responsible ministry: the ministry is in charge of the policy, and the NRA is in charge of regulation. It is preferable that this division is fixed in law and should be rigorously adhered to in practice. Where the line between the policy and regulation is not clear, an open dialogue between the NRA and the responsible ministry helps to agree on the proper delimitation, although it is ultimately the task of the courts to decide. In the case of multi-sector NRAs, a clear internal division of competences is established between different sectors that may overlap (e.g. electronic communications and competition).

The NRA decides on its internal organisation, strategy and/or action plan autonomously based on its needs guided by the objectives of the legal framework and national policy. The NRA can and should consult widely with various stakeholders where necessary, especially on the strategy and action plan, to capture the latest market and technological developments. The government entities participate in such consultations together with other types of stakeholders providing their views on how policy objectives could be implemented. Yet, the NRA decides autonomously whether to take any recommendations into account and how in order to exercise its mandate and achieve the legislative and policy objectives.

In the best-case scenario, an NRA prepares a proposal for its own budget. If approval from the responsible ministry is needed, the process of budget preparation includes a dialogue with the responsible ministry, where needs and preferences are discussed openly and supported by evidence by both sides. Even if the NRA budget is part of the ministry budget, it should be based on the NRA's needs to the greatest extent possible.

The approval of the budget is given in a timely manner; delays in approval are an exception and not a rule, and they are objectively justified. In practice, consent could be exercised instead of approval: if the ministry does not explicitly object to the budget proposed by the NRA within 1-2 months, the NRA assumes that the budget is approved and can start implementing it. Another possibility is that non-approval does not block the whole budget (uncontested parts of the budget must be approved). In the best-case scenario, there are instruments in place preventing the NRA from becoming unable to fulfil its mandate in the rare cases of approval delays. For example, the NRA is allowed to carry out the most important regulatory projects such as auctions or market analysis, or make and use budgetary reserves to finance itself while awaiting the budget approval or carry the remaining budget from the last year over to the new year.

As repeatedly stressed, in the best-case scenario, the NRA budget is based on its needs and reflects the NRA's mandate, i.e. any newly assigned powers come with the appropriate increase in the budget so that the NRA can acquire the necessary equipment and hire staff. Following best governance practice is recommended in such cases: the laws providing for new powers should be accompanied by an assessment of the administrative cost of executing such powers. This means that the accompanying documents to the relevant law must estimate how much budget is likely to be needed and for what. A corresponding increase in the NRA budget shall be based on these estimates.

The NRA can allocate and execute its budget without any additional approvals from other entities (esp. the responsible ministry). In the ideal case, the NRA decides the expenditure lines by itself, based on its strategy or action plan. The only control is auditing or other types of review of the NRA's financial statements at the end of the financial year, according to general rules (i.e. national constitutional controls).

The procedure for the appointment of the NRA leadership is transparent meaning that it is fully clear what considerations go into the selection of candidates and what entities and how are involved. The requirements for the NRA leadership are stated *a priori* in the relevant legislation. It is best if vacancies for the NRA leadership are announced publicly, listing the requirements to the candidate and the job requirements. The procedure (e.g. interviews, presentation, criteria for the selection and how there are weighed) is fixed in bylaws or announced together with the vacancy announcement. Public scrutiny of the

candidate through the parliament or an independent committee adds to the openness and transparency of the process.

The guarantees against the premature dismissals of the NRA leadership are clearly elaborated in law and leave little room for interpretation by the entity that is in charge of the dismissal. The involvement of the parliamentary or independent committee in the dismissal decision provides additional scrutiny. At the same time, NRA leadership uses the available legal instruments for the legal review of the dismissal decisions. Law must be applied to test the system and ultimately improve it.

In the best-case scenario, the NRA is able to hire and retain the high-skilled specialists it needs to carry out its mandate effectively. The recruitment decisions are made by the NRA autonomously and do not require external approvals. The only limitation to the recruitment decisions is the NRA budget and the general rules for public administration, to the degree, such rules do not contradict the requirements of the EECC. In the ideal case, the NRA has flexibility on the salaries, bonuses and promotions to offer to the staff. The NRA regulates an intensely technological market with large and powerful players, and it competes with these players for the same pool of skilled professionals. The NRA must be able to offer at least the same or even better working conditions than the market players it regulates – to stay ahead of the game and be effective in the regulation of the market.

The NRA nurtures the culture of independence internally and externally. Internally, the NRA monitors the risk of regulatory capture of its staff and has internal rules and other mechanisms to prevent conflict of interest or breach of confidentiality. Externally, the NRA works on establishing the reputation of an independent expert body that has transparent relationships with all stakeholders. Openness and transparency are crucial in this regard: they allow for public scrutiny of NRA's actions and they make clear that there is a level playing field in relationships with different stakeholders.

The NRA is continuously working on its expertise and knowledge. It has sufficient resources to train its staff to keep up with the market and technological developments. It is proactive and has an anticipatory approach to its functioning. For example, it follows the latest policy developments nationally and internationally and creates working groups, task forces or units to study new topics.

Being actively involved in cooperation with other authorities, nationally and internationally, is an integral part of the NRA functioning. It has sufficient resources to participate in BEREC, including strong involvement in topics of specific national interest, and in the work of other relevant regional and international organisations. The NRA also cooperates, where necessary, with national authority in adjacent fields (e.g. consumer protection and competition) if these are separate entities. The NRA decides on all cooperation autonomously, on the basis of the legislation and NRA's needs, and does not need additional approval from the government.

6.3 Observations on other factors influencing NRA independence

The overall findings of this study allow to confirm the prevalent scholarly opinion that both *de jure* and *de facto* independence needs to be ensured for effective NRA

independence. However, the report concurs with those authors who argue that the exact interplay of the *de jure* and *de facto* parts is elusive and difficult to determine. The research for this study suggests that a strong **culture of independence** of NRAs can be seen as an additional factor enabling NRA independence if it is practised by the NRA, by the ministry and the government and by other stakeholders. A culture of independence expresses itself in the practices and behaviour of the NRA and stakeholders, based on the respect and observance of unwritten rules and understandings. This is an important yet fragile factor of independence as culture may change, for example, in a new political environment. Therefore, a culture of independence by itself is not sufficient and must be supported by legal safeguards that among others enable effective oversight by national courts and relevant institutions within the system of the EU law.

Expertise is essential for the NRA to assert its independence vis-à-vis the government and other stakeholders. It allows building a strong reputation, on which the NRA can build in future developments and relationships. Yet expertise is costly, and the NRA needs sufficient resources to afford the right talent and equipment and to keep both up to date.

One more factor of independence that did not fit in the analytical matrix used in this study is an external one: the **European Union** itself. The EU-level legal framework provides a safeguard against countries' backsliding, and the role of the European Commission is crucial in this regard. It must stay vigilant to individual cases and monitor the situation, and NRAs must report any possible misconduct that may hamper their independence. Due to the variety of national institutional systems, legal traditions, practices and cultures, it is advisable that the monitoring does not rely on a set of indicators aiming to measure independence. While a simple monitoring of indicators can be the first step, it needs to be followed by an in-depth study of a particular national situation.

The **international cooperation** between NRAs strengthens independence. It is especially relevant for jurisdictions where the culture of independence is not yet well established. International cooperation supports the exchange of experience and mutual learning in this respect, fostering the common understanding, emergence of the common practice and – ultimately – the consistent practice of independence across the European Union.

The research on the dimensions of NRA independence leads to the conclusion that **all of them are important**: if any of them is impaired, the independence of the NRA in general and their ability to function and fulfil the mandate are likely to suffer. It is a combination of all dimensions of independence that makes one strong whole and that is essential to regulate markets effectively.

Annexes

Annex 1: Bibliography

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Judgment of 19 March 1991, *France v Commission*, C-202/88, ECLI:EU:C:1991:120

Judgment of 13 December 1991, *Régie des télégraphes et des téléphones v GB-Inno-BM*, C-18/88, ECLI:EU:C:1991:474

Judgment of 27 October 1993, *Decoster*, C-69/91, ECLI:EU:C:1993:853

Judgement of 27 October 1993, *Criminal proceedings against Francine Gillon, née Decoster*, C-69/91, ECLI:EU:C:1993:853

Judgment of 9 March 2010, *European Commission v Germany*, C-518/07, ECLI:EU:C:2010:125

- Judgment of 6 October 2010, *Base and Others*, C-389/08, ECLI:EU:C:2010:584
- Judgment of 16 October 2012, *European Commission v Republic of Austria*, C-614/10, ECLI:EU:C:2012:631
- Judgment of 28 February 2013, *Commission v. Austria*, C-555/10, ECLI:EU:C:2013:115
- Judgment of 18 April 2013, *Commission v. France*, C-625/10, ECLI:EU:C:2013:243
- Judgment of 8 April 2014, *European Commission v Hungary*, C-288/12, ECLI:EU:C:2014:237
- Judgment of 14 September 2015, *Autorità per le Garanzie nelle Comunicazioni*, C-240/15, ECLI:EU:C:2016:608
- Judgment of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650
- Judgment of 19 October 2016, *Xabier Ormaetxea Garai, Bernardo Lorenzo Almendros v Administración del Estado*, C-424/15, ECLI:EU:C:2016:780
- Judgment of 26 July 2017, *Europa Way Srl and Persidera SpA v Autorità per le Garanzie nelle Comunicazioni (AGCOM) and Others*, C-560/15, ECLI:EU:C:2017:593
- Judgment of 5 June 2018, *Wirtschaftsakademie Schleswig-Holstein*, C-210/16, ECLI:EU:C:2018:388
- Judgement of 13 June 2018, *European Commission v. Poland*, C-530/16, ECLI:EU:C:2018:430
- Judgement of 11 June 2020, *Prezident Slovenskej republiky*, C-378/19, ECLI:EU:C:2020:462
- Judgment of 3 December 2020, *European Commission v. Belgium*, C-767/19, ECLI:EU:C:2020:984
- Judgment of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, ECLI:EU:C:2021:662

Annex 2: Survey of BEREC members – quantitative analysis

The survey was administered to all BEREC members between 15 July and 15 September 2022.

Responses to the first three questions are not provided because these were used to process data for the purposes of follow-up interviews.

GENERAL

Question 4 What sector(s) is your NRA responsible for? Please select all applicable.

Sector	N
Audio-visual media	9
Competition	4
Consumer protection	8
Data protection	0
Electronic communication	34
Energy	5
Postal services	28
Rail	9
Other, please specify	25

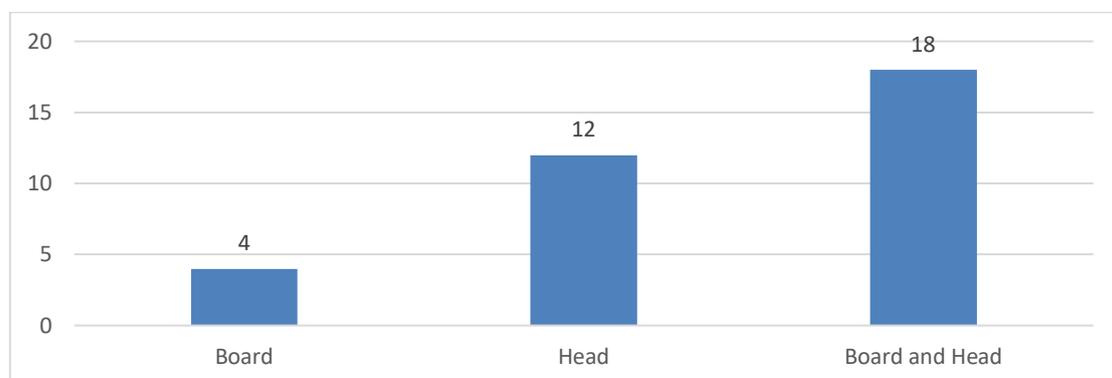
N=34

Twenty-five respondents indicated that they were responsible for other sectors. They provided the following inputs:

Other, please specify
Promotion of end user rights and consumer protection in the field of electronic communications and postal services
Trust Services, network security, partly emergency services and consumer protection. The Agency is also responsible for Audio-visual Media but this is a separate, independent division serving as the administrative agency for the national communications authority
Media only partially
National Supervisory Body in accordance with Regulation (EU) 910/2014
Digital Security
Consumer protection in the two sectors
Building, industrial safety
Aviation, road and maritime, cyber security. Partly audio-visual media.
Print media distribution
Responsible for enforcing competition law only in the electronic communications and postal services. Responsible for the regulation, supervision and management of domain names in top level domains (TLD).

Other, please specify
Designated surveillance authority of the following directives: ePrivacy, eIDAS, RED, NIS and CRD.
Premium Rate Services, Competition in Electronic Communications Sector, some Consumer Protection functions, some functions under e-Privacy Directive 2002
Consumer protection duties in its sectors of competence; monitoring equal treatment of political actors within political campaigns on the media, online copyright protection, audio-visual sports rights, protection of competition in the overall communication system and, more recently, secondary ticketing and P2B
Water management, municipal waste management, deposit packaging management
Frequencies & Signature and Trust Services
Supervision of Trust Service Providers and e-signature, Hotline (illegal and harmful content), calculation of prices for public services provision
Spectrum management, NISS, airports
eCommerce
Space activities
Spectrum
Information security is the capacity of the National CERT.
Data protection with regard to competences on electronic communications as a result of implementation of the Directive 2002/58/EC on E-privacy.
Cyber security, frequency management

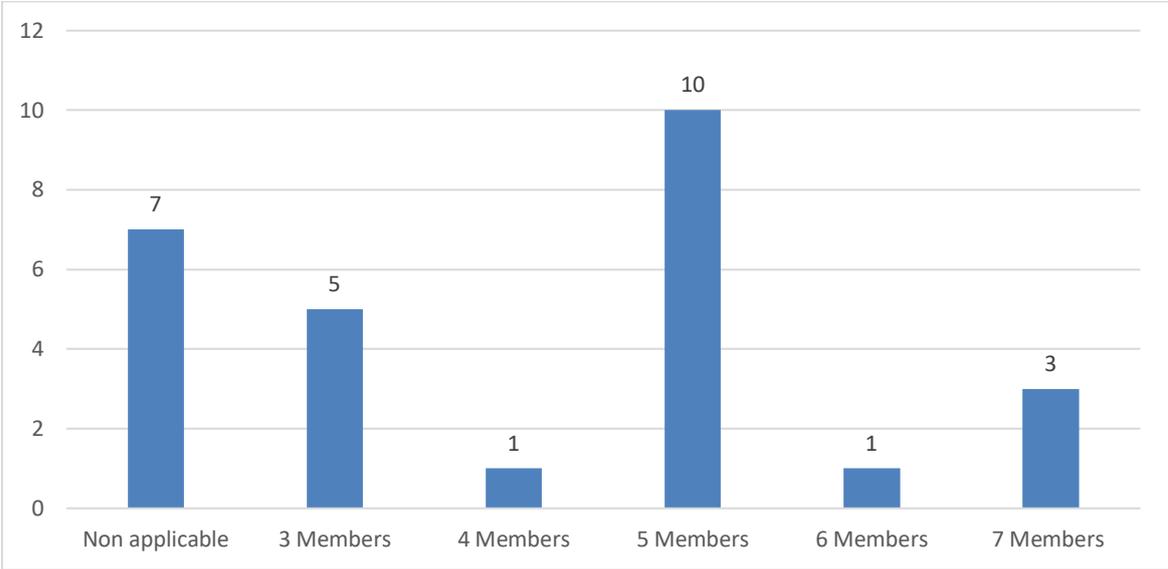
Question 5. What type of leadership does your NRA have?



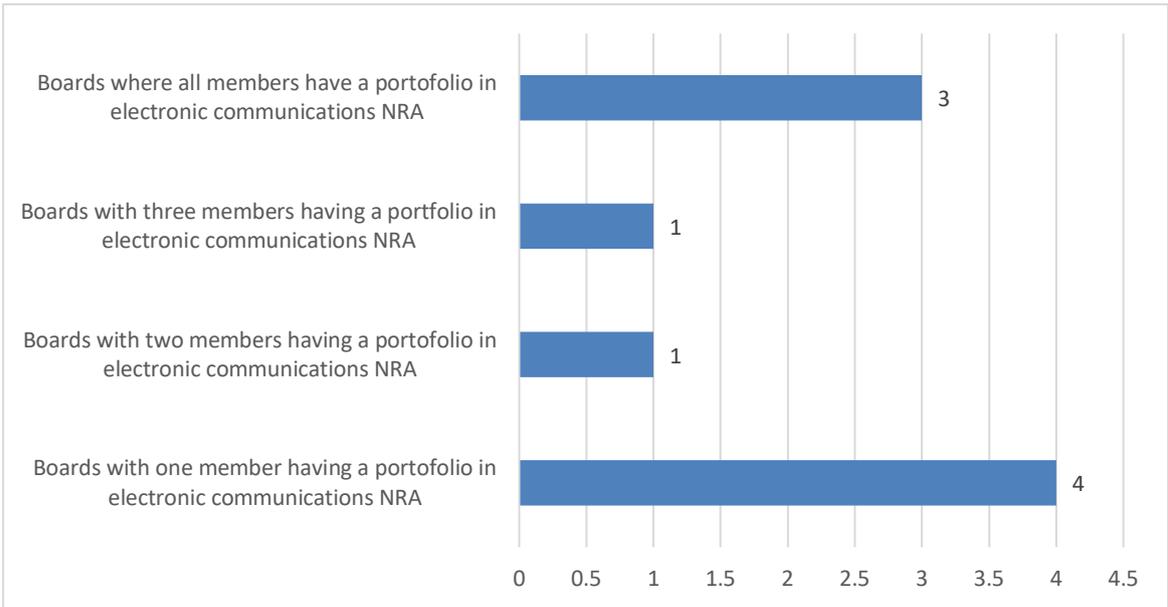
N=34

Question 6. Please describe the composition of the board (how many members, how many of them have a portfolio in the electronic communications NRA and how many have previously worked in electronic comm sector (private or public)).

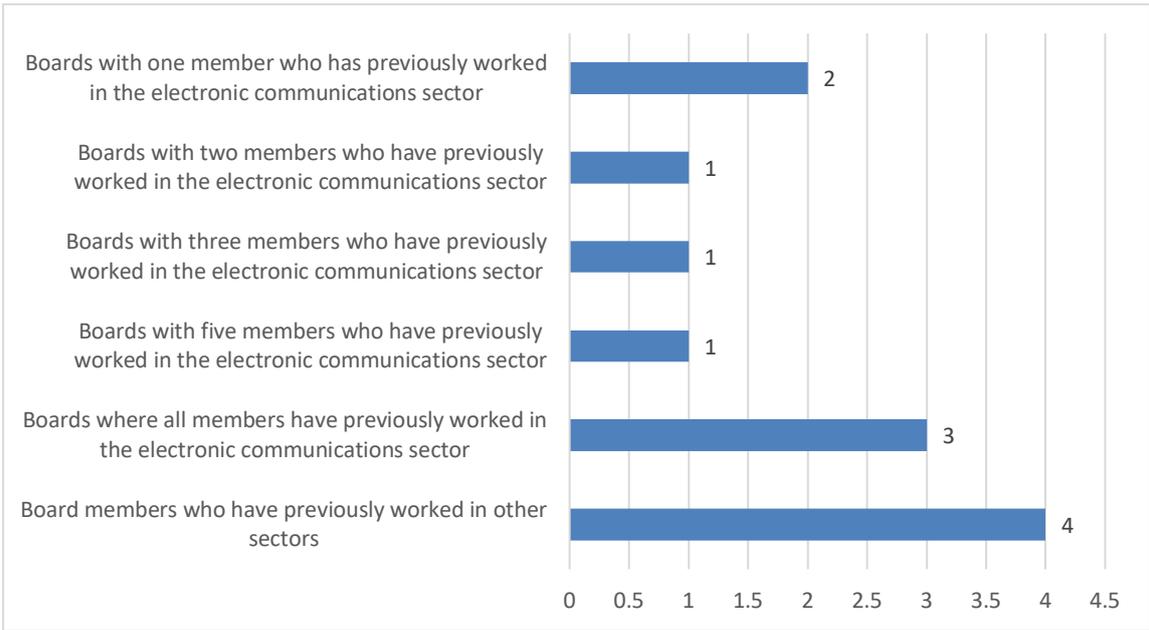
Number of board members



Board members with electronic communications portfolio



Board members with experience in electronic communications



N=27

Note. In the case of work experience in other sectors, this relates to experience in the legal field, finance, business, electronic engineering or postal service.

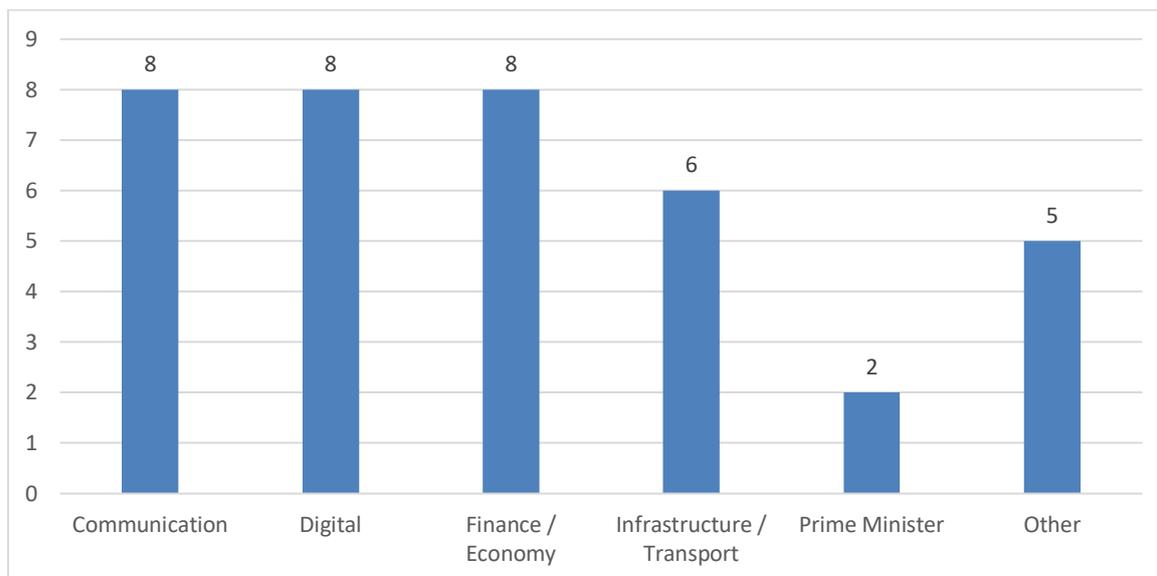
SYSTEMIC INDEPENDENCE

Question 7. Is there a ministry responsible for the electronic communications sector in your country?

	N
Yes	34
No	0

N=34

Question 8 Is there a ministry responsible for the electronic communications sector in your country?



N=34

Other responses include the following: Innovation, local government, climate and energy, industry

Question 9. Please explain what the competencies of the responsible ministry are in this regard.

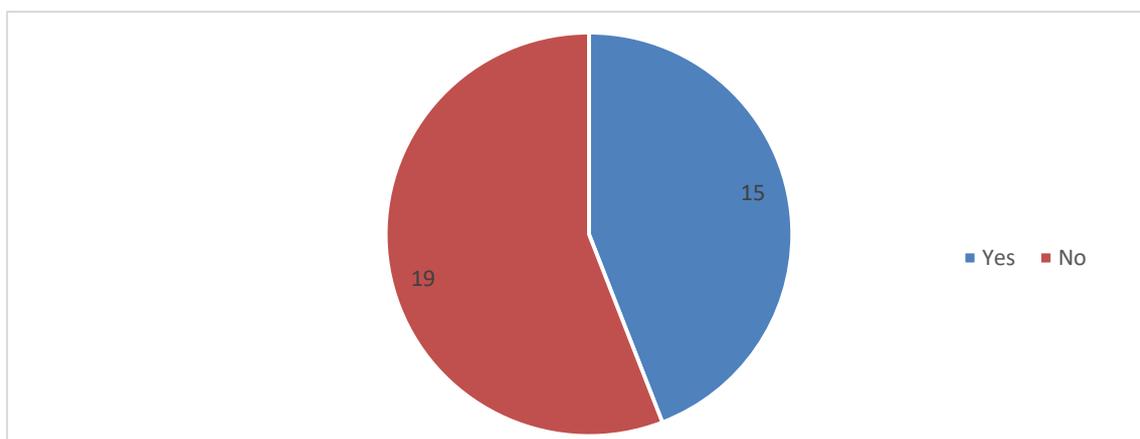
Answer	N
Competencies related to policy and/or strategy	36
Competencies related to legislative matters	12
Competencies related to harmonisation	13
Competencies related to international representation and/or coordination	11
Competencies related to monitoring and implementation	11
Competencies related to radio spectrum	13
Competencies related to emergency communication	5
Competencies related to consumer's right and/or consumer's protection	6
Competencies related to national and/or cyber security	5
Competencies related to geographic broadband mapping	3
Competencies related to investment and research promotions	6
Competencies related to budgetary matters	3
Competencies related to domain names	2

Answer	N
Competencies related to infrastructure	7
Other	24

N=33

Note: In the case of 'Other' the competencies relate to the collection and processing of statistical data, approve the providers of universal service and its respective procedures, ICT and television sectors, electronic communications, fast and ultra-fast internet access, international roaming, national-level preparation and follow-up of transport and communications matters, access to markets for SME's, digital connectivity, transpose EC's, CEPT's, ITU's decisions and recommendations, decide about the universal service obligation, carry out other duties specified by the law, provide for the enforcement of the strategic agenda related to info-communications, universal access to high speed broadband, enhance connected communities, enhance engagement with a younger audience, designation of universal service providers, designation of service providers for supplement services, allocation of means of identification to specific purpose of use, support the development of a diverse media landscape, instruct the NRA to consider cases within the scope of its act and supervision of NRA's head.

Question 10. Does any other government body or agency have regulatory competencies as defined under the European Electronic Communications Code?



N=34

Question 11. Which government body or agency is it?

Answer	N
Electronic communication authority	3
Emergency response authority	3
Ministry	3
Audio-visual Media Authority	2
Body responsible for radio spectrum	2
Data supply and infrastructure authority	2
Other	4

N=15

Note: Regarding 'Other', there are business authorities, cybersecurity authorities, competition authorities and information system authorities.

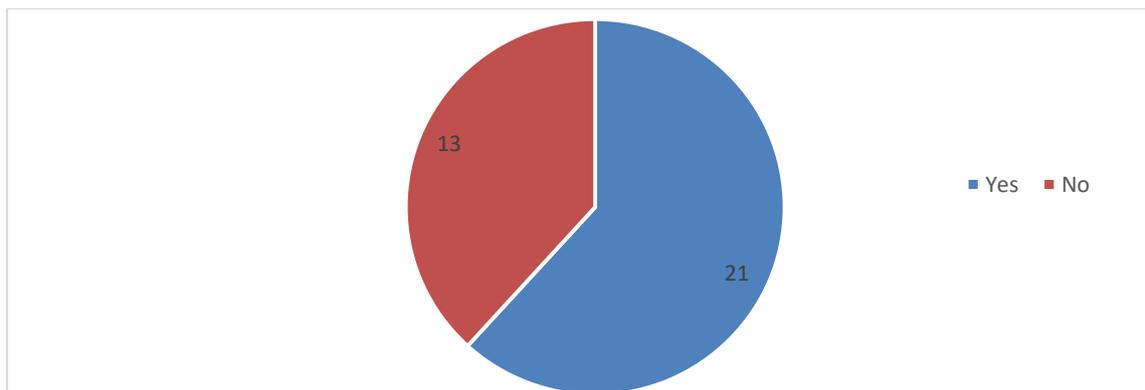
Question 12. Please explain what the competencies of this body or agency are in the electronic communications sector.

Answer	N
Competencies related to emergency communication	2
Competencies related to cybersecurity	4
Competencies related to radio frequency management	17
Competencies related to licenses for satellites and other radio materials	5
Competencies related to consumer's right and/or protection	2
Other	11

N=14

Note: Regarding 'Other', the following competencies are mentioned: licensing in the case of an event, cooperating with the competent electronic communication institutions of other countries in accordance with competence, cooperate with international institutions and organisations in the field of electronic communications and participate in their work in order to promote the effective use of radio frequency spectrum, provide advice regarding market-shaping and competition elements, provide open internet access, international roaming, provision of universal service and numbering issues, digital transformation, regulate electronic communication and regulate audio-visual media services.

Question 13. Is there a specific definition of independence of the electronic communications NRA formulated in the national law?



N=34

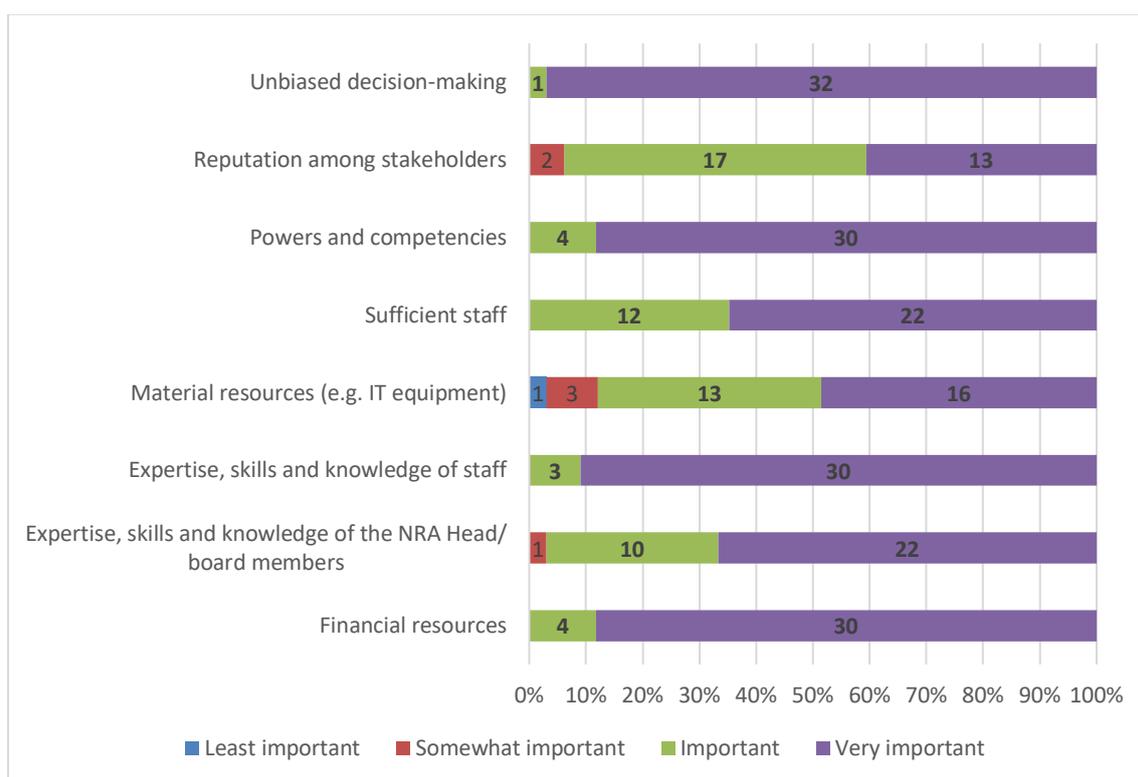
Question 14. Please provide the definition of independence of the electronic communications NRA as formulated in the law.

Responses
The NRA is a regulatory body in the field of electronic communications and postal services which supervises the regulatory framework. It is a public, independent, non-budgetary, legal entity, which exercises its activities in compliance with the legislation in force
The NRA is a competent national regulatory authority, where the managing director acts independently and members shall not be bound by instructions in the performance of their duties
The members of the council may not hold any interest in companies that are active in the telecommunications and/or postal services market, nor may they directly or indirectly perform any duties or services for them
The NRA is functionally independent and a non-profit institution with the status of a legal entity. In performing its duties, it acts in accordance with the principles of objectivity, transparency and non-discrimination
The NRA is an independent organisation that administratively reports to the Minister

Responses
The NRA shall be independent in the fulfilment of its functions specified by law, and it shall not be subordinated to the state or local government authorities
The NRA is an independent state institution that regulates the activities of electronic communications and supervises compliances with the provision of the law. It shall act independently, impartially and transparently and makes decisions independent of any state or municipal institution, company, body or other organisation
The NRA shall be legally separate and functionally independent from any natural or legal person providing electronic communications networks, equipment or services. It will exercise its power impartially, transparently and in timely manner. The NRA shall act independently and objectively, shall conduct its activities in a transparent and accountable manner in accordance with European Union law, and shall not seek or take instructions with regard to the performance of its tasks
The NRA shall act independently and objectively in the exercise of its functions at law. It will operate in a transparent and accountable manner in accordance with EU law, and not seek or take instructions from any other person
The NRA may not be instructed
The NRA is organically, functionally and technically independent in the exercise of its functions. It is not subject to government superintendence or tutelage in the exercise of its functions, and it's financially independent.
The NRA is an independent, non-profit regulatory body of the electronic communications market, it is a legal entity with public empowers
The NRA is an autonomous organisation with the status of a legal entity which exercises public authorities in order to effectively implement the established electronic communications policy. It is functionally and financially independent of the government authorities, organisations and entities engaged in the electronic communications
The NRA is a regulatory authority that acts impartially and independently in its performance, it may not be influenced by other public authorities in the exercise of its regulatory and pricing powers.
The NRA operates independently of natural persons and legal entities

N=21

Question 15. From your perspective, please assess the importance of the following elements or aspects of your independence.

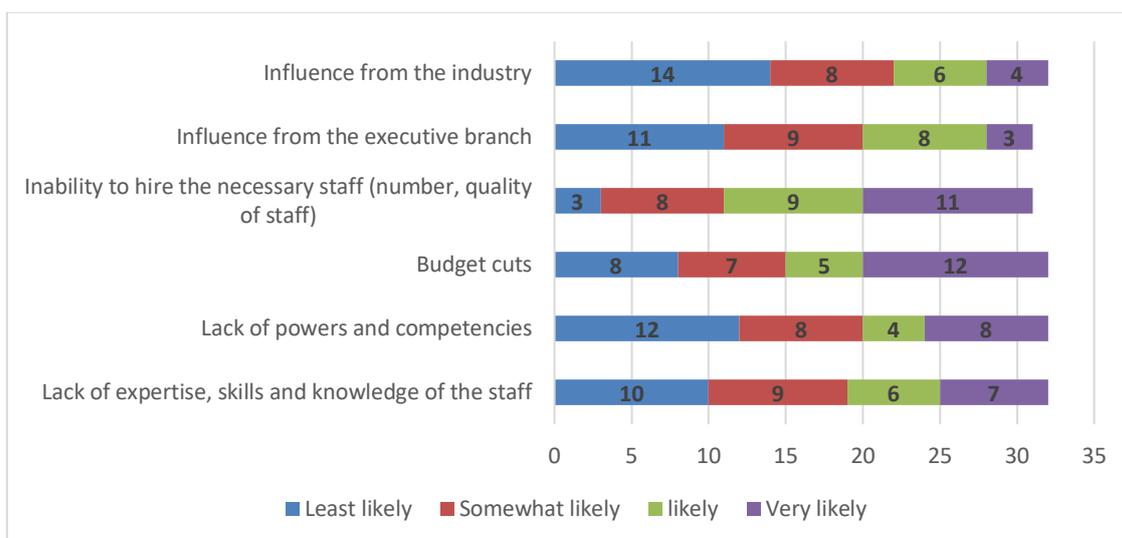


N=34

Fourteen respondents indicated 'Others'. They provided the following inputs:

Others	Importance
Fixed term mandates for the Counsel	important
Ability to define own organisation structure and related numbers/profiles of staff	important
Separate annual budget, transparent and budgetary control	very important
Removal of key staff & principals	very important
Transparency	important
Staff salaries	very important
Exercise control over NRA structure and personal resources	very important
Inviolability of management in terms of resolution	very important
Managerial autonomy	important
Ability to set salaries according to the tasks performed – e.g. to have some categories of staff outside the usual state salaries tables	important
Change in the scope of legislation under which the NRA operates	very important
Exercise control over NRA by audits and inspections	very important
Greater freedom to create employees' salaries	very important
Reporting obligations (e.g. to Parliament)	very important

Question 16. Please assess how likely the following issues or challenges are in threatening your independence.



N=34

Four respondents indicated 'Others'. They provided the following inputs:

Others	Importance
Government's assistance requests impacting on workload and workplan execution	very likely
Delay in approving the budget.	very likely
On the 'lack of powers and competencies", we believe that tasks and powers as defined in the EECC and transposed into national law are fine. However, in perspective, adequate tools and competences shall keep track with digital developments	somewhat likely
early resolution of the Director	very likely

Question 17. Does the legal framework of your country explicitly provide for the independence of electronic communications NRA?

Answer	N
Yes	29
No	0
Other	5

N=34

Note: Four of the five respondents who answered with 'Other', all had an answer leading to 'Yes' and one respondent's answer leading to 'No'

Question 18. By which legal document is the independence status of the electronic communications NRA ensured? Please add a URL to your response and quote relevant law provisions, if available.

Answer	N
Independence of the electronic communications NRA is established per law	19
Independence of the electronic communications NRA is established per law on electronic communications	7

Answer	N
Other	3

N=29

Note: In the case of 'Other', the independence of the electronic communications NRA is established in the establishing act, statutes or by European legislation

Question 19. Has the transposition of the European Code for Electronic Communications been completed in your country?

Answer	N
Yes	23
No	8
Other	3

N=34

Note: For two respondents who choose 'Other', the European Code for Electronic Communications was almost completed and for one respondent, the transposition was problematic

Question 20. What powers does the national legal framework provide for the electronic communications NRA?

Answer	N
Implementation of ex-ante market regulation, including the imposition of access and interconnection obligations	33/34
Ensuring the resolution of disputes between undertakings	34
Carrying out radio spectrum management and decisions	28
Providing advice regarding the market-shaping and competition of national processes related to the rights to use of radio spectrum	29
Contributing to the protection of end-user rights	33
Assessing and monitoring closely market-shaping and competition issues regarding open internet access	29
Assessing the unfair burden and calculating the net cost of the provision of universal service	29
Issuing general authorisation	28
Collecting necessary data and other information from market participants	34
Cooperating with other NRAs	33
Other	15

N=34

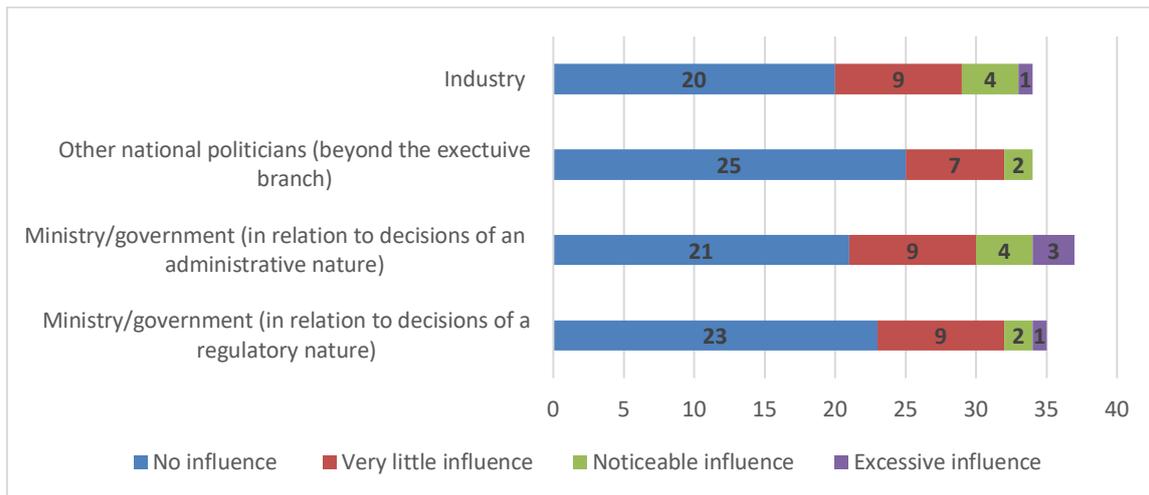
Note: Other powers for electronic communications NRAs include: power to administer domains, handle objection procedures, issuing licenses for provision of electronic communication networks and services, provide advice to the Minister, responsible for power rate services, enforcement of roaming regulations, product safety under radio equipment, open internet access regulation, enforcement of broadband cost reduction directive, settling disputes between users and operators, broadband networks mapping, implementing sectoral end-user protection rules, collect data on the infrastructure development plans of broadband electronic communications, consult target areas of state support measures, achievable results, wholesale access products, access conditions and prices of subsidised infrastructure, supervision of trust service providers, e-signature, child online protection, hotline, railway market supervision co-operate with the Ministry on spectrum management, numbering plan, market supervision, code of practise, grant the rights of use for radio frequencies or/and numbers

Question 21. Does the national legal framework provide for sufficient powers to implement the legal mandate of the electronic communications NRA?

Answer	N
Yes	30
No	4

N=34

Question 22. How much influence on the decision-making does your NRA experiences on a daily basis from the following actors?



N=34

Question 23 Who makes the NRA decisions in the area of electronic communications?

Answer	N
NRA Head	19
An authorised official other than the NRA Head	7
A collective body (board)	15
Other	6

N=34

Note: For the answers for 'Other', all six answers are a combination of the other options.

Question 25. Please explain how the collective body takes decisions in the area of electronic communications?

Answer	N
Voting	6
Decisions are taken unanimous/collegial/collective/deliberative	5
No details	1

N=12

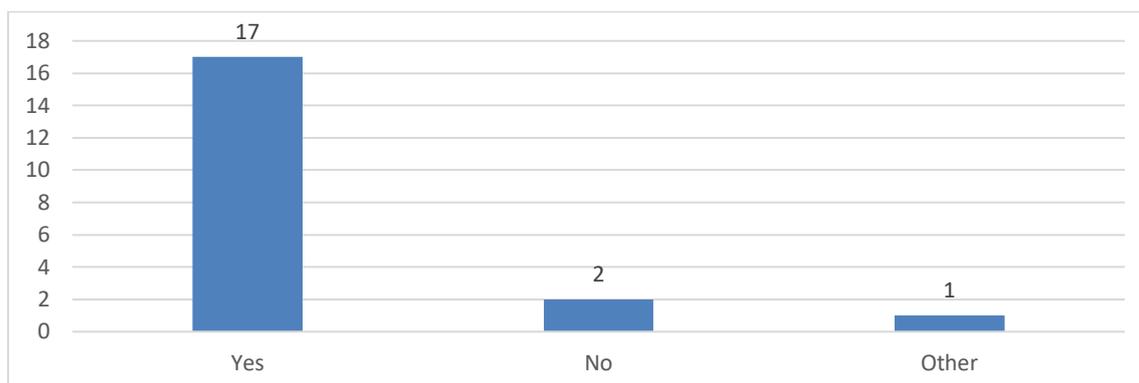
Question 26. Are there any decisions regarding the organisation, structure or activities of the electronic communications NRA that legally require consultation with or approval of the government/Ministry?

Answer	N
Financial decisions	13
Decisions on the organisational structure of the NRA	10
Decisions on international cooperation	5
Decisions on cooperation with other national institutions/authorities	1
Decisions on ex-ante market regulations	1
Decisions on a radio spectrum management	12
The NRA does not require consultation or approval from the Ministry/government in any of its activities	8
Other	16

N=34

Note: Regarding 'Other', eight answers focused on budget/financial management, five on organisational aspects and work plan and six on spectrum management, frequency licence or national numbering

Question 27. Are the circumstances in which consultations or approval is required or permitted clear and the process sufficiently transparent, and the failure to observe procedures and the regulatory decision or outcome subject to sufficient review to safeguard integrity?



N=20

Question 28. Please indicate whether the electronic communications NRA receives instructions/guidance from the government regarding:

Answer	N
Financial decisions	4
Decisions on the organisational structure of the NRA	1
Decisions on international cooperation	13
Decisions on cooperation with other national institutions/authorities	7
Decisions on ex-ante market regulations	1/2
Decisions on a radio spectrum management	1
The NRA does not require consultation or approval from the Ministry/government in any of its activities	13
Other	11

N=33

Note: Regarding 'Other', most answers focused on budgetary issues, followed by general public sector guidelines and similar operation issues

Question 29. Is the electronic communications NRA obligated to follow these guidance/instructions from the government

Answer	N
Yes	14
No	2
Other	5

N=20

Question 30. What happens if the NRA does not follow the guidance/instructions from the government

Answer	Frequency (from most frequent to less frequent less)
Legal consequences/Dismissal	↓
Financial consequences	
Other	

N=21

Note In the case of 'Other', one Member State does not have a lawful regulation, or it has never occurred that the NRA does not follow guidelines/instructions from the government. In one case, it was noted that these guidelines/instructions are not of a controversial nature.

Question 31. Does the electronic communication NRA have the same treatment by Government, and required to follow the same rules as other national independent regulators for other sectors

Answer	N
The electronic communication NRA enjoys high level of independence compared to some other sectoral regulators	6
The electronic communication NRA enjoys the same level of independence compared to some other sectoral regulators	21
The electronic communication NRA enjoys lower level of independence compared to some other sectoral regulators	4

N=31

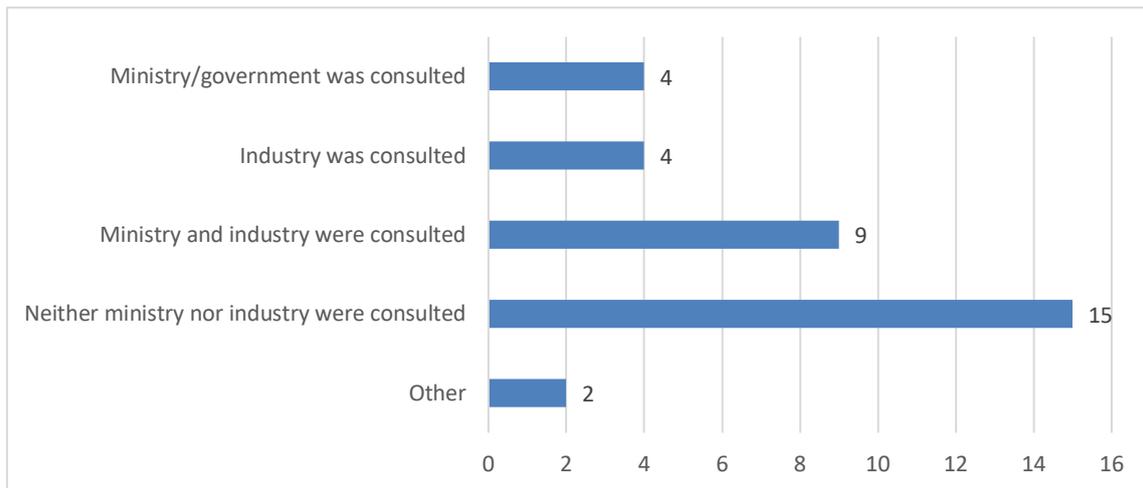
OPERATIONAL INDEPENDENCE

Question 32. Does the NRA decide autonomously on its own strategy? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	32
No	2

N=34

Question 33. Was the ministry or the industry consulted in the preparation of the NRA strategy? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Note: In the case of 'Other' a GVT strategy seems to be followed, instead making its own

Question 34. How was this consultation taken into account?

Answer	Frequency (from most frequent to least frequent)
Public consultations are organised	↓
Sensible amendments based on consultations are reflected into the strategy	
Consultation was opened and all contributions were taken into account	

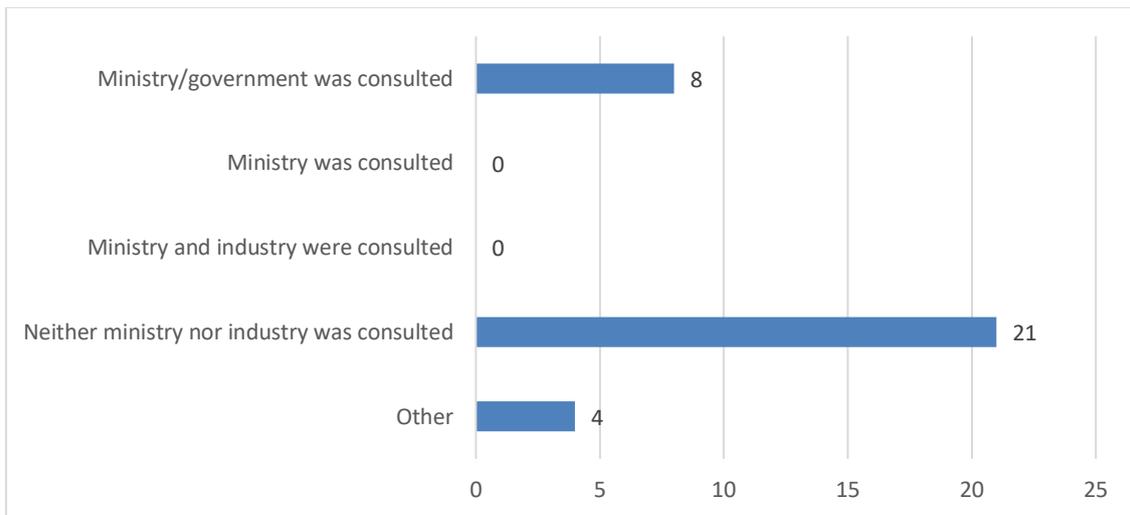
N=14

Question 35. Does the NRA decide autonomously on its internal organisation? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	24
No	7
Other	2

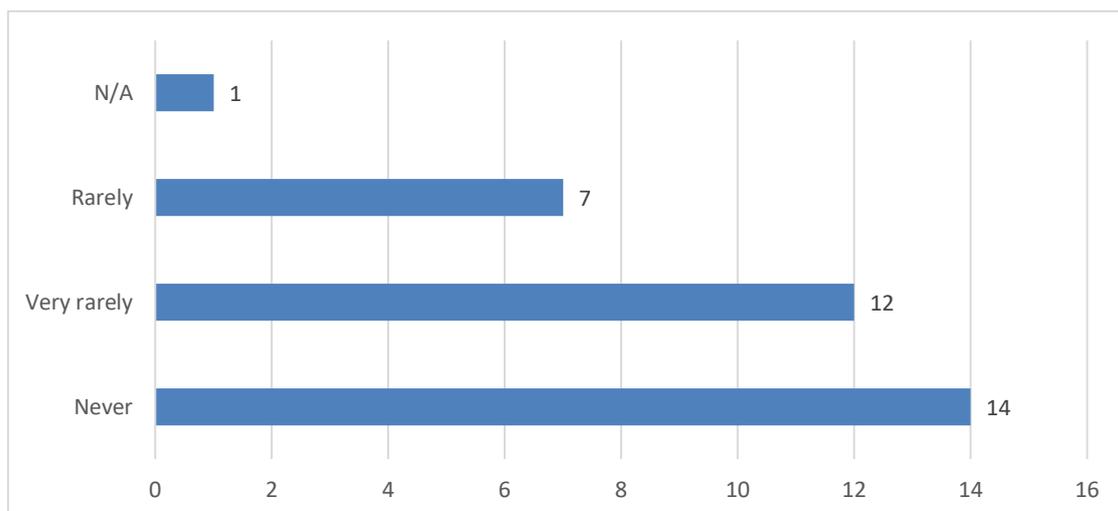
N=33

Question 36. Does the NRA decide autonomously on its internal organisation? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



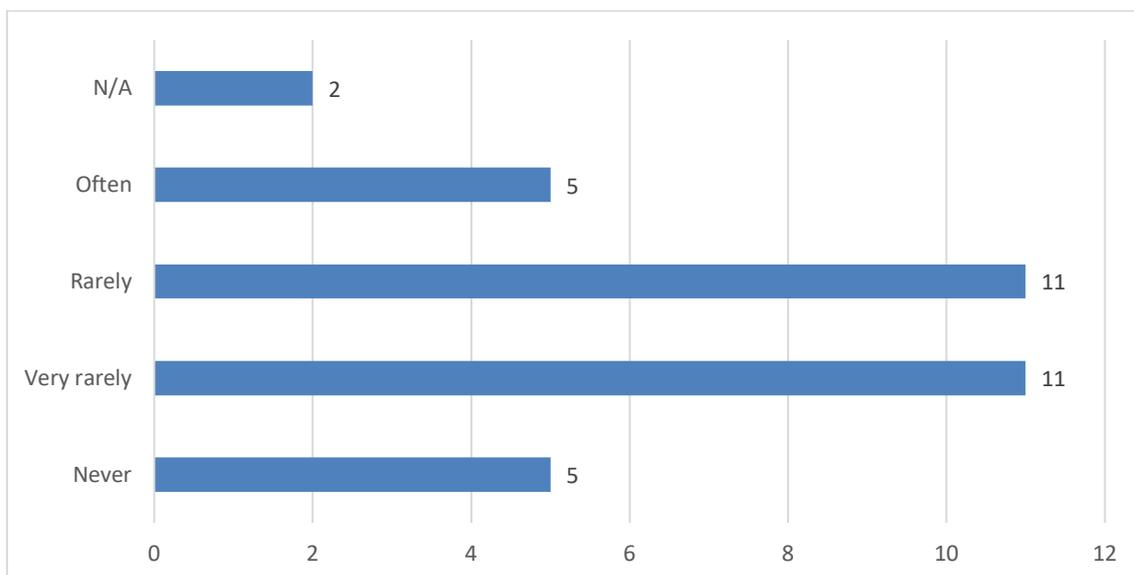
N=33

Question 38. How often have the executive and elected politicians (government/Parliament) publicly disagreed with the NRA's decisions (over the last three years)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Question 39. How often has the NRA been publicly criticised in the media (over the last three years)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Question 40. How does the NRA react to public criticism (considering the last three year)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Ignore	11
Issue comments/ press release on NRA's own webpage	2
Issue comments on the social media	9
Reach out to the media outlets with interviews/comments	17
Others	5

N=34

Note: In the case of 'Other', two answers were a combination of the above options, one explained the use of both social media and own webpage and two explained a response to journalists.

Question 41-42. How is the decision on the budget for electronic communications NRA (i.e. budget formation) taken?

Answer	N
Budget is prepared and decided autonomously by the electronic communications NRA with no approval from any other entity	6
Budget is prepared by the electronic communications NRA, then needs are discussed/renewed and decided by the multi-sector regulator of which the NRA is part	0
Budget proposal is made by the electronic communications NRA and then approved by the responsible ministry/government	12
Budget proposal is made by the electronic communications NRA, reviewed by the multi-sector regulator and then approved by the responsible ministry/government	0

Answer	N
Budget proposal is made by the electronic communications NRA and then approved by the parliament	6
Budget proposal is made by the electronic communications NRA, reviewed by the multi-sector regulator and then approved by the parliament	0
Budget is prepared by the responsible ministry and approved by the parliament	5
Budget is prepared and decided entirely by the responsible ministry/ government	0
Budget made by NRA, approved by ministry, government, then voted in Parliament	4

N=34

Question 43. Have you experienced delays in getting the relevant approval from the Ministry/government that had a negative impact on the ability of the electronic communications NRA to execute its work programme?

Answer	N
Yes	4
No	7

N=8

Question 44. Is the budget of the NRA separate from the government/responsible Ministry budget? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	30
No	4

N=34

Question 45. Are there mechanisms against budget cuts imposed by the Ministry/government? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	0
No	18
Other	13

N=31

Note. In the case of 'Other', most answers are related to the fact that budget is fixed in an annual state budget and cannot be cut by the Ministry alone, but GVT can propose cuts to parliament

Question 46. Did you encounter the cancelling of your budget or changes directly imposed by the Ministry/government over the last three years? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	6
No	28

N=34

Question 47. is the NRA's budget planned/divided according to tasks? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	24
No	9
Other	1

N=34

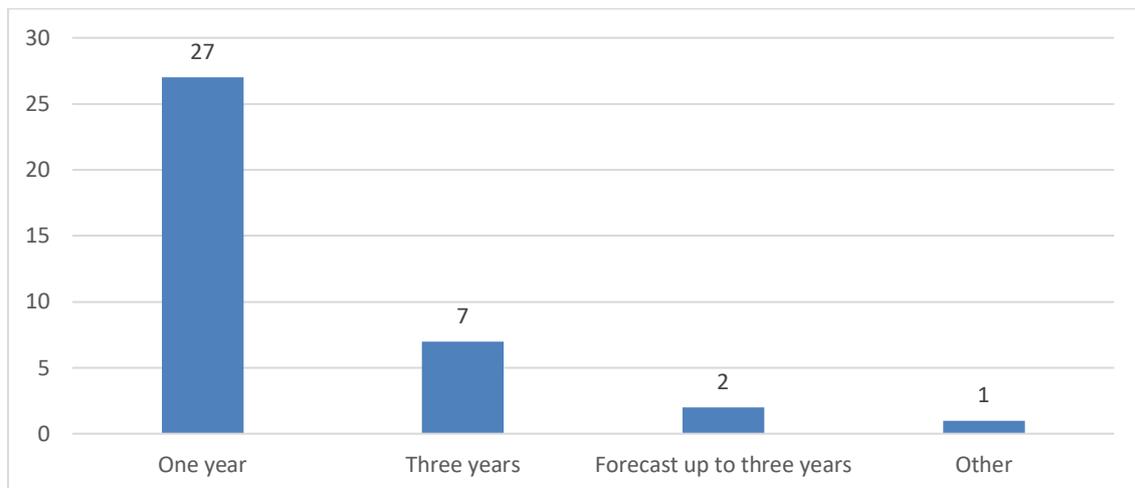
Question 48. What are the criteria for the budget distribution per specific task? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
On the basis of a proposal from the NRA	11
On the basis of a number of employees	1
On the basis of priority according to the NRA strategy/action plan	8
Other	5

N=25

Note: In the case of 'Other', three answers are a combination of both option one and three.

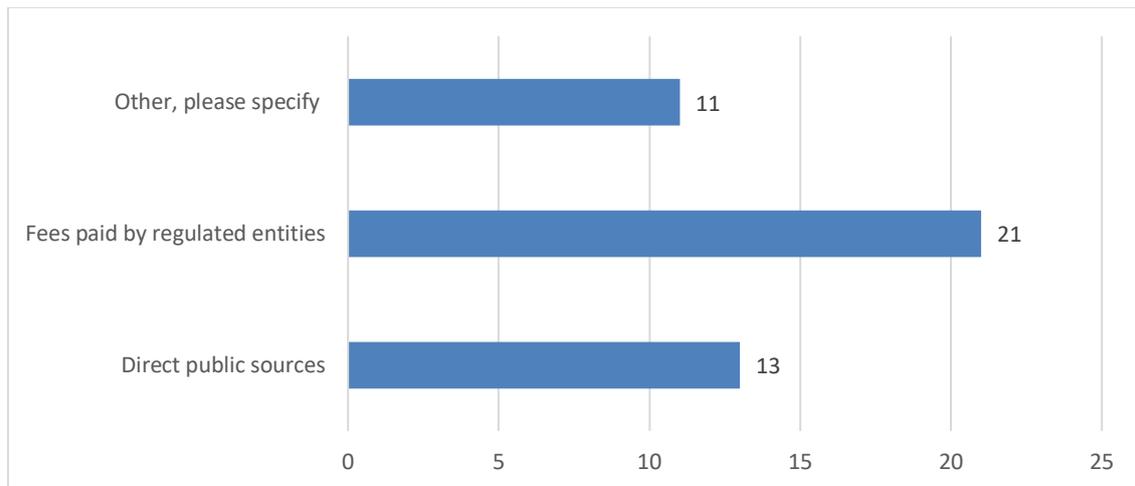
Question 49. For how long is the budget planned? Please write how many months or years.



N=34

Note: For the one case in the category 'Other', the budget is submitted in Q3 and is planned for the next calendar year. It is thus planned for a 18 months ending horizon. The budget is also supplemented by the next two calendar years. The process is repeated each year and thus the approval of one year, does not necessarily means an approval for the next two years.

Question 50. What sources of financing does the NRA have? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Note: In the case of 'Other', licenses, state budget, fines and confiscated goods were mentioned as sources of financing.

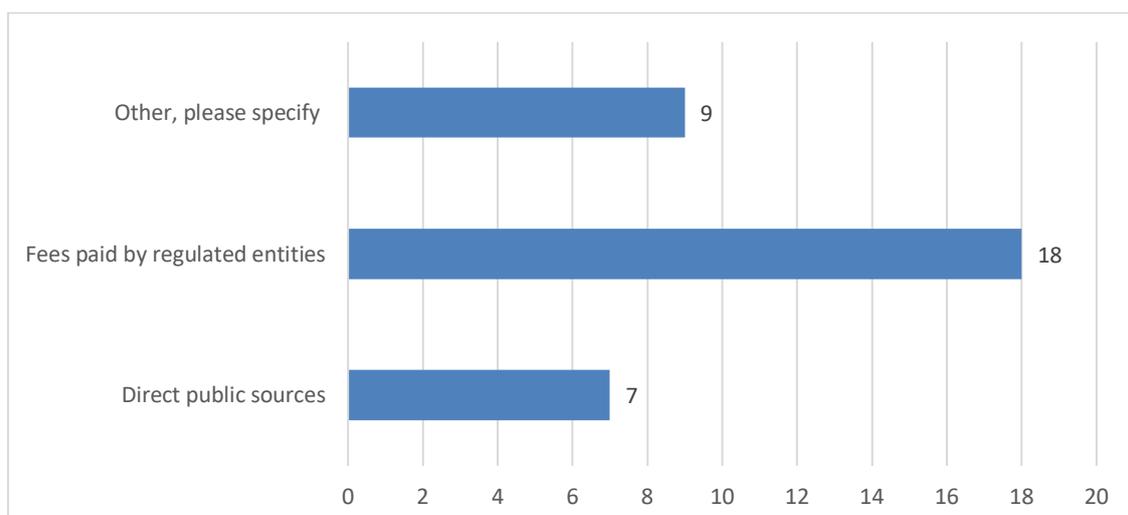
Question 51. What is the approximate share of each funding source in your budget?

Funding source	Percentage of the budget	N
Direct public sources	100%	8
Indirect public sources	0	0
Fees paid by regulated entities	80% or more	17
	70% or more	21
Other	100%	2

N=34

Note: In the case of 'Other', money comes from the state budget

Question 52. Please select only those sources of financing with regard to which NA has no constraints to allocate and spend the budget? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Note: In the case of 'Other', own share of budget, all spending is capped, fees levied can only be used for that chapter of expenditure were mentioned as sources of financing to which the NRA has no constraints to allocate and spend budget.

Question 53. Are there clear budgeting (spending) guidelines in place? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	29
No	2
Other	3

N=34

Note: Regarding 'Other', the budget limits are included in the national budget, or the NRA is subject to the general legal provisions. Lastly, the budgeting decisions are made by the ministry of finance and ministers.

Question 54 Please provide examples of such guidelines.

Answer	N
Reference to General State Budget Law	22
Reference to preparation of budget	1
Other	6

N=29

Note: Regarding 'Other', one example stated that service, utility and rental expenses are planned in line with the rate of inflation and gave an explanation regarding the increase in wage costs, which is planned as a percentage of the average earnings of the second year, preceding the current year. Another example stated that internal guidelines are in place regarding the NRA budget. Lastly, one example was given which stated that salaries are set according to public service sales.

Question 55 Are the NRA's financial statements subject to external approval? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	22
No	12

N=34

Question 56 Are the NRA's financial statements subject to checks after the financial term? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	33
No	0

N=33

Question 57 What are the verification criteria? What is their legal basis?

Answer	N
National Accounting or Audit Standards	18
International Accounting or Audit Standards	2

N=33

Note: In some cases, the question was misinterpreted and respondents stated the responsible organisation for conducting the audit. In most cases, this is done by a national court of auditors or by the Ministry of Finance. In one case, there is a responsible committee within the NRA and in two other cases, an independent auditor is assigned to conduct the audit.

Question 58 How often has the NRA been reprimanded for the execution of the budget in the last three years? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Times reprimanded	Number of respondents
Zero	9
One	2
Two	1
Three	1

N=13

Question 59 What were the consequences (e.g. budget cuts, more expenditure control)?

Times reprimanded	Consequences
3	There were no consequences
1	Member State 1: There were no consequences, as there was no criticism Member State 2: There were budget cuts
2	Regular audits were implemented, where one of these lead to a sanction

N=4

Question 60 Is the NRA's funding adequate to allow it to fulfil its responsibilities, taking into account the size, complexity and types of functions? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Not sufficient	2
Barely sufficient	9
Sufficient	23

N=34

PERSONNEL INDEPENDENCE

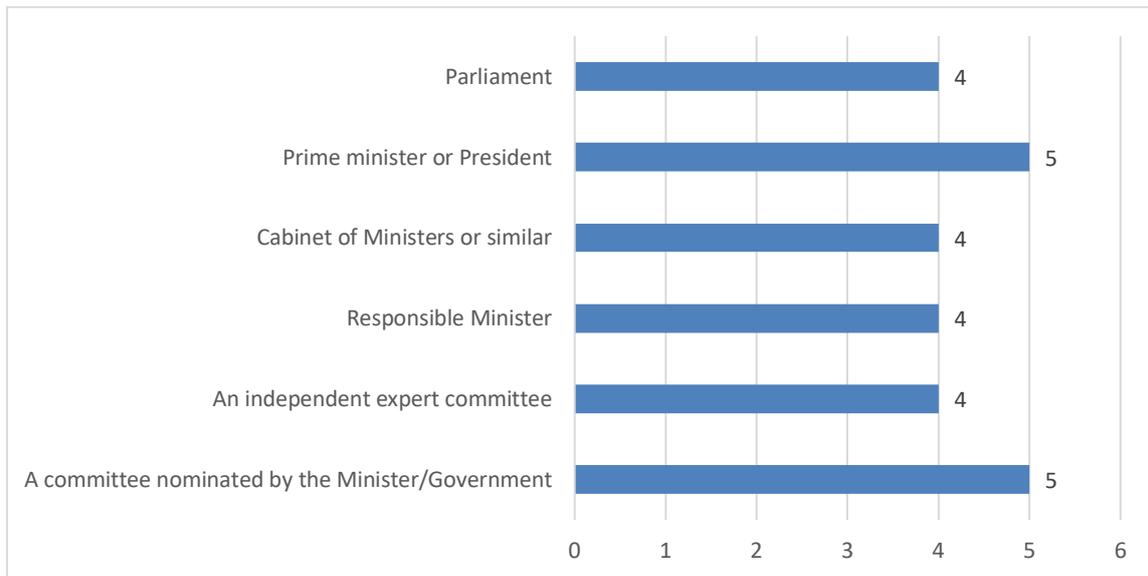
Question 61 According to your national law, is there an open competition for the NRA's head? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	25
No	5
Other	3

N=33

Note: 'Other' refers to the following for Member States: for one Member State, the Members of Council and Char are appointed and dismissed by the government and an open selection is included, but it is used to create a short list of candidates. For another Member State, the Head is appointed by the government upon recommendation of an advisory board. For the last Member States, the head of the NRA is the Chairman of the board, who is appointed by a minister, which is done in an open and transparent way.

Question 62 Who chooses the NRA's head? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



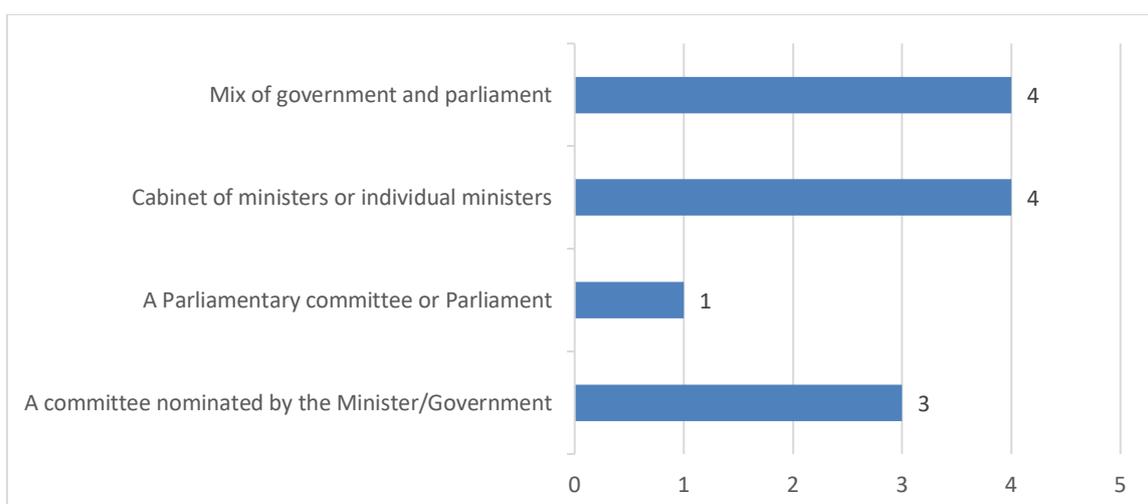
N=24

Question 64 According to your national law, is there an open competition for the members of the NRA's board? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	12
No	4
Other	2

N=18

Question 65 Who chooses the members of the NRA's board? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



N=11

Question 67 Are all members of the NRA's board appointed at the same time or does the procedure envisage rotation? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
There is a rotation	12
All board members are appointed at the same time	6

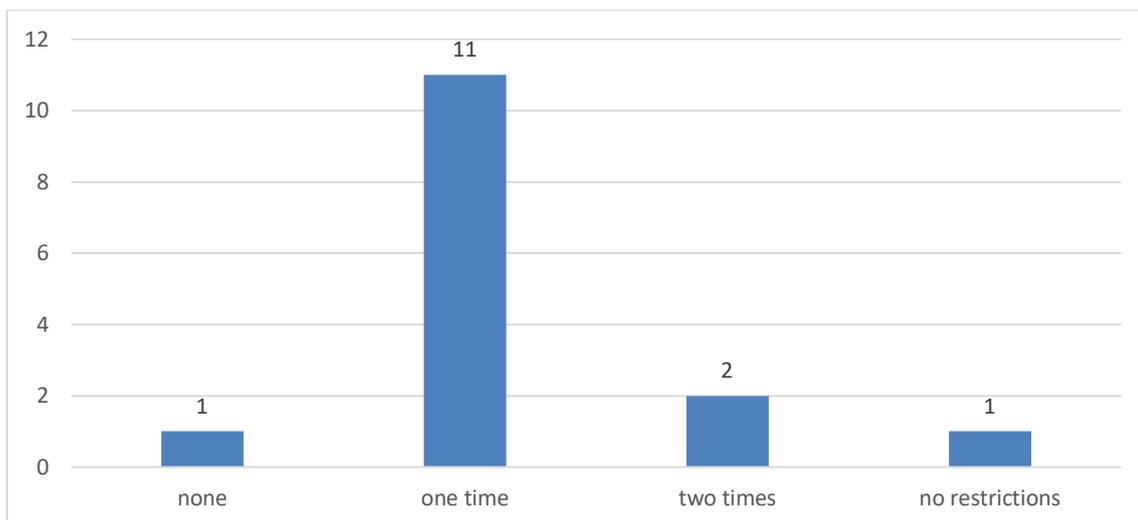
N=18

Question 68 Is the mandate of the NRA's head renewable? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	12
No	6

N=18

Question 69 How many renewals are allowed?

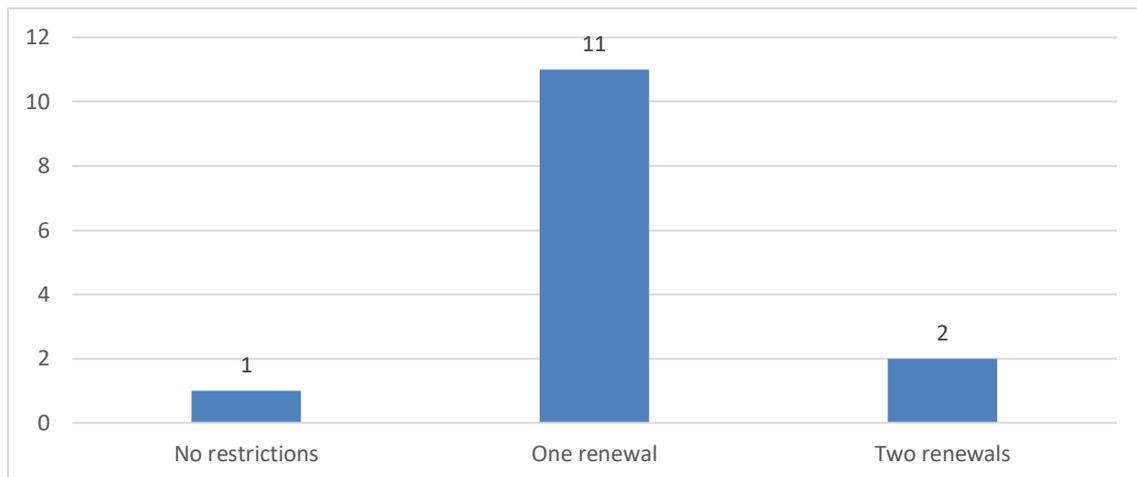


N=15

Question 70 Is the mandate of the board members renewable? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	19
No	3

N=22

Question 71 How many renewals are allowed?

N=14

Question 72 does the law prescribe specific professional eligibility requirements for the NRA's head? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	24
No	8
Other	1

N=33

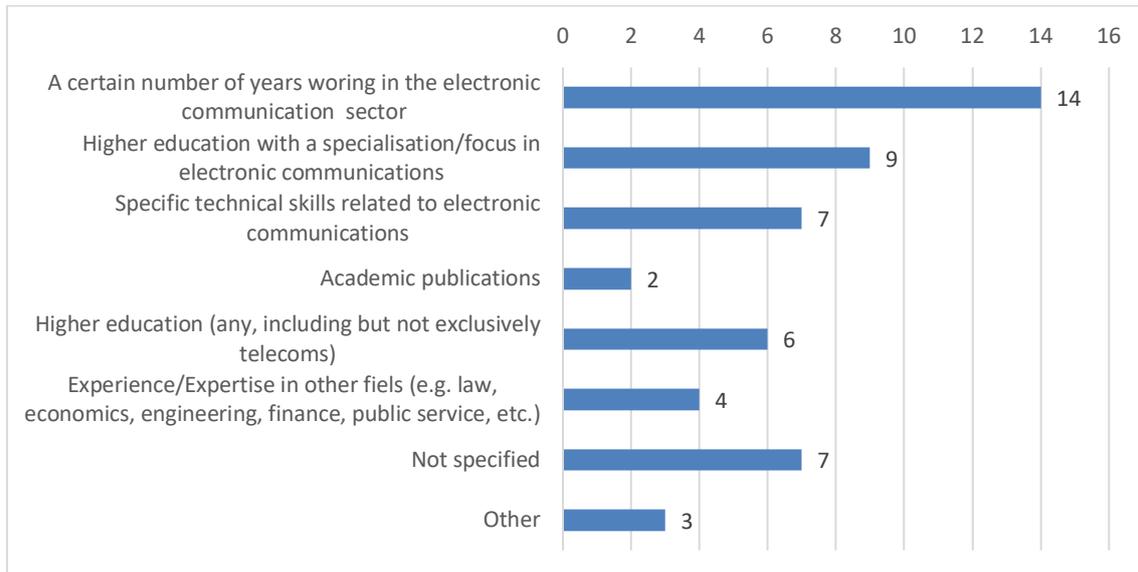
Note: In the case of 'Other' the members are nominated because of their economic, legal and technical qualifications

Question 73 does the law prescribe specific professional eligibility requirements for the members of the NRA's board? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	16
No	6

N=22

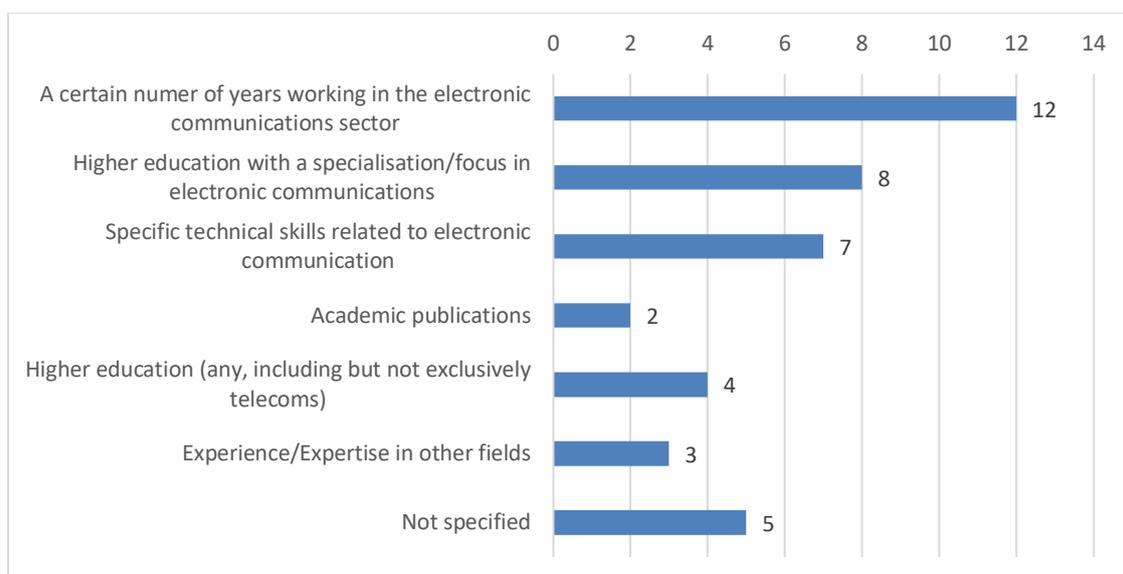
Question 74 On the basis of what evidence is the assessment of expertise of the NRA's head made? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



N=27

Note: In the case of 'Other' the person is assessed based on the fact that he/she has full legal capacity, is a person of integrity and has a second-level university education. In another case, it is a combination of expertise and skills required for the task. In the last case, the person is assessed based on suitability, technical competence, aptitude, professional experience and training adequate to the exercise of the respective functions.

Question 75 On the basis of what evidence is the assessment of expertise of the board members made? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



N=27

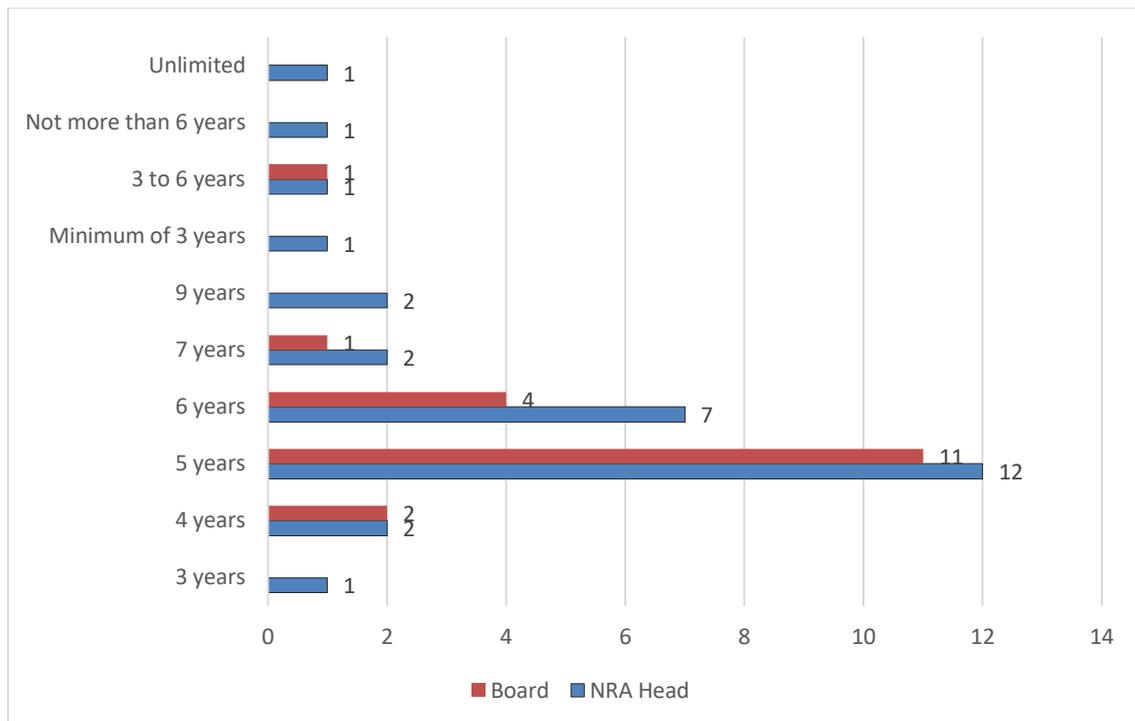
Question 76 what guarantees exist for the independence of the NRA's leadership? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Protection from the premature dismissal	28
Immunity from personal liability for the actions in official states	5
Other	4

N=32

Note. In the case of 'Other', the independence of the NRA's leadership is guaranteed by a cooling off period in one Member State. In another Member State, the area of independence is specified by law. In a different Member State, the president and members of council will submit a declaration of absence regarding their interests they hold and positions they hold, or services they render in an enterprise. Lastly, in one Member State, the NRA has a right to conclude for its president and vice-president professional liability insurance contracts, for damages caused during their performance or specific duties in the exercise of mandate.

Question 77. How long are the terms of office for the head and the board of the NRA? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



N=31

Question 78. Is the duration of the mandate tied to electoral cycles

Answer	N
Yes	0
No	34

N=34

Question 78. Can the NRA's head be dismissed from their position prior to the end of the term of the office? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	27
No	5

N=32

Question 80. Please describe the reasons for the premature dismissal.

Answer	N
Physically or mentally incapable of carrying out tasks	11
Death	3
Resignation or retirement	9
Convicted of a crime	10
Appointed or running for parliament or other (local) government body	3
Unable to carry out tasks for six (consecutive) months (or more)	8
Loss of eligibility	8
Incompatibility	3
Conflict of interest	5
Failure to perform or carrying out assigned tasks	7
Other	16

N=26

Note: In the case of 'Other', the head of the NRA can be prematurely dismissed if the head failed to provide relevant information during the election process or failed to comply with obligations of transparency, if their behaviour is inconsistent with the office or degraded the name of the council. Another reason for premature dismissal could be if the head makes it difficult or impossible for the NRA to perform its activities, or if the head is deprived of its legal capacity. The head of the NRA can also be dismissed when it loses its citizenship, or if it no longer complies with public sector ethics. In another Member State, he/she can be dismissed after an evaluation with the final comment 'insufficient'. In one Member State breach of mandate is also a reason for premature dismissal

Question 81. Can the members of the Board be dismissed from their positions before the end of the term of office? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	19
No	3

N=22

Question 82. Please describe the reasons for the premature dismissal.

Answer	N
Physically or mentally incapable of carrying out tasks	7
Death	1
Resignation or retirement	7
Convicted of a crime	9
Appointed or running for parliament or other (local) government body	3
Unable to carry out tasks for six (consecutive) months (or more)	6
Loss of eligibility	5
Incompatibility	2
Conflict of interest	6
Failure to perform or carrying on assigned tasks	5
Other	15

N=19

Note: In the case of 'Other', the members of the Board can be prematurely dismissed in the case of a violation of the code of ethics. In two Member States, members can be dismissed if it is found that they have provided wrong or omitted data that was relevant for their application. Another reason for premature dismissal is behaviour that questions the suitability or ability to continue as a member of the Board, or stated misbehaviour. Another reason for dismissal could be the loss of citizenship, if the member is deprived of legal capacity, or degrading of the name of the council. Other reasons for premature dismissal relate to a breach of mandate, the conviction of one council member or an evaluation with the final comment 'insufficient'.

Question 83. How often were the head or member of the board of the NRA dismissed or replaced before the end of their term of office in the last ten years? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Never	19
Once	3
Twice	3
Six times	1

N=29

Question 84. Does the NRA have the autonomy to decide the number of employees (without approvals by other bodies)? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	17
No	15
Other	1

N=33

Note: In the case of 'Other', the NRA can hire employees within a maximum staff limit which is defined via a Prime Minister's decree

Question 85. Does the NRA have the autonomy to hire new employees (without the approval by other bodies)? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	23
No	8
Other	2

N=33

Note: In the case of 'Other'; for one Member State, a mechanism of centralised selection of new employees is established. For the other Member State, it is possible to hire new employees within the range of binding indicators set by responsible ministries.

Question 86. Which procedures are used for hiring? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Open public competition	29
Other procedure	8

N=34

Question 87. What is the legal status of the NRA's employees? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Civil servant	23
Private law contract	8
Mix of public and private contracts	1
Other	3

N=34

Note: In the case of 'Other'; for one Member State the legal status is a combination of both public law contracts and civil servants. In another Member State, the legal status is a mix of public and private contracts, but all of them are considered civil servants. In the last Member State, the law states that the authority shall make appointments of officers and other staff, and establish the terms and conditions of such employment. However, this is subject to specific government rules.

Question 88. Does the NRA have the autonomy to determine the salary of its staff (without approval by other bodies)? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	15
No	14
Other	5

N=34

Note: In the case of 'Other'; for one Member State the salaries are based on a salary scale. In another case, the salaries are determined by the NRA autonomously within the confines of pre-defined quotas. In a different Member State, staff salaries are defined based on reference charts applying to the national bank and the competition authority. Additionally, there is no approval needed. In a fourth Member State, the NRA is allowed to determine salaries but within the limits set by legislation. For the last Member State, the NRA has no authority to determine the salary of its staff.

Question 89. Are the salaries of the NRA's employees at the market level (or close)? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	11
No	9
Other	14

N=34

Note: Related to 'Other', for ten of the fourteen Member States the answer to the question depends on the level of the function. For two other Member States, the salaries are bound by restrictions or laws and two other Member States did not provide any further information.

Question 90. Does the NRA have the autonomy to give promotions to its staff or to create new positions (without approval of other bodies)? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	22
No	8
Other	4

N=34

Note: For Member States who answered with 'Other', in two Member States, the NRA requires approval of the government to create new positions but it has authority to decide on internal promotions. In one Member State, the NRA cannot create new positions, only changes within the structure can be made. In the last Member State, the NRA can hire new employees within its budget and it has authority to give promotions.

Question 91. How does the NRA ensure that its staff receive adequate ongoing training to expand or keep their expertise up to date? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Regular training in-house	28
Regular external training	33
Sabbaticals	2
Other	4

N=33

Note: For Member States who answered with 'Other'; in one Member State, the NRA outsources staff to other organisations. In another Member State, there is an exchange of internal experience. In a third Member State, there is a sponsorship of academic courses. Lastly, in the fourth Member State, the NRA has not enough budget to ensure adequate professional development of employees.

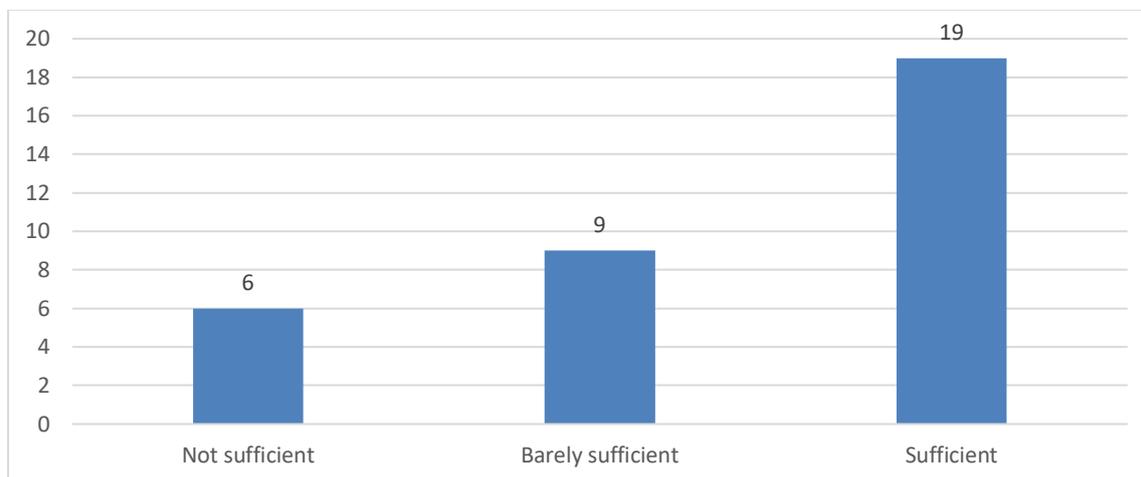
Question 92. Is there any restriction to the use of the funds available to the NRA and/or the requirement to obtain the approval of the government e.g. to hire staff, to invest in equipment, in IT tools? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	11
No	19
Other	3

N=33

Note: For Member States who answered with 'Other'; in one Member State the requirement and guidance is available to the NRA to hire staff, to invest in equipment and to invest in IT tools. In another Member State, the NRA is subject to a public procurement process and for contracts that exceed a certain value, approval of the government is needed. In the third Member State, the NRA does not experience individual restrictions, but there are general restrictions set out in the legal act.

Question 93. Please assess whether the human resources in the NRA are sufficient to carry out its functions and to participate fully in the work of BEREC? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.



N=34

Question 94. Are there legal rules on the prevention of conflict of interest for the NRA head? In the case of a multi-sector NRA, please refer to only to the electronic communications part of the NRA.

Answer	N
Yes	29
No	1
Other	2

N=32

Note: For Member States who answered with 'Other'; in one Member State the head and staff of the NRA are forbidden by law to have any interest vested with undertakings falling within the scope of its surveillance. In another Member States, the prevention of conflict of interests is ensured by a law.

Question 95. Do these rules extend to relatives of the head?

Answer	N
Yes	17
No	11

N=28

Question 96. Are there legal rules on the prevention of conflict of interest for the board members? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	21
No	0

N=21

Question 97. Do these rules extend to relatives of the board members?

Answer	N
Yes	13
No	8

N=21

Question 98. May the NRA head hold simultaneously other offices/appointments in the government/the regulated industry? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes, in the government	5
Yes, in regulated industry	0
Yes, in both	1
No	26

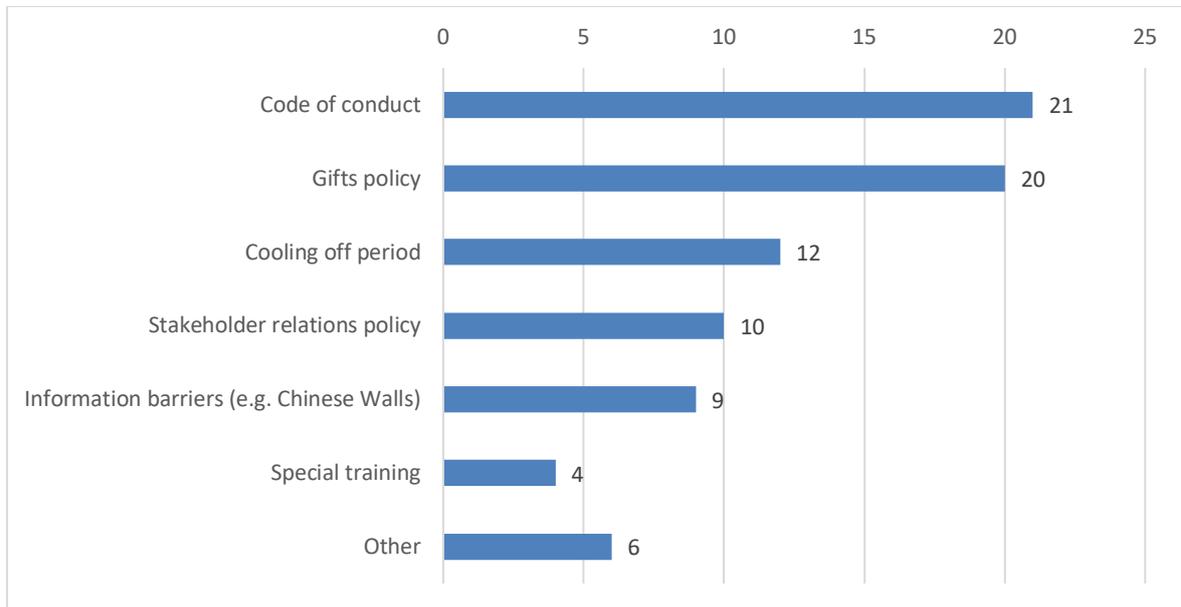
N=30

Question 99. May the board members hold simultaneously other offices/ appointments in the government/the regulated industry? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes, in the government	2
Yes, in regulated industry	0
Yes, in both	0
No	20

N=22

Question 100. Which mechanisms has the NRA put in place in order to tackle conflicts of interest? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=30

Note: For Member States who answered with 'Other': in one Member State a Code of Ethics is in place. In another Member State, a declaration of property and interests needs to be completed. In a third Member State, there are rules of internal procedure. In a different Member State, there are posts with responsibilities of compliance and internal revision. In another Member State, revolving doors are in place. Lastly, in the sixth Member State a specific internal control unit monitors any potential conflicts.

ACCOUNTABILITY AND TRANSPARENCY

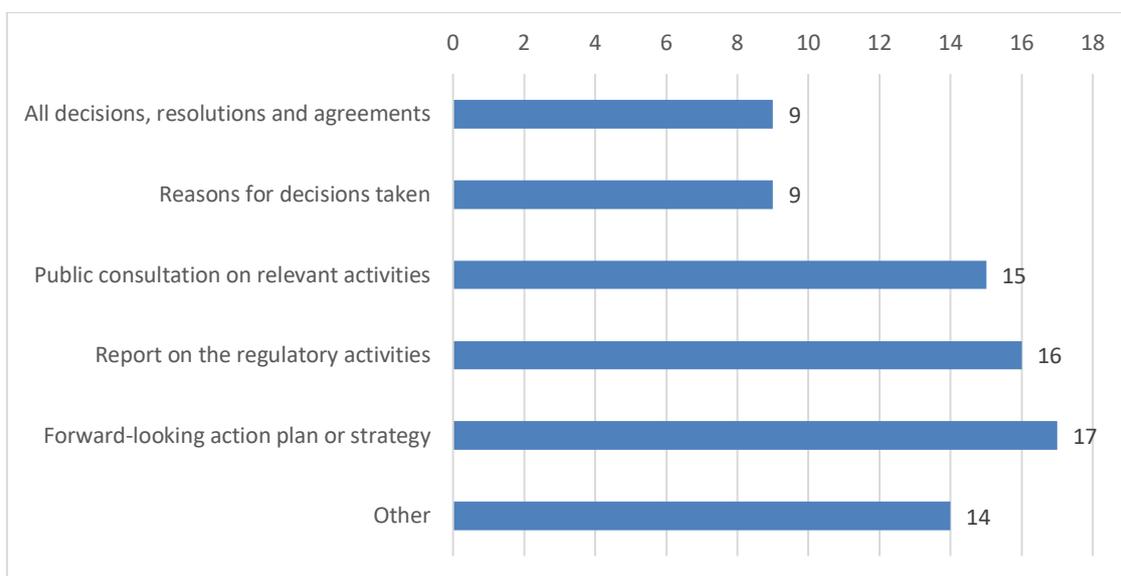
Question 101. Which documents is the NRA obligated to publish? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Note: For Member States who answered with 'Other'; the documents are mostly to clarification documents.

Question 102. Which documents are regularly published by the NRA beyond what is required by law? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=30

Note: For Member States who answered with 'Other'; one Member State's NRA publishes opinion, advices, studies reports and communications. Another Member State's NRA publishes most regulatory decisions on their website. However, some individual administrative decisions are not published.

Question 103. Please specify which type of policy or strategy documents you publish:

Answer	N
Annual strategy documents	13
Operational plans	4
Reports	4
Consultations	4
Scenario studies	2
Other	19

N=16

Note: The following documents classified as 'Other' are published: criteria, notification procedures, issuance of authorisation for the right to use, authorisations issues, technical rules and regulations, standards, ruling chamber decisions, cornerstone paper, points of orientation, frequency compass, call for input, discussion papers, media release, radio frequency plan, regulatory impact assessment, financial plans and guidelines.

Question 104. Does the NRA need any external approval for this document? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	2
No	14

N=16

Question 105. Is the NRA required to submit periodical reports? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	31
No	3

N=34

Question 106. To whom is the NRA obligated to submit periodic reports? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA

Answer	N
Parliament	8
Government/Ministry	12
Other institution	9

N=28

Note: In the cases that the answer was 'Other institution'; in four of nine times, the NRA is obligated to submit periodic reports to Parliament and Government. In one other case, the periodic reports are submitted to Parliament and Government, and the Ministry of Finance, President and National Audit authority. In another case, the periodic reports are submitted to different responsible ministries.

Question 107. Is the NRA's activity subject to regular review by external auditors or independent specialised public institutions/bodies? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	27
No	7

N=34

Question 108. Has the NRA been subject to any audit by external bodies in the past three years? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	9
No	2

N=11

Question 109. Has a constitutional established body conducted such audits? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	6
No	1

N=7

Question 110. Did the NRA initiate these audits? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	0
No	8

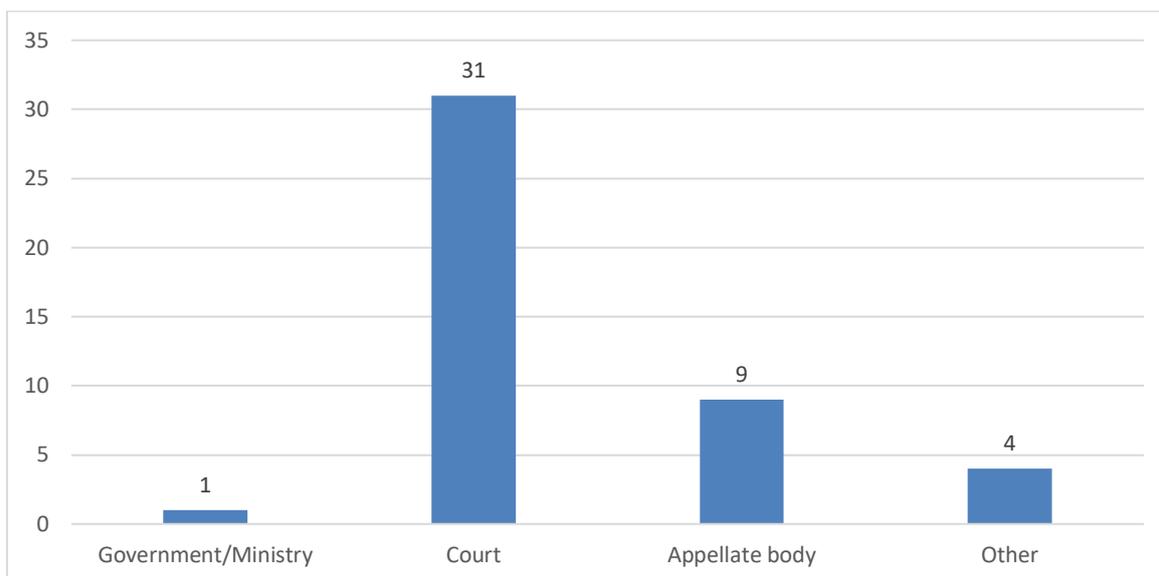
N=8

Question 111. Were these audits mandatory or could the NRA refuse to be submitted to the audit? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Audit was mandatory	8
NRA could refuse the audit	0

N=8

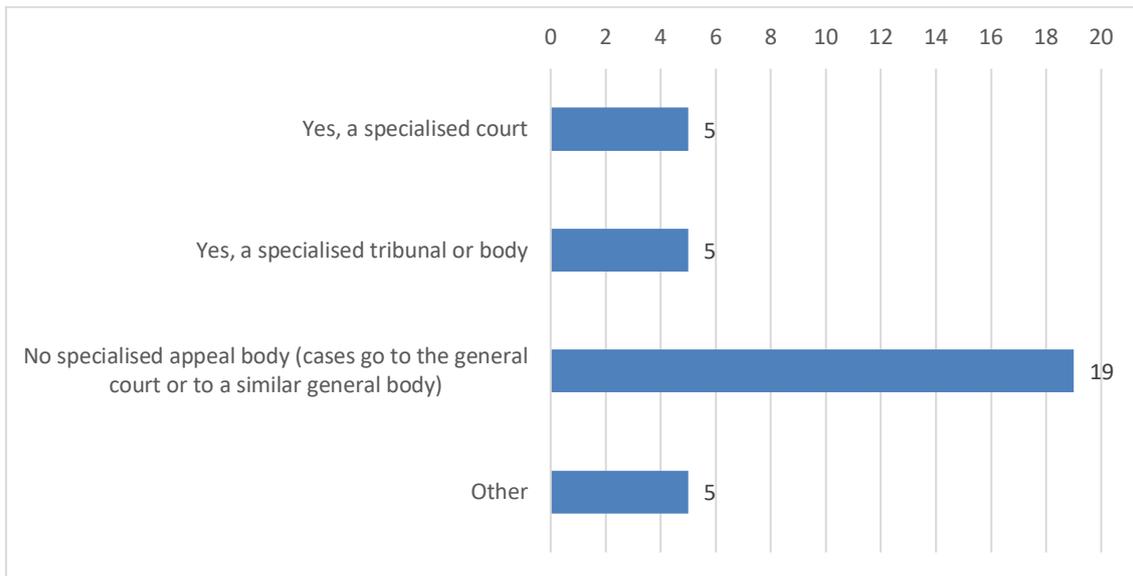
Question 112. Who is authorised to change an NRA's decision? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=33

Note: In the case of 'Other', in one Member State the NRA's decisions can be annulled by a council. In two other cases, an administrative court has the authority. In a third Member State, there is a system of appeal within the NRA.

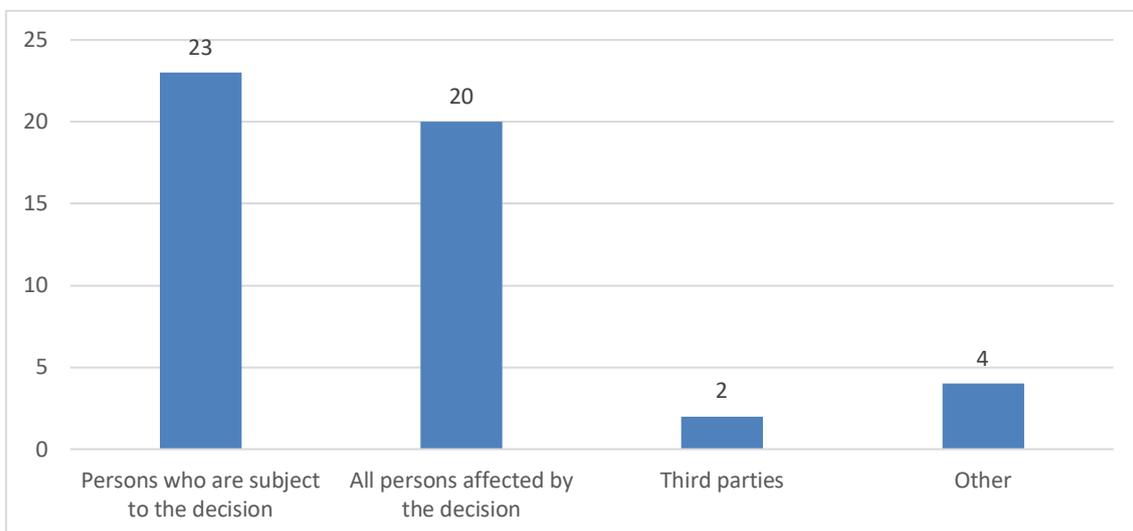
Question 113. Is there a specialised appeal body? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=34

Note: In the case of 'Other', in three Member States, an administrative court is used as an appeal body for the NRA. In another Member State, a decision can be appealed by a council of the NRA. In the fifth Member State, the participant in the proceedings has the right to appeal.

Question 114. Which entities can appeal the NRA's decision? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=33

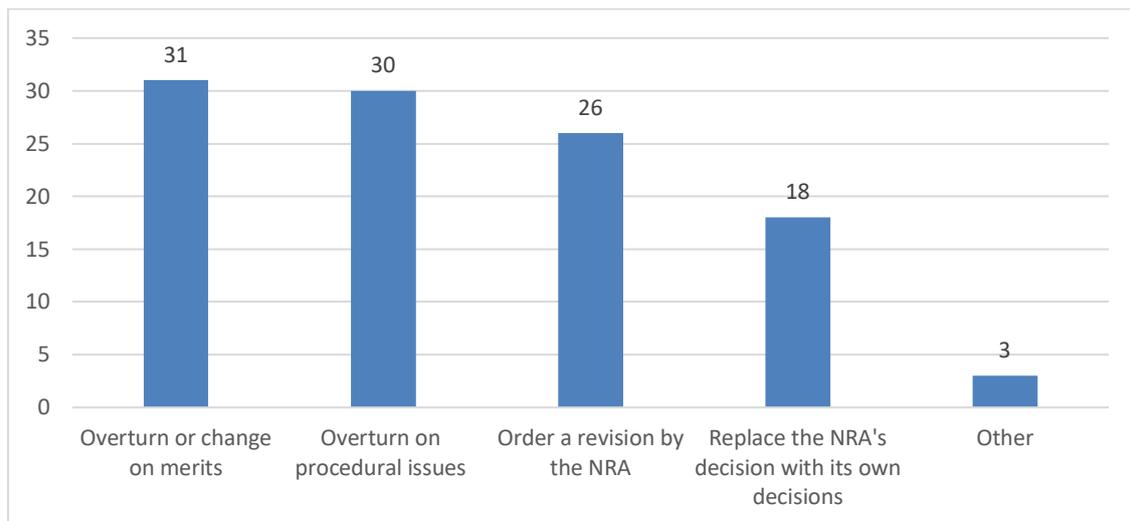
Note: In the case of 'Other'; in one Member State the responsible Minister can appeal the NRA's decision. In two other cases, parties with a significant, direct, legal and individual interest can appeal. In a different Member State, trade and consumer associations can appeal. Lastly, in one Member State, all persons who are affected by the decision can appeal.

Question 115. Does the filing of an appeal suspend the effects of any of the NRA's decisions? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.

Answer	N
Yes	7
No	27

N=34

Question 116. Which powers does the appeal body have in the review of the decisions of the NRA? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA.



N=33

Note: In the case of 'Other'; in one Member State the appeal body can replace the NRA's decision with its own. In a different case, the appeal body can revoke decisions. In last case, the appeal body can declare the decision void.

Question 117. What share of the NRA's decisions has been appealed in the last three years (estimate)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA (%).

Appealed (%)	N
0.1	1
0.25	1
0.5	1
1	2
3	1
4	2
5	3
7	2
13	2
18.3	1
20	1
21	1
23	1
27.5	1

N=27

Note: Out of 27 responses, the average is equal to 13%

Question 118. What share of NRA's decisions has been overturned by the appellate body in the last three years (estimate)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA (%).

Overtured (%)	N
0.05	1
0.1	1
1	5
3.8	1
5	3
9	1
10	2
14	1
17	1
20	1
25	1
33	1
60	1

N=23

Note: In one case, three appeals were lost and twelve were won

Question 119. How often are the cases overturned on merit and on a procedural mistake (estimate)? In the case of a multi-sector NRA, please refer only to the electronic communications part of the NRA (%).

Answer	%
Overturned on merits (in %)	43%
Overturned on procedure (in %)	57%

N=18

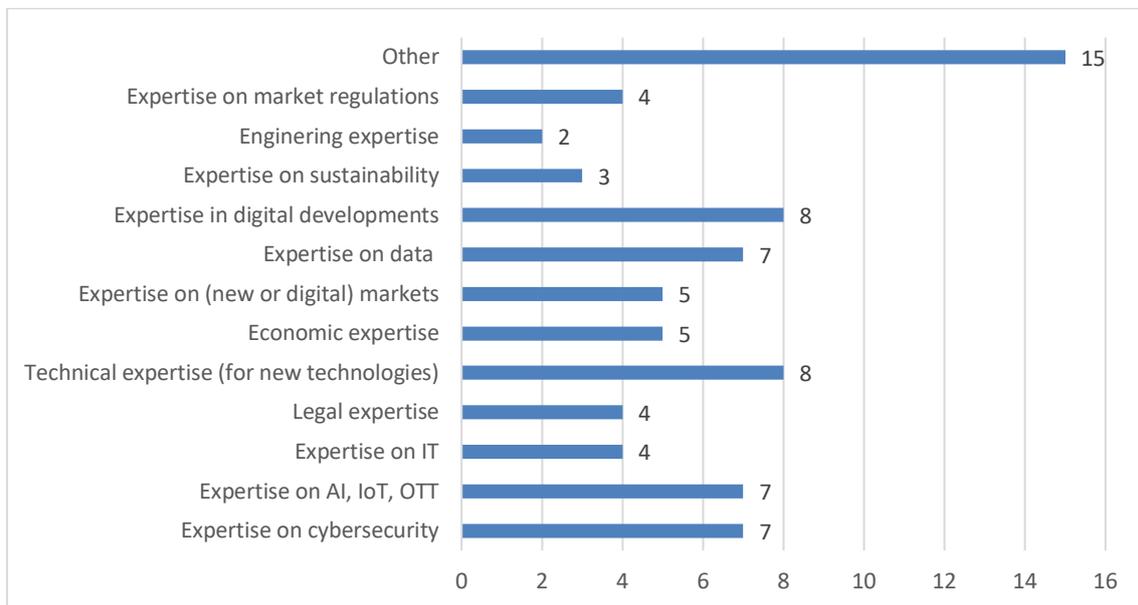
FUTURE-PROOFING

Question 120. What type of expertise do you as an electronic communications NRA need right now to fulfil your mandate?

Answer	N
Need for technical, economic, legal and data analysis expertise	19
Need for PR, administration and PM staffers	8
Need for updated legislation and strategies	2
Involvement into more and more adjacent markets in investigation, put pressure on having the right expertise. A more holistic digital market approach might be welcome	1

N=30

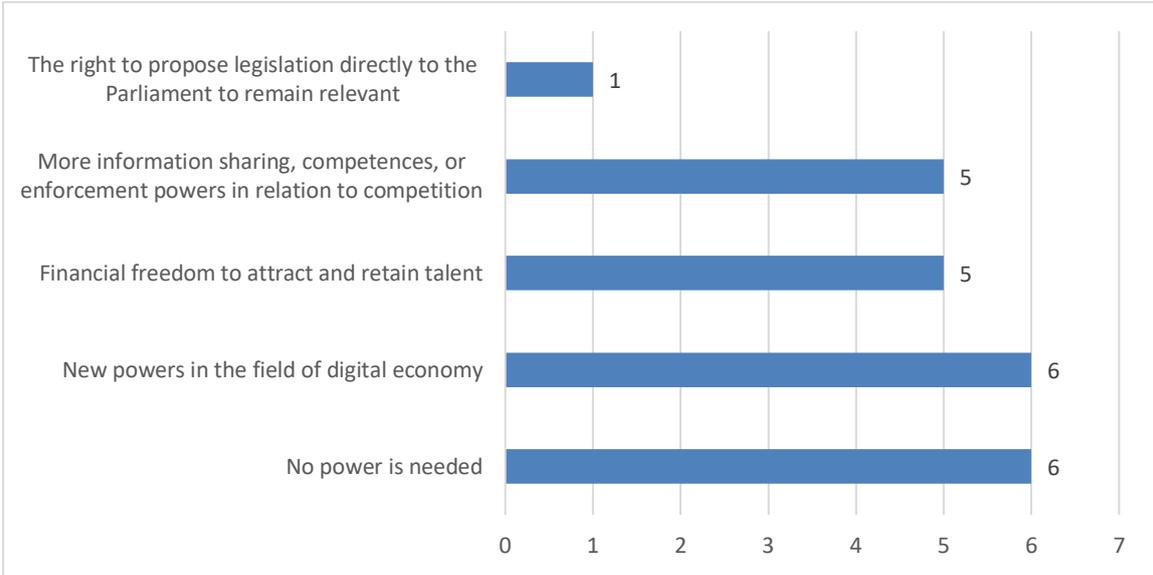
Question 121. What type of expertise do you as an electronic communications NRA expect to need to stay effective and relevant in the future?



N=30

Note. Regarding 'Other', expertise on spectrum management, expertise in different areas, GIS expertise, performance expertise, expertise on architecture, expertise on telecom related platforms, media services, national security and resilience. Additional expertise is required for interpreting and implementing the new EU regulatory framework, also ethical expertise is required.

Question 122. What types of power do you as an electronic communications NRA need to stay effective in the future?



N=29

Question 123. Do you see the tendencies of governments to centralise resources and reduce the number of regulatory agencies as detrimental to NRA independence?

Answer	N
Yes	4
No	24

N=28

Annex 3: Summary report on the expert workshop

On 28 September, the workshop on NRA independence took place in Brussels in a hybrid format. Workshop participants were experts from electronic communications NRAs that are BEREC members. 22 experts participated in person and about 49 joined online.

The workshop was divided into **two parts**.

During the **first part**, the study team (Ecorys and the University of Utrecht) presented preliminary results of the NRA survey on NRA independence. After recapitulating the study's methodology, the study team members presented the results on systemic independence, operational independence, independence of NRA personnel, financial independence and transparency and accountability. The presentation of the survey results was mainly descriptive and was similar to the content that is currently included in Annex 2 of this report.

A Q&A session followed the presentation of each independence dimension. Most questions aimed to clarify some of the items presented by the study team or ask for more details on the results.

In addition, it was discussed that follow-up interviews would be organised with some NRAs to fill the gaps in the survey answers or clarify them. The report would focus on identifying practices and discussing their impact on independence without attributing them to specific NRAs.

During the **second part** of the workshop, five national case studies focused on various dimensions of independence were presented and discussed. The following issues were touched upon:

- **Systemic independence.** The discussed issue concerned legal separation of the NRA from the government and the possibility of independent functioning linked to it. It was explained that the NRA in question appears to be a subordinate structure of the responsible ministry that lacks *de jure* independence and struggles to act independently *de facto*. The situation is created in which there is a risk of prior compliance by the NRA, which was considered detrimental to NRA independence by the CJEU.¹⁷²
- **Independence of the NRA leadership.**
 - The appointment procedure by the government is neither open nor transparent; and
 - Not all grounds for dismissal are included in the national law; several grounds for dismissal come from practice and are open to interpretation.

This combination creates a situation where both appointment and dismissal of the NRA leadership can be used as a tool for political pressure on the NRA. The practice provides evidence for such a risk being real: several members of the NRA leadership were dismissed before the end of their term.

- **Financial independence of NRAs.** Annually, the NRA makes a budget proposal. To be adopted, its budget first needs a positive recommendation from the responsible ministry and then approval from the parliament. The difficulty is two-fold. On the one

¹⁷² Judgment of 9 March 2010, *European Commission v Germany*, C-518/07.

hand, every year there are delays of several months in the approval of the budget, and the NRA has no effective spending capacity until the approval. On the other hand, the ministry annually requests to reduce the expenses and the fees charged to the market, while the NRA activities and the market situation pose completely different demands to the NRA. This situation severely constrains NRA's ability to fulfil its mandate and impedes the ability to fulfil their mandate independently.

- **Personnel policies.** The ability of the NRA to hire the necessary staff is negatively affected by a national law on human resources management in public administration. The NRA needs to seek government approval not only for its human resources plan, designation of positions in the NRA and compensation structure but also regarding the initiation of every individual recruitment. In practice, delays in getting approval for individual vacancies are common, making it hard to hire and replace NRA staff, while increasing the risks associated with losing staff. In the situation of strong competition from the private sector for the same talent, this practice will also impact the future ability to function and independence of the NRA.
- **Multi-sector NRA.** The case study explained how the unclear splitting of competences between the NRA and the responsible ministry negatively impacts the effective fulfilment of the NRA's mandate (e.g. some regulatory functions are with the ministry, while litigation related to these functions is with the NRA) and leads to confusion about who is responsible for what. The change of the internal structure and staff recruitment is rigidly regulated and require approval by the government, which does not allow the NRA to react to the changes in the market in an agile way.

In conclusion, the workshop participants noted that it is important to study the implementation of the EECC by different countries and explore the nuances of the national legal systems because similar transpositions may still lead to different results. More importantly, it is necessary to put them in the context of national practice, which varies significantly across BEREC Members.