A Study of the Regulation of Utilities in Malta

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To Phyllis

and

in memory of my parents

William Frederick and Maria Dolores

Abstract

The utilities considered in this thesis namely electronic communications, postal services, electronic commerce, electricity, gas and water are all essentials of everyday life. It is therefore imperative that the regulation of these utilities is effectively and efficiently catered for by well-resourced regulators. To date few studies have been undertaken in Malta addressing the overall regulation of these utilities under Maltese law. The present regulatory regime whereby regulatory oversight is shared between on the one hand, two sector specific utilities regulators - the Malta Communications Authority (MCA) and the Regulator for Energy and Water Services (REWS) - and on the other hand the national competition and consumer regulators - namely the Director General (Consumer Affairs) and the Director General (Competition) within the Malta Competition and Consumer Affairs Authority (MCCAA) - has been in place in one form or another for more than two decades.

During this period issues have arisen highlighting various deficiencies. These include the overlap of roles of the competent regulatory authorities, leading at times to lack of clarity as to which authority has regulatory responsibility in dealing with certain issues, the lack of uniformity in the enforcement tools available to the regulators leading to a situation where one regulator is better equipped to deal with some instances of non-compliance than the other, and issues relating to the independence and accountability of the regulators in the exercise of their regulatory functions. This notwithstanding, to date no detailed evaluation has been undertaken about the suitability of the current regime and the regulatory tools in place, in particular whether there are more suitable options more so given a continuously changing regulatory environment characterised in part by new European Union (EU) norms relating to matters that impact the provision of the utilities discussed in this thesis. In addressing these and other matters the author considers various key aspects relating to the regulation of utilities in Malta. These include:

- the current regime regulating the provision of utilities, if this should remain in place or whether there are other feasible options such as a multi-sector utilities regulator or going a step further, a 'super' utilities regulator which also assumes the mantle of national competition and consumer protection regulation;
- the composition of the headship of the regulators, the criteria on the basis of which the persons forming part of the headship should be chosen, and the procedure relating to their appointment to and removal from office;
- the independence and accountability of the regulators;
- the enforcement tools used by the regulators, notably whether regulators should be empowered to impose dissuasive sanctions directly or else seek court orders to impose such sanctions;
- judicial review of regulatory decisions, notably the composition and remit of the judicial review forum; and
- consumer redress where different aspects of consumer protection are regulated by different public authorities leading to a fragmented regulatory regime to the detriment of both consumers and utility service providers.

In discussing many of these aspects the chronology of the laws enacted commencing from 1997 when the first utility regulator in Malta was established, is traced highlighting the changes introduced through the years up to the 30th September 2022. One crucial factor that underlines many of the aspects discussed is the impact of EU legislation, which has at least since the accession of Malta as a member state of the EU in 2004, been pivotal in motivating various regulatory measures in relation to the utilities considered in this thesis. The underlying vision of the author in the various proposals made in this thesis is to have in place a single utilities regulator with remit to deal with all aspects of competition and consumer protection at least in so far as these relate to the provision of utilities, ensuring that the regulator has access to effective and timely enforcement tools the use of which is in turn subject to judicial review.

Preface

The idea to undertake this study was motivated in part by the work the author has performed as a lawyer at the MCA since 2001. The professional duties of the author with the MCA give him a good insight of many issues discussed in this thesis. The multiple issues discussed are difficult to resolve. Looking back, substantial progress has been made with notable improvements introduced gradually, many in line with EU requirements. This notwithstanding, there is still considerable room for change. Some issues will not be settled simply through changes to the law. A cursory glance at various legal norms reveals that whilst various laudable measures are in place, in practice effective implementation is sometimes lacking. Ultimately much depends on the willingness of the legislator, government and the headship of the various competent public authorities involved in the regulation of utilities in Malta to adopt and implement adequately the necessary changes to ensure that there is in place effective, fair and timely regulation.

Some of the issues discussed go beyond the regulation of utilities and impact regulatory governance in general. In this regard two key issues considered at some length in this study come to mind. One is the independence and accountability of regulators. At law both utilities regulators discussed in this study - the MCA and the REWS - are independent in the exercise of their regulatory functions. In reality however this is not always the case, with pressure sometimes applied by government, conditioning certain regulatory decisions thereby impacting negatively effective regulation.

Malta needs to progress from a mindset where the independence of regulators remains, directly or indirectly, subservient to government. Considerable improvement has been made in the wording of the law, in part due to applicable EU requirements, in order to ensure regulatory independence from stakeholders and from government. However in practice in some instances regulators still look behind their shoulders seeking or acting on policy directions from government when they should not in practice always do so. Whilst it is legitimate that regulators in the performance of their functions act also in conformity with general

government policies provided that this is all done in an open and transparent manner, the current norms fail to cater for situations where for example government requires compliance by a regulator with a general policy direction which the regulator objects to. The norms on accountability also require substantial change, leading to a situation where regulators are directly accountable to a body that is independent of government such as for example the Office of the Ombudsman, the National Audit Office or a select committee of the House of Representatives where government members of the House are in a minority.

The other main issue that urgently needs to be properly addressed relates to the enforcement powers of regulators, specifically the faculty to impose sanctions on non-compliant utility service providers. The 2016 landmark Federation of Estate Agents judgement by the Constitutional Court has radically changed the regulatory landscape. As a result of this judgement there is uncertainty as to the constitutional legality of the powers of many economic regulators - including the two utilities regulators MCA and REWS - to impose dissuasive sanctions on non-compliant persons allegedly acting in breach of the regulatory norms. Should regulators retain the power to impose sanctions directly in all instances, only in some instances where recourse for a court order is necessary if the sanction exceeds a prescribed monetary limit, or be required in each instance to apply to the courts requesting the imposition of such sanctions? This is an issue which in its own right merits a detailed study and which should be addressed in short order by government.

The regulation of utilities in Malta has not always been given the importance it deserves. Much of the discussion in Malta has been limited primarily to the transposition of the applicable EU norms, rarely venturing beyond. This thesis attempts to address this point by highlighting some of the issues impacting utility regulation in Malta that need be addressed whilst suggesting some solutions. Whilst the author does not assume through this study to have an answer to all the issues discussed, the author has endeavoured to suggest some solutions to resolve various issues.

Acknowledgements

The author would like to acknowledge the support given to him in the course of his studies in writing this thesis. An immense debt of gratitude is due to Professor Kevin Aquilina who was always available, at times at short notice, to discuss numerous points relating to the research undertaken, and to Professor Hans-Wolfgang Micklitz for his advice and support throughout the period of study undertaken and his guidance in facilitating access to various contacts outside Malta. The author would also like to acknowledge the support by various colleagues, in particular Messers Damian Gatt and Robert Mifsud.

The author would also like to acknowledge his debt to the scholarship granted to him under the Tertiary Education Scholarship Scheme (TESS) which covered the University of Malta tuition fees throughout the entire period of registration of his studies with the University. Last but not least thanks are due to his wife Phyllis for her boundless patience and without whose support this thesis would not have been undertaken and concluded.

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Bibliography

List of Acronyms and Abbreviations

- 1999 White Paper: *Privatisation – A Strategy for the Future* – White Paper published by the (then) Ministry of Finance, Malta
- 2021 Amendments: refers comprehensively to Act No XLIX of 2021 and Act No LII of 2021
- Access Directive 2002: Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, EU
- ACER: Agency for the Cooperation of Energy Regulators, EU
- ACM: Authority for Consumers and Markets (Autoriteit Consument & Market), the Netherlands
- ADR: Alternative Dispute Resolution
- ARERA: L'Autorità di Regolazione per Energia Reti e Ambiente, Italy
- ARMS Limited: Automated Revenue Management Services Limited, Malta
- ART: Administrative Review Tribunal, Malta
- Authorisation Directive 2002: Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and serivces, EU
- BA: Broadcasting Authority, Malta
- BAI: Broadcasting Authority of Ireland, Ireland
- BEREC: Body of European Regulators for Electronic Communications, EU
- Better Regulation Directive: Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 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, EU
- CAB: Communications Appeals Board, Malta
- CAT: Competition Appeal Tribunal, UK

- CCAT: Competition and Consumer Appeals Tribunal, Malta
- CCD: Consumer and Competition Division, Malta
- CCT: Consumer Claims Tribunal, Malta
- CEO: chief executive officer
- CEER: Council of European Energy Regulators, EU
- CER: Commission for Energy Regulation, Ireland
- CERRE: Centre on Regulation in Europe, Belgium
- CISAS: Communication and Internet Services Adjudication Scheme, UK
- Citizens' Rights Directive: Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, EU
- CJEU: Court of Justice of the European Union
- CMA: Competition and Markets Authority, UK
- CNMC: Comision Nacional de los Mercados y La Competencia, Spain
- Comreg: Commission for Communications Regulation, Ireland
- CPC: Consumer Protection Cooperation, EU
- CPC Regulation: Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, EU
- CRU: Commission for Regulation of Utilities, Ireland
- DG: director general
- Directive on privacy and electronic communications: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, EU
- Director OFC: Director of the Office of Fair Competition, Malta

- DMP: dominant market position
- DOI: Department of Information, Malta
- DTI: Department of Trade and Industry, UK
- EC: European Community
- ECAP: Electronic Communications Appeals Panel, Ireland
- ECHR: European Convention on Human Rights
- ECJ: European Court of Justice
- EEA: European Economic Area
- EECC: European Electronic Communications Code, EU
- eIDAS Regulation: Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, EU
- Electricity Market Directive 2009: Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning rules for the internal market in electricity and repealing Directive 2003/54/EC
- Electricity Market Directive 2019: 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, EU
- FCC: Federal Communications Commission, USA
- Framework Directive 2002: 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, EU
- FSR: Florence School of Regulation, Italy
- Gas Market Directive 2019: Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, EU
- GEMA: Gas and Electricity Markets Authority, UK
- HMSO: Her Majesty's Stationery Office, UK
- ICNIRP: International Commission for Non-Ionising Radiation Protection
- ICT: Information and Communication Technologies
- Ing: Engineer

- ITU: International Telecommunications Union
- LN: Legal Notice
- LNG: liquefied natural gas
- MCA: Malta Communications Authority, Malta
- MCC: Ministry for Competitiveness and Communications, Malta
- MCCAA: Malta Competition and Consumer Affairs Authority, Malta
- MDIA: Malta Digital Innovation Authority, Malta
- MEI: Ministry for the Economy and Industry, Malta
- MITC: Ministry for Infrastructure, Transport and Communications, Malta
- MP: Member of Parliament
- MoU: Memorandum of Understanding
- MRA: Malta Resources Authority, Malta
- MSS: (Malta) Security Services, Malta
- NRA: national regulatory authority
- OECD: Organisation for Economic Co-operation and Development
- Ofcom: Office of Communications, UK
- Ofgem: Office of Gas and Electricity Markets, UK
- Oftel: Office of Telecommunications, UK
- Ofwat: Water Services Regulation Authority, UK
- OTR: Office of the Telecommunications Regulator, Malta
- PQ: parliamentary question
- PSAB: Postal Services Appeals Board, Malta
- RAB: Resources Appeals Board, Malta
- REWS: Regulator for Energy and Water Services, Malta
- SCT: Small Claims Tribunal, Malta
- SL: subsidiary legislation
- SI: statutory instrument
- TAB: Telecommunications Appeals Board, Malta
- TFEU: Treaty on the Functioning of the European Union
- TPC: Trade Practices Commission, Australia
- TPPI: Today Public Policy Institute, Malta

- UK: United Kingdom
- UKE: Urzad Komunikacji Elektroniczne (Polish office of the electronic communications regulatory authority), Poland
- ULR: Utilities Law Review
- Universal Service Directive 2002: 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, EU
- USA: United States of America
- WAREG: European Water Regulators
- WATRS: Water Redress Scheme, UK

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Council of Europe

- European Convention on Human Rights

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- Treaty on the Functioning of the European Union

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- Regulation (EC) 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on Consumer Protection Cooperation)
- Regulation (EU) 910/2014 of the European Parliament and of the Council of 23 July 2013 on electronic identification and trust services for electronic transactions in the internal market
- Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market
- Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004
- Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

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- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce)
- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy
- Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)
- Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and serivces (Authorisation Directive)
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- Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and protection of privacy in the electronic communications sector, and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (Citizens' Rights Directive)
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- Constitution of Malta
- Interpretation Act – Chapter 249
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- Innovative Technology Arrangements and Services Act – Chapter 592
- Public Administration Act – Chapter 595
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- Act No XXXI of 1994 entitled the 'Competition Act, 1994'
- Act No XXXIII of 1997 entitled the 'Telecommunications (Regulation) Act, 1997'
- Act No XI of 1998 entitled the 'Post Office (Amendment) Act, 1998'
- Act No XVIII of 2000 entitled the 'Malta Communications Authority Act, 2000'
- Act No XIX of 2000 entitled the 'Malta Standards Authority Act, 2000'
- Act No XXV of 2000 entitled the 'Malta Resources Authority Act, 2000'
- Act No III of 2001 entitled the 'Electronic Commerce Act, 2001'
- Act No. XXVI of 2001 entitled the 'Data Protection Act, 2001'
- Act No XXVII of 2002 entitled the 'Post Office (Amendment) Act, 2002'
- Act No VII of 2004 entitled the 'Communications Laws (Amendment) Act, 2004'
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- Act No V of 2011 entitled the 'Various Laws (Amendment) Act, 2011'
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- SL Const.02 entitled the 'Standing Orders of the House of Representatives Order'
- SL 378.18 entitled the 'Consumer Alternative Dispute Resolution (ADR) (General) Regulations'
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- SL 378.20 entitled the 'Digital Content and Digital Services Contracts Regulations'.
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- *Melita plc v l-Awtorità ta' Malta dwar il-Komun*ikazzjoni - 24 September 2015

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- *Federation of Estate Agents v Direttur Ġenerali (Kompetizzjoni) et* - 3 May 2016
- *Thake Rosette nomine et v Kummissjoni Elettorali et* - 8 October 2018

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- *Melita plc v l-Awtorità ta' Malta dwar il-Komunikazzjon*i - 30 September 2015

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- Preliminary judgement dated 29 November 2004 in *Director of the Office of Fair Competition v Datastream Limited* as per application number 3 of 2004

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- Judgement of 8 April 2014, *European Commission v Hungary,* C-228/12, ECLI:EU:C:2014:237
- Judgement of 14 September 2015, *Autorità per le Garanzie nelle Comunicazione v Istituto Nazionale di Statistica – ISTAT and Others*, C-240/15, ECLI:EU:C:206:606
- Judgement of 19 October 2016, *Xabier Ormaetxea Garai, Bernado Lorenzo Almendross v Admistracion del Estado*, C-424/15, ECLI:EU:C:2016:780
- Judgement 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
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- Judgement of 2 September 2021, *European Commission v Federal Republic of Germany,* C-718/18, ECLI: EU:C: 2021.

Introduction

0.1. The purpose of this study

A normal life cannot be imagined without access to electricity, gas, electronic communications, water and postal services all of which are utility services that are taken for guaranteed. Without adequate access to these services our everyday life would in most instances probably be unbearable. Even a few hours without one of these services invariably causes considerable disruption to residential and business consumers alike, leading at times to substantial loss of income and considerable inconvenience. The fact that the provision of utilities is essential to consumer well-being necessitates particular attention in safeguarding consumer interests whilst seeing, where feasible, that such services are provided within a competitive environment conducive to equitable service conditions at affordable prices to all. Ensuring that this happens requires the regulation of the provision of utilities by a body that is independent from the utility service providers, consumer groups and government. Regulatory independence coupled with due accountability is the linchpin of effective regulation of utilities and thus a substantial part of this thesis focuses precisely on this aspect.

There is no one single model of regulation which can be applied universally. In determining how best to regulate utilities in any given jurisdiction, the legal tradition, the size of the country and the way the market is structured must be factored if the regulatory regime adopted is to be effective. The focus of this thesis is to consider what measures can be undertaken to provide for a more effective regulatory regime in Malta. The study of the regulation of utilities in Malta has not been given the attention that it merits. To date the very few studies that have been undertaken on the regulation of utilities in Malta, focus on a specific utility rather than on a study of the regulation of utilities in general that comprehensively evaluates the cardinal points that underlie the regulation of utilities.[1] No studies

[1] See for example E Zammit-Lewis, *The role and powers of the telecommunications regulator under the 1997 Telecommunications Act* – a thesis submitted in partial requirement for the award of the degree of doctor of laws by the University of Malta. This study was undertaken when the first

have been undertaken that evaluate in depth the regulation of utilities in Malta in the light of the chronology of more than two decades of regulation of utilities by 'independent' regulators.[2]

In most instances the approach by different Maltese governments over the years has been to deal with the regulation of utilities on a piecemeal basis based on a sector specific regulatory solution.[3] The author considers that on the basis of the research undertaken there is no tangible evidence that demonstrates that any Maltese government has ever effectively considered and implemented a comprehensive long term strategy in relation to the regulation of utilities. There has been little discussion on the actual role and powers of the regulators - currently the Malta Communications Authority (MCA) and the Regulator for Energy and Water Services (REWS) - that have been assigned the responsibility of regulating the provision of utilities in Malta.[4] The discussion of issues relating to the nomination, appointment, composition, funding, independence, accountability, and powers of regulators have been negligible and conditioned in part by the need to implement European Union (EU) norms relating to the regulation of the diverse utilities rather than by any national long term strategy.

There has been practically no debate on whether the sector specific regulatory model used in Malta to date is the right fit for national requirements. A cursory look at the debates of the House of Representatives of Malta when the different utilities regulators[5] were set up does not reveal much of substance. Moreover the two utilities regulators currently in place - MCA and REWS - are required to perform functions which may be at variance with their core function of regulating utilities,

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regulator - the Telecommunications Regulator - had just been set up preceding the establishment of the Malta Communications Authority in 2000.

[2] The use of quotes in some instances in relation to the word 'independent' is done purposely since as is discussed in this thesis, initially at least the independence of the competent utility regulators in Malta was tenuous if not worse.

[3] In 1999 there was a singular attempt by government to establish a multi-sector utilities regulator. This option however was not taken beyond the initial proposal stage, with government subsequently opting for a sector specific solution.

[4] Both the MCA and the REWS regulate various utilities, in the case of the MCA electronic communications, postal services and the electronic commerce, in the case of the REWS electricity, gas and water services.

[5] The word 'utilities' is used when referring to the two current regulators – the MCA and the REWS – since both regulators regulate diverse utilities.

such as promoting Malta as a commercial destination for the provision of the regulated utilities.[6] This indicates that there is lack of clarity, or worse even confusion, as to what the role of a utility regulator should comprise. The author firmly believes that matters such as the promotion of Malta as a commercial destination should fall within the remit of a dedicated entity bereft of any regulatory role and not of a utility regulator. Including such a function with the remit of a regulator may serve to dilute its regulatory function and even give rise to issues of conflict of roles if the regulator is seem as trying to attract investment in Malta whilst at the same time regulating any such potential investors.

This study comes at a crucial moment in the history of the regulation of utilities in Malta as it coincides with the aftermath of the transposition of two important EU directives namely the European Electronic Communications Code (EECC)[7] relating to the electronic communications market, and the Electricity Market Directive 2019[8] relating to the electricity markets. In case of electronic communications the national legislation implementing the EECC caters for a fairly radical overhaul of previous law, particularly in relation to the independence and appointment of the headship of the regulator and to the regulatory tools available. A similar if not as radical process has been legislated in relation to the electricity market. These changes relating to the independence of the regulators have also impacted their role vis-à-vis other utilities they regulate such as the postal services and water services markets, even if at present there are no express EU norms that necessitate such changes in relation to these other utilities in relation to the independence of the competent national regulator.[9]

[6] See eg Malta Communications Authority Act, art 4(3)(s).
[7] See Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.
[8] See 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.
[9] See Directive (EU) 2020/2184 of the European Parliament and of the Council of 16 December on the quality of water intended for human consumption, and 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 as amended by Directive 2002/39/EC and by Directive 2008/6/EC.

After more than two decades of regulation of utilities when the first steps to have in place regulators distinct from the diverse utility service providers were taken, a review to assess comprehensively the effectiveness of the current regulatory framework in Malta, and to consider what changes should be introduced, is warranted.[10] In this thesis the author endeavours to address this void by examining diverse aspects relating to the regulation of utilities in the light of the experience of Malta, of other selected countries and of the EU as on the 30th September 2022. In doing so the author proposes measures to the current regulatory landscape in Malta that may be conducive to a more effective and transparent regime in line with the realities of the diverse utility markets in Malta.

0.2. Research questions

Within the context of the study undertaken the author addresses specific research questions namely:

[Thesis Questions in Chapter One]

(i) How should the regulation of utilities in Malta be shaped? Should the current regime of sector specific regulators with one regulator - the MCA - dealing with the communications utilities, and another regulator - the REWS - dealing with the energy and water services utilities, be retained? If not, should one opt for a multi-sector utilities regulator, or go further and revisit the role of the national competition and consumer authority - the Malta Competition and Consumer Affairs Authority (MCCAA) - by creating a 'super' regulator empowering it to deal also with all aspects concerning the regulation of utilities that currently fall within the remits of MCA and of REWS?

(ii) How should the headship of the regulator be composed? Should there be a single person headship, or should the headship be composed of a collegiate

[10] The first utility regulator that was not also a service provider in Malta was the Telecommunications Regulator which started to operate in early 1998.

body in the shape of a board of directors? If the headship comprises a collegiate body in the form of a board of governors should it have an executive role?

[Thesis Questions in Chapter Two]

(iii) To whom should a utility regulator be accountable in the performance of its regulatory functions?

(iv) How should the persons making up the headship of the regulator be appointed? Who should appoint such persons and on what criteria should they be appointed? How long should the term of office of the members making up the headship be and should these members be eligible for reappointment? Should the appointment of the persons composing the headship be subject to independent scrutiny? If yes, which entity should undertake such a role, and should that entity have the power to veto any such headship appointments?

(v) On what grounds should a member of the headship be removed during his term of office?[11] What procedure should be followed in doing so and who should be empowered to remove the member? Should a member who is removed from office have a right of recourse to a court of law?

[Thesis Questions in Chapter Three]

(vi) To what extent and on what grounds should regulatory decisions be reviewable by a judicial forum? Which forum should this be and how should it be composed?

(vii) Should there be a further right of appeal from a decision of an appeal judicial forum of first instance to the Court of Appeal on points of law and, or of fact?

[Thesis Questions in Chapter Four]

(viii) What regulatory enforcement tools should a regulator have?

[11] Throughout this thesis the use of the masculine gender includes the feminine gender, this in line with the norms under art 4 of the Interpretation Act (Chapter 249 of the Laws of Malta).

(ix) Should a regulator be empowered to impose administrative financial penalties and, or other regulatory sanctions? If conversely a regulator does not have the faculty of imposing such sanctions, what enforcement system should be used by the regulator to ensure compliance?

(x) Should the regulator be empowered to take other regulatory enforcement measures? If yes what should these measures be?

[Thesis Questions in Chapter Five]

(xi) Should a utilities regulator deal with all aspects of consumer protection where these relate to the utilities it regulates, including issues that currently fall within the remit of the Director General (Consumer Affairs) (DG Consumer Affairs) within the MCCAA such as the use of unfair terms in contracts and unfair commercial practices?

(xii) To what extent should a utilities regulator be empowered to intervene in relation to disputes between regulated undertakings and consumers of the utilities provided? Should the role of the regulator in such instances be limited to mediation or should it also be empowered to issue decisions? Specifically in relation to such disputes, should the regulator be empowered to issue binding decisions enforceable at law, including decisions that may require the payment of monetary compensation by a utility service provider to a consumer?

(xiii) Should the Collective Proceedings Act be extended to utilities legislation in so far as such legislation relates to consumer protection?

0.3. The utilities considered in this thesis and the transition to regulated markets

The utilities considered in this study are the essentials of everyday life, namely electronic communications, electricity, gas, water and postal services.[12] Until a few decades ago most utility service providers in Malta were state controlled monopolies which were responsible both for the regulation and the provision of the utility service in question. This was the case with telecommunications, electricity, gas, water and postal services.[13] Until the 1980s the prevailing philosophy in many countries, including Malta, was that these utilities were natural monopolies and central to individual welfare and to the general economy of the country, and that therefore the delivery of such utilities was too important to be left in the hands of private industry alone.[14] In many instances utilities were provided within a clearly defined financial and administrative framework laid down by government, leading to varying degrees of political intervention in the provision and regulation of utilities.

Such an approach may in past times have been justifiable in a society previously characterised by substantial disparities between the different social classes where the paramount concern of government was to ensure access at affordable prices to basic utilities to all persons. Quality of service and competition as distinct from access and affordability then were not necessarily the paramount considerations. This was the prevalent approach taken by most countries in the first half of the

[12] Following the 2002 EU Regulatory framework for electronic communications, the term used under Maltese law to refer to what was formerly 'telecommunications', is the wider term 'electronic communications' which factors fixed and mobile telephony, broadcast transmission services such as television, radio and internet services. In the case of electricity and gas services, the term 'energy' is sometimes used to refer collectively to the provision of both utilities. In this study the term 'telecommunications' is used primarily when referring to the provision of telephony services prior to 2002.

[13] This was the case with the former TeleMalta Corporation which was responsible for the provision of telecommunications services in Malta until 1997. Under the TeleMalta Corporation Act of 1975, TeleMalta had monopoly rights as both the operator and regulator of all telecommunications services in Malta until 1997.

[14] See eg paper by A Fels entitled *Utilities, Hilmer and the benefits of competition for consumers* published in 1994, which paper was presented during a conference organised by the (former) Australian Trade Practices Commission (TPC) entitled *Passing on the benefits – Consumers and the reform of Australia's utilities*.

twentieth century and until well into the mid-eighties. In the past the predominant trend was to have in place monopolies responsible for the provision of most utilities. This changed in the beginning of the 1980s with the catalyst for change in Europe commencing in the United Kingdom (UK) with the reforms introduced by the Thatcher Conservative government of that period, initially in the telecommunications sector and then gradually extending to the other utilities.[15] The proponents of the new philosophy advocating open markets argued that competition in the provision of utilities would lead to greater economic efficiency because of more productivity and competitive pricing, this to the benefit of the marketplace in general and of consumers of the various utilities.[16]

In most countries, including Malta, the advent of regulatory reform of the various utilities invariably meant that a separation had to be introduced between the roles on the one hand of utilities service provision and on the other of the regulation of the same utilities.[17] The forms of such separation adopted varied from one country to another. In some instances the measures initially taken to implement the separation of roles were weak, consequently undermining the establishment of a transparent and effective regulatory regime, enabling full competition and consumer protection whilst protecting the wider public interest.[18] The extent of the independence of the regulators from ministerial interference was blurred and in some instances regulators, at least initially, were poorly resourced to perform their functions properly.[19] Moreover some governments retained considerable control over the former utility service incumbents and therefore had a direct interest in the conduct of the regulation of the provision of some utilities, more so where

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[15] OECD (2001), *Restructuring Public Utilities for Competition* http://www.oecd.org/competition/sectors/19635977.pdf. See also OECD (2002), *Reviews of regulatory reform - regulatory reform in UK - Regulatory Reform in the Telecommunications Industry* at p 7 et seq http://www.oecd.org/regreform/2766201.pdf; and the Hansard Society for Parliamentary Government together with the European Policy Forum, *The Report of the Commission on the Regulation of Privatised Utilities*, published in December 1996 at p 2 et seq.

[16] Fels (n 14) at p 1 et seq.

[17] See eg Digital Regulation Platform, ITU and World Bank, *Regulatory governance and independence*. Regulatory governance and independence | Digital Regulation Platform.

[18] D Geradin and N Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/2004, p 7 et seq https://ssrn.com/abstract=489722.

[19] Eg initially the Telecommunications Regulator in Malta had a staff of only three persons including the person heading the office.

regulatory intervention could impact public investment in a government controlled utility service provider.[20]

This inadequacy of the measures adopted by some countries was discussed at length in an evaluation that the Organisation for Economic Co-operation and Development (OECD) undertook in 2001 of the situation then in place in different OECD member countries.[21] The OECD Council subsequently adopted a recommendation urging its 'member countries to seriously consider stronger forms of separation when in the process of liberalisation and regulatory reform.'[22] The message by the OECD was clear, emphasising that separation of the roles of service provision and regulation leads to greater efficiency, better quality of service and more competitive prices.[23] Initially not all countries heeded the message by OECD immediately. In some instances the first steps taken were hesitant, at times conditioned by the nature of the utility service concerned and involving a very gradual process spread over a number of years leading to a measured privatisation process in tandem with a clear distinction between on the one hand of the utility service provider and on the other of the utility regulator.

In many countries the first utility to be subjected to regulatory reform was telecommunications. This was the case with the UK and most European states including Malta. Eventually most countries acknowledged that there was the need of regulatory reform more so if their own utility service providers were to remain viable in an increasingly competitive global marketplace with multi-nationals competing in sectors that were formerly the sole domain of state controlled monopolies.[24] This was also evident in the case of the EU, then the European

[20] This was the case in 1997 when the first measures were taken to establish a telecommunications regulator in Malta, where government in doing so retained a substantial shareholding of sixty percent in the former telecoms incumbent then renamed 'Maltacom plc'.
[21] See OECD (2001), *Restructuring Public Utilities for Competition* (n 15).
[22] Ibid, at pp3 and 53 et seq. The recommendation was entitled the *OECD Council Recommendation on Structural Separation of Regulated Industries,* and was adopted by the OECD Council on the 26th April 2001, OECD-Recommendation-on-Structural-separation-regulated-industries.pdf.
[23] OECD (2001) at p 53 et seq (n 15).
[24] Hence in Malta in the early nineties Vodafone, a UK based multi-national company, decided to enter the Maltese telecommunications market, initially by offering mobile telephony services. In 2020 Vodafone Malta Limited was taken over by EPIC Communications Limited.

Community (EC)[25], where periodic legislative reforms relating to the different utilities saw the gradual opening up of national markets to external competition throughout the single market.[26] The philosophy behind such measures was clear. The former model of having a state controlled monopoly responsible for the exclusive provision of a utility service without being subject to some form of independent regulation was not tenable if consumers were to be assured of access to a quality service at a reasonable price.[27]

Malta was not far behind in following the path taken by EU Member States, with the first steps being taken in the telecommunications sector in 1997 when the telecommunications monopoly utility service provider - TeleMalta Corporation - was divested of its regulatory role and restricted to its service provision role, and concurrently a sector specific regulator established with the creation of the Telecommunications Regulator.[28] Interestingly this first step was taken at a time when the Maltese government suspended the application of Malta to join the EU, and was therefore not motivated by compliance with EU norms.[29] This first step was followed in subsequent years with similar measures in the energy, water and postal services sectors, leading to the present situation where the provision of the majority of utilities is characterised by a competitive market with a clear separation of the roles on the one hand of service provision and on the other of the regulation of the same utility.[30]

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[25] The nomenclature of the EU until 1993 was the European Community.

[26] See eg N Zhelyazkova, *Regulatory Independence in the European Union – A top-down view on the Network Industries*, 201601_GovRegWP_Zhelyazkova_0.pdf (fondation-dauphine.fr); and Geradin and others *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, p 24 (n 18).

[27] See the reviews undertaken by the EU preceding the major legislative measures taken in the electronic communications sector such as the European Commission Report which preceded the 2002 Electronic Communications framework, entitled *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 .

[28] In July 1990 Malta applied to become a member of the then EC.

[29] The Labour Government of the day had in 1996 suspended the application of Malta to join the EU which had originally been submitted in July 1990 by the previous Nationalist Government.

[30] This applies to the electronic communications, posts and gas sectors. In relation to the electricity and water sectors whilst regulation lies with a distinct regulator, service provision is provided by a monopoly.

Subsequent to 1998 when a change in government led to the reactivation of the application of Malta to join the EU, many of the measures then taken in dealing with the regulation of utilities were spurred by EU requirements given that Malta was at that juncture revising its laws in anticipation of full EU membership. The emphasis to comply with EU requirements increased even further with the membership of Malta in the EU in 2004.[31] Subsequent to 2004 the EU has been the main impetus for change in the regulation of utilities in Malta. The latest changes by the EU made in 2018 and 2019 in the electronic communications and electricity utilities continued to impact significantly the Maltese utilities regulatory landscape providing for more stringent norms safeguarding the independence of the regulators whilst enhancing their effectiveness.[32]

0.4. Methodology

Essentially the methodology used is a desk based study comprising a black letter approach, a comparative analysis and a historic appraisal. During the initial year of work on this thesis the author focused on researching diverse sources of information, including relevant legislation, academic studies, books, journals, reports undertaken by public bodies in different countries and by international organisations notably OECD, studies by European based research bodies that specialise in the regulation of utilities, and annual reports of national regulators both in Malta and other countries. The intention of the author in writing this thesis is to examine the current utilities regulatory regime in Malta and to consider what changes, if any, should be made. This task necessitated an in-depth evaluation of Maltese law, EU utilities legislation and the laws of selected countries together with relevant literature whether in the form of academic studies or reports undertaken by governments, public entities and research institutions. In this thesis the author considers the measures taken under the relevant EU utilities legislation in so far as

[31] The decision to divest TeleMalta Corporation of its regulatory role and to gradually open up the telecoms sector to competition was taken in 1997 at a time when government had decided to suspend the application of Malta to join the EU.
[32] See the EECC and the Electricity Market Directive 2019.

such measures impacted the Maltese utilities regulatory landscape. It is not the purpose of this thesis to consider why with regard to the regulation of utilities, the EU has not harmonised the norms relating to NRA independence notably the appointment and grounds of dismissal of the persons making up the NRA headsip, and the regulatory and enforcement measures applicable. This said, as discussed elsewhere in this thesis, the lack of uniformity in applicable EU utilities legislation impacts effective regulation at a national level, and clearly the EU should consider taking remedial measures.[33] Throughout this thesis the authour makes reference to the legislative measures taken by other countries, with particular focus on the measures taken by the UK and Ireland given that Maltese administrative law has, and still is, at least in part, substantially influenced by the legal developments in both countries. This influence is also conditioned by the sharing of a common language[34] and that Ireland is a member of the EU as was the case with the UK until the recent advent of Brexit.[35]

In so far as Malta is concerned, there are few studies that relate directly to the study of the regulation of utilities. The main source of information consists of the relevant laws and the annual reports of the utilities regulators. The debates of the House of Representatives do not reveal much of substance other than providing a description of the measures introduced and, at least since 2000, their relevance in the transposition of the diverse EU Directives relating to the regulation of the various utilities. In considering the relevant Maltese legislation the author traces the gradual changes made by the legislator through the years impacting diverse aspects of the regulation of utilities including the independence and accountability of the regulators, the appointment and composition of the headship of the regulators, and significantly the regulatory tools and powers available to each regulator.

The evaluation of the chronology of the relevant laws and the amendments made thereto over the years is fundamental in understanding the point of departure in

[33] See below at Section 3.10 at p 201 et seq.
[34] English is an official language of Malta. See Constitution of Malta, art 5.
[35] The UK formally withdrew from the EU on the 31 January 2020.

relation to the regulation of utilities in Malta commencing from when the diverse regulators were set up, leading up to the present regulatory regime which in many aspects is now regulated by substantially different norms from those originally in place. Such an evaluation serves to reveal the initial hesitant norms enacted by the legislator and how these norms were progressively modified - sometimes quite radically - in relation to key regulatory matters including the role and independence of the regulators, the appeals procedure and the adjudicative fora designated to determine contestations of regulatory decisions, and the remedies available to consumers of the utilities under examination. Similarly the annual reports of the regulators under discussion - notably the MCA and the REWS - contribute in tracing the gradual changes to the respective current regulatory regimes. The author also undertook research on various theses and dissertations of the Faculty of Laws of the University of Malta.[36] The theses and dissertations written to date do not however consider in depth the diverse aspects discussed in this study. The few theses and dissertations written relate mainly to the telecommunications sector and to a lesser extent to the energy sector, whereas no academic studies focusing on the regulation of postal or water services have to date been undertaken.

The author examined documentation issued by government and by various public entities, including public consultations issued over the years preceding the introduction of substantial legislative changes to the diverse utilities regulatory regimes. These with one singular exception – a short but interesting white paper published in 1999[37] – do not really reveal much of substance other than describing proposed legislative measures meant to implement EU norms.[38] Maltese case law

[36] M Attard Montalto, *The market for electricity: EU competition policy and its implications for Malta's electricity sector*, dissertation 2011 University of Malta; M G Hyzler, *EC electronic communications regulation and its impact on Maltese law*, dissertation, 2009 University of Malta; Zammit-Lewis, *The role and powers of the telecommunications regulator under the 1997 Telecommunications Act,* (n 1); K Zammit Southernwood, *A review of the electronic communications regulatory framework: subsidiarity vs centralisation*, dissertation 2009 University of Malta.

[37] See White Paper, *Privatisation – A strategy for the Future,* published by the then Ministry of Finance in November 1999. This White Paper includes short but interesting proposals on the regulation of utilities at a juncture when Malta was at the cross-roads in mapping out the route to deal with the regulation of utilities.

[38] These include *A New Regulatory Framework for Electronic Communications Markets – a White Paper* published in January 2004, and *A New Regulatory Framework for Electronic Communications Markets – Consultation Document on Draft Electronic Communications Networks and Services*

has also been researched specifically with regard to the power of public authorities such as the MCA and the REWS to impose dissuasive sanctions. Though the principal judgements to date relate to decisions taken by public authorities that are not focused utilities regulators, these judgements also impact the enforcement tools of utilities regulators under Maltese law since the argument has been made that the norms determined in these judgements should by analogy apply to public authorities such as the two utilities regulators and hence are very relevant to the present study.[39]

In relation to the EU, the author researched the relevant EU legislation, attendant studies and case law, commencing from the period immediately preceding the accession of Malta in 2004 as a full EU member until the present time.[40] An important source of information are the recitals to the various EU utilities directives and regulations that serve to explain the applicable norms and why these are being done. Additional important sources consulted by the author are the websites of the various European regulatory networks such as the Agency for the Cooperation of Energy Regulators (ACER), the Body of European Regulators for Electronic Communications (BEREC), and the European Water Regulators (WAREG)[41], various reports and studies undertaken by EU research and academic entities including notably entities such as the Centre on Regulation in Europe (CERRE) and the Florence School of Regulation (FSR) which entities focus on different aspects

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(General) Regulations published in July 2004, both documents issued by the then Ministry for Competitiveness and Communications (MCC); the *Draft Amendments to the Communications Laws –Transposition of Revisions to the EU Framework for Electronic Communications adopted in December 2009,* a consultative document issued by the then Ministry for Infrastructure, Transport and Communications (MITC) in June 2010; and the *European Electronic Communications Framework: Transposition of the European Electronic Communications Code (EECC),* issued on the 11th January 2021 by the then Ministry for the Economy and Industry (MEI).

[39] See below at pp 28 and 225 et seq.

[40] See eg the study undertaken in 2019 for the EU Commission entitled *Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy,* Assessing the independence and effectiveness of national regulatory authorities in the field of energy - Publications Office of the EU (europa.eu).

[41] ACER is the European agency for the cooperation of energy regulators, About ACER (europa.eu) accessed 30th September 2022; BEREC is the Body of European Regulators for Electronic Communications What is BEREC? (europa.eu) accessed 30th September 2022; whereas WAREG is the network for European Water Regulators WAREG - European Water Regulators accessed 30th September 2022.

relating to the regulation of utilities.[42] In so far as case law is concerned most judgements of the Court of Justice of the European Union (CJEU) to date relate to the EU Directives prior to the 21st December 2018 after which date the electronic communications and the electricty regulatory frameworks were substantially revised in particular with regard to the independence, appointment and powers of the utility regulators.[43]

From a wider international perspective the author has consulted various academic studies and reports undertaken by organisations such as OECD and the International Telecommunications Union (ITU).[44] OECD in particular has published various relevant studies dealing with diverse aspects relating to the regulation of utilities ranging from a study of the principles underlying the governance of regulators to the need to have in place a culture of independence to counter undue influence of regulators whether by the regulated industry or by governments.[45]

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[42] CERRE is a Brussels based european think tank dedicated to better regulation for energy, media, telecommunications, mobility and water sectors - About us - CERRE accessed 30th September 2022. FSR describes itself as 'a centre of excellence for independent discussion and knowledge exchange with the purpose of improving the quality of European regulation and policy' in relation to energy and climate, communications and media, transport and water - Florence School of Regulation | Energy, Climate, Comms, Transport, Water (eui.eu) accessed 30th September 2022.

[43] See eg judgement of 11 June 2020, *President Slovenskej republiky*, C-378/19, ECLI:EU:C:220:462. This case focused on ministerial intervention that may impact NRA independence in the regulation of electricity services.

[44] See eg F Gilardi and M Maggetti, *The independence of regulatory authorities* in D Levi-Faur, (ed.) Handbook of Regulation, Cheltenham, Edgar Elgar, 2010; Ch Koop and Ch Hanretty, *Political Independence, Accountability, and the Quality of Regulatory Decision-Making,* Comparative Political Studies, Vol. 38, No 1, 2018; and S Lavrijssen, *Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU,* OGEL Vol. 17 No. 1, 2019.

[45] OECD studies that the author consulted include: OECD (2001), *Restructuring Public Utilities for Competition* (n 15); OECD Council Recommendation on Structural Separation of Regulated Industries, OECD-Recommendation-on-Structural-separation-regulated-industries.pdf; OECD (2002), *Reviews of Regulatory reform – Regulatory reform in UK – Regulatory reform in the Telecommunications Industry* - 2766201.pdf (oecd.org); OECD (2013), *Principles of the Governance of Regulators – Public Draft Consultation 21 June 2013*; OECD (2014), *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy,* OECD Publishing, Paris https://read.oecd-ilibrary.org/governance/the-governance-of-regulators_9789264209015-en#page1; OECD (2016), *Being an Independent Regulator, The Governance of Regulators*, OECD Publishing, Paris, http://dex.doi.org/10.1787/9789264255401-en; OECD (2016), *Driving Performance at Latvia's Public Utilities Commission, The Governance of Regulators*, OECD Publishing, Paris, https://doi.org/10.1787/9789264257962-en; and OECD (2017), *Creating a Culture of Independence:Practical Guidance against Undue Influence, The Governance of Regulators*, OECD Publishing, Paris https://www.oecd.org/gov/regulatory-policy/Culture-of-Independence-Eng-web.pdf.

Specifically in relation to telecommunications, the ITU in tandem with InfoDev[46] created the Information and Communication Technologies (ICT) Regulation Toolkit which toolkit considers diverse aspects related to the legal and institutional framework in relation to telecommunications.[47] The author also researched the regulatory regimes adopted in other selected countries in relation to the diverse subjects considered in this study, considering the applicable legislation and the websites of the competent regulators and other relevant public authorities or entities. In some instances the author considered the history of the regulation of utilities where initially a particular regulatory model adopted was subsequently changed, at times quite radically.[48] Other aspects researched include the review or appeals systems adopted, the regulatory tools available and the composition of the headship of the competent regulators.

0.5. Literature review – introduction

In considering the literature relevant to the study undertaken, the author distinguishes between on the one hand the literature relevant to Malta and on the other, where pertinent, that relating to other countries, the EU and internationally. To date there has been no study that purports to provide a comprehensive review of the regulation of utilities in Malta. The academic research that has been undertaken deals with specific issues relating to the separate utilities discussed in this thesis, notably the electronic communications market and to a lesser extent the energy market, and does not directly relate to the issues considered in this thesis. The literature from a local perspective is very limited. No books have been written on the subject matter of this thesis, whereas academic papers are few.[49]

[46] InfoDev is a World Bank Group programme that supports high-growth entrepeneurs in developing economies - infoDev | World Bank Innovation and Entrepreneurship accessed 30th September 2022.
[47] See ICT REGULATION TOOLKIT – Providing practical advice and concrete best practice guidelines to enable access to ICTs for all (itu.int).
[48] This has been the experience of various European countries including the Netherlands, Spain and the UK.
[49] See P E Micallef, *Reflections on the independence of utility regulators in Malta* in Id-Dritt Vol XXIX at pp 566 to 593.

Significantly no comprehensive evaluation has ever been done by government that discusses in depth the regulation of utilities in Malta considering the diverse issues that need to be addressed and the options available outlining the measures to be taken. Issues such as how the headship of regulators should be appointed, their independence and accountability, their relationship with government, and their role and attendant powers at law, have very rarely been discussed in any meaningful way. Where such issues have been discussed these in their vast majority featured in short media reports concerning specific incidents. In many instances the discussion then consisted mainly of political rhetoric rather than proposals of substance.[50] In so far as Maltese case law is concerned there are only a few judgements that in substance relate to the issues discussed in this study including significantly the Constitutional Court judgement of the 3rd May 2016 in Federation of Estate Agents versus Direttur Ġenerali (Kompetizzjoni) et.[51]

Conversely a considerable amount of literature has been written from both an European and International perspective that evaluates various issues discussed in this thesis. Notably amongst such sources of literature are reports and diverse studies by international organisations and research institutes. In this context a useful source of reference is the ICT Regulation Toolkit.[52] This study though it relates only to telecommunications, examines various aspects of regulation that are of relevance to the other utilities, considering in some detail the legal and institutional frameworks adopted by different countries.

Numerous studies have been undertaken in relation to the regulation of utilities in various countries. The UK in particular being also the forerunner in Europe that advocated competitive utilities markets in the 1980s, has periodically undertaken

[50] A case in point relates to the report carried in the media in 2013 when the then chairman of the MCA - Dr Antonio Ghio - was asked to give his 'forced' resignation following a change in government in March 2013, this notwithstanding that there were no valid reason at law why the person in question had to tender his resignation prior to the termination of his term of office. See https://timesofmalta.com/articles/view/I-was-forced-to-resign-says-ex-MCA-chairman.471634.
[51] The case law in this regard does not all relate to the regulation of utilities, but is notwithstanding very pertinent since it impacts the power to impose punitive sanctions by public authorities such as the MCA and the REWS.
[52] See ICT Regulation Toolkit (n 47).

various studies that consider diverse aspects of the regulation of utilities.[53] The importance of considering the experience of other countries in many instances serves to indicate the pitfalls to be avoided and feasible solutions that may be considered in a local context. The main topics of study undertaken in this thesis relate to the independence and accountability of regulators, the regulatory framework, judicial review of regulatory decisions, enforcement powers, and consumer protection and redress. The following list the literature considered in relation to each of these topics.

0.5.1. The regulatory set-up and composition of the headship

A key question discussed in this study relates to the institutional framework adopted in relation to the regulation of utilities in Malta. This question is considered from two aspects. The first relates to the institutional design that should be adopted, namely whether the present sector specific approach should be maintained or else a different approach adopted. The second aspect discussed considers the composition of the headship of the governing body of the regulators. To date very little has been written addressing these points in relation to the regulatory set-up in Malta. The principal source of information are the various laws relating to the regulation of the utilities in question, the annual reports of the diverse regulators commencing from their establishment in 2000[54], and the public consultations undertaken by government preceding the enactment of major changes to the law[55] or relating to a specific aspect impacting the remit of one of the regulators.[56] In so far as case law is concerned, the few cases of some relevance

[53] See eg UK Department of Trade and Industry (DTI) report entitled *A Fair Deal for Consumers – Modernising the Framework for Utility Regulation*, issued in March 1998, CM 3898.
[54] Prior to 2000 the MCA was preceded by the short-lived Telecommunications Regulator which operated between 1998 and 2000. No annual reports covering the activities of the Telecommunications Regulator are available. The regulatory functions of the REWS prior to 2015 were performed by the MRA which was set up in 2000.
[55] See eg MITC, *Draft Amendments to the Communications Laws –Transposition of Revisions to the EU Framework for Electronic Communications adopted in December 2009* (n 38).
[56] See eg *The Effective Enforcement of Competition Law in the Communications Sector – Providing for concurrent Ex Post Powers* – Consultation Paper of the 5th April 2007 issued by the then Ministry for Competitiveness and Communications (MCC) in tandem with the MCA and the former Consumer

relate mainly to the remit of the utilities regulators in relation to *ex-post* competition issues and to a lesser extent of consumer issues.[57] To date there have been no cases that directly relate to the institutional framework or to the composition of the headships of the MCA or of the REWS.

The few studies undertaken to date do not relate to the overall discussion of the regulation of utilities in Malta but focus on specific issues that impact the institutional framework. Hence at least two papers were written advocating that the remit of the MCA should factor also broadcasting including content related issues.[58] Conversely no detailed study has been undertaken that attempts to discuss the wider picture of having in place a comprehensive regulatory regime responsible for the regulation of the utilities discussed in this thesis factoring most if not all competition and consumer issues in so far as these relate to the utilities in question.

The one singular instance where government did make proposals was in a white paper entitled 'Privatisation – A Strategy for the Future', which includes a few pages outlining the vision of the then Ministry of Finance in favour of a multi-sector utilities regulator.[59] The proposals made in that document were not taken forward and in the following months government opted for a sector specific regulatory regime, effectively discarding the approach initially advocated in the 1999 White Paper. Regrettably no government study has ever been issued explaining why there was a change in direction.

In relation to the discussion about the composition of the headship of the regulators in Malta, no studies have been undertaken with the information available consisting primarily of the laws as enacted over the years. There is no

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and Competition Division (CCD) https://www.mca.org.mt/sites/default/files/consultations/consultation-doc-09-04.pdf.

[57] See eg the preliminary judgement of the former Malta Commission for Fair Trading dated 29 November 2004 in *Director of the Office of Fair Competition versus Datastream Limited* as per application number 3 of 2004.

[58] Today Public Policy Institute (TPPI), *Confronting the Challenge: Innovation in the Regulation of Broadcasting in Malta*, a report written by P Caruana Dingli and C Vassallo for the TPPI which report was issued in 2014; and P E Micallef, 'Regulatory set-up of Broadcasting in Malta' in J Borg and M Lauri (Eds) *Navigating the Maltese Mediascape* published in 2019 (Kite Group).

[59] See White Paper 1999, pp 46 to 48 (n 37).

information in the public domain that clearly explains why government initially when setting up the Office of the Telecommunications Regulator (OTR) in 1997 opted for a single person model, and subsequently in 2000 when setting up the MCA and the Malta Resources Authority (MRA), and later the REWS, opted for a collegiate model. Again there is no information, let alone any studies, that explain why subsequent to 2000, on the one hand the MCA, and on the other hand the MRA and later the REWS, in practice adopted somewhat different headship set-ups, where the MCA for most of the time that it has been in operation has had an executive chairperson heading a board, whereas the MRA and later the REWS have always had a non-executive chairperson and board supported by a full-time CEO.[60]

Internationally there are various studies and reports that relate to the institutional framework and the composition of the headship. Some of the literature deals with the regulation of utilities comprehensively covering most of the utilities or else with a specific utility or utilities. Hence OECD considers the structures of the governing bodies and how the headships should be composed.[61] The ITU though it discusses only telecommunications, has undertaken studies comparing the various institutional design options highlighting the advantages and disadvantages of each option.[62]

The EU utilities directives do not provide for any specific requirements relating to the institutional design to be adopted and how the headship is to be structured. Several studies have however been undertaken by research entities such as the FSR drawing on the experience of different European countries.[63] Some countries have from time to time issued reports preceding substantial changes of their regulatory set-up. The UK is a case in point with diverse reports being issued at crucial

[60] See MCA annual reports from 2001 to date, MRA annual reports from 2001 to 2015 and REWS annual reports from 2016 to date, Annual Report | Malta Communications Authority (mca.org.mt);and Regulator for Energy and Water Services >en/rewsfa/26

[61] See OECD 2014, at p 67 et seq (n 45).

[62] See ICT Regulation Toolkit (n. 47).

[63] See eg a research report under taken by P Alexiadis and Caio Mario da Silva Periera Neto for the FSR entitled *Competing Architectures for regulatory and competition law governance* published in 2019, which discusses the independence of regulators, Competing Architectures for Regulatory and Competition Law Governance.pdf (eui.eu).

junctures in the evolution of the regulation of utilities in that country.[64] The experience of other countries that have over the years substantially modified their utilities regulatory institutional set-up has also been researched. In some instances, countries such as Germany and Latvia[65] decided to do away with a sector specific approach opting for a multi-sector utilities regulator, whereas others such as Spain and the Netherlands went further by creating a national competition and consumer authority that is also responsible for the bulk of utilities regulation.[66]

0.5.2. The independence and accountability of the utilities regulators

No studies have been undertaken on the independence and accountability of utilities regulators in Malta apart from a paper by the author of this thesis, where the author discussed the dimensions listed by OECD in fostering a culture of independence within the contest of the Maltese utilities regulatory regime.[67] Otherwise, the main source of material consists of the applicable national legislation and to a lesser extent the public consultations preceding the enactment of such legislation. The examination of how such legislation has evolved commencing from the enactment of the first law in 1997 establishing the first sector specific utility regulator in Malta - the former Telecommunications Regulator[68] - serves to demonstrate the gradual progression from a regulator that was little better than a glorified and undermanned government department enjoying very limited autonomy from government both in practice and at law, to

[64] See eg the DTI Report, 1998 (n 53).
[65] See in case of Germany https://www.bundesnetzagentur.de/cln_1931/EN/Home/home_node.html accessed 30th September 2022; and in the case of Latvia http://www.oecd.org/publications/driving-performance-at-latvia-s-public-utilities-commission-9789264257962-en.htm accessed 30th September 2022.
[66] See in the case of Spain https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc accessed 30th September 2022; and in the case of the Netherlands https://www.stibbe.com/en/news/2013/april/new-dutch-authority-for-consumers-and-markets-becomes-operational accessed 30th September 2022.
[67] See Micallef, *Reflections on the independence of utility regulators in Malta* (n 49).
[68] The Telecommunications Regulator regulated only one utility – the telecoms utility. Conversely the subsequent regulators namely MCA and MRA – later REWS – regulate or regulated multiple utilities.

the current regulatory regime with better resourced regulators enjoying, at least at law, independence from government, private industry and end-users.

In so far as case law is concerned there have been no judgements that relate directly to the independence of either MCA or REWS. There are however a few judgements that serve to illustrate that there is lack of clarity about the role of the utilities regulators in relation to *ex ante* and *ex post* competition law issues and to a lesser extent to consumer law issues.[69] Again an examination of current legislation exposes the need for intervention by the legislator to eliminate such ambiguities that may impact negatively on the effectiveness of the regulators in the performance of their functions. There is therefore an evident void relating to the study of independence and accountability of such regulators when considering the situation in Malta.

Pertinent, and in most instances crucial, when considering the gradual progression of the utilities regulators in Malta where at law the two current regulators – MCA and REWS – have some degree of independence from government and from public or private entities, are the EU norms relevant to the regulation of the diverse utilities notably those relating to the electronic communications and energy utilities. A consideration of the laws enacted through the years by the Maltese legislator reveals that in most instances the changes introduced that were conducive to some degree of independence, were triggered mainly by EU norms. Hence in the case of the electronic communications sector the 2009 amendments to EU Framework Directive 2002 required the implementation by Malta as an EU Member State, of measures to ensure that the MCA as the competent national regulatory authority (NRA) in the exercise of *ex ante* regulation and resolution of disputes between undertakings acted independently without seeking or taking any instructions from any other body including goverment.[70] Following the issue in 2018 of the EECC, this norm was extended to apply to all the tasks assigned to the

[69] See *Melita plc v l-Awtorità ta' Malta dwar il-Komunikazzjoni* decided by the ART as per judgement of the 13 June 2012 which judgement was confirmed by the Court of Appeal (Inferior) as per judgement dated 30 September 2015.

[70] See Directive 2009/140/EC, arts 3(2), (3) and (3a). This Directive amended the various EC Directives then in place regulating the communications sector.

NRAs under the national law implementing the EECC.[71] A similar situation occurred in relation to the regulation of the electricity market consequential to the enactment of the Electricity Market Directive 2019.[72] In both instances national legislation has been amended to reflect these EU norms.[73]

Contrary to the lack of literature in relation to Malta, there is considerable literature on the subject of independence and accountability both from an international and a European perspective.[74] The ITU specifically with regards to telecommunications has considered various aspects concerning the independence of regulators listing the diverse measures in place globally drawing on the experience of various NRAs in different countries.[75] A substantial amount of literature consists of various studies undertaken by OECD dealing with diverse aspects relating to the independence of regulators. These studies range from a listing and evaluation of best practice principles for regulatory policy[76] to studies pertaining to individual OECD Member States.[77] The author also consulted various reports of OECD meetings where diverse aspects relating to the independence of regulators were discussed. These reports provide a very useful insight about the measures in place in different OECD Member States.[78]

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[71] See EECC, arts 6 and 8.

[72] See Directive (EU) 2019/944, art 57(5).

[73] The measures in the EECC and the Electricity Market Directive 2019 were transposed under national law in following the enactment of Act No LII of 2021 amending the Malta Communications Authority Act, and of Act No XLIX of 2021 amending the Regulator for Energy and Water Services Act.

[74] See eg S Lavrijssen, *Independence, Regulatory Competences and the Accountability of National Regulatory Authorities* (n 44); and Warrick Smith, *Utility Regulators – the Independence Debate*, (October 1997) 127 Veiwpoint 1, Public Policy for the Private Sector.

[75] ICT Regulation Toolkit (n 47).

[76] See OECD (2014), *The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy*, OECD Publishing, Paris (n 45). Other studies by OECD related to the independence of regulators include *OECD Council Recommendation on Structural Separation of Regulated Industries* OECD-Recommendation-on-Structural-separation-regulated-industries.pdf, OECD (2016); and *Being an Independent Regulator, The Governance of Regulators*, OECD Publishing, Paris (n 45).

[77] See eg OECD (2002), *Reviews of Regulatory reform – Regulatory reform in UK – Regulatory reform in the Telecommunications Industry* (n 15).

[78] See eg OECD report entitled *Summary of Discussion of the Roundtable on Independent Sector Regulators* https://one.oecd.org/document/DAF/COMP/WP2/M(2019)2/ANN1/FINAL/en/. This report factors a series of interesting comments on issues relating to the independence of regulators in various countries.

Of particular relevance is the OECD guide entitled 'Creating a Culture of Independence – Practical Guidance against Undue Influence', where OECD provides a checklist in relation to what OECD describes as the 'five essential dimensions', which according to OECD determine the *de facto* independence of a regulator namely: role clarity, transparency and accountability, financial independence, independence of leadership, and staff behaviour.[79] The author evaluates the application of the measures listed in these checklists in relation to each of these dimensions in so far as such measures relate to the MCA and to the REWS. The conclusions reached demonstrate that Malta still has some way to go in adhering to all the measures listed therein.

From a European perspective various reports have been undertaken in relation to both the separate utilities and to utilities in general. Hence in the energy sector studies have been undertaken assessing the independence of NRAs.[80] Various European research institutions such as CERRE[81] and FSR[82] have published reports or studies that wholly or in part discuss the independence of regulators focusing on the experience in various EU Member States. NRA independence has also been the subject of various academic studies focusing on the importance of *de jure* political independence and its impact on the performance of NRA regulatory tasks.[83] There is also a wealth of case law at an EU level which considers diverse aspects of NRA independence such as budgetary control of NRAs[84], operational independence[85],

[79] OECD, *Creating a Culture of Independence: Practical Guidance against Undue Influence, The Governance of Regulators*, OECD Publishing, Paris (n 45).
[80] See eg CEER (2016), *Safeguarding the independence of regulators – Insights from Europe's energy regulators on powers, independence, accountability and transparency*, CEER report; and European Commission, *Assessing the independence and effectiveness of National Regulatory Authorities in the field of energy*, 2019, Assessing the independence and effectiveness of national regulatory authorities in the field of energy - Publications Office of the EU (europa.eu).
[81] See a study undertaken for CERRE by C Hanretty, P Larouche and A Reindl for CERRE entitled *Independence, accountability and perceived quality of regulators* issued in March 2012, Independence, accountability and perceived quality of regulators A CERRE Study.
[82] See eg a research report undertaken by Alexiadis and others for FSR entitled *Competing Architectures for regulatory and competition law governance* (n 63).
[83] See eg Koop and others, *Political Independence, Accountability, and the Quality of Regulatory Decision-Making,*(n 44); and Gilardi and others, *The independence of regulatory authorities* (n 44).
[84] See judgement of 14 September 2015, *Autorita' per le Garanzie nelle Comunicazione v Istituto di Statistica – ISTAT and Others*, C-240/15, ECLI:EU:C:206:606 paras 39 et seq.
[85] See judgement of 26 July 2017, *Europa Way Srl and Persidera SpA v Autorita' per le Garanzie nelle Comunicazioni (AGCOM) and Others*, C-560/15, ECLI:EU:C:2017:593; judgement of 11 June 2020,

and dismissal of the NRA headship.[86] Various countries, such as the UK, have periodically issued reports or undertaken studies relating to different aspects concerning independence and accountability. These include reports focusing on the accountability of regulators and the measures to ensure that regulators have the necessary minimum safeguards guaranteeing their independence.[87]

0.5.3. The judicial review of regulatory decisions

The information on the judicial review of regulatory decisions taken by utilities regulators in so far as Malta is concerned consists of the applicable laws, case law and an academic paper. Of importance in evaluating the current judicial review procedures, are the norms under the EU Directives relating to the electronic communications sector and to a lesser extent the postal, electricity and gas sectors[88] since these Directives require that Malta as a EU Member State provides for a right of appeal from regulatory decisions. No detailed study to date has been undertaken tracing the implementation of the applicable EU norms under Maltese law.[89]

An examination of the chronology of the Maltese law commencing from 1997 to date[90] traces the evolution of the right of review of regulatory decisions initially by *ad hoc* appeals boards composed entirely of persons appointed on a part-time basis, to the present situation where regulatory decisions may be contested before

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President Slovenskej republiky, C-378/19, ECLI:EU:C:220:462; and judgement of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, ECLI:EU:C:2021.

[86] See judgement of 19 October 2016, *Xabier Ormaetxea Garai, Bernado Lorenzo Almendross v Admistracion del Estado*, C-424/15, ECLI:EU:C:2016:780, paras 39 et seq.

[87] See for example House of Lords, Select Committee Report on the Constitution, *The Regulatory State: Ensuring its Accountability,* Vol I Report (2004), https://publications.parliament.uk/pa/ld200304/ldselect/ldconst/68/68.pdf.

[88] See the EECC, art 31, the Electricity Market Directive 2019, art 60, and the Postal Services Directive 97/67/EC as amended, art 22. The EU Water Directive 2020/2184 does not provide for any review or appellate procedures that Member States need to have in place in relation to regulatory decisions taken.

[89] See P E Micallef, *Enforcement and Judicial Review of Regulatory Decisions in Electronic Communications – A Review of the Malta Experience with Reference to other Common Law Member States in the EU* – European Journal of Comparative Law and Governance 1 (2014) at p 276 et seq.

[90] The Telecommunications (Regulation) Act, 1997 provided for the establishment of an *ad hoc* appeals board.

the Administrative Review Tribunal (ART) presided over by a member of the judiciary. Significantly the main evaluation of the judicial review of regulatory decisions emerges from the judgement of the Constitutional Court in the Federation of Estate Agents case. Though this case does not relate to a decision taken by a utilities regulator, various issues decided in this case impact the judicial review of such regulatory decisions. Predominant in this regard is the issue relating to the composition of the appellate bodies such as the former Competition and Consumer Appeals Tribunal (CCAT).[91] The adjudicative panel of CCAT was composed of persons who were not all members of the judiciary.[92] Consequently the Constitutional Court determined that the CCAT for the purposes of article 39(1) of the Constitution was not 'an independent and impartial court established by law' when deciding issues relating to the imposition of sanctions.[93] This reasoning by analogy applies to *ad hoc* review fora and possibly to the ART.[94]

At a European and international level, comparative studies have been undertaken on the review procedures in place. CERRE for example in 2011 published a comparative study on the judicial review of regulators in selected European countries in relation to various utilities.[95] Various countries have issued reports or undertaken research generally preceding changes to the norms regulating the review procedure in place. For example the UK government in 2013 issued a public consultation prior to the implementation of changes relating to appeals from

[91] Following amendments as per the 'Competition Act and Consumer Affairs Act and other Laws (Amendment) Act, 2019', the CCAT was replaced by the Civil Court (Commercial Section), which Court now decides all applications filed by the DG Competition and the DG Consumer Affairs requesting the imposition of sanctions in relation to the laws administered by either DG.

[92] Whilst the president of the CCAT was a member of the judiciary, the other members were not. See Act No, VI of 2011, art 32.

[93] See P E Micallef: *An effective regulatory enforcement and sanctions regime post the Federation of Estate Agents Case: the issues* – Id-Dritt Vol. XXVIII at p 104 et seq.

[94] ART does not qualify as an 'independent and impartial court' for the purposes of art 39(1) of the Constitution. ART may be presided either by a judge or magistrate or by a retired judge or magistrate. Though to date sitting magistrates have always been appointed, the possibility at law that a retired judge or magistrate can be appointed may fall foul of the requirements under art 39(1).

[95] Study by P Larouche and X Taton for CERRE entitled: *Enforcement and judicial review of decisions of national regulatory authorities – Identification of best practices,* issued on the 21 April 2011, http://www.cerre.eu/sites/cerre/files/110421_CERRE_Study_EnforcementAndJudicialReview_0.pdf.

decisions taken by UK regulators and competition authorities.[96] Similarly the Irish government in 2006 issued a public consultation where it reviewed the existing appeals procedure.[97] The experience of these and other countries is instrumental in evaluating the various options adopted by Malta through the years notably as to how such appellate fora should be composed and their precise role. These considerations have become even more relevant in the light of the conclusions of the Constitutional Court in the Federation of Estate Agents judgement whereby the role of appellate fora composed in part or wholly of persons who are not members of the judiciary has been questioned.

0.5.4. The enforcement powers of the utilities regulators

The primary source of information regarding enforcement powers of utility regulators in Malta are the law, and case law. Only a few studies consisting of academic papers[98] have to date been undertaken, whereas no studies or reports by government specifically on the subject have to date been published. The public consultations issued by government preceding major changes to the law relating to the regulation of utilities are descriptive in so far as they relate to enforcement measures and go no further than to propose norms in compliance with EU requirements.[99]

A chronological examination of the law commencing from the Telecommunications (Regulation) Act, 1997[100], illustrates the various enforcement tools available and the changes gradually introduced as a result of the amendments to the law, some of which were expressly made in adherence to EU requirements. Hence the EECC

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[96] See UK Government, *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, 19 June 2013, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf.

[97] See Department of the Taoiseach, *Consultation Paper on Regulatory Appeals,* issued in July 2006.

[98] See Micallef, *Enforcement and Judicial Review of Regulatory Decisions in Electronic Communications – A Review of the Malta Experience with Reference to other Common Law Member States in the EU* (n 89).

[99] See for example the public consultation entitled *European Electronic Communications Framework: Transposition of the European Electronic Communications Code (EECC)* issued by the MEI (n 38).

[100] Enacted as per Act No XXXIII of 1997.

requires that Member States, and therefore Malta, empower the competent NRAs to have the power to impose sanctions applicable in relation to infringements of the national provisions implementing the EECC.[101] There are similar requirements under the EU Directives regulating the other utilities.[102]

Of particular importance are the enforcement tools provided for in the EU Consumer Protection Cooperation Regulation (CPC Regulation).[103] Though the CPC Regulation refers only to consumer protection law[104], government in the case of the MCA decided to apply the enforcement tools listed in the CPC Regulation to all the laws enforced by the MCA which therefore increases the relevance of CPC Regulation in relation to the enforcement tools available to the MCA.[105] The relevant case law consists primarily of the Constitutional Court judgement in the Federation of Estate Agents case, whereby the power under ordinary law of the Director General (Competition) (DG Competition) within the MCCAA to impose sanctions was deemed to be contrary to article 39(1) of the Constitution, which judgement in turn impacts the enforcement powers of the MCA and the REWS given that these regulators enjoy similar powers at law to those previously available to the DG Competition.[106]

From an international perspective various reports and studies have been undertaken both by international and European bodies. CERRE for example conducted a comparative study of enforcement of decisions taken by regulators of different utilities[107] whereas EU bodies representing NRAs such as BEREC

[101] See the EECC, art 29.
[102] For example see the Electricity Market Directive 2019, art 59(3).
[103] Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.
[104] The Annex to the CPC Regulation lists the EU Directives and Regulations to which the said Regulation applies.
[105] See Act No XXXIII of 2021 entitled the 'Communications Laws (Amendment) Act, 2021'. The first Part of this Act amended the Malta Communications Authority Act providing for the inclusion of those enforcement tools as stated in the CPC Regulation that until the enactment of that law, were not factored under the laws enforced by the MCA.
[106] The court of first instance in its judgement in this case had expressly referred to the enforcement powers of the MCA amongst others. See Micallef, *An effective regulatory enforcement and sanctions regime post the Federation of Estate Agents Case: the issues* (n 93).
[107] See for example the CERRE Study, *Enforcement and judicial review of decisions of national regulatory authorities – Identification of best practices* (n 95).

periodically assess the enforcement tools of regulators.[108] At a national level various countries have similarly published reports on the enforcement by their regulators.[109] Of particular interest given the impact of the Constitutional Court judgement in the Federation of Estate Agents case leading to a situation where utilities regulators in Malta may forfeit their powers at law to impose sanctions, is the Irish experience in relation to enforcement by its utilities regulators where for example the Commission for Communications Regulation (Comreg) – the Irish communications regulator – is required to apply to the Irish High Court if it considers that a breach of the laws or decisions it enforces has occurred.[110] It is pertinent to note however that the Irish government is actively reviewing the current enforcement regime in order to enable its utilities regulator to impose sanctions directly and is in the process of enacting a law in this regard.[111]

0.5.5. Consumer protection of users of utilities

The main source of information in relation to Malta is the law and the reports of the national utilities regulators and of the MCCAA. MCA and REWS in their annual reports feature dedicated sections on consumer complaints against service providers, periodically issue reports relating to various aspects impacting consumers in their dealings with service providers and maintain dedicated sections of their websites providing consumers with information about their rights.[112]

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[108] See for example BEREC *Report on Penalties* (public version), 2020 , 9707-berec-report-on-penalties_0.pdf.

[109] See for example the Irish Law Reform Commission, *Issue Paper – Regulatory Enforcment and Corporate Offences*, 2016 Microsoft Word - PROJECT 1 ISSUES PAPER FINAL rev7.docx (lawreform.ie).

[110] See Micallef, *Enforcement and Judicial Review of Regulatory Decisions in Electronic Communications – A Review of the Malta Experience with Reference to other Common Law Member States in the EU* (n 89).

[111] See Government of Ireland: *Communications Regulation (Enforcement) Bill 2022, Summary Document,* published in December 2021 file:///C:/Users/pmicallef/Downloads/212053_f6cd7fdc-72b0-45be-bbde-5eb2158b57d1%20(13).pdf. On the 26 September 2022 the Irish Government published the Communications Regulation Bill 2022 (Bill No 86 of 2022).

[112] See MCA website which provides information on consumer related matters on a regular basis at Consumer | Malta Communications Authority (mca.org.mt) accessed 30th September 2022. Similarly, see the REWS website under 'Services' at Regulator for Energy and Water Services >en/home (rews.org.mt) accessed 30th September 2022.

MCCAA given its role in dealing with consumer complaints especially where these relate to unfair commercial practices or unfair contractual terms, including complaints relating to the utilities regulated by MCA and by REWS, in various publications it issues and on its website includes information relevant to consumer protection of end-users of utilities.[113]

No detailed studies have been specifically undertaken about consumer protection in relation to utilities.[114] This subject has been referred to briefly in various public consultations issued by government preceding the enactment of major changes to the law, and then only to describe the measures being proposed which in most instances implement EU requirements.[115] The relevant case law though not extensive reveals various issues relating to the roles of the DG Consumer Affairs within the MCCAA and of the sector specific utilities regulators, and serves to highlight existing deficiencies consequential to the possibility of overlap of regulatory roles.[116]

A review of all this information strongly indicates that there is a fragmentation in the handling of consumer issues given the division of responsibilities between on the one hand the MCA and the REWS, and on the other the DG Consumer Affairs. Regrettably to date no study has been undertaken to address this point, which the author believes persistently undermines the effective handling of consumer issues in so far as the provision of utilities is concerned this to the detriment of consumers.

[113] For example in its annual report for 2019 the MCCAA refers to an administrative decision taken in relation to a telecommunications service provider – see MCCAA Annual Report 2019 at p 32 2019-annual-report.pdf (mccaa.org.mt).

[114] The academic research undertaken only marginally refers to consumer protection in relation to utilities. See for example P.E. Micallef, *Utility Regulation in a Small Island State – Ensuring a Fair Deal for Consumers In Malta*, The Yearbook of Consumer Law 2007 (Ashgate Publishing Ltd) p 92 et seq.

[115] See for example public consultation entitled *European Electronic Communications Framework: Transposition of the European Electronic Communications Code (EECC*) issued by the MEI (n 38). This public consultation proposes a separate Part XII dedicated to 'End-User Rights' under new subsidiary legislation.

[116] See *Melita plc vs Awtorità ta' Malta dwar il-Komunikazzjoni* decided by the ART on 7 October 2013.

From an international perspective, other countries have undertaken various studies. Of particular interest are the reports issued reviewing the measures in place and proposing new measures to enhance consumer rights and redress.[117] The EU through the European Commission and the utilities regulators' networks such as BEREC has issued various reports assessing diverse aspects relating to consumer redress.[118] Studies have also been undertaken relating to specific aspects of consumer protection in relation to diverse utilities.[119]

From the above it can be observed that there is a dearth of information on the subject under review in so far as the Maltese perspective is concerned. The author through this thesis therefore endeavours to address the scarcity of studies on the subject with the intention of developing the literature further to fill in the missing gaps identified in this literature review.

0.6. Overview of the Thesis

This Thesis is divided into an introduction, five chapters and a conclusion. The introduction explains the purpose of this study listing the research questions the author addresses in the Chapters One to Five. This is followed by a section that outlines the transition from utilities markets - dominated in most instances by government controlled monopolies - to liberalised markets intended to facilitate, where feasible, access to better service provision and competitive prices. In the Introduction the author outlines the methodology used and the literature considered. The final part of the Introduction provides an overview of the contents of this Thesis.

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[117] See for example consultation paper by the (UK) DTI, *A Fair Deal for Consumers – Modernising the Framework for Utility Regulation* (n 53), and the study by the former (UK) National Consumer Council *Pay the Price – a consumer view of water, gas, electricity and telephone regulation* published in 1993 by HMSO.

[118] See for example Commission report on open internet | Shaping Europe's digital future (europa.eu).

[119] See for example C Bisping and T J Dodsworth, *Consumer Protection and the Regulation of Mobile Phone Contracts: A Study of Automatically Renewable Long-Term Contracts Across Jurisdictio*ns, J Consum Policy 42, 349–375 (2019). https://doi.org/10.1007/s10603-019-09417-0.

In Chapter One the author discusses two institutional aspects namely the regulatory framework and the composition of the headship of each regulator. The current regulatory frame-work in Malta with two sector specific utilities regulators responsible for *ex-ante* regulation and specific consumer issues, and with *ex-post* competition and general consumer issues dealt with respectively by the DG Competition and the DG Consumer Affairs, is evaluated in some detail. Options to the current regime are discussed including having a multi-sector utilities regulator or going a step further by establishing a 'super' regulator which in addition to regulating utilities, takes on the mantle of *ex post* competition and consumer protection oversight. Reference in considering these options is made to the experience of other countries notably, the UK, Ireland, the Netherlands, Spain and New Zealand.

The second institutional aspect discussed in Chapter One focuses on the governance structure of the regulator. Various options are discussed. These include having in place a non-executive chairperson and board of governors supported by a chief executive officer (CEO) who is responsible for day-to-day administration and executive decisions, a chairperson with executive powers heading a board of governors, or a 'single person' regulator. Related matters discussed include whether the persons making up the headship should be chosen from amongst technocrats with experience and knowledge of the regulated utilities or from amongst representatives of specific interest groups. In the final part of this Chapter the author considers the feasibility of having a comprehensive utilities regulator headed by a board composed of executive director generals (DGs) appointed on a full time basis, each of whom is responsible for specific matters falling within the remit of the proposed new 'super' regulator.

In Chapter Two the author considers the independence and accountability of utilities regulators. The author discusses the reasons why a utilities regulator in the exercise of its regulatory functions should be independent from service providers, other stakeholders and government. In doing so, how the headship of the regulator is appointed to and removed from office and to whom the persons making up the headship should be accountable, are discussed. Other points considered are the

overall relationship of the regulator with government[120] and with the House of Representatives, and the importance of ensuring that the regulator can access sufficient financial and human resources to effectively perform its regulatory work without undue interference from government or third parties. The independence or otherwise of the utilities regulators in Malta as it has developed over the years is evaluated. Reference is made to the applicable norms under EU legislation and their impact on the independence of the MCA and of the REWS, and to measures adopted in other countries relating to the independence and accountability of utilities regulators.

In Chapter Three the author focuses on the judicial review of regulatory decisions. Matters considered relate to how the appeals body should be composed, whether such a body should decide issues relating to both points of law and of fact, and to the timeframes by when appeals proceedings should be concluded. The chronology of the appeals system adopted in Malta is examined whereby initially appeals were determined by dedicated appeals boards and where subsequently the determination of such appeals was assigned to the ART. Reference is made to the applicable EU norms regulating the appeals process and to the appeals process in other countries notably the UK and Ireland. Other matters considered include the evaluation as to what constitutes a regulatory decision under Maltese utilities law, how the appeals tribunal should be constituted, the scope and standard of review to be adopted, and whether there should be a right of further appeal from a final decision taken by the ART and if yes on what grounds should such an appeal be allowed.

In Chapter Four the author considers the enforcement powers of the MCA and of the REWS. These include the imposition of dissuasive financial sanctions[121], the prosecution of acts or omissions that constitute criminal offences, the use of name and shame tools, and in extreme cases of repeated and serious non-compliance the

[120] Unless stated otherwise reference in this thesis to 'government' is to the executive branch of government as distinct from the House of Representatives and from the judiciary.

[121] The term 'financial penalties' is used throughout this study when referring to fines or penalties of a civil or administrative nature as distinct from fines that may be imposed in relation to criminal offences, in which case such fines are referred to as 'fines (*mult*i)' in accordance with the terminology used under Maltese law to describe such fines.

suspension or withdrawal of the authorisation to operate. The author considers other enforcement tools that are being introduced also in the light of EU norms such as the CPC Regulation. One aspect that is given particular attention is the debate relating to the faculty of public authorities such as the MCA and the REWS to impose substantial financial penalties following the landmark Constitutional Court judgement in the Federation of Estate Agents versus Direttur Ġenerali (Kompetizzjoni) et, whereby the Constitutional Court ruled that the imposition of such penalties was in breach of the right to a fair hearing before a court of law provided for under article 39(1) of the Constitution.[122] The author believes that it is only a matter of time when an undertaking on the receiving end of a substantial financial penalty imposed by the MCA or by the REWS for alleged non-compliance with a regulatory decision or the law, will challenge such a penalty before the Constitutional Court on similar grounds. Hence the importance of discussing in some depth this issue and the measures that one can take to address this issue.

In Chapter Five the measures in place specific to the protection of consumers of the diverse utilities are considered. Matters discussed include the role of the regulators in consumer disputes with utility service providers, specifically whether this should relate only to mediation, or conversely extend to the issue of binding decisions by the regulators including the award of monetary compensation and of orders to rectify shortcomings in utilities service provision. The author considers issues of possible overlap between on the one hand the MCA and REWS who at law are responsible in dealing with specific norms intended to protect consumers, and on the other hand the DG Consumer Affairs within the MCCAA who has a general remit to deal with consumer issues including issues that relate to the utilities regulated by MCA and by REWS. The author further considers the use of collective action proceedings as a means of addressing widespread or repeated cases of poor service provision.

[122] *Federation of Estate Agents versus Direttur Ġenerali (Kompetizzjoni) et* decided by the Constitutional Court on the 3rd May 2016.

In the Conclusion to the Thesis the author addresses the various research questions and his responses thereto as reflected in the preceding Chapters. In doing so the author outlines his vision for a more effective and efficient regulatory regime in Malta, listing his proposals in relation to the various aspects of the regulation of utilities, notably the overall regulatory set-up, the composition of the headship of the regulator, the independence and accountability of the regulator in the exercise of its regulatory functions, the remit and composition of the appeals tribunal, the enforcement powers available to the regulator and the handling of consumer issues. In taking matters forward the author outlines the gradual progression of the measures that can be undertaken to reform the current regulatory regime.

Chapter One - The regulatory set-up and composition of the headship

1.1. The aspects discussed and why they are linked

In this Chapter the overall utilities regulatory set-up in Malta is discussed focusing on two aspects. The first aspect relates to what may be best described as the 'institutional design' of utilities regulation in Malta whereby the different designs used are evaluated.[123] The second aspect relates to the composition of the headship or governing body structure of the entity or entities responsible for utilities regulation. The consideration of these two aspects is directly linked since the institutional design chosen and therefore ultimately the determination of the extent of the remit of the competent regulator or regulators, conditions how the headship of the regulator or regulators should be composed. If the institutional design for example envisages a single regulator whose mandate extends to all utilities, then there is a strong argument in favour of having a headship composed of a collegial body as distinct from a headship based on a single member design given the wider remit of such a regulator and the consequential greater knowledge and more varied experience of the diverse utilities subject to regulation required from the headship of the aforesaid regulator.

1.1.1.The institutional design - the options

In evaluating the institutional design of utilities regulation in Malta the principal consideration is whether to adopt on the one hand a sectoral regulatory institutional design or a converged version of that design, or on the other hand a comprehensive and unified institutional design. Four institutional designs may be identified, namely: the 'single sector' regulator where each utility sector has its own dedicated regulator; the 'converged' regulator where regulatory oversight of specific utility sectors that are linked together whether historically or because of

[123] The term 'institutional design' is used in the ICT regulation toolkit which though focused on telecommunications, can also be applied to utilities regulation in general. See also above footnote 47.

technological progress is assigned to the same regulator[124]; the multi-sector regulator where oversight of all or most of the utilities is assigned to one regulator; and a non-specific institutional design whereby the national competition and consumer regulator is given the additional mantle of overall utilities regulation, thereby doing away with any form of sectoral regulation through dedicated regulator or regulators.[125]

1.1.2. The governance structure of the headship – the options

The second aspect discussed in this Chapter deals with the governance structure of the headship of the regulator. Three options are considered. One option is the 'governance board model' with a non-executive chairperson and board of governors supported by a CEO who is responsible for day-to-day administration and for executive decisions and who is answerable to the board in the conduct of his duties. A second option is a variant of the first option with the difference that the executive powers lie with the chairperson and the board of governors with day-to-day administration and executive powers being exercised by a full-time executive chairperson. A third option is to have a 'single person' regulator in whom the headship, including the exercise of executive powers and day-to-day administration, is entrusted.

1.1.3. The EU perspective concerning the aspects discussed

From an EU perspective in the various EU Directives relating to the regulation of utilities, there are no express norms that determine what institutional design should be followed by EU Member States. Therefore Malta as an EU Member State

[124] Hence in Malta, billing of electricity and water services have for many years been done jointly by these utilities, whereas until the early 1970s postal and telecommunications services were provided by the same overall service provider in the form of the then government controlled Post and Telephony Department. Moreover in many European countries such as France and Italy, historically posts and telegraphy, and later telephony, were services provided by the same service provider.
[125] See *Elements for an Effective Regulator*, Section 6.5.2.1 at http://www.ictregulationtoolkit.org/toolkit/6.5.

is free to choose what institutional design it considers suitable in the light of specific national circumstances. In so far as the composition of the headship of the regulator is concerned, it is up to each Member State to decide the governance structure of the headship.

This notwithstanding it is pertinent to emphasise that, irrespective of the governance structure chosen by a Member State, various EU utilities regulatory frameworks require that Member States have in place measures to safeguard the independence and accountability of the person or persons making up the headship. Such measures require the inclusion by Member States in their national legislation of minimum fixed terms of office, the defining of the process and criteria on the basis of which the person or persons making up the headship are chosen, reporting requirements of regulatory activities onerous on the regulator, a general duty of the regulator to consult with all interested stakeholders prior to the taking of regulatory decisions, and the right of aggrieved stakeholders to contest any regulatory decisions before independent tribunals or courts.[126]

1.2. The current institutional design of the regulatory set-up in Malta

1.2.1. The background to the regulation of utilities in Malta

The regulation of utilities in Malta by an entity or entities distinct from the actual utility service providers is of relatively recent origin. Some form of independent regulation of utilities has been in place in Malta only since 1997. Prior to 1997 the regulatory approach taken in Malta was that the incumbent utility service providers, which until then were state controlled monopolies, were also in most instances their own regulators. This was the case with telecommunications, energy, water and postal services until at least 1997.

In the 1990s government recognized that an essential requisite of the gradual liberalisation of the provision of most utilities was the need to separate the role of

[126] See EECC, art 6, and Electricity Market Directive 2019, art 57(5).

utility service provider from that of regulator. Initially in 1997 with the establishment of the first utility regulator in the form of the Telecommunications Regulator, the approach by government was to have in place a sector specific regulator focused on a specific utility, in this case the telecommunications sector, specifically the regulation of fixed and mobile telephony.[127] This approach was maintained in the postal services sector when in 1998 amendments were made to the then Post Office Act, whereby the postal services provider, namely the then Posts Department, was divested of its regulatory role in the postal sector, with these functions being assigned to the Office of the Postmaster General, whereas the role of service provision of postal services was assigned to the then newly created MaltaPost plc.[128]

In 1999 a more comprehensive approach to the regulation of utilities was considered when government published a white paper outlining very briefly its proposals on the future regulation of utilities within the context of its privatisation strategy, whereby it advocated the establishment of a multi-sector utilities regulator.[129] This proposal however was not ultimately taken on board. Instead the following year government decided to opt for a converged regulatory approach by establishing two distinct utilities regulators. The first of these regulators was the MCA with a remit then primarily focused on telecommunications.[130] The second regulator established a few months later, was the MRA which was empowered with regulatory oversight for the energy and water services sectors and for mineral resources.[131] This regulatory design has remained in place up to the present day, with however the difference that the MRA was in 2015 replaced by the REWS as the competent energy and water services regulator.[132]

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[127] See art 4 of the Telecommunications (Regulation) Act 1997 which dealt with the functions of the Telecommunications Regulator.

[128] The provision of postal services until 1998 was the responsibility of the then Posts Department which was a government department. See the Post Office (Amendment) Act, 1998. See also https://www.maltapost.com/the-company?l=1.

[129] See Ministry of Finance, *Privatisation – a Strategy for the Future* at pp 46 to 48 (n 37).

[130] See the Malta Communications Authority Act, 2000 as per Act No XVIII of 2000.

[131] See the Malta Resources Authority Act, 2000 as per Act No XXV of 2000.

[132] The MRA to date remains responsible for the regulation of mineral resources. See opening page of https://mra.org.mt/.

1.2.2. The chronology of the remit of the MCA

In the communications sector the remit of the MCA has over the years been modified on various occasions. When the MCA was established in 2000, it replaced the then Telecommunications Regulator, assuming regulatory oversight for the provision of telecommunications services. The MCA then was also initially identified as being responsible for the exercise of regulatory functions in relation to data protection and electronic commerce.[133] However, when the MCA first effectively started operating in early 2001 its regulatory functions were limited to the telecommunications sector, with its regulatory remit in subsequent years being extended gradually to other sectors that either traditionally or because of technological developments were linked with communications.[134] Hence postal services, following the trend in some other EU Member States, was added to the utilities regulated by the MCA in 2002 following amendments to the then Post Office Act.[135]

Insofar as data protection is concerned, the role of the MCA was, and remains, strictly limited to certain aspects concerning telecommunications, with the MCA assuming such functions in 2003.[136] In the case of electronic commerce, though the Malta Communications Authority Act[137] when it was first enacted in 2000, did clearly list the regulation of electronic commerce as one of the regulatory responsibilities of the MCA, effectively the MCA was only designated as the

[133] See Act No XVIII of 2000 entitled 'the Malta Communications Authority Act, 2000' which Act established the MCA. This Act also amended substantially the then 'Telecommunications (Regulation) Act' by amongst other matters, empowering the MCA to assume the regulatory functions of the OTR in relation to the regulation of telephony services.

[134] The MCA started operating as of the 2nd January 2001. See LN 280 of 2000 whereby the MCA was designated as the competent authority for the purposes of the then Telecommunications (Regulation) Act as from the 1st January 2001.

[135] See the Post Office (Amendment) Act, 2002.

[136] Initially under the Malta Communications Authority Act 2000, a directorate was envisaged 'with responsibility for the regulation of all matters relating to data protection as may be assigned to the Authority'. The only responsibilities concerning data protection assigned to the MCA were strictly in relation to certain aspects concerning telecommunications. See the Electronic Communications (Personal Data and Protection of Privacy) Regulations as per LN 19 of 2003. These regulations were subsequently revoked by LN 273 of 2011 and integrated as a separate part entitled 'Part XIII - Protection of Privacy' of the Electronic Communications Networks and Services (General) Regulations as per SL 399.48 of the Laws of Malta.

[137] References to the Malta Communications Authority Act are references to the consolidated version of the Malta Communications Authority Act as per Chapter 418 of the Laws of Malta.

competent regulator for electronic commerce in 2005.[138] After 2005 the regulatory remit of the MCA was extended to include oversight of norms emanating from various EU regulations linked to the communications sectors for which the MCA is responsible.[139] Furthermore government has in recent years assigned to the MCA the regulatory oversight for certain EU regulations, even though some of these regulations are not directly linked to any of the communications sectors falling within the remit of the MCA.[140]

Finally, it is relevant to note that in 2018 the Malta Digital Innovation Authority (MDIA) was set up to deal with what is broadly described as 'technology innovation including distributed and decentralised technology'.[141] It would appear that the remit of the MDIA complements at least in part some of the regulatory functions of the MCA in so far as these relate to electronic commerce and to the regulation of electronic identification and trust services for electronic communications. Hence paragraph (s) of article 4(3) of the Malta Communications Authority Act lists amongst the functions of the MCA that of promoting Malta as destintation for high value commercial users of information technologies, a function which can also be attributed to the MDIA.[142] This and the assignment of other similar functions give rise to the question whether the role of the MDIA should also be assumed by the MCA.

[138] The MCA was designated as the competent regulatory authority under the Electronic Commerce Act, 2001 following the making of LN 326 of 2005.
[139] The Second Schedule to the Malta Communications Authority Act lists the various EU Regulations in relation to which the MCA has regulatory oversight. Apart from the EU laws listed in this Schedule, government has assigned regulatory oversight to the MCA in other instances where the assignment of regulatory oversight to the MCA was related to one or more of the communications sectors regulated by the MCA. A case in point is regulatory oversight by the MCA of the EU eIDAS Regulation which regulation effectively replaced the former EU Directive 1999/93/EC on electronic signatures - see art 23A of the Electronic Commerce Act (Chapter 426 of the Laws of Malta).
[140] See eg Regulation (EU) 2018/302 on unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or of establishment.
[141] See the Malta Digital and Innovation Act (Chapter 591 of the Laws of Malta), the preamble thereto.
[142] ibid, art 4(2)(b).

1.2.3. The chronology of the remit of the REWS

Insofar as the regulation of energy and water services is concerned, the approach taken by government has consistently been that of having a single regulator covering both utilities.[143] Initially in 2000 regulatory oversight of energy, water and mineral resources was assigned to the MRA.[144] Subsequently in 2015 the role of regulator for energy and water services was assumed by the newly created REWS, this effectively being the only major change insofar as the remit of the energy and water regulator is concerned.[145]

1.2.4. The overall institutional design in relation to the regulation of utilities

Effectively under the current institutional design there are in place two converged sectoral utilities regulators – the MCA and the REWS – which are responsible for *ex-ante* regulation and specific consumer or end-user issues in relation to the respective utilities they regulate, whereas *ex-post* competition and general consumer protection issues such as the regulation of unfair contract terms and unfair commercial practices in relation to any of the utilities under discussion, falls within the remit of MCCAA's DG Competition and DG Consumer Affairs respectively.[146]

[143] In so far as regulation is concerned, gas and electricity services to date have been tackled under the generic term of 'energy'.
[144] See the Malta Resources Authority Act 2000, art 4.
[145] See Regulator for Energy and Water Services Act 2015, art 4. The regulation of mineral resources however remains within the remit of the MRA. See https://mra.org.mt/ accessed 30th September 2022.
[146] In the respective regulatory regimes enforced by the MCA and by the REWS, a variety of terms in line with the terminology in the various applicable EU Directives is used to refer to users of the diverse utilities ranging from 'consumer', 'end-user' and 'user' under electronic communications to 'customer', 'active customer', 'final customer' amongst others in the electricity sector.

1.3. Revisiting the current institutional design in Malta

1.3.1. The experience of other countries

Is the current institutional design the best regulatory set-up for Malta and if it is not, what feasible alternatives are there? Though the current set-up has been in place since 2000, since then there has been to date very little discussion by government about whether there is scope for change, what options exist and the merits and demerits of each option. Four institutional designs can be identified, namely 'sector specific' regulators whereby there are in place distinct regulators responsible for the oversight of each utility sector; 'converged' regulators whereby regulators are responsible for the oversight of more than one utility sector; a 'multi-sector' regulator where a single regulator is empowered with the oversight of all the utilities; or a non-specific sector model where the regulation of utilities is assigned to the competent national competition and consumer regulator.

An overview of the regulatory regimes adopted in various countries, reveals that there are variants of each of these institutional designs conditioned by specific national circumstances. Hence even in those countries where for example a multi-sector design has been adopted or where the national competition and consumer protection regulator has been assigned the task of utilities regulation, there remain some utilities such as water services which either have their own sector specific regulator or are subject to a different regulatory regime.[147]

As was the case with Malta, many countries initially established sector specific regulators for some of the utilities, invariably commencing with the

[147] In the Netherlands whilst the majority of utilities are regulated by the Authority for Consumers and Markets, water services is regulated by the Dutch Water Authorities https://dutchwaterauthorities.com/#anchor-about-us, accessed 30th September 2022. Conversely in Denmark there are separate regulators dealing with respectively, electronic communications by the Danish Business Authority Danish Business Authorityen.kfst.dk accessed 30th September 2022 , energy by the Danish Competition and Consumer Authority en.kfst.dk accessed 30 September 2022, and water by the Danish Utility Regulator About us (forsyningstilsynet.dk) accessed 30th September 2022.

telecommunications sector and then proceeding to establish separate regulators for the other utilities. Gradually however, some countries decided to move from an institutional design based on distinct sector specific regulators to a converged or multi-sector institutional design where the same regulator would be responsible for two or more utilities or in some instances even for most of the utilities. This is what happened in the UK. Initially in the late 1980s as part of the first steps to economic liberalisation in the provision of many utilities, separate utility regulators were established by the UK government for the telecommunications, gas, water and electricity sectors amongst others. These measures were subsequently followed in the late 1990's with the establishment of converged regulators notably in the communications and energy sectors in lieu of the sector specific regulators created earlier.[148] Similar, though not identical, developments occurred in other countries which initially had separate regulators for the communications and energy sectors, and subsequently opted for a converged or a multi-sector institutional design.[149]

Currently the preferred institutional design in many countries, including various EU Member States, is the converged model with a 'communications' regulator responsible for electronic communications and postal services, and a separate regulator or regulators responsible for energy and water services.[150] There are diverse variants of this design that offer interesting insights as to how the regulation of utilities has been implemented in different countries. Significantly for example in some countries the communications regulator is also responsible for the regulation of broadcasting media including that of the content carried on the diverse means of electronic communications. The foremost classical example of such a regulator is the Office of Communications (Ofcom) - the UK communications regulator - which was preceded by five diverse regulators responsible for

[148] See DTI, *A Fair Deal for Consumers - Modernising the Framework for Utility Regulation* pp 25 to 30 (n 53). In this consultation the UK Government issued proposals to combine the then existing gas and electricity regulators, and the diverse communications regulators.
[149] This for example is what happened in Germany, see https://www.bundesnetzagentur.de/EN/General/Bundesnetzagentur/About/AboutTheBundesnetzagentur_node.html accessed 30th September 2022.
[150] This is the case with Ireland with Comreg and the Commission for Regulation of Utilities (CRU), https://www.ComReg.ie/ accessed 30th September 2022, and https://www.cru.ie/home/about-cru/ accessed 30th September 2022.

telecommunications, regulation of broadcasting content, and radiocommunications amongst others. Subsequently in 2003 the UK government decided to create one comprehensive communications regulator by establishing Ofcom.[151] Conversely insofar as the regulation of the communications sectors is concerned, some other countries have adopted the approach taken by Malta, with on the one hand electronic communications services and networks, and on the other hand broadcasting content, falling within the remit of two separate regulators.[152] This is the position for example in Ireland with Comreg responsible for electronic communications and posts and the Broadcasting Authority of Ireland (BAI) responsible for broadcasting matters.[153] This point is of some relevance in a local context given that it has been suggested that the regulatory roles of the Malta Broadcasting Authority (BA) and of the MCA should be amalgamated.[154]

In relation to the non-communications sectors notably electricity, gas and water services, the institutional design adopted in many countries is either to have a converged regulator for all three utilities, or else separate regulators on the one hand for the energy sectors namely electricity and gas services, and on the other hand for water services. Hence in the UK in contrast to the approach taken in that country in the communications sectors with a converged regulator namely Ofcom, separate utility regulators have been established for the energy and water sectors.[155] A similar situation exists in Austria, Croatia, and Finland with separate

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[151] Ofcom was established in 2001 assuming the regulatory functions of five regulatory bodies including Oftel the former telecommunications regulator and the Broadcasting Standards Commission. Susequently in 2011 Ofcom was also designated as the postal services regulator taking over from the former postal services regulator - the Postal Services Commission. See https://www.Ofcom.org.uk/about-Ofcom/what-is-Ofcom accessed 30th September 2022.

[152] In the case of Malta the regulation of broadcasting content carried on television and radio falls under the remit of the Broadcasting Authority. See http://www.ba-malta.org/en/about-us accessed 30th September 2022.

[153] See the Broadcasting Authority of Ireland at https://www.ComReg.ie/about/and https://www.bai.ie/en/about-us/ accessed 30th September 2022. A similar regulatory set-up exists in Cyprus, Greece and Italy.

[154] See TPPI as per report by P Caruana Dingli and C Vassallo, *Confronting the Challenge: Innovation in the Regulation of Broadcasting in Malta* (n.58), and P E Micallef (2019) in an article entitled 'Regulatory set-up of Broadcasting in Malta' published in *Navigating the Maltese Mediascape* (n 58).

[155] Hence this is the case with Ofwat - the Water Services Regulation Authority. In the case of gas and electricity there is a converged regulator namely Ofgem – the Office of Gas and Electricity Markets. See respectively https://www.ofwat.gov.uk/about-us/ accessed 30th September 2022, and https://www.ofgem.gov.uk/about-us accessed 30th September 2022.

utility regulators for energy and for water.[156] In some other countries a different institutional design has been adopted with the establishment of a combined regulator for energy and water services. This for example is the case in Ireland with the Commission for Regulation of Utilities (CRU) and in Italy with l'Autorità di Regolazione per Energia Reti e Ambiente (ARERA).[157]

In recent years some countries have decided to do away with dedicated separate utility regulators in relation to some utilities by assigning the responsibility for the regulation of utilities to their national competition and consumer regulators. This for example is the route that has been taken by the Netherlands with the establishment of Autoriteit Consument & Market (Authority for Consumers and Markets or ACM), which apart from being responsible for competition issues and consumer protection, is responsible for the regulation of telecommunications, postal services, transport, and energy utilities.[158] Similarly in Spain, the Comision Nacional de los Mercados y La Competencia (CNMC) is responsible for competition and consumer protection and for utilities regulation in relation to energy, telecommunications, audiovisual media services, postal services and transport amongst others.[159] Until 2013 both in the Netherlands and of Spain there were in place either specific sector or converged utility regulators, with the respective governments of these countries in 2013 opting to do away with most dedicated sector specific utility regulators.[160]

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[156] This is the case with for example Austria, Belgium, Croatia and Greece see: https://www.ceer.eu/eer_about/members accessed 30th September 2022, and http://wareg.org/members.php accessed 30th September 2022.

[157] See respectively https://www.cru.ie/home/about-cru/ accessed 30th September 2022, and https://www.arera.it/it/che_cosa/presentazione.htm accessed 30th September 2022.

[158] In the case of the Netherlands prior to the establishment of the ACM in 2013, there was in place a converged utilities regulator for the communications sector, whilst the former Competition Office was also responsible for energy regulation, see https://www.acm.nl/en/about-acm/mission-vision-strategy/our-tasks accessed 30th September 2022, and https://www.stibbe.com/en/news/2013/april/new-dutch-authority-for-consumers-and-markets-becomes-operational accessed 30th September 2022.

[159] In the case of Spain, the CNMC assumed the functions of, amongst others, the former energy and telecommunications regulators, see https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc, accessed 30th September 2022.

[160] The exception to the rule in both instances is the provision of water services, with distinct regulatory authorities still in place responsible for the regulation of water services.

Another interesting and in some ways unique institutional design, is that adopted by New Zealand where the Commerce Commission which is the national competition and consumer regulator, has as one of the members forming part of the headship of the Commission, a commissioner who is designated as the 'Telecommunications Regulator' with a remit to deal with the regulation of the telecommunications sector.[161] It is however pertinent to note that it is only in the case of telecommunications that there is in place a dedicated member on the Commerce Commission dealing with the regulation of a particular utility service.[162]

1.3.2. The remits of REWS and of MCA in relation to the utilities they regulate – is there scope for change?

In discussing whether the present institutional design of the regulation of utilities in Malta should be changed, it is important first to determine the extent of the remit of the competent regulator or regulators that will be assigned the responsibility for the regulation of various utilities. To date the remit of the current two utilities regulators has been tied, in the case of the MCA to the various communications sectors namely electronic communications including electronic commerce and postal servcies, and in the case of the REWS to the energy and water sectors. Should this remit be revisited?

In relation to the remit of REWS which currently relates to regulatory oversight of the energy and water services, there does not appear to be any reason for change. The main point of discussion in relation to these utilities is whether they should remain subject to oversight of a focused converged regulator as is currently the case with REWS, or else as was originally proposed by government in its 1999 White Paper, be assigned to a multi-sector regulator, or possibly even going further by having their regulatory oversight assigned to a 'super' regulator empowered to deal

[161] See https://comcom.govt.nz/about-us/our-people/our-board accessed on the 30th September 2022.
[162] Other utilities are regulated under Part 4 of the New Zealand Commerce Act which does not require dedicated commissioners for the other utilities.

with all aspects of utilities regulation including those currently residing with the MCCAA in so far as *ex post* competition and general consumer law are concerned.

The option of having a specific sector regime with distinct utility regulators for energy services and for water services respectively is not in the case of Malta a feasible option for various reasons. The current regime of a converged regulator in the form of the REWS has to date proved to be fairly adequate for the purpose. Traditionally by way of service provision in Malta many aspects of electricity and water services were provided jointly by the utility providers concerned, notably in so far as billing is concerned.[163] Given the small size of Malta there is no valid argument that justifies going down the route of sector specific regulation in so far as energy and water services are concerned more so since a sector specific design would increase the cost of regulatory oversight due to the added cost of more regulatory resources that would be required if separate regulators are in place for the energy and water services sectors respectively.

The issues relating to the remit of the REWS in relation to its regulatory oversight of the energy and water services sectors, when they occurred were tied mainly to the fact that the REWS lacked, and still lacks, both *ex post* competition and general consumer protection powers under Maltese law given that such powers reside with the competent DGs under the MCCAA.[164] The focus therefore of any changes to the remit of the REWS should be targeted at eliminating any such competence issues, ideally advocating one focused regulator able to deal with all regulatory issues – including *ex post* competition – insofar as these relate to the energy and water services utilities.

[163] To date billing is still issued jointly by the electricity and water service utilities through the Automated Revenue Management Services Limited (Arms Limited) which was set up in 2009 to handle a number of services provided by Enemalta plc and the Water Services Corporation. See https://arms.com.mt/en/information/our-company/about-us accessed 30th September 2022.

[164] See E Buttigieg, *Market Liberalisation, competition and consumer welfare – are we there yet?* at p 4 et seq. Though written in 2009, much of what is stated in this article remains valid today. The only notable change that has occurred since this article was written is that the responsibility of the former Office for Fair Trading was in 2011 assumed by the DG Competition within the MCCAA. See https://www.um.edu.mt/europeanstudies/books/CD_CSP5/pdf/ebuttigieg.pdf.

In the case of the communications utilities it is not a feasible option to create separate utility regulators for the diverse communications utilities – notably electronic communications, postal services and electronic commerce. Taking such a route would lead to more regulatory costs and there does not appear to be any valid arguments which justify the setting up of separate sector specific regulators in this regard. Conversely a change that has been advocated on various occasions in relation to the communications sectors, is whether the responsibility for broadcasting and audio-visual media should be included within the remit of the regulator having oversight of the diverse communications utilities. In a report issued by the now defunct Today Public Policy Institute (TPPI), it was argued that the separation of the regulation of broadcasting content by the BA on the one hand, and of electronic communications services and networks by the MCA on the other hand is 'out of step with current needs'.[165] The TPPI Report advocated a merging of the roles of the BA and of the MCA since this would streamline resources and would lead to a converged and simpler regulatory framework that would be in a better position to deal with the ever-increasing range of media technology and with the diverse services resulting therefrom.

These considerations if anything are even more pertinent today with innovative means of audio-visual communications continuously emerging.[166] Increasingly for example television broadcasting is being impacted by technological developments where television channels are accessible by means of streaming over the internet.[167] There is therefore certainly a strong argument in favour of factoring the regulation of audio-visual services within the remit of a revamped communications regulator whereby such a regulator assumes also the current regulatory responsibilities of the BA. For these reasons alone there is a strong case to advocate that a single regulator should be responsible for these functions doing away with the current division of regulatory roles between the BA and the MCA.

[165] See TTIP Report at para 90 (n 58).
[166] The TTIP Report was issued in 2014.
[167] See eg https://theconversation.com/more-streaming-services-could-change-what-we-watch-on-tv-and-how-we-watch-it-122399.

Another regulatory role that may be factored in relation to the communications sector is the present remit of the MDIA which relates to what is generically described as 'technology innovation' focusing amongst others on the regulation of 'distributed or decentralised technology'.[168] Various facets of the matters regulated by the MDIA are closely tied to aspects concerning electronic commerce and to the EU Regulation on electronic identification and trust services for electronic transactions[169] (the eIDAS Regulation) which fall within the remit of the MCA. There is therefore a strong case in advocating that the role of the MDIA is subsumed within the current remit of the MCA, leading to a situation where these issues are dealt with comprehensively by one focused regulator. Finally yet another aspect tied to the regulation of digital society is the assignment of the regulation of digital contracts to the DG Consumer Affairs.[170] All this means that one is confronted with a situation where there are at least four different regulators in Malta that regulate different aspects related in one way or another to the digital society.

What needs to be determined in taking forward such measures is whether the current institutional design should be modified only to the extent that the MCA as the communications regulator assumes also the roles of the BA, the MDIA and possibly the DG Consumer Affairs in relation to digital contracts, or alternatively whether to go further by assigning regulatory responsibilities either to a multi-sector regulator or possibly a 'super' regulator in the form of an institutional design that combines the regulation of utilities with the task of *ex post* competition and general consumer protection.

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[168] See Malta Digital Innovation Authority Act, art 2 which provides for the definitions of 'innovative technology services' and 'innovative technology arrangements'. Reference is also made to the definitions under art 2 of the Innovative Technology Arrangements and Services Act, notably the lists of 'innovative technology arrangements' and of 'innovative technology services' provided for respectively in the First and Second Schedules of the aforesaid Act.

[169] See Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

[170] See the Digital Content and Digital Services Contracts Regulations as per SL 378.20 of the Laws of Malta which regulations transpose Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

1.3.3. Reasons why the current institutional design in Malta should be changed

At this juncture it should be asked whether the current institutional design should be changed? Two considerations stand out which justify that the institutional design in Malta should be revisited and other options actively pursued. The first is tied to the fact that neither the MCA nor the REWS have a comprehensive remit to deal with all competition and consumer protection issues that may arise in relation to the utilities that they regulate. In relation to consumer protection MCA and REWS respectively enforce specific provisions that relate to consumer and, or end-user protection.[171] However this notwithstanding ,neither regulator has a broad remit that empowers either regulator to undertake enforcement measures in relation to all commercial practices that may impact negatively consumers of the utilities that they regulate. Under Maltese law it is only the DG Consumer Affairs within the MCCAA who has a general remit to take regulatory measures in the case of unfair commercial practices or the use of unfair contract terms by any of the utility service providers regulated by the MCA or the REWS.[172] A similar situation arises in the case of competition related issues where whilst *ex-ante* regulation falls within the remit of the competent utilities regulator depending on the utility service concerned, whereas all *ex-post* competition issues fall exclusively within the remit of the DG Competition within the MCCAA.[173]

This situation has occasionally given rise to lack of clarity as to the precise remit on the one hand of the MCA or of the REWS as the competent sector utilities regulators and on the other hand of the DG Consumer Affairs and the DG Competition within the MCCAA, undermining effective and timely regulatory intervention to the detriment of the sector concerned. One such instance occurred

[171] Hence eg the MCA may require a service provider of any regulated communications services to undertake an independent audit of its activities or operations as the MCA may determine, provided that before doing so the MCA informs the undertaking concerned giving its reasons for the audit whilst affording the said undertaking the opportunity to make its submissions thereto. See Malta Communications Authority Act, art 29(1)(j).

[172] See Consumer Affairs Act, Parts VII and VIII.

[173] See Competition Act, art 3, which gives exclusive competence to the DG Competition to apply the provisions of that Act.

in 2011 in relation to the regulation of the operations of the Pay TV service providers in Malta whereby the two service providers concerned - GO plc (GO) and Melita plc (Melita) - from time to time would change their channel line-up by removing certain popular channels.[174] Until late 2011 the MCA had on various occasions intervened against both service operators when certain channels were removed without any valid reason at law to the detriment of their subscribers. In these instances the MCA intervened by imposing financial penalties for non-compliance with the then applicable norms.[175] In late 2011 however the DG Consumer Affairs entered into separate agreements with GO and Melita, effectively allowing either service provider to change or remove up to five TV channels or fifteen per cent of the channel line up within any given period of one calendar year.[176] These agreements effectively meant that the MCA could not intervene if it considered that a channel was removed without any valid reason, otherwise it would be acting in direct conflict with the agreements made by the DG Consumer Affairs with the two service providers in question. These events underline the need for change, possibly even of the current regulatory institutional design, to eliminate future similar incidents where separate regulators may end up taking conflicting regulatory measures.

Other cases have occurred leading to situations where it is not always clear to which regulator consumers or business should have recourse to if they have complaints about the provision of a utility service. At times the borderline between whether for example a consumer issue concerning incorrect or incomplete information in a contract falls within the remit of the sector specific regulator or conversely within the remit of the DG Consumer Affairs, is not always manifestly evident and can lead to a situation where the impacted person is referred from one regulator to another leading to understandable disenchantment with the regulatory set-up that is supposed to protect the rights of the aggrieved consumer.

[174] Both service providers to date still continue with such a practice following a 2011 agreement entered into with the DG Consumer Affairs which allows them to change up to a maximum of 15% of their channel line up in any twelve month period.
[175] See https://timesofmalta.com/articles/view/regulator-fines-melita-10-000-over-billing-football-club-channels.329244.
[176] See https://timesofmalta.com/articles/view/Consumers-better-off-before-on-TV-contracts.389456.

Another point that serves to underline the deficiencies of the current institutional design is that a non-compliant utility service operator may question the intervention of a regulator on the grounds as to whether the issue falls within its remit and thus prolong or even dilute the effective and timely application of regulatory measures, this notwithstanding that there may be a clear breach of the applicable norms. Such an issue arose in a case by Vodafone Malta Limited in 2004 when the then Director of the Office of Fair Competition (Director OFC) within the former Consumer and Competition Division (CCD) declined to intervene against Datastream Limited on the grounds that the issue fell within the remit of the MCA. This stance was overruled by the then Commission for Fair Trading in a preliminary decision whereby the Commission held that the Director OFC and the MCA held concurrent jurisdiction on telecommunications issues in so far as competition issues are concerned.[177]

Similar situations can be resolved by having on the one hand the utilities regulator and on the other hand the competent DG within the MCCAA enter into a memorandum of understanding (MoU) within the framework of a concurrency regime thereby eliminating overlap of roles and conflicting decisions.[178] But is this an ideal solution? Does it make sense to have separate regulators whose remits may at times be at cross purposes and therefore undermine clarity in relation to regulatory ovesight of utility service providers?

A second and equally compelling consideration is the impact on the human and financial resources available given the small size of Malta and the limited number of persons available with the required expertise and experience of Maltese market conditions and of the diverse regulated utilities operating in Malta. This incidentally was also one of the reasons why government had originally in 1999 favoured the idea of a multi-sector utilities regulator.[179] Many people having the necessary expertise are in most instances already engaged with one of the utility service

[177] This decision was given on the 29th November 2004. See S Meli, *Judgements of the Malta Commission for Fair Trading,* p 184 et seq.
[178] See for example the MoU between Ofcom and the CMA https://www.Ofcom.org.uk/__data/assets/pdf_file/0028/83755/cma_and_Ofcom_mou_on_use_of_concurrent_consumer_powers_webversion1.pdf,accessed 30th September 2022.
[179] See Ministry for Finance, *Privatisation – A Strategy for the Future* at p 48 (n 37).

providers operating in Malta, which renders the task of recruiting suitable persons with a solid background in one or more of the regulated utilities and knowledge of the relevant markets in Malta that more difficult. In the case of the MRA, and subsequently the REWS, of the three CEOs appointed to date, two had substantial experience as top executives in one or more of the regulated utilities, whereas the third appointee was relatively new to the utilities sectors falling under the remit of REWS. In so far as the executive headship of the MCA is concerned, of the five persons who to date occupied the headship role whether as executive chairperson or as CEO, only one person could claim to have had substantial expertise in any of the regulated utilities prior to his appointment.[180] To some extent this situation is also reflected with the staff of both the REWS and the MCA with some staff members previously having worked with a regulated utility service provider.[181]

1.3.4. Changing the current institutional design in Malta – the options

What are the feasible options to the current institutional design in Malta? Two options stand out. One option is to have a multi-sector regulator responsible for the regulation of all utilities.[182] The other option goes a step further by assigning the responsibility of the regulation of utilities to the national competition and consumer protection regulator, thereby doing away with the need of sector specific utilities regulators.[183] It is interesting here to note that some of the countries that adopted one of these options originally had in place a sector specific or converged sectors institutional design functioning alongside the national competition and consumer protection regulator, similar therefore to the current institutional design

[180] To date the MCA has, other than for two relatively short periods of a few months, been headed by persons performing the combined role of chairperson and CEO.
[181] In relation to the communications sectors, the engagement of staff especially those with technical background has actually been a two way process, with some professional staff also leaving the MCA to join a regulated service provider.
[182] See for example the Latvian Public Utilities Commission at https://www.sprk.gov.lv/content/par-regulatoru, accessed 30th September 2022.
[183] This is the option taken by the Netherlands with the setting up of the ACM. See https://www.acm.nl/en/about-acm, accessed 30th September 2022.

in place in Malta.[184] Equally relevant is that such options have been adopted by both 'small' and 'large' countries.[185] This indicates that whilst there may be more compelling reasons for small countries because of their size and consequential limited human and financial resources to consider having a unitary institutional design, even relatively large countries have decided that such a design is the better option.[186]

What route should Malta take? If a unitary institutional design is adopted in lieu of the current institutional design, should this be in the form of a multi-sector utilities regulator or should the national competition and consumer regulator also assume the role of a multi-sector regulator in addition to its present remit? In the 1999 White Paper, government had opted for a multi-sector utilities economic regulator mainly because of the size of Malta. Interestingly in that paper government in support of this option had argued that in the case of such sector specific regulators 'there is not much for them to do' and that it would be difficult to find suitably qualified people to form part of such regulators.[187] Regrettably in making such a proposal, government did not elaborate further and explain on what grounds it had arrived at these conclusions. Neither is it clear why less than a year later in 2000, government conversely opted to establish two converged utilities sector specific regulators in the form of the MCA and of the MRA, overturning its earlier stance taken in 1999 advocating a multi-sector regulator responsible for both the communications utilities and the energy and water utilities.

Following the establishment of the MCA and of the MRA in 2000, events have shown that both the MCA, and the MRA and subsequently its successor the REWS, have had quite a lot to do by way of utilities regulation. A cursory look at the

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[184] This was the case with Spain until 2013 when the CNMC was set up. See https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc ,accessed 30th September 2022.
[185] Hence both Luxembourg and Germany have unitary utility regulators. See https://www.editus.lu/en/institut-luxembourgeois-de-regulation-luxembourg-17817, accessed 30th September 2022, and https://www.bundesnetzagentur.de/cln_1931/EN/Home/home_node.html 30th September 2022.
[186] Spain is one such example, where initially a sector specific regulatory regime was used which was subsequently replaced by a new regulatory regime whereby utilities regulation is dealt with by the national competition and consumer authority. See also above at p 46.
[187] See 1999 White Paper, p 48 (n 37).

number of laws and regulatory decisions issued since then in relation to the different utilities regulated by both regulators amply demonstrates that the regulatory work involved has been and remains quite substantial and that there is certainly the need for some form of regulatory oversight of the diverse utilities. In part the reason for this lies with the amount of regulatory norms emerging from the EU that then have to be reflected under national law or regulatory decisions that in turn necessitate active supervision by the competent regulator to ensure compliance.

Furthermore the implementation under Maltese law of the new EU regulatory frameworks in the electronic communications and electricity sectors as a result of the overhaul of these sectors by the EU entails even more regulatory work for both MCA and REWS since in both instances new regulatory functions have been added to those already in place.[188] In all probability there will also be new regulatory challenges in relation to the other utilities falling within the remit of MCA and of REWS.[189] Clearly therefore there is a need to have in place a regulator or regulators to oversee the diverse utilities.

1.3.5. A 'super' utilities regulator?

Is there scope for a 'super' utilities regulator in Malta, and if there is what institutional design should be adopted? The main argument made against having the same regulator responsible for the regulation of all utilities, is that there is a risk that in particular where economists, technical specialists and legal experts are shared across the regulatory structure dealing with the diverse utilities, the pool of expertise may become diluted thereby undermining the capability of a 'super' regulator to effectively regulate the diverse utilities.[190]

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[188] See the EECC and the Electricity Market Directive 2019.

[189] See for example in the case of water service regulation, the regulatory challenges identified by WAREG at http://www.wareg.org/news.php?q=detail&id=21.

[190] See ICT toolkit at *Legal and Institutional Aspects of Regulation* at Section 6.1.1. entitled *Overview and Comparison of Different Institutional Designs – comments on Model 3 – Multi-sectoral Regulator* (n 47).

How valid is this concern more so when factoring the limited specialised human resources available in a small country such as Malta? The experience of other countries, including some large countries, which decided to opt for a 'super' regulator institutional design has demostrated, admittedly with varying degrees of success, that it is quite possible to have in place one efficient comprehensive regulatory set-up that comprises dedicated units focusing on the diverse utilities whilst having common support services.[191] The fundamental consideration is to find the right balance between on the one hand having an overall effective and efficient regulatory set-up that serves as a focal point for both business and consumer stakeholders on all issues relating to utility regulation, whilst on the other hand ensuring that within the same set-up there are distinct units composed of staff with the required expertise capable of addressing any issues relating to a specific utility.

Once the need for a 'super' regulator is agreed to, then the next step is to determine if the 'super' regulator should be a multi-sector regulator acting alongside the national competition and consumer regulator, or else whether to empower the national competition and consumer regulator to deal with all aspects of the regulation of utilities including *ex ante* and *ex post* competition and all consumer protection issues pertinent to the various regulated utilities.

Whilst the option of creating a multi-sector regulator as was proposed by government in its 1999 White Paper would minimise regulatory costs, it would not necessarily solve the issues that may arise related to the overlap of regulatory roles between on the one hand a multi-sector utilities regulator and on the other hand the DG Consumer Affairs and the DG Competition within the MCCAA.[192] There are avenues that may be considered to address such overlap of functions by for example having in place a regime whereby *ex post* competition and all consumer protection issues in so far as they relate to the regulated utilities, are referred to the multi-sector regulator which would enjoy concurrent powers under competition

[191] See for example OECD's report on the operations of the Public Utilities Commission - the 'super' utilities regulator in Latvia (n 45).

[192] For ease of reference unless stated otherwise, any references to both the DG Consumer Affairs and the DG Competition within the MCCAA, are referred to as the 'MCCAA'.

law and consumer law together with the national competition and consumer protection regulator. Hence in relation to competition law in the UK a regime has been adopted where Ofcom has concurrent powers with the Competition and Markets Authority (CMA) to investigate suspected infringements of competition law in so far as such infringements relate to the sectors regulated by Ofcom.[193] It is relevant to note in this regard that a proposal based on the UK concurrency model was made by government in 2007 whereby MCA would have had concurrent powers with the CCD the then national competition office. This proposal however was not taken forward by government.[194]

An option is to have an institional design with a multi-sector regulator responsible for all utilities having concurrent *ex post* competition and general consumer protection powers with the MCCAA. However the author strongly questions whether this is the ideal solution for Malta. Regrettably as described earlier in this Chapter there have been instances where on the one hand a sector specific utilities regulator and on the other hand the MCCAA intervened at cross purposes undermining effective and timely regulatory intervention to the detriment of both business and consumers.[195] MoUs have been used to deal precisely with the occurence of such incidents, but these have not proved to be very effective more so when issues arise between the regulatory authorities concerned as to which authority should be dealing with a particular issue, this notwithstanding that a MoU may be in place to cater for such cases of overlap. Given such circumstances new institutional solutions need to be considered.

The size of Malta with its limited human and financial resources strongly militates in favour of a comprehensive regulatory model whereby the institutional design of the MCCAA is changed in order to factor comprehensively all aspects of the regulation

[193] See *Enforcement guidelines for Competition Act investigations* issued by Ofcom at https://www.Ofcom.org.uk/__data/assets/pdf_file/0014/102515/Enforcement-guidelines-for-Competition-Act-investigations.pdf, accessed 30th September 2022.
[194] The main reason why this proposal was not taken forward appears to have been motivated by the objections of the main telecommunications operators in response to the public consultation issued by government. See public consultation issued in 2007 by the MCA and the CCD – see https://www.mca.org.mt/sites/default/files/consultations/consultation-doc-09-04.pdf.
[195] See above Section 1.3.3 at p 51 et seq.

of utilities. As discussed above such a route has been adopted in other EU Member States that initially, as is currently the case with Malta, had sector specific or converged utilities regulators, and then decided to assign the tasks of the regulation of utilities to the national competition and consumer regulator, or alternatively create a new regulatory set-up that is responsible for both sector specific utilities regulation and national competition and consumer issues. This is what happened when the ACM in the Netherlands was established in 2013, whereby specific departments dealing with the diverse utilities, consumer protection and competition, coupled with other departments providing general support, were set up within a comprehensive institutional design.[196]

The adoption in Malta of a similar design to that introduced in the Netherlands with the establishment of the ACM, would be conducive to better rationalisation and use of the available human resources, thereby minimising regulatory costs, providing for more clarity in regulation by having in place one focal point of reference in relation to the regulation of utilities whilst eliminating issues of conflict of remit between the diverse regulators. Hence tasks relating to public relations, management of human resources and enforcement could be better managed and at lesser cost in an unified regulatory environment having a comprehensive remit to deal with all issues relating to economic regulation including *ex-ante* and *ex-post* competition regulation and issues relating to consumer protection relating to the diverse utilities.

[196] See organisation structure of the ACM at https://www.acm.nl/en/about-acm/our-organization/organizational-structure, accessed 30th September 2022. See also https://www.independent.com.mt/articles/2007-07-27/news/consultation-on-proposed-amendments-to-the-competition-act-2007-177026/.

1.4. The governance structure of the headship of the utilities regulators

1.4.1. The options

Once the institutional design of the regulator has been identified then the next step is to determine the 'governance structure' of the headship of the regulator.[197] OECD identifies three main options in relation to the structure of the headship of a regulator. The first is the 'governance board model' whereby a governance board is primarily responsible for the operational and strategic direction and oversight of the regulator, with regulatory decision making being delegated to a CEO. The second option is the 'commission model' where the governance board is also responsible for the conduct of the affairs of the regulator including the taking of most substantive regulatory decisions acting through the aegis of an executive chairperson or of executive board directors with individual responsibility of each board member for specific regulatory matters. The final option is the 'single member regulator' whereby an individual is chosen as the regulator and is responsible for taking most substantive regulatory decisions.[198]

How the headship is structured is inevitably conditioned by the choice of the institutional design. If the design chosen is that of a 'super' regulator with a remit that includes the regulation of various utilities, possibly even going beyond such a remit factoring also responsibility for *ex post* competition and general consumer protection issues, then there is a very strong argument in favour of a headship composed of persons who collectively have the expertise and experience covering the diverse utilities regulated and other regulatory functions onerous on the regulator concerned.

A regulator whose remit includes the oversight of various utilities should not be led by one person given the range of knowledge and experience required if the

[197] The term 'governance structure' is used by the OECD in its study entitled *OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy* OECD Publishing at pp 69 et seq (n 45).
[198] ibid at p 69.

headship is to take informed decisions.[199] Conversely if the remit of the regulator is limited to a specific utility, then the argument for a 'single person' regulator model may be tenable since the relevant knowledge and experience required would be specific to one utility only.

The OECD in evaluating the merits of a collegial headship compared with a single member headship lists various factors that need to be considered. In doing so the OECD includes:

- The potential commercial and, or social consequences of regulatory decisions. The OECD observes that a collegial headship is less likely to be influenced than an individual headship, adding that the input of different persons has the merit of bringing different perspectives.
- The importance of what OECD describes as the 'diversity of wisdom, experience and perceptions required for informed decision making', whereby collegial decisions can provide for better balancing of judgement factors whilst minimising the risk of variance in regulatory decisions.
- The degree of strategic guidance to achieve regulatory objectives with OECD citing as examples oversight in developing compliance and enforcement policies, and resources allocation.
- Maintaining regulatory consistency, with OCED noting that collegial decision making bodies over time provide for more corporate memory.
- The independence of the regulator, where a collegial body once it is composed of various individuals, is less susceptible to political or industry influence than one single decision maker.[200]

There are arguments both in favour and against the different governance structure options listed by the OECD as described above. Concentrating decision making powers in one individual may translate into quicker and more consistent decisions. Conversely a collegiate headship, whilst it may take more time to decide regulatory

[199] ibid pp 70 et seq.
[200] ibid.

issues, minimises the possibility of abuse of power whilst having the benefit of the input of various persons versed in different aspects of regulation.

Ultimately the crucial point is to ensure that the headship is composed in such a manner that ensures that the person or persons making up the headship and therefore responsible for the final decision making, have the required knowledge and experience of the regulated utilities. In the past various headship appointments in Malta were not always made on the basis of any profound expertise and experience of the appointees of the regulated sector or sectors, but on other considerations including regrettably in some instances the political allegiance of the appointees. Significantly it is worth bearing in mind that the great majority of independent regulators in OECD countries have opted for a collegial headship since as an option, as opposed to a single member headship, it is perceived by many countries to be conducive to a greater level of independence and integrity.[201]

1.4.2. The position in Malta

In the case of Malta, to date the governance structure adopted appears in part to have been conditioned by the remit of the respective regulators. Hence initially when the OTR was established in 1997, the single member regulator governance structure was adopted.[202] Then, the remit of the OTR was limited to the regulation of fixed and mobile telephony. Subsequently in 2000 when the MCA and the MRA were set up, the single member headship approach was discarded and instead a collegial headship option was adopted. This was probably in part motivated by the fact that the remit of both the MCA and the MRA extended to the regulation of various utilities and therefore a collegial set-up was deemed to be more suitable to such converged sector specific utilities regulators. It is relevant here to state that at this juncture the MCA assumed the regulatory responsibilities previously onerous on the former OTR coupled with new responsibilities relating to data protection and

[201] ibid p 71.

[202] See Telecommunications (Regulation) Act, 1997, art 3, which stated that the Telecommunications Regulator had to be a public officer designated by the Prime Minister.

electronic commerce, whereas the MRA was designated as the regulator of electricity, gas and water services and of mineral resources.[203] The remit of the MCA was in the course of time expanded to include other utilities including notably postal services, whereas the regulatory functions of the MRA consisting of energy and water services, less those relating to mineral resources, were taken on by the REWS in 2015.[204]

1.4.3. Full-Time or part-time appointments?

To date one point both in the case of the MCA and of the REWS, that has never been expressly established at law is whether the appointments of the persons forming the headship of the respective regulators whether as chairman, board member or CEO, are on a full-time or part-time basis. In practice to date, there have been some differences between what happened on the one hand in the case of the MCA, and on the other hand in the case of the MRA and later the REWS. In part these differences were conditioned by the fact that the exercise of the day-to-day executive powers and administration was dealt with differently by the aforesaid regulators. In the case of the MCA the positions of chairman and of CEO, apart from a couple of short periods of a few months each, were always held by the same individual.[205] Conversely in the case of the MRA, and later of the REWS, the positions of chairperson and of CEO have always been held by different individuals.

The failure at law to state clearly which appointments are on a full-time basis and which are on a part-time basis, had in the case of the MCA resulted in a situation

[203] See the Malta Communications Authority Act, 2000 which stated that the MCA was responsible for the exercise of regulatory functions regarding telecommunications, data protection and electronic commerce.

[204] The MCA whilst being assigned regulatory oversight of postal services, with the establishment in 2001 of the Office of the Data Protection forfeited regulatory oversight of data protection. See art 56 of the Data Protection Act, 2001 which amended the First Schedule of the Malta Communications Authority Act, 2000 by deleting the directorate within the MCA set-up until then earmarked to deal with data protection. In practice at no stage did the MCA undertake the functions relating to data protection as originally envisaged.

[205] The terms 'chairman' and 'chairperson' are under the different laws discussed in this thesis both used. Whether one or the other term is used depends on the actual term used in the law in question.

where for a number of years between 2014 and 2016 the executive day-to-day conduct and administration lay with a chairman whose appointment was effectively on a part-time basis. This was certainly not an ideal situation once the day-to-day executive conduct and administration of a national regulator should not given the nature of work involved ultimately lie with a part-time appointee.[206] Finally for the sake of completeness it is relevant to note that the appointments of the other members of the boards of both the MCA and of the MRA, and later of the REWS, have to date always been on a part-time basis.

Irrespective of the governance structure that is ultimately adopted, it is imperative that in all instances the diverse appointments of the persons making up the headship should unequivocally be published in the Government Gazette and should state whether these are on a full-time basis or otherwise. Such a measure should at the very least minimise the reoccurrence of a situation as occurred in the case of the MCA between 2014 and 2016 where the day to day executive conduct rested with a part-time appointee, a situation which the author believes is not conducive to the effective and efficient conduct of the day-to-day work of a regulator.

1.4.4. The MCA governance structure

At first glance a reading of Part II of the Malta Communications Authority Act entitled 'Establishment, Functions and Conduct of the Affairs of the Authority' seems to indicate that a 'governance board model' approach has been adopted.[207] On closer examination when factoring how the applicable norms have in practice been applied through the years since the establishment of the MCA in 2001, the governance structure adopted may best be described as a hybrid between the

[206] In 2014 following amendments to the Malta Communications Authority Act , the post of director general – formerly that of CEO – was abolished, and the executive conduct was assigned to Dr Edward Woods the then MCA chairman whose appointment from 2013 up to 2016 was on a part-time basis. See reply to PQ 4812 given during the sitting of the House of Representatives of the 16 April 2018. See Twegibaghall-mistoqsijaparlamentarinumru 4812 (gov.mt).
[207] See Malta Communications Authority Act, art 5, and Regulator for Energy and Water Services Act, arts 3 and 6.

'governance board model' and the 'commission model'.[208] To understand why this is the case, the chronology of the events over the years relating to the headship of the MCA needs to be seen.

The MCA was first set up following the enactment of the Malta Communications Authority Act, 2000 per Act No XVIII of 2000 which provided for a governance board model consisting of a chairman and four to six other members supported by a CEO.[209] Article 5 of the Malta Communications Authority Act, 2000 provided that, subject to the other provisions of the said Act, the affairs and business of the MCA were the responsibility of the Authority, whereas the executive conduct, administration, organisation and administrative control of the officers of the MCA were the responsibility of the CEO.[210] At this juncture one point that could have led to conflicting interpretations, was that article 5 referred to the 'Authority' rather than to the MCA Board. Article 2 of the Malta Communications Authority Act, 2000 defined the 'Authority' as meaning the Malta Communications Authority established by article 3 of the said Act. In turn article 3(1) stated that there:

> 'shall be a body, to be known as the Malta Communications Authority, which shall consist of a Chairman and not less than four and not more than six members.'

In article 3 no reference is made to the use of 'Board'. Instead the nomenclature 'Authority' is used throughout. This issue was rectified following amendments to the Malta Communications Authority Act as per the Communications Laws (Amendment) Act, 2014 whereby the use of 'Board' was introduced instead of 'Authority' where it was evident that the reference at law was to the MCA Board.[211]

The first person appointed as chairman - Mr Joseph V Tabone - was also given the role of CEO, effectively therefore performing the combined functions of chairman

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[208] The MCA started operating as from the 1st January 2001.

[209] See Malta Communications Authority Act, 2000, art 3. This Act also did away with the office of the Telecommunications Regulator, with the MCA effectively taking over the regulatory role previously onerous on the Telecommunications Regulator.

[210] Arts 2 and 3 of the Malta Communications Authority Act, 2000, in defining the 'Authority' refer to the MCA Board as was, and still is, set up under art 3 of the aforesaid Act.

[211] See Communications Laws (Amendment) Act, 2014, arts 19 and 20. These amendments provided for the insertion of a definition of the word 'Board' whilst where pertinent substituting the word 'Authority' with the word 'Board'.

and of CEO.[212] This situation was continued when a new chairman - Ing Philip Micallef - was appointed in 2008, which situation subsisted until his resignation in December 2012.[213] Then for the first time in the lifespan of the MCA, separate individuals were appointed to the posts of chairman and of CEO of the MCA when a non-executive chairman - Dr Antonio Ghio - together with a acting CEO - Mr Ian Agius - were appointed.[214] This set-up however did not last for long. In May 2013 Dr Edward Woods was appointed as chairman. During the tenure of office of Dr Woods as chairman amendments as per the Communications Laws (Amendment) Act, 2014 were made to the Malta Communications Authority Act, effectively changing substantially the governance set-up in place. Significantly article 22 of the Communications Laws (Amendment) Act, 2014 amended article 5 of the Malta Communications Authority Act, providing that the affairs and business of the MCA were (and still are) the responsibility of the MCA Board which responsibility was to be exercised through the Chairman. Article 5 of the Malta Communications Authority Act as amended, empowered the MCA Board to delegate all or part of the executive conduct of the MCA, its administration and organisation and administrative control of its officers and employees to any MCA officer. These amendments also did away with the role of the Director General (formerly the CEO). The sum of these amendments meant that the affairs and business of the MCA were to be conducted by the Chairman, leading in practice to an executive chairman in all but name.

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[212] The second MCA chairman appointed in 2008 was given a similar dual role, with the nomenclature of 'executive chairman' being used even though at law such a post did not exist. See for example the Department of Information (DOI) press release (PR0569) of the 21st April 2008. See NEW EXECUTIVE CHAIRMAN AT THE MALTA COMMUNICATIONS AUTHORITY (gov.mt).

[213] It is pertinent to note that following amendments as per the Communications Laws (Amendment) Act, 2004, the nomenclature of 'Chief Executive Officer' was substituted with that of 'Director General'. In substance the Director General had the same role at law as the CEO had before him.

[214] See *MCA Annual Report and Financial Statements 2012* at p 6. For the sake of completeness the author notes that following amendments to the Malta Communications Authority Act as per the Malta Communications Authority (Amendment) Act, 2019, the post of CEO was reintroduced. Consequential to this amendment Mr Jesmond Bugeja was appointed as CEO of the MCA as from the 8th April 2019. This appointment meant that between the 8th April 2019 and the 30th April 2019, there were in place different individuals occupying the posts of CEO and of chairman. This situation came to a close with the expiry of the term of office of the holder of the post of chairman - Dr Edward Woods - on the 30th April 2019.

In 2019 the applicable provisions under the Malta Communications Authority Act were again amended. The Malta Communications Authority (Amendment) Act, 2019 amended article 5 of the Malta Communications Authority Act adding the new nomenclature of 'Chief Executive Officer'.[215] However unlike as was the case with the applicable provisions of the Malta Communications Authority Act prior to the amendments introduced by the Communications Laws (Amendment) Act 2014, where the law – specifically article 5 of Malta Communications Authority Act as it was written prior to the amendments as per the Communications Laws (Amendment) Act 2014 – laid down the functions of the Director General (DG) notably that the DG was responsible for the executive conduct, administration and organisation of the MCA, the amendments as per the Malta Communications Authority (Amendment) Act, 2019 at law did not in practice change much since the amendments did not state what functions the CEO had. This in practice meant that at law matters remained pretty much as they were prior to the enactment of such amendments. Further developments occurred in April 2019 when Mr Jesmond Bugeja was appointed as CEO.[216] Subsequently in November 2019 a new MCA Board was appointed with Mr. Bugeja appointed as acting Chairman.[217] The above reveals that apart from a short period of a few months in 2013 and a couple of weeks in 2019, the same individual was either appointed to the posts of both Chairman and of CEO[218], or effectively as Chairman was empowered by law to conduct the functions which would otherwise have been performed by the CEO.

In 2021 the norms regulating the administration of the MCA were substantially amended following the enactment of the Communications Laws (Amendment) Act, 2021.[219] This Act provided for the substitution of article 5 of the Malta

[215] A minor though curious point is that the former nomenclature as provided for under Act No XVIII of 2000 actually used the nomenclature of 'Chief Executive'.
[216] Between May 2019 and November 2019 there was no board in place. The term of the previous MCA Board had come to a close on the 30th April 2019 and the new board was appointed on the 5th November 2019.
[217] See Government Notice No 470 of 2019 providing for the appointment of Mr Jesmond Bugeja as CEO and his subsequent appointment as acting chairman as per Government Notice No. 1389 of 2019.
[218] Unless stated otherwise in relation to the MCA, reference to the post of 'CEO' also includes reference to the post of Director General.
[219] As per Act No XXXIII of 2021.

Communications Authority Act with a new article 5. This new provision whilst reaffirming the overall responsibility of the MCA Board for the 'affairs and business of the Authority', provides that the 'day-to-day administration and organisation of the Authority and the administrative control of its officers and employees' is the responsibility of the CEO. In doing so, article 5 lists the core duties onerous on the CEO further stating that the appointment of the CEO is on a full-time basis and that no member of the MCA Board can be appointed as the CEO whilst he is a Board member.[220] This effectively means that the practice of having the MCA chairman also act as its CEO is no longer by law tenable. The law to date however remains silent as to whether the appointments of the chairman and members of the board are on a full-time or part-time basis. [221]

1.4.5. The REWS governance structure

In the case of the REWS, and before it the MRA, the 'governance board model' has consistently been adopted since 2001, with a governance board supported by a CEO responsible for day to day administration and regulatory work. Article 5 of the Malta Resources Authority Act, 2000 which set up the MRA stated that the business and affairs of the MRA were the responsibility of the MRA Board, whilst the executive conduct, administration and organisation, and the administrative control of the MRA officers and employees were the responsibility of the CEO.[222] The Malta Resources Authority Act, 2000 fails to distinguish between the Authority and the MRA Board using the word 'Authority' to refer to the Board.[223] Unlike what happened with the MCA, no rectification has been undertaken to amend the law

[220] See Malta Communications Authority Act, art 5.
[221] In PQ no 4812 made in 2018 by MP Dr Chris Said, the reply given by Government was that whilst the appointments of chairman were in all instances, other than in the case of the tenure of Dr Woods between 2013 and 2016, on a full-time basis, the appointments of the other board members were always on a part-time basis. See Twegiba ghall-mistoqsija parlamentari numru 4812 (gov.mt).
[222] The Malta Resources Authority Act, 2000 came into force on the 2nd February 2001.
[223] See Malta Resources Authority Act, 2000, arts 3 and 5.

and clarify where necessary that certain references to the Authority actually refer to the Board.[224]

From 2001 when the MRA started its regulatory work until 2015, the chairman and other board members were always appointed on a part-time basis with a separate individual appointed as CEO.[225] Throughout this period the various individuals appointed as its chairman were generally appointed for a one year term whereas its CEOs were given three year appointments which in some instances were renewed for similar terms of office. Two CEOs were appointed, the first CEO being Ing Antoine Riolo during the years 2001 to 2009 who was succeeded by Ing Anthony Rizzo in 2009.[226]

The governance structure model used in the case of the MRA has in substance been replicated for the REWS which in 2015 was designated as the competent regulator for energy and water services.[227] The headship of REWS is composed of a collegiate body consisting of a chairman and four to six other members supported by a CEO. Article 6 of the REWS Act provides that the 'affairs and business' of REWS are the responsibility of 'the Regulator itself', adding however that the executive conduct of the Regulator, the administration and organisation, and the administrative control of officers and employees of the Regulator are the responsibility of the CEO who in turn is accountable to the Regulator. To date the appointments of the chairman and other board members have all been on a part-time basis, whereas that of the CEO has been on a full-time basis.[228] In the case of the CEO, article 6(7) of the Regulator for Energy and Water Services Act is somewhat contradictory since this provision first states that the CEO is appointed by the Regulator then goes on to provide that the CEO is appointed by the Minister. A parliamentary question (PQ) was made seeking clarification on this point. The reply however simply referred to

[224] See Malta Resources Authority Act (Chapter 423), arts 3 and 5.
[225] This results from a reading of the annual reports issued by the MRA since its establishment in 2001. See https://mra.org.mt/library/annual-reports/.
[226] In 2015 the regulation of energy and water services was assigned to REWS with Ing Marjohn Abela being appointed as the its first CEO.
[227] REWS was established by the Regulator for Energy and Water Services Act, 2015 which law came into force on the 31st July 2015.
[228] See replies to PQs 9887 and 3003 answered respectively in the sittings of the 11 April 2019 and of the 15 January 2018.

the law without providing a clear answer.[229] The author considers that in any case once the CEO is responsible to the Regulator, then it is not the Minister but the Regulator that should appoint the CEO and that conequently the law should be amended accordingly.

1.5. Conclusion

1.5.1. The argument for a 'super' regulator for Malta

The underlying consideration that must be continuously kept in mind is whether a new institutional design in the form of a 'super regulator' as is being proposed by the author would be an improvement on the current regulatory set-up and therefore benefical to Malta. No institutional design however well-conceived is of course perfect and what is being proposed certainly presents various challenges if it is to be implemented successfully. The crucial consideration is that the current fragemented institutional design where different aspects of utilities regulation are dealt with by different regulators simply does not make sense economically and logistically for a small country such as Malta. Hence as things stand MCA and REWS as the competent converged sector specific regulators are responsible for *ex ante* regulation and for certain consumer related matters concerning the utiliites they regulate, the BA regulates content carried on broadcasting media, the MDIA is responsible for digital innovation related services, and finally the MCCAA through its DG Competition and DG Consumer Affars is responsible for *ex post* competition and consumer protection issues generally, including such issues as may relate to the diverse utilities regulated by the sector specific regulators.

Is it really feasible to have all these authorities when possibly one unified regulatory set-up could undertake all these tasks more efficiently and effectively? The sum of what is being proposed in this Chapter entails that the roles of all these regulators are amalgated into one 'super' regulator. The experience of other countries that

[229] See PQ 9889 made on the 11 April 2019 by MP Dr Chris Said.

have established 'super' regulators or to a lesser degree 'converged' regulators indicate the way forward. Both the Netherlands and Spain in 2013 established 'super' regulators combining the regulatory roles of previous sectoral utility regulators with those of the national competition and consumer protection regulators.[230] If there is the political will to take matters forward, then there is no valid reason why a similar 'super' regulator cannot also be established successfully in Malta.

1.5.2. Challenges in creating a 'super' regulator

In the case of Malta there are specific issues that need to be addressed in creating a 'super' regulator. Foremost is the assumption by a 'super' regulator of the role of the BA, given that the BA as composed is exclusively made up of appointees representing the two major political parties, which incidentally because they have their own means of broadcasting media, are also major stakeholders in the broadcasting media industry and therefore directly impacted by broadcasting regulation. This issue is rendered more ardous given that the provisions relating to the composition of the BA Board are dealt with under article 118 of the Constitution of Malta, which article can only be amended if at least two-thirds of the members of the House of Representatives vote in favour. This in practice means that any changes in the composition of the BA Board require the consent of the same two major political parties whose appointees dominate the BA Board.[231] These considerations however should not derail from the evident need that the current regulatory set-up of the BA is simply not adequate in order to ensure that there is an independent and credible regulator of broadcasting media in Malta with two major stakeholders - namely the two major political parties - effectively determining how they are regulated in the realm of broadcasting media. The

[230] See in the case of Spain https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc; and in the case of The Netherlands https://www.stibbe.com/en/news/2013/april/new-dutch-authority-for-consumers-and-markets-becomes-operational.

[231] At the time of writing the two major political parties in Malta are the Labour Party and the Nationalist Party. Together these two parties dominate the composition of the House of Representatives. Such a situation has characterised the House since at least 1966.

question here is how the regulation of broadcasting media can fit within an institutional design based on a 'super' regulator model. The evident solution is to have in place persons with no political allegiance to decide broadcasting content issues, which persons are appointed solely on the basis of their knowledge and experience of the subject.

Another issue that needs to be factored is whether the members of the board heading such a 'super' regulator should represent any specific interests. The author considers that once the role of a regulator is to regulate given sectors, then there should not be representatives whether of the regulated utilities or of the end-users of the services provided by such utilities. Doing otherwise would lead to a situation where both those who are subject to regulation and those who are impacted by the provision of the regulated services, have some say, however limited that may be, in the regulation of the provision of such services. Those responsible for heading the regulator should be divorced from the various interests relating to the sectors they oversee. Regulatory decisions should be taken on the basis of what is right in the given circumstances and not on the basis of the strength of lobby groups that hold sway in having decisions go one way or the other.

The other major issue relates to the governance structure of the headship of a super regulator. Given the remit of a super regulator and the wide-ranging knowledge and experience required as a result of the remit of such a regulator, the option of having a single member regulator is not tenable. The headship of the current regulators in Malta presents contrasting options, though all are characterised by boards which on paper at least are supported by CEOs.[232] In most instances meetings of the boards are on an average held once a month and then only for a few hours. This certainly is not an ideal situation given that at least in the case of the MCA and of the REWS, ultimately responsibility for regulatory decisions taken lies precisely with their respecitve boards.

[232] The issue as to how and on the basis of which criteria board members are to be chosen is dealt with in Chapter Two, Section 2.4.4 thereof.

In the case of the MCCAA a somewhat confusing situation exists since responsibility for the exercise of regulatory functions in relation to competition and consumer protection, lies with the DG Competition and the DG Consumer Affairs respectively, which DGs are however subject to the 'overall supervision and control' of the MCCAA Board.[233] It is not clear precisely what such supervision or control by the MCCAA Board entails. The author understands that the DGs concerned are empowered to act independently in the taking of regulatory measures in relation to the areas falling under their remit. The exercise of regulatory powers by the DGs concerned is however tempered by various qualifications at law. Article 7 of the Malta Competition and Consumer Affairs Act states that the DGs of the various entities within the MCCAA, including therefore those heading the Office for Competition and the Office for Consumer Affairs, 'shall act independently and autonomously, free from the direction or control of any person or authority without prejudice to article 12'. In doing so the DGs are required to implement the policies set out by the MCCAA Board, to give effect to government policies, and significantly are subject to the overall supervision and control of the MCCAA Board.[234] The author questions whether this provision also empowers the MCCAA Board to overrule a regulatory measure taken by one of the DGs. The author suggests that the law should be amended to clarify unequivocally the powers of the DGs in so far as the taking of regulatory measures are concerned, disspelling any doubts as to whether these can be overturned by the MCCAA Board or for that matter by government.

1.5.3. The proposal for a 'super' regulator

The experience of other countries can serve to indicate the way forward in establishing a 'super' regulator in Malta. Hence the ACM in the Netherlands is headed by a board composed of a chairman and two other members, all of whom are appointed on a full time basis, who in turn have oversight over various

[233] See Part II of the Malta Competition and Consumer Affairs Act, in particular arts 4 and 7.
[234] ibid arts 7(3) and 12.

'departments' dealing separately with consumer protection, competition and with different utilities notably energy, telecommunications, transport and postal services.[235] In the case of the CNMC in Spain the regulatory decisions are taken by a council composed of ten members. This council conducts its busines either in plenary sessions or else through smaller committees composed of select members of the council.[236]

The author proposes to do away with the headship boards of MCA, REWS, BA, MDIA and MCCAA, and instead have in place one board composed of five full-time appointees chosen primarily because of their technical knowledge and experience in one or more of the regulated utilities and, or activities. The appointees should be executive directors who are individually responsible for one or more specific areas in relation to which they have proven expertise. Such a board would ultimately be responsible for any executive decisions taken and for the overall administration of the 'super' regulator, with the faculty of delegating the exercise of its powers to dedicated units within the overall regulatory structure.

Bearing in mind specifically how the BA is composed with regard to the oversight of the broadcasting media, appointments of political appointees with little or no previous background of the regulated activities should be discontinued. The norms regulating appointments to the headship of the regulator should require that prospective nominees for such appointments have expertise and experience of the regulated activities.[237] In this regard it is pertinent to note that in the UK for example appointments to the headship of some of the utilities regulators are subject to certain limitations in relation to individuals who prior to their nomination were active in politics. Hence in the case of Ofcom, a member of the Ofcom Board on joining Ofcom is required to make a declaration of any political interests he or his spouse, partner or children may have had relating to activities that may impact

[235] See https://www.acm.nl/en/about-acm/our-organization/organizational-structure, accessed 30th September 2022.
[236] See https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc, accessed 30th September 2022.
[237] This point is discussed in detail in Chapter Two Section 2.4.4.

on his role as a member of the board. Significantly it is considered inappropriate for a board member to engage in active politics.[238]

The author suggests that one way how to set up a 'super' regulator is to build on the current MCCAA headship set-up by radically revising its composition to reflect the essential requirements stated above, with the ultimate aim that its headship is composed of full time appointees who are experts in their respective areas of responsibility and who are empowered with executive powers. Currently the main organs of the MCCAA are the Board of Governors, the Co-ordination Committee and four regulatory entities.[239] The Chairman and members of the Board of Governors are appointed by the competent Minister.[240] In the case of the Chairman the law requires that the Minister has to be satisfied that the appointee has the 'requisite qualifications and experience and who may also occupy any other post within the Authority'.[241] The other members are chosen from specific professions or after consultaton with specific interest groups.[242] The Chairman of the MCCAA is appointed on a full-time basis, whereas the appointments of all the other members are on a part-time basis.[243] Supporting the Board of Governors are four separate entities namely the Office for Competition, the Office for Consumer Affairs, the Technical Regulations Division and the Standards and Metrology Institute. Each of these entities is headed by a DG. Significantly the law states that each of the DGs acts 'independently and autonomously, free from the direction or control of any person or authority without prejudice to article 12'.[244] This is however subject to the overriding requirement that the DGs must ensure that they

[238] See *Code of Conduct for Ofcom Board, March 2019*, sections 3.18 and 5.4 - members_code_of_conduct.pdf (Ofcom.org.uk) accessed 30th September 2022.
[239] See the Malta Competition and Consumer Affairs Act, art 3(4).
[240] Art 2 of the Malta Competition and Consumer Affairs Act defines 'Minister' as being the minister responsible for competition, consumer affairs, standardization, metrology and technical regulations.
[241] ibid art 9(1)(a).
[242] ibid art 9(1)(b).
[243] The law nowhere actually states such appointments are on a full time or part time basis. However since the establishment of the MCCAA in 2011 up to the present time each appointment to the post of chairman was on a full time basis, whereas those of the other Board members were all on a part-time basis. See reply to PQ 13185 by MP Dr Chris Said Twegibaghall-mistoqsijaparlamentarinumru 13185 (gov.mt).
[244] See Malta Competition and Consumer Affairs, art 7(3).

implement the policies set by the MCCAA Board of Governors, give effect to government policy and are subject to the 'overall supervision' of the said board.[245]

The current MCCAA heaship set-up described above should be changed by having the Board of Governors composed solely of the chairman and four executive DGs appointed on a full time basis. All the appointees to the headship board should be chosen solely on the basis of their knowledge and experience of the sector or sectors, or activities that they are required to oversee.[246] In line with what the author is proposing, the headship of a restructured MCCAA amalgating REWS, MCA, MDIA and BA, would be composed of a board of governors consisting of the various DGs responsible for the diverse areas falling under the remit of the new 'super' regulator. In doing so to emphasise that a new overall set-up is being introduced and to give this new 'super' regulator its own unique identity, the author proposes that a new and simple nomenclature should be adopted such as for example the 'Malta Markets Authority'.

One other crucial point that needs to be ironed out, is the remit of each of the members making up the proposed headship board. Again looking at the experience of other countries that have adopted a comprehensive regulatory model similar to what the author is proposing, in the case of the ACM in the Netherlands, the Dutch legislator opted for a small board of three members who collectively are ultimately responsible for all the regulatory decisions taken by the ACM. The 'Establishment Act of the Authority for Consumers and Markets' in setting up the headship board states that the ACM is composed of three members one of whom is the chairman. This law however does not designate any specific regulatory functions to the individual members of the headship board.[247] It is relevant to note that the ACM subsequent to its establishment issued an administrative decision containing the rules on its organisation providing for the various departments making up the ACM.

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[245] ibid.

[246] ibid Part II thereof.

[247] See section 3 thereof, https://www.acm.nl/sites/default/files/old_publication/publicaties/13190_establishment-act-of-the-netherlands-authority-for-consumers-and-markets.pdf. Separately this was confirmed by ACM following a reply by e-mail dated 2nd March 2020 that the author received on communicating with ACM.

The departments established as a result of this order include amongst others, the Consumer Department, the Energy Department, the Telecommunications, Transport and Postal Services Department, and the Competition Department.[248]

Conversely in the case of the CNMC in Spain, the headship set-up is more complex where the functions are exercised through two governing entities namely the Council and the President who also heads the Council.[249] This Council acts either in plenary sessions or else through smaller committees acting under the aegis of the Council, with two committees being in place, one dealing with competition and the other dealing with the oversight of the various regulated sectors including the different utilities. The Council in the exercise of its functions is supported by four investigative offices dealing respectively with competition, energy, telecommunications and audiovisual, and transport and postal sectors.[250]

The preference of the author would be to establish a headship structure similar to that adopted for the ACM in the Netherlands with however some modifications adapted to local requirements. Given the extent of the remit of the proposed regulator covering the utilities and general competition and consumer protection issues, having in place a headship board of three persons would be too small. On the other hand it is important to avoid having relatively large boards. The author proposes a board of five members whereby the chairman would be responsible overall for the general administration and regulatory oversight, whereas each of the other members would be responsible for specific regulatory aspects with one member assuming the regulatory oversight currently falling within the remit of REWS namely that of the regulation of energy and water services, another member the regulatory oversight of the communications sectors currently under the remit

[248] Other departments established by this decision are the Policy and Communications Department, the Legal Department, the Corporate Services, and the Office of the Chief Economist. See Decision of the ACM of the 2nd April 2013, ACM/DJZ/2013/200833, containing rules on the organisation, mandate, authority and authorisation of the ACM at https://www.acm.nl/sites/default/files/old_publication/publicaties/14646_2013-decision-on-the-organization-mandate-authority-and-authorization-of-acm.pdf.

[249] See https://www.cnmc.es/en/sobre-la-cnmc/que-es-la-cnmc#estructura, accessed 30th September 2022. The members of the Council do not appear individually to be responsible for any specific sector. See Law 3/2013 of June 4, on the creation of the National Commission of Markets and Competition, arts 14 and 15 at https://www.boe.es/buscar/act.php?id=BOE-A-2013-5940.

[250] See https://www.cnmc.es/sobre-la-cnmc/organigrama, accessed 30th September 2022.

of MCA coupled with the inclusion of audio-visual services and other matters that at present fall within the remit of the BA and of the MDIA, with the remaining two members being responsible for competition and consumer affairs respectively. The main advantage of such a set-up is that regulation would be conducted within a comprehensive framework avoiding issues of competence between different regulators by providing one regulatory focal point for businesses and consumers alike, whilst having in place focused executive DGs supported by units responsible for the diverse areas falling within the remit of the 'super' regulator. In addition such a set-up should come at a lower cost to the State since many support services such as finance, corporate and public relations services, would not need to be replicated for diverse areas as is currently the case with separate regulatory authorities in place.

Chapter Two - The independence and accountability of utilities regulators

2.1. Introduction

A fundamental point in the study of the regulation of utilities is the independence of the regulator, specifically of the persons making up the headship of the regulator responsible for the taking of any regulatory decisions. Ancillary to the requirement of independence is the accountability of the regulator. The faculty of the regulator to act independently of third parties must in all instances be tempered by adequate safeguards whereby the regulator is duly accountable for the performance of its regulatory work. An important point that needs to be emphasised continuously is that the regulator cannot be independent if at the same time it is not accountable for the way it conducts its affairs.[251] Independence should never be interpreted as being a form of carte blanche giving the regulator unbridled power to act as it deems fit. Meaningful independence must per force be characterised by a system of checks and balances whereby the regulator is continuously held accountable for any regulatory decisions taken. This requisite is imperative more so when considering that the person or persons making up the headship of a regulator are not elected to office but in most instances are chosen by government or by government acting with the approval of elected representatives of the people, in the case of Malta of the House of Representatives.

The accountability of the regulator in turn raises the question as to whom the regulator should be accountable. Should the regulator be answerable to government, to government and to the House of Representatives jointly, to the House alone, or is there some other feasible alternative? In dealing with these points one paramount consideration that stands out, is that the role of the House is decisive since ultimately it is the House that determines the laws that regulate the role and powers of each regulator. It is therefore the House that is responsible to

[251] The importance of linking independence and accountability has been the subject of various academic studies. See eg Hanretty et *Political Independence, Accountability, and the Quality of Regulatory Decision-Making* (n 44); and Lavrijssen, *Independence, Regulatory Competences and the Accountability of National Regulatory Authorities in the EU* (n 44).

ensure that the appropriate legislation is enacted to safeguard the independence of the regulator, and that concurrently the regulator is subject to a regime of continuous rigorous scrutiny in relation to the performance of its regulatory functions.[252]

Before considering why and how a regulator should be independent in the exercise of its functions, it is important to understand precisely why a regulator is necessary to oversee the provision of utilities. The provision of utilities such as electricity, gas, water and telecommunications are essentials of everyday life and consequently such services need to be provided to all end-users efficiently and at an affordable price based on equitable terms of service provision. In an ideal world these services should be provided through a competitive market where different service providers compete to provide end-users with optimum services at affordable prices. Reality however dictates otherwise since market failures sometimes do occur, and some market players do resort to anti-competitive practices to the detriment both of competing service providers and of end-users. Moreover in some instances a market conditioned by the small size of the country may lead to a situation where some utilities are only provided by a single provider, and therefore competition cannot be used as a lever to ensure the quality and affordable pricing of the utilities in question for all end-users. This is the case with Malta where domestic circumstances conditioned by the size of the economy do not militate in favour of sustainable competition in the provision of certain utilities such as water services.

Given such realities, market players cannot be left to their own devices and therefore the well-being of the market necessitates some form of regulation that is independent from the diverse interests involved in the provision of the utilities concerned. In advocating the need for regulators, OECD considers regulation as a key tool to achieve the social, economic and environmental policy objectives of governments once such objectives cannot effectively be achieved by relying on

[252] House of Lords, Select Committee Report on the Constitution: *The Regulatory State: Ensuring its Accountability* Vol I Report (2004), p 14 et seq (n 87).

voluntary arrangements involving service providers.[253] OECD describes regulators as entities authorised by law to use legal tools to achieve policy objectives, imposing obligations or burdens through regulatory functions such as licensing, accrediting, inspection and enforcement. Significantly OECD states that the exercise of such control by the regulator through these legal powers in turn renders the integrity of decision-making powers and thus the governance of the regulator, crucial.[254] In the light of these considerations, OECD describes the regulator as the 'referee' of the market, and as such the role of the regulator is pivotal in ensuring the quality of and access to key services such as the utilities under discussion in this thesis.[255] As a 'referee' the regulator is required to balance competing interests in the market through the application of good governance, acting in an objective and consistent manner independently of all interests including those of industry, of end-users and of government. OECD argues that the independence of a regulator enhances the role of regulation in mitigating market failures by enabling the regulator to address various issues that would otherwise undermine the provision of the services in question.[256]

How does one ensure that the utility regulator is effectively independent? OECD in a report it published with the purpose of promoting what it describes as the 'culture of independence' in relation to regulators, addresses this question by identifying a series of guidelines based on five dimensions, whereby regulators can thereby be protected from undue influence in the exercise of their regulatory functions. The five dimensions listed by OECD are: role clarity, transparency and accountability, financial independence, independence of leadership, and staff behaviour.[257] In this Chapter each of these dimensions identified by OECD, is considered in some depth in relation to the situation in Malta. Where relevant, reference is made to the applicable EU norms in so far as these impact the independence of the regulators being discussed.

[253] OECD (2014), *The Governance of Regulators*, *OECD Best Practice Principles for Regulatory P*olicy, p 17 (n 45). OECD here refers to regulators in general.
[254] Ibid p 17.
[255] OECD (2016), *Being an Independent Regulator, the Governance of Regulators*, p 3 (n 45).
[256] ibid p 21 et seq.
[257] OECD (2017), *Creating a Culture of Independence: Practical Guidance against Undue Influence, The Governance of Regulators*, pp23 et seq (n 45).

The importance of correct adherence to these OECD guidelines should not be underestimated. Even unequivocal *de jure* independence of a regulator is not by itself enough to ensure the independence of a regulator if stakeholders, especially government, do not fully subscribe to the 'culture of independence' underlying the guidelines formulated by OECD. The effective independence of a regulator is ultimately conditioned by the attitude of government. Regrettably in various countries including to some extent Malta, there is some reluctance by the political class in accepting the necessity and importance of a 'culture of independence' as advocated by OECD whereby regulators can perform their regulatory functions effectively and without undue external influence including political pressure.

Over the years in some EU Member States there have been various challenges impacting the independence of utility regulators, some of them quite serious and at times severally impacting the independence of the regulator concerned.[258] In part some of these instances were triggered off by regulatory interventions which were not to the liking of government or where the headship of the regulator was not considered to be in tune with government policy directions. One such instance was the removal of the head of the Urzad Komunikacji Elektronicznej[259] by the Polish government before the end of his term of office, this notwithstanding that the aforesaid regulator was then under Polish law considered to be an independent authority.[260]

In a local context the independence of the utilities regulators has in recent years been influenced considerably by EU law. Initially when the first utilities regulators in Malta were established, government had a free hand in appointing, and to a lesser extent removing, those heading the regulators, with the applicable law being practically silent on the matter of independence. Gradually matters improved,

[258] See for example the various challenges to independence of telecoms regulators in the study by Alexiadis and others, *Competing Architectures for Regulatory and Competition Law Governance*, Table 2, pp 70 and 71 (n 63).
[259] 'UKE' the Polish office of electronic communications regulatory authority.
[260] Letter by BEREC, the EU body representing telecoms regulators. This letter was sent to the EU Commission following the removal of the head of UKE. See https://berec.europa.eu/eng/document_register/subject_matter/berec/others/9262-letter-to-the-european-commission-on-berec-concerns-of-violation-of-nra-independence-in-poland.

influenced in part by EU requirements, with norms being introduced regulating the process how the persons making up the headship of a regulator are appointed and on what grounds they may be removed during their term of office. This notwithstanding there is still some way to go towards ensuring the effective independence of utilities regulators in Malta. Whilst some measures have been introduced to counter arbitrary removal from office, other measures intimately tied to regulatory independence such as how and what grounds persons are appointed to the headship, financial independence from government and flexibility in the recruitment of staff, remain deficient and too dependent on ministerial discretion.

2.2. Background to the regulation of utilities in Malta

The first step in understanding the extent of the independence of utilities regulators in Malta is to consider the chronology of the regulation of utilities in Malta and evaluating the norms gradually introduced impacting the independence of such regulators. The regulation of utilities by regulators functioning separately from utility service providers does not have a long history in Malta.[261] Until 1997 most of the utilities were provided by state controlled monopolies that were in most cases their own regulators. Until then the approach taken by the diverse administrations in government was that the provision of basic utilities at affordable prices accessible to all end-users could only be guaranteed by such monopolies whereby government could, through its control of these monopolies, intervene to ensure that all end-users had access to basic utilities at affordable prices. Whilst the ultimate objective was laudable, such a regime had its deficiencies primarily because the lack of competition meant that there was lack of choice in the quality and price of the utilities in question, and that therefore the diverse utility service providers had no pressing incentive to better their services other than in response to political pressure by government to whom ultimately they were accountable.

[261] See P E Micallef, *Reflections on the independence of utility regulators in Malta'* at p 568 et seq (n 49).

It is interesting to observe when evaluating the development of the regulation of utilities in Malta, that initially the institutional model adopted both in the case of the MCA and of the MRA on paper was similar, namely a board supported by a CEO and diverse directorates focusing on the different utilities falling under the remit of each regulator. Indeed in many instances initially similar wording at law was used especially in describing the role of the respective regulators, the norms relating to the appointment and removal of the members of the respective boards heading the two regulators, and the conduct of the relationship with the ministers responsible at a political level for the aforesaid regulators. In practice however, on the one hand the MCA and on the other hand the MRA and subsequently REWS as the successor to the regulatory role of MRA, after the enactment of the first laws establishing the aforesaid regulators[262] followed substantially different routes both in relation to the institutional set-up in place and to the gradual development of norms impacting their independence and accountability. In part this may have been motivated by the different wording of the norms in the applicable EU laws regulating the diverse utilities regulated by the aforesaid regulators, and in part by the manner how in practice day-to-day administration evolved during the years subsequent to the establishment of and commencement of operations of the two regulators.

2.2.1. The chronology of communications regulation in Malta

In 1997, government in line with developments that were taking place in many other countries in Europe initiated a gradual process aimed at liberalising many of the utilities then provided by state-controlled monopolies by separating the role of service provider from that of utility regulation, thereby creating a separate public regulatory entity responsible for market regulation. The first measures in this regard were taken in the telecommunications sector with the establishment of the OTR following the enactment of the Telecommunications (Regulation) Act, 1997.

[262] Namely Act No XVIII of 2000 entitled the 'Malta Communications Authority Act, 2000' and Act No XXV of 2000 entitled the 'Malta Resources Authority Act, 2000'.

As a direct consequence of the administrative measures introduced in tandem with the enactment of the Telecommunications (Regulation) Act 1997, the then telecommunications monopoly TeleMalta Corporation was divested of its regulatory functions, whilst its service provision functions were taken over by a new service provider labelled with the nomenclature of 'Maltacom plc'.[263] In 1998, in accordance with the provisions of the Telecommunications (Regulation) Act 1997, the Prime Minister appointed the first Telecommunications Regulator whose function was to regulate, supervise and monitor telecommunications, to ensure that telecommunications infrastructure was installed and operated, and telecommunications services provided for the benefit of users of telecommunications with due consideration to the commercial viability of authorised providers.[264]

A reading of the Telecommunications (Regulation) Act, 1997 reveals various glaring deficiencies and omissions related to the independence of the regulator. This Act provided that the Telecommunications Regulator would be 'a public officer designated as such by the Prime Minister'.[265] The Act however made no mention of the criteria on the basis of which the person appointed as the Telecommunications Regulator was chosen, who was eligible to occupy such a post, the length of the term of office, and on what grounds the Telecommunications Regulator could be removed during his tenure of office. The Act envisaged that the Telecommunications Regulator would be assisted 'by such personnel in the public service or otherwise engaged for that purpose, as may be deemed appropriate by the competent authorities'.[266] Whilst the Act failed to identify specifically who 'the competent authorities' were, in practice this meant that the engagement of any personnel that the Telecommunications Regulator required to assist him in his work, was subject to prior approval by unidentified 'competent authorities' presumably forming part of government.[267] Significantly the Act made no reference

[263] See https://maltaprofile.info/profile/632-GO-plc.
[264] Telecommunications (Regulation) Act 1997, art 4(1).
[265] ibid art 3(1).
[266] ibid art 3(2).
[267] Both MCA and REWS are in practice required to seek prior clearance from government before recruiting new personnel. The author considers that the now defunct OTR was tied to similar

to the independence of the OTR whether from service providers or from government.

In 2000 the Malta Communications Authority Act, 2000 was enacted whereby government revisited substantially the telecoms regulatory landscape then in place, doing away with the OTR and instead establishing a new regulatory set-up in the shape of the MCA.[268] The intention of the legislator, as outlined in the Malta Communications Authority Act 2000, was to establish an authority with responsibility for the regulation of various communications sectors including telecommunications, data protection and electronic commerce.[269] The headship of the MCA was entrusted to a board consisting of a chairman and four to six other members appointed by the Minister responsible for communications for a term of not less than one year but not more than three years, with the Minister having the faculty of reappointing the members on the expiration of their term of office.[270] The Act did not cap the number of times that a member of the board could be reappointed to office on the expiration of his term of office.[271]

The Malta Communications Authority Act 2000 did not envisage any criteria or procedure which the Minister was required to follow in appointing the MCA board members.[272] As was the case with the Telecommunications Regulator, the Malta Communications Authority Act 2000 did not provide for the independence of the MCA whether from stakeholders or from government. The Act did however provide for a first, albeit minor, positive step in regulating the composition of the MCA board, by excluding from the membership of the board, members of the judiciary,

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constraints, probably more so given the wording of art 3 of the Telecommunications (Regulation) Act 1997.

[268] The Malta Communications Authority Act 2000 was divided into two main parts, the first part setting up the MCA with its attendant functions at law, and the second part amending various existing laws primarily the then Telecommunications (Regulation) Act.

[269] Subsequently regulatory oversight for data protection was assigned to the (then) Commissioner for Data Protection following the enactment of the Data Protection Act in 2001 as per Act No XXVI of 2001. Conversely following the enactment of the Post Office (Amendment) Act, 2002 as per Act No XXVII of 2002, the responsibility for the regulation of postal services was assigned to the MCA.

[270] Unless expressly stated otherwise any reference to a 'member' within the context of the MCA Board also includes a reference to the chairman of the said board.

[271] To date with the exception of the first chairperson, no member has served more than two consecutive terms.

[272] The Malta Communications Authority Act 2000, art 3.

ministers and parliamentary secretaries, members of the House of Representatives and, significantly, persons having a financial or other interest in an enterprise or activity that was likely to affect the discharge of their functions as members of the board. In relation to the last named category the Minister was empowered to waive such a ground of disqualification from board membership if the person concerned declared his interest and both such declaration and the attendant waiver were published in the Government Gazette.[273] The Act also empowered the Minister to remove a member of the board from office if in the opinion of the Minister that member was 'unfit to continue in office' or else had 'become incapable of properly performing his duties as a member'.[274]

The Malta Communications Authority Act 2000 provided for the establishment of the post of a CEO with responsibility for the executive conduct of the MCA, its administration and the organisation and administrative control of its officers and employees.[275] The Act empowered the MCA Board to assign to the CEO other powers that the Board might decide to delegate to him. The Act in delineating the role of the CEO stated that the CEO was responsible for the implementation of the objectives of the MCA including the development of strategies for the implementation of the aforesaid objectives, advising the MCA Board on any matter it may refer to him or which he may consider expedient, and to perform such other duties as the Board may assign to him.[276] The responsibility for appointing the CEO lay with the MCA Board, which in doing so was required to consult with the Minister for communications. The appointment of the CEO was for a term of three years. The Act however provided that the first CEO was to be appointed by the Minister.[277] Presumably the faculty of the Minister to appoint the first CEO was tied to the consideration that with the establishment of the MCA, concurrent appointments would be necessary at an initial stage both in relation to the persons making up the MCA Board and to the appointment of a person to act as CEO. It is

[273] ibid art 3(1), (2) and (4).
[274] ibid art 3(6).
[275] ibid art 5(1).
[276] The Act uses the term 'Authority', though it is evident from a reading of art 5(9) that the reference to the 'Authority' refers to the MCA Board.
[277] The Malta Communications Authority Act 2000, art 5(7).

relevant to note that when the MCA was set up in 2001, the same person was appointed as chairman and as a CEO of MCA, effectively acting as an executive chairman in all but name. This arrangement with an executive chairman at the helm of the MCA has characterised the MCA administrative set-up for much of the time since it has been in operation.[278]

The Malta Communications Authority Act, 2000 provided for the establishment of various directorates, initially listing three directorates responsible respectively for telecommunications, for data protection, and for information and other systems including all matters relating to electronic commerce.[279] The Minister for communications after consulting the MCA Board was empowered by order in the Gazette to abolish one or more of the directorates or to vary their responsibilities. The Act established that the functions of the MCA were to be exercised through the directorates which in turn were subject to the overall supervision of the CEO.[280] Factually however none of these directorates were set-up and subsequently the law was amended doing away with the applicable provisions relating to the setting-up and functions of these directorates.[281] To offset the fact that these directorates were not in place, an amendment to the Malta Communications Authority Act was enacted in 2007 whereby no decision taken by the MCA could be considered as invalid or null if the said decision was taken when there was not in place one or more of the directorates as initially listed in the First Schedule to the Malta Communications Authority Act 2000.[282] The author notes that of the three initial sectors covered by the aforesaid directorates, the MCA retained regulatory responsibility in relation to telecommunications – subsequently integrated as part of the wider 'electronic communications' – and to electronic commerce. Conversely

[278] From a reading of the annual reports issued by the MCA to date it results that in only two instances was a person expressly appointed to the post of CEO, namely for a short period during 2012 and 2013 and from 2019 to date. In the latter instance the person concerned was initially appointed as CEO in April 2019 and subsequently also as Acting Chairman. See https://www.mca.org.mt/sites/default/files/Annual%20Report/past/reports/2012.pdf.
[279] The Malta Communications Authority Act 2000 the First Schedule thereof.
[280] ibid art 5(3).
[281] Art 21 of the Communications Laws (Amendment) Act, 2014 enacted as per Act No VIII of 2014, abolished the definitions of 'Director-General' and 'Directorates' whilst amending the various articles where references to either of these terms was made.
[282] Art 40 of the Communications Laws (Amendment), 2007 as per Act No XXX of 2007.

the MCA never factually exercised a regulatory role in relation to general data protection issues, the regulatory responsibility for which was assigned to a dedicated office established in 2001 following the enactment of the Data Protection Act.[283] The author considers that the initial placement of data protection as part of the remit of the MCA was a mistake given that the role envisaged for the MCA was and remains essentially that of regulating the provision of diverse utilities services. Involving the MCA in general data protection regulation would have meant giving the MCA a role which was not in consonance with the intended remit of a utilities regulator envisaged for the MCA.

One interesting aspect related to the appointment of persons selected to head such directorates was the norm that the person chosen was required to have 'adequate experience or knowledge in his respective field of operation'.[284] Compliance with this requirement however was never tested given that no one was ever appointed to the post of director of any one of the directorates listed in the Schedule to the Act. Conversely and somewhat strangely the Malta Communications Authority Act 2000 did not cater for a similar requirement in relation to the persons appointed as members of the MCA Board or to the person appointed as CEO of the MCA.[285] One would have assumed that at least in relation to the post of CEO, given the substantial responsibilities onerous on the holder of such a post, a norm would have been included stating that the person appointed would be chosen on the basis of his experience and knowledge of one or more of the regulated utilities falling under the remit of MCA.

One significant and debateable measure introduced in the Malta Communications Authority Act 2000 was the norm regulating the relations between the minister for communications and the MCA, whereby the minister was empowered to give 'directions in writing of a general character' in relation to matters which he

[283] See Data Protection Act, 2001 as per Act No XXVI of 2001. This Act was subsequently repealed and replaced by a new Data Protection Act as per Act No XX of 2018

[284] Malta Communications Authority Act 2000, art 5(4).

[285] In art 4 of the Communications Laws (Amendment), 2004 as per Act No VII of 2004, the definition of 'Chief Executive' was deleted and instead that of 'Director General' inserted, effectively changing the nomenclature from 'Chief Executive' to that of 'Director General', whilst retaining the same responsibilities previously onerous on the CEO.

considered affected public interest and which were not inconsistent with the provisions of the said Act, relating to the policy to be followed in the carrying out of the functions vested in the MCA.[286] If the MCA failed to comply with any such directions, the Prime Minister was empowered to make an order transferring to the minister in whole or in part any of the functions of the MCA.[287] When this measure was enacted in 2000 it was not unique to the MCA.[288] During the early 2000's similar measures were introduced in relation to other public authorities including the MRA.[289] It is pertinent to note that as on the 30th September 2022 no such directions were ever issued to the MCA.[290]

In 2004 substantial amendments were made to the Malta Communications Authority Act as part of the process related to the entry of Malta as a full member of the EU, which in turn meant that Malta had to amend its laws to reflect the norms of the then EU 2002 Electronic Communications Framework Directives.[291] In substance as part of this process no new significant measures were introduced relating to the independence of the MCA.[292] In 2010 a measure impacting the accountability of the MCA in relation to its stakeholders was enacted, whereby the MCA in relation to a decision taken by it which had a significant impact on any of the communications markets it regulated, was required in the first instance to make available to interested parties a statement of the proposed decision, giving the parties concerned the opportunity to comment on the proposed decision within such time as MCA considered reasonable. This procedure however did not apply in relation to disputes or complaints dealt with by MCA, to the exercise of any

[286] Ibid, art 6(1).
[287] Malta Communications Authority Act 2000, art 6.
[288] The issues consequential to such directions by the Minister are discussed below at Section 2.4.1 at p 124 et seq
[289] Another public authority which was then subjected to a similar measure was the former Malta Standards Authority as per art 3(20) and (21) of the Malta Standards Authority Act, 2000 as per Act No XIX of 2000.
[290] See reply to a PQ by MP Dr Chris Said as per question number 4295 Twegibaghall-mistoqsijaparlamentarinumru 4295 (gov.mt).
[291] The EU Regulatory Framework consisted of four directives namely Directive 2002/19/EC (Access Directive), Directive 2002/20/EC (Authorisation Directive), Directive 2002/21/EC (Framework Directive), and Directive 2002/222/EC (Universal Service Directive). These were complemented by Directive 2002/58/EC (Directive on privacy and electronic communications).
[292] See the Communications Laws (Amendment) Act 2004. In relation to the institutional set-up the only change was cosmetic whereby the nomenclature of 'Chief Executive' was changed to that of 'Director General'.

enforcement powers by MCA, or to cases where MCA considered that there was an urgent need to act to safeguard competition and protect the interests of users in accordance with EU law.[293]

In 2011 various changes were made to the Malta Communications Authority Act impacting the independence of the MCA.[294] In part these changes were enacted in compliance with the changes introduced by the EU to its electronic communications regulatory framework in 2009.[295] One important change related to the removal of members of the MCA Board, whereby the Minister could remove a member if he considered that that member was unfit to continue in office or else incapable of continuing to properly perform his duties. In doing so however as a result of these changes, the Minister was in the case of the Chairman of the MCA, required to make public such removal by no later than the effective date of the actual removal from office, and to provide the Chairman with a statement of the reasons for his removal.[296] The Chairman in question was afforded the right to request the publication of a statement with the reasons for his removal and the Minister was accordingly required to publish the said statement.[297]

One evident issue consequential to this new norm was why such a right afforded to the MCA Chairman was not extended to the other Board members. The relevant EU norm referred to 'the head of a national regulatory authority, or where applicable, members of the collegiate body fulfilling that function within a national regulatory authority.'[298] The question here arises whether then the MCA Board collectively was the 'head' of the MCA. On the basis of the wording used by the legislator in deciding to limit the measure to require the publication of the reasons for removal only to the holder of the post of Chairman, the legislator opted to

[293] The Communications Laws (Amendment) Act 2010 as per Act No XII of 2010, art 13 which provided for the insertion of a new art 4A in the Malta Communications Authority Act.
[294] See arts 44 and 48 of the Communications Laws (Amendment), 2011 as per Act No IX of 2011 which amended arts 3 and 6 of the Malta Communications Authority Act, and also art 20 of the Communications Laws (Amendment) Act 2014 which amended art 3 of the Malta Communications Authority Act.
[295] See in particular art 3(3a) of Directive 2002/21/EC as amended by Directive 2009/140/EC.
[296] The Communications Laws (Amendment) Act 2011 art 44 thereof which substituted art 3(6) of the Malta Communications Authority Act.
[297] ibid.
[298] See Directive 2002/21/EC, art 3(3a).

interpret the reference in the EU norm to the 'head' of the NRA as being applicable only to the Chairman of MCA. This is debateable from various angles. On the one hand in practice many executive regulatory decisions were at that juncture taken by the Chairman of his own volition without reference to the other Board members, who then also performed the role of director general taking various decisions on the basis of the exercise of his functions as director general. On the other hand at law the ultimate responsibility for decisions taken was, and remains, with the Board members collectively.[299] Given that the responsibility was and remains of all the Board members, it stands to reason that the aforesaid right to require the Minister to state publicly the reasons for removal from the Board should have been extended to all Board members.[300]

Another change enacted in 2011 was in relation to the requirement onerous on the MCA to consult prior to the issue of regulatory decisions. As a result of this amendment, the MCA was expressly required when taking a decision concerning end-user or consumer rights, in particular where the decision had a significant impact on any of the communications markets regulated by the MCA, to take into account the views of end-users, in particular of disabled end-users, of consumers and of manufacturers and undertakings providing the services or networks concerned.[301]

A significant change, also introduced in 2011, related to the general policy directions that the Minister for communications was then empowered to give to the MCA. A proviso to article 6 of the Malta Communications Authority Act was added whereby exception was made to compliance by the MCA when required to give effect to any directions by the Minister, since following this amendment the MCA was required to act 'independently' and not seek or take instructions from any

[299] See art 5 of the Malta Communications Authority Act 2000 as per Act No XVIII of 2000, and also art 5 of the Malta Communications Authority Act as currently applicable.
[300] This was rectified following amendments in 2014 as per the Communications Laws (Amendment) Act, 2014.
[301] Prior to the amendments in 2011, the MCA before taking such decisions was only required to consult with 'interested parties'. Following this amendment, the law expressly required the MCA to factor the views of specific categories of interested parties. See art 46 of the Communications Laws (Amendment) Act, 2011 which article amended art 4A of the Malta Communications Authority Act.

other body, including the Minister, on matters related to *ex-ante* market regulation and to the resolution of disputes between undertakings regulated by the MCA.[302]

Another amendment to the law following the changes to the EU electronic communications framework in 2009, was the inclusion of a new norm requiring that the MCA be afforded 'adequate financial and human resources to carry out its functions' under the Electronic Communications (Regulation) Act and any other laws relating to electronic communications.[303] The significance of this measure in the overall consideration of the independence of the MCA should not be underestimated. The inclusion of this measure did not go far enough since it was limited to the electronic communications sector and was not complemented by other norms detailing the effective implementation of such a measure, leaving room for different interpretations as to how it should be applied. This notwithstanding the enactment of this measure was another important step towards the regulatory independence of the MCA.

At this juncture in the chronology of the applicable norms relating to the independence of the MCA, it is relevant to refer to an incident that occurred in March 2013 following the 2013 general elections in Malta and the change in government whereby the then Nationalist administration was replaced by a Labour administration. The new incoming Labour administration had requested that the chairman and other board members of the MCA 'offer' their resignation. The then chairman contested what was described in the media as a 'forced' resignation.[304] Ultimately however the matter was not pursued any further by the then outgoing chairman who decided to offer his 'resignation' which was accepted. It is pertinent to note that the practice at least until 2013 was that once there was a change of the administration in government following a general election, the chairman and

[302] See art 48 of the Communications Laws (Amendment) Act 2011 which amended art 6(1) of the Malta Communications Authority Act. This norm was introduced to implement art 3(3a) of Directive 2002/21/EC as amended by Directive 2009/140/EC.
[303] See art 4 of the Communications Laws (Amendment) Act 2011 which amended art 3 of the Electronic Communications (Regulation) Act. This amendment in turn implemented art 3(2) of Directive 2002/21/EC as amended by Directive 2009/140/EC.
[304] See https://timesofmalta.com/articles/view/I-was-forced-to-resign-says-ex-MCA-chairman.471634.

members of the diverse public entities, including regulatory authorities such as the MCA, were expected to 'offer' their 'resignation' to the incoming new administration. At law there was (and there still is) no express norm that actually required incumbent members of the headship of regulators such as the MCA or the REWS to offer their resignation when there is a change of government.

As the law was in 2013, the chairman of the MCA could only be removed from office by the Minister for communications if the person concerned was 'unfit to continue in office' or had 'become incapable of properly performing his duties', which in this particular instance does not appear to have been the case. If the person concerned felt that there was no valid reason at law for him to be removed from office prior to the lapse of his term of office, then he could have refused to 'offer' his resignation. This possibly could have resulted in a situation where if the Minister was adamant in removing the chairman, the Minister would then have proceeded to remove the person concerned who in turn would have been entitled to insist for a publication of the reasons for his removal from office in accordance with the provisions of article 3(6) of the Malta Communications Authority Act as it was worded at the time.[305]

In 2014 other amendments were enacted to the Malta Communications Authority Act impacting the independence of the MCA. The grounds of removal of a member of the Board were amplified factoring an exhaustive list of the grounds on the basis of which the Minister could remove a member of the MCA Board during his tenure of office.[306] The grounds listed were: infirmity of mind or of body or of any other cause whereby effectively the member would not be able to continue to discharge his duties; behaviour or performance of the member which would bring into question his suitability or ability to continue as a member, in particular where his behaviour affects or may affect his reputation, independence or autonomy, or the reputation, independence or autonomy of the MCA; conviction of a criminal offence affecting public trust, or of theft or fraud or of bribery or of money

[305] Communications Laws (Amendment) Act 2011, art 44.
[306] ibid, art 20 which substituted art 3(6)(f) of the Malta Communications Authority Act.

laundering[307]; or failure by the member to perform his duties for a prolonged period without any valid justification, with this final ground being qualified by the inclusion of a proviso stating that it would be a cause for removal if the member for any reason fails to attend for Board meetings for a continuous period exceeding six months.[308] Significantly a new norm was included whereby the right of the chairman to request the Minister to state the reasons for removal and have these published was extended to all the members of the Board therefore addressing an earlier shortcoming in the law.[309]

An interesting change introduced under the Communications Laws (Amendment) Act, 2014 related to the conduct of the business of the MCA, whereby the post of Director General and the establishment of the Directorates were removed, with the responsibility of the conduct of the MCA being devolved onto the Chairman.[310] The Board in this regard was also empowered to delegate or devolve all or part of the executive conduct of the MCA to any other officer of the MCA.[311] This change had the merit of stating at law what had until then been the situation for most of the time following the commencement of operations by the MCA in 2001 in relation to the executive conduct of the work of MCA, where the holder of the position of chairman in practice also exercised the functions of director general or of CEO. This situation was however revisited in 2019, when the post of CEO was re-introduced. In this regard however the law simply included the post of CEO without stating precisely what his role was and what his powers and obligations were.[312]

These changes in the law were followed by events which could have had serious consequences for the effective and proper conduct of regulatory powers of the MCA. In line with the changes introduced by the Malta Communications Authority

[307] The Communications Laws (Amendment) Act, 2014 substituted art 3 of the Malta Communications Authority Act empowering the Minister to suspend the member concerned if the said member was being investigated in relation to the commission of any such crimes.
[308] Communications Laws (Amendment) Act, 2014, art 20 para (f).
[309] ibid, para (h).
[310] ibid, art 22 which amended art 5 of the Malta Communications Authority Act.
[311] ibid, art 22 which provided for the substitution of art 5 of the Malta Communications Authority Act relating to the conduct of the affairs of the MCA.
[312] Malta Communications Authority (Amendment) Act 2019, arts 3 and 5 which amended respectively arts 5 and 7 of the Malta Communications Authority Act.

(Amendment) Act, 2019[313], a CEO was appointed in April 2019.[314] On the 30th April 2019 the term of office of the then current chairman and members of the board came to a close. On the lapse of the term of office of the then existing board, a new board was not appointed. This resulted in a situation where the headship of the MCA was vacant with the potentially dire consequences that such a situation could have led to. This situation persisted for several months until a government notice was issued in the Gazette in early November 2019 backdating the appointments of the new board to the 1st. October 2019.[315] This meant that for a period of five months between the 1st May and 30th September 2019 the MCA had no board and therefore no headship ultimately responsible for its regulatory decisions. It is also pertinent to note that the law as it was in April 2019 when a CEO was appointed, did not then give the CEO in question any specific powers or role at law. This could have given cause to challenges as to the validity of any regulatory decisions taken between May and September 2019, a situation that fortunately did not arise.

In 2021 two laws impacting the regulatory set-up of the MCA were enacted. The first of these laws was the Communications Laws (Amendment) Act, 2021[316] which Act replaced the existing provisions relating to the conduct of the affairs of the MCA as provided for under the Malta Communications Authority Act. In doing so the Act whilst providing that the affairs and business of the MCA are the responsibility of the Board, states that the day-to-day administration and organisation of the MCA, and the administrative control of the officers and employees of the MCA lies with the CEO who may also be delegated other powers as the Board may decide.[317] The Act states that the CEO is appointed by the Board on a full-time basis for a term of office of three years and cannot whilst occupying the post of CEO be a Board member.[318] The Act provides that the CEO is responsible for the implementation of

[313] Enacted as per Act No XIII of 2019.
[314] See Government Notice No 470 published in the Gazette on the 16th April 2019.
[315] See https://timesofmalta.com/articles/view/new-boards-rushed-out-following-reports.747981. The government notice appointing this Board was published on the 5th November 2019 and was backdated to the 1st. October 2019.
[316] See Act No XXXIII of 2021, art 5.
[317] ibid.
[318] ibid.

the objectives of the MCA in the exercise of its functions at law as set out by the Board, and lists amongst his functions: the full responsibility for the overall administration; the supervision and control of the various components of the MCA; the development of strategies for the implementation of the MCA objectives as directed by the Board; advising the Board on any matter it refers to him or which he considers necessary; and presenting the financial estimates of the MCA for the approval of the Board.[319]

The second law was the Communications Laws (Amendment No. 2) Act, 2021[320] which introduced amendments impacting positively the independence of the MCA, which amendments were in part motivated by norms under the EECC.[321] One innovation inserted in adherence to the EECC is that the appointment by the Minister for communications of the chairman and board members must be made 'from amongst persons of recognised standing and professional experience on the basis of merit, skills, knowledge and relevant experience'. In doing so the Minister is required to 'act in an open and transparent manner' ensuring the continuity of decision-making by the MCA.[322] The same law enhanced the rights of a board member if he is dismissed during his tenure of office and wishes to contest his dismissal, by enabling the member concerned to take action before the Civil Court to contest his dismissal.[323] Significantly article 6 of the Malta Communications Authority Act which regulates the independence of the MCA and its relations with the Minister was replaced with a new provision expressly stating that the MCA:

> 'shall act independently and objectively in the exercise of its functions at law, including in the development of its internal procedures and organisation of its staff, and shall operate in a transparent and accountable manner in accordance with European Union law. In doing so the Authority shall not seek or take instructions from any other person in relation to the exercise of the tasks assigned to it by law, this without prejudice to any

[319] ibid.
[320] See Act No LII of 2021.
[321] See EECC, arts 6 to 8.
[322] See Communications Laws (Amendment) Act, 2021, art 54 which amended art 3 of the Malta Communications Authority Act.
[323] ibid. Until then a member could only require the Minister to issue a public statement giving the reasons for dismissal.

supervision, however so described, that may be undertaken in accordance with the Constitution of Malta.'

The law as amended still allows the Minister to give written directions of 'a general character' on the policy to be followed by the MCA in the exercise of its functions at law. In doing so the directions given must not be inconsistent with the provisions of the Malta Communications Authority Act, and the Minister is required to give his reasons in writing for the directions given.[324] The law however does not state what happens if the MCA fails to comply with any such written direction.

2.2.2. The chronology of energy and water services regulation in Malta

As was the case in the communications sector, the provision of energy and water services was until 2000 provided by government controlled monopolies that effectively were also the regulators of the utilities they provided. This situation changed in 2000 with the enactment of the Malta Resources Authority Act 2000[325] which provided for the establishment of a body to be known as the MRA headed by a board composed of a chairman and four to six other members appointed by the Minister responsible for resources for a term of between one to three years. Each member was eligible for reappointment for other similar terms of office, and could be removed from office by the Minister if in his opinion that member was unfit to continue in office or had become incapable of properly performing his duties.[326] The Malta Resources Authority Act 2000 did not provide for any criteria on the basis of which such members were selected other than to exclude persons who were either ministers, parliamentary secretaries, members of the House of Representatives, judges or magistrates, or who had financial or other interests in any enterprise or activities falling within the regulatory remit of the MRA.[327] In the case of the last mentioned disqualification it was possible for the Minister to waive

[324] ibid, art 59 which provided for the substitution of art 6 of the Malta Communications Authority Act.
[325] Enacted as per Act No XXV of 2000.
[326] The Malta Resources Authority Act 2000, art 3(1) and (2). The law did not then cap the number of reappointments for a board member.
[327] ibid, art 3(4).

that disqualification if the person concerned made a declaration of his interest and this declaration coupled with the waiver of the Minister were subsequently published in the Gazette.[328]

The Minister was empowered to remove a member of the MRA Board if in his opinion, the member concerned was 'unfit to continue in office' or had 'become incapable of properly performing his duties as a member'.[329] In this regard the wording used in the Malta Resources Authority Act 2000 was almost identical to that used in the case of the MCA when the Malta Communications Authority Act 2000, which provided for the establishment of the MCA, was enacted in 2000. What is interesting, are the divergences in the subsequent amendments to this norm in the respective laws on the one hand regulating the MCA, and on the other hand the MRA and subsequently the REWS.

The Malta Resources Authority Act 2000 provided for the appointment of a CEO with responsibility for the executive conduct of the MRA, its administration and organisation, and the administrative control of its officers and employees, and for the establishment of diverse directorates within the MRA. The Board was empowered to delegate to the CEO other powers as it considered necessary. The CEO was specifically responsible for the implementation of the objectives of the MRA in the exercise of his functions and for the overall supervision and control of the Directorates. In the performance of his functions the CEO was also responsible for the development of the necessary strategies for the implementation of the objectives of the MRA.[330] The MRA Board in consultation with the Minister, was responsible for the appointment of the CEO and of the heads of the Directorates, whose appointments were for terms of three years. The appointees were eligible for re-appointment for similar terms of office. The Act provided that the initial appointments were to be made by the Minister.[331]

[328] ibid, see proviso to art 3(4).
[329] ibid, art 3(6).
[330] ibid, art 5(9).
[331] ibid, art 5(7).

In contrast to what happened in the case of the MCA, institutionally a very different approach was taken in relation to the MRA. As distinct from the MCA, two different persons were appointed to the posts of chairman and of CEO, an approach that has been maintained consistently up to the present day with different persons being appointed to the aforesaid two posts.[332] Again in contrast to what happened with the MCA where the directorates as established under the Malta Communications Authority Act 2000 were never set up, in the case of the MRA the directorates were factually established and for some time were in place and operational. In 2001 after the coming into force of the Malta Resources Authority Act 2000, the three directorates listed in the First Schedule to the aforesaid Act were set up, namely the Directorate for Energy Resources Regulation, the Directorate for Minerals Resources Regulation and the Directorate for Water Resources Regulation.[333] In 2011, the list of specific directorates under the MRA Act was deleted, and instead the MRA was empowered in consultation with the Minister responsible for resources, to establish such 'Directorates, Units, Divisions and Sections as appropriate' which would be vested with such responsibilities as the MRA may decide.[334] In practice subsequent to 2011 no new directorates were set up and the internal set-up was dealt with administratively without making any further changes to the law in this respect.

As was the case with the MCA, a provision was included to regulate the conduct of the relations between on the one hand the Minister responsible for resources and on the hand the MRA. This provision empowered the Minister in relation to matters that appeared to him to affect the public interest, to give 'directions in writing of a general nature not inconsistent with the provisions of the Act' on the policy that the MRA was required to follow in the carrying out of its functions at law.[335] The

[332] See the reports for MRA covering the period from 2001 until 2015, http://mra.org.mt/library/annual-reports/.
[333] See MRA annual report covering the period 2001-2002, at p 11 and 19 to 42, http://mra.org.mt/wp-content/uploads/2012/08/Annual-Report-2001-2002.pdf.
[334] See the Various Laws (Amendment) Act, 2011 as per Act No V of 2011, arts 31 and 36 which respectively amended art 5 and deleted the First Schedule of the MRA Act. In the MRA annual reports subsequent to 2011 there are no references to the former directorates as were listed under the Malta Resources Authority Act 2000.
[335] Malta Resources Authority Act 2000, art 6(1).

MRA was required to give effect to such directions 'as soon as may be'. Furthermore the MRA was required to afford to the Minister 'facilities' for obtaining information with respect to its property and activities, and for the verification of the information provided. If the MRA failed to comply with any directions issued, then the Prime Minister was empowered to issue an order transferring in whole or in part any of the functions of the MRA to the Minister responsible for resources.[336]

In 2015 the responsibility for the regulation of the energy and water services was transferred from the MRA to the REWS following the enactment of the Regulator for Energy and Water Services Act, 2015[337] which Act provided for the establishment of the REWS with the responsibility of exercising regulatory functions in relation to the provision of energy and water services. Effectively this meant that the REWS assumed the regulatory functions previously onerous on the MRA other than those relating to matters concerning mineral resources.[338] The Regulator for Energy and Water Services Act, 2015 stated that REWS consisted of a board composed of a chairman and not less than four and not more than six other members. The Act provided that the chairman and members are appointed by the Minister responsible for energy and water services for a term of five years or such longer term as may be specified in the instrument of appointment provided this did not exceed seven years. Such appointments were to be made on 'an appropriate rotation scheme' whereby the end date of the term of office of the members of the Board must not be the same for all members, thereby ensuring continuity once not all the Board members are replaced at the same time.[339] The Act further stated that members may be reappointed only once.[340] This contrasts with the norms relating to the appointments of the MRA Board as provided for under the Malta

[336] ibid.
[337] Enacted as per Act No XXV of 2015.
[338] See Regulator for Energy and Water Services Act 2015, art 1(2) and (3).
[339] ibid, art 3(2). See also the reply to PQ No. 3003 made by MP Dr Chris Said where it results that four members of the REWS Board were appointed for a term of five years covering the period August 2015 to August 2020, another member was appointed for a term covering the period from August 2015 to August 2021, whereas the term of office for another two members covers the period November 2017 to November 2022. See Twegibaghall-mistoqsijaparlamentarinumru 3003 (gov.mt).
[340] ibid, art 3(2).

Resources Authority Act, 2000 where no limitations to the number of reappointments of the Board members were envisaged.[341]

In 2021 new norms were enacted relating to the establishment and composition of the REWS Board in part to reflect the new requirements under the Electricity Market Directive 2019.[342] The Regulator for Energy and Water Services (Amendment) Act, 2021 whilst retaining similar provisions relating to composition of the REWS board members and the length of the terms of their appointments, introduced new provisions emphasising the independence of the REWS whilst providing for criteria on the basis of which the board members are chosen.[343] As a result of these amendments, article 3 of the Regulator for Energy and Water Services Act now states that REWS is 'functionally independent from other public or private entities' and the persons responsible for its management are required to 'act independently from any market interest' and should 'not seek or take direct instructions from government or other public or private entities when carrying out its regulatory tasks.' This requirement is without prejudice to general policy guidelines that government may issue not related to the regulatory powers and duties of REWS. Article 3 continues to state that REWS 'shall take autonomous decisions independently from any political body' and that it 'shall have a separate annual budget and autonomy' in the implementation of its budget.[344] The other notable change relates to the introduction of specific norms requiring that the appointment of the REWS board members is 'based on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience.'[345]

As was the case with the MRA Board, persons holding specific public offices including ministers, parliamentary secretaries, members of the House of Representatives, members of the judiciary, or who have a financial or other interest

[341] See Malta Resources Authority Act, art 3.
[342] See Electricity Market Directive 2019, art 57.
[343] See Regulator for Energy and Water Services (Amendment) Act, 2021 as per Act No XLIX of 2021, art 2 thereof substituted art 3 of the Regulator for Energy and Water Services Act with a completely new article.
[344] See Regulator for Energy and Water Services Act, art 3(2) and (3).
[345] ibid, art 3(6).

in any enterprise or activity regulated or likely to be regulated by the REWS cannot be considered for appointment as a member.[346] However in contrast to what the position was under the MRA as stipulated under the Malta Resources Authority Act 2000, the Minister concerned does not have the faculty of waiving a disqualification in relation to a person who has a financial or other interest.[347]

The Regulator for Energy and Water Services Act provides for an exhaustive list of the reasons on the basis of which a member of the REWS Board is considered unfit to continue in office and may therefore be removed by the Minister. The reasons listed are: if the member is found to be unable to act independently from any market interests; if the member is found to be taking instructions or directions from any other public or private entity in the exercise of the regulatory functions onerous on REWS; or where the member is found guilty of misconduct under any law.[348] The list of reasons for the removal of a member from office contrast substantially with the reasons previously listed in the instances at law for the removal of members of the MRA Board, whereby the Minister responsible for resources had some discretion in deciding whether the member concerned was 'unfit to continue in office' or else had 'become incapable of properly performing his duties'. In contrast the Regulator for Energy and Waters Services Act 2015 clearly and comprehensively states the reasons why a member should be considered as unfit and therefore removed from office.

It is pertinent to note that one of the reasons expressly listed under the Regulator for Energy and Water Services Act, 2015 whereby a member may be removed, is if he is found to be taking instructions or directions from any other public or private entity. The inclusion of this reason amongst the grounds for removal from office should have some significant bearing in order to strengthen the independence of REWS from all stakeholders, including from government. One shortcoming however is that it is the responsibility of the Minister concerned to remove a member from office in such a circumstance. One asks what would happen if the member

[346] Regulator for Energy and Water Services Act, art 3(4).
[347] ibid, art 3(9).
[348] ibid, art 3(11).

concerned is found to be taking directions from the Minister himself in relation to matters concerning the regulatory functions of the REWS. It is somewhat inconceivable that the Minister would take steps to remove a board member from office on the grounds that that member was acting on directions given to him by the same Minister in the first instance. This issue raises the point whether, if such a circumstance occurs, the Minister is the best suited person to undertake the required measures for the removal of a member of the REWS Board. Other options divorced from Ministerial control should be actively considered in relation to the removal of board members, more so if the independence and effective regulatory action by the headship of REWS is to be properly safeguarded.

The Regulator for Energy and Water Services Act expressly states that REWS is to 'independently, transparently and impartially implement and administer' the various functions onerous upon it under the said Act.[349] The Minister is empowered to give written directions of 'a general character' in relation to matters that appear to him to affect the public interest, provided such directions are not related to the regulatory powers of REWS and are not inconsistent with the provisions of the Act. REWS is required to give effect to such directions provided that in doing so the independent regulatory powers of REWS are in 'no way prejudiced'.[350] In this regard REWS is required to afford to the Minister 'facilities' to obtain information about its property and activities and to furnish him with 'returns, accounts and other information with respect thereto' whilst affording him facilities to verify the information provided in such a manner and at such times as he may reasonably require.[351] The Act however expressly states that any communications between the Minister and REWS in relation to any directions that the Minister may give to REWS, are to be 'conducted in such a manner as to ensure that at no time shall the independence of the Regulator in the exercise of its functions be, or be perceived to be, in any way prejudiced.'[352]

[349] Regulator for Energy and Water Services Act, 2015, art 5(1) and (2).
[350] ibid, art 7(1).
[351] ibid, art 7(2). This provision mirrors in substance similar provisions enacted in relation to the MRA under the Malta Resources Authority Act 2000.
[352] ibid, art 7(3).

There are two notable differences, the combination of which impact positively the independence of REWS when compared to the inclusion of the norms regulating the conduct of relations between the MRA and the Minister.[353] The first difference is that the Regulator for Energy and Water Services Act does not empower the Prime Minister to detract any functions onerous on REWS at law if REWS fails to 'give effect' to any directions that the Minister may give in accordance with the said Act, and whereby the Prime Minister may then assign all or part of the functions of REWS to the said Minister. This must in turn be evaluated in the light of the second difference, whereby the said Act places a strong emphasis on the importance of ensuring the independence of REWS in any communications relating to any such directions that the Minister may give.

In this regard the Regulator for Energy and Water Services Act does not state what happens if REWS fails to abide with any directions given to it by the Minister.[354] The non-inclusion of the power of the Prime Minister to assign all or part of the functions of REWS if it fails to give effect to directions by the Minister was an overdue measure more so since the application of a similar measure in relation to REWS could in extreme cases undermine the independence of REWS. This notwithstanding the inclusion at law of the faculty of the Minister to issue directions within the strict confines of the current norms, should be complemented by a procedure which, whilst clearly not requiring REWS to act in such a manner so as to compromise its independence, should be characterised by a transparent process whereby in case of evident disagreement, both the Minister and REWS are required to give their reasons in writing for their respective positions, and if notwithstanding disagreement persists, then the matter can be referred to an independent select parliamentary committee for its ruling on the matter.[355]

[353] Subsequent to the enactment of Act No XXV of 2015 the norms as provided for in art 6 of the Malta Resources Authority Act apply only in relation to mineral resources and to the legislation listed in the Schedule to Act No XXV of 2015.
[354] As observed earlier the same issue can arise with regard to the MCA if the MCA fails to adhere to any written directions given to it by the Minister responsible for communications. See above at p 98.
[355] The same consideration applies in the case of the MCA where similarly there is an evident lacuna if the MCA does not abide with any written directions given by the minister for communications.

2.3. The impact of EU sector specific directives relating to the regulation of utilities

The EU sector specific directives on the regulation of utilities impact significantly on the norms adopted under Maltese law relating to the independence and accountability of MCA and of REWS, given that Malta as an EU Member State is required to ensure that its national laws strictly reflect the applicable EU norms. A careful examination of the national laws made since Malta joined the EU in 2004, reveals the considerable influence of EU law on the gradual evolution of national norms intended to cater for the independence of MCA and of REWS. This part traces the relevant EU norms which impacted Malta following its membership of the EU in 2004.

In considering the diverse norms under applicable EU law concerning the independence of national utility regulators, the author notes that the approach taken depends on the utility concerned and that no single uniform approach has been adopted by the EU. Hence in the case of water services, EU law regulating this utility does not provide for any specific norms on the independence of the regulator.[356] Conversely with regard to the electronic communications and energy sectors[357], there are fairly detailed norms relating to the independence of the regulator including notably concerning the exercise of regulatory functions, and the appointment and dismissal of the persons making up its headship. The applicable norms are not identical and as is discussed below, there are in some instances substantial differences. In so far as the electronic communications and energy sectors are concerned, the applicable EU norms are characterised by a strong emphasis on the independence and accountability of the persons making up the headship of the national regulators. In relation to the postal services sector, the EU norms concerning the independence of the competent regulatory bodies are less detailed and unlike the norms applicable to the electronic communications and

[356] See Directive 2000/60/EC establishing a framework for Community action in the field of water policy (the EU Water Framework Directive), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0060.
[357] The reference to energy refers to the electricity and gas utilities.

energy sectors, do not cater for matters concerning the appointment or dismissal of the persons making up the headship of the regulator.

2.3.1. The Communications Utilities[358]

In the electronic communications sector, the first tangible measures of the EU concerning the independence of NRAs were provided for in the Framework Directive of 2002 whereby Member States were required to 'guarantee' the independence of NRAs by ensuring that they were 'legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services.'[359] If a Member State retained ownership or control of undertakings providing electronic communications services or networks, then that Member State was required to ensure effective structural separation of the regulatory function from those relating to the activities associated with ownership or control.[360] The 2002 Framework Directive further stated that Member States had to ensure that the NRAs exercise their powers 'impartially and transparently'.[361] Otherwise the 2002 Framework Directive did not provide for any measures specifically related to the independence of the NRA. Notably, the 2002 Directive did not envisage any specific norms about how the persons making up the headship of the NRA were to be appointed to or dismissed from office, or requiring the independence of the NRA from any directions of government.

In 2009 the EU revisited substantially the norms concerning NRAs by providing new norms relating to diverse aspects impacting the effective role and independence of NRAs. One change introduced by the EU required the implementation of financial autonomy whereby Member States were required to ensure that NRAs have 'adequate financial and human resources to carry out the task assigned to them.'[362]

[358] This refers to the diverse communications sectors regulated by the MCA, specifically electronic communications and postal services.
[359] See Directive 2002/21/EC, art 3(2).
[360] ibid.
[361] ibid, art 3(3).
[362] See Directive 2002/21/EC as amended by Directive 2009/140/EC, art 3(3).

In doing so, NRAs were also to be given separate annual budgets.[363] Specific norms were included concerning the dismissal of a person or persons making up the headship of a NRA, whereby such persons could only be dismissed from office if 'they no longer fulfil the conditions for the performance of their duties' as laid down under national law. The decision dismissing the person concerned was to be made public at the time of dismissal and the person so dismissed was entitled to receive a statement of the reasons for his dismissal and to request its publication.[364]

A third important measure introduced in 2009 was the inclusion of a norm specifically stating that a NRA limitedly to the exercise of *ex ante* regulation and to the resolution of disputes between undertakings, must be empowered to act independently and must not seek or take instructions from 'any other body' in relation to the exercise of such regulatory functions. This norm was qualified since its application was without prejudice to supervision under national constitutional law and to the right of appeal from such decisions before the competent adjudicative authorities.[365]

In 2018 as a result of the enactment of the EECC which replaced the then existing electronic communications regulatory framework, new norms were made by the EU significantly impacting the independence of NRAs, whereby these norms not only improved on the existing norms, but also provided for matters which until then were not catered for, including notably the appointment of the person or persons making up the headship of a NRA, and the criteria on the basis of which such persons were to be appointed.[366] In the first instance, the EECC in substance replicated the previous norms requiring that Member States guarantee the independence of the NRA by ensuring structural separation from any entity providing regulated services or networks, and that the NRA is afforded 'adequate technical, financial and human resources' to carry out the tasks assigned to it.[367]

[363] ibid, art 3(3a).
[364] ibid.
[365] ibid, art 3(3a).
[366] EECC, in particular arts 7 and 9.
[367] ibid, art 6.

The requirement concerning financial autonomy is further emphasised in relation to the regulatory capacity of the NRA whereby Member States are required to ensure that NRAs have separate annual budgets and are autonomous in the implementation of the allocated budget. The EECC requires that such financial autonomy is exercised without prejudice to supervision or control in accordance with national constitutional law, which supervision or control is to be undertaken in a transparent manner and made public.[368]

One important innovation consequential to the EECC is the inclusion of a norm that requires that the person or persons making up the headship of the NRA are appointed for a minimum term of three years. The EU in its recitals to the EECC states that Member States 'should consider' limiting the possibility of renewing the mandates of the persons making up the headship, but does not expressly require that Member States follow suite.[369] The appointees must be chosen from 'among persons of recognised standing and professional experience, on the basis of merit, skills, knowledge and experience' and significantly 'following an open and transparent procedure'.[370] In implementing these norms Member States are required to ensure the continuity of the decision-making process.[371] The EECC whilst retaining the substance of the norms previously in place concerning the dismissal from office of a person forming part of the headship, in addition requires that Member States ensure that the decision taken dismissing the person from office is subject to review by a court on both points of fact and of law, thereby providing an additional safeguard to ensure that persons making up the headship are not arbitrarily removed from office.[372]

The EECC reinforces the earlier norms on independence doing away with the previous limitations whereby the independent exercise by NRAs of their regulatory functions was limited to *ex ante* regulation and inter-operator disputes. The EECC in contrast does away with such limitations by unequivocally stating that NRAs are

[368] ibid, art 9(1) and (2).
[369] ibid, recital (38).
[370] ibid, art 7(1).
[371] ibid, art 7(1).
[372] ibid, art 7(2) and (3).

to 'act independently and objectively, including in the development of internal procedures and the organisation of staff', doing so in a transparent and accountable manner in accordance with EU law.[373] Hence in undertaking the tasks assigned to them under the national law implementing EU law, NRAs must not seek or take instructions from any other body. The performance of the NRA in accordance with these norms is without prejudice to supervision undertaken in accordance with national constitutional law.[374]

The current applicable norms relating to independence of the competent NRA in so far as the postal services sector is concerned were enacted in 1997 and have remained substantially the same. The Postal Service Directive[375] lists as one of its objectives the creation of 'independent national regulatory authorities' and requires that Member States have in place a regulatory authority that is legally separate from and operationally independent of postal operators.[376] If a Member State retains ownership or control of postal services providers then that Member State is required to ensure that there is in place 'effective structural separation of the regulatory functions from activities associated with ownership or control'.[377] The EU in its recitals to the Postal Service Directive states that Member States 'should guarantee' the independence of the NRAs thereby ensuring the impartiality of their decisions without however providing any other norms or elaborating further.[378] More specifically unlike both the electronic communications and energy sectors, the Postal Services Directive does not provide for any norms relating to the appointment and removal of the persons making up the headship of the NRA, the independence from other persons including government in the taking of regulatory decisions, and financial independence so as to ensure the effective performance of regulatory functions by the NRA.

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[373] ibid, art 8(1).
[374] ibid.
[375] Reference to the Postal Service Directive refers to Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of service as amended by Directive 2002/39/EC and by Directive 2008/6/EC.
[376] EU Postal Services Directive, art 22(1).
[377] ibid, art 22(1). See also https://www.rtr.at/en/post/Richtlinien/RL_2008_6_EC_consolidated_Version_EN.pdf.
[378] ibid, recital (47).

2.3.2. The Energy and Water Services Utilities

In the energy sector the relevant EU norms relating to the regulation of the electricity sector and the independence of the NRA were initially factored in the Internal Market Electricity Directive of 2003.[379] In this Directive Member States were required to designate one or more competent bodies to perform the functions of regulatory authorities in relation to the provision of electricity services.[380] These authorities had to be 'wholly independent from the interests of the electricity industry' and were tasked with ensuring that there was non-discrimination, effective competition and efficient functioning of the market.[381] Otherwise the aforesaid Directive did not provide for any express norms relating to the independence of the competent regulatory authority. A similar situation existed under the Directive regulating the gas market.[382]

In 2009 new directives were issued by the EU in relation to both the electricity and gas markets which directives included similar norms relating to the independence of the competent regulators as those then in place.[383] The Electricity Market Directive 2009 required Member States to 'guarantee the independence of the regulatory authority' and to ensure that it exercised 'its powers impartially and transparently'.[384] In this context the Electricity Market Directive 2009 required that Member States ensure that the NRA when carrying out its regulatory tasks as required under the Directive was legally distinct and functially independent from any other public or private entity, and that its staff and the persons responsible for its management act independently from any market interest and do not seek or

[379] See Directive 2003/54/EC concerning common rules for the internal market in electricity. This Directive repealed Directive 96/92/EC which previously provided for common rules for the internal market in electricity.
[380] In the diverse electricity and gas market directives, the term 'regulatory authority' is used in lieu of 'NRA'.
[381] See Directive 2003/54/EC, art 23(1).
[382] See Directive 2003/55/EC, art 25(1).
[383] See Directive 2009/72/EC concerning rules for the internal market in electricity which directive replaced Directive 2003/54/EC, and Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.
[384] Directive 2009/72/EC, art 35(4).

take 'direct instructions from any government or other public or private entity when carrying out regulatory tasks.'[385] This requirement was subject to general policy guidelines issued by government not related to regulatory powers and duties of the NRA as listed under the Directive.[386] The Electricity Market Directive 2009 further provided for a series of norms intended to protect the independence of the NRA. These included measures to ensure that the NRA could take 'autonomous decisions independently from any political body' and that it had 'separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties'.[387]

Significantly new measures introduced in the Electricity Market Directive 2009 related to the headship of the NRA. This Directive provided that members making up the headship had to be appointed for a term of office of not less than five years and not more than seven years. Members could be re-appointed only once for a similar term of office.[388] In providing for such appointments Member States were required to adopt an 'appropriate rotation scheme' with the purpose of ensuring some form of continuity in the composition of the headship of the NRA.[389] The Directive furthermore required that the persons making up the headship could only be relieved from office during their term of office if they no longer fulfilled the conditions stated in article 35 of the Directive or if they were guilty of misconduct under national law.[390]

In 2019 the EU repealed the Electricty Market Directive 2009 replacing that Directive with a new directive, whilst amending the Gas Market Directive 2009.[391] The Electricity Market Directive 2019 whilst retaining the norms relating to

[385] ibid. Similar norms were provided for under the Gas Market Directive 2009, see art 39(4).
[386] ibid. The regulatory duties and powers of the NRA were listed under art 37 of Directive 2009/72/EC.
[387] ibid, art 35(5)(a).
[388] Directive 2009/72/EC, art 36(5). The Directive in relation to the headship of the regulatory authority refers to the 'members of the board of the regulatory authority' or in absence of a board, to the 'top management'.
[389] ibid, art 35(5) and recital (34).
[390] ibid, art 35(5). Similar provisions were provided in relation to the Gas Market under Directive 2009/73/EC as per art 39(4) and (5) thereof.
[391] Directive (EU) 2019/944 on common rules for the internal market for electricity and amending Directive 2012/27/EU, and Directive (EU) 2019/692 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.

independence under the Electricity Market Directive 2009, provided for various new measures intended to enhance the independence of the NRA.[392] One important new measure was the requirement that the persons making up the headship are appointed on the basis of 'objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience for the relevant position in the regulatory authority'.[393] Equally important was the inclusion of a norm requiring that conflict of interest provisions and confidentiality requirements provided for under national law extend beyond the end of mandate of the persons making up the headship of the NRA.[394] The former norm relating to the dismissal of persons forming part of the headship under the Electricity Market Directive 2009 was revised, clarifying that members of the headship can be dismissed only on the basis of transparent criteria.[395] Interestingly these changes have not been adopted in relation to the Gas Market sector, which in substance in so far as the independence of the NRA is concerned, remains bound by the norms adopted under the Gas Market Directive 2009.[396] In relation to the regulation of water services, the EU to date has not provided for any explicit norms relating to the independence of the competent NRA.[397]

2.3.3. Conclusions on the overall impact of EU law

The diverse EU directives on the regulation of utilities are conditioned in part by the specific utility. As discussed above, it is in relation to the energy and electronic communications sectors that the EU has taken the most pronounced measures in

[392] The norms relating to the independence from other parties, the need to have a separate annual budget and the appointment of the headship for fixed terms are dealt with under art 57(5) of the Electricity Market Directive 2019.
[393] Electricity Market Directive 2019, art 57(5)(e). The provision applies to the appointment of the members of the board or in its absence to the 'top management' of the NRA.
[394] ibid, art 57(5)(f).
[395] ibid, art 57(5)(g).
[396] See Directive (EU) 2019/692, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0692.
[397] See Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

relation to the independence of regulators. Various common denominators emerge when considering the applicable norms in relation to the energy and electronic communications Directives. However there are some notable differences when evaluating the norms under these Directives that impact the application of the relevant EU norms at a national level, in particular where the regulatory functions are carried out by the same NRA. One difference relates to the term of appointment of the headship of the NRA. In the Energy Directives[398] the members making up the headship must be appointed for a term of between five to seven years and can only be reappointed once for a similar term of office.[399] Conversely the EECC states that members of the headship must be appointed for a minimum term of three years and may be re-appointed for one or more similar terms.[400]

Other differences concern the appointment and removal of members of the headship. Under the Electricity Market Directive 2019 and the EECC, specific norms albeit not using similar wording have been introduced as to how the persons making up the headship are to be appointed. The Electricity Market Directive 2019 states that the persons making up the headship are to be appointed on the basis of 'objective, transparent and published criteria in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience for the relevant position in the regulatory authority.'[401] The EECC uses different wording and states that such persons are to be chosen from amongst 'persons of recognised standing and professional experience, on the basis of merit, skills, knowledge and experience and following an open and transparent selection procedure'.[402] Conversely in the case of postal services and water services there are no norms in place as to how the persons making up the headship are to be appointed.

In substance the norms under the Electricity Market Directive 2019 and the EECC concerning the appointment of the persons making up the heading appear similar.

[398] The EU Directives dealing separately with the electricity and gas markets are referred to collectively as the 'Energy Directives' in this thesis.
[399] See Directive (EU) 2019/944, art 57(5)(d), and Directive 2009/73/EC, art 39(5)(b).
[400] See EECC, art 7.
[401] See Directive (EU) 2019/944, art 57(5)(e).
[402] See EECC, art 7(1) and recitals (35), (37) and (38).

However the difference in wording can give rise to some variations relating to the criteria and procedure followed in the selection of the headship. Whereas the Electricity Market Directive 2019 lists as criteria 'the necessary skills and experience' for the relevant position, the EECC goes further by requiring that the members making up the headship are appointed from amongst persons of 'recognised standing and professional experience' and on 'the basis of merit, skills, knowledge and experience'. Significantly the EECC requires that the appointment of such persons is made following 'an open and transparent selection procedure'.[403] Conversely the Electricity Market Directive 2019 forgoes any reference to an open selection process and instead uses the term 'in an independent and impartial procedure'.[404] In using such a term one can argue that the appointing body can appoint persons to the headship without adopting 'an open and transparent selection' procedure, provided that in doing so it abides with the stated criteria as listed in the Electricity Market Directive 2019. Conversely the inclusion of the word 'selection' used in the EECC presupposes that a selection procedure is used whereby interested persons who satisfy the required criteria can apply to be selected for membership of the headship.[405]

Another important difference concerns the norms regulating the dismissal from office of a member of the headship. The EECC states that a member of the headship may be dismissed during his term of office if he no longer fulfils the conditions required for the performance of his duties as provided for under national law. If a decision is taken to dismiss such a member then such a decision must be made public at the time of dismissal of the member in question. The EECC requires that the person so dismissed receives a statement of the reasons for his dismissal. If such a statement is not published then the person dismissed can request its publication.[406] Moreover such a decision is subject to review by a court both on points of fact and of law. Conversely in the case of the Energy Directives the norms

[403] ibid, art 7(1).
[404] Directive (EU) 2019/944, art 57(5)(e).
[405] See meaning of 'selection' at https://businessjargons.com/selection-process.html accessed 30th September 2022.
[406] Art 7(2) of the EECC emphatically states that if the person dismissed makes such a request, then the statement of reasons 'shall be published'.

relating to the dismissal of a member of the headship, whilst stating that such a person may only be dismissed on the basis of transparent criteria in place or if he has been found guilty of misconduct under national law, fail to provide for a procedure similar to that applicable under the EECC whereby the person dismissed is entitled to a written statement which can be made public at his request, and who can seek redress before the courts.[407]

There do not appear to be any valid reasons why the EU has adopted different measures in relation to the appointment and dismissal of persons making up the headship of the NRAs responsible for the regulation of the different utilities. The applicable norms in this regard should be uniform unless there are reasons specific to the better regulation of the utility concerned that may justify a different approach, which at least in relation to the energy, postal and electronic communications sectors does not appear to be the case.

In relation to the term of appointment of office of the persons making up the headships of the NRAs in question, it is suggested that the term should be of five to seven years with the possibility of one renewal for another similar term of office. The minimum term of three years as provided for under the EECC is too short more so since a short period of office can impact negatively on the long term strategy of the NRA and does not serve to ensure consistent and effective regulation over the medium to long term. It is pertinent here to note that both the EECC and the Energy Directives require that a system of rotation of membership is in place to ensure continuity in the headship avoiding a situation whereby the members of the headship at the end of their term are replaced en bloc by a new headship.[408] This is a situation that regrettably on various occasions with the change of government in Malta has characterised and impacted negatively the headship of utilities regulators in Malta.[409] On the other hand leaving the possibility for renewal of a term of office without capping the number of renewals for which a member is eligible should be

[407] See Directive (EU) 2019/944, art 57(5).
[408] See EECC, art 7(1) and Electricity Market Directive 2019, art 57(5) the proviso thereto.
[409] This occurred following the change of government in February 2013, where an entirely new MCA board was appointed in May of that year. At times the lack of continuity was evident even following the change of ministers within the same government. This occurred for example in 2008 in relation to the MCA when following a change in minister, an entirely new board was appointed.

avoided since the possibility of having unspecified number of renewals in the longer term may influence the way some members of the headship may act in the hope of further renewals by the appointing body thereby impacting the autonomous judgement of the members making up the headiship and therefore the independence of the NRA.

In so far as the appointment of the persons making up the headship is concerned, the applicable norms should be worded in such a manner to ensure that the headship is appointed only after an open and transparent selection procedure whereby interested persons can apply to be considered provided they comply with a clear set of pre-established criteria aimed at ensuring that whoever is eventually appointed, is chosen on the basis of merit, experience, knowledge and skills. The amendments enacted in 2021 to the Malta Communications Authority Act and to the Regulator for Energy and Water Services Act appear to address matters in this regard.[410] One however needs to see how in practice these amendments will be applied.[411] Equally important the norms currently in place under the EECC relating to the dismissal of a member of the headship should be replicated and applied uniformly to all utilities regulators in particular the norms relating to the publication of the reasons for any dismissal and the right to contest any such dismissal before a court. The inclusion of such norms should not be tied to the nature of the utility concerned, but specifically to the need to ensure that any person forming part of the headship is not dismissed arbitrarily.

2.4. Creating 'a Culture of Independence' – the five dimensions listed by OECD

OECD remarks that the life of a regulator 'is fraught with potential entry points for undue influence, from issues related to finance, leadership, staff behaviour to links to the political cycle.' According to OECD 'a real culture of independence will help

[410] See art 54 of Act No LII of 2021, and art 2 of Act No XLIX of 2021.
[411] As up to the 30 September 2022 both in the case of the MCA and of the REWS no board members had been appointed on the basis of the new norms introduced in 2021.

to navigate these pinch points.'[412] In this part of the thesis extensive reference is made to the five dimensions identified by OECD aimed at creating what OECD describes as 'a culture of independence'. The dimensions listed by OECD are role clarity, transparency and accountability, financial independence, independence of leadership, and staff behaviour.[413] In relation to each of these dimensions OECD lists a series of guidelines. The author considers each dimension on the strength of the guidelines provided by OECD with reference to the measures under Maltese law and to the measures adopted in other selected countries. Having considered each dimension in turn, the author evaluates what changes, if any, should be introduced to the current regulatory set-up in Malta to pave the way for a comprehensive regime that effectively fosters a culture of independence as advocated by OECD.

2.4.1. Role Clarity

The point of departure in evaluating the independence of a utility regulator is to understand precisely what the role and attendant responsibilities of such a regulator are. OECD stresses that the role and responsibilities of a regulator should be clearly stated at law and that in doing so the regulator must have the necessary powers and resources to fulfil that mandate, noting in particular that the role of the regulator should be clearly defined with regard to the executive branch of government, the legislature and other elected bodies. OECD however observes that in practice overlapping and some grey areas are inevitable given that the regulated sectors are dynamic and therefore subject to continuous change. Significantly OECD states that 'directions' from government to provide the regulator guidance to clarify its role outside the legislative process are to be avoided.[414] This point is of

[412] See OECD, note introducing the guidance it prepared at https://www.oecd.org/regreform/independence-of-regulators.htm.
[413] OECD (2017), *Creating a Culture of Independence: Practical Guidance against Undue Influence, The Governance of Regulators*, p 24 (n 45).
[414] ibid, p 25.

particular relevance in a local context given that the laws setting up MCA and REWS envisage the giving of directions by government.[415]

The national laws establishing MCA and REWS provide for fairly detailed norms listing their respective roles and responsibilities. The functions listed range from generic functions to regulate, monitor and keep under review all regulated activities, to the authorisation or licensing of regulated activities.[416] The Malta Communications Authority Act lists the purposes, functions and powers of the MCA in relation to the various sectors it regulates.[417] The norms under the Malta Communications Authority Act are complemented by other norms under the various sector specific laws enforced by the MCA that further detail the role of the MCA in relation to the utility concerned. In the electronic communications sector, the Electronic Communications (Regulation) Act lists the general objectives that the MCA as the competent NRA must follow in carrying out the regulatory tasks onerous on it by law.[418] In the postal services sector the Postal Services Act only provides for a short provision that states that the MCA is the competent regulatory authority for the sector and is responsible for monitoring and ensuring compliance with the applicable postal services legislation without elaborating any further.[419] In the electronic commerce sector the Electronic Commerce Act details the role of the MCA in performing the supervisory tasks consequential to this sector, empowering the MCA to undertake the 'necessary regulatory measures' if there is a breach of the said Act or of the eIDAS Regulation.[420]

The role of REWS is primarily factored in the Regulator for Energy and Water Services Act which lists in some detail the diverse functions onerous on REWS. In general terms the Act states that REWS is responsible for the regulation of energy and water services and resources to ensure 'greater focus on and increased

[415] See Malta Communications Authority Act, art 6, and Regulator for Energy and Water Services Act art 7.
[416] See also P E Micallef, *Reflections on the independence of utility regulators in Malta* at p 571 et seq (n 49).
[417] Malta Communications Authority Act, art 4(1) and (3).
[418] See Electronic Communications (Regulation) Act, arts 3 to 5A.
[419] See Postal Services Act, art 3.
[420] See Electronic Commerce Act, arts 23A to 23C.

consumer protection' and its independence as required under EU law.[421] The Act specifically lists the various functions that REWS is required to 'independently and impartially implement and administer'.[422] The initial part refers to the functions that REWS has in relation to all the 'practices, operations and activities' it regulates listing among such functions: the granting of authorisations, regulating and securing interconnectivity, establishing minimum quality and security standards, securing and regulating the development and maintenance of efficient systems to provide for all reasonable demands for the services it regulates, regulating the price structure for the regulated activities, and promoting interests of users including vulnerable consumers in relation to the prices charged and the quality of the regulated services.[423] Under separate provisions, the Act lists the functions that REWS has specific to the different utilities it regulates - energy, water and petroleum - with the principal intent of ensuring that there are in place measures to harness, secure and safeguard the continued provision of these essential utilities.[424]

To date, notwithstanding the norms detailing the roles of MCA and of REWS, there is an evident lack of role clarity when determining the exact limits of the competence of on the one hand MCA and REWS, and on the other hand of the competent national authorities responsible for competition and for consumer affairs, thereby on various occasions giving rise to overlap as to which regulatory authority should intervene to deal with an act or omission by a utility service provider.[425] In part the reason for this situation is that the law itself does not always establish clear parameters as to the precise remit of the regulatory authorities concerned, giving rise therefore to considerable ambiguity. In the case of consumer affairs, the DG Consumer Affairs under the Consumer Affairs Act[426] has

[421] See Regulator for Energy and Water Services Act, art 4.
[422] ibid, art 5(1).
[423] ibid.
[424] ibid, art 5(2).
[425] As on the 30 September 2022 the competent national authorities are, in the case of competition the DG Competition, and in the case of consumer affairs the DG Consumer Affairs. Both DGs form part of the MCCAA. This set-up came into being in 2011 with the establishment of the MCCAA. Previously different regulatory structural set-ups were in place in form of government departments dealing with competition and with consumer affairs, initially separately and later as part of one comprehensive regulatory set-up.
[426] Chapter 378 of the Laws of Malta.

a fairly broad remit to deal with consumer protection issues in general, including notably unfair commercial practices and unfair contractual terms, this irrespective of the commercial sector[427], whereas MCA and REWS are empowered to deal with specific consumer issues as provided for under the sector specific legislation that each utilities regulator enforces.[428]

This state of affairs has repeatedly led to a situation where it is not always clear whether the sector specific regulator – MCA or REWS as the case may be – or the DG Consumer Affairs should be dealing with the complaint in question. Regrettably the law fails to determine how such instances of overlap should be dealt with and does not provide for a mechanism determining the procedure to be followed where a complaint may *prima facie* fall under the remit of both the sector specific regulator and the DG Consumer Affairs. In most instances such matters are generally resolved through informal communications between the respective public authorities. This however is not an ideal situation and should be addressed by having in place corrective measures either through a MoU between the public authorities concerned, or better still by clear legislative norms.

Role clarity on the one hand of MCA and of REWS, and on the other hand of the DG Competition in so far as competition issues are concerned, is equally of concern. At law MCA and REWS deal with *ex-ante* competition regulation whereas the DG Competition has exclusive jurisdiction vis-à-vis *ex post* competition.[429] The wording of the law at times can lead to diverse interpretations as to the extent of the role of the regulator concerned. Hence the MCA 'to the extent that it is empowered' under the Electronic Communications (Regulation) Act, must ensure that 'the principles of

[427] See Consumer Affairs Act, Parts VII and VIII.

[428] Hence under Part XII entitled 'End-User Rights' of SL 399.48, MCA enforces specific rights protecting consumers requiring transparency and publication of information to consumers, the termination of contracts and minimum billing information. Similarly, REWS under SL 545.13 enforces diverse specific consumer rights including access to information about energy consumption and billing.

[429] In relation to the MCA reference is made to the Electronic Communications (Regulation) Act, arts 4(1)(b) and 9, and SL 399.48 Parts II, VI and IX, whereas in relation to the REWS reference is made to the Regulator for Energy and Water Services Act, art 5(1)(d) and SL 545.34, regs 4, 46 and 47. The Competition Act (Chapter 379 of the Laws of Malta), art 3 states that the DG Competition and the Civil Court (Commercial Section) have exclusive jurisdiction in the application of the Competition Act.

competition law are fully adhered to in the electronic communications sector'.[430] The same provision, without prejudice to the generality of the norm in question, then lists specific areas in relation to which the MCA is required to act accordingly.[431] In some instances this situation has led to uncertainty about the respective roles of the utilities regulator and of the DG Competition. Hence in a 2004 case submitted by Vodafone Malta Limited for the issue of interim measures by the then Director of the Office of Fair Competition, the former Malta Commission for Fair Trading[432] held that the MCA had the 'same powers' as the aforesaid Director in dealing with issues of a fair competition law in electronic communications.[433] If anything the roles of MCA or of REWS on the one hand and of the DG Competition on the other can give rise to more uncertainty about the remit of the utilities regulator concerned if the issue under examination involves both *ex ante* and *ex post* competition issues. This was precisely the point at issue in a case filed by Melita plc contesting a regulatory decision taken by the MCA.[434] Melita contested a MCA decision whereby the MCA determined that it did not have the remit at law to evaluate a bundle of products which consisted of both regulated and unregulated products, inferring that such an issue should be dealt with under *ex post* competition law and therefore by the national competition authority namely the DG Competition. The Court determined that the MCA did have the competence to determine the regulatory issues in question, referring to the functions onerous on the MCA at law whereby the MCA in accordance with the

[430] See SL 399.48, reg 4(2).
[431] ibid.
[432] The Malta Commission for Fair Trading was a quasi-adjudicative forum that dealt with *ex post* competition law issues. This Commission was established under the Competition Act, 1994 as per Act No XXXI of 1994. The Commission was composed of a magistrate, an economist and an accountant. In 2011 the Commission was replaced by the Competition and Consumer Appeals Tribunal whose role, following amendments as per Act No XVI of 2019, has in turn been assigned to the Civil Court (Commercial Section).
[433] The decision was a preliminary judgement in the case *Director of the Office of Fair Competition v Datastream Limited* as per application number 3 of 2004. See S Meli: *Judgements of the Malta Commission for Fair Trading*, p 192 et seq. The conclusion reached by the Commission is debateable given that the Competition Act, even as it was worded in 2004 when the decision in question was taken, did not assign to the MCA any regulatory role relating to *ex post* competition.
[434] See *Melita plc vs l-Awtorità ta' Malta dwar il-Komunikazzjoni* decided by the ART as per its judgement dated 13 June 2013, and subsequently the judgement by the Court of Appeal (Inferior jurisdiction) of the 30 September 2015, where the Court of Appeal in substance confirmed the judgement of the Tribunal.

laws it is entitled to enforce, ensures 'fair competition in all such services, products, operations and activities.'[435]

Irrespective as to whether one agrees or not with the interpretation given by the Courts in delineating on the one hand the role of the utilities regulators and on the hand of the national competition authority (currently the DG Competition), legislative intervention is called for to avoid the recurrence of similar issues of jurisdiction. It is relevant to note that in relation to competition issues in so far as the electronic communications sector is concerned, there have in the past been attempts to clarify the roles of MCA and of the competent national competition authority. Government in tandem with the MCA and the former CCD had in 2007 published a consultation paper outlining amendments to the law, proposing that the MCA should have a regulatory role in relation to *ex post* competition.[436] The proposals however were not taken forward.

An aspect particular to the roles of MCA and of REWS that can impact their independence in the performance of their respective regulatory functions, is the inclusion of norms at law which empower government through the ministers responsible at a political level for the regulation of the utilities concerned to give 'directions' to the aforesaid regulators. These norms raise serious concerns about the effective and independent exercise of the regulatory roles of MCA and of REWS and probably in the case at least of the electronic communications and energy sectors are incompatible with the applicable EU Directives.[437] This stated, the author notes that whilst these norms in one form or another have been in place since 2000, government through the medium of the ministers concerned has never formally made recourse to the issue of such directions. The fact however remains that such 'directions' may still be given, and if given can impact negatively the effective independence of the regulator concerned.

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[435] Ibid, at p 39 et seq. The Court of Appeal refers specifically to art 4(3)(c) of the Malta Communications Authority Act. This article was subsequently amended and renumbered as art 4(3)(d).
[436] See https://www.mca.org.mt/sites/default/files/consultations/consultation-doc-09-04.pdf.
[437] See also above at p 92 et seq and p 104 et seq.

In the case of the MCA, article 6(1) of the Malta Communications Authority Act empowers the Minister responsible for communications in relation to matters that appear to him to affect the public interest, to give the MCA 'directions in writing of a general character' that are not inconsistent with the provisions of the Malta Communications Authority Act, on the policy to be followed by the MCA in the exercise of its functions at law. The MCA is required to give effect to any such directions 'as soon as may be'.[438] This norm is subject to article 6(1) which requires that the Malta Communications Authority acts 'independently and objectively in the exercise of its functions at law' and does not seek or take instructions' from any other person in relation to the exericse of the tasks assigned to it by law, this without prejudice to any supervision, however so described, that may be undertaken in accordance with the Constitution of Malta.' In this context it is interesting to remember that until the amendments to the Malta Communications Authority Act introduced in 2021, the Prime Minister was actually empowered to delegate part or all of the functions of the MCA to the Minister for communications if the MCA did not comply with any such directions, a draconian measure which the author considers then undermined the independence of the MCA.[439]

In relation to REWS the wording used at law is similar to that used vis-a-vis MCA. The Minister for energy and water services is empowered to give REWS written 'directions' of a general nature in matters that appear to him to affect the public interest. REWS is required to give effect to such directions as soon as may be, with however the caveat that the provisions of article 5 of the REWS Act which list the functions of REWS in so far as these relate to the independent regulatory powers of REWS 'are in no way prejudiced'.[440] Interestingly the importance of safeguarding the independence of REWS in relation to any such directions is emphasised with the insertion of an explicit requirement stating that all communications between the Minister and REWS are to be 'conducted in such a manner as to ensure that at no time shall the independence of the Regulator in the exercise of its functions be, or

[438] See Malta Communications Authority Act, art 6(2).
[439] See Act No LII of 2021, art 59 which substituted art 6 of the Malta Communications Authority Act with a new art 6.
[440] See Regulator for Energy and Water Services Act, art 7(1).

be preceived to be, in any way prejudiced.'[441] Reference is also made to a CJEU ruling in the context of the Electricity Market Directive 2009 where the CJEU emphasised that ministers should not be allowed to put pressure or give instructions to the NRA that might condition a regulatory decision.[442]

The question arises both in relation to MCA or REWS if one of these regulators decides not to follow any such ministerial directions. Given that the directions must be in writing if they are to have the force of the law, one assumes that the minister concerned will only have recourse to the giving of such directions in extreme cases that can be readily justified by him if challenged. In such circumstances it is reasonable to expect MCA or REWS to abide with any legitimate directions. The question however remains - what happens if the regulator concerned refuses to abide with a ministerial direction because for example it considers that doing so impacts negatively its independence.

One other aspect in relation to the faculty of the ministers concerned to issue such directions, is whether maintaining at law such powers is compatible with EU law. The EECC requires that Malta as a member state ensures that the MCA being the competent sector specific NRA exercises its powers 'impartially, transparently and in a timely manner' and that the MCA acts 'independently and objectively' and operates in a transparent and accountable manner in accordance with EU law without seeking or taking instructions from any other body in relation to the exercise of the tasks assigned to it under national law implementing EU Law.[443] The only qualifications that the EECC makes are that adherence by a member state with these requirements does not prevent supervision in accordance with national constitutional law, and that only appeal bodies – in the case of the MCA – ART and the Court of Appeal – have the power to suspend or overturn decisions taken by the MCA.[444] The CJEU in this context emphasised that NRAs must act independently in relation to the tasks assigned to them, and external bodies such as government or

[441] ibid, art 7(3).
[442] Judgement of 11 June 2020, *President Slovenskej republiky*, C-378/19, ECLI:EU:C:220:462 paras 54 et seq.
[443] EECC, art 8.
[444] ibid, arts 6(2) and 7(1).

the national legislature should not be permitted to suspend or annul the performance of such regulatory tasks.[445]

In relation to the electricity sector, the Electricity Market Directive 2019 requires that Member States guarantee the independence of the regulator and that when the regulator is carrying out the regulatory functions onerous upon it, its staff and the persons responsible for its management 'do not seek or take direct instructions from any government or other public or private entity'. Compliance with this norm is without prejudice to 'general policy guidelines issued by government not related to the exercise of the regulatory powers and duties of the regulator.'[446] The CJEU in interpretating the requirements for NRA independence from political influence in the energy sector, has determined that whilst government can give general guidelines, it must not involve itself in the regulatory tasks reserved for the NRAs in accordance with the EU energy Directives.[447]

Ultimately the paramount consideration is whether the faculty to issue such directions should be maintained. If there are valid reasons to do so, should the current norms be amended to ensure in absolute terms that they do not impinge on the independent exercise by the regulators of their regulatory functions at law? OECD argues that directions from government giving the regulator guidance to clarify its role outside the legislative process should be avoided.[448] If the need at a political level is still felt to enable government to issue 'directions', then the reasons for the issue of such 'directions' should be clearly articulated providing for a process subject to transparent norms requiring that the 'directions'are made public and reasons given why they are being issued. Any directions from government that remotely impinge the effective exercise of any regulatory functions of the regulator, should be considered as invalid.

[445] See judgement of 26 July 2017, *Europa Way Srl and Persidera SpA v Autorita' per le Garanzie nelle Comunicazioni (AGCOM) and Others*, C-560/15, ECLI:EU:C:2017:593 paras 49-58.
[446] See Electricity Market Directive 2019, art 57(4).
[447] See judgement of 2 September 2021, *European Commission v Federal Republic of Germany*, C-718/18, ECLI:EU:C:2021 paras 109 et seq.
[448] See OECD (2017) p 25 (n 45).

The author suggests that an additional safeguard should be introduced whereby the giving of any such directions would be subject to the scrutiny of a body that is independent from government. Hence if any issue arises because the regulator refuses to follow or fails to follow any such directions, then any such issue can be referred to such a body. Such a role could be performed by the ART or another independent adjudicative forum empowered to confirm or overrule any such directions. Any such body when considering the appropriateness or otherwise of any such directions would be required to ensure that the independence of the regulator in the effective performance of its regulatory functions is not undermined. If the direction given by the Minister is upheld then the aforesaid body should be requried to give its reasons ensuring that both its ruling and the reasons therefor are made public. This would ensure that the process in reviewing any direction is transparent and that any rulings given thereon are adequately motivated.[449]

Another aspect that lacks sufficient clarity at law concerning the role of the regulators but which in practice involves considerable input from both MCA and REWS, relates to the work on the drafting of legislation that both regulators do for government. Whilst at law the final responsibility for the making of laws lies with government, much of the legislative spade work is in reality done by the regulators. In the vast majority of instances, the initial draft legislation is prepared by the regulators and then submitted to government for its consideration. In the case of primary law, on paper the regulators do not have any express role. In practice however the initial draft legislation is prepared by the regulator concerned and then submitted to government. In most instances the role of the regulator informally continues right through all the stages of discussion before the House of Representatives including during committee stage, with officials from the regulator concerned advising the competent minister on the draft law he is piloting through the House of Representatives. In relation to the making of subsidiary legislation the situation is more pronounced since the competent minister in making such laws may also consult the regulator concerned or act following the recommendation of

[449] See P E Micallef, *Reflections on the independence of utility regulators in Malta* at p 576 (n 49).

the regulator.[450] However even in this regard in most instances by law it is at the discretion of the minister whether to consult with the regulator or act of his own initiative.[451]

Confronted with such a situation the author asks whether there is scope in clarifying at law the role of the regulators in the making of legislation whether as primary or secondary legislation. On a strictly practical level, in many instances government, because of the lack of human resources having the required expertise in utilities regulation, invariably reverts to the regulators for the preparation of draft laws relating to the sectors they regulate. But is this an ideal situation? And if there is no feasible option should then this role of the regulators be reflected at law? The one fundamental question here is whether regulators should initiate and draft the laws that ultimately they will administer and enforce. The main argument against the active involvement of regulators in the making of the laws that they administer and enforce is that the regulators may be tempted to draft norms to suit their own purposes without looking at the wider public interest.

In larger countries the drafting of such laws is done by dedicated entities within government set up for the purpose, which entities are distinct from the regulators. In the case of Malta this is not the case in relation to the sector specific legislation regulating the diverse utilities. It is pertinent to note that to date the involvement of regulators in the drafting of the laws that they administer has never been seriously questioned. There are various reasons for this. The bulk of the legislation that regulators prepare for government is in most instances technical legislation transposing EU norms, and where ultimately the end-product is very similar to the EU norms being transposed. The other consideration is that the responsibility for the law in its final version lies exclusively with government which may vary as it considers necessary any draft laws submitted for its consideration by the regulator concerned.

[450] See for example art 47(1) of the Electronic Communications (Regulation) Act whereby the Minister for communications may either on the recommendation of the MCA or of his own initiative after consulting the MCA, make regulations in relation to the subject matters listed in that article.
[451] See for example the Electronic Communications (Regulation) Act, art 47(1).

Given these considerations there is no practical option to the current practice whereby the regulators - in this case MCA and REWS - prepare the draft laws for government. The outstanding point that remains to be sorted out is whether at law the role of the regulators in the preparation of legislation should actually be stated. The author considers that the law should refer to the role of regulators in the drafting of laws to reflect what in actual practice is the situation with however the caveat that the final responsibility for any laws lies with government. If this is not possible, then government should ensure that it has sufficient human resources able to undertake the task of drafting legislation without directly involving the expert resources of the regulators.

2.4.2. Accountability and transparency

Accountability is fundamental if a regulator exercises its regulatory functions independently of other entities. A regulator cannot be independent in the exercise of its regulatory functions, if then it is not also accountable for the proper conduct of those same functions. This in turn necessitates determining to whom a regulator is accountable. These include the House of Representatives, government through the minister responsible for the utilities regulator assigned to his ministerial portfolio, utilities service providers and consumers of the utilities. A subset of accountability is that if the regulator is to be credible and trusted when providing information to interested parties about the conduct of its functions, then it must act in a transparent manner explaining the reasons for decisions taken whilst ensuring that impacted stakeholders are consulted beforehand.[452]

OECD in guidelines it published on accountability and transparency identifies some measures that should be in place. In substance OECD lists three measures. The first measure is what OECD describes as the 'timely and relevant performance information and reporting' by the regulator to the House of Representatives and to government thereby linking the internal governance of the regulator and its

[452] OECD (2017) at p 26 (n 45).

outputs and outcomes.[453] A second measure identified by OECD is that there is in place an appeals mechanism whereby regulatory decisions taken by the regulator can be contested before an independent adjudicative forum. The third measure focuses on the importance of having continuous interaction, notably prior to the taking of regulatory decisions, between on the one hand the regulator and on the other hand stakeholders, in particular regulated utilities providers. Significantly OECD observes in this context that the legitimacy of a regulator is tied to its engagement with industry by exchanging information, consulting prior to the taking of regulatory decisions, ensuring compliance, and dealing with consumer complaints.[454]

How and to what extent are these measures reflected under the laws regulating MCA and REWS? The norms at law relating to the reporting requirements of both MCA and REWS are in many respects similar. The reporting requirements to the House of Representatives onerous at law on MCA and on REWS are exercised primarily through the submission of reports through the minister under whose remit each regulator falls. Hence MCA is required to submit a copy of its annual statement of accounts to the minister responsible for communications and to the minister responsible for finance together with a copy of any report made by its auditors on that statement or on its accounts.[455] The minister for communications is in turn required at the earliest opportunity and in no case later than eight weeks from the receipt by him of such statement and report, to submit this information to the House of Representatives. MCA is furthermore required by not later than six weeks after the end of each financial year, to submit to the minister for communications and to the minister responsible for finance, a report dealing generally with its activities during that financial year and including any such information as either of the said ministers may from time to time require from MCA. Subsequent to the receipt of such a report, the minister for communications must then submit a copy of the report to the House of Representatives at the earliest opportunity, but in any case not later than eight weeks from his receipt of

[453] ibid.
[454] ibid.
[455] Malta Communications Authority Act, art 21(3) and (4).

the said report.[456] Similar provisions at law apply in the case of REWS with identical timeframes applying in the case of the minister responsible for energy and water services, who is required to submit to the House of Representatives a copy of the annual statement of the accounts of REWS and of any report by its auditors on that statement or on the accounts of REWS, and a copy of the annual report on the activities of REWS for any given financial year.[457] Furthermore the House of Representatives may also scrutinize the conduct of MCA or of REWS during the annual budget debates relating to each regulator, where the competent ministers give a general overview of the operations of the regulators falling under their remit, enabling the opposition spokespersons to focus on any relevant issues concerning the activities undertaken by the regulator concerned.

Another tool that can enable the House of Representatives to monitor the operations of MCA or of REWS about their regulatory work is through the making of parliamentary questions. This is a tool that any member of the House of Representatives may use in obtaining information about the conduct of the regulatory functions of MCA or of REWS. Parliamentary questions may relate either to specific cases or generally to the overall conduct of the activities of a regulator. Occasionally such questions may serve to highlight shortcomings thereby soliciting remedial measures. Otherwise the other occasion where the House of Representatives has the opportunity to discuss the activities of MCA or of REWS is when a bill relating to the regulatory work of either regulator is submitted for discussion by the House of Representatives. On such occasions, particularly during the second reading and the committee stage, various matters may be raised relating to the work of the regulator concerned, requiring response or clarification from the competent minister in relation to the points raised. This in practice

[456] ibid, art 24.

[457] Regulator for Energy and Water Services Act, arts 28 and 30. The wording used is practically identical to that used under the Malta Communications Authority Act.

however rarely occurs given that the bulk of new legislation concerning MCA or REWS is generally made through subsidiary legislation.[458]

One questions whether the totality of these measures does really provide for effective accountability by MCA and by REWS to the House of Representatives. Both regulators given the importance of their respective roles in relation to society in general should be subject to more strigent and direct forms of scrutiny by the House of Representatives. It is the House of Representatives collectively that is responsible for the approval of the laws establishing the regulators and defining their regulatory functions and the parameters in which they operate. It is therefore the House of Representatives that should ultimately be responsible to ensure that each regulator acts in accordance with the norms regulating its operations and hence be responsible for effectively monitoring their operations continuously.

As stated above both MCA and REWS report directly to the ministers responsible for the sectors that each regulator oversees. It is therefore the minister in question who provides the House of Representatives with the information that is in turn provided to him by the regulator concerned. One questions whether this should be so. The importance of improving existing scrutiny by the House of Representatives should not be underestimated. This is a point that has time and again been raised in different countries. Hence in a report to the House of Lords in the UK it was emphasised that not only is parliamentary scrutiny essential, but that it is the duty of the legislature to ensure that its scrutiny of the activities of the regulator concerned is effective.[459]

The author suggests that MCA and REWS should periodically be required to submit reports on their activities to a select committee of the House of Representatives in dedicated hearings whereby the House through the medium of such a committee evaluates and scrutinises in depth the operations of the regulators, where necessary seeking clarifications directly from them thereby affording the aforesaid

[458] It is however possible for a member of the House of Representatives to seek clarifications in relation to new subsidiary legislation concerning a regulator by making a PQ following the tabling of such subsidiary legislation before the House.
[459] See House of Lords, Select Committee on the Constitution, *The Regulatory State: Ensuring its Accountability* at p 7 et seq (n 87).

committee the faculty to probe the proper exercise by each regulator of its respective regulatory functions. Such a role could be undertaken by the Public Appointments Committee which currently considers appointments to key public positions or the Standing Committee on Public Accounts (Public Accounts Committee).[460] Rather than creating a new dedicated committee, the role of the Public Appointments Committee or of the Public Accounts Committee can be extended to monitor on a on-going basis the conduct of regulatory activities by the regulators. This would serve to contribute to a higher degree of accountability where each regulator would in the conduct of its work also be subject to continuous oversight by the House of Representatives.

Conversely in so far as government is concerned, the sum of measures relating to the accountability of MCA and of REWS to government are excessive when one considers in particular that a minister may issue directions of a general character that can impact on the independent exercise of the regulatory functions by the regulator. An examination of the provisions of the laws regulating MCA and REWS reveals that government, primarily through the minister concerned, enjoys considerable influence tantamount at times to indirect control over the regulator concerned. This is evident when one for example considers that at present the chairman and members making up the headship of each regulator are appointed by the minister concerned for periods determined by him within the parameters of the law and that any re-appointments of the same persons are also approved by the said minister.[461] Such powers effectively can be used as a means of influencing such members once appointments and re-appointments are dependent on the discretion of the minister concerned. Equally intrusive on the independence of the regulators, are the norms whereby each regulator is required to obtain approval by government of its financial estimates relating to its income and expenditure[462], for the investment of any funds not immediately required for expenditure or for the

[460] See Public Administration Act, Chapter 595 of the Laws of Malta, art 7, and Standing Orders of the House of Represenatatives as per SL Const.02 of the Laws of Malta, standing order 120E which details the role of the Standing Committee on Public Accounts.
[461] See Malta Communications Authority Act, art 3(2), and Regulator for Energy and Water Services Act, art 3(2).
[462] See Malta Communications Authority Act, art 18, and Regulator for Energy and Water Services Act, art 25.

borrowing of such sums that exceed prescribed amounts at law where this is required for the carrying out of functions of the regulator as prescribed by law.[463]

Another means of making a regulator accountable is by having in place an independent adjudicative forum where aggravated stakeholders whether regulated service operators or consumers can contest any regulatory decision taken. OECD states that it is imperative that there is in place 'an easy, fair, timely complaints and appeals process for regulators' decisions, which is also independent and located outside government.'[464] At law regulatory decisions taken by MCA and by REWS are subject to a double tier of judicial review. In the first instance regulatory decisions taken by MCA or by REWS may be contested before the ART which is an independent adjudicative tribunal presided by a magistrate assisted by two non-voting 'assistants'. The ART is composed of 'sections' dealing with different categories of cases specific to each section. In the case of the utilities sectors regulated by MCA and by REWS, contestation of their regulatory decisions are assigned to the Communications Panel and to the Regulation Panel respectively.[465] The assistants in question are chosen by the President of Malta acting on the advice of the Prime Minister from amongst persons having 'previous experience and special qualifications in a particular field of expertise' falling within the competence of the Tribunal.[466] Though the presiding magistrate may consult the assistants concerned, he is not bound by their opinions and the final decision of the Tribunal rests exclusively with him.[467]

Decisions taken by the ART in relation to appeals from regulatory decisions taken by MCA or by REWS can be appealed before the Court of Appeal in its inferior competence composed of a single judge, both by the party contesting the regulatory decision taken or by the regulator concerned whose decision has been contested before ART. It is interesting to note that in the case of contestations of

[463] See Malta Communications Authority Act, arts 14(5) and 15, and Regulator for Energy and Water Services Act, arts 21(5) and 22.
[464] See OECD (2017) at p 26 (n 45).
[465] See Administrative Review Tribunal (Establishment of Panels) Regulations, as per SL 490.4 of the Laws of Malta, regs 2, and 3(8) and (9).
[466] Administrative Justice Act, Chapter 490 of the Laws of Malta, art 10(3).
[467] ibid, arts 3 et seq.

ART judgements futher to REWS decisions, appeals before the Court of Appeal can only be filed on a point of law, whereas appeals further to ART judgements concerning contestations of MCA decisions can be filed on both points of law and, or of fact.[468] Otherwise the procedural norms applicable in relation to contestations of MCA and of REWS regulatory decisions before ART are similar, with proceedings held in public in accordance with the principles listed in the Administrative Justice Act.[469] The ART is required to take into account the merits of an appeal and may in whole or in part confirm or annul the regulatory decision being contested. In doing so the ART is required to give its reasons in writing for its decision which decision is to be made public and communicated to the parties to the appeal.[470]

The third means by which a regulator may be held accountable for the conduct of its regulatory activities is through interaction with its stakeholders. Article 4A of the Malta Communications Authority Act requires that the MCA before taking a decision in accordance with any law that it is empowered to enforce which decision has a significant impact on a communications market it regulates, makes available to interested parties 'a statement of the proposed decision' affording such parties the opportunity to comment thereon within a period which the MCA considers reasonable which period having regard to the complexity of the matter, save in exceptional circumstances, must not be less than thirty days.[471]

Where the MCA takes a decision on end-user or consumer issues, the MCA is specifically required to take into account the views of end-users or consumers, in particular of end-users with disabilities, manufacturers and undertakings providing communications services and, or networks. The MCA is furthermore required to ensure that the result of any consultations it carries out are made through a single information point through which such consultations can be accessed and that such

[468] See Regulator for Energy and Water Services Act, art 34, and Malta Communications Authority Act, art 41.
[469] See Administrative Justice Act, art 3.
[470] See Malta Communications Authority Act, art 39(1), and Regulator for Energy and Water Services Act, art 32(4).
[471] See Malta Communications Authority Act, art 4A(1). If the decision relates to electronic communications the period must in all instances be of at least thirty days.

results are publicly available, other than for information that is considered to be confidential.[472]

Article 4A of the Malta Communications Authority Act makes exception if such consultation relates to certain situations namely: any dispute or complaint dealt with by the MCA; the exercise of enforcement powers by the MCA; and cases that the MCA considers need to be dealt with urgently to safeguard the interests of users in accordance with EU law. It is pertinent however to note that in the case of disputes and complaints, the MCA is bound by other norms that require that where applicable the parties involved are given the opportunity to make their submissions.[473] In so far as the exercise of enforcement powers is concerned, before deciding to impose the sanctions listed under article 31 of the Malta Communications Authority Act, the MCA is required to write to the person against whom such sanctions are being considered, warning that person of the measures that may be taken and the reasons therefor, giving him the opportunity to make his submissions thereto.[474]

The REWS unlike the MCA does not at law have an express norm requiring it to seek the views of impacted stakeholders prior to the issue of a regulatory decision. The Regulator for Energy and Water Services Act lists amongst the functions onerous on REWS a requirement that when preparing 'its position and actions' REWS undertakes 'effective stakeholder and regulated entity involvement and consultation.'[475] Otherwise the law does not elaborate further. In so far as the taking of sanctions are concerned, the Act states that when imposing an administrative penalty REWS is required to notify by judicial letter the party against whom the penalty is to be imposed, informing that party of the amount being imposed, the reasons therefor and affording the said party reasonable opportunity

[472] ibid, art 4A(2), (3) and (4).
[473] See the Malta Communications Authority Act, art 44 which regulates the procedure applicable in the case of disputes lodged by end-users and the regulatory decision entitled *MCA Guidelines for Inter-Operator complaints, disputes and own initiatives investigations* published on the 7th January 2011 at https://www.mca.org.mt/articles/mca-guidelines-inter-operator-complaints-disputes-and-own-initiative-investigations-070111.
[474] See the Malta Communications Authority Act, art 32 et seq. In cases of urgency the MCA is empowered to take interim measures including ordering the cessation of any act or omission.
[475] See the Regulator for Energy and Water Services Act, art 5(1)(m).

to make its submissions and to propose any remedies to rectify any act or omissions as may be required by REWS.[476] Furthermore, without prejudice to the specific norms regulating MCA and REWS in relation to the respective norms on consultation, it is relevant to note that public authorities such as therefore MCA and REWS in accordance with government policy are required to undertake public consultation prior to the issue of a regulatory decision.[477]

2.4.3. Financial Independence

One of the pillars to enable a regulator to perform its regulatory functions independently is access to appropriate funding to carry out its mandate effectively.[478] OECD observes that the source of funding can impact the financial independence of a regulator if it is funded through general public revenue where it can be easier for government to influence a regulator by reducing or withholding access to resources otherwise available to the regulator.[479] In the case of MCA and of REWS the main source of funding is derived from the payment of licence or authorisation fees that the regulated industry pays each regulator, thereby minimising the influence that may be exercised by government by for example reducing the financial resources available.

OECD remarks that the way funding needs are determined, how they are decided and the extent to which the regulator can manage these funds autonomously can be more relevant than the actual source of the funding.[480] Financial independence does not mean that a regulator should have unfettered power to raise as much funds as it wants, and to use such funds as it deems fit. This must be tempered by accountability of the regulator to the legislature and, or to government as to how it uses the funds available and for what purposes. This in turn leads to the

[476] ibid, art 13(1).
[477] See https://meae.gov.mt/en/Public_Consultations/Pages/Home.aspx. Such consultation also applies to proposed legislation unless the legislation is strictly tied to the implementation of an EU directive.
[478] See OECD (2016) at p 79 (n 45).
[479] ibid, p 14.
[480] OECD (2017) at p 27 (n 45).

consideration as to which entity should have the final say in approving the budgetary measures of the regulator - the legislature, government or both - and what should their precise roles be if one or both of these entities are involved in the approval process.

OECD lists a number of guidelines on financial independence of regulators which can serve to identify the norms to be applied so that MCA and REWS have financial independence subject to appropriate safeguards at law ensuring due accountability.[481] These guidelines include that:

- The law clearly establishes the source of funding for the regulator.
- The needs of the regulator are identified on the basis of adequate information provided by the regulator to the legislature and, or to government on the costs and resources needed to fullfil its mandate in the course of the budget cycle concerned.
- The budget of the regulator is decided on a multi-year basis. OECD suggests a minimum of a three year budget allocation since this serves to minimise the potential for undue influence by third parties, including government, on the regulator.
- The decision by the legislature and, or government approving the budget for the regulator is subject to a transparent and clearly defined process. If the revenue is from the industry, then an independent and accountable channel to provide the allocation to the regulator, such as through a ring-fenced process involving the legislature, should be catered for.
- The regulator has appropriate and accountable autonomy in spending its budget, guided by rules of public spending and procurement coupled with auditing obligations and good practices. If the regulator has its own spending rules these should be subject to accountability measures such as demonstration of effective and appropriate spending through key performance measures on its performance.

[481] ibid, p 27.

- Interference with the use of the regulator of its budget should be curbed provided the regulator abides with what OECD describes as 'the general rules of orderly budgetary behaviour with legitimate justification.'[482] If the need for intervention arises this should be resorted to on the basis of a transparent and accountable process justifying the need for such intervention.
- Both external and internal audit of the budget of the regulator is undertaken. External evaluation of the spending of the regulator is to be done by an independent apolitical body, whereas internal evaluation must include performance information, the initial budget proposal of the regulator, and the use of cost recovery mechanisms.[483]

The situation relating to the financial independence of MCA and of REWS in the light of the guidelines listed by OECD leaves much to be desired. The principal norms applicable in relation to both regulators are based on a similar set of norms. It is pertinent to note that the making by the EU in recent years of updated regulatory frameworks in relation to the regulation of the electronic communications and electricity sectors, provides for more onerous requirements than was applicable under the earlier EU regulatory regimes.[484]

In relation to the electronic communications sector, the EECC requires that Member States ensure that NRAs have 'adequate technical, financial and human resources to carry out the tasks assigned to them', and that furthermore NRAs 'have separate annual budgets and have autonomy in the implementation of the allocated budget' which budgets are to be made public. The EECC provides that financial autonomy of a NRA 'shall not prevent supervision or control in accordance with national constitutional law' which control is to be exercised in a transparent manner and made public. It is pertinent to note here that the CJEU did explain that

[482] ibid, p 28. As example of 'interference' OECD lists spending-caps and political discretion on budget autonomy.
[483] ibid, p 28.
[484] See EECC, arts 6, 8, and 9, and the Electricity Market Directive 2019, art 57(5).

budgetary monitoring by the national legislature does not impair the independence of an NRA as guaranteed by the EU legislative framework.[485]

The Electricity Market Directive 2019 provides that in order to protect the independence of the regulator, Member States must ensure that the regulator 'has a separate annual budget allocation and autonomy in the implementation of the allocated budget.' This Directive also states that Member States may provide for *ex post* control of the annual accounts of the regulator by an independent auditor.[486] In relation to the other utilities the applicable EU laws do not envisage any specific rules in relation to the financial independence of the regulator.

In the case of the MCA, the law expressly states that the MCA is to be 'afforded adequate financial and human resources to carry out its functions' in relation to the applicable laws relating to electronic communications.[487] Significantly there is no similar provision in relation to the other utilities that the MCA regulates. There does not appear to be any valid reason why such a provision should not apply to all the utilities regulated by the MCA. In so far as the REWS is concerned there is no similar provision at law. In the light of the applicable EU norms the author considers that the Maltese legislator is required to amend the applicable legislation in order to reflect fully the revised EU norms in so far as these impact the financial independence of the MCA and of the REWS. In doing so there does not appear to be any valid reason why the required norms on financial independence should not then apply to all the utilities regulated by the MCA and by the REWS.

The MCA and the REWS are governed by similar financial norms. In conduct of their functions the MCA and the REWS are required as far as is practicable, to meet any expenditure related thereto out of their revenue.[488] For such a purpose they are required to levy such fees, rates or payments however so described as provided for under the laws that relate to the exercise of their powers and functions. Both

[485] See judgement of 14 September 2015 in *Autorita' per le Garanzie nelle Comunicazione v Istituto di Statistica – ISTAT and Others*, C-240/15, ECLI:EU:C:206:606 paras 39 et seq.
[486] Electricity Market Directive 2019, art 57(5)(c) and (6).
[487] Electronic Communications (Regulation) Act, art 3(2).
[488] Malta Communications Authority Act, art 14(1), and Regulator for Energy and Water Services Act, art 21(1).

regulators are required to prepare the estimates of their income and expenditure for each financial year, taking into account any funds or other monies that may be paid to them out of the Consolidated Fund during the relevant financial year, and to ensure that their total revenues are enough to meet all the sums chargeable to their revenue accounts.[489]

The MCA and the REWS are required to make their estimates in such form and to include such information and such comparison with previous years as the minister responsible for finance may direct.[490] The MCA and the REWS are subsequently required to forward their estimates to the ministers to whom they answer to and to the minister responsible for finance.[491] The utilities minister concerned must then at the earliest opportunity, and in any case not later than six weeks from his receipt of the estimates, approve the said estimates with or without any amendment. In doing so the utilities minister concerned is required to consult with the minister responsible for finance.[492] The utilities minister concerned on receiving a copy of the estimates is then required at the earliest opportunity and in any case not later than eight weeks from receipt, to cause such estimates to be laid down before the House of Representatives.[493] Each regulator is required to keep 'proper accounts and other records in respect of its operations' and to prepare a statement of accounts for each financial year.[494] These accounts must then be audited by an auditor appointed by the regulator and approved by the utilities minister concerned. The minister for finance after consultation with the utilities minister concerned may require that such accounts be audited or examined by the Auditor General who in doing so is empowered to carry out any such physical checking and

[489] Malta Communications Authority Act, art 18(1) and (2), and Regulator for Energy and Water Services Act, art 25(1) and (2).
[490] Malta Communications Authority Act, art 18(3)
[491] In relation to the MCA the competent minister is the minister responsible for communications whereas in relation to REWS the competent minister is the minister responsible for energy and water services. See Malta Communications Authority Act art 2 in relation to the definition of 'Minister', and the Regulator for Energy and Water Services Act art 2 in relation to the definition of 'Minister'.
[492] Malta Communications Authority Act, art 18(4) and (5).
[493] See ibid, art 20. If the House of Representatives is not in session then the minister is required to submit such estimates within eight weeks from the beginning of the next session of the House.
[494] Malta Communications Authority Act, art 21(1), and Regulator for Energy and Water Services Act, art 28(1).

other certifications as he considers necessary.[495] At the end of each financial year each regulator is required to submit a copy of the duly audited statement of accounts together with a copy of any report by the auditors relating thereto to the utilities minister concerned and to the minister responsible for finance. The utilities minister concerned is then required at the earliest opportunity and in any case not later than eight weeks from receipt, to cause such statement and report to be laid before the House of Representatives.[496]

A point raised by OECD that can impinge on the exercise of the regulatory functions of a regulator is the cost of major and unanticipated court actions. OECD observes that court action can lead to significant legal costs not catered for in the budgeted estimates which in turn may condition the decision of a regulator whether to take action. This can lead to what OECD describes as 'substantial challenges' in relation to the approval by government of substantial funds for major unanticipated courts actions.[497] To date this issue has not arisen in relation to either the MCA or the REWS. The occurrence of such an issue in the near future should not however be discounted. In recent years the number of constitutional cases contesting decisions taken by regulators in other sectors relating to the imposition of substantial financial penalties or other sanctions is increasingly taking a toll on the ability of the regulators concerned to contest the issues raised, more so when the litigants involved are able to engage reputable and well-resourced law firms in their endeavours to overturn such regulatory decisions.[498] If regulators are to be able to contest successfully such litigation they must be in a position to engage expert lawyers – in this case probably well-versed in constitutional, administrative, human rights and EU law – to assist them in any consequential lawsuits. Otherwise a situation may very well arise where a regulator is reluctant to take effective action

[495] Malta Communications Authority Act, art 21(1) and (2), and Regulator for Energy and Water Services Act art 28(1) and (2). The Auditor General is an officer appointed under the Constitution of Malta who acts independently of government and oversees the proper auditing of government and of public authorities amongst others. See the Constitution of Malta, art 108.
[496] See Malta Communications Authority Act, art 21(3) and (4).
[497] See OECD (2014) at p 101 (n 45).
[498] A case in point is the Federation of Estate Agents judgement given by the Constitutional Court on the 3rd May 2016.

because it considers that it is not properly resourced to dispute matters successfully.

There is currently no express procedure whereby the MCA or the REWS are on a regular basis required to report directly to the House of Representatives about their revenue and expenditure and in doing so to answer any questions that may be raised. The process, as described earlier, is that any estimates and reports on expenditure and revenue to the House of Representatives are primarily done through the aegis of the utilities minister concerned.

The author considers that the House of Representatives should have a more pro-active role whereby it is able to intervene directly so that the MCA and the REWS have the required funding to perform their regulatory functions whilst ensuring that they are held accountable for the expenditure incurred. The current norms at law should be revised whereby the approval of estimates and the subsequent submission of the report on revenue and expenditure of the regulator should be made directly and on a regular basis to a dedicated select committee of the House of Representatives such as the Public Accounts Committee. Such a measure would be conducive to a more transparent process where scrutiny and approval would be the responsibility of a dedicated committee of the House of Representatives that ensures that ministerial approval of the budgets required for the MCA and for the REWS is not withheld unreasonably.

2.4.4. Independence of the headship

OECD considers the nomination process of the persons making up the headship of a regulator as a crucial element since lack of transparency and accountability on the process and the criteria on the basis of which such nominations by government are made, can 'create strong perception of undue proximity' between the persons

nominated and government.[499] OECD lists the following guidelines as being conducive to the independence of the headship of a regulator, namely that:

- The nomination process should be transparent and accountable through specific formal requirements at law.
- The appointment process should be transparent and accountable, and subject to selection criteria. It must be clear who is ultimately responsible for taking the final decision on the choice of the person appointed and the terms and conditions of the appointment.
- Where the headship of the regulator consists of a board, then the appointments of the board members should be on a staggered basis to maintain continuity of knowledge and expertise. Significantly OECD emphasises that terms of office 'should be designed in a way that ensures that board members' terms cut across electoral cycles', advocating also that terms of office should be of a minimum of five years in order to allow for knowledge and expertise development of the board members.
- Measures to safeguard the professionalism and integrity of the board members to avoid perceived or actual undue influence, whereby the persons concerned are required to declare any interest or assets in the regulated industry.
- The grounds for terminating an appointment should be clearly stated at law and should relate to serious cases of behaviour. Any such termination should involve the legislature and, or the judiciary to ensure transparency and fairness of the process.[500]

Until 2021 the appointment of the board members of the MCA and of the REWS was the prerogative of the competent utilities minister.[501] Following amendments to the law in 2021 the norms regulating the appointment of both MCA and REWS board members were substantially amended minimizing in part the then unfettered

[499]OECD (2017) p 28 et seq (n 45).
[500] ibid, p 29.
[501] Until 2021 both in the case of the MCA and of the REWS, no person nominated as chairman had been subjected to a pre-appointment hearing before the Standing Committee on Public Appointments as per art 37 of the Public Administration Act (Chapter 595 of the Laws of Malta).

discretion of the competent minister in making such appointments.[502] These amendments were introduced in adherence to EU requirements relating to the electronic communications and electricity sectors which amendments apply comprehensively to the respective MCA and REWS Boards notwithstanding that both MCA and REWS also regulate other utilities.[503] Hence the Minister for communications is required to appoint the MCA Board members from 'amongst persons of recognised standing and professional experience on the basis of merit, skills and relevant experience'. In doing so the Minister is required to act 'in an open and transparent manner'.[504] As to the appointment of the REWS Board, the Minister responsible for energy and water services is required to appoint the Board members based 'on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience'.[505]

A difference between the MCA and REWS regimes regulating the appointment of the board members is the length of the term of office, where in the case of the MCA, board members are appointed for a term of office of between three to six years, whereas in the case of the REWS the term of office of the board members is of five to seven years. In both instances members are eligible for re-appointment for another term. The REWS Board appointments are done on a rotation scheme basis whereby the terms of office of the individual members are not the same, this with the scope of ensuring continuity in the decision-making process of the REWS Board.[506] In the case of the MCA the law limits itself to stating that the Minister is required to 'ensure the continuity of decision-making' by the MCA.[507]

Different norms apply in relation to the dismissal of board members of the MCA and of the REWS. The reasons why a member may be dismissed during his term of

[502] In relation to the MCA see Act No LII of 2021, art 54(a) which amended art 3 of the Malta Communications Authority Act. In the case of the REWS see Act No XLIX of 2021, art 2 which substituted art 3 of the Regulator for Energy and Water Services Act with a new art 3.
[503] See EECC, art 7, and the Electricity Market Directive 2019, art 57.
[504] See Malta Communications Authority Act, art 3(2).
[505] See Regulator for Energy and Water Services Act, art 3(6).
[506] Ibid, art 3(7).
[507] See Malta Communications Authority Act, art 3(2).

office in some instances differ. Significantly in the case of the MCA a board member may be dismissed because of 'infirmity of mind or of body or of any other cause' if this effectively means that the member is unable to continue in his role. Conversely no such grounds are catered for in relation to the dismissal of a REWS board member. A MCA board member can be dismissed if he is convicted of a criminal offence affecting public trust, of theft or fraud, or of knowingly receiving property obtained by theft or fraud or of bribery or of money laundering. In contrast a REWS board member may be dismissed if he is found guilty 'of misconduct under any law'. Another ground for dismissal of a MCA board member is if the member fails to perform his duties for a prolonged period without any valid justification, with the law also providing that failure to attend for board meetings for a continuous period of six months is sufficient cause for dismissal. There is no similar ground for dismissal in relation to REWS board members. The law both in relation to MCA and to REWS board members provides that acts by a board member that can compromise his independence may be cause for dismissal.[508]

In relation to the procedure followed in the case of a dismissal of a REWS board member, the law simply limits itself to stating on what grounds the Minister may dismiss a member without providing any remedy for the member dismissed.[509] The situation is radically different in case of MCA board members whereby the law requires the Minister to make public the removal of a board member by not later than the effective date of removal. In doing so the Minister is required to provide the member concerned with a statement of the reasons why he is being removed. The member concerned has the right to request that such statement is made public by the Minister.[510] Following the 2021 Amendments[511] a member who is dismissed is also entitled to contest his dismissal before a court of law.[512] In this context reference is made to a CJEU judgement that arose following institutional changes in

[508] The wording used is however substantially different. See Malta Communications Authority Act, art 3(6)(b), and Regulator for Energy and Water Services Act, art 3(6)(a) and (b).
[509] Regulator for Energy and Water Services Act, art 3(6).
[510] ibid, art 3(7).
[511] Unless stated otherwise in this Chapter the reference to 'the 2021 Amendments' is to Act No XLIX of 2021 and Act No LII of 2021.
[512] See Act No LII of 2021, art 54 which amended art 3(7) of the Malta Communications Authority Act.

the regulatory set-up in Spain where the CJEU emphasised the importance that EU Member States have in place safeguards against premature dismissals of the headship that may impact negatively on NRA independence.[513] Furthermore both MCA and REWS board members are required to disclose any interests in any contract made or proposed to be made to their respective boards. In such instances the member concerned is required to withdraw from any meetings where the contract in question is discussed. If the interest is considered such as to disqualify him, the member is required to report the fact immediately to the Minister and submit his resignation.[514]

When discussing the independence of leadership within the Maltese context two points need to be factored. The first is that the number of suitable persons who have the necessary experience and knowledge of the regulated utilities in the light of the specifics of local circumstances is limited. The few persons who might be suitable, invariably work for the regulated industry and would in most instances be reluctant to leave their post with the private sector for a challenging position with possibly a much lower remuneration package and restricted long term career prospects given that persons making up the headship of the regulator are eligible only once for a reappointment.[515]

A second consideration arises when the term of office comes to a close and the person concerned wishes to continue working in the industry that as a board member he previously supervised. In various countries such persons are debarred for some time from doing any work in the regulated industry. Currently in so far as board members are concerned at law there are no restrictions that debar former board members from working in the private sector for whose oversight they were previously responsible.

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[513] See judgement of 19 October 2016, *Xabier Ormaetxea Garai, Bernado Lorenzo Almendross v Admistracion del Estado*, C-424/15, ECLI:EU:C:2016:780, paras 51 et seq. See also judgement of 8 April 2014, *European Commission v Hungary,* C-228/12, ECLI:EU:C:2014:237, paras 60 et seq.

[514] Malta Communications Authority Act, art 3(9), and Regulator for Energy and Water Services Act, art 3(8).

[515] Art 3(2) of the Malta Communications Authority Act states that a member is eligible for re-appointment 'for another term'. Art 3(7) of the Regulator for Energy and Water Services Act is more explicit and clearly states that members can only be re-appointed once.

There are two points to be made in this regard. The first is that in the case of the MCA until 2014, board members for a period of one year from the termination of their term of office were not allowed if not with the prior approval of the MCA, to 'accept any office, consultancy or employment where in the course of such office, consultancy or employment, the member or officer would be in a position to make use of confidential information acquired by him in the exercise of his functions' to the detriment of the MCA or undertakings regulated by the MCA.[516] A person acting in breach of this norm was liable to a maximum administrative fine of ten thousand Maltese liri.[517] This provision was deleted in 2014.[518] The second point is that the Public Administration Act envisages some restrictions in relation to MCA and REWS officers whose work entails regulatory functions, when such officers terminate their employment with the regulator concerned. This Act requires that any such officer enters into an undertaking whereby for a period of up to two years from termination of his employment, he agrees not to enter into 'a relationship of profit with any private enterprise or non-government body' that he may have dealt with for a period of up to five years preceding the termination of his employment with the regulator concerned.[519]

In so far as the MCA and the REWS are concerned, what is disconcerting is that whilst such a requirement applies to officers who are answerable to the respective headships, the board members who make up the headship of both regulators and who are ultimately responsible for the conduct of regulatory affairs, are as things stand not bound by similar norms. Logically, one would assume that the persons making up the headship and therefore ultimately responsible for the conduct of the business of the regulator would be tied by such norms rather than the officers answerable to the headship.

[516] See the Communications Laws (Amendment) Act 2007, art 47 which amended art 45 of the Malta Communications Authority Act by including a provision regulating the employment of members or officers of the MCA subsequent to the termination of their engagement with the MCA.
[517] This is the equivalent of €23,294.
[518] See the Communications Laws (Amendment) Act 2014, art 34 which amended art 45 of the Malta Communications Authority Act.
[519] Public Administration Act, art 4(5).

The 2021 amendments have at least on paper improved matters, doing away with the almost absolute discretion of the ministers concerned when appointing the respective headships of the MCA and of the REWS. One however needs to see how in practice the norms consequential to these amendments will be applied once board members are to be chosen on the basis of their experience and skills and following new more transparent appointment procedures. What is somewhat puzzling is that different wording is used by the legislator in detailing the criteria and the procedure to be followed when making such appointments to the MCA and REWS headships. The difference in part at least owes its origin to the wording in the applicable EU legislation, which in turn has broadly though not entirely been reflected in the Maltese legislation transposing the aforesaid EU legislation. Hence article 7(1) of the EECC states that the members making up the headship are to be chosen 'from among persons of recognised standing and professional experience, on the basis of merit, skills, knowledge and experience and following an open and transparent selection procedure'. On the other hand, article 57(5)(e) of the Electricity Market Directive 2019 provides that members of the REWS board are to be appointed on the basis of 'objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience for the relevant position in the regulatory authority'. When comparing the above mentioned EU norms there are some interesting and significant differences. One obvious example relates to the procedure to be following in choosing the headship members. The EECC refers to 'an open and transparent selection procedure' whereas the Electricity Market Directive 2019 refers to 'an independent and impartial procedure' making no express reference to an open and transparent selection procedure.

The author considers that it would be more appropriate to have one procedure based on identical selection criteria. There does not appear to be any valid grounds why a set of uniform norms relating to the appointment, dismissal and terms of office should not apply to members of both the MCA and the REWS boards. Having different norms which supposedly purport to attain the same purpose can lead to conflicting procedures when in reality there should not be any. Regrettably the

differences in the applicable EU norms have also been reflected under Maltese law where the legislator opted to use similar though not identical wording. One such notable difference in that whereas article 7(1) of the EECC refers to 'an open and transparent selection procedure', article 3(2) of the Malta Communications Authority Act uses the words 'the Minister shall act in an open and transparent manner' omitting the use of the words 'selection procedure'. The author considers that this variance omits an important aspect in relation to the appointment of the persons making up the MCA Board - namely that of having in place an 'open and transparent' selection procedure, which variance may therefore be conducive to unwarranted ministerial discretion in the selection of the board members.

One measure that was not factored in the 2021 amendments was the scrutiny and sanctioning of board appointments by a body that is independent of government. Currently the Public Administration Act requires that the chairmen of MCA and of REWS are scrutinized by the Standing Committee on Public Appointments.[520] However, though this committee is empowered to conduct pre-appointment hearings of the person being proposed for appointment as a chairman, the final decision on the effective appointment or otherwise of the person nominated lies exclusively with the minister concerned. Furthermore, this process does not extend to the other board members.[521]

It is relevant in this regard to refer to a curiousity concerning exclusively REWS which has given cause to some confusion in relation to the use of the term 'the Regulator' in lieu of the term 'the Authority' which latter term was previously used to refer to the MRA, the former regulator for energy and water services.[522] The Regulator for Energy and Water Services Act is quite emphatic when referring to the 'Regulator' when it expressly states that the 'Regulator for Energy and Water Services, hereinafter referred to as the '"Regulator" consists of 'a Chairman and not

[520] ibid, arts 37 and 38 and the Second Part of the Fifth Schedule.
[521] ibid, art 38(5)
[522] See art 3(1) of the Malta Resources Authority Act, 2000 which provided that the Authority consisted of a chairman and not less than four and not more than six other members. Art 2 of the same Act stated that the word 'Authority' meant the Malta Resources Authority as established under art 3 of the said Act.

less than four and more than six other members.'[523] Interestingly however until quite recently under the Public Administration Act the legislator assumed that the 'Regulator' in the case of the REWS only consisted of the executive head of the REWS, presumably the chairman thereof. The Second Part of the Fifth Schedule of the Public Administration Act in the list of the posts of the heads of various regulatory entities included 'the Regulator for Energy and Water Services'. Reading through the other headship positions listed, it is evident that the legislator had in mind only the individuals holding the most important executive position in the regulatory entity concerned.[524] If this was not the case, then the situation concerning the REWS under the Regulator for Energy and Water Services Act would have been unique. This would have meant that, as distinct from the other headships listed in the Fifth Schedule, the chairman together with the other members of the REWS Board were subject to the review process envisaged under article 38 of the Public Administration Act. In this regard a PQ was made in March 2019 by MP Dr Chris Said whereby government was asked to clarify whether the reference to 'Regulator' in the aforesaid Fifth Schedule referred to the chairman and to the other members of the REWS Board. Though the reply to this PQ was non-sensical, government did state that it would be making a clarification to the law.[525] The legislator in fact amended the relevant provision in the Fifth Schedule to clarify that the norm in question applied only to the chairman of the REWS.[526]

This stated, it would certainly not be amiss to require that the chairman and all the other board members of the various public entities listed in the Fifth Schedule of the Public Administration Act are subject to the scrutiny process envisaged under article 38 of the aforesaid law. Regrettably however to date the intention of the legislator under the Public Administration Act appears to be limited to a hesitant

[523] See Regulator for Energy and Water Services Act, art 3(1).
[524] Art 38 of the Public Administration Act requires that the persons appointed to the positions listed in the Fifth Schedule of the aforesaid Act are first scrutinised by the Standing Committee on Public Appointments.
[525] See also reply to PQ 9764 given on 8th April 2019 where a somewhat evasive reply was given, with however the minister concerned stating that government was prepared to consider amending the applicable norms. See Twegiba ghall-mistoqsija parlamentari numru 9764 (gov.mt).
[526] See LN 19 of 2020 entitled the 'Public Administration Act (Fifth Schedule) Amendment Order, 2020'.

first step with the purpose of scrutinising only the respective chairmen or individuals heading the entities listed. It is evident, given both the reply to the PQ by Dr. Said and the consequential amendment that followed, that the initial reference to the REWS Regulator in the Fifth Schedule was the result of an unintentional drafting oversight by the draftsperson who was apparently unaware that under the Regulator for Energy and Water Services Act any reference to the term 'Regulator' referred to chairman and all the other REWS board members and not solely to the chairman. The author suggests that rather than limiting the scrutiny only to the individuals heading the respective entities listed in the Fifth Schedule, it would be more appropriate to extend such scrutiny to all the persons making up the headship, specifically in the case of the MCA and the REWS to all the board members.

In considering the term of office of board members, one improvement as a result of the 2021 amendments is that the former short terms of office of a minimum of one year and a maximum of three years in the case of the MCA board members was substituted with terms of a minimum of three years and a maximum of six years.[527] The previous terms were far too short to ensure that the persons making up the headship could plan ahead in order to implement their vision with any degree of success.[528] The new longer terms with the possibility of one reappointment are more suitable, allowing the board members involved to have a sufficiently long term of office to put forth their vision relating to the conduct of regulatory business.

The author suggests that the procedure and grounds for dismissal of a member during his term of office should be uniform whereby the discrepancies in the current grounds listed under the Malta Communications Authority Act and the Regulator for Energy and Water Services Act are eliminated, and one set of uniform norms applicable to both regulators. Furthermore in the case of the REWS board, any member who is dismissed should be entitled to the remedies currently

[527] See Act No LII of 2021, art 54 which amended art 3(2) of the Malta Communications Authority Act.

[528] In relation to the REWS Board the terms of office have always been of a minimum of five years and a maximum of seven years with the possibility of one re-appointment.

available to his MCA counterparts, including the right to contest any such dismissal before a court of law.

2.4.5. Staff Behaviour

OECD in promoting a culture of independence observes that: 'The way in which the regulators attract, retain and motivate staff is ultimately a key determinant of the ability of the regulator to act independently and take decisions that are objective and evidence based.'[529] OECD further to this statement lists the following guidelines:

- Professional staff should be protected from external pressures, and placed in a position where they can provide objective advice through safeguards such as the tenure of their post.
- Personalised incentives should be adequate to avoid undue influence. OECD suggests that these should include opportunities for development and non-monetary incentives such as flexible work arrangements.[530] Ideally the overall salary package and incentives should compare favourably with what the regulated industry offers for similar positions.
- Staff should be encouraged to demonstrate what OECD describes as 'a responsible culture of independence in their daily duties.'[531] OECD states that this should include 'freedom from political and legal personal retribution, the capability to manage risk, the capacity to act independently, with appropriate internal accountability processes and monitoring linked to organisational strategic objectives.'[532]

[529] OECD (2017) p 30 (n 45)
[530] ibid.
[531] ibid.
[532] ibid.

- Career paths for staff should be developed to allow professional and personal growth, coupled with mentoring by senior staff and training to allow mobility within the organisation set-up of the regulator.[533]

Both MCA and REWS are empowered to appoint their officers and to establish the terms and conditions of their employment including the remuneration payable.[534] In the case of the MCA prior to 2021 amendments, the approval of such terms and conditions required the consent of the Minister for communications. As a result of the 2021 Amendments, the MCA is empowered to establish such terms and conditions subject 'to any supervision, however so described, that may be undertaken in accordance with the Constitution of Malta.'[535] The previous norm requiring the consent of the Minister responsible for communications could have impinged on the independence of the MCA as such a norm could condition the inclusion or otherwise of such terms and conditions of employment as the MCA may have considered necessary in order to attract to its ranks the best available human resources if for example constraints on the remuneration package were imposed by government through the aegis of the minister concerned. The author considers that while the 2021 Amendments are an improvement, the vague reference to 'any supervision' under the Constitution needs to be clarified in order to avoid conflicting interpretations as to what such supervision entails.

In so far as the number of staff engaged is concerned, the law appears to give MCA and REWS adequate latitude in determining the number of officers required since each regulator is empowered to employ such officers and employees 'as may from time to time be necessary for the due and efficient discharge' of its functions.[536] This notwithstanding, both MCA and REWS before proceeding to recruit new officers in practice seek clearance from government. Such clearance is normally granted if the regulator concerned justifies the need for such recruitment.

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[533] ibid.

[534] See Malta Communications Authority Act, art 9, and Regulator for Energy and Water Services Act, arts 10 and 11.

[535] See Act No LII of 2021, art 62 which amended art 9 of the Malta Communications Authority Act.

[536] Malta Communications Authority Act, arts 9 and 10, and Regulator for Energy and Water Services Act, arts 16 and 17.

At law there are no express norms purporting to protect staff from external pressures that impinge on the proper conduct of their duties. It is however pertinent to note that under the Malta Communications Authority Act it is an offence if MCA officers, including any board members, knowingly disclose confidential information obtained while they are or were performing official duties with MCA. The author suggests that a norm should also be included that expressly prohibits the exercise by any person of any undue influence on staff members. In addition, in the case of REWS a provision should be included whereby it is an offence if a staff member or a board member divulges confidential information obtained during the course of his work with REWS.

2.5. Conclusion

There are some points that need to be addressed if MCA and REWS are to have effective independence in the exercise of their respective regulatory functions. In the first instance on a practical basis the norms on independence applicable to both regulators should be similar if not identical. There does not appear to be any valid reasons why norms relating to the nomination, appointment, length of the terms of office and dismissal of the governing board of either regulator, and to their relationship with government and stakeholders, should be substantially different. Ideally similar wording should be used providing for a flexible regulatory set-up adaptable to changing market developments.

At least on paper the 2021 Amendments appear to have improved matters in relation to the independence of the MCA and of the REWS by providing for transparent procedures whereby the headship of both regulators is appointed on the basis of established criteria. At this juncture, one needs to see how the new norms introduced following the enactment of the 2021 Amendments will be implemented in practice.[537] The persons who are ultimately responsible for leading MCA or REWS must be chosen on the basis of their individual merits because they

[537] At the time of writing, both the MCA and REWS Boards had been appointed on the basis of the legislative norms preceding the 2021 Amendments.

have expertise and experience in the markets they are required to regulate. This requisite appears to have been addressed by the 2021 Amendments. Regrettably prior to the enactment of the 2021 Amendments, various persons with no expertise or experience in the regulated industries were appointed to form part of the headship of both regulators. This hopefully following the 2021 Amendments will no longer be the case.

One issue that needs to be sorted out is whether such headship appointments should be made following an open public call or else subsequent to a nomination by the minister concerned of a person or persons who satisfy stated criteria at law. Regrettably the wording used in the 2021 Amendments in this regard, is not clear. Article 3(2) of the Malta Communications Authority Act states that Minister should act 'in an open and transparent manner' when appointing the MCA Board members, but does not elaborate any further. Article 3(6) of the Regulator for Energy and Water Services states that it is the minister who appoints the REWS Board members 'based on objective, transparent and published criteria in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience.'[538] In both instances it is not clear whether the competent utilities minister is required to issue a public call inviting elegible persons to apply, or conversely whether the minister can handpick persons provided they satisfy the applicable criteria.

There are various points that regrettably need to be clarified if the process in selecting the persons making up the headships of the two regulators is to be truly transparent. It is not clear for example what criteria will be adopted in selecting the chairman and members of the respective boards. In the case of the REWS the law actually refers to published criteria. To date what these published criteria are has not been revealed despite PQs asking for information in this regard.[539] In the case

[538] In both instances the wording of the law cited was introduced following the 2021 Amendments.
[539] See the reply given by Minister Miriam Dalli to PQ no 1135 by Ing Mark Anthony Sammut during the sitting of the House of Representatives of the 6 June 2022 Twegiba ghall-mistoqsija parlamentari numru 1135 (gov.mt).

of the MCA, the law is equally vague and does not even make reference to published criteria as is the case with REWS.[540]

The author considers that having a public call when a vacancy occurs in the headship of either regulator should be actively considered as such a procedure gives equal opportunity to all those who satisfy the required criteria to apply. The process for example followed by Ofcom, the UK communications regulator, may serve as a model in following a transparent procedure targeted at identifying the most suitable persons to head Ofcom, whereby a call is made and people invited to apply if they satisfy the required criteria for applicants.[541] Alternatively the other option is to leave such appointments to the discretion of the competent utilities minister provided the persons appointed by him satisfy the required minimum eligibility criteria. Whatever option is adopted, it is imperative that the person concerned prior to his appointment is subject to the scrutiny and approval of an independent select committee of the House of Representatives thereby providing some assurance that the person in question is chosen on the basis of merit.

The role of the House of Representatives in relation to the safeguarding of the independence of MCA and of REWS needs to be revisited on various counts. The appointment of all the members of the headship of MCA and of REWS should be subject not only to the scrutiny of the House of Representatives, but ultimately also to its approval. Whilst one may consider enabling government through the competent utilities minister to nominate suitable persons for headship, the final appointment should be conditioned by the approval of a select committee chosen by the House, a role that the current Public Appointments Committee could fulfil. This would be a step forward in doing away with the current discretionary power of the competent utilities ministers when appointing board members. In the case of the dismissal of a board member, the same process as is in place in the case of MCA board members, should similarly apply to REWS board members.

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[540] See Malta Communications Authority Act, art 3(2).
[541] See link to the UK public appointments procedure followed in the case of Ofcom https://publicappointments.cabinetoffice.gov.uk/appointment/Ofcom-chair/ accessed 30th September 2022.

The faculty of the competent utilities ministers to issue 'directions' to MCA and to REWS as worded at law may impact the independence of both regulators to perform their regulatory roles effectively and properly. Whilst there may be scope for directions by ministers, such directions should always be in writing and clearly motivated, and should not compromise even indirectly the ability of the regulator to conduct its regulatory functions independently. Whilst at law these requirements appear to be in place, the author suggests that to ensure greater transparency adequate publicity should be given to the issue of such directions by requiring their publication in the Government Gazette and applicable websites including those of the regulators concerned.

One issue that the law fails to address is what happens if the regulator refuses to comply with any such directions. The author considers that if there is any disagreement relating to the adherence by the regulator with such directions, the regulator should be given the faculty of objecting in writing giving its reasons thereto. In the event that matters are not resolved, it is suggested that the issue is referred to the ART or another independent adjudicative forum for a final binding ruling. The whole process should in any case be characterised by transparency whereby all entities concerned are required to give the reasons for their stance in the matter. This should serve to ensure that all concerned act with the desired prudence knowing that they may be taken to task if their stance is clearly not justified.

Chapter Three - Judicial review of regulatory decisions

3.1. The right to appeal a regulatory decision – the issues

The right of an aggrieved person to appeal a regulatory decision[542] before a review body which is independent of all parties including of the regulator, is pivotal to the regulation of utilities.[543] Such a right serves to enhance credibility in the overall regulation of utilities by providing for an additional tier of regulation whereby regulatory mistakes can be corrected, whilst ensuring that a regulator acts in a reasonable and consistent way. The right of a party impacted by a regulatory decision to seek an independent review of that decision serves to make the NRA more accountable for its decisions since the NRA will endeavour to do its utmost to deliver decisions that are defensible both legally and factually, knowing that such decisions if contested will be scrutinized by an independent review body. OECD observes that having in place what it describes as 'timely, transparent and robust mechanisms' for the external review of regulatory decisions serves to strengthen the accountability of a NRA towards its stakeholders and to improve the quality of its decision-making.[544] This observation explains the importance of having in place a review process which may be invoked if a person believes that he has valid grounds to contest a regulatory decision that impacts that person, whether as a utility service provider or as an end-user of a utility service.[545]

The discussion relating to the review of regulatory decisions involves various considerations. One paramount consideration is the nature of the appeal body. Given the specialised and technical nature of some of the issues underlying regulatory decisions taken by NRAs, the review of such decisions needs to be

[542] The word 'regulatory' is used to qualify 'decisions' so as to distinguish between decisions taken by a NRA in relation to purely functional or administrative matters such as the award of contracts for the execution of works to be carried for the NRA, as distinct from decisions concerning the exercise of regulatory functions as set out by law onerous on the NRA in question. The focus of this Chapter is on the latter functions and on the contestation of any decisions taken subsequent to the exercise of such functions.

[543] The term 'appeal' is used interchangeably with the term 'review'. The reference whether to one or the other term, is used to refer to an independent judicial or quasi-judicial body before which an aggrieved person can contest a regulatory decision.

[544] OECD (2014) p 84 et seq (n 45).

[545] The term 'end-user' refers to both business and residential consumers.

entrusted to an appeal body which as a minimum can consult persons with expertise in, and experience of, the different aspects of utilities regulation, or alternatively whose composition includes such persons. If the option of including persons with specialised expertise as members of the appeal body is adopted, then the question arises whether such persons if they are not members of the judiciary, should have full voting rights as members of the appeals body, or conversely whether their role should be that of non-voting technical experts who assist the judge or magistrate presiding the appeal body in his deliberations on the issues in contestation where these involve specialised or technical matters.[546]

Equally important is the scope of, and standard for review that should be adopted by such an appeal body. Should the appeal body be empowered to consider and decide on all factual and legal issues that may arise as a result of the contestation of the regulatory decision? And what standard should be adopted in reviewing a regulatory decision? Should this include a review of all legal issues and of all errors of fact, or should it extend to a review of the discretion by the NRA?[547] An appeal body may be reluctant to overrule a decision of a NRA if this involves mainly technical issues about which the person or persons making up the appeal body have little or no expertise. Hence the importance of ensuring that the appeal body where its remit extends to the evaluation of factual issues involving technical considerations, is composed of or has access to such technical experts as are necessary to ensure that it is in a position to give informed decisions, and therefore able to overturn, where the appeal body considers appropriate, regulatory decisions which predominantly involve technical issues. Other important considerations in evaluating the procedure underlying the review of regulatory decisions are the duration and the litigation costs of the appeal proceedings, which in some instances may be of severe prejudice to one or more of the parties

[546] This is the situation with ART, where the presiding judge or magistrate is assisted by two non-voting 'assistants' who sit with him on each case.

[547] See CERRE *Enforcement and Judicial Review of Decisions of National Regulatory Authorities* (n 95). This report consists of a comparative study of the enforcement and review of decisions by utility regulators of energy, electronic communications and rail services in Belgium, France, Germany, the Netherlands and the UK. As part of the research conducted, a series of questions are made and answered in order to establish the effectiveness of the appeal procedures considered.

impacted by the regulatory decision being contested if the proceedings either take too long to be concluded or involve considerable costs.[548]

There is no magic formula whereby in practice one can guarantee *a priori* that an appeal body will give a final ruling within a given timeframe. There are a few instances where by law an appeal body is required to give a final ruling within a precise timeframe. These norms, where they were introduced, have in practice rarely if ever been strictly adhered to. Moreover there is no clear cut remedy that may be used if a ruling by the appeal body is not given within a set timeframe established by law.[549] At times the delay in concluding the appeal proceedings is beyond the control of the appeal body more so when the issues being contested are complex and require the input of technical experts. There is no simple solution how to ensure that cases are determined in good time. Good case management and the curbing of delaying tactics by litigants by the appeal body may help in some instances, but does not necessarily always guarantee a timely determination of the appeal. A measure which has served to mitigate somewhat those cases where the appeal proceedings have taken some time to be concluded, is the requirement that a contested regulatory decision stands for the duration of the appeal proceedings unless the appeal body decides to suspend such a decision. This is an aspect which within the context of the appeal process needs to be considered carefully, more so in relation to the instances where the appeal body may suspend the effects of the regulatory decision being contested and the impact that such a suspension may have on end-users and on the market in general.

Equally important is the negative impact of prohibitive litigation costs. In some instances, especially where the appeal involves technical issues, the costs incurred may serve as a barrier for those litigants who *prima facie* may have a legitimate

[548] ibid at p 12. CERRE estimated that in general the average duration of appeal proceedings in various EU Members States considered in the research undertaken was close to a year and a half.
[549] Hence the former CAB was required to give its final decision within sixty days from when the parties declared that they have concluded their evidence and submissions. See Malta Communications Authority Act, art 40 following amendments as per the Communications Laws (Amendment) Act, 2004. The same provision was subsequently amended by LN 180 of 2012 when the CAB was replaced by the ART, with the same requirement applying to proceedings before the ART.

grievance in contesting a regulatory decision but who cannot afford the costs involved to undertake litigation successfully. Such litigants should not be placed in a position where because of the costs involved they cannot effectively seek the review of a regulatory decision because they lack the financial clout of their opponents in litigation. Some measures can be taken which may alleviate the financial burden, such as for example reducing the court registry fees in lawsuits involving consumers with identical grievances.[550] Ultimately however there is no one simple solution that may comprehensively address such an issue.

3.2. The EU norms on appeals

The need to have some form of independent judicial review of regulatory decisions is considered by the EU as an essential part of the overall utility regulatory set-up, even if the stance adopted by the EU varies according to the utility under consideration. To date in so far as utilities regulation is concerned, the most detailed norms concerning the review of regulatory decisions emanating from the EU relate to the electronic communications sector.[551] The EECC requires that Member States ensure that there are in place 'effective mechanisms' whereby any person who is affected by a regulatory decision of the NRA, has the right to contest such a decision 'to an appeal body that is independent of the parties involved and of any external intervention or political pressure liable to jeopardise its independent assessment.'[552] The EECC further provides that such a body, which may be a court, must 'have the appropriate expertise to enable it to carry out its functions effectively'.[553] The EECC however does not state what constitutes 'appropriate expertise', leaving it to the individual Member State to determine how the appeal body should be composed in order to ensure that the said body does have such expertise. Nor does the EECC elaborate what in practice are 'effective

[550] See for example art 23(4) and (5) of the Collective Proceedings Act, Chapter 520 of the Laws of Malta which exempts a consumer association which is recognised in terms of the Consumer Affairs Act from the payment of certain court registry fees.
[551] See also CERRE Study (2011), p 83 (n 95).
[552] EECC, art 31(1).
[553] ibid.

mechanisms'[554], failing to address matters such as the length of the appeal proceedings, the nature and powers of the appeal body and the standard for review to be followed by the appeal body. Significantly however the EECC does state that if the appeal body chosen by the Member State 'is not judicial in character', then the appeal body is required to give written reasons for its decisions, which decisions then must be subject to review by a court or tribunal as set up under article 267 of the Treaty on the Functioning of the European Union (TFEU).[555]

With the other utilities other than water services, whilst the EU does require that Member States ensure that there is in place the right to appeal from a regulatory decision, the emphasis of ultimately making certain that such decisions may be reviewed by a court or tribunal is not clearly stated.[556] In the energy sectors, Member States are required to ensure that 'suitable mechanisms exist at national level', whereby a person affected by a decision of the NRA may appeal to 'a body independent of the parties involved and of any government'.[557] The applicable EU norms state that decisions taken by the NRA are to be 'fully reasoned and justified to allow for judicial review', without however elaborating any further.[558] The EU fails to explain what precisely is meant by 'judicial review'. The interpretation of the author is that such review ultimately has to be conducted by a judicial body which is an independent court or tribunal presided by a member of the judiciary.[559] In the case of the postal services sector, the EU states that an appeal body must be independent of the parties involved, without providing for any further requisites, avoiding any reference even to the requirement of having in place some form of

[554] Art 31 of the EECC requires that Member States have effective appeal mechanisms without amplifying what constitutes an 'effective' mechanism.
[555] See Directive 2002/21/EC, art 4(2). Previously art 267 was numbered as art 234 of the EU Treaty. This provision states that a court or tribunal of a Member State may refer to the CJEU any question relating to the interpretation of the EU Treaties or to the validity and interpretation of any acts of any institutions, bodies, offices or agencies of the EU.
[556] See M Szydlo, *Judicial review of decisions made by national regulatory authorities: Towards a more coherent application of EU sector-specific regulation*. CON (2014) Vol12 No 4, pp 930-953.
[557] See Electricity Market Directive 2019, art 60(8).
[558] ibid, art 60(7). Similar norms apply in relation to the gas market, see art 41(16) and (17) of Directive 2009/93/EC.
[559] The use of the phrase 'judicial review' presupposes that the regulatory decision is subject to review by an appeal body presided by a member of judiciary. See https://en.wikipedia.org/wiki/Judicial_review accessed 30th September 2022.

'judicial review'.[560] In the case of water services there is no mention whatsoever of any right of appeal from regulatory decisions.[561]

The author questions why there are these differences concerning the measures required in relation to the right of appeal from a regulatory decision in relation to the diverse utilities. Significantly in the electronic communications sector there is a marked emphasis on the importance of having final oversight of a regulatory decision by a judicial body, with the EU expressly stating that if the appeal body established by the Member State for this purpose is not a court or a tribunal, then that body must give the reasons for its decision which decision must be reviewable by a court or tribunal.[562] There is no similar requirement in relation to the energy and postal sectors. There does not appear to be any valid reason why in the case of electronic communications an aggrieved party ultimately has the right to contest a decision before a court or tribunal, whereas in the case of the other utilities such a right is not clearly stated, or worse is not catered for.[563]

In the context of appeals from any regulatory decisions, irrespective of the utility in question, there should as a matter of course be a final right of appeal to an independent body presided by a member of the judiciary. Ultimately it is important to ensure that the person or persons tasked with the responsibility of reviewing any regulatory decisions, especially where such decisions may somehow also impact government, have the required independence from all interested parties when making their deliberations. Leaving the role of adjudication of such appeals exclusively in the hands of a body composed of a person or persons who do not enjoy the equivalent independence and security of tenure of office that a member of the judiciary has, can give rise to doubts about the credibility and fairness of that body. Given this consideration, the EU norms applicable in the case of appeals from regulatory decisions in the electronic communications sector, should without distinction similarly apply to all the other utilities, thereby ensuring that the most

[560] See Directive 97/67/EC, art 22(3).
[561] See Water Directive (EU) 2020/2184.
[562] The understanding here is that the court or tribunal is composed of a member or members of the judiciary.
[563] Though in the case of the energy directives this can be inferred given the reference to 'judicial review'.

onerous requisites apply irrespective of the utility in question. Such a measure would serve to ensure that there is uniformity as to how contestations of regulatory decisions in relation to the different utilities are dealt with, whilst ensuring that the right to contest regulatory decisions before an independent judicial body is adequately guaranteed once an aggrieved person has the right at least at the final stage of the appeal process to refer his case to a body presided by a member of the judiciary. It is pertinent to note here that judicial review at least in the final stage of an appeal process, is currently a feature in the appeal procedures of most EU Member States.[564] This fact underlines that there is a general consenus amongst EU Member States that regulatory decisions should ultimately be subject to review by a judicial body.

3.3. The chronology of the utilities appeal procedures in Malta

To date the approach taken by the Maltese legislator is to have in place specialised appeal bodies, whether as separate adjudicative bodies or else as dedicated panels within the ART adjudicative regime to deal with appeals relating to the communications utilities, and to the energy and water utilities respectively. Initially with regard to the communications utilities, separate appeal boards were established for the then telecommunications utility on the one hand, and for the postal services utility on the other. Eventually the decision was taken by the legislator to have one general appeal board to deal with appeals concerning the various communications utilities namely electronic communications services and networks, and postal services.[565] In the case of the energy and water utilities an appeal board was established to determine appeals from regulatory decisions taken in relation to these utilities. Subsequently in 2012 the ART was designated as the competent appeal body to determine such regulatory appeals, commencing with

[564] See M Szydlo at p 938 (n 556).
[565] Until 2004 the nomenclature 'telecommunications' was used to refer to the sector.

the communications utilities followed in short order with appeals from regulatory decisions relating to the energy and water services utilities.[566]

The first appeal board in utilities regulation in Malta was established in 1997 under the then Telecommunications (Regulation) Act 1997. This law provided for the establishment of the Telecommunications Appeals Board (TAB) composed of a chairman and two other members. The chairman was chosen from amongst advocates with at least seven years practice in the profession of advocate. No express criteria were listed in relation to the appointment of the other members of the TAB. Members of Parliament or of a local council were excluded from being members of the TAB.[567] Otherwise the law did not provide for any criteria which the chairman or the other two members had to satisfy to be appointed as members of this board. All the members of the TAB were appointed by the Minister responsible for telecommunications for 'a period indicated in their letter of appointment', and could be appointed for further periods as the Minister deemed appropriate.[568] Though at law no indication was given on the length of the term of appointment of the chairman or of the other members, this was generally for a term of three years. Any member of the TAB could be challenged or abstain for the same reasons on the basis of which a member of judiciary under Maltese law could be challenged. The law however did not elaborate on what grounds and how the chairman or any other member of the TAB could be removed and by whom he could be removed.[569] Nowhere at law was it clearly stated that the TAB in the exercise of its functions, had to act independently of the parties to the appeal or of any other persons.[570]

[566] The ART was designated as the competent appeal body in the case of the communications utilities by LN 180 of 2012 published on the 25 May 2012, and in the case of the energy and water utilities by LN 184 of 2012 published on the 29 May 2012.
[567] See Telecommunications (Regulation) Act, 1997, art 29.
[568] ibid, art 29(2).
[569] This void was rectified with the establishment of the CAB in 2004.
[570] The issue of the independence or otherwise of the TAB was never raised in the course of any of the appeals before the TAB. It was generally assumed that the TAB was independent, however the fact that the law did not state that it was independent, could then have given rise to questions about the impartiality of the TAB given also that the members if the TAB were all part-time appointees of government, appointed for a fixed term the renewal of which was at the discretion of government.

The TAB had the remit to hear and determine appeals from most decisions taken by the Regulator. These included appeals from regulatory decisions relating to the grant or refusal of an authorisation to provide or operate a telecommunications service or infrastructure, issues on rate mechanisms for charges concerning telecommunications services, allocation of frequencies under the former Wireless Telegraphy Ordinance,[571] disputes between authorised providers, and complaints by subscribers of telecommunications services.[572] The TAB was required to give reasons for its decisions, which decisions, unless the law stated otherwise, were taken by a majority vote.[573] Decisions of the TAB could be contested only on a point of law before the Court of Appeal (inferior competence) presided by a single judge.[574]

In 2002 amendments were enacted to the then Post Office Act, whereby the MCA was designated as the regulatory authority for the regulation of postal services, whereas concurrently the Postal Services Appeals Board (PSAB) was established to determine appeals from regulatory decisions taken by the MCA in relation to the postal services sector.[575] The PSAB was composed of a chairman chosen from amongst advocates with at least seven years of experience in the profession, and two other members. The appointments were made by the Prime Minister for a term not exceeding three years, and the members were eligible for re-appointment. Members of the judiciary, members of the House of Representatives or of local councils, and public officers were not eligible to be members of this

[571] Chapter 49 of the Laws of Malta.
[572] Telecommunications (Regulation) Act, 1997, art 30(1). The Wireless Telegraphy Ordinance - subsequently renamed the Radiocommunications Act - was repealed by the Communications Laws (Amendment) Act 2010 as per Act No XII of 2010. The provisions of that law were integrated as a new part under the Electronic Communications (Regulation) Act, entitled 'Part IV - Radiocommunications'.
[573] See reg 5(1) of the Telecommunications Appeals Board (Rules of Procedure), 1998 as per LN 218 of 1998. Reg 4(2) thereof provided that the Chairman alone decided questions relating to the cause of abstention or challenge of a member of the Board or questions of procedure.
[574] Telecommunications (Regulation) Act 1997, art 32.
[575] See arts 7 and 8 of the 'Post Office (Amendment), Act, 2002' as per Act No XXVII of 2002, which articles provided for the inclusion of new arts 4 and 5 to the then Post Office Act.

Board.[576] As was the case with the TAB, the law did not provide for any other criteria on the basis of which such members were to be appointed.

In these amendments a norm which was previously not applicable in the case of members of the TAB was introduced, whereby a member of the PSAB on the termination of his appointment was required for a period of one year not to engage in any activity which would have been incompatible with the exercise of his functions had he still been a member of the PSAB.[577] A similar requirement was enacted in relation to the members of the TAB.[578] In contrast to the TAB, provision was made whereby a member of the PSAB could be removed from office by the Prime Minister on the grounds of gross negligence, conflict of interest, incompetence, or acts or omissions unbecoming a member of the said board.[579]

A person could appeal to the PSAB from any final decision of the MCA relating to the postal sector on one or more of the following grounds, namely: if there was a material error on facts, a material procedural error, an error of the law, or some material illegality including unreasonableness or lack of proportionality. In doing so, the person appealing was required to explain his juridical interest. The PSAB was required to give its reasons for any decision given. The PSAB could either dismiss the appeal or annul the regulatory decision taken by the MCA. In the case of an annulment of a regulatory decision the PSAB could refer its decision to the MCA or to the Minister responsible for posts depending on the specific circumstances and final conclusions reached, with a direction to consider matters and reach a decision in accordance with the findings of the PSAB. If the decision of the PSAB was in turn appealed, the effects of the decision were not suspended unless the Court of Appeal decided otherwise.[580]

[576] Post Office (Amendment) Act, 2002, art 8.
[577] ibid.
[578] See art 58(e)(ii) of the Post Office (Amendment) Act 2002 which amended art 34 of the then Telecommunications (Regulation) Act.
[579] See art 8 of the Post Office (Amendment) Act 2002 which article provided for the inclusion of a new art 5(5) to the then Post Office Act.
[580] ibid, art 8 thereof which provided for the inclusion of a new art 5 to the then Post Office Act.

In 2004 the TAB and the PSAB were replaced by a new appeal board entitled the 'Communications Appeals Board' (CAB), with the jurisdiction to hear and determine appeals from decisions or directives of the MCA in relation to the Malta Communications Authority Act, the Electronic Communications (Regulation) Act, the Utilities and Services (Regulation of Certain Works) Act, the Broadcasting Act, the Postal Services Act and the Electronic Commerce Act.[581] Furthermore the Prime Minister was empowered by order in the Gazette to extend the jurisdiction of the CAB to any other decisions that the MCA may take under any other law that it was empowered to enforce, or to any decisions taken by or on behalf of government or by any public authority which decisions had a substantial bearing on any of the communications utilities. Any person aggrieved by a decision or directive of the MCA was entitled to contest that decision or directive before the CAB, provided that in doing so that person also explained his juridical interest in impugning the decision or directive.[582] In determining an appeal the CAB was empowered in whole or in part, to confirm or annul the decision appealed from, giving the reasons for its decision. In the case of appeals from decisions imposing financial penalties the CAB could only annul such a fine if it determined that the fine could not be imposed in the circumstances of the case, or could not at law be fixed in the amount established by the MCA in its decision. In doing so the CAB was required to give due account to the principle of proportionality.[583]

The CAB was composed of a chairman appointed by the Prime Minister, who had to be an advocate with at least seven years practice in the profession of advocate and two other members selected by the Chairman of the CAB from amongst panels of persons appointed by the Prime Minister. In contrast to the norms regulating the appointment of the members of the TAB and the PSAB, the law provided for criteria with regard to the appointments of persons forming part of the aforesaid panels by stating that they had to be chosen from amongst persons having commercial,

[581] See art 8 of the Communications Laws (Amendment) Act, 2004 which article provided for the insertion of a new part to the Malta Communications Authority Act entitled 'Part VIII - Communications Appeals Board'. Arts 36 to 42 of Part VIII provided for the establishment of the CAB and the applicable norms and procedure.
[582] ibid, art 37(1) and (2) of Part VIII.
[583] ibid, art 38 of Part VIII.

technical, or financial experience in the fields of electronic communications, postal services and such other areas in relation to which the CAB had jurisdiction.[584] The intention behind the establishment of such panels, was to have in place a number of persons who were well versed in different regulatory aspects concerning the communications sectors regulated by the MCA, with the CAB Chairman having the faculty of selecting the two other members of the board from amongst the persons appointed on the said panels to sit with him on a given case according to the technical and factual issues of the case.

The term of appointment of the chairman and of the members of the panels of the CAB was of three years with the possibility of re-appointment. Significantly in contrast to the norms regulating the earlier TAB and PSAB, the law expressly stated that the CAB was to be independent in the performance of its functions.[585] The chairman and members of the CAB could be challenged or abstain for any of the reasons that a judge could be challenged under the Code of Organisation and Civil Procedure.[586] The chairman or members of the CAB during their term of office could only be removed from office by the Prime Minister on grounds of gross negligence, conflict of interest, incompetence, or acts or omissions unbecoming a member of the CAB. In doing so the Prime Minister was required to lay before the House of Representatives a statement giving the reasons for the removal of the member concerned.[587] A requirement was introduced similar to that previously applicable in the case of members of both the TAB and the PSAB, whereby members were required for a period of one year from the termination of their appointment, not to engage in any activity which would have been incompatible with the exercise of their functions had they still been members of the Board, with however the difference that if a person was found acting in breach of this requirement, he would also be subject to criminal proceedings, and if found guilty, liable to a fine (*multa*) of up to a maximum of one thousand Maltese liri coupled

[584] Ibid, art 36(2) and (3) Of Part VIII.
[585] ibid, art 36(4).
[586] As per Chapter 12 of the Laws of Malta.
[587] See article 8 of the Communications Laws (Amendment) Act, 2004 which article provided for the inclusion of a new Part VIII entitled 'Communications Appeals Board' to the Malta Communications Authority Act, which Part provided for such measures as per art 36(7). See also above at footnote 584.

with the prohibition of holding any similar posts for a period of not less than ten years.[588]

In 2012 amendments were made to the law, whereby the ART replaced the CAB as the competent appeal body in relation to appeals from regulatory decisions taken by the MCA.[589] These changes meant that, unlike the case with the CAB, decisions by the new appeal body – the ART – would be taken only by the presiding chairperson assisted by two non-voting 'assistants'.[590] The ART was set up with the purpose of having in place an adjudicative forum before which aggrieved persons could contest decisions taken by diverse public authorities.[591] To this end the law provides for the establishment of panels of experts in the diverse sectors in question to assist the Tribunal in its deliberations including those relating to the communications utilities and to the energy and water services utilities. The chairperson of the ART is chosen by the President of Malta acting on the advice of the Prime Minister from amongst judges or magistrates or ex-judges or ex-magistrates.[592] The 'assistants' are appointed by the President of Malta acting on the advice of the Prime Minister, from amongst persons with 'previous experience and special qualifications' in the particular field or fields of expertise falling within the competence of the ART.[593] As was the case with the CAB, decisions of the ART

[588] ibid, art 36(8) of Part VIII. One thousand Maltese liri would amount to €2339.00c.

[589] See LN 180 of 2012 titled the 'Extension of the Administrative Review Tribunal (Communications) Regulations, 2012'. Under art 21 of the Administrative Justice Act, the Minister for justice is empowered by regulation to amend any law for the purpose of bringing such law in conformity with the provisions of the aforesaid Act, in this case to enable the ART to assume jurisdiction in relation to appeals relating to the communications sector. The amendments made included amendments to Part VII of the Malta Communications Authority Act whereby references to the CAB were substituted with references to the ART. These changes came into force on the 1st June 2012.

[590] See Administrative Justice Act, arts 9 and 10.

[591] The ART commenced operations following the enactment of the Administrative Justice Act in 2007. Gradually the remit of ART was extended to diverse areas concerning public administration, including in 2012 to the contestation of regulatory decisions concerning the communications utilities, and the energy and water services utilities.

[592] If the chairperson is an ex-judge or an ex-magistrate, then the law states that his appointment will be for a term of four years and the appointee shall vacate his office on the expiration of his appointment. To date the appointments have all been of sitting magistrates. The law further provides that more than one person may be appointed to preside over the Tribunal. See art 8(1) of the Administrative Justice Act. There are currently two magistrates who preside over different panels of the ART.

[593] See Administrative Justice Act, art 10.

in the case of appeals from decisions taken by the MCA are subject to appeal before the Court of Appeal (inferior competence).

The chronology of the determination of appeals in the case of the energy and water services utilities followed a similar path, albeit with some differences, to that taken in the case of the communications utilities. The first appeal body - the Resources Appeals Board (RAB) - was set up in 2000 concurrently with the establishment of the MRA.[594] The RAB was composed of a chairman with at least seven years of experience as a practising advocate and two other members. All the members were appointed by the Minister responsible for resources for a period indicated in their letter of appointment and such members could be appointed for further periods as the Minister deemed appropriate. Members of the House of Representatives or of a local council were disqualified from being members of the RAB. A member of the RAB could be challenged or abstain on the same grounds that a member of the judiciary could be challenged or abstain as provided for in the Code of Organisation and Civil Procedure. The law did not provide for any express provisions detailing on what grounds a member of the RAB could be dismissed.[595] Appeals before the RAB from regulatory decisions taken by the MRA could be filed on any of the following grounds, namely: if there was a material error on facts, a material procedural error, an error of the law, or some material illegality including unreasonableness or lack of proportionality. Subsequently an amendment to the law was introduced requiring that any person aggrieved by a decision taken by the MRA in filing his appeal had to demonstrate that he had a direct interest in impugning the decision being appealed.[596]

The RAB in determining an appeal could either dismiss the appeal or annul the regulatory decision being appealed. In the case of an annulment of a regulatory decision, the RAB could refer the matter back to the MRA with a direction to the MRA to reconsider the regulatory decision taken previously in accordance with the findings of the RAB. The effects of the regulatory decision being appealed would

[594] See art 32 et seq of the Malta Resources Authority Act, 2000 as per Act No. XXV of 2000.
[595] This, as discussed earlier, was the case with the TAB when it was set up in 1997.
[596] See art 33 of the Various Laws (Amendment) Act, 2011 - as per Act No V of 2011 - which amended art 34 of the Malta Resources Authority Act.

not be suspended unless the RAB decided otherwise. Appeals on a point of law from decisions of the RAB could be lodged before the Court of Appeal (inferior competence).[597]

In 2012 amendments were made whereby the RAB was replaced by the ART as the competent appeal body in relation to appeals from regulatory decisions taken by the MRA.[598] As is the case with the ART in relation to appeals relating to the communications utilities, decisions by the ART, unlike as was the case with the RAB, are taken only by the presiding chairperson assisted by two non-voting 'assistants'. Subsequently in 2015 when the regulatory functions in relation to the energy and water utilities was assumed by the REWS, almost identical norms were included in the Regulator for Energy and Water Services Act in so far as appeals from regulatory decisions taken by the REWS are concerned, with the ART being designated as the competent appeal body.[599] As was the case with appeals from the decisions taken by the RAB, appeals from decisions taken by the ART can be contested on a point of law before the Court of Appeal (inferior competence).[600]

3.4. What constitutes a regulatory decision under Maltese utilities law?

The applicable laws which regulate the MCA and the REWS provide different interpretations as to what constitutes a 'decision' which can then be appealed before the ART. In the case of the MCA a 'decision' is defined as including 'any directive, determination, direction, licence conditions, measure, requirement or specification, however so described, made by the Authority and the word 'decision' shall be construed accordingly'.[601] In the case of the term 'directive' the law further states that 'directive' means a directive issued by the MCA in terms of article 4 of

[597] See arts 34 and 35 of the Malta Resources Authority Act 2000 as per Act No XXV of 2000.
[598] See LN 184 of 2012 entitled the 'Extension of Jurisdiction of the Administrative Review Tribunal (Resources) Regulations, 2012.' These regulations came into force on the 1 July 2012.
[599] See Regulator for Energy and Water Services Act, arts 31 to 34.
[600] ibid, art 34.
[601] See the definition of 'decision' as per art 2 of the Malta Communications Authority Act.

the Malta Communications Authority Act, which provision empowers the MCA to issue such directives as it may consider necessary for the carrying into effect of, or compliance with any provisions of any laws and, or decisions which the MCA is empowered to enforce.[602]

In this regard reference is made to a court judgement concerning the juridical nature of a 'directive' issued by the MCA. In 2007 Vodafone Malta Limited (Vodafone) filed a lawsuit before the First Hall of Civil Court contesting a directive issued by the MCA, whereby the MCA defined a cost sharing mechanism for legal interception obligations, establishing the manner how such contributions were to be paid by electronic communications service providers such as Vodafone in relation to the legal interpretation system used by the Maltese Security Service (MSS).[603] Vodafone in its lawsuit requested the Court to declare the directive issued by the MCA null and void.[604]

In its response to this lawsuit, the MCA argued that the First Hall did not have the jurisdiction to declare the aforesaid directive null and void since the contestation of such a directive fell under the jurisdiction of the CAB (then being the competent appeal board before which regulatory decisions by the MCA could be contested). In accordance with article 37 of the Malta Communications Authority Act, Vodafone then had the right to contest any decision or directive given by the MCA before the CAB, a remedy which the MCA argued had not been sought by Vodafone.[605] The First Hall however did not agree with this line of argumentation by the MCA. The First Hall held that the directive being contested was an act of a legislative nature, noting that this resulted from the title of the directive being contested and that the

[602] ibid, art 4(6).
[603] See the judgement of the First Hall of the Civil Court presiding by Madame Justice A Felice in *Vodafone Malta Ltd vs Awtorità Maltija dwar il-Komunikazzjoni u l-Avukat Generali,* given on the 18 June 2013. GO plc intervened a few months after the commencement of proceedings by Vodafone, associating itself with the claims made by Vodafone against defendants.
[604] The directive in question was Directive No 2 of 2005 entitled 'Modalities of payment for contributions to the cost of legal intercept obligations' which was issued by the MCA on the 30th November 2005 - Directive - Modalities of payment for contributions to the cost of legal intercept obligations | Malta Communications Authority (mca.org.mt).
[605] Art 37 of the Malta Communications Authority Act as it was when the directive in question was issued in 2005, provided for the contestation of MCA directives or decisions before the CAB. Subsequently in 2012 the remit to hear and determine contestation of decisions, however so described, taken by the MCA was transferred from the CAB to the ART.

directive applied *ergo omnes*, adding that once the directive applied well beyond the period by law during which one can appeal, then - according to the First Hall - the right of appeal as was then provided for under the Malta Communications Authority Act did not apply. It is relevant here to quote what the First Hall precisely said:

> 'Inoltre, il-Qorti tqis illi ġaladarba l-applikabilità tad-direttiva testendi ferm oltre l-perjodu stabbilit bil-liġi għall-appell skont il-fuq imsemmi Art. 37, isegwi li d-dritt ta' appell kif provdut bl-imsemmi Art. 37 ma japplikax.'[606]

This reasoning however is debateable. The directive issued by the MCA applied to all undertakings providing electronic communications services. It is not clear from a reading of the aforesaid judgement why the fact that the directive applied beyond the period during which an aggrieved person could contest such a directive, necessarily meant that the then applicable right of appeal before the CAB did not apply.[607] Furthermore the fact that the MCA issued a directive - even if for the sake of argument the directive was an act of a legislative nature - did not per se forfeit the right of appeal to contest that directive before the CAB. It is pertinent here to refer to subarticles (6) and (7) of article 4 of the Malta Communications Authority Act which provisions then (in 2005 when the directive was issued) stated - and still state - that the MCA may issue such directives as it may consider to be necessary for the carrying into effect of or compliance with any laws it enforces or any decisions that it may issue. Subarticle (7) specifically provides that the MCA may amend or revoke any such directive, and in doing so notify the person concerned, empowering the MCA to publish any such directive in any manner that it may consider appropriate in the circumstances, taking into account the importance of the directive and its impact on the market. These provisions clearly demonstrate that in practice the directives, even if one accepts the argument that they constitute an act of a legislative nature, are decisions of the MCA and as such should have been contested before the CAB.

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[606] See *Vodafone Malta Ltd vs Awtorità Maltija dwar il-Komunikazzoni et* at p 12 (n 603).
[607] This judgement has been appealed and at the time of writing is pending before the Court of Appeal (Superior).

Finally on this point it is relevant to note that in 2011 the definition of 'decision' in the Malta Communications Authority Act was amended to include specifically the word 'directive.[608] This legislative measure should hopefully serve to clarify that directives of the MCA are equivalent to 'decisions' of the MCA, and as such in the first instance should be contested before the ART if a person is aggrieved by the contents of any such directive.

In the case of the REWS the term 'decision' is defined at law as including 'any determination, measure, order, requirement or specification however so described' made by the REWS.[609] The term 'directive' is defined as meaning a directive issued by REWS in accordance with the procedures as may be prescribed by regulations made under the Regulator for Energy and Water Services Act.[610] These definitions are similar to the definitions of the same terms under the Malta Resources Authority Act which therefore applied in relation to the MRA, the former energy and water utilities regulator.[611]

The definition of 'decision' under the Regulator for Energy and Water Services Act does not include the term 'directive' in the meaning given. Significantly however the definition of 'decision' uses the inclusive 'includes' rather than 'means' when defining what constitutes a 'decision' for the purposes of the aforesaid Act. This seems to imply that a 'directive' could be considered as a 'decision' taken by the REWS and therefore may be contested as such even though the term 'directive' is not expressly mentioned in the definition of 'decision' under the Regulator for Energy and Water Services Act. To date it does not result that any regulations have been published under the Regulator for Energy and Water Services Act defining the procedures to be followed when the REWS issues a directive. In those regulations made under the Regulator for Energy and Water Services Act where reference is

[608] See art 43 of the Communications Laws (Amendment) Act, 2011 as per Act No IX of 2011.
[609] See Regulator for Energy and Water Services Act, art 2.
[610] ibid, art 2. It does not result that REWS has ever issued any directive in accordance with this article. See reply to PQ number 6840 by MP Dr. Chris Said given on the 22 October 2018, Twegiba ghall-mistoqsija parlamentari numru 6840 (gov.mt).
[611] See Malta Resources Authority Act, art 2. The definitions of the terms 'decision' and 'directive' were introduced in the aforesaid Act following amendments under the Malta Resources Authority (Amendment) Act, 2007 as per Act No XII of 2007.

made to the issue of directives by the REWS, the term 'directive' in most instances seems to imply a ruling given by the REWS whereby an authorised provider is required to comply with measures that the REWS may specify in the directive.[612]

Regrettably, unlike as is the case with the MCA under the Malta Communications Authority Act, it is very much a matter of conjecture to determine precisely what a directive issued by the REWS is meant to cater for. One may deduce that the issue of such directives by the REWS is similar in purpose to that of the MCA, namely to cater for such norms as the REWS may consider necessary for the carrying into effect of or compliance with any provisions of any laws and, or decisions which the REWS is empowered to enforce. The nature of a directive issued by the REWS becomes even more ambiguous when reading the provisions in the Regulator for Energy and Water Services Act relating to the appeals before the ART. Article 32(1) of the aforesaid Act clearly states that appeals to the ART may be made 'on any decision' of the REWS. In article 32(7) of the Regulator for Energy and Water Services Act reference is then made to 'an appeal from a decision or directive' of the REWS. The wording used is confusing to say the least, and the legislator should intervene to implement the necessary changes to ensure that such inconsistencies in the law are rectified.

3.5. The nature of the appeal body

The EU in relation to appeals from regulatory decisions in electronic communications requires that the appeal body has the 'appropriate expertise to enable it to carry out its functions effectively'.[613] CERRE advocates that EU Member States should assign the review of regulatory decisions taken by utilities regulators to a specialist court or a specialist body within an existing court, whereby what is

[612] See for example reg 24(3) of the Electrical Installations Regulations as per SL 545.24, where in the case of any malpractice or defect in an inspected electrical installation, REWS is empowered to issue a 'directive' to the authorised provider or the warranted engineer to rectify at his expense the defects or the result of the malpractice.

[613] See EECC, art 31(1). The EU does not provide for a similar express requirement in the case of appeal bodies responsible for determining appeals relating to the other utilities.

described as a 'horizontal, cross-sector approach' is taken in designing the review regime so that a single court is responsible across the various sectors, in order to maximise the chances of cross-fertilisation and synergies between the different utility sectors.[614] CERRE states that other than in the case of France and the UK, the courts that review contestations of regulatory decisions taken by utility regulators are 'ordinary courts' that also regularly deal with different general civil law cases, observing however that these same courts also hold the exclusive competence for appeals from regulatory decisions taken by utility regulators, adding that as a result the aforesaid courts have gathered 'significant expertise regarding regulatory issues'.[615]

The importance of ensuring that the appeal board has the 'appropriate expertise' raises the question whether the review of regulatory decisions taken by utility regulators, should be allocated to a specialist adjudicative body, or conversely to the ordinary courts? If a specialist body is assigned the task of deciding such appeals, should it deal with appeals from regulatory decisions of all the utility regulators, or should it only focus on specific sectors? And how should such an appeal body be composed? Should it consist of a single judge or should it also include persons with specific technical expertise? If such technical experts form part of the appeal body, should they then have voting rights or should their role be limited to that of 'assisting' the presiding judge in his deliberations by giving their technical opinion without however having any voting powers?

In addressing these questions one needs to factor the specific circumstances that condition litigation in a small jurisdiction such as Malta where issues concerning specialised areas require expert input if the competent adjudicative body is to give an informed decision. Regrettably the number of independent persons with expertise in the diverse aspects of utility regulation who are not involved with any of the major utility service providers in Malta or with the NRAs is very limited. One could consider addressing the lack of experts by engaging foreign experts whether

[614] See CERRE (2011) at pp 12 and 83 et seq (n 95). Though the CERRE study was undertaken in 2011, most EU Member States still assign the determination of such appeals to the ordinary courts.
[615] ibid, at p 86 et seq.

as part-time members of the appeal body or as technical advisers to the appeal body. However such an approach would invariably involve substantial costs coupled with the consideration that such experts would not necessarily be familiar with the local market and the applicable legislation. These considerations cannot be ignored in discussing the role and composition of the appeal body. The bottom line is that the appeal body should be composed in such a manner so as to ensure that its members collectively have the required knowledge to determine any contestations of regulatory decisions. Given such considerations what therefore are the options as to the composition of the appeal body?

One option is to have such decisions reviewable before the ordinary courts. However a factor which strongly militates against such an option is that the presiding judge sitting alone may not necessarily have the required expertise to review all the issues that may arise in the contest of such appeals. Without the benefit of informed technical expertise a judge may have some difficulty in assessing the merits of a regulatory decision characterised by technical considerations taken by a regulator backed by expert professional advice on the diverse technical aspects. One can argue that a judge can appoint technical experts to give their opinion on any technical issue. However the author questions whether the final decision in cases intimately tied to an appreciation of technical issues should be exclusively decided by a person well-versed only in the law?

Another option adopted in various jurisdictions, including Malta, is to have in place a dedicated adjudicative body which factors the input of persons with technical expertise in the diverse aspects relating to utility regulation. In taking forward such an option there are different variations as to how the appeal body may be composed. One composition is having an appeal body consisting of a judge who presides, together with other members with full voting powers, which members have expertise in specific aspects of utility regulation.[616] Another composition is

[616] A parallel under Maltese law was the CCAT which was composed of a judge and two technical members who had full voting powers. See art 32 of the Malta Competition and Consumer Affairs Act as it was in 2013 when the Federation of Estate Agents case was lodged. The role of the CCAT has since been assigned to the Civil Court (Commercial Section) following amendments made under

where the appeal body is presided by a judge who is assisted by technical experts who however have no voting powers. A third composition would be a half way measure between the two other compositions, whereby the appeal body is composed of a judge and other expert members with the latter members having voting rights other than in relation to issues involving the interpretation of the law, procedure and the imposition of sanctions.[617]

One important consideration in determining whether the appeal body should include members with technical expertise who have voting powers, and the extent to which such members, if at all, should enjoy such powers, is the manner and conditions of the appointment of such members. This point was considered in the Federation of Estate Agents versus Direttur Ġenerali (Kompetizzjoni) et case.[618] In this case both the court of first instance the First Hall of the Civil Court (constitutional competence) and subsequently the Constitutional Court, examined in some detail the right of judicial review in relation to regulatory decisions taken by the DG Competition within the MCCAA in so far as these related to the imposition of substantial fines.

This case arose as a result of investigations that the DG Competition was undertaking in relation to alleged non-compliance with competition law norms by the Maltese Federation of Estate Agents. The Federation contested the validity of these investigations and their possible outcomes, arguing that if the Federation was found guilty of having acted in breach of competition law, then it could be liable to the imposition of hefty fines by the DG. These sanctions, according to the Federation, were equivalent to sanctions of a criminal nature and therefore in breach of its right to a fair hearing before a court as safeguarded by article 39(1) of

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the Competition Act and Consumer Affairs Act and other laws (Amendment) Act, 2019 as per Act No XVI of 2019.

[617] To a very limited extent this option was adopted in the case of the former CAB, whose chairman alone was empowered to decide any issues relating to the procedure to be followed by the CAB. It is pertinent to note however that the chairman was not a member of the judiciary, but a lawyer appointed on a part-time basis for a fixed period. See regs 4 and 5 of the Communications Appeals Board (Procedure) Regulations 2005 as per LN 111 of 2005.

[618] The case was decided by the Constitutional Court on the 3rd May 2016 following an appeal by defendants from the judgement of the First Hall of the Civil Court (Constitutional Jurisdiction) given on the 21st April 2015. See also Falzon Group Holdings et v Direttur Ġenerali (Kompetizzjoni) et decided by the First Hall of the Civil Court (constitutional jurisdiction) on the 8th November 2018.

the Constitution of Malta, and to a fair hearing before an independent and impartial tribunal as provided for under article 6 of the European Convention on Human Rights (ECHR).[619] The Federation contended that the DG Competition is neither a court nor a tribunal, and that therefore the provisions under the Competition Act giving the authority to the DG to impose such fines were in breach of both the Constitution and the ECHR.

One of the pleas raised by defendants was that any regulatory decision of the DG Competition could be contested both on points of fact and of law before the CCAT, arguing that this right of appeal before the CCAT ensured that even if the DG was not a court, his decisions were subject to review by the CCAT. The Federation however in turn argued that the CCAT could not be considered as a 'court' or 'tribunal' for the purposes of article 39 of the Constitution of Malta or of article 6 of the ECHR since the non-judicial members of the CCAT were appointed on part-time basis for a fixed three year term and the manner of their appointment and tenure of office could compromise their impartiality.[620] The Constitutional Court held that whilst the CCAT could be considered as an adjudicating authority prescribed by law for the purposes of article 39(2) of the Constitution in so far as the case related to the determination of civil rights or obligations, the CCAT could not be considered as a 'court' for the purposes of article 39(1) of the Constitution in relation to the determination of a criminal accusation.[621] It is pertinent to note that the arguments by the Federation in relation to the independence of the non-judicial members of the CCAT on the basis of the manner and conditions of their appointment were

[619] The Federation contended that if found in breach of competition law, then it was liable to a fine that could reach up to €1.2 million.

[620] See art 32 of the Malta Competition and Consumer Affairs Authority Act as it was in 2013 when the Federation of Estate Agents case was lodged. The CCAT was composed of a judge who presided, together with two other 'ordinary' members who were chosen by the judge from a panel of six members appointed by the President of Malta acting on the advice of the Prime Minister. These members were appointed for a term of three years and were eligible for reappointment. During their term of office they were not precluded from the exercise of their profession. Significantly such members could only be removed during their term of office on the grounds of proven inability to perform the functions of their office or of proven misbehaviour.

[621] See Federation of Estate Agents judgement of 3 May 2016 at para 20 and paras 35 et seq. Art 39 of the Constitution makes a clear distinction in relation to cases involving criminal offences on the one hand and civil issues on the other. In the case of criminal offences, the Constitution clearly provides that these are to be determined by a 'court', whereas in the case of civil issues these are to be determined by 'any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations'.

rejected by the Constitutional Court.[622] According to the Constitutional Court the safeguards given at law in relation to the independence of these members of the CCAT were strong enough to dispel any doubt about their independence and impartiality.[623]

Whilst this case refers only to the contestation of regulatory decisions involving substantial fines meant to punish non-compliant undertakings, its conclusions serve to underline the importance of ensuring that an aggrieved party has the right to contest a regulatory decision before an independent adjudicative body presided by a member of the judiciary. The final judgement of the Constitutional Court in the Federation of Estate Agents case indicates how an appeal body can be constituted factoring also the inclusion of non-judicial technical members with voting powers in stated circumstances. One point which is clearly evident from the Federation of Estate Agents judgement given by the Constitutional Court is that final decisions imposing criminal sanctions can only be taken by a court composed exclusively of members of the judiciary. Doing otherwise according to the aforesaid judgement would be in breach of article 39(1) of the Constitution which states that:

> 'Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

Conversely if the regulatory decision being contested before the appeal body involves only issues of a civil nature, then the appeal can be referred to an appeal body such as the former CCAT whose composition included also voting members who did not form part of the judiciary.[624] It is therefore possible to have an appeal body presided by a member of the judiciary which body includes members who have technical expertise in diverse aspects of utility regulation and who are not members of the judiciary, enjoying voting powers in relation to issues involving civil rights. In the case of appeals from regulatory decisions imposing administrative

[622] Conversely the court of first instance had agreed with the arguments made by the Federation on this point. See the Federation of Estate Agents judgement of 21 April 2015 given by the First Hall at p 28.
[623] See Federation of Estate Agents judgement of 3 May 2016 given by the Constitutional Court at paras 49 to 53.
[624] ibid, paras 35 et seq.

fines, such decisions could be determined by the presiding judge or magistrate alone. The author suggests that such a solution would be an equitable measure which would address the concerns raised in the Federation of Estate Agents judgement. Its implementation would however necessitate amendments to the law whereby such specialised tribunals would be recognised as courts for the purposes of the Constitution provided issues relating to interpretation of the law or the imposition of fines are left to the exclusive remit of the presiding judge or magistrate.

In the case of Malta the ART as the competent appeal body both in relation to appeals from regulatory decisions taken by the MCA or the REWS, is composed of a magistrate who in turn is assisted by two non-voting assistants. The Administrative Justice Act is quite clear on this point and states that the ART 'shall consist of a Chairperson who shall preside over the Tribunal'.[625] The Administrative Justice Act provides that the ART 'shall be assisted by two assistants' whom the Tribunal 'may consult in any case for its decision'.[626] The Act further states that the Tribunal is not bound to abide with the opinion of its assistants.[627] Any regulatory decisions taken either by the MCA or the REWS, including decisions imposing financial penalties on non-compliant persons, can be contested before the ART. This situation is in contrast to the situation as it was prior to 2012 where the former appeal boards - in case of the communications sectors the CAB, and in the case of the energy and water sectors the RAB - were composed entirely of persons who were not members of the judiciary, with each member having full voting powers irrespective of the nature of the appeal other than in issues relating to procedure which issues were decided by the chairman alone.[628]

One can argue that the ART as composed is in conformity with the requirements as determined by the Constitutional Court in the Federation of Estates Agents judgement once all decisions taken by the ART, whether they relate to purely civil

[625] Administrative Justice Act, art 8.
[626] ibid, art 10.
[627] ibid, art 10.
[628] See regs 4 and 5 of the Communications Appeals Board (Procedure) Regulations 2005, and regs 4 and 5 of the Resources Appeals Board (Procedure) Regulations 2009.

issues or to the imposition of fines, are taken only by the presiding magistrate. Conversely, one can argue that the ART is strictly speaking not a 'court' for the purposes of article 39(1) of the Constitution since it is not listed among the courts mentioned in articles 3 and 4 of the Code of Organisations and Civil Procedure.[629] In substance however the purpose of the provisions of article 39(1) of the Constitution is to ensure that a person accused of a criminal offence is afforded a fair hearing by an independent and impartial court composed exclusively of a member or members of the judiciary. If once the decision is taken only by the magistrate presiding the ART, then factually the concern that a fair hearing is not afforded before an adjudicative body composed solely of a member or members of the judiciary does not subsist. For the sake of completeness it is relevant to point out that the Administrative Justice Act does cater for the possibility that an ex-judge or ex-magistrate may be appointed to preside over the ART. It is suggested to avoid possible controversies about the impartiality or otherwise of the ART, to amend the law to limit such appointments to sitting members of the judiciary.[630]

Given the above, should the current situation whereby all appeals are referred to the ART and consequently determined only by the chairperson, who is a member of the judiciary, remain? As stated earlier the bottom line in considering the nature of the appeal body, is that it should be constituted in such a manner as to ensure that it is able to give an informed decision on all the issues brought before it, including those involving technical matters. The possibility of having also as voting members of the appeal body, persons who are not members of the judiciary but who are well-versed in the different technical aspects of utility regulation including economics, accountancy and engineering aspects amongst others, should not be discounted. In many other countries the appeal body is chaired by a member of judiciary whilst the other members, who are not necessarily members of the judiciary, are chosen because of their expertise in some aspect of utility regulation.

[629] See on this point the Constitutional Court judgement of the 3rd May 2016 in the Federation of Estate Agents case at paras 32 to 35.
[630] See Administrative Justice Act, art 8. To date all the chairpersons presiding over the ART have been sitting magistrates.

The Irish experience in dealing with appeals from regulatory decisions taken by Comreg in the electronic communications sector is an eye-opener in relation to the effectiveness of the various options in dealing with such appeals.[631] Until July 2003 a regulatory decision taken by Comreg could be contested before the High Court either by requesting judicial review or by appeal on a point of law.[632] Subsequently the appeal system was changed whereby aggrieved persons could contest Comreg regulatory decisions before the Electronic Communications Appeals Panel (ECAP), an *ad hoc* appeal body appointed by the Minister responsible for communications. The ECAP was composed of three members one of whom had to be a lawyer of at least seven years' experience, whereas the other members had to have 'such commercial technical, economic, regulatory or financial experience' as the Minister considered appropriate. In each appeal the Minister was empowered to appoint a panel, and different panels could be appointed to hear other appeals.[633] The ECAP however did not prove to be an efficient means in determining appeals from regulatory decisions, and in 2007 the appeal system with some modifications reverted to the earlier system whereby appeals from regulatory decisions taken by Comreg were determined by the High Court.[634] Prior to the changes in the appeal system in 2007, the Irish government undertook a review of the then existing process. One proposal made was for the introduction of a procedure then used in relation to competition law cases whereby the presiding judge could appoint experts to assist the Court in understanding complex and technical issues more so when the Court was confronted with differing and conflicting information by the parties.[635]

The Competition Appeal Tribunal (CAT) in the UK can serve as a model for Malta since it provides some degree of flexibility in the choice of the persons appointed as

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[631] In the case of the energy sector, regulatory decisions taken by the Commission for Regulation of Utilities (CRU) may be contested before an *ad hoc* appeal panel. See ss 29 to 32 of the (Irish) Electricity Act 1999 https://www.cru.ie/home/about-cru/corporate-information/#legislation, and http://www.irishstatutebook.ie/eli/1999/act/23/section/29/enacted/en/html#partiv.

[632] See Department of Taoiseach *Consultation Paper on Regulatory Appeals* p 14 (n 97).

[633] See reg 5 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2003 – SI No 307/2003.

[634] Department of Taoiseach *Consultation Paper on Regulatory Appeals* pp 14 and 37 (n 97).

[635] ibid, p 37.

members of the Tribunal to deal with the diverse cases falling within its remit. The CAT determines various appeals from regulatory decisions taken by the different utilities regulators in the UK including Ofcom and the Gas and Electricity Markets Authority (GEMA).[636] The members of the CAT are chosen from amongst members listed in two panels, one is a panel of chairmen chosen by the Lord Chancellor from amongst persons of the legal profession who satisfy judicial appointment eligibility conditions and have 'appropriate experience and knowledge of competition law and practice', and the other a panel of 'ordinary' members chosen by the Secretary of State from amongst persons with expertise in either law, economics, business or accountancy.[637] A case once filed and accepted by the CAT Registrar, is first notified to the respondent and subsequently a tribunal consisting of a chairman and two ordinary members is chosen to hear and determine the case.[638] Whilst there are no precise written rules as to how the members of a tribunal for each case are chosen, in practice consideration of the issues involved is taken into account in the choice of the members selected to determine each case.[639] The procedure adopted by the CAT empowers the chairman presiding the Tribunal to deal with various issues, with the other 'ordinary' members being involved in the determination of substantive issues if the chairman considers for example that there is a particular need for wider expertise in relation to any particular aspect of the case or if there is a matter which the chairman cannot deal with sitting alone.[640] In such instances the ordinary members have full voting powers and decisions are taken together with the presiding chairman of the Tribunal.

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[636] See the CAT website under the section titled 'the current functions of the Tribunal', https://www.catribunal.org.uk/about, accessed 30th September 2022.
[637] See the (UK) Enterprise Act 2002, s 12 and Schedule 2 thereto. See also https://www.catribunal.org.uk/about, accessed 30th September 2022.
[638] See CAT *Guide to Proceedings*, p 29 et seq at https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf.
[639] Rule 115(1) of the (UK) Competition Appeal Tribunal Rules 2015 (SI 2015 No 1648) states that the Tribunal, subject to the aforesaid Rules, may regulate its own procedure. The Rules per se do not detail how the individual members assigned to determine a particular case are chosen. See https://www.catribunal.org.uk/frequently-asked-questions, accessed 30th September 2022 This was confirmed in e-mail correspondence of 27 November 2018 between the author and the CAT Information service which advised that members of the individual tribunal are appointed by the President of the Tribunal who in doing so considers various criteria, including the expertise of the members on the matters arising in a given case.
[640] See CAT *Guide to Proceedings* para 5.60 at p 50. https://www.catribunal.org.uk/sites/default/files/2017-12/guide_to_proceedings_2015.pdf. See also Competition Appeal Tribunal Rules 2015, rule 11.

3.6. The scope and standard of review by the appeal body

When providing for the norms applicable to the contestation of regulatory decisions taken by a NRA the EU limits itself to generic norms requiring Member States to ensure that such decisions are subject to review by bodies independent of the parties to the appeal. In the case of electronic communications the EU requires that Member States ensure that an appeal can be made before an appeal body which is independent of the parties, has the 'appropriate expertise' to carry out its functions effectively, and that measures are taken to ensure that 'the merits of the case are duly taken into account'.[641] Otherwise the EU does not list any other requirements, and it is up to each Member State to determine the extent of the remit and powers of review of its appeal body.[642] With the other utilities, the norms listed by the EU are, if anything, of even less help in determining the extent of the remit of the appeal body and the standards of review that such a body should follow.[643]

This failure by the EU to provide more direction to Member States leaves unanswered what precisely the role of an appeal body should be when reviewing a regulatory decision. Should the appeal body limit itself to reviewing a regulatory decision and if it disagrees with the decision taken, to annul that decision or to refer it back to the NRA for a new decision? Or should the role of the appeal body go beyond, enabling the appeal body to replace a regulatory decision taken by a NRA with its own conclusions? In doing so what are the standards of review that the appeal body should adopt?

The stance taken in Malta is that the ART may in part or in whole confirm or annul regulatory decisions taken by a NRA. In the case of appeals from regulatory decisions by the MCA or by the REWS, the ART cannot substitute the conclusions

[641] See EECC, art 31(1).
[642] See P E Micallef 'Enforcement and judicial review of regulatory decisions' p 286 (n 89).
[643] See Electricity Market Directive 2019, art 60(7) and (8), and Postal Directive 97/62/EC, art 22 para 3.

reached by either regulator with its own. There are some differences as to the grounds of appeal from regulatory decisions taken by the MCA and by the REWS on the basis of which an appeal can be made before the ART. In the case of appeals from regulatory decisions taken by the MCA, an appeal can be made by any person aggrieved by a decision taken by the MCA under the various laws that the MCA is entitled to enforce.[644] The only qualification is that the person making an appeal, must explain his juridical interest in contesting the regulatory decision. Conversely in the case of regulatory decisions taken by the REWS, whilst an appeal can be filed from any decision taken by the REWS in accordance with the Regulator for Energy and Water Services Act or any regulations made thereunder, this right of appeal is limited to the grounds listed under the Regulator for Energy and Water Services Act on the basis of which an appeal may be filed, namely that: (i) a material error to the facts has been made, (ii) there is a material procedural error, (iii) an error of law has been made, or (iv) there is some material illegality, including unreasonableness or lack of proportionality.[645] This means that whereas in the case of the MCA an appeal can be filed on any grounds whether of fact or of law, in the case of the REWS an appeal must be based on one or more of the grounds as described above in accordance with the Regulator for Energy and Water Services Act.

As is the case with an appeal from a MCA regulatory decision, a person who is aggrieved by a regulatory decision of the REWS is required to demonstrate that he has a direct interest in impugning the decision in question.[646] In the case of an appeal from a MCA regulatory decision, the ART in determining the appeal is required to take into account 'the merits of the appeal' and may in whole or in part confirm or annual the decision.[647] Almost identical wording is used in the case of an appeal from a REWS regulatory decision.[648] The ART therefore has no authority to

[644] See Malta Communications Authority Act, art 37(1). The Prime Minister may by order in the Government Gazette extend the jurisdiction of the ART in relation to any other decisions that the MCA may take under any other law which it is entitled to enforce or to any decision taken by or on behalf of government or of any public authority which decision has a substantial bearing on communications. To date the Prime Minister has not availed himself of this faculty.
[645] See Regulator for Energy and Water Services Act, art 32(2).
[646] ibid, art 32(6).
[647] See Malta Communications Authority Act, art 39(1).
[648] See Regulator for Energy and Water Services Act, art 32(4).

substitute a regulatory decision with its own conclusions, and a regulatory decision once contested is either confirmed or else annulled whether in whole or in part.

The question at this juncture is whether the remit of the ART in determining appeals from regulatory decisions taken, should extend to the faculty of actually substituting the conclusions reached by a regulator. Is it tenable that an appeal body such as the ART is empowered to substitute the conclusions reached by a regulator? An appeal body composed solely of a lawyer or lawyers will understandably be reluctant to adopt different conclusions from those reached by a regulator where the conclusions may be based on specialised technical knowledge of the sector which the member or members of the appeal body may lack.

In recent years in the UK there has been considerable debate on the standard of review that should be adopted by an appeal body when determining contestations of regulatory decisions taken by NRAs.[649] Under UK Law the CAT when determining appeals from regulatory decisions by Ofcom, is required to decide the appeal 'by applying the same principles as would be applied by a court on an application for judicial review'. In doing so the CAT may either dismiss the appeal or quash the whole or part of the decision to which it relates. If the CAT decides to quash the whole or part of the decision, it may refer the matter back to Ofcom with a direction to reconsider and make a new decision in accordance with the ruling taken by the CAT.[650]

In a consultation paper published in 2013 the UK government argued that appeals should be heard on what it described as a 'judicial review' standard unless there were specific legal or policy reasons for a different approach. If the appeal was not heard on a judicial review basis, then the standard of review was to be determined

[649] See the UK Government consultation titled *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, published on the 19th June 2013 and the various responses thereto. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf, and the responses thereto at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/240389/bis-13-1185-regulatory-and-competiton-appeals-options-for-reform-views-from-stakeholder-workshops.pdf.

[650] See (UK) Communications Act 2003, s 194A. The same norm applies in relation to appeals from regulatory decision taken by Ofcom in accordance with s 57 of the (UK) Postal Services Act 2011.

by clear grounds of appeal focused on identifying material errors or unreasonable decisions by the regulator. In doing so the UK government identified a number of principles for non-judicial review appeals, namely if there is (i) a material error of fact; (ii) a material error of law; (iii) a material procedural irregularity; (iv) a decision outside the limit of what a regulator could reasonably decide in the exercise of its discretion; or (v) a decision based on a judgement or prediction which the regulator could not reasonably make.[651] The CAT, in its response to these proposals by the UK government, expressed concern about the proposals by the UK government to move to a general judicial review model, or to what it described as 'pixelated' grounds of review in certain cases.[652] The CAT questioned whether the proposals by the UK government on the 'standard of review' would result in the benefits sought by the UK government, noting that there appeared to be 'a degree of misunderstanding and misinformation about how 'merits' appeals work and what would be the likely effect of changing them'.[653]

There appears to be a general consensus amongst various EU Member States that the remit of an appeal body should not extend beyond a review of issues relating to points of fact and, or of law, whereby a regulatory decision is either confirmed or annulled in part or in whole. CERRE examined in some detail the standards of review that should be adopted by a court in relation to the merits of appeals from regulatory decisions.[654] The conclusion it arrived at after considering the situation in different EU Member States, was that whilst there are some differences between the standards of review of the various appeal bodies examined, there is a broad tendency to provide for a remit which caters for a full review of errors of law or errors of fact, and for a marginal review of the exercise of the discretion of the

[651] UK Government *Streamlining Regulatory and Competition Appeals – Consultation on Options for Reform*, p 29 et seq. See also G Read and J Townsend, *Reforming Communications Act appeals: a new ERRA?* – Communications Law Vol 19 No 2, 2014 - http://www.devereuxchambers.co.uk/assets/docs/publications/comms_law_19_2_2_-_gsr_qc__jwt.pdf.

[652] See the Response of the Competition Appeal Tribunal, p 8 et seq https://www.regulation.org.uk/library/2013-CAT_Response_to_Streamlining_Regulatory_and_Competition_Appeals_Consultation.pdf.

[653] ibid, p 2. These proposals were not taken on board.

[654] See the CERRE (2011) p 133 (n 95).

regulator.[655] The paramount consideration behind such a stance is that whereas NRAs are specialised authorities supported by personnel with expertise in the diverse areas relating to the utilities concerned, an appeal body is not similarly composed such as to be able to 'reconstruct' the exercise of regulatory powers of a regulator.[656] Consequently an appeal body cannot effectively substitute its discretion for that of the regulator. Empowering an appeal body to substitute the conclusions reached by a regulator with its own, in practice means that a second regulator is being created. The purpose of having an appeal body is different. An appeal body is there to provide an effective right of challenge if a regulator has made a mistake whether of law and, or of fact or else has acted unreasonably, thereby ensuring that a regulator is held accountable for its decisions and the aggrieved party has an effective means of seeking a review of such regulatory decisions.

3.7. The suspension of a regulatory decision during appeal proceedings

The EU in relation to appeals from regulatory decisions in the electronic communications sector requires that pending the outcome of the appeal, the decision of the regulator stands unless interim measures are granted in accordance with the applicable national law.[657] Similarly in the postal services sector, the EU states that pending the outcome of an appeal from a regulatory decision, the decision of the regulator is to stand unless the appeal body decides otherwise.[658] Conversely in the case of the electricity sector the requirement that a regulatory decision stands unless overruled by the appeal body, applies only in relation to decisions taken by the regulator following a complaint against a transmission or distribution system operator in relation to the obligations onerous on that operator

[655] ibid, p 136 et seq.
[656] ibid, p 137.
[657] See EECC, art 31(1).
[658] See Postal Services Directive, art 22(3).

under the Electricity Market Directive.[659] Nothing however is stated in relation to the status of appeals from other regulatory decisions pending the final outcome of the appeals proceedings. The position is similar in the gas sector, where it is only in the case of an appeal from a regulatory decision further to a complaint against a transmission, storage, LNG or distribution system operator in relation to the obligations onerous on such an operator under the Gas Market Directive, that the decision has binding effect unless and until overruled on appeal.[660]

Under Maltese law the general norm is that a regulatory decision taken by a NRA stands even if an appeal is filed. In the case of a regulatory decision taken by the MCA, the law expressly states that such a decision 'shall stand and shall be adhered to by all the parties to whom the decision applies' for the duration of the appeal proceedings.[661] This norm applies to all regulatory decisions of the MCA irrespective of the sector to which they relate to. It is however possible for the ART on the application of a party to the appeal, to suspend in whole or in part the decision being contested pending the final determination of the appeal.[662] The ART is required to give its reasons in deciding whether or not to suspend the regulatory decision, taking into account all the relevant circumstances including the urgency of the matter, the effect on the party making the request for suspension if the request is not upheld, and the effect on competition and, or end-users if the request for suspension is upheld. The ART in determining any such request may include any such conditions as it may consider necessary in the circumstances.[663]

In the case of an appeal from a regulatory decision imposing a sanction following an alleged infringement of a regulatory requirement, the position is somewhat different. In such an instance if the MCA decides that an infringement has been

[659] See Electricity Market Directive 2019, art 60(2).
[660] See Directive 2009/73/EC, art 41(11).
[661] See Malta Communications Authority Act, art 42(1).
[662] The law also states that the Court of Appeal has a similar power in ordering the suspension of a regulatory decision. This however appears to be an oversight by the legislator since an application for suspension can only be made before or with the application of an appeal from a regulatory decision, which can only occur when an appeal is being made before the ART as the appeal body of first instance. See art 42 of the Malta Communications Authority Act. The same issue arises in the case of an appeal from a regulatory decision taken by the REWS. See art 32(5) of the Regulator for Energy and Water Services Act.
[663] See Malta Communications Authority Act, art 42(2).

committed and consequently imposes a sanction, then the MCA is required to notify the person concerned specifying the nature of the infringement, the sanction being taken and if the sanction consists of an administrative fine the amount of the fine being imposed. If prior to the lapse of the period during which the notification of such a decision can be contested, the person concerned files an appeal and concurrently or before the filing of the appeal, also files a request asking for the suspension of the decision imposing the sanction, then the MCA is required to desist from taking any further action in relation to the sanction in question.[664] The ART is required to decide any such request 'expeditiously' giving the MCA 'a reasonable opportunity to reply and make its submissions.'[665] This procedure in practice means that the mere act of filing a request for suspension of the regulatory decision imposing the sanction, leads to the consequential suspension of that decision at least until the request for suspension is decided by the ART.

The reason why a regulatory decision imposing a sanction is treated differently from other regulatory decisions of the MCA appears to be motivated by the consideration that any delay in determining a request for the suspension of the imposition of a sanction may have a serious negative impact on the person against whom the sanctions are targeted especially if the sanction consists of a substantial daily fine.[666] If a regulatory decision imposing a sanction is not suspended, the person concerned may be required to pay up, even though the fine is being contested and a request for its suspension has been made. It is pertinent to note that this norm was introduced in 2007 in response to a case before the former CAB - the then competent appeal body - where a request for the suspension of a sanction was not determined in short order by the CAB, this to the prejudice of the person concerned.[667]

The EECC requires that all regulatory decisions stand and that such decisions may be suspended only in accordance with interim measures that may be granted in

[664] ibid, art 32(5).
[665] ibid.
[666] See P E Micallef *Enforcement and Judicial Review of Regulatory Decisions in Electronic Communications – A Review of the Malta Experience with Reference to other Common Law Member States in the EU*, p 279 (n 89).
[667] ibid, p 279. The CAB was then the competent appeal body and remained so until 2012.

accordance with national law.[668] This raises the question whether a regulatory decision taken by a NRA imposing a sanction suspended on the sole basis of the filing of an appeal and a request for suspension without any decision by the appeal body acceding to the request being taken, is tantamount to the granting of an interim measure as stated under EU law? This point to date has never been raised under Maltese law. The EU norm does not require the issue of a specific order by the appeal body suspending the effects of a regulatory decision – in this case the imposition of a sanction – and therefore does not exclude instances where the law in given circumstances provides for the application of interim measures, in this case the suspension of any further measures to enforce a sanction which is being contested. One can therefore argue that the 'granting' of an interim measure is determined by the provisions of the law which provide for such a measure if certain pre-defined circumstances occur, in this case the filing of an appeal coupled with a request for suspension of the sanctions imposed in the decision being appealed.

In the case of an appeal from a regulatory decision taken by the REWS, the effect of such a decision is not suspended unless the ART orders otherwise.[669] The faculty to suspend a regulatory decision taken by the REWS applies to all regulatory decisions relating to any of the energy or water sectors regulated by the REWS. Unlike requests for the suspension of regulatory decisions taken by the MCA, the law in the case of regulatory decisions taken by the REWS does not list any circumstances which the ART is required to consider in deciding whether or not to accede to a request for suspension. There is no evident reason why there is this difference between the norms applicable in the case of appeals from MCA regulatory decisions and from REWS regulatory decisions. Objectively the circumstances listed at law which the ART is required to consider in relation to a request for the suspension of a MCA regulatory decision, can in their entirety easily apply to requests for the suspension of a regulatory decision taken by the REWS.

[668] See EECC, art 31(1).

[669] See Regulator for Energy and Water Services Act, art 32(5). The Court of Appeal has similar powers to suspend a regulatory decision.

As is the case with the MCA, a regulatory decision imposing a sanction issued by the REWS is suspended if the person against whom the sanction has been imposed, decides to appeal the decision imposing the sanction and concurrently with or before the filing of the appeal requests the ART to suspend the notice sent enforcing the regulatory decision imposing the sanction.[670] The law regrettably in the case of the suspension of a sanction imposed by either the MCA or the REWS limits itself to requiring that the ART determines such requests 'expeditiously' without elaborating any further.[671] A request for suspension impacts both the NRA imposing the sanction and the person against whom the sanction is being imposed. In the case of the NRA, such a sanction can constitute an effective tool in curbing in short order a harmful malpractice impacting consumers and, or competitors of the person allegedly responsible for the malpractice. This consideration however needs to be balanced with the rights of the person against whom the sanction has been imposed who is entitled to a fair hearing, more so when faced with the imposition of a substantial fine that can have a crippling impact on his commercial operations.[672]

3.8. The length and the cost of proceedings before the appeal body

The EU does not provide for any specific norms which relate either to the length of appeal proceedings or to the costs incurred by the parties to such proceedings. In the electronic communications sector the EU limits itself to stating that Member States should have in place appeal mechanisms that are 'effective' and that they collect information on the duration of appeal proceedings.[673] The situation is

[670] See Regulator for Energy and Water Services Act, art 13(1) to (6).
[671] See Malta Communications Authority Act, art 32(5), and Regulator for Energy and Water Services Act, art 13(6).
[672] Relevant to this consideration is the judgement of the Constitutional Court in the Federation of Estate Agents case, whereby that Court held that a regulatory authority cannot impose fines which are of a punitive nature on a non-compliant undertaking. At the time of writing no measures have been taken to address this point at least in so far as regulatory decisions taken by NRAs imposing punitive fines are concerned. The possibility that such issues may surface is however there and needs to be addressed in short order.
[673] See EECC, art 31.

similar with regard to appeals in relation to postal services, with an identical requirement in the Postal Services Directive requiring Member States to ensure that there are 'effective mechanisms' in place.[674] In the case of the electricity and gas sectors the EU limits itself to stating that Member States should ensure that 'suitable mechanisms exist at national level' whereby a party affected by a decision of the NRA may appeal to 'a body independent of the parties involved and of any government'.[675]

Under Maltese law in the case of appeals from regulatory decisions taken by the MCA, the ART is required to 'endeavour to determine' an appeal within one hundred and twenty days from when the MCA may file its reply to the said appeal, and is in any case required to give a final decision not later than sixty days from when the parties to the appeal declare that they have concluded with their evidence and made their final submissions.[676] It is pertinent here to note that the ART is given a precise time frame in which to decide cases only when the parties have concluded their evidence and made their submissions, and therefore at a juncture of the proceedings when the time required to issue a decision is in practice exclusively dependant on the ART. Significantly the law does not envisage any remedial measures if such timeframes are not adhered to by the ART.

In the case of requests for the suspension of a regulatory decision imposing a sanction, the ART is required to decide such a request 'expeditiously'. In doing so the ART is required to give the MCA 'a reasonable opportunity' to reply and make its submissions.[677] In relation to costs incurred in appeal proceedings, the ART may, whether of its own initiative or at the request of a consumer who is a party to the appeal, consider 'having regard to its determination of the appeal and all other relevant matters' if there are sufficient reasons whether to order that the whole or part of the costs incurred by the consumer relating to the engagement of a lawyer or of a technical adviser be paid to the consumer by any other party to the

[674] See Postal Services Directive, art 22(3).
[675] See Electricity Market Directive 2019, art 60(8).
[676] See Malta Communications Authority Act, art 40(1).
[677] ibid, art 32(5).

appeal.[678] If the ART in order to assist it in the exercise of its functions decides to appoint experts to advise it on any issue relevant to an appeal, it may then make provisional orders in respect of the payment of the costs relating to such experts by any of the parties to the appeal.[679]

In the case of appeals from regulatory decisions taken by the REWS, if a request for the suspension of a regulatory decision is made, the ART is required to determine any such request 'expeditiously'. In doing so the ART is required to give the REWS not more than three working days in which to make its response to the application.[680] Otherwise the law does not make any specific provision relating to the period by when an appeal from a regulatory decision by the REWS should be determined by the ART. In relation to costs the law does not provide for any specific measures concerning appeals before the ART from regulatory decisions by the REWS.

This is another instance where different norms exist in relation to appeal proceedings from regulatory decisions taken by the MCA and by the REWS. There is no evident reason for such differences more so when appeals from such decisions are reviewable before the same adjudicative body – the ART – and have in practice the same purpose, namely that of providing for a right of review of regulatory decisions by an independent appeal body. As with other instances of litigation, the time factor in determining appeals from regulatory decisions taken by NRAs is of crucial importance in ensuring effective and timely regulation of utilities in Malta. The feasibility of providing for timeframes by when the ART must determine appeals whilst desirable is not in practice a realistic measure that can always be applied with success. Ideally an appeal should be decided within a short timeframe.

[678] ibid, art 39(2). To date no appeals in which a consumer was a party have been filed before the ART.
[679] ibid, art 40(2).
[680] See Regulator for Energy and Water Services Act, art 13(6). One difference is that the Malta Communications Authority Act does not provide for a maximum period during which the MCA may respond to a request for suspension, whereas the Regulator for Energy and Water Services Act provides for a maximum period of three working days.

The Maltese legislator has unsuccessfully in a few instances provided by law for timeframes by when a decision should be given.[681]

There are various points that need to be factored in considering whether or not timeframes should be imposed. A fundamental consideration is that the inclusion of a timeframe should not undermine the right of a party to a fair hearing. Each party to an appeal should be given adequate opportunity to state its case and to submit any relevant evidence. This right however should be tempered with the duty of the appeal body - in this case the ART - to ensure that proceedings do not prolong unduly. Timeframes should be considered only in those circumstances where it is reasonable for the appeal body to intervene, such as when it is clear that a party is purposely using delaying tactics to the detriment of the other party.

As discussed earlier, in the case of an appeal from a regulatory decision by the MCA, the ART is required to 'endeavour to determine' such an appeal within one hundred and twenty days from the lapse of when the MCA may file its response to the said appeal. To date all appeals from MCA regulatory decisions contested before the ART have taken much more than one hundred and twenty days to be decided.[682] One must remember that many appeals from decisions taken by either the MCA or the REWS involve complex technical points at times requiring the input of expert technical witnesses. Such considerations invariably impact on the duration of such appeals and given such realities the timeframe of one hundred and twenty days is not realistic.

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[681] A case in point is art 26 of the Arbiter for Financial Services Act, Chapter 555 of the Laws of Malta, which states that the Arbiter must decide complaints referred to him within ninety days of receipt, which can be extended up to one year in the case of complex complaints. In practice the observance of such timeframes is rarely adhered to, given in part because of the complexity of the issues involved in most cases. See reply to PQ number 1829 by Dr Chris Said which was answered on the 19th October 2017. The Minister for Finance in his reply to this PQ stated that only one case was decided within the ninety day timeframe, adding that most cases were of a complex nature and required more time to be decided, Twegiba ghall-mistoqsija parlamentari numru 1829 (gov.mt).

[682] The average duration of an appeal from a regulatory decision of the MCA before the ART is of roughly eighteen months. This is slightly more than the average for EU Member States. See figure 1 at p 40 of a study undertaken for the European Commission titled *Inventory of Case-law on Electronic Communications* at http://publications.europa.eu/resource/cellar/7ff4b9ca-e10c-11e5-8a50-01aa75ed71a1.0001.01/DOC_1.

CERRE in a study undertaken in 2011 noted that in the countries considered in that study, on average appeal proceedings took roughly a year and half to be concluded. CERRE commented that this length of time is probably unavoidable because of the 'legal, technical and economic complexity' of the subject matters of the appeals in question, concluding that there is no realistic hope that the duration of such proceedings can be substantially reduced. CERRE observed that EU Member States might be 'incentivized' to search for measures to reduce the length of appeal proceedings if the maximum length is fixed in the applicable EU directives, adding however that such a measure would be hard to defend from the point of view of subsidiarity.[683]

The UK experience in dealing with timescales in relation to appeal proceedings before the CAT may indicate some measures which can be replicated for appeal proceedings before the ART. CAT is required by law to 'actively' manage cases by:

> '(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
>
> (b) identifying of and concentration on the main issues as early as possible;
>
> (c) fixing a target date for the main hearing as early as possible together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case;
>
> (d) adopting fact-finding procedures that are most effective and appropriate for the case;
>
> (e) planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument; and
>
> (f) ensuring that the main hearing is conducted within defined time-limits.'[684]

CAT is also empowered to dispense with the need for the parties to attend any hearing, to use technology actively to manage cases and to give directions how proceedings are to be conducted including any time limits to be observed in the conduct of an oral hearing.[685] Whilst most of these norms are not expressly stated

[683] CERRE (2011) at p 108 et seq (n 95).
[684] See the (UK) Competition Appeal Tribunal Rules, 2015, rule 4(5)
[685] ibid, rules 4(6), 19(2)(a) and 53(2)(a).

under Maltese law, in practice there is nothing at law which prohibits the ART from adopting at least some of these measures.[686] This notwithstanding it would be a step forward if such norms are also explicitly listed under Maltese law thereby providing better articulated norms as to how proceedings should be conducted enabling the ART to deal with appeals in a time effective yet flexible manner.[687]

3.9. In what Instances, if any, should there be a further right of appeal?

As stated earlier, the EU in the EECC requires that if the appeal body is not judicial in character, then provision must be made under national law for a further right of review by a court or tribunal within the meaning of article 267 of the TFEU.[688] The EECC does not specify whether such further right of review should apply only to points of law or also to points of fact, but simply states that there should be a 'review' by a court or tribunal.

Under Maltese law the need to factor an additional right of review as required by the EECC does not arise given that appeals from regulatory decisions taken in the case of the MCA and of the REWS are decided by the ART whose decisions are taken by a magistrate. This therefore should not give rise to any concerns that the appeal is not being decided by a court or tribunal once in the case of the ART, decisions are taken only by a magistrate. Irrespective of this consideration, decisions taken by the ART are furthermore subject to a right of appeal to the Court of Appeal in its inferior competence composed of a judge. In the case of an appeal to the Court of Appeal from a decision given by the ART following a contestation of

[686] Art 20 of the Administrative Justice Act provides that the ART has all the powers as are vested in the First Hall of the Civil Court under the Code of Organisation and Civil Procedure which in turn gives a court - and hence the ART - considerable latitude in the conduct of proceedings. Reference in this context is made to art 173 of the Code of Organisation and Civil Procedure whereby a court may, to expedite or facilitate proceedings, give in camera all such orders as it may consider fit.
[687] Art 3(2)(b) of the Administrative Justice Act states that the time taken by the ART in deciding a case shall be 'reasonable' in the light of the circumstances of the case in question. The same provision requires that a decision is given 'as soon as possible'.
[688] See art 31(2) of the EECC. There are no similar norms under the EU legislation relating to the other utilities.

a REWS regulatory decision, the law explicitly states that such an appeal may be made on a question of law.[689] In the case of an appeal from a decision of the ART following a contestation of a MCA regulatory decision, the law provides that any party to the appeal before the ART who feels aggrieved by a decision of the ART can appeal to the Court of Appeal on a point of law and, or of fact in terms of the Administrative Justice Act.[690] Interestingly prior to 2012 appeals to the Court of Appeal from decisions of the CAB, which was until then the competent appeal body, were limited to points of law.[691]

The main argument against having a right of appeal before the Court of Appeal which extends to issues other than points of law, is that the Court of Appeal may end up reviewing issues which relate to technical issues of which that Court may not necessarily have the required expertise. One may counter-argue that the Court may appoint experts to advise it on such issues. However is it desirable to have an additional tier of adjudication that may review decisions relating to what in substance may amount to technical matters? A right of review by the Court of Appeal limited to points of law guarantees that there is a fair balance that safeguards the rights of aggrieved parties whilst ensuring that the diverse utility markets are not hampered by excessive multiple appeal procedures which challenge the soundness of technical decisions taken by NRAs. Going beyond by providing also for a right of appeal on points of fact may be counterproductive in ensuring that utility services litigation is dealt with in a timely yet fair manner. Utility regulation is by its nature dynamic and ever-changing. Whilst it is important that impacted parties have the right to contest regulatory decisions, such rights must be tempered with the need to ensure that the utilities markets are not subject to prolonged uncertainty which excessive and lengthy litigation processes can lead to.

[689] See Regulator for Energy and Water Services Act, art 34(1).
[690] See art 41 of the Malta Communications Authority Act which article until 2019 provided for a right of appeal on a point of law from decisions taken by the CAB then the competent appeal body relating to contestations of regulatory decisions taken by the MCA.
[691] See art 8 of Act No VII of 2004 which article provided for the inclusion in the Malta Communications Authority Act of a new part entitled 'Part VIII – Communications Appeals Board', which Part as per art 41 enabled parties to proceedings before the then CAB to contest decisions of the CAB only a point of law before the Court of Appeal (Inferior Jurisdiction).

3.10. Conclusion

When considering the judicial review of regulatory decisions by NRAs one feature which stands out is the lack of uniformity in the directions of the EU to Member States in the diverse directives relating to utility regulation. This is aggravated by the fact that direction where it is given is characterised by vague terminology. This is the case under the EECC which fails to address crucial issues such as the length of the duration of appeal proceedings, limiting itself to stating that there should be in place 'an effective appeal mechanism'.[692] Similarly in relation to the composition of the appeal body, the EU in the same directive requires that the appeal body, which may be a court, has 'the appropriate expertise to enable it to carry out its functions effectively' without however elaborating any further.[693] The norms provided for by the EU in the other utility regulation directives are if anything even less helpful. There is no plausible reason why the EU should not at least provide for identical norms when dealing with the judicial review of utilities regulatory decisions. This would at least ensure that appeals from utilities regulatory decisions are subject to the same basic norms.

The review of regulatory decisions in Malta has over the years witnessed various developments. Initially regulatory decisions could be contested before *ad hoc* appeal boards created expressly for the purpose. The effectiveness of these appeal boards was fraught by various shortcomings. At times these appeal boards lacked adequate administrative support facilities including human and material.[694] None of the appeal boards had a registry or even continuous access to premises where board sittings could regularly be held. In practical terms it did not make much sense to have an organisational set-up to support an appeal board operating outside the general court administration system dealing with a relatively very small caseload

[692] EECC, art 31.
[693] ibid.
[694] See P E Micallef *Enforcement and Judicial Review of Regulatory Decisions in Electronic Communications – A Review of the Malta Experience with Reference to Other Common Law Members States in the EU* at p 270 (n 89).

which on an average per annum, did not exceed single digits.[695] An important and beneficial change took place in 2012 when the ART was designated as the competent appeal body to determine appeals from regulatory decisions taken by the two utilities regulators, taking over from the former CAB and RAB. This change led to immediate improvement in various aspects given that the logistical set-up was now integrated within the overall general court administration system and therefore able to benefit from the support services provided by such a system. Appeals before the ART are filed in the court registry which is open during regular office hours, whereas sittings are held in one of the court halls of the inferior courts.[696] The ART is backed up by the human resources of the Courts Services Agency, given that the magistrates presiding over ART cases assigned to them use the court staff allocated to them in relation to other litigation referred to them, to deal also with any ART related sittings. Moreover the ART minutes of the separate tribunal hearings and the ART decisions are available on the eCourts.gov.mt services website maintained by the Court Services Agency.[697]

One other difference between the ART and the former appeal boards is that whereas with the ART, decisions are taken only by the presiding magistrate, in the case of the CAB and of the RAB, decisions were taken collectively by the chairman and the two other members of the respective boards who were all part-time appointees whose term of office was fixed and renewed by government at its discretion. Given the issues that have arisen following the judgement of the Constitutional Court in the Federation of Estate Agents case, the composition of the appeal body needs to be given careful thought more so where its remit includes deciding appeals from regulatory decisions imposing substantial financial penalties. Clearly the establishment of an appeal body which is composed only of persons appointed on a part-time basis for a fixed term is no longer tenable more so if the issues contested relate to the imposition of sanctions by a utilities regulator.

[695] Since the establishment of the first regulator in 1997, the number of new appeals contesting regulated decisions for each utility sector on an average has never exceeded the single digit per annum.

[696] This is in contrast with the situation with the former appeal boards, where to file an appeal application or a reply thereto one had to make an appointment with a part-time clerk who was not always readily available.

[697] Neither the CAB nor the RAB had a website.

As a minimum the appeal body should be presided over by a sitting member of the judiciary. Ancillary to this requirement is whether the appeal body should be composed only of a sitting member or members of the judiciary or whether alternatively there should also be persons with technical expertise who may not necessarily be members of the judiciary. CERRE as discussed earlier recommends that EU Member States should assign the review of regulatory decisions taken by NRAs to a specialist court or a specialist body within an existing court.[698] The experience of the CAT in the UK demonstrates that an effective way of dealing with appeals that may involve complex technical, economic or regulatory issues is to have a process which facilitates the allocation of each case to members of the adjudicative body who are best placed to determine the issues in contestation, which members may not necessarily all be members of the judiciary.

In the case of Malta the designation of the ART to determine appeals from utilities regulatory decisions was an improvement on the previous appeal boards' set-up. There is however room for further change. One cannot ignore the implications of the Federation of Estate Agents judgement in relation to the imposition of sanctions in particular of substantial financial penalties. Any final adjudicative decisions relating to the imposition of sanctions must be given by a member or members of the judiciary alone. This notwithstanding, is there a role for technical 'non-judicial' members on an appeal board? Should strictly technical issues which therefore do not involve points of law or the imposition of sanctions, be decided only by a sitting member of the judiciary? Any final decision by an appeal body should be based on the premise that it is taken on an informed basis.

The author considers that issues relating to strictly technical matters should be decided collectively by the presiding judge or magistrate together with the technical members of the competent appeal body. This could be addressed either by changing the existing structure of the ART by giving the Tribunal 'assistants' the faculty to vote on technical issues together with the presiding magistrate, with issues related to points of law, procedure and the imposition of sanctions being

[698] CERRE (2011), p 12 (n 95).

decided exclusively by the presiding magistrate.[699] Another option would be to establish a specialised adjudicative body on the lines of the former CCAT, but with the important innovation that the 'technical' members of the body will only have voting powers in relation to technical issues, whereas issues relating to points of law and to the imposition of sanctions are decided only by the presiding magistrate or judge.

[699] This would obviously necessitate substantial changes to the Administrative Justice Act, not least of which changing the nomenclature of 'assistants' to a more suitable one such as 'member'.

Chapter Four – The enforcement powers of utilities regulators

4.1. Introduction

Enforcement has a key role in the regulation of utilities since compliance with the applicable regulatory norms and decisions is imperative for the orderly provision of the diverse utilities both in the interests of utility providers and of utility services end-users. In evaluating enforcement the author distinguishes between on the one hand the enforcement tools in place to enable a regulator to perform its regulatory functions effectively, and on the other hand the imposition of sanctions on utility providers that fail to adhere with applicable law or regulatory decisions.

The enforcement tools available to the MCA and the REWS to have access to market information are crucial to enable both regulators to perform their regulatory functions on an informed basis and in a timely manner. Such tools range from the power to require the provision of regulatory information to that of issuing compliance or 'cease and desist' orders where it results that a utility provider may act or is acting in breach of its regulatory obligations. Equally important is the faculty of both regulators to impose sanctions whether in the form of financial penalties or other punitive measures if it results that there is non-compliance with the laws or decisions that each regulator enforces.[700] Hence if a regulator issues a decision requiring a utility provider to desist from practices which it considers to be in breach of regulatory norms, and notwithstanding the utility provider persists with such practices, then the next step is for the regulator to consider the imposition of sanctions. In this regard a consideration of the enforcement procedures used in different European countries reveals that to date two routes are generally followed, either the regulator imposes such sanctions itself, or conversely the regulator applies to an independent adjudicative forum - normally a court of law - for the imposition of sanctions.

[700] There are no set criteria at law that serve to distinguish clearly when a breach of the law should be listed as being criminal or otherwise. See Electronic Communications (Regulation) Act, arts 25, 31 and 48, and Regulator for Energy and Water Services Act, arts 10, 11, 13 and 38.

Ideally recourse to regulatory measures should be undertaken sparingly, and then only when other means prove futile. In some instances where a utility provider does not in good time provide requested information or fails to comply with a regulatory requirement, generally a formal warning by the regulator is sufficient to ensure compliance in short order. This however is not always the case. There are instances where a utility provider may be prepared to run the risk of falling foul of regulatory requirements and thereby face compliance proceedings conducive to the imposition of sanctions. Some utility providers may even decide that the gain to be made from non-compliance offsets any sanctions that may be imposed, comforted perhaps by the knowledge that contestation of any regulatory measures may result in lengthy litigation proceedings thereby delaying and even possibly minimising the negative impact of the imposition of any such sanctions.

A consideration that impacts the regulation of utilities in Malta is the landmark Constitutional Court judgement in Federation of Estate Agents case decided on the 3rd May 2016.[701] Though this judgement does not relate to the regulation of utilities, nonetheless it does have an important bearing on the procedure followed when imposing sanctions if there is non-compliance with utility services regulatory norms or decisions. The issues raised in that case whereby the former powers at law of the DG Competition within the MCCAA to impose sanctions were successfully challenged, can readily be applied to similar powers that both the MCA and the REWS to date have at law. Hence the issues consequential to that case must necessarily be factored in any comprehensive evaluation of the enforcement powers of utilities regulators in Malta. If there is to be in place an effective utilities regulatory regime that is in line with the constitutional law requirements as interpreted by the Constitutional Court in the Federation of Estate Agents case, then it is imperative to determine if the utilities regulators - the MCA and the REWS - should retain their powers to impose sanctions, or conversely whether a different sanctions regime such as that introduced under the Competition Act vis-à-vis the DG Competition, should be adopted.

[701] A resume in English of this judgement is provided by Dr Tonio Borg in *Leading cases in Maltese Constitutional Law* at pp 367 to 377.

Whatever route is finally chosen by the legislator necessitates that the changes to the law are clearly identified in the light of the conclusions reached in the Federation of Estate Agents judgement. The current situation whereby the majority of public authorities have the power to impose dissuasive financial penalities in relation to cases of alleged non-compliance and that when doing so risk facing constitutional lawsuits contesting the exercise of such powers is untenable and needs to be addressed in short order. This risk applies to the MCA and the REWS given that both regulators are by law empowered to impose sanctions.

4.2. Enforcement tools under Maltese Utilities Law

A fundamental aspect of effective utilities regulation is the ability of the regulator to have access to market information in order to be able to take informed decisions. Both the MCA and the REWS have considerable powers at law enabling them to acquire information that may be necessary for the effective conduct of their respective regulatory functions. Whilst there are some similarities, there are also various notable differences between the powers afforded to each regulator. Under the Regulator for Energy and Water Services Act authorised officers are empowered at 'all reasonable times' to enter 'any premises, vehicle, vessel or any other place' to make inspections, tests, measurements and take samples or to ascertain that there is no breach of any of the laws or applicable authorisation conditions enforced by REWS, or to ascertain or reproduce data or information that REWS may require.[702] REWS is also empowered to require 'any person or authorised provider to provide it with any information, including financial information' that REWS considers necessary in order to ensure compliance with the laws and decisions it enforces[703], and to require service providers 'to keep it

[702] See Regulator for Energy and Water Services Act, art 11. A person who obstructs or impedes a REWS officer, is liable on conviction to imprisonment not exceeding eighteen months and, or to a *multa* not exceeding €70,000.
[703] ibid, art 5(4).

updated at all times with information it identifies as necessary and objectively justified for it to fulfil its supervisory function.'.[704]

The wording used under the Malta Communications Authority Act in relation to the exercise of the enforcement powers of the MCA is more specific and detailed. MCA officers in the exercise of any of the functions at law onerous on the MCA are empowered to enter at any reasonable time to search and inspect any premises other than a place of residence, or any other place or any vehicle, vessel or aircraft and in doing so to inspect any books, documents or records found therein.[705] Unlike the situation under the Regulator for Energy and Water Services Act, distinction is made with regard to access to premises that are not residential and premises that are. In relation to non-residential premises entry is possible at 'any reasonable time', whereas MCA officers when inspecting residential premises may do so between eight o'clock in the morning and six o'clock in the evening, and then only after giving adequate notice to the person whose residence is to be inspected. In instances of 'manifest urgency' the MCA may however carry out such inspections outside such hours.[706] Furthermore the MCA is required to exercise such power of entry 'only in such a manner as is reasonably required in the interest of public saftey, public order, public health or public benefit.'.[707]

Other enforcement tools that the MCA has include the faculty to require the production for inspection and taking of any extracts from, or the removal or retention of any documents or records in so far as these relate to regulated activities, and to purchase goods or services as test purchases even under a cover identity in order to detect instances of non-compliance.[708] MCA officers may also make site inspections and undetake tests or measurements of any machinery or apparatus. Furthermore, in line with the functions of the MCA to monitor the level

[704] ibid, art 36(9). Without prejudice to the general powers REWS has under the Regulator for Energy and Water Services Act, it is empowered to request information specific to the performance of certain functions by utility service providers. See for example reg 41(7) of the Electricity Regulations as per SL 545.34.
[705] See Malta Communications Authority Act, art 29(1).
[706] ibid, art 29(1)(b).
[707] ibid, art 29(2).
[708] ibid, art 29(1)(i).

of radiation emissions consequential to the use of radiocommunications apparatus, MCA officers are empowered to require a person to 'switch off, modify or desist' in the use of any such apparatus that does not comply with applicable radiation emission standards.[709] If the person concerned fails to abide with any such request then MCA officers may switch off or modify such apparatus themselves.[710]

An important norm is the requirement onerous on a MCA officer who when exercising any enforcement powers, as a matter of course, must produce for inspection by any person in relation to whom such enforcement powers are being exercised, a certificate that states that he is duly authorised to act on behalf of the MCA.[711] Conversely in the case of REWS officers there is no similar explicit requirement. The MCA also has a general power to request any person to provide it with any information that it may consider to be necessary to ensure compliance with the laws or decisions it enforces. In making such a request for information the MCA must ensure that the said request is proportinate to the performance of its functions and obligations, and that it explains why the information is being requested. If the person who is asked to provide the information, considers that for commercial reasons the information is in part or in whole confidential, then that person when furnishing the information is required to state which part of the information provided is confidential and why it should be treated as confidential. Ultimately however it is the MCA that decides if the information provided is to be treated as confidential.[712]

Another tool available to the MCA is the faculty to require a utility provider to do 'an independent audit or operations review' of any of its regulated activities, the costs of which are to be borne by the provider concerned. In doing so the MCA must first notify the provider concerned of the audit or operations review to be taken, giving its reasons therefor, and affording the utility provider concerned the opportunity to make its written submissions within a period of not less than twenty

[709] These standards are in practice those established by the International Commission for Non-Ionising Radiation Protection (ICNIRP). See Malta Communications Authority Act, art 29(1)(h).
[710] See Malta Communications Authority Act, art 29(1)(h).
[711] ibid, art 29(3).
[712] ibid, art 4(10) to (13).

days from the date of notification of the warning sent by the MCA that such an audit or operations review is to be undertaken.[713] A final decision taken by the MCA further to the issue of such a warning may be contested by the aggrieved utility provider before the ART.[714] Conversely the REWS does not have any explicit similar power at law.

Another enforcement tool specific to the regulation of the utilities falling under the remit of the MCA and which is not factored in the enforcement toolbox of the REWS, is that provided for under article 32A of the Malta Communications Authority Act. Under this article if the MCA considers that there are no 'effective means' to bring about the cesstion or prohibition of an infringement of any law or decision it enforces, then the MCA in order to avoid the risk of serious harm to the collective interests of end-users, may apply to the Civil Court for the issue of a court order imposing one or more of the following remedies, namely an order requiring:

- any person to remove content and restrict access to an online interface or to display explicitly a warning to end-users when they access an online interface[715];
- a hosting service provider to remove, disable or restrict access to an online interface; or
- domain registries or registrars to delete a fully qualified domain name and allow the competent national entity responsible for the registration of such domain name to register it.

If a person fails to comply with any such order, then the Civil Court[716] may impose a financial penalty which is payable as a civil debt to the MCA.[717] The inclusion of this enforcement tool vis-à-vis the MCA is consequential to the implementation of the various enforcement tools listed in the CPC Regulation which Regulation includes an annex listing various EU consumer protection laws which must factor these

[713] ibid, art 29(1)(j).
[714] ibid, art 37.
[715] ibid, art 2 which defines 'online interface'.
[716] Civil Court is the Civil Court (Commercial Section). See art 2 of the Malta Communications Authority Act which defines what constitutes the 'Civil Court'.
[717] ibid, art 32A.

enforcement tools. It is pertinent to note that whilst the aforesaid Annex includes some EU laws which under national law fall under the remit of the MCA, conversely the Annex does not include any EU laws which under national law fall under the remit of the REWS. This notwithstanding there is nothing that prohibits the legislator from empowering the REWS to exercise all or some of the enforcement tools listed in the CPC Regulation in relation to the energy and water utilities it regulates.[718]

Another notable difference between the enforcement tools available to the MCA and to the REWS, relates to the faculty to issue *cease and desist* and other compliance related orders. The MCA may in the context of any law or decision it enforces, order any person:

- to cease any act or omission that is in breach of the law or of a regulatory decision;
- delay a service or bundle of services which if continued may result in significant harm to competition pending compliance with access obligations following a market analysis undertaken with regard to the electronic communications sector; or
- require the taking of such measures as the MCA considers necessary in accordance with its powers at law to protect the rights of end-users if the act or omission impacts negatively such rights.[719]

Before taking any such measures the MCA is required to notify the person concerned, warning him of the measure that may be taken and the reasons therefor, requiring him where applicable to cease or recitify his act or omission, affording him a period of not less than fifteen days from the date of notification in

[718] See art 9 of Regulation (EU) 2017/2394 which lists the minimum powers of the competent authorities in the EU Member States that are responsible for the enforcement of the various directives and regulations listed in the Annex to the aforesaid Regulation. The MCA as the national authority responsible for some of the laws listed in the Annex is required to have in place these minimum powers in so far as these laws are concerned. The legislator when implementing the norms of the CPC Regulation vis-à-vis the MCA decided that the applicable relevant enforcement tools listed in the Regulation should apply to all the laws and decisions that the MCA enforces.
[719] See Malta Communications Authority Act, art 31(1)(b), (c) and (d). These norms reflect EU regulatory tools as provided under art 30 of the EECC.

which to do so or to make his submissions in response to such a notification. If the person concerned rectifies the infringement and agrees to abide with any conditions that the MCA may impose, then the MCA may at its discretion desist from proceeding any further.[720]

In so far as the REWS is concerned, whilst the law does not expressly provide for similar enforcement tools, the REWS when giving notice that a financial penalty may be imposed, may require the non-compliant person to rectify the act or omission allegedly done where such rectification is possible, affording the person concerned a period of of not less than five days but not more than twenty days from the date of notification to undertake such rectification. If the person concerned rectifies the infringement and agrees to any conditions that the REWS may impose, then the REWS is required to desist from taking any further action.[721] Conversely the MCA is not required to desist from taking further action even if the non-compliant person rectifies matters.[722]

The substantial differences between the norms regulating the enforcement tools available to the MCA and to the REWS, raise various questions. It is not clear why certain enforcement tools are available to the MCA but not to the REWS. A case in point is that whereas the MCA may require a utility provider to undertake an independent audit, the REWS does not at law have any similar power. Another evident difference is that whereas the law prescribes limitations in relation to the power of entry by the MCA in residential premises notably the time when and reasons why such powers can be exercised, no such limitations appear to apply in the case of the REWS.[723] The author suggests that, where feasible, a set of uniform enforcement tools should apply in relation to the MCA and the REWS, making exception only in relation to tasks that are conditioned by the specific nature of the

[720] ibid, art 32(1) and (2). The fifteen days period may be abridged by the MCA if it considers that the continuation of the alleged infringement impacts negatively the effective exercise of its regulatory functions or warrants its immediate intervention.
[721] See Regulator for Energy and Water Services Act, art 13(1) et seq. This provision requires that REWS issues a judicial letter prior to the imposition of a financial penalty and provides for the procedure to be followed if matters are rectified.
[722] See Malta Communications Authority Act, art 32(2).
[723] ibid, art 29(1) and (2), and Regulator for Energy and Water Services Act, art 11.

regulated utility. Hence in the case of the MCA, unlike that of the REWS, enforcement tools specific to radicommunications empowering the MCA to modify or switch off non-compliant apparatus may be warranted in order to ensure effective adherence with radiation emissions standards.[724]

4.3. The imposition of sanctions under Maltese Utilities Law

The sanction generally resorted to by the MCA and the REWS in curbing non-compliance with regulatory requirements is that of imposing a financial penalty.[725] Such a penalty can either be a one-off financial penalty or a daily financial penalty that continues until there is effective compliance with the applicable norm, or a combination of a one-off financial penalty and a daily financial penalty.[726] Such penalties are then recoverable by the regulator concerned as a civil debt.[727] The impostion of a daily financial penalty can be a very effective means of ensuring compliance in the short term more so when continued non-compliance can lead to the accumulation of a substantial sum since the continuance of this type of sanction puts pressure on a non-compliant person to desist from continuing any act or omission of non-compliance, knowing that the penalty will only stop once there is compliance with the law or decision being contravened.

In some instances depending on the nature and gravity of the act or omission of non-compliance, the breach is considered as a criminal offence, and the law therefore envisages a criminal sanction which may consist of a criminal fine (*multa)* and, or of imprisonment. If the *multa* is not paid the defaulting person is then liable to imprisonment which is calculated on the basis of the amount of the *multa* imposed that is not paid.[728] In the case of alleged criminal offences both MCA and REWS are required to initiate proceedings through the Police or the Attorney

[724] ibid, art 29(1)(i).
[725] ibid, art 32, and Regulator for Energy and Water Services Act, art 13.
[726] See Malta Communications Authority Act art 33(1), and Regulator for Energy and Water Services Act art 12(2)(a).
[727] See Malta Communications Authority Act, arts 32 and 49, and Regulator for Energy and Water Services Act, art 13.
[728] See Criminal Code (Chapter 9 of the Laws of Malta), art 11(3).

General before the competent court of criminal competence.[729] In relation to the laws enforced by the MCA if a criminal offence is committed, the law apart from the imposition of a one-off *multa* and, or imprisonment, also envisages instances where a *multa* consisting of a daily fine may also be imposed.[730] Interestingly in the case of the laws enforced by the REWS it does not result that a *multa* on a daily basis in relation to a criminal offence may be imposed, though conversely it appears that administrative financial penalties can be so imposed.[731]

Another difference relates to the maximum amount of both administrative financial penalties and of *multi* that may be imposed by the MCA and the REWS. The MCA is empowered to impose administrative financial penalties up to a maximum of €350,000 for each infringement and, or a maximum of €12,000 for each day of non-compliance. If the act or omission constituting the infringement is committed by an undertaking and that act or omission has 'especially significant effects on the market to the detriment of competitors and, or consumers' then the administrative financial penalty may be increased up to five per cent of the turnover of the undertaking concerned for the year preceding that year when the infringement was allegedly committed.[732] The REWS is empowered to impose a maximum administrative financial penalty of up to €100,000 for each infringement and, or €600 for each day of non-compliance, or in the case of an undertaking or body corporate up to ten percent of the total turnover of the year preceding that year when the alleged infringement was committed even if the penalty exceeds €100,000.[733]

Another variance between the powers of the two regulators is that the MCA can impose financial penalties up to five percent of the annual turnover of the non-

[729] ibid, art 4 which states that criminal action is prosecuted through the Police or the Attorney General.
[730] See Electronic Communications (Regulation) Act, art 47(1)(t) empowers the Minister for communications to make regulations whereby a fine (*multa)* of up five hundred euro for each day of non-compliance may be imposed.
[731] Art 38(b)(ii) of the Regulator for Energy and Water Services Act provides for daily financial penalties of up to a maximum of €1400 for each day until the offence persists but does not cater for the imposition of a daily *multa*.
[732] Malta Communications Authority Act, art 33.
[733] Regulator for Energy and Water Services Act, art 12.

compliant undertaking, whereas the REWS can impose financial penalties of up to ten percent of the turnover of the non-compliant undertaking. It is not clear why there is this variance at law. The author suggests that the percentage should be a uniform ten per cent factoring the consideration that in the case of the electricity sector the EU establishes a maximum ten per cent for financial penalties whereas the EU does not prescribe any maximum percentage in the case of the regulation of any of the communications utilities.[734]

It is not clear why the maximum administrative financial penalties that may be imposed by the MCA and the REWS are different. Moreover the Regulator for Energy and Water Services Act, unlike the Malta Communications Authority Act, fails to state the specific circumstances when the REWS may impose administrative financial penalties of up to ten per cent of the turnover of the non-compliant undertaking even if the penalty exceeds the maximum amount of €100,000 provided for by law. The author considers that the maximum amount of administrative financial penalties that can be imposed by the MCA and the REWS should be identical. Where the regulator concerned considers that the amount should exceed the limit prescribed by law and instead be tied to a higher amount based on percentage of the turn-over of the non-compliant undertaking, then the regulator should be empowered to do so only in specific circumstances stated at law as is currently the case with the MCA.

In relation to *multi* that may be imposed consequential to the commission of a criminal offence, the maximum amounts vary according to the regulated utility. Under the communications laws enforced by the MCA the maximum *multa* is specific to the offence in question and varies accordingly.[735] In the majority of

[734] See Malta Communications Authority Act, art 33, and Regulator for Energy and Water Services Act, art 12. In the case of the REWS, art 59(3) of the Electricity Market Directive 2019 envisages specific circumstances where fines of up 10% may be imposed on non-compliant undertakings operating in the electricity market. Conversely none of the EU norms relating to the regulation of communications utilities cater for similar measures tied to the percentage of the turnover of an undertaking.

[735] See Electronic Communications (Regulation) Act, arts 25, 31, 48, 49, and 50 envisage a maximum *multa* of €25,000, other than in relation to art 48(4) which provides for a maximum *multa* of €15,000, and art 48(5) which provides for a maximum fine of €50,000. Under the Malta

instances under the Postal Services Act, the Electronic Communications (Regulation) Act and the Malta Communications Authority Act the maximum *multa* prescribed is of €25,000.[736] Under the Regulator for Energy and Water Services Act the maximum *multa* that may be imposed is of €115,000.[737] What stands out is that whereas under the laws enforced by the MCA the maximum *multa* for a criminal offence does not exceed €50,000, in the case of the REWS the maximum *multa* is of €115,000.[738] The reason for this difference between the two regulatory regimes is not clear.

In the case of the utilities regulated by the MCA the sanctions applicable with regard to unauthorised activities vary according to the utility in question. In the case of the provision of unauthorised postal services the maximum sanction that may be imposed is of an administrative financial penalty not exceeding €25,000.[739] In so far as electronic communications is concerned if the breach relates to the provision of an unauthorised electronic communications service or network, then the sanctions applicable consist of administrative financial penalties.[740] Conversely if the infringement relates to the unauthorised installation or use of radiocommunications apparatus then the sanction applicable is the imposition of a *multa n*ot exceeding €25,000[741], whereas if a person without being authorised uses an apparatus to deliberately interfere with radiocommunications then he is liable to a *multa* not exceeding €50,000 or a daily *multa* not exceeding €1000, or to imprisonment not exceeding one year, or both such a *multa* or imprisonment.[742] In so far as the energy and water utilities are concerned the REWS Act envisages a maximum *multa* of €115,000 in relation to the carrying out of unauthorised

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Communications Authority Act art 29 provides for a maximum *multa* of €25,000, whereas art 30 envisages a maximum *multa* of €10,000 and art 50 a maximum *multa* of €5000.

[736] See Postal Services Act, arts 62, and 66, whereas arts 71 and 72 provide for maximum *multi* of respectively €2,000 and €1,160. Similarly under the Electronic Communications (Regulation) Act, as per arts 25, 31, 34, 47 to 50, and under the Malta Communications Authority Act as per arts 29 and 30, the maximum *multi* provided for do not exceed €25,000.

[737] See Regulator for Energy and Water Services Act, art 10.

[738] ibid, art 10.

[739] See Postal Services Act, arts 7 and 76B.

[740] See art 6 et seq of the Electronic Communications (Regulation) Act, and reg 5 of the Electronic Communications Networks and Services (General) Regulations as per SL 399.48.

[741] Electronic Communications (Regulation) Act, arts 30 and 31.

[742] ibid, art 48(5).

activities or breach of licence conditions in relation to the provision of energy or water services.[743]

An important difference in the norms regulating the imposition of sanctions relates to the criteria that each regulator should factor in establishing the quantum of a financial penalty. The MCA in determining the amount of an administrative financial penalty is required to have regard to the nature and extent of the infringement, its duration and its impact on the market and on consumers.[744] No similar norms are provided for under the Regulator for Energy and Water Services Act to guide the REWS when determining the amount to be imposed. The author suggests that this lacuna under the Regulator for Energy and Water Services Act should be rectified by the legislator by providing for criteria established by law on the basis of which the REWS determines the quantum of the administrative financial penalty to be imposed.

Distinct from the imposition of sanctions, is the faculty of the MCA in specified instances to require the payment of compensation by a utility provider if it fails to achieve pre-set standards of service within the context of the provision of certain universal services.[745] This measure has been applied in the postal services sector whereby MaltaPost plc as the universal service provider is required to abide with minimum quality of service standards in relation to the delivery of items within the context of certain universal services it provides.[746] If the pre-set standards are not achieved then MaltaPost is required to pay compensation based on a formula

[743] Regulator for Energy and Water Services Act, art 10.
[744] Art 33 of the Malta Communications Authority Act provides for a maximum financial penalty of €350,000 for each infringement, and, or a daily financial penalty of up €12,000.
[745] See MCA decision dated 8 June 2005 entitled *MaltaPost plc – Quality of Service Requirements – Decision Notice* - https://www.mca.org.mt/consultations-decisions/maltapost-plc-quality-service-requirements. This decision was amended by another decision dated 2 December 2016 entitled *Review of Quality of Service Standards to be achieved by MaltaPost Plc for the Universal Postal Service* - https://www.mca.org.mt/consultations-decisions/review-qos-be-achieved-maltapost-universal-postal-service.
[746] See art 17A of the Postal Services Act whereby the MCA may designate one or more service providers to provide different elements of the universal service and in doing so may determine the obligations onerous on the service provider concerned. As per LN 409 of 2012 MaltaPost was designated to provide the universal services referred to in that Legal Notice. Similar measures exist for example under Irish Law whereby Comreg monitors the quality of service of An Post the Irish universal postal services provider. See https://www.comreg.ie/industry/postal-regulation/regulation-of-an-post/regulation-of-quality/ accessed 30th September 2022.

determined by the MCA. It is important to emphasise that the requirement to pay such compensation does not constitute a sanction but is intended to serve as a means of maintaining an efficient postal service whilst compensating end-users in relation to the timely delivery of postal items by the service provider designated as being responsible for the provision of the universal service in the postal sector. To date it does not result that REWS has made use of similar measures in relation to any of the utilities it regulates.

Another sanction available to both MCA and REWS is the suspension or withdrawal of the authorisation to provide the utility service in question.[747] The use of this tool is however rarely resorted to, and then only in extreme cases of serious and repeated non-compliance with regulatory norms and where other enforcement tools have failed to curb non-compliance by the offending service provider.[748] In practice such a tool cannot be resorted to in relation to the major utility undertakings in Malta. For example one cannot suspend the authorisation of one of the major electronic communications operators let alone withdrawn the authorisation, without severally impacting negatively the subscribers using the utility service in question. In the case of the electricity or water service utilities, such sanctions cannot even be contemplated given that the service providers concerned are monopolies in their respective sectors, and therefore suspending or withdrawing their authorisation to operate, effectively means stopping the provision of an essential utility service to the general public, which measure is obviously not tenable once such a measure would mean depriving consumers of the provision of an essential utility service.

A tool that can at times be very effective to ensure compliance is the use of 'name and shame', whereby an act or omission of non-compliance by an undertaking is given publicity by the regulator on the public media. In a small country like Malta the use of 'name and shame' can be an extremely persuasive tool to ensure

[747] See Malta Communications Authority Act, art 31(2). In relation to the energy sector see reg 5 of the Authorisations (Suspensions, refusal and revocation) Regulations as per SL 545.19.
[748] See for example art 31(2) of the Malta Communications Authority Act, which article provides that in cases where the MCA considers that a person has seriously and repeatedly infringed a regulatory norm, then the MCA may suspend or withdraw the authorisation to provide services and, or networks.

compliance in those sectors where competition is tight such as in the electronic communications or the parcel post sectors. Conversely in other sectors where service provision is provided by a monopoly, though 'name and shame' can be of some annoyance for the non-compliant service provider concerned, effectively its impact is much more limited given the lack of competing service providers to whom consumers can turn to if they wish to transfer their custom.

Whilst current utility regulation law does not regulate the use of 'name and shame' as a means of ensuring compliance, legally there is nothing to stop a utilities regulator from resorting to such a tool provided this is done in a factual and correct manner. In this context the norms applicable under the Consumer Affairs Act can serve as a model to regulate the use of such a tool. The Consumer Affairs Act empowers the DG Consumer Affairs to issue a public warning statement or information about goods that are unsatisfactory or dangerous, services that are supplied in an unsatisfactory manner, and trading practices detrimental to consumers. In doing so the DG may mention the non-compliant trader by name. The DG when issuing such warnings or information is required to adhere to the 'principles of fairness and objectivity', and is exempt from any liability for any acts done in good faith in accordance with the faculty by law given to the DG in this regard. This exemption also extends to those persons who publish, print, record, broadcast or communicate any such warnings or information by whatever means.[749] The author suggests that similar norms should be considered in relation to the MCA and to the REWS. Such a measure would serve to set the parameters on the basis of which such warnings or information may be issued by a utilities regulator, minimising legal controversies when a regulator decides to resort to the use of such a tool in curbing malpractices by a utiltity service provider.

[749] See Consumer Affairs Act, art 8.

4.4. The impact of the Federation of Estate Agents judgement on the regulation of utilities

In recent years the powers of regulators under Maltese law to impose sanctions, including substantial administrative financial penalties, have been successfully challenged in various lawsuits before the Constitutional Court. The landmark judgement in the Federation of Estate Agents case paved the way for various lawsuits challenging the powers of different regulators under ordinary law to impose sanctions. The Federation of Estate Agents case arose following the initiation of investigations by the DG Competition in relation to alleged anti-competitive practices by the Federation.[750]

Whilst the investigation by the DG Competion was in course the Federation filed an application before the First Hall of the Constitutional Court claiming that such an investigation was in breach of its fundamental human rights under the Constitution of Malta and the ECHR. The Federation argued that if the DG Competition decided that there was a breach of competition law by the Federation, then the DG could impose administrative financial penalties up to a maximum of ten per cent of the total turnover of the Federation for the previous business year, which in this case could reach a maximum of up to €1,250,000. According to the Federation, the power at law of the DG Competition to impose what it described as severe fines - *multi severi* - rendered such sanctions as criminal in nature. The Federation claimed that according to article 39(1) of the Constitution and Article 6(1) of the ECHR, a person – including a legal person such as the Federation – investigated for allegedly committing a offence, should only be tried before an independent and impartial court[751] and that therefore various provisions of the Competition Act then in place affording the DG the faculty to impose such sanctions were in breach of the Constitution and of the ECHR.[752] The First Hall upheld the arguments made by the

[750] See judgement dated 3 May 2016 by the Constitutional Court in *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et.* See also T Borg at p 367 et seq (n 701).
[751] See judgement of the 21 April 2015 by the First Hall of the Constitutional Court in *Federation of Estate Agents vs Direttur Generali (Kompetizzjoni) et* at p 3 et seq.
[752] The Federation specifically objected to arts 12A, 13, 13A and 21 of the Competition Act as it was prior to the amendments enacted as per Act No XVI of 2019.

Federation and decided that the articles of the Competition Act that empowered the DG Competition to impose punitive financial penalties were in breach of the Constitution and of the ECHR. Significantly in its judgement the First Hall also referred to the powers of other public authorities, specifically to the laws then in place empowering the MCA and the MRA[753] to impose sanctions.[754]

The DG Competition and the Attorney General filed an appeal from the judgement of the First Hall before the Constitutional Court. In substance the Constitutional Court confirmed the judgement of the First Hall in relation to non-compliance with article 39(1) of the Constitution, but disagreed with the First Hall with regard to the alleged non-compliance with article 6(1) of the ECHR. The Constitutional Court held that punitive financial penalties, even if technically at law such penalties are listed as 'administrative fines', once such penalties are meant to punish a non-compliant person, then such penalties must be considered to be of a criminal nature and therefore subject to the applicable norms under the Constitution.[755] The Constitutional Court ruled that in accordance with the requirements of article 39(1) of the Constitution, such financial penalties can only be imposed by a court, declaring as unconstitutional the former provisions under the Competition Act which enabled the DG Competition to impose substantial administrative financial penalties on non-compliant undertakings.[756]

This judgement effectively meant that the DG Competition could not impose or request the imposition of any sanctions on non-compliant persons until the law was changed. Initially in 2017 government considered amending article 39(1) of the Constitution, a measure that required - and still requires - a two-thirds majority of the members of the House of Representatives, and therefore the support of the opposition in taking matters forward given that the party in government then did

[753] The case was filed in 2013. The MRA was until 2015 the competent national energy and water services regulator.
[754] See judgement of the First Hall of the Civil Court of the 21 April 2015 in the *Federation of Estate Agents vs Direttur Generali et* at p 34 et seq.
[755] *Federation of Estate Agents v Direttur Ġenerali (Kompetizzjoni) et* decided by the Constitutional Court on the 3 May 2016 at p 35 et seq.
[756] ibid, p 65 et seq. See also T Borg at pp 367 et seq. (n 701).

not enjoy such a majority in the House of Representatives.[757] This route however was not pursued by government since the opposition was not prepared to support amendments to the Constitution in order to address the enforcement issues raised consequential to the Federation of Estate Agents judgement.[758] The opposition spokesperson in justifying the position taken by the Nationalist Party in opposition argued that if a law is declared unconstitutional then it is that law that should be amended and not the Constitution.[759]

In August 2018 government decided to take a different approach to address matters, issuing a public consultation (the '2018 Public Consultation') proposing amendments to the Competition Act and other laws administered by the MCCAA or by the DGs forming part of the MCCAA.[760] In substance government proposed that the functions of the CCAT should be assumed by the Civil Court (Commercial Section) which court would have the power to review in their entirety decisions taken by the DG Competition. Furthermore a person, including an undertaking, could apply to the aforesaid court on points of fact and, or of law, contesting any infringement decision, cease and desist order or compliance order, interim measure and, significantly, any administrative financial penalty imposed by the DG Competition, whereby the court would have the power to substitute its discretion for that of the DG Competition, with the faculty to confirm or modify, or to annual any such decision taken by the DG Competition.[761]

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[757] The amendments to the Constitution as proposed by government in this instance were never officially published.

[758] In 2017 most of the members of the opposition in the House of Representatives were deputies representing the Nationalist Party.

[759] See article by MP Clyde Puli entitled *Safeguarding consumers' rights* published on the 18 January 2017 in The Times of Malta, https://timesofmalta.com/articles/view/Safeguarding-consumers-rights.636839. In 2020, government made a second attempt to amend art 39 of the Constitution by publishing Bill number 166 entitled *The Constitution of Malta (Amendment No.4) Act, 2020*. This Bill however was not approved by the House of Representatives. See report in The Times of Malta of the 14 July 2021 at https://timesofmalta.com/articles/view/plans-to-change-constitution-to-allow-for-larger-regulatory-fines.886636.

[760] See public consultation entitled *An Act to amend the Competition Act, Cap. 379 and the Consumer Affairs Act Cap. 378 and other Laws to extend the competence of the Civil Court (Commercial Section) and to make ancillary and consequential provisions thereto*. See https://meae.gov.mt/en/Public_Consultations/MJCL/Pages/Consultations/AnActtoamendtheCompetitionActCap379andtheConsumerAffairsActCap378andotherLawstoextendthecompetenceoftheCivilCourtCommercial.aspx.

[761] ibid, p 5 et seq of the executive summary of the government response to the consultation.

In this consultation, government proposed similar measures in relation to the powers then enjoyed by the DG Consumer Affairs who, as was the case with the DG Competition, could impose administrative financial penalties on non-compliant persons.[762] Of note is that in this consultation, government did not propose any measures in relation to the powers of other public authorities, including the utilities regulators, to impose sanctions. The response to this public consultation was poor with only five respondents, which considering the issues involved concerning the enforcement powers of the DG Competition and the DG Consumer Affairs was somewhat surprising and dissappointing.[763]

The next step following the conclusion of this public conclusion was the publication on the 26 March 2019 of Bill Number 80, which Bill became law on the 31 May 2019 as per Act Number XVI of 2019 entitled 'The Competition Act and Consumer Affairs Act and other Laws (Amendment) Act'. This Act went well beyond the measures proposed in the 2018 Public Consultation, since consequential to the amendments introduced by this Act, both the DG Competition and the DG Consumer Affairs are in all instances required to apply to the Civil Court not only for the issue of court orders imposing any sanctions, but also for court orders requiring compliance with the laws regulated by either DG even though no sanctions might be requested. These measures were not factored in the 2018 Public Consultation and were uncalled for, more so when one considers that no valid concerns were raised during the public consultation preceding the enactment of this Act that the issue of such compliance orders by either DG would be in breach of the Constitution. Moreover no plausible reason was given in the government response further to the submissions made following the aforesaid public consultation to explain or justify the inclusion of these additional measures whereby the two DGs were as a result of the amendments brought forth by this Act, required to apply for a court order for

[762] ibid.

[763] ibid, p 15. The respondents were Mamo TCV Advocates a Maltese law firm, l-Għaqda tal-Konsumaturi a Maltese consumer association, the European Commission, the American Bar Association and an unnamed individual.

the imposition of any sanction or for compliance with any of the laws they enforce.[764]

To date challenges to the power by law of various public authorities to impose sanctions, in particular punitive financial penalties, has been restricted to a few specific authorities notably in the financial services sector.[765] However it is quite possible that similar cases may in the near future be raised in relation to the enforcement powers that other public authorities such as MCA or REWS have under their respective regulatory regimes. The above consideration, more so in the light of the issues raised as a result of the Federation of Estate Agents judgement, urgently point to the need for a radical overhaul of the enforcement powers in place and the introduction of new measures in line with the applicable norms under the Constitution.

The sum of the legislative measures introduced as per Act Number XVI of 2019 was for various reasons a step in the wrong direction. This Act may have addressed the enforcement issues relating to the DG Competition, extending the same measures to the DG Consumer Affairs. Government however when enacting this Act, did not factor the probability that other public authorities may face similar legal challenges as had occurred with the DG Competition in the Federation of Estate Agents case. A curiosity that underlines this point is that Bill Number 80 in its 'Objects and Reasons' clause did actually state that one of the reasons for the Bill was to address the concerns raised by the Constitutional Court about the imposition of administrative penalties by non-judicial bodies in its judgement of 8 October 2018 in Thake Rosette nomine et versus Kummissjoni Elettorali et case. In this case applicant acting on behalf of the Nationalist Party in opposition successfully challenged the power at law of the Electoral Commission to impose financial

[764] See *Consultation outcome: Final Report* entitled *Government response to the Consultation on (An Act to amend the Competition Act, Cap. 379 and the Consumer Affairs Act Cap. 378 and other Laws, to extend the competence of the Civil Court (Commercial Section) and to make ancillary and consequential provisions thereto*, Consultation Report - Bill Competition Amendments FINAL.pdf (gov.mt) . See also art 13 of Act No XVI of 2019.

[765] See the judgement of the Constitutional Court in *Thake Rosette nomine et versus Kummissjoni Elettorali et* decided on the 8th Ocotber 2018, where the power by law of the Electoral Commission to impose financial penalties was successfully challenged. See also T Borg pp 377 et seq (n 701).

penalties in relation to alleged non-compliance with the Party Financing Act [766], with the Constitutional Court deciding that such penalties can only be imposed by a court, and that therefore the norms under ordinary law empowering the Electoral Commission to impose sanctions were in breach of article 39(1) of the Constitution.[767]

This notwithstanding, Act Number XVl of 2019 enacted further to this Bill did not envisage any amendments whatsoever to address the concerns relating to the powers of the Electoral Commission to impose administrative penalties. This fact alone demonstrates that Act Number XVI of 2019 was at most a job done only in part. Further confirmation that this Act was deficient in addressing overall the enforcement issues facing public authorities other than the DG Competition and the DG Consumer Affairs within the MCCAA, was amply demonstrated by the constitutional lawsuits made subsequent to the enactment of this Act relating in particular to the financial services sector contesting the legality of the imposition of substantial financial penalties by the Financial Intelligence Analysis Unit (FIAU).[768]

Another issue of concern is that Act Number XVI of 2019 requires that both the DG Competition and the DG Consumer Affairs apply to the Civil Court for the imposition of a financial penalty irrespective of the quantum of the amount that may be imposed, making no distinction if the financial penalty requested is of a mere hundred euro or conversely of a million euro. In doing so the legislator seems to have ignored that one of the pivotal points that motivated the Constitutional Court in the Federation of Estate Agents case, was precisely the substantial amount of the financial penalty that could have been imposed by the DG Competition if that DG decided that there was non-compliance with competition law by the Federation of Estate Agents, with government opting instead for a procedure whereby the DG is required to apply to the court irrespective of the quantum of the penalty that can

[766] See Chapter 544 of the Laws of Malta.
[767] ibid.
[768] See Times of Malta of the 28 September 2020 report entitled:*Investment firm fined record €1.2m files constitutional action*, Investment firm fined record €1.2m files constitutional action (timesofmalta.com); and Times of Malta of the 4 June 2021 report entitled *Lombard Bank claims FIAU breached its rights* - Lombard Bank claims FIAU breached its rights (timesofmalta.com).

be imposed.[769] The author questions the viability of requiring a regulator to apply to the court where the financial penalty that might be imposed is relatively low, this in the light of the consideration that one of the underlying motivations of the Federation of Estate Agents judgement was precisely the substantial amount of the financial penalty that could have been imposed by the DG Competition.

4.5. The EU dimension vis-à-vis enforcement powers

The EU does not adopt a set of uniform norms in the context of enforcement powers in relation to utilities regulation. In some instances the EU requires that Member States ensure that the regulators have the power to impose 'effective, proportionate and dissuasive penalities'[770] with some norms varying according to the utility in question. With some utilities the EU requires that Member States provide for specific norms in relation to certain regulated matters whereby sanctions can only be applied in relation to specific infringements.[771] This for example is the case with the electronic communications sector whereby sanctions in relation to the deployment of very high capacity networks may only be imposed in those instances where an undertaking or a public authority 'knowingly or grossly negligently provides misleading, erroneous or incomplete information' having regard to certain factors such as whether the behaviour of the undertaking has a negative impact on competition.[772]

In general terms in the electronic communications sector Member States are required under the EECC to provide for 'rules on penalties, including, where necessary, fines and non-criminal predetermined or periodic penalties, applicable to infringements of national provisions adopted pursuant to this Directive or of any

[769] See *Federation of Estate Agents v Direttur Ġenerali (Kompetizzjoni) et* decided by the Constitutional Court on the 3 May 2016 at p 34 et seq (n 51). The Federation argued that it could face a financial penalty of up to €1,250,000 if the DG decided that it had acted in breach of competition law.
[770] See eg Directive (EU) 2019/944 art 59(3)(d), and EECC art 29(1).
[771] See eg EECC, art 29(2).
[772] ibid, art 29(2). See also recital (64) of the EECC. Under Maltese law this norm has been transposed under reg 17(7) and (8) of SL 399.48.

binding decision adopted by the Commission, the national regulatory or other competent authority pursuant to this Directive'.[773] In doing so 'all measures necessary' are to be taken by Member States to ensure that such rules are implemented.[774] NRAs and other competent authorities are within 'the limits of national law' to have the power to impose such penalties.[775] The competent authorities must also be empowered to monitor and supervise compliance with the conditions of general authorisations, rights of use for radio spectrum and for numbering resources and other specific obligations, and in doing so to require the provision of information to verify compliance.[776]

In this regard the EECC requires that the competent authorities are empowered to impose dissuasive financial penalties including periodic penalties with retroactive effect, and to issue orders to cease or delay provision of a service or a bundle of services which if continued would result in significant harm to competition.[777] In instances of serious and repeated infringements where the taking of regulatory measures has not ensured compliance, then the competent authority must be empowered to suspend or withdraw the right of the non-compliant undertaking to continue to provide electronic communications services or networks.[778] If an infringement represents an immediate and serious threat to public safety, public security or public health, or risks creating serious economic or operational problems for other providers or users of electronic communications services or networks, then the competent authority must be empowered to take urgent interim measures pending the taking of a final decision. In taking any such measure the competent authority is required to give the undertaking concerned a 'reasonable opportunity' to state its views and propose remedies. Any interim measures imposed are to be valid for a period of not more than three months and may be extended for a further final period not exceeding three months.[779]

[773] EECC, art 29(1).
[774] ibid.
[775] ibid.
[776] ibid, art 30(1) and recital (74).
[777] ibid, art 30(3).
[778] ibid, art 30(5).
[779] ibid, art 30(6).

The EU Postal Services Directive[780] does not cater for any enforcement measures other than to state that the NRA has 'a particular task ensuring compliance with the obligations arising' from the Directive, making specific reference to the establishment by the NRA of monitoring and regulatory procedures to ensure the provision of universal service.[781] The Directive provides that the NRA may be empowered to ensure compliance with competition rules in the postal sector, but fails to state what enforcement powers should be catered for to ensure compliance, leaving it up to each Member State to determine the enforcement powers necessary.

The EU Drinking Water Directive[782] requires that Member States provide for rules on the penalties applicable to the infringement of national provisions made pursuant to the transposition of this Directive and that 'all necessary measures' are taken to ensure that these are implemented. The Directive states that the penalties provided for must 'be effective, proportionate and dissuasive'.[783] The Directive however does not elaborate any further. Again it is up to the Member State to determine what enforcement powers should be in place.

In the energy sector the enforcement powers related to electricity and gas are dealt with under two directives dealing separately with the regulation of these utilities. The Electricity Market Directive 2019[784] requires that Member States ensure that regulators are empowered 'to impose effective, proportionate and dissuasive penalties' on electricity undertakings that do not comply with their obligations under the aforesaid Directive, Regulation (EU) 2019/943 on the internal market for electricity, or any relevant legally binding decisions of the regulator or of ACER[785], including the power to impose penalities of up to ten per cent of the annual turnover of the transmission system operator or of the vertically integrated

[780] See Directive 97/67/EC on common rules for the development of the internal market of Community postal services and the improvement of quality of services as amended by Directive 2002/39/EC, Regulation (EC) No 1882/2003 and Directive 2008/6/EC.
[781] ibid, art 22 and recital (16).
[782] See Directive (EU) 2020/2184 on the quality of water intended for human consumption.
[783] ibid, art 23 and recital (50).
[784] ibid, art 59(3)(d).
[785] ACER is the EU Agency for the Cooperation of Energy Regulators - https://www.acer.europa.eu/the-agency/about-acer.

undertaking for non-compliance with their respective obligations under the Electricity Market Directive 2019.[786] Significantly this Directive states that a Member State in lieu of empowering the regulator to impose such sanctions directly may empower the regulator to 'propose to a competent court' the penalties to be imposed. This norm caters for the adoption by a Member State of a regulatory regime whereby the regulator is required to apply to a court of law if it considers that there has been a breach of the law or of a regulatory decision which merits the imposition of sanctions. The Gas Market Directive 2009 uses similar wording in relation to the imposition of penalties, including the option of requiring the regulator to propose to a court the penalty to be imposed instead of being empowered to impose it directly.[787]

Conversely, the possibility of enabling a regulator to apply to a court for the imposition of dissuasive penalties is not expressly catered for in the other EU sector specific utility directives considered above. The inclusive of such norms in the Electricity Market and Gas Market Directives has an important bearing in a local context once the Federation of Estate Agents judgement effectively questions the power of public authorities such as the utilities regulators to impose dissuasive penalties on non-compliant operators, and at least in relation to the energy markets clearly enables Member States to adopt a regime whereby a Member State can require that a regulator applies for a court order to impose a sanction instead of imposing such a sanction directly.

Though the EU sector specific directives regulating the diverse utilities do not envisage uniform minimum enforcement powers, conversely in the context of consumer protection law, the EU requires that Member States ensure that the competent authorities have certain minimum powers of enforcement.[788] This means that if a utility regulator is under national law required to enforce certain aspects of EU consumer protection law, then that regulator must also be empowerd under national law to exercise the minimum enforcement powers required by the

[786] See Electricity Market Directive 2019, art 59(3)(d) and recital (84).
[787] See Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, art 41(4)(d).
[788] See CPC Regulation.

EU in such instances. In this regard the CPC Regulation requires that Member States ensure that the competent authorities responsible for enforcing any of the EU Directives or Regulations listed in the Annex to that Regulation have the minimum powers listed in article 9 of the CPC Regulation. These powers include:

- Investigation powers such as access to relevant documents, data or information, requiring any persons including public authorities to provide relevant information, undertaking of site inspections, purchase of goods or services as test purchases, where necessary under a cover identity, to detect infringements'.[789]
- Adoption of interim measures to avoid the risk of serious harm to the collective interests of consumers.[790]
- Obtaining or accepting commitments from the trader responsible for non-compliance to cease the infringement and to accept remedial commitments from the trader concerned for the benefit of consumers impacted adversely by the infringement.[791]
- Ordering the cessation of Infringements and the power to bring about the cessation or the prohibition of such infringements.[792] Where no other effective means are available to bring about the cessation or the prohibition of the infringement and in order to avoid the risk of serious harm to the collective interests of consumers, then measures must be in place whereby the competent authority can require the removal of content, restriction of access to an online interface or the explicit display of a warning to consumers when accessing an online interface, or order a hosting service provider to remove, disable or restrict access to an online interface, or order domain registries or registrars to delete a fully qualified domain name.[793]
- Imposing penalties for infringements, including for failing to comply with any regulatory decision, interim measure or commitment, which penalties

[789] ibid, art 9(3).
[790] ibid, art 9(4)(a).
[791] ibid, art 9(4)(b) and (c).
[792] ibid, art 9(4)(e) and (f).
[793] ibid, art 9(4)(g).

must be 'effective, proportionate and dissuasive in accordance with the requirements of Union laws that protect consumers' interests'.[794]

The MCA is empowered by law to enforce Directive 2000/31/EC, certain norms of Directive 2002/58/EC, and Regulation (EU) 2017/1128, all of which are listed in the Annex to the CPC Regulation. Conversely the REWS does not enforce any of the EU laws listed in the Annex to the CPC Regulation. This means that the MCA in relation to the national laws it enforces that reflect any of the EU laws listed in the Annex, must be empowered to exercise the minimum enforcement powers listed in Article 9 of the CPC Regulation. In this regard the legislator in empowering the MCA to exercise all the enforcement powers in conformity with Article 9 of the CPC Regulation, decided to apply the exercise of such powers not only to the laws enforced by the MCA in relation to the EU laws listed in the Annex that fall within the remit of the MCA, but to all the laws enforced by the MCA. In this context Article 10 of the CPC Regulation lists the entities that may exercise the minimum powers mentioned under Article 9, expressly stating that such powers may also be exercised 'by application to courts competent to grant the necessary decision'.[795] Hence Member States may also provide for procedures whereby a regulator - as is the case with the DG Consumer Affairs - must first apply for a court order to exercise any of the powers listed under Article 9 of the CPC Regulation.

The author questions why the EU has not taken a consistent approach in relation to the enforcement powers of regulators under the different utility sector specific directives. Whilst there may be scope for some differences, it is not clear why the EU has not provided for the inclusion of minimum enforcement powers in the regulation of the diverse utilities. The approach taken by the EU with the CPC Regulation could have been adopted in relation to diverse utilities factoring the minimum enforcement powers that should apply vis-à-vis the effective regulation of each utility. Regrettably the failure to have in place such minimum enforcement powers has lead to a situation where the powers available to each utility regulator vary considerably, commencing from a situation where in the case of the Postal

[794] ibid, art 9(4)(h).
[795] ibid, art 10(1)(d).

Services sector no tangible powers are expressly catered for, to a situation where there are some norms in place that provide for the minimum powers that should be in place as is the case with the Electronic Communications sector and to a lesser extent the Energy sectors. The author suggests that in the context of the overall effective regulation of utilities, the EU should establish minimum enforcement powers possibly using the example of the CPC Regulation in adopting such a measure.

4.6. Enforcement in other European countries

Most European countries in relation to the use of enforcement powers vis-à-vis utility regulation follow one of three regimes. One regime envisages that the regulator may impose sanctions subject to certain safeguards notably that the regulator in doing so acts independently of any other persons, including of government, whilst affording the provider concerned the right to make its submissions prior to a decision on whether to impose any such sanctions, and that the aggrieved utility provider on the receiving end of such sanctions has the right to contest the regulatory decision imposing the sanctions before an independent adjudicative forum – in most instances a court of law presided by a member of the judiciary. A second regime requires that the regulator must apply for a court order requesting the imposition of the sanction. A third regime that has been adopted is a hybrid between the two regimes described above, whereby the regulator may impose sanctions but in doing so must first seek confirmation by a court of law of the envisaged sanction.[796]

Most European countries empower their utility regulators to impose sanctions directly. This for example is the situation in the UK, where utility regulators are empowered by law to impose dissuasive sanctions including substantial financial penalties, which penalties however cannot exceed ten per cent of the turnover of

[796] See for example the Irish Energy Act 2016, ss 60 and 61. See also *Administrative Sanctions - Information Pap*er issued by CRU at p 10 et seq - https://www.cru.ie/wp-content/uploads/2019/11/CRU19135-Administrative-Sanctions-Information-Paper.pdf.

the utility provider being fined.[797] Each utility regulator is by law required to publish its policy with respect to the imposition of financial penalties and how the amount is determined.[798] In all instances an aggrieved person has the right to contest the decision imposing the sanction before an independent adjudicative forum, in the case of Ofwat and of Ofgem before the Administrative Court of the High Court[799], and in the case of Ofcom before the CAT.[800]

BEREC in a report it published in 2020 stated that the majority of regulators in the electronic communications sector impose financial penalties directly, observing however that there are two exceptions to this general practice where either the regulator cannot impose financial penalties directly or else can impose such penalties only after obtaining court confirmation.[801] A similar situation exists in the other utility sectors where the regulators in the majority of European countries can impose such penalties directly.[802]

4.7. The Irish experience

A factor that conditions what enforcement regime is adopted in some countries are the limitations that the supreme law of the country – in many instances the constitution of the country in question – places on the powers of regulators to impose such sanctions. Ireland is a case in point and bears some similarities to the situation that arose in Malta subsequent to the Federation of Estate Agents judgement. For some years there has been an on-going debate in Ireland whether regulators should be empowered to impose financial penalties and other dissuasive sanctions.

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[797] See eg (UK) Electricity Act 1989, s 270.
[798] See (UK) Water Industry Act 1991, s 22B, (UK) Gas Act 1986, s 30B, Electricity Act, s 27B, and (UK) Communications Act 2003, s 392.
[799] See (UK) Water Industry Act 1991, s 22E, (UK) Gas Act 1986, s 30E, and (UK) Electricity Act 1989, s 27E.
[800] See (UK) Communications Act 2003, s 192 et seq.
[801] See BEREC *Report on Penalties* 2020 (n 108) p 8 et seq.-
[802] See eg the UK where utility regulators are empowered to impose sanctions - https://www.dentons.com/en/insights/articles/2020/january/9/the-utility-regulators-powers-to-impose-financial-penalties.

In 2018 the Law Reform Commission of Ireland (ILRC) published a report entitled 'Regulatory Enforcement and Corporate Offences' (the 'ILRC 2018 Report') where ILRC considered whether it is constitutionally permissible for administrative financial sanctions to be imposed by public authorities on undertakings or individuals.[803] Though the relevant articles of the Irish Constitution[804] relating to the constitutionality of the powers of public authorities to impose such sanctions are substantially different from the wording of article 39(1) of the Constitution of Malta, there are some points worth noting that arise in the discussion relating to Irish law.

The ILRC in its 2018 report referred to a 2016 judgement of the Irish High Court in the names Purcell versus Central Bank of Ireland, where it was alleged that the Central Bank in conducting an inquiry was engaged in the exercise of judicial power in breach of article 34.1 of the Irish Constitution which article in substance states that justice shall be administered in courts established by law by judges appointed in accordance with the Constitution and that save 'in special and limited cases as may be prescribed by law', administered in public. In the Purcell case the High Court decided that there was no breach of the Constitution, noting that any sanctions that might be imposed by the Central Bank were not enforceable as a judgement and would only take effect once confirmed by an order of the court of competent jurisdiction.[805]

Of relevance to the debate in Malta on the exercise of enforcement powers by regulators is that in the Purcell case the Irish High Court decided that a potential financial sanction by the Central Bank could not be considered as the imposition of a criminal penalty since a criminal trial is distinct from financial regulation.[806] Equally relevant is the interpretation given to article 38.1 of the Irish Constitution which requires that no person is to be tried on any criminal charges 'save in the due

[803] Law Reform Commission *Regulatory Enforcement and Corporate Offences* (n 109) at pp 106 et seq.
[804] See arts 34 and 38 of the Irish Constitution. https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2019/2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf.
[805] Law Reform Commission *Regulatory Enforcement and Corporate Offences* (n 109), pp 108 et seq.
[806] ibid.

course of law', the issue being what constitutes a 'criminal charge'. The Oireachtas Library and Research Service remark that in the Purcell case the High Court determined that there was no breach of that article, without however elaborating how it arrived at this conclusion, and that on the basis of existing case law the constitutionality of financial penalties under articles 34 and 38 of the Irish Constitution has been broadly established, adding however that there is scope for further judicial interpretation to establish conclusively this issue.[807]

The ILRC remarks that the points considered in the Purcell judgement in relation to the Irish Central Bank can be readily applied to comparable powers conferred on other regulators, a point which similarly applies to Malta when one considers that the conclusions reached by the Constitutional Court in the Federation of Estate Agents judgement vis-à-vis the DG Competition can be applied to other regulators in Malta, a consideration confirmed by the various lawsuits filed against the Electoral Commission, FIAU, MFSA and other public authorities raising issues similar to those raised against the DG Competition in the Federation of Estate Agents case. Significantly the ILRC in its report highlighted the importance of ensuring that when a regulator is taking decisions that may adversely impact private individuals or undertakings, then the regulator should cater for fair procedures in any decision making process, adding that 'it is generally the case that the more severe the potential consequences, the greater the level of fair procedures that must be provided.'[808]

Currently the Irish government is actively considering new powers for Comreg to enable it to impose financial penalties directly and has issued a document outlining its proposals for a new law entitled the 'Communications Regulation (Enforcement) Bill, 2022' whereby it is being proposed that Comreg is given greater enforcement powers including the faculty to impose financial sanctions.[809] What new enforcement measures are introduced ultimately depends on the political direction

[807] Oireachtas Library & Research Service, 2019, *Spotlight: Administrative financial sanction*, p 12 et seq - 2019-11-20_l-rs-spotlight-administrative-financial-sanctions_en.pdf (oireachtas.ie).
[808] Law Reform Commission *Regulatory Enforcement and Corporate Offences* (n 109) p 108 et seq.
[809] See the summary document entitled *Communications Regulation (Enforcement) Bill 2022* issued by the Government of Ireland at p 5 et seq - 212053_f6cd7fdc-72b0-45be-bbde-5eb2158b57d1(5).pdf.

taken by the Irish government.[810] For some time various regulators in Ireland have been arguing in favour of the need for more effective enforcement powers by virtue of which they can impose dissuasive sanctions directly.[811] Conversely however constitutional challenges are being made in relation to those regulators in Ireland who do enjoy powers to impose such sanctions, one recent example being a case by WhatsApp challenging a fine of €225 million by the Irish Data Protection Commission (Irish DPC) as being contrary to the Irish Constitution and the ECHR on the basis that the sanctions are of a criminal nature and could not therefore be imposed by the Irish DPC.[812]

4.8. The options to ensure an effective enforcement regime in compliance with the Constitution of Malta

The current situation in Malta in relation to the enforcement powers of the MCA and of the REWS to impose dissuasive sanctions including financial penalties on non-compliant utility providers needs to be revisited in short order. The author considers that it is only a matter of time before a utilities regulator issues a punitive financial penalty against a utility provider and the aggrieved provider contests the issue of such a penalty as being in breach of article 39(1) of the Constitution using similar arguments to those raised in the Federation of Estate Agents case. It is imperative that measures are taken to amend the law to pre-empt a recurrence of what happened to the DG Competition subsequent to the Federation of Estate Agents judgement. In that instance for a period of more than three years subsequent to the Constitutional Court judgement of the 3rd May 2016, the DG Competition could not initiate proceedings to impose dissuasive financial penalties on non-compliant persons given that in that judgement the then enforcement regime under the Competition Act empowering the DG Competition to impose financial penalties was declared to be contrary to article 39(1) of the Constitution.

[810] As on the 30 September 2022 Bill No 86 of 2022 entitled the Communications Regulation Bill 2002 was being discussed before the Dail Eireann.
[811] See eg Regulators seek stronger enforcement powers and greater fines | Irish Legal News.
[812] See WhatsApp wins right to challenge record €225m fine | Ireland | The Times.

The law as it was then did not provide for alternative measures whereby the DG Competition could request the issue of a court order imposing financial penalties. This meant that until the amendments to the Competition Act whereby a new enforcement regime enabling the DG to apply for court orders to impose financial penalties were enacted and brought into force, the DG Competition was powerless to curb non-compliance with competition law. A similar situation can easily occur in relation to the MCA or to the REWS, given that the main enforcement tool that both regulators have at law is to impose dissuasive financial penalties on non-complaint utility service providers, failing which the only other punitive measures that can be imposed are the suspension or the revocation of the authorisation to operate – a measure which could also be construed as being in breach of article 39(1) of the Constitution given the punitive nature and severity of the sanctions in question. Hence the urgency of having a regulatory regime that dispels any doubts about the conformity with the norms of the Constitution in relation to the enforcement measures that either utilities regulator can take to curb non-compliance.

Before considering the options to address matters, the issues relating to the effective enforcement by the utilities regulators need to be identified. If the regulators are to ensure compliance with the laws and decisions they are required to enforce, then it follows that they must have recourse to an effective enforcement regime. The issue subsequent to the Federation of Estate Agents judgement is whether such a regime should include the power enabling the utilities regulators to impose sanctions including dissuasive financial penalties. To date in the majority of cases, the approach taken by the Maltese legislator has been to enable public authorities to impose such sanctions directly on the non-compliant person. Since at least the 1990s various laws have been enacted empowering different public authorities to impose substantial financial penalties. Even subsequent to the Federation of Estate Agents judgement, the legislator has continued to enact laws empowering public authorities to impose hefty financial

penalties and other sanctions.[813] This approach manifestly contradicts the measures taken by the legislator in relation to the DG Competition whereby as a result of the changes implemented as per the Competition Act and Consumer Affairs Act and other laws (Amendment) Act, 2019 the DG Competition is required in all instances to apply to the Civil Court in order to impose any form of sanction.[814] It is confusing to say the least to have a situation where certain public authorities are required to go to court for the issue of sanctions whereas others can issue sanctions directly.

The author considers that the continuation of such a situation is untenable, and if allowed to remain can lead to regulatory chaos where diverse public authorities continue to dish out punitive financial penalties which in turn may be successfully contested before the Constitutional Court as being contrary to article 39(1) of the Constitution. A paramount consideration when identifying what measures to introduce is, as observed by the Venice Commission, on the one hand 'affording full fair trial guarantees' whilst 'ensuring effective regulatory action'.[815] In the context of utility regulation it is imperative to ensure that any person who is being investigated for non-compliance and who consequently may be liable to sanctions must be afforded adequate opportunity to state his case and rebut any allegations made before any final binding decision is applicable in his regard. This fundamental right should be factored in any regulatory regime that enables the regulator to take enforcement measures in good time to curb non-compliance.

Another important consideration relates to the quantum of the financial penalty that may be imposed. A fundamental point underlying the Federation of Estates Agents case is the severity of the financial penalty that the DG Competition could have imposed in that case.[816] This consideration was not catered for when the amendments to the Competition Act as per Act Number XVI of 2019 were enacted

[813] See eg art 42 et seq of Act No XXXI of 2018 entitled the Malta Digital Innovation Authority Act, 2018.
[814] See above Section 4.4.
[815] European Commission for Democracy through law (Venice Commission), a report dated 1 June 2021 entitled *Malta Urgent Opinion on the Reform of Fair Trial Requirements relating to substantial administrative fines*, p 25 - Venice Commission :: Council of Europe (coe.int).
[816] See Federation of Estate Agents judgement of the 21 April 2015, given by the First Hall at p 26.

since the DG Competition as a result of these amendments is required to apply to the Civil Court in relation to the imposition of any financial penalty with no distinction being made whether the penalty that may be imposed is trivial, or conversely substantial.[817] The point in this regard that must be factored is whether a regulator should in all instances be required to apply for a court order irrespective of the quantum of the financial penalty that may be imposed given that one of the main reasons whereby the faculty of public authorities to impose financial penalties has been challenged is precisely the severity of the sanctions as reflected in the substantial amounts that could be imposed on the non-compliant person.

There are three feasible options whereby matters can be addressed. One option is to take the route adopted with the DG Competition in 2019, whereby the DG Competition is required to apply to the Civil Court for the issue of any penalties or 'any other remedy'.[818] Taking such a route in the case of the MCA and the REWS would require amending the laws empowering each utilities regulator to impose sanctions without however amending the Constitution. The author considers that the opposition in the House of Representatives would support such a measure given the stance adopted by the opposition during the debate in the House on Bill Number 166 presented by government in 2021 when the opposition did not give its support to the proposed amendments by government to amend article 39 of the Constitution to thereby maintain the powers of various public authorities to impose sanctions, the opposition contending that the solution is to amend ordinary law as was done in relation to the DG Competition.[819] To date it appears that the opposition has not modified its stance in this regard.[820]

The author questions whether the adoption of this option will in practice provide for more effective and efficient regulation of the provision of utilities in Malta. Some instances of non-compliance must be curbed in short order otherwise failing

[817] See Act No XVI of 2019, art 35 et seq.
[818] See Competition Act, art 12A.
[819] See report carried in The Times of Malta dated 14 July 2021 Constitution reform bill defeated in parliament (timesofmalta.com).
[820] Bill No 166 was entitled the *Constitution of Malta (Amendment No. 4) Bill* and was published during the Thirteenth Legislature (2017-2022). The Bill was not resubmitted for consideration during the Fourteenth Legislature.

to do so may impact severally end-users and possibly competing utility service providers. The author refers to a case some years ago, where a major utility provider in the electronic communications sector was allegedly over-charging various end-users, a practice which obviously needed to be stopped in short order given the immediate negative impact on end-users. In that instance the MCA had issued a decision imposing financial penalties. The decision was subsequently unsuccessfully contested before the ART.[821] Had the MCA not taken immediate remedial action to curb this practice, then more end-users would probably have been negatively impacted. If conversely an enforcement regime similar to that adopted vis-à-vis the DG Competition in 2019 is taken on board whereby the MCA or the REWS would be required to seek a court order with the attendant timescales that such procedures entail, then one may be confronted with a situation where the necessary court orders imposing dissuasive sanctions to stop harmful illegal practices may be issued very late in the day to the detriment of end-users.[822]

A second option is to keep in place the current enforcement regime whereby both utilities regulators can impose sanctions. This as a minimum requires that the Constitution is amended, otherwise the probability is that when a utilities regulator decides to impose a sanction, this decision will be challenged successfully on the basis that the law empowering the regulator concerned to impose such sanctions is in breach of article 39(1) of the Constitution. Aside from the relevance of the legal issues raised in the Federation of Estate Agents case discussed elsewhere in this study[823], a serious concern raised vis-à-vis the imposition of such sanctions by public authorities, such as the utilities regulators being discussed, is that the headship of most of these authorities which is ultimately responsible for the issue of such sanctions, is not effectively independent of other interests including of government. This is an extremely valid concern that must be addressed if the utilities regulators are to retain their enforcement powers. It is imperative that no

[821] See judgement of the ART in *Melita plc v L-Awtorità ta' Malta dwar il-Komunikazzjoni* dated 24 September 2015.
[822] See also P E Micallef: *Power of Maltese Regulators to impose punitive sanctions*, Vol 23 Issue 3 ULR at p 97.
[823] See above at Section 4.4 .

doubts are harboured about the independence and objectivity of each utilities regulator when taking decisions on whether to impose such sanctions.

In this regard a significant step was taken in July 2021 when the House of Representatives approved amendments to the laws regulating the MCA and the REWS in compliance with EU Directives relating to the electronic communications and electricity sectors respectively.[824] Hence following the amendments enacted in July 2021 government is now required to appoint the persons making up the headship of both utilities regulators from amongst persons with skills and experience in the regulated sectors. In the case of the MCA the minister for communications in making such appointments is required to act in an 'open and transparent manner', whereas in the case of the REWS the minister for energy and water resources is required to act on the basis of 'objective, transparent and published criteria in an independent and impartial procedure'.[825] Amendments have also been enacted to strengthen the independence of both the MCA and the REWS in the exercise of their regulatory powers. Though the wording used by the legislator in relation to the two regulators is not identical, in substance in both instances the legislator endeavours to ensure that both regulators act independently from any other persons including government.[826] On paper at least both regulators subsequent to the amendments enacted in July 2021, appear to have the required independence to perform their regulatory functions objectively and impartially including, where necessary, to take sanctions against non-compliant persons. Time only will tell whether these changes will have the desired positive impact on effective utility regulation in Malta. It will be interesting to see how in practice these new norms will be applied when the terms of office of the current headships of the respective regulators come to a close and new appointments are made.

[824] See especially EECC arts 6, 7, and 8, and Electricity Market Directive 2019, art 57.
[825] See Malta Communications Authority Act, art 3(2), and Regulator for Energy and Water Services Act, art 3(6). The amendments as per Act No LII of 2021 relating to the laws enforced by the MCA came into force on the 1 October 2021, whereas the amendments as per Act No XLIX of 2021 relating to the laws enforced by the REWS were backdated to the 31 December 2020.
[826] See Malta Communications Authority Act, arts 3A and 6, and Regulator for Energy and Water Services Act, arts 4 and 5.

An equally important consideration if the utilities regulators are to retain their powers at law to impose sanctions, is to ensure that any regulatory decision imposing any such sanction is taken only after the person allegedly acting in breach of regulatory norms is afforded reasonable opportunity to state his case, and if he disagrees with the regulatory decision imposing such sanctions, to contest such a decision before an independent adjudicative forum presided by a member of the judiciary. Under current utilities law such procedures are in substance already in place since aggrieved persons can contest such decisions before the ART.

This notwithstanding, one point that needs to be addressed relates to the composition of the ART as the competent appellate forum that determines all contestations of regulatory decisions taken by the MCA or by the REWS. At law for the purposes of the Constitution – specifically of article 39(1) – it can be argued that the ART is not considered as 'an independent and impartial court established by law'[827] since the Tribunal may be composed of an ex-judge or ex-magistrate appointed for a fixed term of office.[828] The author considers that in practice the ART is a court in all but name. To date the ART has always been composed of a sitting magistrate. However, to pre-empt possible challenges on the basis that the ART is not a court of law for the purposes of article 39(1) of the Constitution, the Constitution should be amended so that the ART is also factored in the interpretation of a 'court of law' under article 47(1) of the Constitution. In taking forward such an amendment the author suggests that the Administrative Justice Act should be amended whereby the composition of the ART is strictly limited to sitting members of the judiciary, thereby eliminating the possibility of having ex-members of the judiciary appointed for a fixed term as is currently the case.[829] The author further suggests that the composition of the ART is modified whereby ART is restructured with a member of judiciary presiding as chairperson together with two technical expert members. The author suggests that the decision making powers of the ART are revisited, whereby in lieu of having non–voting assistants, technical

[827] See art 47(1) of the Constitution which defines the interpretation of 'court' for the purposes of Chapter IV of the Constitution.
[828] See Administrative Justice Act, art 8.
[829] ibid. The fixed term for an ex-judge or ex-magistrate is of four years.

experts are appointed as members of the ART with the faculty of voting in relation to strictly technical matters but having no vote in relation to the application or otherwise of sanctions, procedural issues or the interpretation of the law.[830]

A third option is to have a hybrid system of the first and second options discussed above, whereby the utilities regulator is empowered to impose financial penalties up to a certain amount, with amounts in excess requiring a court order. The thorny issue in considering this option is to determine the limit of the financial penalty that the utilities regulator may be empowered to impose. One of the principal considerations in the Federation of Estate Agents judgement was that the substantial quantum of the financial penalty that could have been imposed in that case by the DG Competition rendered the sanction punitive and therefore - according to the Constitutional Court - having the nature of a criminal offence. Presumably therefore if the maximum amount of a financial penalty that may be imposed is relatively low, then the sanction would not fall foul of article 39(1) of the Constitution as interpreted by the Constitutional Court. The author however considers that establishing a threshold whereby sanctions below a certain amount are not considered criminal offences evades the point that financial penalties or for that matter any other sanctions, are ultimately in most cases punitive in nature. Establishing a threshold whereby the utilities regulator may impose sanctions directly may still be challenged as constituting a 'criminal offence' for the purposes of the article 39(1) once it can still be argued that the sanction - irrespective of the amount being imposed - is meant to punish non-compliance with the law or with a regulatory decision, and therefore constitutes a criminal offence.

4.9. Conclusion

The outstanding issue that conditions enforcement in relation to effective utility regulation in Malta is to determine the tools that the utilities regulators should

[830] The chairman of the ART is also assisted by two 'assistants' who however have no vote. See art 10 of the Administrative Justice Act. See also above at Section 3.5 where the author discusses in more detail this proposal.

have in dealing with non-compliance by utility providers. The question that needs to be answered is whether the utilities regulators should retain their current powers to impose sanctions directly? The author firmly believes that the utilities regulators should have the power to impose sanctions provided safeguards are in place to guarantee their independence coupled with mandatory oversight by the courts of any regulatory decisions taken imposing such sanctions. In doing so, due consideration must be taken of the human rights issue raised following the Federation of Estate judgement, an issue which merits a separate detailed study comprehensively examining the impact of that judgement on the overall regulatory regime in Malta. The Venice Commission in evaluating the option of giving a regulator the faculty to impose sanctions, emphasizes that if such an option is adopted then there should be in place guarantees on the independence and impartiality of the regulator.[831] The Venice Commission remarked that if a regulator is empowered to impose what it described as "'criminal' administrative sanctions" subject to a right of appeal to a court or independent tribunal as was proposed by government in the defunct Bill Number 166[832], then the Commission suggested that the proposed legislative measures 'could be improved by making it clear that the constitutional or legal protections constraining the exercise of power by regulatory authorities will continue to apply when they exercise the new sanctioning competence', adding that one could consider amending the text of article 39(1) of the Constitution instead of creating a specific rule for its interpretation.[833]

In line with the observations made by the Venice Commission, three important norms must be factored if the utilities regulators are to retain their powers to impose sanctions. First the headship of the regulator responsible for the decisions to impose such sanctions must by law be guaranteed full independence from all parties, including government, when taking such decisions. Complementary to such

[831] See Venice Commission Report (n 815) at paras 56 and 57.
[832] See clause 2 of Bill No. 166 which proposed a new sub-art (3A) to article 39 of the Constitution. The Bill however was not approved by the House of Representatives as it was not supported by the required two-thirds majority of the members of the House. See sitting of the 14 July 2021 Parliament of Malta - PS 489 - 14.07.2021 02:00 PM (parlament.mt).
[833] See Venice Commission Report (n 815) at para 100.

independence, the law must clearly state that the persons making up the headship of the utilities regulators are chosen strictly on merit on the basis of their knowledge and experience of the regulated utilities, thereby eliminating allegations of appointees chosen exclusively because of their political inclinations.[834] The choice of such persons should be undertaken only following a transparent and public selection process whereby those selected are subject to the scrutiny and approval of the Public Appointments Committee[835] or of another public body similar in composition for example to the Judicial Appointments Committee whereby the appointments committee is made up of persons who by reason of their post enjoy autonomy when making their deliberations.[836]

A second requisite is that the utilities regulator, prior to a final decision on whether to impose a sanction, must enable the person allegedly acting in breach of regulatory requirements, to make his submissions. Any final decision subsequent to such a process must be clearly motivated explaining the reasons underlying the decision. Finally, it is imperative that a decision by a regulator imposing a sanction should only be final after the lapse of the period during which such a decision can be contested before a court, and if contested in good time then only after the appeal has been finally determined by the competent court.

Retaining the present enforcement powers of the two utilities regulators necessitates amendments to the Constitution which require a two-thirds majority of the House of Representatives. Specifically article 39 of the Constitution should be amended to cater for a situation whereby utilities regulators can impose such sanctions provided they comply with the requisites stated above. If such amendments are not done then the probability is that the current sanctions regimes applicable to the MCA and the REWS will be challenged successfully before the Constitutional Court if one of these regulators decides to issue a decision imposing a substantial financial sanction. The author disagrees with the option

[834] This point is discussed in more depth above at Section 2.4.4.
[835] The Public Appointments Committee is set up in accordance with art 48A of the Public Administration Act.
[836] The Judicial Appointments Committee is set up in accordance with art 96A of the Constitution and consists of the Chief Justice, two judges, a magistrate, the Ombudsman and the President of the Chamber of Advocates.

adopted in the case of the DG Competition consequential to the Federation of Estate Agents judgement. Requiring a regulator to apply for a court order to impose a sanction each time it considers that the law or a regulatory decision has not been complied with does not make practical sense. In some cases, the need to curb non-compliance is immediate and the non-compliant utility service provider should in short order be subject to dissuasive measures, this without prejudice to his right to contest the decision taken by the regulator before a court of law.

The classical example of an abusive commercial practice that needs to be stopped in its tracks, is misleading information about a utility service whereby consumers are impacted negatively in short order. Having in place a procedure whereby the regulator after duly giving the non-compliant provider ample opportunity to state its case and address any non-compliance, is then required to initiate court proceedings requesting a court order to impose sanctions may lead to a situation where whilst the proceedings are in course, consumers are still being impacted negatively. Past experience has demonstrated that utilities regulators exercise their regulatory powers with extreme caution and will only have recourse to the imposition of sanctions if no other course of action is possible. A non-compliant person faced with a daily financial penalty that continues to run until effective compliance, will in most instances desist from further non-compliance even if in the meantime that person has contested the decision imposing such a sanction, this in knowledge that the accumulation of a daily fine for continued non-compliance whilst contestation proceedings before the court are in process may eventually result in substantial financial penalties.

Conversely in a procedure where sanctions can only be imposed by a court, in some instances unscrupulous persons may be prepared to run the risk of persisting with an unfair practice in the knowledge that any financial penalties that may be imposed in the long term may be offset by the commercial gain made in the interval. In this regard reference is made to an editorial of the Times of Malta which was strongly critical of amendments made to Competition Law and Consumer law in 2019, effectively requiring the MCCAA through its DG Competition and DG Consumer Affairs to apply to the courts for the issue of any sanctions. The

Times of Malta observed that these amendments added yet another layer of red tape which would increase the frustration of aggrieved consumers, noting that mandatory proceedings before the courts meant that consumers would have to wait even more for a final ruling on their grievances.[837]

In a study undertaken by CERRE on the enforcement of regulatory decisions in the diverse utility sectors, it was concluded that it is preferable to enable regulators to impose financial penalties directly. One pertinent observation made in this study was that the imposition of such financial penalties - even if contested and therefore not applicable immediately - influence the behaviour of non-compliant market participants pending the appeal proceedings, and that issues relating to the length of appellate proceedings and the powers of the appellate courts to quash such decisions with retroactive effect become key considerations.[838] The overwhelming majority of EU member states enable their utility regulators to impose dissuasive sanctions directly subject to the right of review before independent adjudicative fora.[839] A similar situation exists in many other countries outside the EU. Hence in the UK, utility regulators may impose dissuasive sanctions which can be contested before different adjudicative fora.[840] The author considers that the requirement that no sanctions are applied prior to the lapse of the period during which an aggrieved person can appeal before a court, or if contested within that period prior to the final determination of the appeal by the competent court, adequately safeguards the rights of a person faced with the possible imposition of sanctions. The author suggests that article 39(1) of the Constitution should be amended to enable the imposition of sanctions by regulators provided that by law they satisfy the following minimum criteria, namely that:

(i) there is in place a transparent procedure whereby the utilities regulator affords the person allegedly in breach of any regulatory norms, the right to

[837] See Times of Malta Editorial entitled: *Not in the interest of consumers* dated 21 June 2019, https://timesofmalta.com/articles/view/not-in-the-interest-of-consumers.715419.
[838] See CERRE, Report 2011 (n 95) at p 80 et seq and p 161.
[839] See BEREC, *Report on Penalties* 2000 (n 108) p 7 et seq.
[840] See for example the (UK) Gas Act 1986 s 30A et seq, and the (UK) Water Industry Act 1991, s 22A et seq. See also an article by Dentons entitled *The utility regulators' powers to impose financial penalties* - Dentons - The utility regulators' powers to impose financial penalties.

state his case prior to the issue of any regulatory decision on the imposition or otherwise of sanctions;

(ii) the utility regulator is effectively independent from all parties; and

(iii) no sanctions are definitively imposed before the closure of the appeal proceedings available to the aggrieved person contesting any such sanctions before a court.

Moving forward, the bottom line in relation to the enforcement powers of the utilities regulators is to ensure that they have adequate tools to ensure timely compliance without however infringing the fundamental human rights of the person against whom regulatory measures are being taken. The Venice Commission in its 2021 Report noted that in the consultations it undertook in preparing its report, it was pointed out that the administrative penalties under Maltese law would all have be changed in order to comply with the conclusions reached in the Federation of Estate Agents judgement.[841] The author considers that a uniform procedure should be adopted in relation to utilities regulation addressing the various inconsistencies highlighted earlier in this chapter between the regimes regulating the MCA and the REWS, notably the disparity in the enforcement tools available and in the sanctions that may be imposed. Unless there are valid reasons specific to the effective regulation of a particular utility, then there should be in place regulatory regimes with similar if not uniform measures. Such similarity in regulatory measures should also extend to the procedure applicable in relation to both utilities regulators in the exercise of their powers to impose sanctions.

The author considers that the ultimate solution to have in place effective, fair and timely enforcement, necessitates amending article 39 of the Constitution ensuring that the criteria highlighted above are properly factored, and once implemented, adhered to in practice. The author considers that key to all this, is the effective independence of the utilities regulators which must not only be on paper but also adopted in practice. Regrettably past experience in Malta reveals that some

[841] See Venice Commission 2021 Report (n 815) at para 26. See also T Borg (n 701) at p 376.

appointees to the headship of utilities regulators were not always chosen exclusively on the basis of their knowledge and experience of the regulated utilities.

An important step in the right direction was taken with the amendments to the laws regulating the MCA and the REWS in July 2021 establishing criteria to be followed when appointing the headship of utilities regulators. Government must now ensure that these amendments are in practice complied with. The choice of the right persons to head the utilities regulators ensuring that these have the required knowledge, experience and integrity should serve to allay any concerns about the fairness of the enforcement process. The current situation at law comprehensively necessitates a general overhaul that should be preceded by a wide-ranging public consultation process outlining the various options to rectify matters. Failure to do so means that the utilities enforcement regimes in Malta remain subject to uncertainty impacting negatively timely and fair regulation.

Chapter Five - Consumer protection of users of utilities

5.1. Introduction

The focus of this chapter is twofold: that of considering the role of the competent public authorities in the handling of consumer related issues, in this case the utilities regulators - the MCA and the REWS - and the DG Consumer Affairs within the MCCAA, and the avenues available to consumers in Malta seeking redress whether individually or collectively.

One point that needs to be clarified before discussing these points is to understand what the word 'consumer' stands for in the context of utilities regulation in Malta. In general terms 'consumer' is normally understood to refer to a natural person acting for purposes outside his business, trade or profession.[842] A similar interpretation with some differences is used in the context of some of the utilities regulatory norms of the EU. Hence for the purposes of the EECC, the 'consumer' is interpreted as referring to 'any natural person who uses or requests' a publicly available electronic communications services for purposes not relating to his trade, business or profession, excluding thereby legal persons.[843] Conversely in the Electricity Market Directive 2019 and the Drinking Water Directive, though the term 'consumer' is used extensively, no interpretation is provided leaving some ambiguity as to who is precisely the 'consumer' for the purpose of those directives. In the Electricity Market Directive 2019 in many instances in lieu of the term 'consumer', the term 'household customer' is used with reference to the customer who purchases electricity for his own household consumption excluding commercial or professional activities.[844]

In some EU directives norms affording protection to other users of utilities, notably business end-users, are provided for. This has resulted in a situation where, depending on the utility concerned, different measures generally associated with consumer protection are in place affording protection to all or specific categories of

[842] See CPC Regulation, art 3(12).
[843] See EECC, art 2(15).
[844] See Electricity Market Directive 2019, art 2(4).

users of utilities. This situation has in turn led to the use of a variety of terms referring to different categories of users. Hence in the electronic communications sector, the EECC uses the terms 'consumer', 'end-user' and 'user' in relation to the inclusion of measures intended to protect different users of electronic communications services.[845] This approach in EU legislation is reflected in the Maltese legislation transposing the applicable EU norms.[846] For the purposes of this chapter in line with the meaning generally attributed to 'consumer', the reference to 'consumer protection' is understood to refer to the measures in place to protect individuals who use utilities not in the contest of their business, trade or profession. Where the measure refers also to other users this will, where necessary, be highlighted.

Evaluating consumer protection in relation to the provision of utilities in Malta involves various issues conditioned by the fragmentation of regulatory oversight between on the one hand the sector specific utilities regulators – the MCA and the REWS – and on the other hand the DG Consumer Affairs within the MCCAA. A reading of the applicable laws reveals that some consumer protection norms are enforced by the utilities sector specific regulator, whereas other norms especially those of a more general nature such as the regulation of unfair commercial practices or of unfair contract terms fall within the remit of the DG Consumer Affairs. This state of affairs has at times been of considerable disservice to consumers who may consequently be uncertain to which public authority they should refer their complaints where these relate to the provision of a utility service. In some instances, consumers end up either referring the issue to the wrong authority, or else to be on the safe side, communicate with both the DG Consumer Affairs and the utilities sector specific regulator, at times complicating matters to their own detriment with responses from the different authorities which may not always be in strict unison.

[845] See EECC, art 2(13), (14), and (15).
[846] See the definitions of 'consumer', 'end-user' and 'user' as per art 2 of the Electronic Communications (Regulation) Act.

In so far as individual consumer redress is concerned, there are in place different avenues that a consumer seeking redress in relation to a utility service, may use. To date the form of redress most used especially where compensation is being sought and where the monetary values in issue are relatively low, is recourse to the CCT. Otherwise where the amounts exceed €5000 and therefore beyond the competence of the CCT, the principal means of redress is to file a lawsuit before the ordinary courts.[847] Alternatively, a consumer can have recourse to ADR schemes in place, the use of which schemes in Malta however to date has been poor.[848]

The law also contemplates collective actions by consumers seeking redress. Regrettably recourse to such actions has to date been negligible even though one of mainstays for the enactment of the Collective Proceedings Act is precisely to facilitate collective actions by consumers impacted by the same issue.[849] The lack of recourse by consumers under the Collective Proceedings Act in so far as collective redress in relation to grievances concerning utilities is conditioned by the fact that in so far as consumer related issues are concerned the aforesaid Act only factors the Consumer Affairs Act and the regulations made thereunder as the laws on the basis of which collective redress may be sought.[850] Hence consumers who wish to file a collective action vis-à-vis a utility service provider must link their grievances to some aspect of general consumer law such as the use of unfair contract terms or unfair commercial practices.

In part in compliance with EU norms, utilities regulators are being given an active role in the resolution of consumer disputes with service providers. The issue is to determine the extent of the involvement of utilities regulators in resolving such disputes. To date both MCA and REWS have been involved in facilitating resolution of such disputes with the difference that in relation to energy and water disputes

[847] The CCT can only determine claims where the monetary value does not exceed €5000. See art 20 Consumer Affairs Act.
[848] See Part VI of the Consumer Affairs Act entitled 'Consumer Alternative Dispute Resolution' and SL 378.18 'Consumer Alternative Dispute Resolution (ADR) (General) Regulations' and SL 378.19 'Consumer Alternative Dispute Resolution (Residual ADR) Regulations'. See PQs Nos. 23813 and 14449 by MP Dr Chris Said Twegibaghall-mistoqsijaparlamentarinumru 23813 (gov.mt) and Twegibaghall-mistoqsijaparlamentarinumru 14449 (gov.mt).
[849] See Collective Proceedings Act, Cap 520, art 3 and Schedule A thereto.
[850] ibid.

REWS can also consider requests for compensation by the consumer.[851] Assuming such a role by the utilities regulators involves various considerations, notably whether such a role should relate to all types of disputes that consumers may have irrespective of the monetary values involved, whether reference to the utilities regulator should be mandatory on the utility service provider against whom the complaint is being made, and whether any decision by the utilities regulator should be binding and enforceable on the parties to the dispute.

5.2. The chronology of consumer protection in the regulation of utilities in Malta

Prior to the enactment of the laws establishing the utilities regulators in Malta, consumer protection measures relating to the provision of the various utilities were dealt with by measures provided for under general consumer law regulating different aspects that impact the provision of utilities such as the regulation of contractual terms, and under the utilities sector specific laws regulating the diverse monopolies then in place responsible for the provision of the different utilities.[852] This situation changed with the establishment of sector specific regulators in relation to the various utilities. This also coincided with the measures that Malta was then taking in relation to the transposition of the EU acquis within the context of its application to join the EU. This meant that the laws introduced subsequent to 1998 in relation to utilities regulation also factored various consumer protection measures consequential to the transposition of EU norms under national legislation.[853]

In the communications sector, Act Number XXXIII of 1997 entitled the 'Telecommunications (Regulation) Act, 1997' which established the former OTR, whilst not using the term 'consumer', did provide for some norms to protect the

[851] Dispute Resolution (Procedures) Regulations SL 545.30, reg 4 et seq.
[852] See for example Act No XXIII entitled 'the Water Services Corporation Act, 1991', arts 18, 19 and 27.
[853] In 1998, Government reactivated the application of Malta to join the EU. Malta in the EU (gov.mt).

interests of subscribers of telecommunications services including therefore consumers.[854] These included the right of a subscriber to request the OTR to investigate any complaint relating to the quality and, or the terms and conditions of the service, the norms prohibiting the denial of service if not in conformity with the law, and the nullity of terms which - even if agreed to by the subscriber - were contrary to the law.[855] This law also provided for the reference to the OTR of a dispute between an authorised provider and 'any other person relating to a telecommunications infrastructure or service', whereby the OTR on receipt of any such dispute was required to notify the parties concerned giving them a 'reasonable time' to produce the information relevant to the dispute and to make their submissions. The OTR was empowered to issue 'such directives' as were within its powers and as it may deem appropriate to resolve any such dispute.[856]

Act Number XVIII of 2000 entitled the Malta Communications Authority Act, 2000 which established the MCA in lieu of the OTR, listed amongst the functions of the MCA, the regulation and monitoring of all practices, operations and activities relating to the regulated sectors[857] and the promotion of the 'interests of consumers, purchasers and other users in Malta in respect of the prices charged for, and the quality and variety of, telecommunications services provided and telecommunications apparatus supplied'.[858] Complementing the norms under Act Number XVIII of 2000, subsidiary legislation was made dealing with specific consumer protection issues relating to telecommunications including, amongst others, norms requiring written contracts factoring minimum information, the provision of emergency services, and billing procedures.[859] It is pertinent to note that in 2000, the telecommunications market was not fully liberalised and operators enjoying a dominant market position (DMP) in relation to certain services

[854] Act No XXXIII of 1997 did not provide for the definition of a 'subscriber'. A reading of the relevant norms where 'subscriber' is used implies that the use of this word referring to any person subscribing to a service including business subscribers.
[855] ibid, arts 23, 24 and 25.
[856] ibid, art 22. Act No XXXIII of 1997 did not however provide any interpretation of what constitutes a 'directive'.
[857] Act Number XVIII of 2000, art 4(3)(a).
[858] ibid, Second Schedule art 3(3) thereof which provided for the substitution of art 4 of the Electronic Communications (Regulation) Act.
[859] See LN 151 of 2000, regs 28, 33, and 34.

were consequently required to comply with quality service targets to ensure that all consumers had access to basic services.[860] Significantly then, an operator having a DMP could be required to provide universal services as identified by the MCA with the purpose of ensuring the provision of basic services to any persons, including notably people with special social needs, 'within a reasonable period and at an affordable charge, if any'.[861]

In 2004, new measures positively impacting consumers were introduced under Maltese law in part transposing the EU Electronic Communications Regulatory Framework of 2002.[862] These measures included norms on the affordability of tariffs[863], transparency and publication of information[864], number portability[865] and the provision by designated undertakings of universal services such as directory enquiry services and public pay phones[866], and dispute resolution procedures involving consumers.[867] In 2011 more measures were introduced to protect consumers including amongst others, norms relating to contractual information, suspension and termination of contracts, billing information and e-mail forwarding.[868] In 2021 amendments to Electronic Communications (Regulation) Act expressly emphasised amongst the core objectives of the MCA, the importance of consumer protection requiring the MCA to ensure:

> 'a high and common level of protection for end-users through the necessary sector-specific rules and by addressing the needs, such as affordable prices of specific social groups, in particular end-users with disabilities, elderly end-users and end-users with specific social needs, and choice and equivalent access for end-users with disabilities.'.[869]

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[860] ibid, regs 6, 7 and 8.
[861] ibid, reg 38 et seq.
[862] See the EU Telecoms Package adopted in 2002 entitled the *Regulatory framework for electronic communications* at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al24216a.
[863] LN 412 of 2004, reg 31.
[864] ibid, reg 41.
[865] ibid, reg 50.
[866] ibid, regs 25 to 29.
[867] See Act No VII of 2004, art 19 which provided for the inclusion of a new Part entitled '8. Dispute Resolution' under the Electronic Communications (Regulation) Act making provision for dispute resolution measures involving consumers and service providers.
[868] See LN 273 of 2011, Part VI thereof entitled 'End-user interests and rights'.
[869] See Act No LII of 2021, art 16.

These changes to the law were complemented by yet more detailed norms introduced in part to transpose the EECC, replacing many of the consumer protection measures then in place under Maltese law. These norms provide for specific measures relating amongst others to contractual information, transparency, comparison of offers and publication of information, quality of service, contract duration and termination, modification of contractual conditions, provider switching and number portability, and billing information.[870] An aspect relating to the electronic communications sector, first introduced under Maltese law in 2004 in order to implement an EU measure[871], is the faculty afforded to service providers to modify contractual conditions unilaterally, provided end-users are given the right to exit the applicable contract without incurring any costs.[872] A similar measure was also introduced in relation to the energy sector, again in compliance with the transposition of an EU measure[873], whereby an electricity supplier may modify contractual conditions, provided it enables its customers to terminate the contract without incurring any charge.[874] The author questions the fairness of such measures vis-à-vis end-users once service providers are empowered to change contractual terms to their benefit even though the original contract may have been binding on the service provider for a specific period. The EECC as per Recital (276) does state that the provisions on contract termination in the EECC are:

> 'without prejudice to other provisions of Union or national law concerning the grounds on which contracts can be terminated or on which contractual terms and conditions can be changed by the service provider or the end-user.'

The author therefore considers that any unilateral changes to a subscriber contract by the service provider though permissible under the EECC, needs to be evaluated

[870] See SL 399.48 Part XII entitled 'End-User Rights'.
[871] Originally this measure was catered for under art 20(4) of Directive 2002/22/EC. This measure is now dealt with under art 105(4) of the EECC.
[872] Originally this measure was implemented under Maltese law as per art 19 of Act No VII of 2004 which amended the then Telecommunications (Regulation) Act, inserting a new art 22 on end-user rights. This measure is currently provided for under reg 92 of SL 399.48.
[873] See Directive (EU) 2019/944, art 10(4).
[874] See Electricity Regulations as per SL 545.34, reg 7(3). 'End-users' are under these regulations referred to as the 'final customers'.

in the light of other applicable norms such as those regulating the use of unfair contractual terms or unfair commercial practices.

Specifically in relation to consumer dispute resolution, in 2007 amendments were made to the Electronic Communications (Regulation) Act and to the Malta Communications Authority Act, whereby uniform procedures were introduced applicable to all consumer disputes relating to the utilities regulated by the MCA.[875] In 2010, the term 'consumer' in this context was substituted with the term 'end-user' to factor also disputes raised by business users of utilities.[876] Under the current norms, an end-user can lodge a dispute which he may have with an undertaking, with the MCA if it relates to non-compliance with any law or decision which the MCA enforces. In doing so, the end-user must *prima facie* show that he has suffered prejudice because of such non-compliance.[877] The MCA is also empowered to intervene if it becomes aware of any such dispute which it believes should be investigated.[878]

The MCA in dealing with such disputes is required to follow a procedure which, as far as is reasonably possible, is 'transparent, non-discriminatory, simple, inexpensive and conducive to a prompt and fair settlement' whilst affording all the parties to the dispute 'reasonable opportunity to make their submissions and to produce any relevant information.'[879] The MCA may decline investigating any such dispute if it considers that there are other means of resolving the dispute in a timely manner or if legal proceedings have been initiated by a party to the dispute.[880] The MCA in resolving any disputes may issue directives to the person against whom the compliant was made, requiring that person to comply with any measure that the MCA may specify in accordance with its powers at law. If the end-user is requesting the payment of compensation or other civil redress, the MCA

[875] See Act No XXX of 2007, arts 31 and 46 whereby amendments were made to the Electronic Communications (Regulation) Act and to the Malta Communications Authority Act.
[876] See Act No XII of 2010, art 44.
[877] See Malta Communications Authority Act, art 44(1).
[878] ibid, art 44(2).
[879] ibid.
[880] ibid.

may then refer the dispute to the CCT provided the amount in dispute does not exceed the competence of the CCT.[881]

In the energy and water utilities, initially when the MRA was established in 2000 as the first energy and water services regulator, the law did not factor express norms requiring the MRA to promote consumer interests in the energy, water services and mineral resources sectors falling under its remit.[882] In 2007 the MRA Act was amended introducing specific measures intended to protect the interests of consumers. These measures included requiring the MRA to promote the interests of consumers particularly vulnerable consumers in relation to the prices charged and the quality and variety of the services and, or products regulated by the MRA, and the making of norms dealing with various aspects impacting the provision of the regulated utilities by service providers to consumers including the imposition of public and, or universal service obligations, the regulation of price structures, contractual information, quality of service targets, the establishment and maintenance of efficient customer services and of complaint processing procedures, and of dispute resolution procedures.[883] Subsequent to the assumption in 2015 of regulatory oversight of the energy and water services utilities by the REWS, similar provisions were replicated under the Regulator for Energy and Water Services Act[884] with the singular addition that the REWS when regulating the utilities under its remit is also required to ensure 'greater focus and increased consumer protection'.[885]

Under the Malta Resources Authority Act, no norms were made to regulate dispute resolution of complaints by consumers against authorised providers of energy or water services. Conversely in 2016 specific norms - the Disputes Resolution (Procedures) Regulations - were made under the Regulator for Energy and Water

[881] ibid, art 44(3). The CCT may decide disputes provided the amount in dispute does not exceed 5000 euros.
[882] Act Number XXV of 2000, art 4.
[883] Act Number XII of 2007 art 4 para (b), and art 6 paras (b), (c), (e) and (i).
[884] See Regulator for Energy and Water Services Act, art 5(1)(k) and art 37(2)(g). See also the Electricity Regulations per SL 545.34, reg 7 et seq, and the Water Supply and Sewerage Services Regulations per SL 545.14, reg 12.
[885] See Regulator for Energy and Water Services Act, art 4(a).

Services Act to regulate disputes between a utility service provider and a consumer using or requesting a utility service or product regulated by REWS, not in the course of his trade, business, craft or profession.[886] The relevant norms of these regulations in substance replicate the norms described above in relation to similar disputes under the Malta Communications Authority Act.[887]

In accordance with these regulations, where a consumer makes a complaint alleging an infringement of any of the laws enforced by the REWS, then both the consumer and the utility service provider against whom the complaint has been made, may refer the dispute to the REWS. The consumer when referring a dispute, must *prime facie* show that he was affected by the act or omission of the authorised provider in question, though there is no similar requirement if conversely the dispute is referred to the REWS by the utility provider.[888] The REWS upon receipt of any such reference or upon becoming aware of any such dispute which the REWS believes should be investigated is then required to notify all the parties to the dispute that the dispute is being investigated. The REWS in the conduct of its investigation is required, as far as is reasonably possible, to adopt a procedure which is transparent, simple, inexpensive and conducive to a prompt and fair settlement of the dispute, ensuring that all the parties have 'reasonable opportunity' to make their submissions and to produce any relevant information.[889] The REWS may decline to investigate a dispute in accordance with these regulations if it is satisfied that there are other means of resolving the dispute in a timely manner or if legal proceedings have been initiated by a party to the dispute.[890] The REWS in resolving any such disputes may issue directives to the authorised provider concerned, requiring that provider to comply with any such measures that REWS may specify in order to resolve the dispute. In contrast to the measures that MCA may take, REWS when issuing any such directives may order compensation payments by the utility provider which payments may include the costs in whole or

[886] See Dispute Resolution (Procedures) Regulations SL 545.30, reg 4 et seq. See also reg 2 thereof which defines the term 'consumer'. These regulations also cater for disputes involving authorised energy and, or water utility providers.
[887] ibid. See in particular reg 4.
[888] ibid, reg 4(1).
[889] ibid, reg 4(2).
[890] ibid.

in part incurred by any party in engaging the services of a lawyer and, or of a technical adviser. If REWS does not provide for any ruling in relation to such costs, then the consumer is entitled to ask REWS that all or part of such costs be paid to him by the other party to the dispute.[891] If a party fails to comply with any measure determined by REWS in the course of the resolution of a dispute then such non-compliance is deemed to be an infringement of the regulations and the non-compliant party liable to the payment of an administrative fine not exceeding six hundred euro for each day of non-compliance.[892]

Though there are various similarities in the dispute resolution procedures applicable vis-à-vis the MCA and the REWS, there are also some notable differences. Foremost among these differences is that the REWS is required to conclude matters within ninety days from receipt of the complete complaint, though the law does envisage an extension in cases of a 'highly complex nature' or where one of the parties is on justified grounds unable to take part in the proceedings. Also noteworthy is that the REWS can order the reimbursement of any payments made by the consumer, or the award of compensation to the consumer.[893] Conversely the MCA is not at law bound by a specific time frame in concluding any such disputes, nor can it issue any orders requiring the payment of compensation to consumers.

An aspect that utility sector specific legislation does not cater for is collective consumer redress. Time and again practices have been adopted by some utility service providers which impact consumers in general negatively, thus giving rise to the importance of having in place procedures that enable consumers to seek redress collectively. Under Maltese law, collective action may be taken through various avenues. One possibility is to initiate collective proceedings under the Collective Proceedings Act whereby the cessation of an infringement, the rectification of the consequences of an infringement and, or the compensation in

[891] ibid, reg 4(3).
[892] ibid, reg 4(4).
[893] ibid.

relation to the laws listed in Schedule A of the aforesaid Act[894] may be sought by a class representative[895] acting for a group of persons who suffered or are suffering harm and whose claims arise from common issues.[896] Such proceedings may also be initiated by a registered consumer association[897] provided the court before which such proceedings are filed is satisfied that the association in question is acting in the interests of the persons impacted and that it does not have a material interest that is in conflict with their interests.[898] Though Schedule A of the Collective Proceedings Act does not factor any of the utilities laws enforced by the MCA or by the REWS, the inclusion thereunder of the Consumer Affairs Act and of any regulations made under that Act does offer considerable scope for impacted consumers to initiate collective proceedings where for example an alleged infringement by a utility service provider constitutes an unfair commercial practice and therefore an infringement of the Consumer Affairs Act.

Another route whereby action may be taken to protect the collective interests of consumers is for a qualified entity[899], including a registered consumer association[900], to utilize the remedies available to such entities in accordance with the Consumer Affairs Act. These remedies include the right to request the DG Consumer Affairs within the MCCAA to investigate any infringement of the Consumer Affairs Act or of any regulations made under that Act,[901] to make a complaint to the said DG about the conduct of any person who supplies or acquires goods or services[902], or to apply directly to the Civil Court for a compliance order in terms of article 12G of the Consumer Affairs Act. The faculty for a qualified entity to request the issue by the Civil Court of a compliance order, even though limited to infringements of the Consumer Affairs Act or of the regulations made thereunder,

[894] ibid, art 3.
[895] A 'class representative' is the person authorised to bring the claims in the collective proceedings. See art 2 of Collective Proceedings Act.
[896] ibid, art 2 definition of 'class'.
[897] See definition of a 'registered consumer association' as per art 2 of Collective Proceedings Act. Part III of the Consumer Affairs Act establishes the criteria and the procedure for the recognition of such associations.
[898] ibid, art 12(1).
[899] See the definition of a 'qualified entity' as per art 2 of the Consumer Affairs Act.
[900] See Consumer Affairs Act, Part IV.
[901] ibid, art 12.
[902] ibid, art 12B.

can be a very useful tool in curbing malpractices by utility providers that impact consumers collectively. Hence a qualified entity by virtue of article 12G of the Consumer Affairs Act, may ask the Civil Court to issue a compliance order vis-à-vis a utility provider requiring that provider to delete or alter unfair contractual terms or to incorporate terms for the better information of consumers or to prevent a significant imbalance which is of detriment to consumers, to desist from unfair commercial practices, or from committing any breach of the Consumer Affairs Act or any regulations made thereunder.[903]

5.3. Consumer protection in utilities regulation – the EU measures

Many of the consumer protection measures specific to utilities regulation under Maltese law owe their origin to the transposition of EU requirements. In regulating the different utilities the EU has through the years gradually increased the consumer protection measures in place, ranging from the need to ensure the provision of basic utility services at affordable prices, to the protection of persons with specific needs such as persons with disabilities. In the electronic communications sector the EECC envisages various measures to protect consumers all of which have in turn been implemented under Maltese law. The importance of consumer rights is reflected in article 1 of the EECC which states that one of the aims of the EECC is to:

> 'ensure the provision throughout the Union of good quality, affordable, publicly available services through effective competition and choice, to deal with circumstances in which the needs of end-users, including those with disabilities in order to access the services on an equal basis with others, are not satisfactorily met by the market and to lay down the necessary end-user rights.'.

The achievement of this aim is listed amongst the general objectives that the EU and its Member States are required to pursue. Specifically article 3(d) of the EECC lists as a general objective the promotion of the interests of EU citizens:

[903] ibid, art 12G(1).

> 'by ensuring a high and common level of protection for end-users through the necessary sector-specific rules and by addressing the needs, such as affordable prices, of specific social groups, in particular end-users with disabilities, elderly end-users and end-users with special social needs, and choice and equivalent access for end-users with disabilities.'.

The promotion of these interests is in turn reflected in detail in various articles under the EECC. Hence the measures that Member States are required to have in place include:

- taking into account by the competent authorites of the views of end-users on issues that may impact on them;[904]
- resolution of disputes between consumers and providers by a NRA, another competent authority or an independent body with proven expertise in the application of the applicable consumer protection norms under the EECC;[905]
- provision of affordable universal services, in the light of specific national conditions, relating to the provision of broadband internet access service and of voice communications;[906]
- minimum information requirements for contracts provided in a clear and comprehensible manner on a durable medium, which with the exception of certain specified services, must be complemented with a concise and easily readable contract summary;[907]
- norms establishing the maximum contract duration and the circumstances when a consumer can terminate a contract free of cost;[908]
- norms allowing end-users when switching a provider to retain their phone number;[909] and
- the right to access emergency services through emergency communications free of charge.[910]

[904] See EECC, art 24(1).
[905] ibid, art 25(1).
[906] ibid, arts 84 and 85.
[907] ibid, art 102.
[908] ibid, art 105.
[909] ibid, art 106.
[910] ibid, art 109.

In the Postal services sector, the EU Postal Directive[911] provides for various measures intended to protect consumers. This Directive requires that users enjoy the right to a universal service that guarantees the provision of postal services of specified quality to all points in the territory of a Member State at affordable prices to all users which prices must be cost-oriented, transparent and non-discriminatory, and provide incentives for efficient universal service provision.[912] Member States are required to ensure that quality standards are in place and independent performance monitoring undertaken and that where necessary corrective action is taken.[913] Moreover postal service providers are required to have in place 'transparent, simple and inexpensive procedures' to deal with postal users' complaints. Where a complaint has not been satisfactorily resolved, Member States must then ensure that there are in place procedures that enable consumers, whether individually or through organisations representing their interests, to submit their claims before the competent national authorities.[914]

The purpose of the EU Water Directive[915] is to regulate the quality of water for human consumption in the EU. Whilst there are no specific articles in the Directive providing for consumer redress, measures provided for under this Directive, include the continuous monitoring of the quality of water supply systems on the basis of quality standards as identified in the Directive and the taking of measures by the designated competent authorities to ensure compliance with the norms of the Directive.[916]

The EU Electricity Market Directive 2019 lists as one of its aims that of ensuring 'affordable, transparent energy prcies and costs for consumers, a high degree of security of supply and a smooth transition towards a sustainable low-carbon energy

[911] See Postal Directive 97/67/EC as amended by Directive 2002/39/EC, Regulation (EC) No 1882/2003 and Directive 2008/6/EC (hereafter 'Postal Directive'). See consolidated version at file:///C:/Users/pmicallef/Desktop/Consolidated%20version%203rd%20postal%20directive%20(unofficial).pdf.
[912] ibid, arts 3 to 7 and 12.
[913] ibid, arts 16 and 17.
[914] ibid, art 19(2).
[915] See Directive (EU) 2020/2184 of 16 December 2020 on the quality of water intended for human consumption.
[916] ibid, art 23.

system.'[917] In order to achieve this aim the Directive lists amongst the duties of the NRA that of helping to ensure that the applicable consumer protection measures are effective and enforced.[918] More specifically the Electricity Market Directive 2019 requires that Member States ensure the protection of poor and vulnerable household energy customers[919] enabling Member States to apply public interventions subject to compliance with certain conditions, notably that such interventions do not go beyond what is necessary to achieve the general economic interest, are limited in time and proportionate with regard to their beneficiaries, and do not result in additional costs that impact market participants in a discriminatory way.[920] The Directive further requires that Member States ensure that all household customers enjoy universal service 'namely the right to be supplied with electricity of a specified quality' at 'competitive, easily and clearly comparable, transparent and non-discriminatory prices'.[921] Other measures provided for in the Directive that impact consumers include:

- the right to contractual information deemed to be essential such as the service provided and the service quality levels offered, the duration of the contract and how this can be renewed or terminated, coupled with a summary of key contractual conditions written in a prominent manner and in concise and simple language;[922]
- the right to 'a good standard of service and complaint handling' whereby suppliers are required to handle complaints in a simple, fair and prompt manner;[923]
- billing information that is accurate, easy to understand and is clear, concise and user-friendly;[924]

[917] See Directive (EU) 2019/944, art 1.
[918] ibid, art 59(1)(r).
[919] ibid, art 28.
[920] ibid, art 5.
[921] ibid, art 27(1).
[922] ibid, art 10(3).
[923] ibid, art 10(9).
[924] ibid, art 18(1).

- the provision of a single point of contact providing customers with all the information about their rights and dispute settlement mechanisms available;[925] and
- access to 'simple, fair, transparent, independent, effective and efficient out-of-court mechanisms for the settlement of disputes' relating to customer rights and obligations.[926]

5.4. The regulatory remit vis-à-vis consumer issues in the UK

Some countries have implemented measures to minimise if not eliminate the possible overlap in the regulation of consumer protection issues relating to utilities by empowering some of the sector specific utility regulators to take regulatory measures in relation to matters that would otherwise fall within the remit of the national consumer authority. This solution has been adopted in the UK where sector specific utilities regulators such as Ofcom and Ofwat are empowered under the (UK) Consumer Rights Act, 2015 to apply for the issue of an injunction to the CAT or the High Court[927] if the utilities regulator concerned considers that there is a breach of the norms regulating the use of unfair contract terms under the aforesaid Act.[928] This procedure has the merit of empowering the sector specific regulator to deal with consumer related issues concerning the utilities it regulates in a fairly comprehensive manner minimising overlap that may arise between the sector specific utilities regulators and the UK national consumer law enforcement authorities. In achieving this goal separate MoUs have been entered into between

[925] ibid, art 25.
[926] ibid, art 26.
[927] This depends on which regulator is applying for the issue of an injunction.
[928] See UK Consumer Rights Act, 2015, Schedule 3. https://www.legislation.gov.uk/ukpga/2015/15/contents. See also the 'Unfair contract terms guidance' issued by the Competition and Markets Authority at p 135 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/450440/Unfair_Terms_Main_Guidance.pdf.

the sector specific utilities regulators on the one hand and the national consumer authorities on the other.[929]

5.5. Consumer redress in the UK and Ireland

In various countries different out-of-court schemes are in place with the purpose of facilitating the resolution of individual consumer disputes involving the provision of a utility service. In some countries the utility regulator may intervene directly to resolve such disputes, whereas in other countries such disputes are referred to ADR schemes. In the UK the utility regulators do not deal directly with consumer complaints unless these relate to a breach of the norms enforced by them. If the individual consumer dispute does not relate to a breach of the norms enforced by the competent utility regulator, then the aggrieved consumer is referred to the ADR schemes approved by the regulator in question.

In the communications sectors falling under the remit of Ofcom, consumers are referred to two ADR schemes approved by Ofcom, namely the 'Communication and Internet Services Adjudication Scheme' (CISAS) and the 'Ombudsman Services' scheme.[930] Similar schemes exist in relation to water services regulated by Ofwat where if the consumer is not satisfied with the response received in resolving his complaint then the consumer can seek resolution of his dispute under the Water Redress Scheme (WATRS)[931], and in relation to the energy sectors regulated by Ofgem where consumer disputes can be lodged under the Ombudsman Services

[929] See Memorandum of Understanding between the CMA and Ofcom on the use of concurrent powers under consumer protection legislation (publishing.service.gov.uk).
[930] See Ofcom website *Making a complaint and using ADR Schemes* https://www.Ofcom.org.uk/phones-telecoms-and-internet/advice-for-consumers/problems/adr-schemes, accessed 30 September 2022.
[931] See Ofwat website *Alternative dispute resolution routes* https://www.ofwat.gov.uk/regulated-companies/investigations/how-we-investigate/alternative-dispute-resolution-routes/ accessed 30 September 2022.

scheme.[932] The use of such schemes is free of charge to consumers, is impartial and simple to use.[933]

In Ireland the utilities sector specific regulators - Comreg and CRU - both provide for dispute resolution procedures whereby they can determine consumer disputes in relation to utilities they regulate. In the communications sectors Comreg[934] provides for a complaint handling service where, if the complaint is not resolved within forty working days, the consumer may then apply to Comreg to adjudicate the dispute under its dispute resolution procedures.[935] In the energy and water services sectors the CRU is an approved Dispute Resolution body under Irish Law[936] whereby CRU is empowered to issue decisions awarding compensation or giving instructions to the service provider on how the complaint should be resolved. Such decisions by CRU are binding on the service provider and are not subject to appeal. If the consumer is not satisfied with the outcome, he can then consider filing a claim before the competent court of civil jurisdiction.[937]

5.6. Conclusion

There are various aspects of consumer protection relating to the regulation of utilities in Malta that require substantial changes. Foremost is the need to address the current fragmented regulatory regime whereby the regulation of consumer protection issues is divided between the DG Consumer Affairs within the MCCAA on

[932] See Ofgem website *Making a complaint about your energy supplier or network operator* - https://www.ofgem.gov.uk/information-consumers/energy-advice-households/making-complaint-about-your-energy-supplier-or-network-operator, accessed 30 September 2022.
[933] See (UK) Ombudsman Services at https://www.ombudsman-services.org/, the Communication and Internet Services Adjudication Scheme at Resolve a Telecoms Complaint - CEDR | Submit your complaint online accessed 30 September 2022, and the Utilities ADR How to complain about a utilities provider| ADR for utilities | Utilities ADR accessed 30 September 2022.
[934] The utilities regulated by Comreg include electronic communications and postal services. See What we do | Commission for Communications Regulation (comreg.ie) accessed 30 September 2022.
[935] See Comreg website at Dispute Resolution | Commission for Communications Regulation (comreg.ie) accessed 30 September 2022.
[936] See CRU website at Complaints - Commission for Regulation of Utilities (cru.ie) accessed 30 September 2022.
[937] ibid, at Log a complaint with the CRU - Commission for Regulation of Utilities, accessed 30 September 2022.

the one hand and the utilities sector specific regulators - the MCA and the REWS - on the other. In some countries this issue has been surmounted by establishing a national regulatory authority that is responsible both for the regulation of most utilities and for most aspects of consumer protection. This for example is the case with the ACM in the Netherlands and the CNMC in Spain.[938] Conversely in other countries the responsibility for consumer protection in the various utilities is shared between the utility sector specific regulators and the national consumer authority. This is the situation in the majority of EU Member States where specific consumer protection measures, in the main reflecting EU norms, fall within the remit of the sector specific utility regulator, whereas general norms dealing with matters such as the regulation of unfair contract terms or of unfair commercial practices falls within the remit of the national consumer authority.

The present regulatory regime in Malta undermines effective consumer protection in so far as the regulation of utilities is concerned, with consumers of utility services at times uncertain which public authority they should have recourse to in relation to complaints they have relating to the provision of utility services. Regrettably there have also been instances where the DG Consumer Affairs and a utilities sector regulator issued decisions at cross-purposes causing regulatory uncertainty.[939] The practical solution to address such a situation is to have one regulatory authority with comprehensive powers to deal with consumer protection issues relating to the provision of utilities thereby eliminating overlap between different regulatory authorities, whilst providing one focal point to address such issues.

If conversely the current regulatory regime in Malta is maintained, then this regime should at least be revisited whereby the utilities sector specific regulators – the MCA and the REWS – are empowered to deal with all consumer issues concerning the utilities that they regulate including the exercise of the powers under general consumer law – notably under the Consumer Affairs Act, the enforcement of which currently fall under the exclusive remit of the DG Consumer Affairs. In doing so the

[938] See above at pp 46 and 57 et seq.
[939] See eg report in the Times of Malta dated 17 October 2011 entitled *Consumer 'better off before' on TV contracts* at https://timesofmalta.com/articles/view/Consumers-better-off-before-on-TV-contracts.389456.

author suggests that the utilities sector specific regulator should have the remit to enforce applicable norms under the Consumer Affairs Act, especially those relating to unfair commercial practices and unfair contract terms, in so far as such norms relate to the utilities regulated by the utilities regulator concerned.[940] The law should clearly state that enforcement of such norms should in the first instance lie with the utilities sector specific regulator concerned, whilst providing for those instances where non-compliance may also impact other sectors not regulated by the utilities regulator concerned and which therefore may necessitate the intervention of the DG Consumer Affairs given the wider impact of the infringement on the market in general.

Conversely if as proposed elsewhere in this study[941], the MCCAA is restructured with the power to deal with utilities regulation assuming the functions of the MCA and the REWS, then the regulatory landscape in so far as consumer protection issues relating to the diverse utilities will have the merit of having in place one competent authority doing away with issues as to which authority is competent to deal with a given consumer protection issue relating to the provision of a specific utility service, a situation that regrettably has from time to time arisen under the current regulatory set-up.

Another aspect that needs to be addressed is the resolution of consumer disputes. As described earlier, REWS can when dealing with complaints, make financial awards in favour of aggrieved consumers. If a utility services provider fails to comply with a REWS ruling to pay compensation, then REWS can impose a maximum administrative fine of six hundred euro for each day of non-compliance on the non-compliant provider. The author questions the feasibility of such a dispute resolution procedure. The REWS is not a court of law and an aggrieved consumer who is for example awarded four thousand euro as compensation to be paid by a non-compliant utility provider, does not have recourse to enforce such a ruling since a decision by REWS is not by law considered an executive title on the

[940] See P E Micallef, Id-Dritt Edition XXXI *The case for a 'Super' Market Authority in Malta* at p 124 et seq.
[941] See above Section 1.5.3.

basis of which a consumer can then have recourse to the appropriate legal tools under the Code of Organisation and Civil Procedure to recover the compensation due to him.[942] Conversely in the case of the MCA, any consumer complaints whereby the MCA considers justified the payment of compensation to an aggrieved consumer are referred to the CCT[943].

The author considers that there should be in place a uniform dispute resolution procedure that applies to all consumer complaints irrespective of the utility service in question. As a first step, both MCA and REWS should be empowered to attempt to resolve matters through mediation. If despite such mediation no solution is achieved then alternative measures should be considered. There are two feasible options that may be adopted once the endeavours of the regulators to resolve matters through mediation fail. One option is to refer claims for compensation or other forms of redress to the CTT, whereby any final decisions are enforceable as executive titles under the Code of Organisation and Civil Procedure.[944] Another alternative is to have some form of ADR procedure focused specifically on disputes relating to the provision of utilities on the model of the UK Ombudsman Services Scheme whereby unresolved complaints involving also claims for compensation can be submitted by the aggrieved consumer to an independent body with the faculty to issue binding decisions on the utility provider subscribed to the ADR scheme.[945]

Finally a shortcoming that should be dealt with in short order is to extend the application of the initiation of class actions under the Collective Proceedings Act to utilities legislation notably the laws enforced by the MCA and the REWS, in so far as these impact consumer rights. There is no valid reason why this should not be done. This point was raised in the House of Representatives by MP Dr Chris Said. Regrettably however no commitment was forthcoming from government to include

[942] See Code of Organisation and Civil Procedure, Title VII entitled 'Of the enforcement of judgements and other executive titles'. Art 253 thereof lists the executive titles in relation to which executive acts can be applied for.
[943] See Malta Communications Authority Act, art 44(3).
[944] See Code of Organisations and Civil Procedure, art 253(g).
[945] See above at p 267 and the UK Ombudsman Services website at The Complaints Process | Ombudsman Services (ombudsman-services.org), accessed 30 September 2022.

such laws in the Schedule to the Collective Proceedings Act.[946] A similar issue exists in relation to the right of qualified entities, including registered consumer associations, to apply for the issue of compliance orders by the Civil Court in terms of the Consumer Affairs Act. Whilst qualified entities can apply for such orders in relation to the infringements of the Consumer Affairs Act and the regulations made there under[947], no similar applications can be made in relation to infringements of the laws enforced by the MCA and by the REWS other than under the Electronic Commerce Act whereby a qualified entity[948] can apply to the MCA for the issue of a compliance order requiring any person to take any measures to ensure compliance with the Electronic Commerce Act or any regulations made thereunder, or to cease and desist from committing a breach of any of the aforesaid laws.[949] In so far as the MCA is concerned, the author questions why a qualified entity should also not be entitled to apply for the issue of similar orders by the MCA in relation to all the other laws which the MCA enforces. Similarly in the case of the REWS the author suggests that the concept of 'qualified entity' should be introduced, whereby any such entity can apply to the REWS for the issue of orders to ensure that utility service providers falling under its remit adhere to their obligations at law.

The opportunity to address matters in this context should arise when government implements the EU Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2000/22/EC.[950] This Directive requires that Member States have in place norms relating to collective consumer redress proceedings whereby consumers impacted by the same unlawful act or omission can collectively make one single action, and to injunctive measures curbing unlawful acts or omissions that harm or may harm consumers. In doing so government should actively consider applying the representative action measures

[946] See PQ no 14780 by MP Dr Chris Said, the reply given thereto during the sitting of the 8 June 2020 - Twegibaghall-mistoqsijaparlamentarinumru 14780 (gov.mt).
[947] See Consumer Affairs Act, art 12G.
[948] A qualified entity includes a registered consumer association under the Consumer Affairs Act. See art 2 of the Electronic Commerce Act which defines a 'qualified entity'.
[949] See Electronic Commerce Act, art 24B.
[950] See Directive (EU) 2020/1828. Member States are required in have in place the required national norms transposing this Directive by the 25th December 2022. The measures then adopted are to be applied as from the 25th June 2023. See art 24 of the aforesaid Directive.

required in the Directive not only to the EU laws listed in the First Annex of the Directive but also to all national consumer protection laws even if these are not related to the EU laws listed in the First Annex.[951]

[951] As on the 30 September 2022, government had not as yet published any official proposals in relation to the transposition of Directive (EU) 2020/1828.

Conclusion - The research questions and the conclusions reached

6.1. Introduction

In the Introduction to this thesis research questions are listed which are subsequently discussed in some detail in Chapters One to Five. Some of these questions and the answers thereto are directly linked and to some extent the answers thereto articulate the overall vision of the author when reviewing the regulation of utilities in Malta. The main proposal underlying some of the conclusions reached is to have in place a 'super' regulator responsible for the regulatory oversight of the utilities discussed in this study, including all aspects of competition law and of consumer law enforcement. Ancillary to this proposal the author discusses other matters that need to be considered irrespective of whether one adopts the proposed 'super' regulator regime or retains the current regime with utilities sector specific regulators. Such matters include notably the independence and accountability of the utilities regulators, the process followed when appointing the headship of a regulator, enforcement tools and the imposition of sanctions, judicial review of regulatory decisions and consumer protection.

This list is not comprehensive but purports to cover some of the main issues that are pivotal in assessing the regulation of utilities in Malta. There are matters discussed in this thesis which separately merit further study – the independence and accountability of regulators being a case in point. The regulation of utilities is subject to continuous developments whether in response to domestic circumstances that may arise or to changes at an EU level that impact the regulatory set-up in Malta. Hence during the period of study relating to the writing of this thesis, significant developments occurred that impacted significantly the regulation of utilities, including the substantial changes brought forth as a result of the transposition of new EU directives in the electronic communications and electricity sectors in 2021.

Some conclusions reached apply irrespective of the regulatory regime in place, foremost among which are the following, namely that:

- the regulators are independent and accountable in the performance of their regulatory tasks;
- the persons making up the headship of the regulator are chosen on merit in a transparent manner on the basis of their knowledge and experience of the regulated utilities; and
- regulatory decisions are subject to judicial review.

Irrespective of whether one agrees or disagrees with the conclusions in the answers to the research questions in this study, in evaluating the current regime and the changes proposed, it is imperative to keep in mind the necessity of continuously updating the law, regulatory decisions, and the regulatory regime in place in order to address adequately and efficiently new challenges that arise as a result of technological progress, and evolving consumer and market requirements.

One need only look at the not-too-distant past, with the initial, at times somewhat hesitant measures taken by different governments over the years to regulate the provision of utilities in Malta, commencing from a situation where the provision of most utilities was the exclusive domain of state-controlled monopolies which were in practice their own regulators, to a gradual liberalisation of most utilities with regulatory oversight by quasi-independent regulators. The author considers that now Malta has arrived at a juncture where the regulation of utilities merits a comprehensive reassessment, in particular whether the current regulatory regime is adequately providing for comprehensive, coherent and effective regulation of the diverse utilities, or conversely whether there are more feasible options to the current regime.

Regrettably the discussion in this regard both at political and academic levels in Malta has been negligible, this notwithstanding the importance of the provision under fair and equitable conditions of essential utilities such as energy, communications and water services on society in general. The tendency of different governments over the years to create more regulators, rather than consider the feasibility of a more unified regulatory approach, has not helped matters. To take a case in point, in the communications sector which encompasses the regulation of

digital services, one can identify at least four different national regulators responsible for different aspects relating to such services, namely the MCA with regulatory oversight of electronic communications services and networks and electronic commerce[952], the DG Consumer Affairs within the MCCAA with oversight for digital content and digital services contracts and for distance selling[953], the BA with responsibility for content transmitted over broadcasting media notably television and radio[954], and the MDIA with responsibility for innovative technology.[955] Each of these authorities has its own headship comprising a board of directors and its own staff, and has at law specific functions regulating diverse aspects relating to digital society. At times the respective roles of some of these regulators have crossed paths leading to regulatory uncertainty. These considerations underlie the reasons for the proposal of the author advocating a unified regulatory approach, avoiding the creation of new regulators and doing away with some of the current ones.

The author considers that the establishment of a 'super' regulator to be a feasible option that may be conducive to more effective regulation of utilities in Malta. Having in place a 'super' regulator that acts independently and effectively in the performance of its tasks is a tall order to achieve, but by no means impossible. Other countries such as the Netherlands, Spain and Estonia have undertaken and maintained such a route. In the case of Malta more so because of its small size and limited human and financial resources, taking such a route makes considerable sense. A 'super' regulator can for example facilitate better regulation in relation to consumer protection issues, eliminating issues of competence between the utilities sector specific regulators on the one hand and the national consumer authority in the form of the DG Consumer Affairs within the MCCAA on the other. With a 'super' regulator in place both consumers and service providers would have a single point of reference when regulatory issues occur. Financially the cost of running such a regulator should be less than that of running multiple regulatory authorities, with

[952] See the Electronic Communications (Regulation) Act and the Electronic Commerce Act.
[953] See the Consumer Rights Regulations as per SL 378.17, and the Digital Content and Digital Services Contracts Regulations as per SL 378.20.
[954] See the Broadcasting Authority Act.
[955] See the Malta Digital and Innovation Authority Act.

the added advantage of having in place a more coherent and unified approach where the required expertise and knowledge resides in one entity with overall responsibility for the regulation of utilities and attendant consumer protection and competition issues.

The author in his answers to the questions raised, endeavours to provide a fairly comprehensive framework for the regulation of utilities in Malta. As shown in this thesis, the diverse aspects of the present regulatory regime need to be revisited. Some steps have already been taken in part in adherence to EU requirements. Regrettably the EU in some instances has not always taken a uniform approach on the regulation of utilities.[956] The author considers that had a uniform approach been adopted for example as to how persons making up the NRA headship are appointed and the grounds on which they may be dismissed from office, then such an approach would have had a beneficial impact on NRA independence by establishing standard norms irrespective of the nature of the utility regulated.[957] This said, overall the applicable EU norms have had a positive impact on the regulation of utilities in Malta especially with regard to the emphasis on the independence of the regulators, *ex ante* regulation, judicial review and consumer protection.

The measures enacted between July and October 2021 in relation to the MCA and the REWS providing for a transparent selection procedure of the headships of the regulators coupled with norms on regulatory independence, were definitively steps in the right direction.[958] However more needs to be done. One needs to see how in practice these norms will be applied. At times whilst the norms at law are fairly clear, in practice these are not adhered to in full, hence the importance of ensuring not only that the required norms are in place, but equally important that they are in practice applied correctly by the powers that be. The underlying purpose of this study is to instigate further change conducive to a revised utilities regulatory

[956] See eg above at Section 2.4.4 at p 145 et seq.
[957] See eg above at Section 2.4.4 at p 144 et seq where the length of the terms of appointment of members of a NRA headship vary from 3 to 7 years.
[958] See Act No XLIX of 2021, arts 2 and 4, and Act No LII of 2021, arts 54, 55 and 59.

regime that factors the specific needs of Malta in line with good governance principles.

6.2. Chapter One -The regulatory set-up and composition of the headship

[Thesis Questions in Chapter One]

(i) How should the regulation of utilities in Malta be shaped? Should the current regime of sector specific regulators with one regulator - the MCA - dealing with the communications utilities, and another regulator - the REWS - dealing with the energy and water services utilities, be retained? If not, should one opt for a multi-sector utilities regulator, or go further and revisit the role of the national competition and consumer authority - the MCCAA - by creating a 'super' regulator empowering it to deal also with all aspects concerning the regulation of utilities that currently fall within the remits of MCA and of REWS?

(ii) How should the headship of the regulator be composed? Should there be a single person headship, or should the headship be composed of a collegiate body in the shape of a board of directors? If the headship comprises a collegiate body in the form of a board of governors should it have an executive role?

In this Chapter the key question discussed is whether to retain the present regime whereby regulatory oversight for the provision of utilities is shared between the sector specific utilities regulators - namely the MCA and the REWS on the one hand - and the DGs for consumer affairs and for competition within the MCCAA on the other, or whether other regulatory regimes such as a multi-sector utilities regulator combining the roles of the MCA and the REWS, or going a step further with a 'super' regulator responsible also for all aspects of consumer and competition law,

should be considered thereby minimising if not eliminating outright the current fragmentation of the regulation of utilities in Malta.[959]

A subset of this question, which is relevant irrespective of whether the present regulatory regime is retained or not, is whether in the context of the communications utilities the regulator should also assume the regulatory functions of the BA and, or of the MDIA. In this regard the author advocates that the regulator responsible for the regulation of communications utilities, whether in shape of a sector specific regulator or as part of a multi-sector or 'super' regulator, should also assume the roles currently exercised by the BA and MDIA, this more so with the increasing emphasis on the need to regulate digital services both from technical and content regulation related angles. Maintaining the current fragmented approach serves only to complicate and possibly even confuse effective regulation where the lines of demarcation between the remit of the different regulators currently in place is not always clear.[960]

The author strongly advocates a 'super' regulator with a remit to regulate all the utilities discussed in this study, having in addition regulatory oversight of all competition and consumer protection issues relating at least to the utilities in question. There are two main reasons that justify the establishment of such a 'super' regulator. One reason is that the adoption of such a regime should lead to better rationalization of both human and financial resources whereby a 'super' regulator should be able to avoid the replication within its administrative set-up of various key functions such as complaints handling, public relations, administration, and the handling of human and financial resources – functions that are currently replicated in the various regulators that regulate the diverse aspects relating to the regulation of the provision of utilities in Malta. The second reason is that a unified regulatory set-up would be conducive towards more coherent regulation, doing away with instances of overlap or conversely of omission in regulatory oversight, where for example a malpractice by a utility service provider might be in breach

[959] See above Question (i) at p 4.
[960] See above Section 1.3.3 at p 50 et seq.

both of sector specific norms enforced by the sector specific utilities regulator and of general consumer law enforced by the DG Consumer Affairs.

If the proposal for a 'super' regulator is taken up, a point that would have be decided is whether the remit in relation to competition and consumer protection issues should be restricted only to the regulated utilities or else extended to all market sectors. The preference of the author is that the remit of the 'super' regulator should extend to all market sectors even if not related to utilities. If the remit is limited solely to the regulated utilities, the possibility of overlap between the 'super' utilities regulator on the one hand, and the national competition and consumer authority on the other may still subsist. A MoU might serve to diminish overlap, however going by past experience in Malta even when fairly detailed MoUs were in place, instances of overlap continued to occur to the detriment of clarity of the regulatory roles in the market of the diverse regulators involved. Regrettably there have even been instances where conflicting regulatory decisions were taken by a utilities sector specific regulator on the one hand and the DG Consumer Affairs or the DG Competition on the other, hence the preference for a 'super' regulator having also a comprehensive competition and consumer protection remit with regard to all market sectors.[961]

The other key question discussed in Chapter One relates to the governance structure of the headship.[962] In this regard three options are identified, namely:

- a 'governance board model' with a non-executive chairperson and board of governors supported by a CEO responsible for day-to-day administration and for executive decisions, who is answerable to the board;
- a variant of the first option, where executive powers reside with the chairperson and the board of governors with the chairperson also performing the functions that would otherwise be onerous on a CEO; or
- a 'single person' regulator where headship, including the exercise of executive powers, resides with one person.

[961] See above Section 1.3.3.
[962] See above Question (ii) at p 5.

In part what option should be followed is conditioned by the regulatory regime in place. If one opts to maintain a regulatory set-up, with distinct sector specific utility regulators, then a single person regulator model for each of the separate utility regulators might be a doable option. If on the other hand the remit of the regulator spans various utilities with a remit extending also to competition and consumer protection at least in so far as these impact the regulated utilities, then given the wide ranging expertise required, a collegiate model is evidently more appropriate.

If a collegiate model is adopted, one then needs to determine if the governing board should exercise executive powers or else delegate such powers to a CEO. The preference of the author is for a full-time executive collegiate headship. If a 'super' regulator is established having also a comprehensive competition and consumer protection remit, then the author advocates a headship with executive powers composed of a chairperson and four other members appointed on a full-time basis, whereby the chairperson is responsible for general administration and overall regulatory oversight, whereas each of the other members has an executive role tied to a specific area of regulation factoring communications utilities, energy and water utilities, competition issues, and consumer protection respectively.[963]

6.3. Chapter Two – The independence and accountability of utilities regulators

[Thesis Questions in Chapter Two]

(iii) To whom should a utilities regulator be accountable in the performance of its regulatory functions?

(iv) How should the persons making up the headship of the regulator be appointed? Who should appoint such persons and on what criteria should they be appointed? How long should the term of office of the members making up the headship be and should these members be eligible for

[963] See above Section 1.5.3 at p 73 et seq

reappointment? Should the appointment of the persons composing the headship be subject to independent scrutiny? If yes, which entity should undertake such a role, and should that entity have the power to veto any such headship appointments?

(v) On what grounds should a member of the headship be removed during his term of office? What procedure should be followed in doing so and who should be empowered to remove the member? Should a member who is removed from office have a right of recourse to a court of law?

In Chapter Two the independence of the utilities regulators and their accountability in relation to the exercise of their functions is discussed. The conclusions reached apply irrespective of whether the current utilities regulatory regime is retained with the MCA and the REWS as sector specific utilities regulators, or conversely if a multi-sector utilities regulator or a 'super' regulator regime is adopted as proposed elsewhere in this study.[964] The need for effective independent regulation of utilities is imperative when one considers that such services are essential to the well-being of society in general and should be provided efficiently and at affordable prices based on equitable terms of service provision. Market forces alone are not enough to guarantee the provision of optimum services at affordable prices for all. Moreover some utilities in Malta such as the electricity and water services utilities are provided by monopolies and therefore are not subject to competitive market forces which can impact positively on the quality and price of the services provided. Hence the need for regulators empowered to exercise their regulatory functions independently of utilities service providers, end-users and government. The exercise of such powers must however be tempered by the accountability of the regulators. This leads to the question as to whom such regulators should be accountable.

Both the Malta Communications Authority Act and the Regulator for Energy and Water Services Act provide for norms that require that the MCA and the REWS act independently, stating expressly that neither regulator should seek or take

[964] See above Section 1.5.3.

instructions from any other person in the exercise of its regulatory tasks.[965] The point of departure in the discussion on the independence of utilities regulators is to have norms in place that clearly define their role and responsibilities with regard to the executive branch of government, the legislature and other elected bodies. Specifically in this regard one issue that can impact on the independence of both MCA and REWS in the exercise of their regulatory functions, is the inclusion at law of norms whereby the minister responsible politically for the utilities regulator, can give written 'directions' of a general character on the policies to be followed by the regulator concerned.[966]

Whilst to date no minister has issued such directions at least in writing, the fact that such ministerial powers at law exists, is a cause for some concern as such directions if issued may impact the independence of the regulator. The amendments introduced in 2021 were in this regard a step forward in diluting the impact of such directions, more so when one considers that previously in the case of the MCA non-compliance with a direction actually empowered the Prime Minister to assign part or all of the functions of the MCA to the minister responsible for communications.[967] The author however considers that in addition to the amendments introduced in 2021[968], clear provision should be made at law whereby any such directions that remotely impinge on the effective exercise of any regulatory functions are *ipso facto* invalid.[969] Furthermore if issues arise between the minister concerned and the utilities regulator as to the validity of any such direction, then provision should be made so that such issue can be referred to an independent adjudicative body such as the ART.

Equally relevant to the independence of the regulators is the manner how the persons making up their headships are appointed to and removed from office. Until the amendments enacted between July and October 2021 to the Malta Communications Authority Act and to the Regulator for Energy and Water Services

[965] See Malta Communications Authority Act art 6(1), and Regulator for Energy and Water Services Act, art 3(2) and (3), and art 5(1) and (2).
[966] See above Section 2.4.1 at p 122 et seq.
[967] See above Section 2.2.1 at p 89 et seq.
[968] See Act No LII of 2021, art 58.
[969] ibid, Section 2.4.1 at p 123 et seq.

Act, the appointments of the headships of both regulators were the exclusive prerogatives of the ministers responsible respectively for the communications sectors, and for the energy and water sectors. Until then, no norms were in place providing for the criteria to be followed when making such appointments.[970] This changed following the amendments enacted in 2021. In the case of the MCA, the Minister for communications is required to choose the persons making up the MCA Board from amongst:

> 'persons of recognised standing and professional experience on the basis of merit, skills, knowledge and relevant experience'.[971]

In doing so the Minister is required to act 'in an open and transparent manner'.[972] In the case of the REWS, the Minister for energy and water services is required to appoint the REWS Board members:

> 'on objective, transparent and published criteria, in an independent and impartial procedure, which ensures that the candidates have the necessary skills and experience.'[973]

In both instances the national legislation purports to implement the applicable EU norms the purpose of which norms though similar, use different wording. The difference in the wording in relation to the appointments of the headship of both regulators under national law is further conditioned by the fact that the wording used in the case of the MCA headship does not reflect precisely the relevant EU norms.[974] This lack of uniformity in the wording of the respective norms under the Malta Communications Authority Act and the Regulator for Energy and Water Services Act may give rise to the use of conflicting criteria and procedures on the basis of which the persons making up the respective headships are chosen.

Another difference concerning the appointment of the persons making up the headship of the two regulators relates to the length of the term of appointment, norms which are again tied to the norms as provided for under the applicable EU

[970] See above Section 2.2.1 at p 85, Section 2.2.2 at p 100 and Section 2.4.4 at p 143 et seq.
[971] See Malta Communications Authority Act, art 3(2).
[972] ibid.
[973] See Regulator for Energy and Water Services Act, art 3(6),
[974] See EECC, art 7(1), and Malta Communications Authority Act, art 3(2). See also above Section 2.4.4 at p 149 et seq.

legislative articles.[975] In the case of the MCA Board the term of office is of between three to six years and members are eligible for re-appointment for another term, whereas in the case of the REWS Board the term of office is of five to seven years and on the expiration of the term such members can only be re-appointed once for one other similar term of office.[976] The Malta Communications Authority Act does not expressly state that re-appointments are limited only to one other term of office, though the wording of the law implies that a reappointment is only for one other term given that the legislator uses the singular 'another term'.[977]

The norms relating to the dismissal of persons forming part of the respective headships of the two regulators differ significantly. In the case of the MCA Board a person who has been dismissed during his tenure of office can insist that the reasons of his dismissal are made public and subsequently contest such a dismissal before the Civil Court, whereas no similar right of redress is catered for in relation to the dismissal of a REWS board member.[978] Furthermore the grounds on the basis of which MCA and REWS board members may be removed are characterised by notable differences. Hence the Regulator for Energy and Water Services Act does not list as a ground for dismissal if a board member is unable to continue in his role due to infirmity of mind or of body or else fails to perform his duties for a prolonged period of time without any justification.[979] Under the Regulator for Energy and Water Services Act a board member may be dismissed if found guilty of 'misconduct under any law', whereas conversely under the Malta Communications Authority Act dismissal is limited to convictions of specific criminal offences. Such differences are confusing and uncalled for more so when one considers that in substance the two boards perform similar duties though related to different utilities. Given this situation a comprehensive review of the diverse grounds

[975] See EECC, art 7(1), and Electricity Market Directive 2019, art 55(5)(d).
[976] See Malta Communications Authority Act, art 3(2) and Regulator for Energy and Water Services Act art 7(7).
[977] See Malta Communications Authority Act, art 3(2).
[978] See Malta Communications Authority Act art 3(7) and above at Section 2.4.4. at p 145 et seq.
[979] See Regulator for Energy and Water Services Act, art 3(11).

currently listed in relation to the MCA and the REWS Boards should be undertaken to ensure that the grounds for removal are uniform and comprehensive.[980]

The author advocates that there should be a set of uniform norms that regulate both the appointment and removal of the persons making up the headship of both utilities regulators. The applicable criteria for such appointments should be uniform, in the public domain and the law should expressly require that the selection in all instances is made on the basis of an open and transparent procedure conducted under the scrutiny of a body that is distinct and effectively independent from government. There is no obvious reason why the terms of office and re-appointment thereto of the headships of the MCA and the REWS should be different. A minimum term of three years is too short a term for persons who are expected to provide a medium to long term vision in dealing with diverse aspects of utilities regulation. A minimum term of office of five years not exceeding seven years would in such circumstances appear to be more suitable. Re-appointments should be restricted to one term of similar duration to that of the first term, more so when one considers that a person so appointed will have done a period of service of at least ten years.[981]

Uniform norms should apply in the case of a dismissal from office of a board member whereby the member who is dismissed is entitled to request a public statement for the reasons of his dismissal and to contest his dismissal before the courts. The adoption of such norms should contribute to a more transparent process regulating the dismissal of persons forming part of the headship, minimising if not eliminating outright instances of arbitrary dismissal from office. In this regard it is suggested that the norms currently applicable under the Malta Communications Authority Act should be replicated under the Regulator for Energy and Water Services Act.[982]

One issue that has not to date been adequately addressed is who should supervise headship appointments of the MCA and of the REWS, what should such supervision

[980] ibid, art 3(11)(c), and Malta Communications Authority Act, art 3(6)(c).
[981] See also above section 2.4.4 at p 144 et seq.
[982] See above p 116 et seq.

consist of and whether such supervision should extend to the overall conduct of the aforesaid regulators without however impacting negatively the independent exercise of their regulatory functions.[983] To date such appointments have been made by the minister with political responsibility for the utilities regulator concerned. The only extraneous oversight of such appointments by the minister concerned is restricted to the chairperson heading the regulator concerned whereby the Standing Committee on Public Appointments of the House of Representatives may make questions to the appointee proposed by the minister concerned.[984] The role and powers of oversight of this committee and its composition must however be revisited if the committee is to function adequately as an effective guardian that ensures that persons proposed for such appointments are chosen strictly on merit.

There are various issues that undermine the effectiveness of the role of this committee. It is not clear why the remit of the committee in the case of the MCA and of the REWS does not extend to all the members of the respective boards. The role of the committee is advisory, and the law expressly states that it is the minister giving notice of the proposed appointment who finally decides whether the appointment is approved or otherwise.[985] Moreover the composition of the committee ensures that government has a majority of the members making up the committee. This is hardly the hallmark of an effective independent entity that can overrule unsuitable ministerial nominees.

The author questions the suitability of the norms regulating both the role and the composition of this committee vis-à-vis the vetting of proposed appointments to the chairperson of the MCA and of the REWS. The purpose of the procedure under article 38 of the Public Administration Act is to enable an independent assessment of the suitability of the persons nominated for such headship positions. This purpose may not always be achieved once the final decision rests with the minister nominating the person for the headship position, this coupled with the

[983] This is discussed in Sections 2.4.4 and 2.5.
[984] See Public Administration Act, arts 37 and 38 and the Fifth Schedule thereto.
[985] ibid, art 38(5)(c).

consideration that any 'advice' given by the committee to the minister on the proposed appointment is conditioned by the fact that the committee is composed of a majority of pro-government members of the House of Representatives who in practice will rarely if ever object to an nominee proposed by the minister concerned.[986]

Whilst the author does not question the faculty of the minister concerned to propose a person for a headship position with a utilities regulator, the final decision as to the suitability of the nominee should lie with a body composed of persons who are independent of government. This is a procedure that for example has been adopted in relation to the appointment of members of the judiciary.[987] The author sees no reason why a similar procedure should not be adopted in relation to sensitive positions such as those of the headships of utilities regulators, with the difference however that any nominations to any such positions remain the sole responsibility of the minister concerned made in line with the applicable norms at law. The author further proposes that such a procedure should apply to all the persons nominated to form part of the headship of a utilities regulator more so if such persons as board members have a role in the taking of regulatory decisions as is being proposed in this study.[988]

Equally important is the accountability of the regulators in the conduct of their regulatory functions.[989] The MCA and the REWS are in this regard subject to similar norms which in substance consist of reporting requirements exercised through the ministers under whose political responsibility each regulator falls. These reports include a copy of the annual financial statements coupled with a copy of any report made by the auditors on the statements or on the accounts of the regulator concerned. Both utilities regulators are required to submit a report about their activities, which reports are then submitted by the minister concerned to the House of Representatives.[990] The author questions whether the sum of these measures

[986] ibid, art 37(1). See also above Sections 2.4.4 and 2.5.
[987] See art 96(A) of the Constitution.
[988] See above Section 1.5.3.
[989] See above Section 2.4.2.
[990] ibid.

does provide for effective accountability of the MCA and of the REWS. The House of Representatives should have more regular and visible oversight over the activities of both regulators through dedicated hearings held periodically before a select committee of the House of Representatives, which committee should have the express remit of monitoring the activities of both regulators in order to ensure that these act in accordance with the applicable law and the norms regulating good governance.

The author suggests that such a role might be undertaken by the Public Accounts Committee which by law is empowered to examine the accounts of any statutory authorities[991], extending the role of this committee to include the monitoring on an ongoing basis of the activities of the two regulators with the faculty of summoning the regulator concerned if there are matters that need to be clarified. Such a measure would serve to contribute to a higher degree of accountability where each regulator would in the conduct of its work also be subject to continuous oversight.[992]

6.4. Chapter Three – Judicial review of regulatory decisions

[Thesis Questions in Chapter Three]

(vi) To what extent and on what grounds should regulatory decisions be reviewable by a judicial forum? Which forum should this be and how should it be composed?

(vii) Should there be a further right of appeal from a decision of an appeal judicial forum of first instance to the Court of Appeal on points of law and, or of fact?

An essential tool in the regulation of utilities is to have in place an independent judicial forum empowered to review contestations of regulatory decisions taken by

[991] See Standing Orders of the House of Representatives Order as per SL Const 02 of the Laws of Malta, standing order 120E.
[992] See above Section 2.4.2.

a utilities regulator. Such a forum should have the right of review where an aggrieved person may contest a regulatory decision whether relating to points of law and, or of fact. Affording an aggrieved person the right to seek an independent review of such regulatory decisions serves to enhance the credibility of the fairness and impartiality of the utilities regulatory regime in place whilst contributing to greater accountability of the regulator concerned further ensuring that the regulator will endeavour to do its utmost to give decisions that factually, technically and legally are sound, knowing that its decisions may also be scrutinized by an independent review body.[993]

Currently both MCA and REWS regulatory decisions may be contested before the ART on points of fact and of law. The decisions of the ART are taken exclusively by the presiding chairperson who is assisted by two 'assistants' whose opinion is not however binding on the chairperson. To date the chairperson presiding ART in relation to contestations of regulatory decisions taken by MCA or REWS has always been a sitting magistrate, though the law does contemplate the possibility that a former member of the judiciary can also be appointed as a chairperson. There is a further right of appeal from a decision of the ART following a contestation of regulatory decisions of the MCA to the Court of Appeal (Inferior) on both points of law and, or of fact,[994] and in the case of the REWS to the Court of Appeal (Inferior) on a point of law only.[995]

The author considers that there is scope for some changes relating to the composition of the ART when determining appeals from regulatory decisions taken by either of the utilities regulators. Many regulatory decisions relating to the provision of utilities require the assessment of diverse technical aspects. This notwithstanding, decisions by the ART are taken exclusively by the presiding chairperson. The author suggests that the role of the 'assistants' should be changed to that of voting members of the ART where the issues relate strictly to technical matters in relation to which the said members have the required expertise. Such

[993] See above Section 3.1.
[994] See Malta Communications Authority Act article 41. See also above at Section 3.9.
[995] See Regulator for Energy and Water Services Act, art 34(1).

cases where they relate to technical matters should be decided by the chairperson and the expert members of the ART collectively. Conversely issues relating to the interpretation of the law including where applicable the imposition of sanctions, should be decided by the ART chairperson only. There are various adjudicative bodies in place that include technical members who are not lawyers and who have a vote in the determination of issues in contestation more so if the issues relate to technical matters falling within their area of expertise.[996] The author considers that the ART should similarly be reconstructed. In doing so, provision should also be made to ensure the independence and impartiality of the technical members.

Another change proposed by the author is to review the right of appeal from decisions taken by the ART following contestations submitted to it of regulatory decisions taken by the MCA and by the REWS. Currently there is a further right of appeal to the Court of Appeal (Inferior) on both points of law and of fact from an ART decision following a contestation of a MCA decision. Conversely in relation to an ART decision taken following a contestation of a REWS regulatory decision the right of further appeal to the Court of Appeal (Inferior) is limited to points of law. The author considers that a further right of appeal to the Court of Appeal (Inferior) in the case of ART decisions whether further to contestations of MCA or of REWS regulatory decisions should be limited only to points of law. Extending such a further right of appeal other than to contestation of points of law decided by the judicial forum of first instance - in this case the ART - would mean that a judicial forum composed exclusively of a lawyer - in this case the Court of Appeal (Inferior) - is empowered to overturn technical rulings which do not relate to issues of law. In taking matters forward, there are two options. One option is to amend the Administrative Justice Act to factor the proposed changes whereby the ART is composed of a chairperson and two expert members, with the chairperson chosen only from amongst sitting members of judiciary and who is exclusively responsible for deciding legal issues including notably imposition of sanctions. If the issues in contestation involve technical matters, then the decision by the ART is to be taken

[996] See eg the Tourism Appeals Board established under the 'Malta Travel and Tourism Services Act' (Chapter 409) and the Environment and Planning Review Tribunal established under the 'Environment and Planning Review Tribunal Act' (Chapter 551 of the Laws of Malta).

collectively by the chairperson together with the two technical expert members well-versed in the relevant technical matters. Furthermore the author suggests that the composition of the ART in relation to each specific case is determined by the presiding chairperson who on receiving notification of an appeal then selects from the appropriate panels the other members who will form part of the Tribunal according to the nature of the issues in contestation. The other option is to establish a new adjudicative forum on the same lines as described above composed of a sitting member of the judiciary and expert technical members.

6.5. Chapter Four – The enforcement powers of utilities regulators

[Thesis Questions in Chapter Four]

(viii) What regulatory enforcement tools should a regulator have?

(ix) Should a regulator be empowered to impose administrative financial penalties and, or other regulatory sanctions? If conversely a regulator does not have the faculty of imposing such sanctions, what enforcement system should be used by the regulator to ensure compliance?

(x) Should the regulator be empowered to take other regulatory enforcement measures? If yes, what should these measures be?

Fundamental in the evaluation of the regulation of utilities are two considerations. One consideration is the need to ensure that the utilities regulator has access to enforcement tools that enable it to perform its regulatory functions effectively and in good time. The second consideration is to have in place a regime that provides for dissuasive sanctions where there is non-compliance with regulatory norms.

Some of the enforcement tools in place in substance are common to both MCA and REWS, whereas other tools are specific to one or the other regulator. Significantly, important enforcement tools available only to the MCA include the faculty to require a utility service provider to perform an independent audit of its operations, and to apply to the Civil Court for the issue of an order imposing remedial measures

to remove, restrict or disable access to online content if the MCA considers that there are no 'effective means' to bring about the cessation or prohibition of an infringement of any law or decision it enforces in order to avoid the risk of serious harm to the collective interests of end-users.[997] Where feasible the enforcement tools of the two regulators should be aligned. Any differences in the enforcement tools available should only be in place because of measures that are specific to the effective regulation of the utility service concerned, for example the power specific to radiocommunications regulation when monitoring the use of radiocommunications equipment whereby the MCA may require a person to switch off, modify or desist from the use of such equipment if the person concerned does not comply with applicable radiation emission standards.[998]

In considering the imposition of sanctions there are two points to consider. The first relates to the type of sanctions that may be imposed. The sanctions generally used by both MCA and REWS are the imposition of punitive financial penalties. *In extremis* the suspension or the revocation of the authorisation of a utility service provider to provide services is another measure. In practice however recourse to such a measure is not always tenable more so where the provision of the utility service is conditioned by limited or no competition. The other point is whether sanctions should be imposed directly by the regulator – as is currently the case with both MCA and REWS – or else by a court following an application by the regulator.

This point came to the forefront following the Federation of Estate Agents judgement which effectively impacted the faculty of public authorities - including the utilities regulators - to impose sanctions to ensure compliance with the law and, or with regulatory decisions. The route taken in the case of the DG Competition and the DG Consumer Affairs within the MCCAA whereby either DG must, subsequent to the amendments enacted in 2019,[999] apply to the Civil Court (Commercial Section) for an order to impose a sanction is not the correct approach for various reasons. Requiring a regulator in each instance where there is a breach of the law

[997] See Section 4.2 – Enforcement tools under Maltese utilities law.
[998] See Malta Communications Authority Act, art 29(1)(h).
[999] See Act No XVI of 2019, and above at Section 4.4.

or of a regulatory decision to apply for a court order for the imposition of sanctions is not always tenable. In some instances the need to take a decision to impose dissuasive sanctions may be of immediate necessity. Initiating proceedings before a court can take time, and some utility service providers may be prepared to run the risk of persisting with a non-compliant practice even though they may face substantial sanctions down the line.

The current regime whereby the MCA and the REWS can impose sanctions should be retained provided the Constitution is amended in order to address the issues raised following the Federation of Estate Agents judgement. The author considers that any final solution as a minimum necessitates amending article 39 of the Constitution in order to factor two essential conditions if a regulator is to be empowered to impose such sanctions, namely that:

- the regulator is effectively independent in determining whether or not to impose a sanction and in doing is required to afford the service provider under investigation adequate opportunity to defend itself prior to the taking of a final decision on whether to impose a sanction; and
- any regulatory decision imposing a sanction is subject to review before a court which decision cannot be enforced before the definitive conclusion of any appeal proceedings if the aforesaid decision is contested by an aggrieved person within the prescribed timeframe at law to contest such a decision.

6.6. Chapter Five - Consumer protection of users of utilities

[Thesis Questions in Chapter Five]

(xi) Should a utilities regulator deal with all aspects of consumer protection where these relate to the utilities it regulates, including issues that currently fall within the remit of the DG (Consumer Affairs) within the MCCAA such as the use of unfair terms in contracts and unfair commercial practices?

(xii) To what extent should a utilities regulator be empowered to intervene in relation to disputes between regulated undertakings and consumers of the utilities provided? Should the role of the regulator in such instances be limited to mediation or should it also be empowered to issue decisions? Specifically in relation to such disputes, should the regulator be empowered to issue binding decisions enforceable at law, including decisions that may require the payment of monetary compensation by a utility service provider to a consumer?

(xiii) Should the Collective Proceedings Act be extended to utilities legislation in so far as such legislation relates to consumer protection?

In Chapter Five the author considers various issues that relate to consumer protection concerning primarily the role of the diverse public authorities and the consumer redress procedures in place. One issue that has constantly impacted on the effective regulation of utilities in Malta is that the present regulatory regime envisages that the responsibility for consumer protection enforcement is divided between the sector specific utilities regulators on the one hand and the DG Consumer Affairs on the other. The author firmly believes that this fragmentation of consumer protection enforcement is not conducive to effective and comprehensive regulation of the provision of utility services. Having in place such a regulatory regime means that both consumers and utility service providers do not have a focal point to which they can refer consumer protection issues that may arise for a comprehensive regulatory remedy.

As things stand consumers and utility service providers are faced with a situation where it is not always clear which regulator is responsible for dealing with certain consumer protection issues. Hence the regulation of some commercial malpractices may fall within the remit of a sector specific utilities regulator because there are in place specific norms regulating that particular practice under the sector specific legislation as for example is the case in the electronic communications sector with erroneous or misleading billing.[1000] Conversely, if the alleged unfair commercial

[1000] See SL 399.48, reg 95.

practice is not expressly regulated under sector specific utilities legislation, then one per force must have recourse to the regulation of such practices under the Consumer Affairs Act, which law is exclusively enforced by the DG Consumer Affairs.[1001]

The author considers that there should be in place one comprehensive authority that is responsible for the enforcement of consumer protection issues relating to the provision of utility services irrespective of whether the substantive norms form part of the sector specific utilities legislation or of general consumer law. Such a solution would have the merit of eliminating issues of regulatory competence between the sector specific utilities regulators on the one hand and the national consumer authority - the DG Consumer Affairs - on the other whilst providing one point of reference for consumers and utility service providers.

If such an option is not taken on board and instead the current regulatory regime comprising sector specific utilities regulators on the one hand and the DG Consumer Affairs within the MCCAA on the other is maintained, then the sector specific utilities regulators should be empowered to enforce all aspects of consumer law including those provided for under the Consumer Affairs Act, notably the norms regulating unfair commercial practices and unfair contract terms in so far as these impact the utilities in question. Failing to follow such a path means that in some instances there will continue to be lack of clarity as to whether a given issue should be dealt with by the sector specific utilities regulator or by the DG Consumer Affairs.

Another key question considered in Chapter Five relates to the role, if any, that a sector specific utilities regulator should have vis-à-vis disputes between consumers and utility service providers. Should the regulator act only as a mediator between the parties or should the regulator also be empowered to issue decisions? If empowered to issue a decision determining such a dispute, should such a decision then be binding on both parties? At present both MCA and REWS can issue decisions to determine consumer versus service provider disputes, with the notable

[1001] See Consumer Affairs Act, Parts II, VIII and XII.

difference that in the case of the MCA if the consumer is asking for compensation or some form of other civil redress, then the consumer is referred to the CCT, whereas the REWS is also empowered to issue decisions awarding compensation. If the service provider however decides not to comply with a REWS decision requiring that the service provider pays compensation, then the only remedy available for REWS to constrain the non-compliant provider to pay up is to impose a financial penalty not exceeding €600 for each day of non-compliance.[1002] This procedure however does not really make practical sense for the consumer. An aggrieved consumer is interested in acquiring effective redress - in this case the payment of the compensation awarded to him - not the imposition of a financial penalty which is payable to the regulator.

The author considers that the current procedures relating to dispute resolution involving MCA and REWS needs to be revisited radically. In the first instance there should be a clear understanding of the role of the regulators in dealing with such disputes. The two regulators are not judicial or quasi-judicial bodies whose decisions are therefore considered as executive titles and enforceable as such under the Code of Organisation and Civil Procedure. In the light of this consideration, where the dispute relates to a request for compensation or for some other form of civil redress, then the role of the regulators should be strictly limited to that of mediation. If mediation does not succeed, then the consumer should be referred to the CCT whose decisions are enforceable as executive titles for the purposes of the Code of Organisation and Civil Procedure. This should be the uniform procedure applicable to consumer disputes relating to the utilities under discussion. Where the request for compensation exceeds the current monetary limit of *50*00 euro of the CCT, then the competence of the CCT can be extended to determine a claim for compensation in excess of this amount if both parties agree to empower the CCT to determine such a claim. Alternatively the aggrieved consumer would then have to seek redress before the competent civil court.

[1002] See above at p 271 et seq, and SL 545.30, reg 4.

Another issue considered in Chapter Five relates to collective proceedings under the Collective Proceedings Act, whereby collective proceedings cannot be initiated in relation to non-compliance with any norms – including consumer protection measures – under any law relating to the regulation of the diverse utilities, given that the Collective Proceedings Act limits the institution of collective proceedings strictly to the Consumer Affairs Act, the Competition Act, the Product Safety Act and any regulations made under any of these laws.[1003] This limitation under the Collective Proceedings Act constitutes a serious shortcoming that is of detriment to consumers of utilities since consumers are deprived of the faculty to initiate collective proceedings in relation to evident shortcomings by a utility service provider which impacts negatively a substantial number of consumers in the same manner. This for example could be the case if contractual information required under applicable communications law is not provided and damages are incurred by consumers as a result of such an oversight.[1004] There appears to be no valid reason why Schedule A of the Collective Proceedings Act should not therefore also factor the diverse utilities laws that relate to consumer protection.

6.7. Conclusion – the next steps

Overall there is a very strong case to argue in favour of the establishment of a 'super' regulator with a remit to regulate all aspects of utility services relating to the communications, energy and water services sectors. The remit of such a regulator would include the roles of the MCA, the REWS, and the DG Consumer Affairs and the DG Competition within the MCCAA. The author proposes that such a regulator is headed by a board composed of a chairperson and four full-time executive directors, each director responsible for a specific area falling within the remit of the proposed 'super' regulator. The board of directors would be responsible respectively for consumer protection, competition, the energy and

[1003] See Collective Proceedings Act, art 3 and Schedule A.
[1004] For example reg 87 of SL 399.48 requires that consumers are provided with certain minimum information before being a party to a service contract with an electronic communications service provider.

water utilities and the communications utilities, whereas the chairperson would be responsible for the overall administration of the regulator. Crucial to the success or otherwise of such a 'super' regulator is the importance of having in place a clear, public and transparent process regulating the selection of the chairperson and board members, which process should be subject to rigorous independent scrutiny. The chairperson and board members should be chosen on the basis of pre-set published criteria based on their knowledge and experience of the regulated sectors.

Complementing the establishment of such a 'super' regulator is the reconstruction of the current appeals regime. The options as stated in this study are either to amend the composition of the ART or to create a new adjudicative forum. One crucial aspect that needs to be catered for is to provide for a more active and responsible role for the technical persons forming part of the adjudicative appellate forum in so far as the determination of technical matters forming part of the regulatory decision under appeal is concerned. If a contestation of a regulatory decision necessitates a technical determination then at least in so far as the technical aspects are concerned, the appellate forum should be structured in such a manner whereby such matters are determined collegially by the chairperson – being a sitting judge or magistrate – together with the technical experts.

The setting up of a 'super' regulator should act as a catalyst to eliminate some of the differences in the procedures currently in place applicable in relation to the MCA and to the REWS. Examples of such differences include the norms relating to the appointment and dismissal from office notably the grounds for dismissal and the rights granted to board members to contest their dismissal during their tenure of office, the sanctions that may be imposed, the different enforcement tools available, and the right of appeal from ART decisions to the Court of Appeal. There are no valid reasons why for example the grounds for dismissal from office of a board member in relation to the MCA and to the REWS differ, or worse why under the Regulator for Energy and Water Services Act - in contrast to the Malta Communications Authority Act - there are no express provisions relating to the right of a board member to contest his dismissal during tenure of office before a court.

Taking forward such proposals should be directly linked to a comprehensive review of the laws currently in place setting up the MCCAA, the MCA and the REWS. This is admittedly a massive task. The issues involved are, as discussed in this study, manifold. However taking forward a restructuring of the current regime is doable provided the required political and administrative direction and good will is forthcoming. The first step in taking matters forward should be to undertake a wide-ranging public consultation that reviews the overall current regime, whereby the various options and the arguments for and against are made. Inevitably with changes of this magnitude involving diverse public authorities, a structured timetable needs to be ironed out, providing for the phasing out of the current regulators and the gradual assumption of their functions by the new 'super' regulator. Ultimately what is important if such a project is to succeed, is to adopt a consistent vision which actively promotes a regulatory regime that as far as is feasible eliminates the current overlap between different public authorities, and is able to perform its regulatory functions in a transparent and time effective manner subject to judicial oversight.

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