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The New Framework Law on Independent Regulatory Authorities in Portugal

Carlos Botelho Moniz & Pedro de Gouveia e Melo*

1 INTRODUCTION

Regulatory authorities are faced with a range of demands often contradictory in nature, and therefore difficult to reconcile in practice: to be less intrusive, but more effective; focus the regulatory effort, but act consistently; process and decide cases faster, but respect companies' rights of defence and produce robust decisions that withstand judicial control; address important issues, but do not go beyond statutory powers and competences; be responsive to regulated companies, but do not get captured, in particular by incumbents.[1]

While the precise recipe for ensuring that such goals are achieved is open to discussion, a factor that in recent years has been considered fundamental in this regard is the *independence* of regulatory authorities, which, in the absence of an accepted definition, has generally been taken as involving a marked degree of autonomy in the determination of a public body's policy choices and decision-making, both from political actors (Government and Parliament) and market parties alike.[2]

As in many other countries, in Europe and elsewhere, the last three decades have seen the appearance in Portugal of a wide number of public law bodies that have become collectively known as *independent administrative entities* or *authorities*. These bodies carry out important functions of the State, being responsible for regulating economic sectors where market failures are identified (such as energy or

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1 As noted by M. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* 17 (Brookings Institution Press 2000). See also OECD, *Principles for the Governance of Regulators*, draft submitted to public consultation, 21 Jun. 2013, p. 4.

2 See F. Gilardi & M. Maggetti, *The Independence of Regulatory Authorities*, *Handbook on the Politics of Regulation* (D. Levi-Faur ed., Edward Elgar Publishing 2011).

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communications), for ensuring that competition in the economy as a whole is not distorted (the case of the Competition Authority), and for safeguarding certain fundamental rights, such as the plurality of the media, privacy regarding personal data or access to public documents.

However, as in most jurisdictions, such authorities were created on a pragmatic, individual basis, and therefore lack a common framework. For this reason, although regulatory authorities share a number of common characteristics, there remains a considerable variety as to their powers, internal organization, resources, and autonomy from the Government, which was thought to hinder the effective exercise of their respective roles.

To remedy this situation, and as part of the commitments undertaken by Portugal in the context of the financial assistance program resulting from the economic and financial crisis,[3] a new law was recently enacted introducing a common institutional regime for independent regulatory entities.

The *framework law on independent regulatory entities with functions of regulation of economic activity in the private, public and cooperative sectors*, approved by Law 67/2013, of 28 August 2013 (the 'Framework Law' or the 'Law'), attempts to establish a comprehensive legal regime for independent regulatory authorities, which must be respected by the individual statute of each authority. The Framework Law sets out rules on the role, creation, governance and functioning of regulatory authorities with the express aim of reinforcing their independence.[4]

The purpose of this article is to analyse the main features of the Framework Law. To this effect, section 2 begins by briefly outlining the history of the regulatory authorities in Portugal. In section 3 we examine the background of the Framework Law and its main features. Section 4 focuses on the concept of independent regulatory authority and on the process for setting up new authorities. Section 5 then analyses the main provisions of the Law intended to strengthen the authorities' independence, in particular the absence of formal Government supervision or oversight, appointment procedures, governance, powers, and financial autonomy. Section 6 examines the transparency and accountability of the authorities, before Parliament, the public, and the courts. Section 7 concludes.

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[3] See the Memorandum of Understanding on Specific Economic Policy Conditionality, 3 May 2011, entered into by the Government, the European Union and the International Monetary Fund ('IMF'), and Council Implementing Decision 2011/344/EU of 17 May 2011 on granting Union financial assistance to Portugal (OJ L 159, 17 Jun. 2011, p. 88). The three-year program is scheduled to end on 17 May 2014.

[4] See the preamble of Draft Law 132/XII, presented to Parliament by the Government on 7 Mar. 2013, which resulted in Law 67/2013, pp. 1–2.

2 THE REGULATORY AUTHORITIES IN PORTUGAL

The phenomenon described as the 'rise of the regulatory State' in Portugal broadly mirrors the trend observed in other Member States of the European Union, and essentially results from the combination of two factors, which are intertwined: liberalization and privatization.[5]

The preparation of the accession of Portugal to the then-European communities (which occurred on 1 January 1986) resulted in the gradual opening-up to private initiative of most of the sectors of the economy that following the 1974 revolution had been reserved to the State, such as banking and insurance (1983), energy (1988), communications and transport (1988–1991).[6] This coincided with determined efforts by the European Commission to complete the Single Market, through the gradual liberalization of sectors until then closed to competition, and the elimination of exclusive and special rights maintained by Member States. The Commission first directed its action to the liberalization of the communications sector, initially through directives adopted under Article 86(3) EEC [now 106(3)] TFEU,[7] and the effort subsequently spread to other sectors, such as energy, transport and postal services, in coordination with the EU legislator (the Council and the Parliament) through the Treaty provisions on the approximation of laws.[8]

Simultaneously, from 1990 onwards successive Portuguese Governments carried out a vast programme of privatization of state-held companies, in particular banking, insurance, communications and energy,[9] essentially reversing the

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5 See G. Magione, *Regulating Europe* (Routledge, 1996), and E. Pais Ferreira & L. Morais, *A Regulação Sectorial da Economia – Introdução e Perspectiva Geral*, in *Regulação em Portugal: Novos Tempos, Novo Modelo?*, (E. Paz Ferreira, L. Morais & G. Anastácio eds., Almedina 2009).

6 See Decree-Laws 406/83, 449/88, 339/91 and 372/93, amending Law 46/77, of 8 July. The Portuguese Constitution of 1976 was also revised in 1982 (and to a lesser degree in 1989) in order to allow these sectors to be opened to private investment. More recently, the postal sector was liberalised in 2012 (see Law 17/2012), and waste management was opened to privately owned companies in 2013 (see Law 35/2013). At present the only sectors of the economy still reserved to State-held companies are water, rail transportation under public service obligations and port management (see Law 88-A/97, of 25 July, as amended by Law 35/2013).

7 In particular through Commission Directives 80/723/EEC of 25 Jun. 1980 ('Transparency Directive'), 88/301/EEC of 16 May 1988 ('Terminals Directive') and of 90/388/EEC of 28 Jun. 1990 on competition in the markets for telecommunications services. Commission Directive 96/19/EC of 13 Mar. 1996 concluded the liberalization of the communications sector the European Union. See E. Maia Cadete, *Concorrência e Serviços de Interesse Económico Geral* 159–179 (Principia 2004).

8 Contained in the now-Art. 114 TFEU (formerly 95 EC). See L. Hancher & P. Larouche, *The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest*, *The Evolution of EU Law* (P. Craig & G. De Burca eds, 2nd ed., Oxford 2011).

9 Between 1990 and the present day the Government also privatised companies active in the beer, cement, chemicals, foodstuffs, glass, industrial gases, media, mining, motorways concessions, oil and refined fuels, paper, road transport, tobacco, shipping, shipbuilding, and steel sectors (see Direcção-Geral de Estudos e Previsão, *Privatizações e Regulação – A Experiência Portuguesa* (Ministério das Finanças 1999). In the context of the implementation of the financial assistance programme agreed

widespread nationalizations that had been carried out in the wake of the 1974 revolution.[10]

As the State gradually retreated from operating directly in the market, the need arose for an adequate regulation of the recently liberalized and privatised sectors.[11] In many cases, such as those of energy and communications, both processes were gradual, which meant that not only part of each sector remained closed to competition, but also the State maintained partial ownership over the incumbent companies active in the liberalized parts of the market. Even in markets already fully liberalized, and where exclusive or special rights have been abolished, many incumbents continue to enjoy significant market power, especially when they own infrastructure that cannot be easily duplicated (as is frequently the case in the network industries).[12]

In this context, the creation of public authorities separate from general civil service (under direct control of the Government) was considered to be an appropriate solution to distinguish policy-making function from regulatory function, 'immunizing' the regulators from daily political pressure, especially when many incumbent companies were still state-owned.[13] Other benefits generally attributed to specialist independent regulatory authorities are stability and continuity of action (regardless of the contingent political majority in government), specific technical expertise, and a wider participation of specialists in highly technical and complex areas.[14]

It cannot be excluded that the gradual introduction of independent regulators in Portugal may have also been influenced by prior decisions in other European

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upon with the European Union and the IMF, the Portuguese airports operator (ANA) and the postal services incumbent (CTT) have recently been privatized, and the Government is presently carrying out the sale of waste management company EGF and contemplating the privatisations of airliner TAP and of the freight branch of rail operator CP. Please see the Memorandum of Understanding, *supra* n. 3, s. 3.30.

[10] See J. Brito Pereira & L.M. Romão, *Public Capital and Private Capital in the Internal Market. Securing a Level Playing Field for Public and Private Enterprises*, *Proceedings of the FIDE XXIV Congress Madrid 2010, Vol. 3* (G.C. Rodriguez Iglesias & L. Ortiz Blanco eds, 2010), as well as B. Bortolotti & V. Milella, *Privatization in Western Europe – Stylized Facts, Outcomes, and Open Issues*, Fondazione Eni Enrico Mattei (FEEM) Working Paper No. 124.06 (2006), available at http://ssrn.com/abstract=936911.

[11] The role of the State in the economy therefore evolved from that of a 'service provider' to that of a 'guarantor' of the efficient functioning of markets, of undistorted competition and of consumers' rights, in particular regarding the services of general economic interest, under Arts 81(f) and 81(i) of the Constitution (see Pedro Gonçalves, *Direito Administrativo da Regulação*, *Estudos em Homenagem ao Professor Doutor Marcello Caetano - No Centenário do seu Nascimento* – Volume II 535 (Almedina 2006)).

[12] See A. Ottow & S. Lavrijssen, *The Legality of Independent Regulatory Authorities*, in *The Eclipse of the Legality Principle in the European Union* 4 (Leonard F.M. Besselink ed., Kluwer Law 2010).

[13] Pedro Gonçalves, *Direito Administrativo da Regulação*, *supra* n. 11 p. 549.

[14] It nevertheless constitutes an implicit admission that traditional administrative authorities are under the influence of political power and are not impartial (as noted by J. Bougrab, *Independent Administrative Authorities in France*, in *Independent Administrative Authorities* 47 (R. Caranta, M. Andenas & D. Fairgrieve eds, BIICL 2004). This admission would however be somewhat contradictory with general Portuguese administrative law, pursuant to which the bodies of the civil service must act according to the law and

countries (such as France and Spain). As noted by Gilardi, the idea of independent regulators may have become the 'default solution' at the international level, and rather than strongly justifying the need for the introduction of an independent regulator, a stronger argument would perhaps be needed to prevent the setting up of such independent entities.[15]

From 1990 onwards many regulatory authorities were created (or in some cases regulatory powers were conferred on existing entities), the main of which are the following:[16]

Year	*Sector*	*Entity*
1990	Banking	*Banco de Portugal* ('Bank of Portugal')[17]
1991	Capital markets	*Comissão do Mercado dos Valores Mobiliários* ('CMVM')[18]
1993	Pharmaceuticals	*INFARMED – Instituto Nacional da Farmácia e do Medicamento*[19]
1995	Energy	*Entidade Reguladora dos Serviços Energéticos* ('ERSE')[20]
1997	Insurance	*Instituto de Seguros de Portugal* ('ISP')[21]

its conferred powers (principle of legality), and should treat equally and impartially all parties to which it may be related (principles of justice and impartiality) (Arts 3 and 6 of the Portuguese Administrative Procedure Code).

15 F. Gilardi, *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe*,(Edward Elgar Publishing 2008), as well as Gilardi & Maggetti, *supra* n. 2.

16 Many other public law bodies exist in Portugal with some regulatory functions, such as the *Autoridade Reguladora da Segurança Alimentar e Económica* ('ASAE'), the Government department responsible for enforcing food safety and economic regulations, and the *Instituto da Vinha e do Vinho* ('IVV'), the Government body tasked with the regulation of the wine sector. However, such entities were not given special independence status by the Government, and therefore fall outside the scope of this article.

17 The Bank of Portugal, the Portuguese central bank, was created in 1846 and nationalised in 1974, but was only given regulatory powers over the banking sector in 1990, following the privatization of the main Portuguese banks (see Decree-Law 337/90, of 30 Oct. 1990). The current Statute of the Bank of Portugal was approved by Decree-Law 142/2013 of 18 Oct. 2013.

18 By Decree-Law 142-A/91, of 10 Apr. 1991. The Statute of the CMVM was approved by Decree-Law 473/99, of 8 Nov. 1999, most recently amended by Decree-Law 169/2008, of 26 Aug. 2008.

19 See Decree-Law 353/93, of 7 Apr. 1993. The current Statute of the INFARMED was approved by Decree-Law 46/2012, of 24 Feb. 2012. As we will see below, the INFARMED is not covered by the new Framework Law.

20 ERSE was created by Decree-Law 187/95 of 27 Jul. 1995 as the electricity sector regulator *(Entidade Reguladora do Sector Eléctrico)*. It was redesignated *Entidade Reguladora dos Serviços Energéticos* further to the liberalization of the natural gas sector (see Decree-Law 97/2002, of 12 Apr. 2002, as amended by Decree-Law 84/2013, of 25 Jun. 2013).

21 See Decree-Law 251/97, of 26 Sep. 1997. The present Statute of the ISP is contained in Decree-Law 289/2001, of 13 Nov. 2001.

Year	*Sector*	*Entity*
1998	Water and waste management	*Entidade Reguladora dos Serviços de Águas e Resíduos* ('ERSAR') [22]
1998	Civil aviation	*Instituto Nacional de Aviação Civil* ('INAC')[23]
1998	Rail transport	*Instituto Nacional de Transportes Ferroviários* (replaced in 2007 by the *Instituto da Mobilidade e dos Transportes* – 'IMT')[24]
1998	Media	*Alta Autoridade para a Comunicação Social* (replaced in 2005 by the *Entidade Reguladora para a Comunicação Social* – 'ERC')[25]
1999	Construction and Real Estate	*Instituto dos Mercados de Obras Públicas e Particulares e do Imobiliário* (replaced in 2007 by the *Instituto da Construção e do Imobiliário* – 'InCI')[26]
2001	Communications	*ICP ANACOM – Autoridade Nacional de Comunicações*[27]
2003	Competition	*Autoridade da Concorrência (*Competition Authority')[28]
2003	Health services	*Entidade Reguladora da Saúde* ('ERS')[29]

The designation of an independent regulatory authority, which often results from the need to adequately enforce the national laws implementing EU market liberalization legislation, has also in some cases been expressly required by EU

[22] ERSAR was created by Decree-Law 362/98 of 18 Nov. 1998 as *Instituto Regulador das Águas e Resíduos*. So far it has been the only regulatory authority whose Statute has been enacted further to the entry into force of the Framework Law (see Law 10/2014, of 6 Mar. 2014).

[23] See Decree-Law 133/98, of 15 May, later replaced by Decree-Law 145/2007, of 27 Apr. 2007. The INAC was redesignated *Autoridade Nacional da Aviação Civil* by Law 67/2013, which approves the Framework Law.

[24] See Decree-Law 289-B/98, of 7 Sep. 1998. In 2007 the INTF was merged into the *Instituto da Mobilidade e dos Transportes Terrestres (IMTT)* (see Decree-Laws 146, 147 and 148/2007, all of 27 Apr. 2007). The IMTT was more recently redesignated *Instituto da Mobilidade e dos Transportes*, after receiving the competences for regulating maritime transport, by Decree-Law 236/2012, of 31 Oct. 2012.

[25] See Laws 43/98 of 6 Aug. 1998 and 53/2005 of 8 Nov. 2005.

[26] See Decree-Laws 60/99 of 2 Mar. 1999 and 144/2007 of 27 Apr. 2007.

[27] ANACOM originally created in 1981 as the *Instituto das Comunicações de Portugal*, was transformed into a regulatory authority by Decree-Law 309/2001 of 7 Dec. 2001, further to the liberalization of the communications sector.

[28] Decree-Law 10/2003, of 18 Jan. 2003. The Competition Authority replaced two public bodies previously responsible for enforcing competition rules in Portugal, the Directorate-General for Commerce of Competition of the Ministry of Commerce and the Competition Council (see Art. 5 of Decree-Law 10/2003).

[29] See Decree-Law 309/2003 of 10 Dec. 2003, subsequently replaced by Decree-Law 127/2009 of 27 May 2009.

law.[30] Besides the *Banco de Portugal*, the Portuguese central bank and banking regulator, whose independence results from its status as a member of the European System of Central Banks (and not its role as a regulatory authority for the banking sector),[31] Member States are required to establish independent national regulators notably for energy and communications, as well as national competition authorities.

The first generation of communications and energy directives (1996–1998) required that national regulatory authorities be legally distinct from and functionally independent of market parties and that suitable appeal mechanisms be created to enable an injured party to appeal to a 'body independent of the parties involved'.[32]

More recently, the directives of the Third Energy Package of 2009 acknowledged that past experience had shown that the effectiveness of regulation is frequently hampered through a lack of independence of regulators from government and insufficient powers and discretion.[33] Further to proposals from the Commission, the directives therefore address the main obstacles to the effectiveness of authorities by establishing that Member States must designate a single authority at the national level, guarantee its independence (regarding notably the appointment of its top management and adequate human and financial resources), and provide it with broad investigative and sanctioning powers detailed in the directives, including the power to impose fines of up to 10% of the annual turnover of infringing companies,[34] similar to the powers of the European Commission and many national competition authorities, such as the Portuguese *Autoridade da Concorrência*.[35]

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30 See A. Ottow & S. Lavrijssen *supra* n. 12, pp. 4–5.

31 See Art. 282(1) TFEU and Art. 7 of Protocol No. 4 on the statute of the European System of Central Banks and of the European Central Bank.

32 See Art. 5a of Directive (EC) 97/51 of the European Parliament and of the Council of 6 Oct. 1997 amending Council Directives (EEC) 90/387 and (EEC) 92/44 for the purpose of adaptation to a competitive environment in telecommunications (OJ 1997, L 295/23). See also Arts 20 and 22 of Directive (EC) 96/92 of the European Parliament and of the Council of 19 Dec. 1996 concerning common rules for the internal market in electricity (OJ 1996, L 27/2), and Arts 21 and 22 of Directive (EC) 98/30 of the European Parliament and of the Council of 22 Jun. 1998 concerning common rules for the internal market in natural gas, OJ 1998, L 204/1.

33 See in particular recital 33 of Directive 2009/72/EC of the European Parliament and of the Council of 13 Jul. 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ L 211, 14 Aug. 2009, p. 55), recital 29 of Directive 2009/73/EC of the European Parliament and of the Council of 13 Jul. 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (OJ L 211, 14 Aug. 2009, p. 94), and recital 3 of Regulation (EC) 713/2009 of the European Parliament and of the Council of 13 Jul. 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14 Aug. 2009, p. 1).

34 See Arts 35 and 37 of Directive 2009/72/EC and Arts 39 and 41 of Directive 2009/73/EC.

35 See Arts 23 and 24 of Regulation (EC) 1/2003 and Arts 68 and 69 of Law 19/2012, of 8 May (the 'Competition Act'). The Statute of the Portuguese energy regulator, ERSE, has been amended and a new penalties framework law has been enacted, in order to implement the Third Energy Package

In the communications sector, the 2009 amendment to the Framework Directive aimed, *inter alia*, at strengthening the independence of national regulators, in order to ensure a more effective application of the regulatory framework and to increase their authority and the predictability of their decisions.[36] The amended Framework Directive, therefore, requires that national regulators *act independently and do not seek instructions from any other body* in the implementation of EU law, while acknowledging that this does not prevent supervision in accordance with national constitutional law. It also lays down rules limiting the dismissal of members of the management body, rules requiring separate budgets and adequate resources for authorities and appropriate and dissuasive penalties for infringements of the regulatory framework.[37]

Regulation (EC) 1/2003,[38] which established a decentralized system of application of EU competition law in which national competition authorities are fully competent to apply Articles 101 and 102 TFEU (including the exemption of 101(3) TFEU, previously an exclusive competence of the Commission[39]), also requires Member States to designate a competition authority or authorities responsible for the application of EU competition law '*in such a way that the provisions of this regulation are effectively complied with*'. National competition authorities are entrusted with significant powers and are to cooperate closely between themselves and the Commission within the European Competition Network.[40]

However, the very independence of administrative regulatory authorities from political influence sought by both the EU and national legislators has raised concerns regarding its compatibility with constitutional principles. The *democratic deficit* of independent administrative agencies has been a frequently debated issue in

(see Decree-Law 84/2013, of 25 Jun. 2013, as well as Law 9/2013, of 20 Jan. 2013). See also P. Cameron, 'General Report, M. Simm, 'European Union Institutional Report' and P. Gouveia e Melo, 'Portugal Report', J. Lafranque (ed.) *The Interface between European Union Energy, Environmental and Competition Law – Reports of the XXV FIDE Congress Tallinn 2012* 13, 33 and 377 (Vol. 2, Tartu University Press 2012).

36 See Recital 13 to Directive 2009/140/EC of the European Parliament and of the Council of 25 Nov. 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorization of electronic communications networks and services (OJ L 337, 18 Dec. 2009, p. 37).

37 See Arts 3(3a) and 21a of Directive 2002/21/EC of the European Parliament and of the Council of 7 Mar. 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24 Apr. 2002, p. 33.

38 Council Regulation (EC) No. 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (OJ L 001, 4 Jan. 2003, p. 1).

39 See Council regulation No. 17 First Regulation implementing Arts 85 and 86 of the Treaty (OJ P 13, 21 Feb. 1962, p. 204).

40 See Arts 5 and 11 of Regulation (EC) 1/2003.

the study of such entities.[41] In Portugal, constitutional scholars initially questioned whether the creation of independent administrative entities complied with the constitutional rule pursuant to which the Government is the head of the civil service.[42] The Constitution was subsequently amended in 1997 to provide that independent administrative entities can be created by law[43] in order to allay the fear that such entities could be declared unconstitutional. Nonetheless, this amendment was deemed insufficient due to the absence of criteria or limits to the creation and role of such entities, and the powers given to the ordinary legislator to strike the appropriate balance, especially with the principles of democracy and separation of powers.[44]

In the case of independent administrative authorities whose creation is expressly required by EU law (such as energy and communications regulators, as well as the national competition authority), there can be no doubt as to their compatibility with the Constitution. However, EU directives recognize that elected national bodies can retain supervisory powers over independent authorities under national constitutional laws,[45] and the Portuguese Constitutional Court has not questioned the independence of national regulators, which in its view was aimed at conferring credibility and authority to the regulation of the market and ensuring a strict impartiality in sensitive economic sectors.[46]

As it will be seen below, even if the new Framework Law considerably limits the supervision and oversight of regulatory authorities by the Government – this was after all its main objective – it also attempts to address the issue of the democratic legitimacy of independent administrative entities. In particular, attention has been given to the justification of the creation of new entities and the specification of their attributions and competences, as well as to their accountability before the Parliament.

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41 See Mario Comba, *The Evolving Concept of Separation of Powers and Independent Administrative Agencies*, in Caranta, Andenas & Fairgrieve *supra* n. 14, p. 225. Against the notion that regulatory authorities can be truly independent, see E. Paz Ferreira & L. Morais *supra* n. 5, p. 29.

42 See Art. 199(d) of the Constitution, as well as Gomes Canotilho & Vital Moreira, *Constituição Portuguesa Anotada* 810–811 (Vol. II, 4th ed, Almedina 2010).

43 See Art. 267(3) of the Constitution. This act can be enacted by the Parliament (under the form of Law) or by the Government (under the form of a Decree-law), pursuant to their respective legislative competences. Under the Portuguese Constitution, Parliament has general competence, and certain matters are the object of a reserve of competence, which may be absolute (only the Parliament can legislate) or relative (the Parliament can authorize the Government to legislate in a given area). Government has competence to legislate in all domains other those of Parliamentary reserve, except if authorized by Parliament (see Arts 164, 165 and 198 of the Constitution).

44 See L. Fábrica & J. Colaço, *Article 267*, in *Constituição Portuguesa Anotada* 586–587 (Vol. III, J. Miranda & Rui Medeiros eds, Coimbra Editora 2007), and V. Moreira & F. Maçãs, *Autoridades Reguladoras Independentes – Estudo e Projecto de Lei-Quadro*, 248–252 (Coimbra Editora 2003).

45 See Art. 3(3a) of Directive 2002/21/EC, as amended by Directive 2009/140/EC.

46 See Judgment of the Constitutional Court No. 365/2008 of 2 Jul. 2008 regarding the compatibility with the Constitution of a regulatory charge imposed by the ERC, the media regulator.

3 THE FRAMEWORK LAW

The existence of many regulatory authorities without a common legal framework,[47] and the co-existence of heterogeneous institutional solutions, with a varying degree of autonomy in relation to the executive, caused the Government to prepare in February 2002 a proposal for a framework law on the independent regulatory authorities ('2002 Proposal'). This proposal ultimately did not reach the Parliament due to a change of government. The proposal and its accompanying report were nevertheless published and formed a meaningful basis for scholarly analyses in this area.[48]

A common framework for regulatory authorities received a new impulse from the implementation of the EU-IMF financial assistance programme for Portugal,[49] which brought a call for reinforcing the powers of regulators.[50] Pursuant to the Memorandum of Understanding, the Government committed to ensuring that national regulatory authorities *have the necessary independence and resources to exercise their responsibilities*, first by procuring an independent report on the responsibilities, resources and characteristics determining the level of independence of the main authorities with respect to the best international practices, and second by presenting to Parliament a proposal to implement the best practices identified in the report, in order *to reinforce the independence of regulators where necessary*.[51]

Further to a report prepared by AT Kearny, an international consultancy (which curiously was not published by the Government), and to a first consultation of the regulatory authorities, a proposal for a Framework Law was duly presented by the Government to Parliament in March 2013.[52] A public consultation ensued involving again the regulatory authorities and other stakeholders,[53] which resulted in the Framework Law.[54]

The new law establishes a common institutional framework for independent regulators, including the general principles for which these entities are bound, as

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47 As noted by the Constitutional Court in judgment 365/2008, of 2 Jul. 2008.

48 The 2002 Proposal was prepared at the request of the Government by Professors Vital Moreira and Fernanda Maçãs of the University of Coimbra, and later published in V. Moreira & F. Maçãs, *supra* n. 44.

49 Further to the global financial crisis initiated with the collapse of Lehman Brothers in September 2008, and the sovereign debt crisis which struck a number of EU Member States from April 2010, Portugal requested financial assistance from the EU and the IMF, which was approved on 17 May 2011 (see *supra* n. 4). The three-year programme is scheduled to end on 17 May 2014.

50 P. Gonçalves, *Reflexões sobre o Estado Regulador e o Estado Contratante* 33 (Coimbra Editora 2013).

51 See the Memorandum of Understanding *supra* n. 3, s. 7.20.

52 Proposal of Law 132/XII, of 7 Mar. 2013.

53 See the opinions and reports submitted by the regulatory authorities and other respondents to Parliament at www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=37580 (accessed on 30 Apr. 2014).

54 The Framework Law entered into force on 2 Sep. 2013 following its publication in the official gazette on 28 Aug. 2013 and the statutory *vacatio legis* period of five days.

well as specific rules on the creation of new authorities, appointment of management bodies, governance and accountability, which will be analysed in further detail below. As a framework law, it does not establish detailed rules on individual authorities' competences and on procedural and sanctioning powers and duties, which are set forth in individual statutes and other substantive and procedural legal instruments. Nevertheless, the new provisions of the Framework Law are imperative for the existing regulatory authorities bound by it,[55] and, therefore, individual statues will have to be amended in order to comply with the new rules. Thus far, only the statute of the water and waste management regulator (ERSAR) has been revised in the implementation of the Framework Law.[56]

4 REGULATORY AUTHORITIES: CONCEPT AND CREATION

The definition of what constitutes an *independent regulatory authority* has long been the object of scholarly debate.[57] The Constitution refers to '*independent administrative entities*',[58] and some authorities are designated in the statute as such. But this concept is not uniformly applied, not only because there are a number of bodies with regulatory functions which lack independence from the Government, but also because several independent authorities exist whose functions differ from those of economic regulation.[59] In the Statute of the Competition Authority, the term '*sectoral regulatory entities*' is used to define the list of the sectoral regulators who are bound by reciprocal duties of cooperation.[60]

Pursuant to the Law, the new framework is applicable to *independent administrative entities with functions of regulation and promotion of competition in economic activities*.[61] These are defined as *public law bodies with the nature of independent*

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55 Article 2(2) of the Framework Law establishes that its provisions are imperative and overrule existing legal instruments currently in force, with the exception of EU acts and the recent Competition Act (Law 19/2012, of 8 May).

56 Law 10/2014, of 6 Mar. 2014.

57 See V. Moreira & F. Maçãs, *supra* n. 48, as well as E. Paz Ferreira & L. Morais, *supra* n. 5.

58 See Art. 267(3) of the Constitution, as well as the Statutes of media regulator ERC or energy regulator ERSE, for instance.

59 For instance, data protection authority *Comissão Nacional de Protecção de Dados* ('CNPD') safeguards the fundamental right to privacy, and the main role of media regulator ERC is to protect the plurality of the media and the freedom of the press as a way of ensuring the fundamental right to expression, although some of its competences over media companies are largely equivalent to other 'economic' regulators (see Art. 39 of the Constitution). There are also objections to the term being applied to the Competition Authority, as its competence spans across all sectors of the economy and in its functions of promotion and safeguarding the process of competition it does not directly regulate the access to, or the terms of operation in, the market.

60 See Art. 6(4) of Decree-Law 10/2003. Although this list is not exhaustive, in the absence of a statutory classification of the regulatory authorities it has been used throughout the years in practice to identify the main regulatory authorities in Portugal.

61 See Art. 1(1) of the Framework Law. The 2002 Proposal referred instead to *independent regulatory authorities*. In this article both terms are used interchangeably (all regulatory entities enjoy wide powers

administrative entities, responsible for regulating economic activity, defending services of economic interest, protecting consumers' rights and interests and promoting and defending competition.[62] The first category of independent administrative authorities placed outside the common framework is therefore that of those without a primary economic regulation role, such as the data protection authority CNPD.[63]

While the new common framework is applicable to any *regulatory entity that is defined as such by a law*, the Law recognizes as being bound by it, for the purposes of amending its respective statutes, the existing regulators for insurance, capital markets, energy, communications, civil aviation, transports, water and waste and health services, as well as the Competition Authority.[64]

The entities recognized as regulatory authorities for the purposes of the new framework largely coincide with those referred to in the Statute of the Competition Authority, with a number of exceptions. Expressly excluded from the scope of the Framework Law are the central bank and banking regulator (the Bank of Portugal) and the media regulator ERC. The Bank of Portugal is subject to a specific EU law regime as a member of the European System of Central Banks,[65] which at some point could collide with the application of some of the provisions of the Framework Law. The exclusion of the ERC results, however, from its special constitutional status. As the authority responsible for safeguarding fundamental values such as the freedom of expression in the media, it is the only administrative authority expressly referred to in the Constitution, which defines its main attributions, and its members are appointed by Parliament,[66] without any intervention or supervision from the Government.[67] Finally, a number of entities with regulatory functions are not mentioned in the new law, such as the real estate and construction regulator (InCi) or pharmaceuticals regulator INFARMED, and therefore remain outside the new framework.

Although the attempt to formulate a legal definition of regulatory authority is welcome, it falls short of covering all the public bodies existing in Portugal with some kind of regulatory function. On the other hand, a number of public bodies that under this definition should be considered regulatory entities are placed outside the new framework. This leads to the conclusion that, beyond a purely legal categorization, the determining factor for the submission of a public body to the Framework Law still remains a political judgment by the legislator of whether

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of public authority, and the official designation of several is 'authority', such as the Competition Authority or communications regulator ANACOM).

62 See Art. 3(1) of the Framework Law.

63 See *supra* n. 59.

64 Article of 2(1) of the Framework Law, and Art. 3(a) of Law 67/2013 (approving the Framework Law).

65 See *supra* n. 31.

66 See Art. 39 of the Constitution.

67 See Law 53/2005.

a given public body, considering all relevant circumstances, should be given (or not) a special degree of independence from the Government.

One of the main innovations of the Framework Law, already contained in the 2002 Proposal, is the establishment of a procedure for the creation of new regulatory authorities.

The first principle in this regard is that regulatory authorities *can only be created for pursuing regulatory activities that recommend that these authorities should not be submitted to the direction of the Government, given the need for such activities to be performed with independence*. Regulatory authorities cannot, in particular, have functions that are required by the Constitution to be performed by the general civil service. Besides the requirement of independence, there are two other cumulative conditions to be met by new authorities, that result from an effort pursued in recent years to consolidate and prevent the increase of expenditure within the public administration: an effective public interest need for a new public body to perform such activities, and financial self-sufficiency.[68] Any decision in this regard must be preceded by a study about the public interest need for a new entity and the financial and operating impact for the State, as well as the (positive) effects over the regulated activities and communities.[69] While it is not expressly stated in the law, it is advisable that this impact study be made public, or even be preceded by public consultation, which in any event must take place before the adoption of the legislative act creating the new entity.

In order to confer additional democratic legitimacy to new regulators, the Framework Law provides that new regulatory authorities are created by an act of Parliament, further to a proposal from the Government. The Constitution already provides that independent administrative entities must be created by a legislative act (either a law, enacted by Parliament, or a decree-law, enacted by the Government, within their respective spheres of competence[70]), but conferring the legislative competence to the Parliament contributes to reinforcing the legitimacy of the new entity, not only as a result of a broader political consensus,[71] but especially from a wider parliamentary discussion of the proposal. The statute of the new entity, detailing its mission, powers, bodies and financing, is then approved by the Government.[72]

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68 See Art. 6(1) to (3) of the Framework Law. These requirements are not applicable when the creation of a new regulator is determined by EU law (Art. 6(5)).

69 The Framework Law in this regard follows the prior assessment exercise for the creation of new agencies advocated in the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies, 25 Feb. 2005, COM (2005) 59 final, p. 12.

70 See *supra* n. 43.

71 Even though in the Portuguese political system the Government is formed as a result of a parliamentary majority, and therefore this majority (which is sufficient to approve legal instruments that do not require a special majority) is usually closely aligned with the Government.

72 See Art. 7 of the Framework Act.

5 INDEPENDENCE

5.1 Formal independence from the government

In Portuguese administrative law, even Government agencies with some degree of organizational and financial autonomy (usually characterized as *institutos públicos*[73]) are subject to the Government's powers of supervision (*superintendência*) and oversight (*tutela*). The power of supervision generally implies the ability of the responsible minister to give directives and to make recommendations to the management of the public entity on its activities or priorities,[74] whereas the extent of the Government's oversight powers may vary between a strict legality control of the agency's budget and annual report and a control on the merits of its activities,[75] including intrusive powers such as the ordering of inquiries regarding the functioning of the agencies' services.[76]

The autonomy of the regulatory authorities now covered by the Framework Law presented a diverse picture. While the Competition Authority or energy regulator ERSE, for instance, benefitted from formal independence from the Government, and were subject to the responsible minister's oversight only over financial and staff matters, others – such as the regulators for rail transport (INTF), water and waste (IAR) or civil aviation (INAC) – were 'traditional' autonomous agencies (*institutos públicos*),[77] and were subject to the supervision and oversight of the responsible minister. Even recently reorganized agencies, such as IMT (resulting from the merger of the rail, road and maritime transport regulators), remained subject to the Government's supervision and oversight.[78]

The Framework Law establishes in this regard that *the regulatory entities are independent in the exercise of their functions and are not subject to Governmental supervision or oversight*.[79] Although for organizational purposes each authority is placed within the sphere of the minister with responsibility over the regulated economic activity (called the 'responsible minister'[80]), the new Law expressly prevents the Government from issuing recommendations or directives, and oversight powers are limited to the execution of the agency's finances. In this

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73 See Law 3/2004, of 15 Jan. 2004, as amended by Decree-Law 5/2012, of 17 Jan. 2012.

74 See Art. 42 of the Framework Law of Autonomous Public Bodies (*Lei-quadro dos Institutos Públicos*), approved by Law 3/2004, of 15 Jan. 2004, as amended by Decree-Law 5/2012, of 17 Jan. 2012.

75 Freitas do Amaral, *Direito Administrativo* 699–712 (vol. I, 2nd ed., Almedina 2002).

76 See Art. 55(5) of the statute of the health services regulator ERS (*supra* n. 29).

77 See M.M. Leitão Marques, J.P. Simões de Almeida & A. Matos Forte, *Concorrência e Regulação (A Relação entre a Autoridade da Concorrência e as Autoridades de Regulação Sectorial)* 11 (Coimbra Editora 2005).

78 See Art. 1(2) of Decree-Law 236/2012, of 31 Oct. 2012.

79 Article 45(1) of the Framework Law.

80 Article 9 of the Framework Law. In the case of the Competition Authority, the responsible minister is the Minister for Economy.

context, the multi-annual plan, the budget and the annual report and accounts must be approved by the responsible minister (and are considered to be tacitly approved within sixty days upon their reception), but approval can only be refused on grounds of illegality or serious harm to the agency's objectives or the public interest, or in the case of a negative opinion by the advisory committee (if one exists).[81] Importantly, the Law allows the statute of each agency to provide for Government approval of other decisions with 'financial incidence'.[82] As the statutes of the regulatory authorities are approved by the Government, it could be argued that this provision leaves an 'open door' for the Government to re-introduce stronger oversight powers over independent regulators. It is therefore advisable that this exception be applied with restraint, in order not to jeopardize the independence of the regulatory authority.

Regulatory authorities are frequently consulted by Governments due to their specific expertise in their respective domains. Consultation of regulators on policy-making can have positive effects, because their contribution can improve the quality of legislation in such areas.[83] Accordingly, the Framework Law sets forth that authorities should assist the Government, by way of technical support, providing opinions, information and preparing draft legislation.[84] This must be viewed against the backdrop of a considerable downsizing in recent years of the central departments (directorates-general) of many ministries, in particular further to the EU-IMF assistance programme.[85] One of the main functions of such departments being the support of their respective ministers in determining public policy and preparing new legislation, the loss of capabilities of the traditional civil service has meant that in a number of sectors members of Government have been relying more on the assistance of regulatory authorities. While this support is welcome to a certain extent, it may also raise concern, not only from a democratic legitimacy perspective (a non-democratically elected body shaping legislation), but also because closer and more frequent contacts with the Government, especially in the context of 'technical assistance', may have a detrimental effect on a regulatory authority's independence.

In any event, while regulatory authorities should act independently from the Government, and cannot be pressured as to the choice and implementation of their enforcement priorities, there is no doubt that, as any administrative authority, regulators are subject to the laws enacted by the legislator (the Parliament and the

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81 Article 45(2) to (7) of the Framework Act. The minister is also competent to approve decisions with financial implications for the agency, namely the acceptance of donations or inheritances, or the acquisition or sale of buildings.

82 See Art. 45(5) of the Framework Law.

83 See Gilardi & Maggetti *supra* n. 2.

84 Article 21(1)(m) of the Framework Law.

85 See *supra* n. 3.

Government, not to mention the EU legislator, of significant importance in the regulated sectors), as well as to the Government's political documents defining the national overall strategy for each sector (e.g., transportation, energy or communications), pursuant to the applicable sectoral laws.[86]

With respect to the decision-making process, under the Framework Law all decisions of a regulatory authority are taken collectively by the managing board (*conselho de administração*),[87] which is composed of three or five members. A collective decision-making and deliberation process promotes the objectivity and responsibility of its members, a plurality of views, consistency of decisions over time and reduced pressure from exterior forces.[88] This has long been the general practice in autonomous agencies in Portugal, and all existing regulatory authorities had already collegiate management bodies. Decisions are taken by majority of votes cast, and while abstentions in voting are not allowed, dissenting votes and opinions may be issued.[89] This is a further measure of transparency in the internal workings of regulatory authorities, which may contribute to strengthening their independence, and, consequently, their legitimacy.

The main objective of the principle of independence is that decisions of regulatory authorities are adopted without any interference from the Government.[90] Pursuant to the 2002 Proposal, the responsible minister can attend meetings of the managing board, although not take part in the deliberative part of the meeting, *in order to facilitate ways of informal communication between the Government and regulatory authorities, and to prevent conflicts for lack of information*.[91] This solution, questionable from an independence perspective, was not followed in the Framework Law. While informal contacts between the Government and regulatory authorities are to a certain extent necessary and welcome, the regular presence of the minister in the meetings of the board could at a minimum jeopardise the appearance of independence regulators must uphold, besides potentially submitting the members of the board to political pressures which the very existence of the authorities is meant to eliminate.

A peculiar solution of the Framework Law in this context is the right of the president to veto decisions of the board *if they are contrary to the law, to the Statute or*

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86 See, for instance, the recent statute of ERSE.

87 Certain decisions (such as decisions on procedural matters) can be delegated to senior staff by the managing board pursuant to general rules of administrative law.

88 See V. Moreira & F. Maçãs, *supra* n. 48, as well as *OECD Principles for the Governance of Regulators*, *supra* n. 1 at p. 43.

89 See Art. 22(2) and (3) of the Framework Law. Against, see Luís Catarino, *O Novo Regime da Administração Independente: Qui custodiet ispos custodes?*, Cedipre Online 16 Feb. 2014, p. 18.

90 Except regarding the decisions with financial impact (e.g., approval of budget or annual accounts), as mentioned above.

91 See Art. 22(4) of the 2002 Proposal.

to the public interest.[92] According to the 2002 Proposal, on which this provision of the Framework Law is based, the objective is to give the president the responsibility to safeguard legality and public interest in the decision-making of the board. At any rate, this veto right is 'mitigated', or merely temporary, since it can be overruled by the board, after the hearing of entities that the president deems convenient.[93]

It is also interesting to note in this regard that in public consultation in the Parliament doubts were raised as to the combination in one administrative body of the roles of investigator, prosecutor, and decision maker in cases involving sanctions, reflecting the growing debate on the compatibility of the administrative system of competition enforcement (in force in the EU and in most Member States, such as Portugal) with the rules of the European Convention of Human Rights ('ECHR') requiring a fair hearing in criminal sanction cases by an independent and impartial tribunal.[94] In particular, it was suggested that investigations of regulatory authorities involving sanctions should be decided by an ad hoc commission, independent from the management board, which could not include any member of staff involved in the previous phases of the investigation.[95]

The final version of the Framework Law did not endorse this suggestion, and does not contain any reference to the procedural duties of independent regulators when deciding on the imposition of penalties.[96] This is not entirely unsurprising, as the Law deals essentially with institutional matters, but since it lays down a common framework for regulatory authorities (some of which were granted sanctioning powers only recently), a provision of general nature outlining the need to respect the rights of the defence of regulated companies would certainly have been welcome.

Finally, the independence of regulatory authorities means that a decision adopted by an authority under its statutory powers cannot be overturned by the Government, and is subject only to judicial appeal. There is, however, an exception to this rule in the Statute of the Competition Authority regarding decisions prohibiting a merger operation that significantly impedes competition under the Competition Act. Further to an extraordinary administrative appeal from the merging parties, the minister for economy may overturn the Competition

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92 See Art. 23(4) of the Framework Law.

93 Based on Art. 23(3) of 2002 Proposal.

94 In particular, Art. 6 of the ECHR. See C. Bellamy, *ECHR and Competition Law Post Menarini: An Overview of EU and National Case Law*, e-Competitions, n.º 47946, www.concurrences.com.

95 See comments of the *Associação Portuguesa de Seguradoras* (the Portuguese Insurance Association) to the proposal of a framework law on independent regulatory authorities, 19 Apr. 2013, available at the Parliament's proposal webpage (*supra* n. 53).

96 In any event, as discussed below in s. 6, the decisions of regulatory authorities are subject to full judicial review (see P. Gonçalves, *Direito Administrativo da Regulação*, *supra* n. 13 at p. 569).

Authority's decision and authorize the operation when its benefits for the fundamental interests of the national economy outweigh its anti-competitive effects. This decision must be duly reasoned and may contain conditions and obligations in order to mitigate its negative impact on competition. This power, which is based on a similar solution in the German Competition Act, has thus far been sparingly used by the Government.[97]

5.2 Appointments and tenure

One of the areas where considerable differences between regulatory authorities remained concerned the rules governing the appointment and termination of each agency's managing and decision-making and auditing bodies. The Framework Law introduces welcome common rules in this regard, which reinforce the transparency of the process and the independence of members of statutory bodies.

Under the Framework Law, all regulatory authorities must have a managing board (*conselho de administração*) and an audit committee (*comissão de auditoria*) or single auditor (*fiscal único*). The managing board must be a collegiate body and, as mentioned above, is composed of either three or five members (including a president and in the latter case, a vice-president). The statute of each regulator must provide either for a three-member audit committee or a single auditor. The single auditor or at least one of the members of the audit committee, where applicable, must be a chartered auditor.[98]

Traditionally, members of the management bodies of Government agencies were appointed by a decision of the responsible minister. Certain regulatory authorities were already subject to a more formal procedure, where the decision was taken through a collective resolution of the Council of Ministers, as is the case of the Competition Authority.

The Framework Law now establishes that members, who must have appropriate qualifications and experience and meet recognized integrity standards, are proposed by the responsible member of Government. The independent recruitment commission for civil service[99] must give its opinion on the candidate

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[97] Since 2003 to the present day the minister for economy overturned only one prohibition decision of the Competition Authority, in case 22/2005 *Brisa/AEO/AEA* (Authority's decision of 7 Apr. 2006, Ministerial decision of 8 Jun. 2006). See C. Botelho Moniz & P. Gouveia e Melo, *Merger control in Portugal 2014*, International Comparative Legal Guide to: Merger Control 2014 (Global Legal Group 2013), available at http://www.mlgts.pt/xms/files/Publicacoes/Artigos/2013/Merger_Control_Portugal_2014.pdf (accessed on 30 Apr. 2014) p. 314.

[98] See Art. 28 of the Framework Law. If the activity of the regulator so justifies (for instance, regarding the setting of regulated tariffs), an advisory committee composed of representatives of the regulated companies may also be created (see Art. 15(2) of the Framework Law).

[99] *Comissão de Recrutamento e Selecção da Administração Pública* ('CRESAP'), created by Decree-Law 8/2012, of 18 Jan. 2012.

(including qualifications and conflicts of interest), which then should be sent to the relevant committee of Parliament. The parliamentary committee should then conduct a hearing on the candidate and prepare a report on his/her suitability. The final decision is taken by the full Government, through a duly reasoned resolution of the Council of Ministers.[100]

It has been argued that Parliament should have confirmation or veto power over the appointment of the members of the management board of regulatory authorities, as it would reinforce their independence from the Government and at the same time their democratic legitimacy. However, in a semi-presidential parliamentary political system such as the Portuguese system, it is the parliamentary majority that forms the Government, and the composition of parliamentary committees reflects the importance of political forces in the Parliament. This means that in practice the Government is usually closely aligned with the parliamentary political majority. For this reason, the main contribution of Parliament to the appointment procedure is the reinforcing of transparency and public discussion of the candidates' qualifications and integrity (even without veto powers), thereby strengthening the quality of the authorities' management and at the same time their independence relative to the Government.[101]

Terms of office for the management board are limited to fixed six-year periods, which cannot be immediately renewed.[102] While members are formally independent and non-partisan, in the case of the simultaneous appointment of two or more members, the duration of their terms cannot coincide (if necessary, the terms should be shortened so that there is a difference of at least six months between the end date of each member's term of office).[103]

Board members should exercise their functions on an exclusivity basis (with the exception of lecturing or investigative functions, which in any case cannot be remunerated), and the Framework Law sets out detailed rules on incompatibilities and conflicts of interest of board members, during and after their term of office, which in the case of several authorities constitute a meaningful clarification and

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100 See Art. 17 of the Framework Law.

101 In the same way, regarding the Spanish political system, see Maria Salvador Martínez, *Independent Administrative Authorities in Spain*, in *Independent Administrative Authorities* 176 (R. Caranta, M. Andenas & D. Fairgrieve, BIICL 2004).

102 Article 20(2) of the Framework Law. Board members can be re-appointed after at least six years have passed from the end date of their previous term.

103 In order to further gender equality, the Framework Law also provides that the office of president should alternate between genders, and that the remaining members must ensure a 33% representation of each gender (see Art. 17(8)). Legislative provisions to promote gender equality are generally welcome. However, the wisdom of requiring that a female president succeed in all cases a male president and vice-versa may be questioned, especially in very specific technical areas where the pool of candidates may at the outset already be limited, especially when the limitations on term renewals are also considered.

reinforcement of members' independence. The aim of these restrictions is to ensure that the members of the governing body of a regulatory authority are independent from any pressure, not only from the Government, but also from pressure groups or individual companies (such as regulated companies, especially in concentrated sectors such as those of energy and communications).

In particular, during their term of office members cannot maintain any relationship with or interest in regulated companies or entities, or in any other entity the activity of which may collide with the regulatory authority's mission and competences.[104] In addition, the 2002 Proposal, by considering the previous functions of potential board members, effectively prevented the appointment of those members to a regulatory authority, who in the previous two years had held senior positions in entities subject to its jurisdiction.[105] The Framework Law did not include this outright restriction, which in our view is positive, since it would automatically disqualify a number of qualified candidates, and concerns regarding the previous occupations of potential board members and their impact on their independence can be adequately addressed during the appointment process by the assessment of the CRESAP and the Parliament.

After their term of office has ended, board members cannot work in any capacity for regulated companies during the following two years, for which they receive a compensation equivalent to half their monthly salary.[106] The penalty for breaching these rules is high, as former members who breach these rules are required to return all remuneration received from the regulatory authority during and after their term of office.[107]

The above-described rules on incompatibilities and conflicts of interest during the term of office are applicable to members of the auditing bodies, as well as to the staff of the regulatory authorities, which is a positive clarification in order to reinforce the agencies' independence from market parties. The restrictions after

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[104] They also cannot be members of any other government or public body. See Art. 19(1) of the Framework Law.

[105] See Art. 17(1) of the 2002 Proposal (see *supra* n. 48).

[106] See Art. 19(1) to (8) of the Framework Law. In the case of the Competition Authority, the limitation concerns only those companies or entities intervening in cases during their term of office (see Art. 19(3) of the Framework Law). The broad formulation of this provision may be interpreted as including, for instance, law firms or economic consultants, for instance, which would be undesirable, since these professionals are under duties of independence, and conflict of interest concerns could be effectively and transparently dealt with on a case-by-case basis.

[107] See Art. 19(6) of the Framework Law. The compatibility of this penalty (which clearly has a sanctioning effect) with constitutional principles, such as the principle of proportionality, is somewhat doubtful, as it does not allow for all the circumstances of the case to be considered. The law also does not expressly state the body responsible for enforcing this penalty, and the procedural rules to be followed. In any event, the rights of the defence of the former member must be respected and this question must be addressed in the statute of each independent regulatory authority.

the term of office also apply to staff which held positions of head of department or equivalent.[108]

In order to bolster their independence from the Government, the conditions regarding the dismissal of board members of regulatory authorities are also severely limited. Members of governing bodies can only be dismissed by a duly reasoned resolution of the full Council of Ministers, preceded by an inquiry and reports from an independent entity, from the audit committee (if it exists) and by the competent parliamentary committee. The only grounds for dismissal, however, in the case of serious or consistent breach of statutory obligations, are breaches of exclusivity or duties of confidentiality or substantial and unjustified non-compliance with an authority's activity plan or budget.[109]

5.3 Resources, financial and administrative autonomy

Financial and administrative autonomy is, according to the Framework Law, one of the key requirements to be fulfilled by regulatory authorities in order to enable them to carry out their duties independently.[110] This is in point of fact a fundamental issue, as formal independence without the adequate means and resources and the ability to manage them effectively without external interference can mean very little.

For the legislator behind the Framework Law, the concept of an independent authority implies its financial self-sufficiency, which is a necessary condition for the creation of any new regulator, as seen above. Moreover, under the Law, the regulatory authorities' own revenues are primarily contributions, fees or regulated tariffs, and the amounts from fines imposed. Funds from the State budget should only be used on a subsidiary basis.[111] In practice, all the main regulators in Portugal are currently financed by regulatory contributions and fees.[112]

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108 See Art. 32(4) to (6) of the Framework Law. In the case of former department heads, however, they are not granted any compensation for this limitation to their subsequent careers, an outcome which could be seen not only as disproportionate but also as dissuading qualified candidates from joining the staff of a regulatory authority, especially considering the broad wording of the law (see *supra* n. 105).

109 See Art. 20(4) to (7) of the Framework Law.

110 See Art. 3(2)(a) of the Framework Law.

111 See Arts 6(3)(c) and 36 of the Framework Law. The power to impose regulatory contributions and fees is established in Art. 34.

112 Even the Competition Authority, which besides merger control fees and amounts from fines imposed, receives a percentage from the regulatory contributions of the other sectoral regulators. See Sérgio Gonçalves do Cabo, *Gestão financeira e patrimonial – Modos de financiamento de Autoridades Reguladoras (contribuições, taxas e tarifas)*, presentation to the conference *A Nova Lei-Quadro das Entidades Reguladoras – Primeiras Reflexões e Perspectivas para o Futuro*, Lisbon University Law School, 11 Nov. 2013, available at http://www.institutoeuropeu.eu/images/stories/A_LQER_-_Gesto_Financeira_e_Patrimonial_SGC_12112013.pdf (accessed on 30 Apr. 2014).

While the approval of the budget and annual accounts continues to be the Government's responsibility, as seen above, the Framework Law extends the reinforced financial autonomy regime that already applied to a number of authorities (such as insurance regulator ISP or capital markets regulator CMVM) to all regulatory authorities. These rules considerably reinforce the authorities' autonomy, for instance in terms of authorization of expenses or use of budget surpluses from year to year (which before were simply transferred to the State budget).[113]

Another important feature of the new Law is a marked increase of the autonomy of the regulatory authorities in the hiring and management of staff. All staff-related issues are now decided by the management board, including the approval of internal regulations on remuneration, evaluation and career plans of staff, which until now were to a large extent dependent on confirmation by the responsible minister.[114] Although the ability to define internal hiring and compensation rules represents an exception to the general regime of the civil service (and special remuneration regimes are questioned from time to time, especially in situations of budgetary constraints), it is vital to attract potential qualified candidates and to motivate and retain existing staff.

5.4 Competences and powers

In order to ensure that the mandate of a regulatory authority is strongly and effectively enforced, not only should its competences be clearly stated in the law, but also the authority should be provided with strong powers of enforcement. In addition, for independence to be preserved it is important that the competences and powers of independent regulatory authorities are formulated in a narrow and precise way, in order to avoid requiring agencies to make a broad balancing of interests and policies.[115] Unclear objectives may harm the action of even formally independent authorities.[116]

As would be expected from a framework instrument applicable to a large number of authorities, the Law establishes only a general list of responsibilities and powers,[117] which are then detailed and specified in each entity's statute and

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113 *Ibid*.

114 See Art. 10(2) of the Framework Law as well as the Preamble of Draft Law.

115 See M. Andenas, *Scandinavian Model*, Caranta, Andenas and Fairgrieve *supra* n. 14.

116 See Gilardi & Maggetti *supra* n. 2.

117 See Art. 40(1) of the Framework Law, pursuant to which regulatory authorities are competent to: (a) enforce the applicable laws and regulations; (b) determine or assist in the determination of regulatory contributions or fees; (c) define the rules for access to the regulated activity, under the terms of the law; (d) ensure a non-discriminatory access to network-based activities; (e) guarantee public services or universal service obligations regarding general interest activities; (f) implement the applicable laws and

applicable substantive and procedural laws. It should in any case be noted that the Framework Law provides for a broad catalogue of competences and for wide-ranging regulatory, investigative, mediation and sanctioning powers, which if fully implemented into each authority's statute and substantive law, will considerably reinforce the enforcement powers of existing regulators.

Regulatory authorities have delegated legislative authority, that is, the power to make acts of general application, usually taking the form of regulations, which are legally binding on regulated companies and other addressees as if they were provisions of statutory law, while continuing to be subject to enabling legislation.[118] The Framework Law provides for increased transparency duties of regulatory authorities when drafting regulations, harmonizing rules and best practices which to a certain extent were already practiced by a number of authorities.[119]

In particular, when envisaging the adoption of a new regulation, regulatory agencies must launch a public consultation of all interested stakeholders (Government, companies, interested entities, consumer associations and the general public). A draft should be made available on the agency's webpage, and stakeholders must be given a minimum of thirty days for the submission of comments. The authority should consider all comments and suggestions and explain their incorporation or rejection in a report attached to the final version of the regulation.[120]

The vast catalogue of investigative and sanctioning powers is modelled on those granted to the Competition Authority under the Portuguese Competition

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regulations; (g) enforce the compliance of relevant companies with any legal or regulatory obligation; (h) enforce the compliance of any guidance or requirement issued by the regulatory authority; (i) issue orders or instructions, grant authorizations and approvals in the cases provided for in the law. The Framework Law also creates a general duty of all regulators to protect the rights and interests of consumers, and promote conflict resolution between regulated companies and consumers, which is welcome, as according to the Directorate-General of Consumer, complaints against regulated companies represent approximately 80% of total complaints received. See T. Moreira, *Implicações para a Política de Defesa do Consumidor*, presentation to the Conference *A Nova Lei-Quadro das Autoridades Reguladoras – Primeiras Reflexões e Perspetivas para o Futuro*, Lisbon University Law School, 11 Nov. 2013, available at http://www.institutoeuropeu.eu/images/stories/DGC_-__IDEFF_IE_-_Confern cia_Lei_Quadro_Entidades_Reguladoras__TM.pdf (accessed on 30 Apr. 2014).

[118] See P. Gonçalves, 'Direito Administrativo da Regulação', *supra* n. 13 at p. 553. In contrast, European agencies, for instance, do not have regulation-making powers (see P. Craig, *European Administrative Law* 150 (2nd ed., Oxford University 2012)).

[119] Such as the Competition Authority, communications regulator ANACOM and energy regulator ERSE.

[120] Article 31 of the Framework Act. See Organisation for Economic Co-operation and Development, *Review of Better Regulation in Portugal*, 2009, p. 35 and D. Ettner & J.T. Silveira, *Better Regulation Programs in Portugal: Simplegis*, E-Publica, No. 1 (2014), www.e-publica.pt.

Act[121] and more recently replicated in the energy sector, further to the implementation of the EU's Third Energy Package.[122] While it will depend on the manner in which these provisions are implemented into each authority's statute, it may herald the creation of a common sanctioning regime for regulatory authorities.[123]

All regulatory authorities will now be empowered to conduct unannounced inspections of companies' premises, obtain copies of documents (including in digital form) and investigate the representatives and workers of companies, requesting the assistance of polices force whenever needed. They will also be able to order interim measures and to impose fines. These powers are worded in very broad terms and it is advisable that they be defined more precisely and carefully in implementing legislation. For instance, there is no mention of the need for a search warrant in surprise inspections (not authorized by the inspected company), as is the case with the Competition Authority, without which the inspection may be illegal.[124] This could still be addressed in the individual statute of each authority, although the only implementing statute approved thus far (that of water and waste management regulator ERSAR) does not provide for the need of a search warrant in the case of unauthorized inspections.[125]

6 ACCOUNTABILITY

6.1 Before the parliament and the public

The Framework Law recognizes that reinforcement of independence must go hand in hand with added accountability and transparency duties, in order to protect public interest and public confidence in the action of regulatory authorities.[126] The Framework Law therefore includes provisions regarding accountability, transparency and good management, which extend to all regulatory authorities rules and best practices that were in part already applied by some

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121 The powers of the Portuguese Competition Authority in turn receive inspiration from the powers of the European Commission for the enforcement of Arts 101 and 102 of the Treaty on the Functioning of the European Union (see Regulation (EC) 1/2003 and its implementing legislation).

122 See Law 9/2013, of 28 Jan. 2013 and *supra* n. 33.

123 See M. Moura e Silva, *Direito Sancionatório das Autoridades de Regulação, Supervisão e Defesa da Concorrência: a caminho de um direito comum?*, presentation to the Conference *A Nova Lei-Quadro das Autoridades Reguladoras – Primeiras Reflexões e Perspetivas para o Futuro*, Lisbon University Law School, 11 Nov. 2013, available at http://www.institutoeuropeu.eu/images/stories/Apresentao_Prof._Doutor_Miguel_Moura_e_Silva.pdf (accessed 30 Apr. 2014).

124 See M. Moura e Silva *supra* n. 123, raising doubts as to the compatibility of the Framework Law with Art. 8 of the European Convention of Human Rights and the case law of the European Court of Human Rights, e.g., in case 37971/97, *Société Colas v. France*, judgment of 16 Apr. 2002.

125 See Art. 9(2) of the statute of ERSAR.

126 See the preamble of Proposal 132/XII *supra* n. 52, p. 6.

authorities (such as the Competition Authority or the energy sector regulator ERSE).

Regulatory authorities are required to follow good management principles, and in particular to perform their activity efficiently and according to high standards, which can be measured by quantifiable performance indicators.[127] The audit committee or the single auditor must assess annually the results obtained and report the conclusions to the Government.[128] Like any other body of the civil service, regulatory authorities are subject to the jurisdiction and financial control of the Court of Auditors.[129]

In order to reinforce the accountability of regulatory authorities to Parliament (the institution with primary democratic legitimacy), the Framework Law establishes that in the first quarter of each year every authority should present before the competent Parliamentary committee its plan of activities and schedule of enforcement actions. Regulators should also prepare a detailed annual report on their activities (to which the report of the audit committee or the single auditor is attached), which should be sent to Parliament and to the Government and published on their website. Finally, the members of the managing body of the regulatory authorities must be present at hearings before the competent Parliamentary committee whenever so required.[130]

The Framework Law also endeavours to increase the transparency of the regulators' activities by requiring that all authorities maintain a webpage in which they make available *all relevant information*, notably regarding the applicable legislation, internal organization (including biographic information, wages of bodies, staff lists and career plans), financial documents, as well as *information relating to its regulatory and sanctioning activity*.[131] The timely publication of non-confidential versions of decisions taken in individual cases by a regulatory authority is essential for regulated companies and other interested stakeholders alike to know and comply with their regulatory obligations. It is therefore somewhat disappointing that the Framework Law has been so succinct on this point, especially because the tradition of transparency of the civil service in Portugal in this regard is not remarkable. As an example, the recent Competition Act provides that the Competition Authority must publish on its website non-confidential versions of all

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127 See Article 4 of the Framework Law. Regulatory authorities are expressly required to adopt the most cost-effective solutions, taking into account the cost for the regulated sector (see the preamble of Proposal 132/XII *supra* n. 52, p. 6, and Art. 4(2) and (3) of the Framework law).

128 See Art. 39 of the Framework Law.

129 See Art. 5(3)(d) of the Framework Law. Art. 5(3)(e) establishes that regulatory authorities are also subject to the general auditing regime of the civil service by the Portuguese audit authority (*Inspecção-Geral de Finanças*).

130 See Art. 49 of the Framework Law.

131 See Art. 48 of the Framework Law.

final decisions, as well as of court judgments related to such decisions.[132] Regrettably, the statute of water and waste management ERSAR (the only one approved thus far in implementation of the law) does not provide for such duty.[133]

6.2 Before the courts

Decisions adopted by regulatory authorities, especially those imposing heavy penalties, are frequently fact-intensive and involve complex technical and economic assessments. The requirement for an effective judicial review of those decisions has led to the creation in many jurisdictions of specialized courts to hear appeals of decisions of regulatory authorities, such as the EU's Court of First Instance (now the General Court), originally created in 1989 to hear appeals from Commission decisions on competition matters[134] or the United Kingdom's Competition Appeal Tribunal.[135]

In Portugal, a specialized court was created in 2011 to hear appeals of decisions of regulatory authorities. The Competition, Supervision and Regulation Court, installed in 2012 in the city of Santarém, is competent to rule on the appeals of all decisions adopted by the Competition Authority, of decisions on sanctioning proceedings by the Bank of Portugal (banking), ANACOM (communications), CMVM (capital markets), ISP (insurance) and ERC (media), as well as sanctioning decisions taken by *other independent administrative entities with functions of regulation and supervision*.[136]

The absence of a legal definition of regulatory independent authority created uncertainty as to which were the authorities (not expressly mentioned in the law) whose decisions could be challenged before the new court.[137] While the Framework Law does not contain provisions on the judicial review of decisions of

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132 See Art. 90 of the Competition Act (Law 19/2012, of 8 May 2012).

133 See Art. 51 of the Statute of ERSAR.

134 See Opinion of Advocate-General Cosmas in case C-344/98 *Masterfoods and HB v. Commission*, 2000 ECR I-11369 at para. 54, as well as Bo Vesterdorf, *Judicial Review in EC Competition Law, Reflections on the Role of the Community Courts in the EC System of Competition Law Enforcement*, 1(2) Competition Policy International 13 (2005).

135 See G. Barling, *The Role of the Court in the Public Enforcement of Competition Law*, *Annual Proceedings of the Fordham Competition Law Institute 2013* 381 (Barry Hawk ed., Juris Publishing 2014); P. Freeman, *Competition Decision Making and Judicial Control – The Role of the Specialised Tribunal*, The Centre for Competition Policy UEA Annual Conference, Norwich, 7 Jun. 2013, available at http://www.catribunal.org.uk/8190-8072/Competition-decision-making-and-judicial-control--the-role-of-the-specialised-tribunal.html (accessed on 30 Apr. 2014). For an analysis of judicial review of competition and regulatory authorities in the Netherlands, France and the UK, see S. Lavrijssen & M. de Visser, *Independent Administrative Authorities and the Standard of Judicial Review*, 2(1) *Utrecht Law Journal* 2006.

136 See Art. 89-B of Law 3/99, of 13 Jan. 1999, as amended by Law 46/2011, of 24 Jun. 2011.

137 See M. Vicente, *Comentário à Lei n.º 46/2011, de 24 de Junho, que cria o Tribunal da Concorrência, Regulação e Supervisão*, Cedipre Online Issue 12 (2012), www.fd.uc.pt/cedipre/cedipreonline.html.

regulatory authorities, it serves the welcome purpose of clarifying this matter, by containing a definition of an independent administrative entity with regulatory function. The Law therefore extends the specialized court's jurisdiction to sanctioning decisions taken by the INAC (civil aviation), IMT (transport), ERSAR (water and waste) and ERS (health), as well as to any new authority that is created in the future pursuant to the Law.

With the exception of the Competition Authority, the specialized court is not the single *forum* for all appeals, but only for those of decisions involving sanctions.[138] All other decisions from regulatory authorities, governed by administrative procedure rules, are challengeable before the administrative courts.[139]

7 CONCLUSION

The establishment of a common institutional regime for a wide number of existing administrative bodies, each with its own history and peculiarities, is certainly not an easy task. Despite its shortcomings, the Framework Law appears to have achieved its main objective of strengthening the independence and improving the functioning of regulatory authorities in Portugal, especially of those that until now were formally under the Government's supervision and oversight powers.

Formal (statutory) independence is not sufficient to ensure de facto independence of regulatory authorities.[140] If properly implemented into the statutes of individual authorities, it is hoped that the Framework Law will enable the appointment of managing boards that are capable, motivated and independent (through a combination of the appropriate powers and duties), supported by qualified and motivated staff, endowed with their own sufficient resources, and subject to (some degree of) Parliamentary scrutiny. However, the success of the Framework Law will ultimately depend on the robustness of the sanctioning powers of each authority, on adequate procedural safeguards to check their actions, on strong policies of transparency and openness and on an effective judicial review, in particular by the recently created specialized court.

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138 These cases are in general subject to the Misdemeanours Act (*Regime Geral das Contra-ordenações*), approved by Decree-Law 422/83, as amended, although there are special sanctioning regimes for the communications and energy sectors (see Laws 99/2009, of 4 Sep. 2009 and 9/2013, of 28 Jan. 2013), as well as for competition law (in the Competition Act).

139 M. Moura e Silva *supra* n. 123. The appeals are ruled by the Code of Procedure in the Administrative Courts, approved by Law 15/2002, of 22 Feb. 2002, as amended.

140 See Gilardi & Maggetti, *supra* n. 2.