

THE “SUPER-POWERS” OF THE EUROPEAN DATA PROTECTION BOARD (EDPB) AND THE PRINCIPLE OF DUE ADMINISTRATIVE PROCEDURE

An open access paper by

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The paper is the outcome of the Authors' shared thoughts.

However, paragraphs 1-2 were written by Luca Bolognini, paragraph 3 by Tommaso Bonetti, paragraphs 4-5 by Enrico Guarnieri, and paragraph 6 by Luca Bolognini, Tommaso Bonetti, Enrico Guarnieri.

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Abstract

This open access paper examines the extensive powers and tasks of the European Data Protection Board (EDPB), highlighting its role as an independent administrative authority with major influence over data protection law and policy in the European Union. The paper critically analyses the procedural legitimacy of the EDPB's regulatory powers, emphasizing the need for prior consultation and discussion with stakeholders to ensure democratic legitimacy.

The EDPB's decisions, which often imply assessments of the necessity of technological deployments and innovations involving personal data processing, are scrutinized for their possible lack of participatory tools and consultation with interested parties. The document argues that the EDPB's regulatory powers should be balanced, among other accountability measures, through participatory procedures, in compliance with the principle of due and fair administrative procedure.

From an Italian administrative law perspective, the paper underscores the importance of prior consultation and discussion with stakeholders to ensure the procedural legitimacy of the EDPB's decisions. It criticizes the current framework for not mandating such consultations, which undermines the democratic legitimacy of the EDPB's regulatory actions. More in general, the paper highlights the existence of a risk of inadequate due process guarantees on EDPB decision-making process, which could also include a possible deficiency of transparency of the Board's working groups/task forces as well as of plenary meeting discussions, clear appeal avenues against EDPB decisions, opinions and guidelines before the CJEU, explicit incorporation of the right to be heard in EDPB processes, etc. – even though this derives from the GDPR insufficient specification of stringent constraints for EDPB's procedures.

Overall, the document provides a comprehensive analysis of the EDPB's "super-powers" and their implications for data protection law and policy in the European Union, with a particular focus on the procedural aspects and the need for greater stakeholder consultation.

The Authors of this paper, in their conclusions, also explore some possible solutions - both interpretative or amending the GDPR and the internal functioning rules of the EDPB and the national Data Protection Authorities - in order to overcome the deficit of participation and consultation in the administrative procedures for binding and non-binding opinions, guidelines, and other decisions to be adopted.

1. A premise on the European Data Protection Board's "super-powers": an administrative authority or a "data-driven world policy maker"?

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The European Data Protection Board (EDPB) is the successor to the "Article 29 Working Party" (WP29), a joint body of the Data Protection Authorities of the European Union, provided for by the now repealed Directive 95/46/EC. Unlike the WP29, the EDPB has a robust institutional structure, and extremely varied and extensive powers and tasks, specifically established by EU Regulation no. 2016/679 (GDPR). The EDPB shall act independently when performing its tasks or exercising its powers pursuant to Articles 70 and 71 GDPR, neither seeking nor taking instructions from anybody. The EDPB normally takes decisions by a simple majority of its EU members (with some exceptions provided for in the GDPR): it is worth noting this aspect because, while European Economic Area (EEA) countries do not have a formal right to vote in the EDPB, still it is possible to witness an EEA DPAs' relevant influence in urgent procedures, opinions or guidelines adopted at the EDPB level.

Since its very first years of activity, the EDPB has, actually, provided relevant orientation on the lawfulness and legitimacy of innovation, in every public and private sphere. It has done so by adopting guidelines (Article 70(1)(e) GDPR) and opinions (Article 70(1)(a) GDPR) – binding and non-binding – on extremely sensitive issues, often concerning new-generation business models and economic, legal and social dynamics. The official positions expressed in the EDPB provisions immediately affect the content of the decisions of Member states Data Protection Authorities, as well as, indirectly, the whole European jurisprudence on data protection law. In addition to this, the impact is not limited to DPAs and courts: even if formally not directly binding on controllers, EDPB's provisions substantially impact on their behaviour since its interpretation acts as soft-law, replacing policymakers (if EDPB does not give clear indications or its main regulatory message is against personal data use, it de-incentivizes investments in the EU digital economy, which is based on intensive data use).

Often, in such guidelines and opinions we find, alongside legal reasoning on the protection of personal data, broader assessments on the admissibility of certain practices and transactional dynamics not based on any legal foundation or scientific independent research: interpreting the principle of necessity in a strict but broad (extra-privacy/data protection) sense, the EDPB sometimes appears to go so far as to distinguish between what is or is not necessary "factually" ("naturally", one might say) – rather than just juridically – in specific use cases and scenarios. This evaluative operation, of assigning value or disvalue (on what deserves protection, or not) to factual phenomena – on the basis of a necessity test – closely reminds the competence of legislators, high level policy makers and constitutional courts, while it may be out of the rule of law for an independent administrative authority.

Although the personal Data Protection Authorities are provided for by Article 16 of the TFEU and Article 8 of the Charter of Fundamental Rights of the European Union (CFREU), it does not seem easy to recognize them – and, on their top, the EDPB – a sort of wide power of "legal filtering of the whole data-driven world", that would go beyond the enforcement of rules relating to the protection of individuals with regard to the processing of personal data. At least, in compliance with Articles 52 and 54 of the CFREU, such interpretation and

enforcement exercises should operate a balancing between privacy, and other freedoms, rights, interests. All this, even adequately and systematically considering opinions issued by other authorities with different competences, and rigorously assessing the positions of concerned parties.

To date, there have been numerous EDPB's decisions – impacting directly or quasi-directly on interested parties other than the Member States DPAs – which contain assessments and guidelines on the merits of the existence of the factual / natural (not merely legal) necessity of technological deployments, process and product innovations that may imply personal data processing.

Among them, we can recall the Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms⁴, the Opinion 11/2024 on the use of facial recognition to streamline airport passengers' flow (compatibility with Articles 5(1)(e) and(f), 25 and 32 GDPR)⁵, the Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR (legitimate interest)⁶, the Guidelines 03/2022 on deceptive design patterns in social media platform interfaces⁷, the Guidelines 8/2020 on the targeting of social media users⁸, the Guidelines 01/2020 on processing personal data in the context of connected vehicles and mobility related applications⁹, the Guidelines 05/2020 on consent under Regulation 2016/679¹⁰, the Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR (contractual necessity) in the context of the provision of online services to data subjects¹¹, the Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679 (international data transfers)¹², and several other decisions.

Another recent example of an extremely sensitive EDPB's opinion, to be adopted pursuant to Art. 64 par. 2 GDPR, is the one requested by the Irish data protection authority on AI Models¹³. It is likely that this EDPB's opinion on AI Models will heavily influence the way European Union will approach Artificial Intelligence and its provision, deployment, distribution and import on EU territory, even though this will happen years before the full application of the AI Act (Regulation EU no. 1689/2024). Such "super-regulation" will impact on every and each stakeholder, setting the boundaries of AI-driven business models for data

⁴ https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-082024-valid-consent-context-consent-or_en

⁵ https://www.edpb.europa.eu/our-work-tools/our-documents/opinion-board-art-64/opinion-112024-use-facial-recognition-streamline_en

⁶ https://www.edpb.europa.eu/our-work-tools/documents/public-consultations/2024/guidelines-12024-processing-personal-data-based_en

⁷ https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032022-deceptive-design-patterns-social-media_en

⁸ https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-82020-targeting-social-media-users_en

⁹ https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-012020-processing-personal-data-context_en

¹⁰ https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-052020-consent-under-regulation-2016679_en

¹¹ https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22019-processing-personal-data-under-article-61b_en

¹² https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22018-derogations-article-49-under-regulation_en

¹³ [Stakeholder event on 'AI models': express your interest to participate | European Data Protection Board \(europa.eu\)](https://www.edpb.europa.eu/news/news/2024/stakeholder-event-ai-models-express-your-interest-participate_en)
https://www.edpb.europa.eu/news/news/2024/stakeholder-event-ai-models-express-your-interest-participate_it

subjects, users, citizens, consumers, workers, entrepreneurs, public servants – and for governments which intend to use (or are actually leveraging on) Common Crawl or their own public data to create their own LLMs or using LLMs produced by private sector developers, in particular when open-source licensed (e.g., Mistral or Llama) –, and conditioning all the future decisions on the matter by Member states Data Protection Authorities.

In this paper, analysing the EU discipline combined with the specific Italian administrative law perspective, we will try to understand how certain DPA's and EDPB's sensitive "super-powers" could be balanced through more transparency and respect of due process, including but not limited to participatory tools and the consultation of interested parties, in compliance with the principle of due and fair administrative procedure.

2. More in detail: an overview on the powers and tasks of the EDPB

2.1 Composition, powers, and tasks of the EDPB: the Opinions

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Article 68 of the GDPR recognizes the EDPB as a body of the European Union with legal personality. It is represented by its Chair and is composed of the head of one data protection authority of each Member State (however, as mentioned above, the EEA DPAs do not have a right to vote but can express their views, influencing the procedure) and of the European Data Protection Supervisor (EDPS), or their respective representatives. The European Commission has the right to participate, through its own representative, in the work of the EDPB and to be informed of its activities, but without voting rights: according to paragraph 5 of Article 68, the Commission shall participate in all the works of the EDPB, not only in Art. 65 dispute resolution procedures¹⁴; in these procedures, the EDPS shall have the right to vote only with respect to principles and rules applicable to the Union institutions, bodies, offices, and agencies which correspond in substance to those of the GDPR.

The powers and tasks of the EDPB, as mentioned above, are extensive and varied. The EDPB shall, first of all, (a) monitor and ensure the correct application of the GDPR in the cases provided for in Articles 64 and 65 GDPR, without prejudice to the tasks of national supervisory authorities. In particular, the EDPB shall exercise its soft-law powers issuing: (i) binding opinions regarding consistency mechanism, that operates automatically in One Stop Shop decisions (where a Lead Authority's decision shall be issued in a concrete case impacting more than two Member states); (ii) binding opinions on general matters (in principle, "in abstract") or correcting DPAs' misbehaviour concerning *ad intra* cooperation, which shall be triggered by a DPA, EDPB's Chair or EC; (iii) binding opinions on DPAs' decisions affecting listed matters according to Art. 64(1) GDPR (DPIA lists, Standard Contractual Clauses, Binding Corporate Rules or certifications), and (iii) advisory-non-binding activities (listed in footnote 15).

In cases of binding opinions requested by national supervisory authorities (according to Art. 70(1)(a) and Art. 64(1) GDPR), the EDPB shall issue an opinion on the matter submitted to it provided that it has not already issued an opinion on the same matter. That opinion shall be adopted within eight weeks by simple majority of the members of the Board. That period may be extended by a further six weeks, considering the complexity of the subject matter. According to Article 64(7) GDPR, the supervisory authority concerned shall take utmost account of the opinion of the EDPB and shall, within two weeks after receiving the opinion, communicate to the Chair of the EDPB by electronic means whether it will maintain or amend its draft decision and, if any, the amended draft decision, using a standardised format.

Where the supervisory authority concerned informs the Chair of the Board that it does not intend to follow the opinion of the Board, in whole or in part, providing the relevant grounds, Article 65 paragraph 1 GDPR shall apply. In order to ensure the correct and consistent application of the GDPR, in individual cases, the EDPB shall then adopt a binding decision in the following cases:

- where, in a case of cooperation between the lead supervisory authority and the other supervisory authorities concerned, a supervisory authority concerned has raised a

¹⁴ See the EDPB's guidelines on the application of Art. 65(1)(a) GDPR https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-032021-application-article-651a-gdpr_en

relevant and reasoned objection to a draft decision of the lead authority or the lead authority has rejected such an objection as being not relevant or reasoned. The binding decision shall concern all the matters which are the subject of the relevant and reasoned objection, in particular whether there is an infringement of the GDPR;

- where there are conflicting views on which of the supervisory authorities concerned is competent for the main establishment;
- where a competent supervisory authority does not request the opinion of the EDPB in the cases referred to in Article 64(1) GDPR or does not follow the related opinion of the EDPB. In that case, any supervisory authority concerned, or the Commission may communicate the matter to the EDPB.

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Such EDPB's binding decision shall be adopted within one month from the referral of the subject-matter by a two-thirds majority of the members of the Board. That period may be extended by a further month on account of the complexity of the subject-matter. The decision shall be reasoned and addressed to the lead supervisory authority and all the supervisory authorities concerned and binding on them.

Where the EDPB has been unable to adopt a decision within the two months, it shall adopt its decision within two weeks following the expiration of the second month by a simple majority of the members of the Board. Where the members of the Board are split, the decision shall be adopted by the vote of its Chair. The supervisory authorities concerned shall not adopt a decision on the subject matter submitted to the EDPB during the periods in which its decision is pending. The Chair of the Board shall notify, without undue delay, the decision to the DPAs concerned. It shall inform the Commission thereof. The decision shall be published on the website of the EDPB without delay after the supervisory authority has notified the final decision. The lead supervisory authority or, as the case may be, the DPA with which the complaint has been lodged shall adopt its final decision on the basis of the EDPB's decision, without undue delay and at the latest by one month after the Board has notified its decision. The lead supervisory authority or, as the case may be, the DPA with which the complaint has been lodged, shall inform the Board of the date when its final decision is notified respectively to the controller or the processor and to the data subject.

According to Article 66 GDPR, where a DPA has taken a measure in exceptional circumstances, and considers that final measures need urgently be adopted, it may request an urgent opinion or an urgent binding decision from the EDPB, giving reasons for requesting such opinion or decision. Any DPA may request an urgent opinion or an urgent binding decision, as the case may be, from the EDPB where a competent supervisory authority has not taken an appropriate measure in a situation where there is an urgent need to act, in order to protect the rights and freedoms of data subjects, giving reasons for requesting such opinion or decision. Such an urgent opinion or an urgent binding decision shall be adopted within two weeks by simple majority of the members of the Board. Furthermore, the EDPB shall issue multiple types of advice and guidelines on several relevant aspects in matters related to personal data processing¹⁵.

¹⁵ In addition to the adoption of requested binding and non-binding opinions, just analysed above, the EDPB shall:

2.2 Transparency and “appropriate” consultations

In compliance with Article 70(3) GDPR, the EDPB shall forward its opinions, guidelines, recommendations, and best practices to the Commission and to the Board referred to in Article 93 and make them public.

According to Article 70(4) GDPR, the EDPB shall also, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period. Interestingly, no reference is made to a legal obligation to consult parties concerned and impacted by a binding opinion, nor to include a reasoned motivation on acceptance or rejection of consulted concerned parties’ positions. Notwithstanding this, the Board shall anyway make

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- (b) advise the Commission on any issue related to the protection of personal data in the Union, including on any proposed amendment of the GDPR;
 - (c) advise the Commission on the format and procedures for the exchange of information between controllers, processors, and supervisory authorities for binding corporate rules;
 - (d) issue guidelines, recommendations, and best practices on procedures for erasing links, copies, or replications of personal data from publicly available communication services;
 - (e) examine, on its own initiative, on request of one of its members or on request of the Commission, any question covering the application of the GDPR and issue guidelines, recommendations, and best practices in order to encourage consistent application of the GDPR;
 - (f) issue guidelines, recommendations, and best practices for further specifying the criteria and conditions for decisions based on profiling;
 - (g) issue guidelines, recommendations and best for establishing the personal data breaches and determining the undue delay referred to in Article 33 GDPR and for the particular circumstances in which a controller or a processor is required to notify the personal data breach;
 - (h) issue guidelines, recommendations, and best practices as to the circumstances in which a personal data breach is likely to result in a high risk to the rights and freedoms of the natural persons;
 - (i) issue guidelines, recommendations, and best practices for the purpose of further specifying the criteria and requirements for personal data transfers based on binding corporate rules adhered to by controllers and binding corporate rules adhered to by processors and on further necessary requirements to ensure the protection of personal data of the data subjects concerned;
 - (j) issue guidelines, recommendations, and best practices for the purpose of further specifying the criteria and requirements for the personal data transfers;
 - (k) draw up guidelines for supervisory authorities concerning the exercise of their powers and the setting of administrative fines pursuant to Article 83 GDPR;
 - (l) review the practical application of its guidelines, recommendations and best practices;
 - (m) issue guidelines, recommendations, and best practices for establishing common procedures for reporting by natural persons of infringements of the GDPR;
 - (n) encourage the drawing-up of codes of conduct and the establishment of data protection certification mechanisms and data protection seals and marks;
 - (o) carry out the accreditation of certification bodies and its periodic review and maintain a public register of accredited bodies and of the accredited controllers or processors established in third countries;
 - (p) specify the requirements referred to in Article 43(3) with a view to the accreditation of certification bodies under Article 42;
 - (q) provide the Commission with an opinion on the certification requirements referred to in Article 43(8) GDPR;
 - (r) provide the Commission with an opinion on the icons referred to in Article 12(7) GDPR;
 - (s) provide the Commission with an opinion for the assessment of the adequacy of the level of protection in a third country or international organisation, including for the assessment whether a third country, a territory or one or more specified sectors within that third country, or an international organisation no longer ensures an adequate level of protection;
 - (t) issue opinions on draft decisions of supervisory authorities pursuant to the consistency mechanism referred to in Article 64(1) GDPR, on matters submitted pursuant to Article 64(2) GDPR and to issue binding decisions pursuant to Article 65 GDPR, including in cases referred to in Article 66;
 - (u) promote the cooperation and the effective bilateral and multilateral exchange of information and best practices between the supervisory authorities;
 - (v) promote common training programmes and facilitate personnel exchanges between the supervisory authorities and, where appropriate, with the supervisory authorities of third countries or with international organisations;
 - (w) promote the exchange of knowledge and documentation on data protection legislation and practice with data protection supervisory authorities worldwide;
 - (x) issue opinions on codes of conduct drawn up at Union level; and
 - (y) maintain a publicly accessible electronic register of decisions taken by supervisory authorities and courts on issues handled in the consistency mechanism.

the results of the consultation procedure publicly available; however, according to the literal wording of Article 76 GDPR, the discussions of the EDPB *shall be confidential where the EDPB deems it necessary, as provided for in its rules of procedure*. In this sense, it would be useful to better clarify which objective criteria should be followed by the EDPB to determine the necessity of confidentiality, on a case-by-case basis.

Moreover, access to documents submitted to members of the EDPB, experts and representatives of third parties shall be governed by Regulation (EC) No 1049/2001 of the European Parliament and of the Council (in particular, an exception provided by its Art. 4 par. 3 could apply: “Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure”, to be read in light of its Recital 11: “In principle, all documents of the institutions should be accessible to the public. However, certain public and private [this reference to “private interests” shall be intended as relating to rights, freedoms and interests of third private parties, i.e. IP or trade secrets – Authors’ note] interests should be protected by way of exceptions. The institutions should be entitled to protect their internal consultations and deliberations where necessary to safeguard their ability to carry out their tasks [...]”).

An example of “light consultation” – leveraging Article 70 par. 4 GDPR – is the EDPB’s online “stakeholders’ event” scheduled for 5 November 2024, to gather suggestions and points of view on the opinion on AI Models requested by the Irish data protection authority. As stated in the EDPB’s press release of 11 October 2024¹⁶, “during its latest plenary, the European Data Protection Board (EDPB) exceptionally agreed to organise a remote public event aimed at collecting input from stakeholders on issues relating to the request for an Art. 64(2) GDPR opinion on artificial intelligence (“AI”) submitted to the EDPB by the Irish Data Protection Authority (DPA). Individuals representing European sector associations, organisations or NGOs and individual companies, law firms or academics are invited to take part in this event (one participant per organisation). The EDPB encourages all organisations interested in this matter to delegate a representative with technical knowledge of this topic. As a general rule, participants will be registered on a first-come first-serve basis. Nonetheless, the EDPB reserves the right to give precedence to specific stakeholders among those who expressed their interest, in light of their relevance for the subject matter of this event with the aim to ensure relevant expertise among participants, as well as the diversity of the views expressed at the event”.

However, considering 270 minutes time (that is the time allocated to debates in breakout rooms) to be dedicated to 150 participants¹⁷ during each event, it results in 1,8 minutes time for every stakeholder’s contribution: a very limited slot for expression. In addition to this, it is not clear on how the feedback which was received will be incorporated in the act to be adopted.

¹⁶ [Join the stakeholder event on EDPB opinion on ‘AI models’ | European Data Protection Board \(europa.eu\)](https://www.edpb.europa.eu/news/news/2024/join-stakeholder-event-edpb-opinion-ai-models_it)
https://www.edpb.europa.eu/news/news/2024/join-stakeholder-event-edpb-opinion-ai-models_it

¹⁷ https://www.edpb.europa.eu/system/files/2024-10/call_expression_interest_aimodels_en.pdf

2.3 The “challenge of challenging” EDPB’s decisions

As we will better highlight in this paper, considering both the European discipline and - as an example - the Italian national one, not only the EDPB’s decisions are interpreting and orientating the admissibility of innovative models in EU, impacting directly or semi-directly on so many interested parties; these decisions are also difficult to challenge by anyone other than the national Data Protection Authorities. Recital 143 GDPR recalls that any natural or legal person has the right to bring an action for annulment of decisions of the EDPB before the Court of Justice under the conditions provided for in Article 263 of the Treaty on the Functioning of the European Union (TFEU). As addressees of such decisions, the supervisory authorities concerned which wish to challenge them have to bring action within two months of being notified of them. Where decisions of the EDPB are of direct and individual concern to a controller, processor or complainant, the latter may bring an action for annulment against those decisions within two months of their publication on the website of the EDPB.

Furthermore, where a decision of a supervisory authority implementing a decision of the EDPB is challenged before a national court and the validity of the decision of the EDPB is at issue, that national court does not have the power to declare the EDPB's decision invalid but must refer the question of validity to the Court of Justice in accordance with Article 267 TFEU as interpreted by the Court of Justice, where it considers the decision invalid. However, a national court may not refer a question on the validity of the decision of the EDPB at the request of a natural or legal person which had the opportunity to bring an action for annulment of that decision, in particular if it was directly and individually concerned by that decision, but had not done so within the period laid down in Article 263 TFEU.¹⁸

As can be seen, **the mechanism provided for by Art. 263 TFEU and recalled by Recital 143 of the GDPR is significantly rigid** and allows direct appeal of EDPB decisions only in case they have a direct impact, individually, on the legal sphere of a controller, processor, or complainant. However, “rigid” shall not mean “impossible”: to assess the existence of a relevant impact, actually, there are interesting CJEU sentences affirming the general principle that EU bodies’ decisions should be able to be challenged before a CJEU, even by parties which are indirectly affected by an EU body decision. Reference shall be made to the case of Portigon in connection with the actions against the Single Resolution Board

¹⁸Article 263 TFEU

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Board of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

(SRB), regarding the bank's ex-ante-contributions to the Single Resolution Fund (SRF): in that case, the contributions were based on an administrative order issued by the respective National Supervisory Authority (NSA). However, this national act was based on a decision of the SRB, which calculated the individual amount of the ex-ante contributions to be paid by over 3,000 credit institutions in the EU. The General Court of the CJEU ruled in favour of Portigon (ruling 28 November 2019; cf. recitals 55 et seq., and, in particular recitals 78-82¹⁹).

The question of admissibility of such direct actions against the SRB's decision was finally settled by CJEU in its decision "Iccrea Banca" (3 December 2019²⁰). In this sentence, the CJEU recalls that, *"in any event, the possibility for a person to rely, in an action brought before a national court, on the invalidity of provisions contained in a measure of the European Union, which constitutes the basis of a national decision taken concerning him, presupposes either that that person has also brought, pursuant to the fourth paragraph of Article 263 TFEU, an action for annulment of that EU measure within the prescribed time limits, or that that person has not done so, as a result of not having an undoubted right to bring such an action"*. So, the admissibility of an action brought by a natural or legal person against an act which is not addressed to that person, in accordance with the fourth paragraph of Article 263 TFEU, is subject, *inter alia*, to the condition that that act is of direct and individual concern to that person. The CJEU reaffirms that *"the condition that the decision forming the subject matter of the proceedings must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 263 TFEU, requires the fulfilment of two cumulative criteria, namely that the contested measure must, first, directly affect the legal situation of the individual and, secondly, leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules"*. That is exactly what normally happens in case of EDPB's binding opinions. In addition, in the same "Iccrea Banca" sentence, the CJEU clarifies that *"persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and thus distinguishes them individually just as in the case of the person to whom the decision is addressed"*.

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016TJ0365>

78 Second, as regards direct concern, it should be noted that the NRAs, which are entrusted with the task of implementing the contested decisions, have no discretion concerning the amounts of the individual contributions determined in those decisions. The NRAs may not, in particular, amend those amounts and are required to collect them from the institutions concerned.

79 Moreover, with regard to the reference by the SRB to the IGA in order to dispute the assertion that the applicant is directly concerned, it should be pointed out that that agreement does not concern the collection by the NRAs of the 2016 ex-ante contributions from the institutions, but only the transfer of those contributions to the SRF.

80 As is apparent from the provisions of Regulation No 806/2014 (see recital 20 and Article 67(4) of that regulation) and the IGA (see recital 7, Article 1(a) and Article 3 of the IGA), the collection of contributions is carried out pursuant to EU law (namely Directive 2014/59 and Regulation No 806/2014), whereas the transfer of those contributions to the SRF is carried out pursuant to the IGA.

81 Thus, even though the legal obligation devolving on the institutions to pay, into the accounts indicated by the NRAs, the sums due by way of their ex-ante contributions requires the adoption of national acts by the NRAs, the fact remains that those institutions are nonetheless still directly concerned by the SRB's decisions which determined the amount of their individual contributions.

82 It follows from the foregoing considerations that the applicant is individually and directly concerned by the contested decisions.

²⁰ <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62018CJ0414>

3. Notes on the Authorities system, between independence and 'unification' of powers: the cases of the Data Protection Authorities and the EDPB

Are there procedural requirements on prior consultation and discussion with *stakeholders* within the EDPB's regulatory powers? Whatever the answer, is there a legal reason for the necessity of such procedural arrangements? These are just some of the questions that the following pages will attempt to briefly answer.

It must be premised that it is not possible to fully understand the critical issues underlying the regulatory powers exercised by the EDPB *pursuant to* Articles 64, 65 and 70 GDPR if one omits to consider that this body constitutes a *sui generis* subject, referable to the group of independent administrative authorities (hereinafter also *Authorities*); the EDPB, moreover, is not a solitary monad, considering that it acts in a universe studded with national supervisory Authorities (Data Protection Authorities²¹), which are also attributed the legal status of independent administrative authorities.

In this regard, it should be clarified that the choice to consider EDPB and Data Protection Authorities together stems from the observation that many of the EDPB's regulatory functions are exercised downstream of the activation of corresponding regulatory powers by the individual national Supervisory Authorities: as a result, and for the reasons illustrated below, the study of the procedural parameters to which the EDPB must (should) adhere cannot disregard the procedural events pertaining to the national levels of regulation.

That being said, let us be guided by the questions, why then should the Data Protection Authorities and the EDPB be qualified as independent authorities? And what are the characteristics that determine this qualification, and its consequences? First of all, of course, to be independent does not mean to be above the law, while it even implies an increase of level of accountability, in full compliance with the *due process of law* principle.

Moving on from this last question, it is worth anticipating what has been pointed out by many, namely that it is not possible to generalise too much about independent authorities²²: they differ in terms of genesis, given that the Authorities "originate for very different needs in different cases"²³; they differ in terms of "typology", because there are Regulatory Authorities and Data Protection Authorities²⁴ (even if the distinction tends to blur in the face of the transversal nature of the functions exercised, see our analysis below); the forms of

²¹ In the Italian legal system, the Data Protection Authority is represented by the Garante per la protezione dei dati personali (hereinafter also Garante *privacy*). This clarification suggests a caveat for the reader: aware of the fact that the 'highest' legal issues of the Authorities phenomenon are shared among European countries, one will be forgiven if a privileged look is reserved here for Italian doctrine

²² See G. Amato, *Autorità semi-indipendenti ed autorità di garanzia*, in *Riv. trim. dir. pubbl.*, 1997, 645 et seq. and F. Patroni Griffi, *Tipi di autorità indipendenti*, in *I garanti delle regole*, edited by S. Cassese, Bologna, il Mulino, 1996, 25 et seq. For a partially different reading see F. Merusi, *Democrazia e autorità indipendenti: un romanzo quasi giallo*, Bologna, il Mulino, 2000, 18 et seq.

²³ M. D'Alberti, *Il valore dell'indipendenza*, in *Arbitri dei mercati. Le autorità indipendenti e l'economia*, edited by M. D'Alberti and A. Pajno, Bologna, il Mulino, 2010, 11.

²⁴ The distinction is based on the different "destination" of the Authorities: as well explained by M. D. Alberti, *Le autorità amministrative indipendenti*, in *La riforma dell'amministrazione centrale*, edited by G. Vesperini, Milan, Giuffrè, 2005, 95 et seq. spec. 96 ff, Data Protection Authorities are those in charge of ensuring adequate protection of "sensitive" rights, which are particularly exposed to the pitfalls of public and private powers" (as is the case in the sectors of radio and television, *privacy*, competition, etc.), while regulatory authorities are those functional to "ensure a highly complex technical regulatory capacity" (thus, in the sectors of transport, energy, etc.).

appointment or, in any case, the organisational components of the individual Authorities may differ, with the resulting gradation of independence (so much so that some Authorities have been described as semi-independent²⁵). However, there is a hard core (albeit still fuzzy) of 'recurring characters' that can succinctly describe the Authorities' pattern.²⁶

Notwithstanding the different gradations, independent administrative authorities are (*nomen omen*) primarily independent. But independent from whom? Certainly, they are in relation to public and private regulatees, operating in the sector to be overseen: the need, as is well known, is to avoid the risk of the so-called capture of the regulator by the regulatees²⁷. But that is not all. Independence shall be also ensured in the relationship with other parties, which are not directly regulated and supervised by the Authorities, such as complainants, activists or their organisations.

Moreover, independence is manifested with respect to the Government, i.e., in relation to the conditionings of the government's political orientation: as it is customary to say, the Authorities are therefore a 'non-state centre'²⁸, they corrode the principle of ministerial responsibility and fracture the system of the political-representative circuit²⁹. Not coincidentally, the CJEU and Member states settled case-laws show that the issues have been mainly focused on the lack of independence³⁰ regarding the government; notable examples of this can be found in the Belgian³¹ or Spanish³² cases.

Then there is a further qualifying aspect, which relates to the functional side. The independent administrative Authorities (this time, despite the *nomen omen*) are something more than mere public administration, although formally preserving the nature of an administrative apparatus: the Authorities are in fact the holders of regulatory powers, of punctual administrative powers (of *adjudication*) and of powers of extra-judicial settlement of disputes (as well as so-called *advocacy* powers). In view of the above, therefore, the

²⁵ G. Amato, *Semi-independent Authorities and Data Protection Authorities*, cit., 645 et seq.

²⁶ M. De Benedetto, *Independent Authorities*, in *Dizionario di diritto pubblico*, I, directed by S. Cassese, Milan, Giuffrè, 2006, 588 et seq. spec. 589.

²⁷ M. Clarich, *Independent Authorities. Bilancio e prospettive di un modello*, Bologna, il Mulino 2005, 18.

²⁸ M. Dugato, *Organisation*, in *Manuale di diritto amministrativo*, Turin, Giappichelli, 2023, 191.

²⁹ The location outside the political-representative circuit has always called for the identification of some justification on the basis of which to constitutionally legitimise these bodies: impartiality towards market operators when among the regulated there are subjects controlled by political power; non-discrimination, given that the democratic legitimacy of the regulator ensures representation of the national operator but not the foreign one (S. Battini and G. Vesperi, *L'indipendenza del regolatore nazionale imposta dal diritto europeo e globale*, in *Arbitri dei mercati. Le autorità indipendenti e l'economia*, cit., 61 et seq., spec. 73); pure and simple derivation from European law (V. Cerulli Irelli, *Sul potere normativo delle Autorità amministrative indipendenti*, in *Arbitri dei mercati. Le autorità indipendenti e l'economia*, cit., 75 et seq., spec. 91 et seq.); constitutional prominence of some of the interests protected or, in any case, the high level of *expertise*, profiles that for obvious reasons do not tolerate political conditioning. For an overview, see M. D'Alberty, *The Value of Independence*, *ibid.*, 11 et seq.

³⁰ *Ex multis*: European Commission v. Germany (9 March 2010, CJEU, C-518/07), European Commission v. Austria (16 October 2012, CJEU, C-614/10), European Commission v. Hungary (8 April 2014, CJEU, C-288/12).

³¹ See also the interesting Belgian DPA's Opinion on preliminary draft law amending the Act of 3 December 2017 establishing the Data Protection Authority (AH-2022-0020), 25th February 2022 - <https://www.autoriteprotectiondonnees.be/publications/opinion-on-preliminary-draft-law-amending-the-act-of-3-december-2017-establishing-the-data-protection-authority.pdf>

³² Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección Cuarta, Sentencia núm. 608/2022, 24/05/2022 - <https://www.poderjudicial.es/search/openDocument/51839964fb4ca996>

European independent Authorities model clearly undermines the principle of separation of powers.

Having reviewed the salient features of the independent Authority model, it is now possible to observe (the summary does not allow us to go any further) that the Data Protection Authorities and the EDPB are - as we already mentioned - to all intents and purposes independent Authorities³³. Suffice it to note in this regard that this capacity is cloaked in a firm legislative cover, arranged at the highest level. Imposed by the "sensitive" nature of the rights it oversees, independence is in fact "constitutionally covered at European level"³⁴, being guaranteed by Article 8 of the European Charter of Fundamental Rights and by Article 16 TFEU³⁵.

In fact, for the Data Protection Authorities, independence has been required at least since Directive 1995/46/EC, where the Community legislator wanted the guarantee of respect for private life and the right to the protection of personal information and therefore the supervision of compliance with the national implementing legislation of the Directive to be attributed to "supervisory authorities, exercising their functions with complete independence" in each Member state (Recital no. 62); in the GDPR, then, the model of the Data Protection Authorities has not only been confirmed, but moreover, it has been further standardised³⁶ and their independence has been strengthened (which, according to Article 53(1), remains so even in the case of governmental appointment of the relevant members, with regard to the so-called semi-independent authorities). Like the supervisory

³³ For an analytical study see E. Guardigli, *Le autorità di controllo: dalla direttiva 95/46/CE al regolamento n. 679/2016*, 662 et seq. and C. Ippoliti Martini, *European Data Protection Board*, 725 et seq. both contained in the volume *La protezione dei dati personali in Italia. EU Regulation No. 2016/679 and Legislative Decree No. 101 of 10 August 2018*, edited by G. Finocchiaro, Bologna, Zanichelli, 2019.

³⁴ G. Pitruzzella, *Le autorità amministrative indipendenti: bilancio e prospettive*, cit., 23.

³⁵ Article 8 of the Charter of Fundamental Rights of the EU, after having established the right of every individual to the protection of personal data concerning him or her, the right to access the data collected and to have them rectified, and after having identified rules to safeguard the proper processing (the processing of those data must be carried out in accordance with the principle of fairness, for specified purposes and on the basis of the consent of the person concerned or, in any event, on another legitimate basis laid down by law), has provided in paragraph 3 that compliance with those rules 'shall be subject to control by an independent authority'. Similarly, Article 16 TFEU, after having enshrined the right of every person to the protection of personal data concerning him or her and after having conferred the relevant legislative competence on the European Parliament and the Council, then provided at the end of paragraph 2 that 'compliance with those rules shall be subject to control by independent authorities'.

³⁶ We move from Art. 28, Dir. 1995/34/EC alone to an entire Chapter (Chapter VI, Art. 51-59, GDPR). In Art. 52, a real legal status of independence is defined: 1. Each supervisory authority shall act with complete independence in performing its tasks and exercising its powers in accordance with this Regulation. The member or members of each supervisory authority shall, in the performance of their tasks and exercise of their powers in accordance with this Regulation, remain free from external influence, whether direct or indirect, and shall neither seek nor take instructions from anybody. Member or members of each supervisory authority shall refrain from any action incompatible with their duties and shall not, during their term of office, engage in any incompatible occupation, whether gainful or not. Each Member State shall ensure that each supervisory authority is provided with the human, technical and financial resources, premises and infrastructure necessary for the effective performance of its tasks and exercise of its powers, including those to be carried out in the context of mutual assistance, cooperation and participation in the Board. Each Member State shall ensure that each supervisory authority chooses and has its own staff which shall be subject to the exclusive direction of the member or members of the supervisory authority concerned. Each Member State shall ensure that each supervisory authority is subject to financial control which does not affect its independence and that it has separate, public annual budgets, which may be part of the overall state or national budget. Furthermore, the requirement that the members of the supervisory authorities be technical is now expressly laid down in Article 53(2) GDPR.

authorities³⁷, the EDPB (as the "closing body of the system"³⁸) is also qualified and regulated as an independent administrative authority: according to Art. 69, the EDPB exercises its tasks and powers "with independence" (para. 1) and "neither requests nor accepts instructions from anybody" (para. 2), except for requests coming from the Commission *under* Art. 70(1) and (2).

³⁷ According to Article 68(3), the EDPB is composed of the head of a supervisory authority for each Member State and the European Data Protection Supervisor. On this topic, see M.S. Esposito, *Il trattamento transfrontaliero e la cooperazione tra Autorità garanti. The consistency mechanism*, in *The protection of personal data in Italy. EU Regulation No. 2016/679 and Legislative Decree No. 101 of 10 August 2018*, cit., 690 et seq.

³⁸ F. Pizzetti, *Privacy and the European right to personal data protection*, II, *The European Regulation 2016/679*, Turin, Giappichelli, 2016, 106.

4. An Italian perspective: independent regulatory power and the need for 'bottom-up' procedural legitimisation

The consequence of the above findings is that also the Data Protection Authorities and the EDPB, as independent authorities, shall operate outside the political-representative circuit. This, as is well known, opens up important critical issues regarding the use of regulatory powers in the absence of democratic legitimacy.

A further interlocutory question therefore arises, namely: is the regulatory power attributed to these bodies compatible with the representativeness deficit inherent in their independent matrix?

As is well known, the attribution of regulatory power to independent administrative authorities evokes a multiplicity of legal problems: in democratic systems, the ownership of regulatory powers could only be legitimised by democratic investiture, which is, however, naturally absent in the Authorities³⁹; this is coupled with the circumstance that the regulatory power of the Authorities, far from being merely technical and neutral, in reality often presupposes the balancing of public and private interests, as pointed out in the incipit of this paper; moreover, regulatory powers most often conflict with the principle of substantive legality, given that the laws attributing the relevant power do not always clearly predetermine their content and boundaries⁴⁰.

To overcome the aforementioned criticalities, doctrine and then jurisprudence - in Italy and abroad - have elaborated the theory of "bottom-up" procedural legitimisation, modelled on what has been provided for in the United States since 1946 by the *Administrative Procedure Act*: to cope with the structural deficit of democratic legitimacy, the regulatory powers of the Authorities must therefore be carried out through procedures in consultation or discussion with the interested parties⁴¹, because **"when representation is not present, consultation must be complete and integral"**.⁴²

More specifically, there is now broad agreement on the need to provide, in accordance with the US model of *notice and comment*, for forms of prior consultation that allow interested private parties to participate in the decision-making process of the Authorities: in essence, the *Authorities* must publish the draft regulations on the basis of which interested parties can then submit their comments. In order not to render the *ex-ante* participatory process formalistic and empty, it is also a common belief that the

³⁹ Exceptionally, we find a parliamentary intervention in the European Data Protection Supervisor appointment (by the European Parliament and the Council) as well as in certain Member states (i.e. the Spanish and Italian DPAs commissioners are appointed by Parliaments). However, the democratic process is still intermediated.

⁴⁰ On the subject, P. Pantalone, *Autorità indipendenti e matrici della legalità*, Naples, Editoriale Scientifica, 2018.

⁴¹ F. Merusi, *Democrazia e autorità indipendenti*, Bologna, il Mulino, 2000. S. Cassese, *Negoziato e trasparenza nei procedimenti davanti alle Autorità indipendenti*, in *Il procedimento davanti alle Autorità indipendenti*, Turin, Giappichelli, 1999, 37 ff., spec. 42, states that "political democracy" is replaced by "procedural democracy".

⁴² F. Merusi, *Giustizia amministrativa e autorità amministrative indipendenti*, in *Dir. amm.*, 2002, 181 et seq. Cons. Stato, sez. II, 7 March 2024, no. 2255, cautiously applies this, however, and recently, according to which "administrative participation, while marking the overcoming of an elitist and authoritarian vision of the Administration (allowing interested economic operators to make their own informative and evaluative contribution), is certainly not equivalent to the democratic investiture of the law".

Authorities have an obligation to seriously consider the observations submitted by private stakeholders and, therefore, they also have an obligation to justify the reasons for their non-acceptance: otherwise, the transparency of the decision-making process and the very possibility for the judge to understand and retrace the logical process followed by the Authority would be lost.⁴³ It is also worth mentioning the so-called "Gunning Principles", as established by UK settled case-law⁴⁴. Such "Gunning Principles" consist of 4 main principles of fair consultation by public bodies:

1. consultation must take place when the proposal is still at a formative stage;
2. sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
3. adequate time must be given for consideration and response; and
4. the results of consultation must be conscientiously taken into account.

This perspective is firmly shared by the Italian jurisprudence⁴⁵, which affirms the legitimising function, in a primarily democratic key, of the rules of consultation and discussion for the participation of the private subjects concerned in the ambit of the regulatory activity of the *Authorities*: thus, in Italy, starting from a well-known precedent of 2006, the ruling is recurrent according to which "the exercise of regulatory powers by Authorities, placed outside of the traditional tripartition of powers and outside of the circuit of responsibility outlined by Art. 95 of the Italian Constitution, is also justified on the basis of the existence of a participatory procedure, understood as an instrument of the participation of stakeholders in place of the dialectic typical of representative political structures. In the absence of accountability and subjection to the Government, the independence and neutrality of the Authorities can find a bottom-up basis, provided that the guarantees of due process are ensured, and that control then takes place in the courts"⁴⁶.

It goes without saying that the imposition of a prior discussion with the interested parties, during the proceedings, has an impact on the validity of the regulatory act adopted, with the consequence that the regulatory act adopted in the absence or in any case in violation of the procedural rules and guarantees must certainly be considered illegitimate. The assumption, moreover, is not trivial in a legal system - such as the Italian one - in which Article 21-octies, paragraph 2, of Law No. 241/1990 is in force, which in substance would render procedural flaws irrelevant to the extent that it is demonstrated a posteriori, according to a prognostic judgement "now for then", that compliance with the rule would not in any case have led to a different result. Here, then, is the absolutizing force of the procedural rule in the ambit of the exercise of the regulatory powers of the *Authorities*: "the completely founding character that respect for procedural

⁴³ Thus, S. Del Gatto, *La partecipazione ai procedimenti di regolazione delle autorità indipendenti*, in *Giorn. dir. amm.*, 2010, 947 et seq. and F. de Leonardis, *Natura e caratteri degli atti di regolazione pubblica dell'economia*, in *Dir. econ.*, 2018, 679 et seq.

⁴⁴ The first sentence implied the naming in 1985, "R v Brent London Borough Council, ex parte Gunning", https://unece.org/sites/default/files/2021-03/Annex1f_RvBrent_OP_INQ_115.pdf

⁴⁵ Also constitutional: cf. Constitutional Court. 7 April 2017, no. 69, according to which procedural legitimacy 'represents a useful, albeit partial, complement to the substantive guarantees required by Article 23 of the Constitution'.

⁴⁶ Cons. Stato, sec. VI, 27 December 2006, no. 7972. *Ex multis* see Cons. Stato, sec. VI, 23 September 2020, no. 5555 and Cons. Stato, sec. VI, 11 January 2021, no. 341.

legality has - in the scope of the legitimacy of the exercise of the regulatory activities of the independent Authorities - does not admit the *ex post facto* carrying out of a counterfactual judgement (or of “posthumous prognosis”) regarding the results that the participation - which was in fact omitted - would have produced if it had been correctly admitted”⁴⁷.

In the face of the binding and legitimising force of the procedural guarantees, however, it is worth noting that case law has nevertheless sought to strike a balance, in the interests of the economy of the regulatory process. In particular, it has been affirmed by several parties, not without well-founded criticism⁴⁸, that in the context of proceedings aimed at the adoption of regulatory acts, there is no need for a punctual and specific consideration of the arguments put forward by each market operator: it is sufficient, therefore, that the act taken indicates the factual and legal assumptions of the decision and is endowed with a “substantial justification”⁴⁹.

⁴⁷ Recently, see Cons. Stato, sec. VI, 23 March 2022, no. 2111 and Cons. Stato, sec. VI, 27 December 2021, no. 8616.

⁴⁸ Cf. N. Posteraro, *Forme e limiti della partecipazione degli interessati ai procedimenti regolatori delle AAI*, in *Le Autorità amministrative indipendenti tra garanzia e regolazione*, edited by A. Contieri, M. Immordino and F. Zammartino, Naples, Editoriale Scientifica, 2020, 279 et seq. spec. 288 et seq.

⁴⁹ Cons. Stato, sec. VI, no. 341/2021; *ex multis* T.A.R. Lazio, Rome, sec. II, 12 June 2013, no. 5915 and Cons. Stato, sec. VI, 2 March 2010, no. 1215. More clearly, for Cons. Stato sez. VI, 15 December 2014, no. 6153 “the motivation must also take charge of the adequacy of the preliminary investigation, on the basis of compliance with procedural rules (consultation, acquisition of the relevant facts and interests, giving account of the justifying reasons for the regulatory act, especially in cases where the assumptions of the regulatory action should be contested upstream)”.

5. The deficiency of “bottom-up” procedural legitimacy provisions in the 'privacy sector'

Given that, according to the approach that is absolutely majority today, the validity of the exercise of regulatory power depends on the prior establishment of forms of consultation and discussion with the private stakeholders, it is therefore now necessary to verify whether the sectoral legislation (even second-tier legislation) provides adequate prescriptions as to how the Data Protection Authorities and the EDPB are to exercise their regulatory power.

Moreover, the verification starts from a necessary assumption, as shown in the previous paragraphs, it should be recalled that the Data Protection Authorities in the *privacy* sector are undoubtedly holders of regulatory powers. This is a relevant premise, considering that the dichotomous reading of "Regulatory Authority - Guarantee Authority" has led some experts to unexpectedly claim that the Data Protection Authorities, as Guarantee Authorities, lack genuine regulatory power. This misunderstanding stems from the circumstance that - at both European and national level - the powers of the EDPB and the Data Protection Authorities are not usually qualified in terms of 'regulation'. Yet, and as is well known, this fact is not decisive. The *nomen juris* belongs to the group of so-called formal criteria for identifying the regulatory act: criteria whose non-decisiveness is now well established⁵⁰. Therefore, considering that "the *nomen* (and consequently the absence thereof) is not decisive (the so-called non-decisiveness of the 'onomastic' criterion)"⁵¹, it is necessary to look at the substance of the act, and in particular the fact that it is expressed through binding, general (*i.e.* impersonal) and abstract (*i.e.* repeatable over time) provisions.⁵²

Now, if one considers the proverbial European *imprinting* on forms of prior consultation within the framework of regulatory powers⁵³, one will be disappointed to note that the GDPR appears rather silent on this point.

As regards the exercise of the regulatory powers of the Data Protection Authorities, no provision of the GDPR explicitly requires consultation of private stakeholders by the individual authorities. With the exception of the provision, which is in any case excessively vague, contained in Article 58(4) ("The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards"), all the regulatory focus is indeed concentrated on the sole "regulatory concert"⁵⁴, *i.e.* on the dialogue between independent authorities in the context of the cooperation mechanisms *pursuant to* Article 60 et seq. of the GDPR.

⁵⁰ On this point see A.M. Sandulli, *Fonti del diritto*, in *Novie seguenti Dig. It.*, VII, Turin, Utet, 1961, 530 and V. Crisafulli, *Lezioni di diritto costituzionale. II. L'ordinamento costituzionale italiano (Le fonti normative)*, Padua, Cedam, 1993, 17 et seq.

⁵¹ G. Morbidelli, *Linee guida dell'ANAC: comandi o consigli?*, in *Dir. amm.*, 2016, 273 et seq. On the other hand, it should be added that the non-decisiveness of the name of the act also derives from the fact that there is no *numerus clausus* of regulatory power.

⁵² G.U. Rescigno, *L'atto normativo*, Bologna, il Mulino, 1998.

⁵³ As attested, for the Commission's regulatory proceedings, by Protocol No. 7 to the Amsterdam Treaty and the 2016 *Better Regulation Agenda*, and as also attested in certain areas of independent regulation (cf. dir. 2018/1972/EU on the European Electronic Communications Code)

⁵⁴ S. Cassese, *Il concerto regolamentazione europeo delle telecomunicazioni*, in *Giorn. dir. amm.*, 2002, 689 et seq. and M. Clarich, *Autorità indipendenti. Bilancio e prospettive di un modello*, cit., 172 et seq.

The analysis of the provisions taken at national level provides more indications. Perimetering the investigation into the Italian legal system, particular attention should be paid to Legislative Decree No. 196/2003 and Regulation No. 1/2019 of the Italian Garante.⁵⁵

Sparse hints of procedural participation can be found in Legislative Decree no. 196/2003. Article 2-*quater* provides first of all that the Garante, prior to approval, must subject the scheme of ethical rules 'to public consultation for at least sixty days'. The same article then makes subject to the *due process of law* also the activity of verifying the conformity of the deontological rules with the provisions in force: the exercise by the Garante of this regulatory activity - so to speak, maintenance - takes place in fact "also through the examination of observations of interested parties". Article 2-*septies* of the Italian Privacy Code then provides that the outline of the provision establishing the safeguards for the processing of genetic, biometric, and health-related data 'shall be subject to public consultation for a period of not less than sixty days'.

More copious references are then provided for in the aforementioned Regulation No. 1/2019 of the Italian Garante. In particular, the procedural rules for the adoption of the deontological rules are meticulous, where it is provided that the public consultation of the outline of the deontological rules is preceded by further moments of dialogue: pursuant to Article 25, paragraph 1, the public and private parties belonging to the categories concerned entitled to sign the deontological rules and the other parties invited as interested in the application of the deontological rules are entitled to 'participate in an initial working meeting aimed at analysing the preliminary outline of the deontological rules'⁵⁶. The same procedure, according to Art. 32(1), is applied, as far as compatible, for the approval of codes of conduct.

A first conclusion can therefore be formulated: for many of the regulatory powers of the Italian Garante, which can be traced within the meshes of Article 64 GDPR, no form of prior consultation and discussion is contemplated. In a supplementary function the 'open' wording recited in Article 7(7) of the Italian Garante's Regulation No. 1/2019 can at most be underlined. There, in fact, it is provided that the Authority shall take care of "the fulfilments related to the public consultation of the schemes of authoritative act" not only where provided for by the legislation but also where "deemed however appropriate". Two considerations in this regard: given that the provision is included in Chapter I (containing general provisions on all the powers of the Garante), through a substantive and generalising reading, one can certainly neutralise the textual reference to the "authoritative act" (which in the classic nomenclature of administrative law evokes a precise act of punctual active administration,

⁵⁵ Brought to you by the Garante's resolution of 4 April 2019 'concerning internal procedures having external relevance, aimed at the performance of the tasks and exercise of the powers delegated to the Garante for the protection of personal data'.

⁵⁶ It is then envisaged that the contributions provided by the interested parties must be duly taken into account by the representative bodies, which draw up and submit to the Garante an outline of deontological rules that, precisely, 'takes into account the contributions provided by the interested parties'. On the other hand, the formula used for the assessment by the representative subjects of the observations collected in the public consultation is more vague: pursuant to Article 28, these must be merely 'examined' for the purposes of drafting the final outline of the deontological rules, whereas the contribution of the interested parties on the observations made during the consultation must be taken into consideration (the formula is evidently more peremptory).

therefore not regulatory); however, this does not elide the problem that the forms of public consultation would be activated at the discretion of the Authority and therefore the interested parties could not assert any procedural right.

The regulation of the procedural hubs of the EDPB's regulatory powers offers no more certainty. Granted that, since it is a European Union body, the relevant discipline cannot be sought in the individual member states, it should be noted immediately at European level that there is an almost total absence of *ad hoc* regulatory provisions. The GDPR provides nothing specific with reference to the powers of the EDPB in Articles 64 and 65. The only provision is contained in Article 70 GDPR, where, following the recapitulation of the EDPB's multiple powers, paragraph 4 provides: 'the Board shall, where appropriate, consult interested parties and give them the opportunity to comment within a reasonable period. The Board shall, without prejudice to Article 76, make the results of the consultation procedure publicly available'. In this regard, the same observation that was addressed just above to Article 7(7) of Regulation No. 1/2019 of the *Italian Garante* applies: thus, the provision could have a generalised application to all regulated powers, but it is not peremptory; and this is confirmed by Article 30 of the EDPB's Rules of Procedure (version 8) of 6 April 2022 when it states: '*the means and consultation period shall be decided on a case-by-case basis*'. Actually, this appears to be a significantly variable and uncertain regulation for public consultation.

The EDPB's Rules of Procedure provide some further guidance, but not with regard to opinions *under* Article 64 GDPR, only with regard to binding decisions *under* Article 65 GDPR. For the issuance of binding decisions, Article 11 of the Rules in fact states that the EDPB shall respect the right to good administration as set out by Article 41 of the Charter. Before taking decisions, the Board shall make sure that all persons that might be adversely affected have been heard (para. 1); then, for the purpose of taking the final decision, the EDPB will further consider information that is potentially gathered in the context of ensuring the right to be heard of the affected parties (para. 2).

More in general, it should be highlighted the existence of a risk of inadequate due process guarantees on EDPB decision-making process, which could also include a possible deficiency of transparency of the Board's working groups/task forces as well as of plenary meeting discussions – even though this might derive from the GDPR insufficient specification of stringent constraints for EDPB's procedures, despite art. 47 of the Charter that sets forth the fundamental right of fair and due process. In the silence of the GDPR, there could be leanings to interpret this lack of specification to justify the consultation, close doors, with associations, or the discretion to deny the interested parties' requests to exercise their right to be heard on its opinions and decisions, affecting ongoing enforcement actions. The same risk of an insufficient due process guarantees would also include: the possible lack of transparency of EDPB's subgroups works; the vague selection criteria and working rules of nominated pool of experts; the timing of publication of the agenda of EDPB's plenary meetings; and the late publication of minutes of these meetings where relevant information could be either absent or redacted.

6. Concluding remarks and some proposals for reform

The participative deficit in the regulatory activity of the EDPB (as well as of the Data Protection Authorities) is therefore real. This deficient set-up is the result of three possible misunderstandings (as such not relevant and insufficient to justify such a significant shortcoming).

The first. It matters little that the deficit of democratic legitimacy is not compensated for by grass-roots participation, because after all, deficits are not to be expected in the area at hand: the founding *rationale* of the Data Protection Authorities and the EDPB is so steeped in specific fundamental rights (privacy, data protection) in search of guard that it finds its legitimacy in and for this.

The second. Deceived by the *nomen iuris* (in itself irrelevant, see the previous paragraph) and having thus misinterpreted the substantive nature of the EDPB's powers, the legislator has prepared an unsuitable and therefore improper legal statute since it pertains to *stricto sensu* (!) advisory and adjudication powers: yet, to take note of the real substance concealed behind the formal qualification of the powers, it suffices to recall that the EU General Court has candidly admitted that even in binding decisions there is contained "the affirmation or reference to principles and interpretations of a general nature"⁵⁷.

The third. Given that many of the EDPB's powers are activated downstream of other regulatory events, the European legislator may have too optimistically wished for *ex ante* participation to be carried out upstream, i.e. at the national level within the regulatory activity initiated by the individual Data Protection Authorities. But such a wish would be misplaced, considering that at the national level participation is not always prescribed (as demonstrated by the Italian case, in this paper) and in any case it would require to be carried out and first of all regulated on the basis of convergent and 'coherent' procedural models (where coherence seems to be the necessary attribute in the events that may fall within the perimeter of the coherence mechanisms referred to in Section II, Chapter VII, of the GDPR).

Now, the participatory deficit is in itself a sufficient criticality to invalidate regulatory acts taken without prior consultation and discussion. However, this criticality becomes even greater if one considers certain procedural impasses, already partly anticipated at the beginning of this paper.

For opinions under Art. 64 GDPR, some have concluded that "*opinions of the Board, like in principle all opinions under EU law, cannot be challenged due to the lack of binding effect and due to the lack of a specific provision for such within the GDPR*"⁵⁸: in principle, a similar

⁵⁷ T-709/21 *WhatsApp Ireland v. EDPB* (pt. 40)

⁵⁸ I. Spiecker gen. Döhmman, sub. Art. 64, in *General Data Protection Regulation. Article-by-Article Commentary*, Indra Spiecker gen. Döhmman, Vagelis Papakonstantinou, Gerrit Hornung, Paul De Hert (ed.), Baden, Nomos, München, Beck,

conclusion would also apply to the contestability of guidelines or recommendations adopted by the EDPB. However, the apparently “non-binding” nature of these instruments is questionable since DPAs are bound by them and therefore they directly affect potential and actual regulatees. But that is not all. There are also difficulties to appeal decisions under Article 65 GDPR, which are also binding acts. Despite Recital no. 143 of the GDPR that recognises that “*Any natural or legal person has the right to bring an action for annulment of decisions of the Board before the Court of Justice*”, and CJEU case law discussed beforehand (e.g., *Portigon*) that provides the rationale for appeals of this nature, the sole attempt to appeal an article 65 GDPR decision before the CJEU has failed (but is still under appeal). Therefore, the independent challenge of binding decisions has proved to be, in practice, essentially impossible.

Through a strict interpretation of the criterion of the direct effect of the act on the applicant, the binding decision is qualified as “a preparatory, or intermediate, act in a procedure which [...] must be closed precisely by the adoption of a final decision of a national supervisory authority addressed to that undertaking”⁵⁹; to that effect, the binding decision becomes for that very reason an act that cannot be challenged, considering that “in procedures which culminate in the drawing up of acts in several stages, intermediate acts whose purpose is to prepare for the final decision do not in principle constitute acts open to challenge”⁶⁰.

There certainly remains the right to invoke before the national court the invalidity of acts of the institutions, bodies, offices and agencies of the Union for a preliminary ruling on validity: yet, according to the *Cilfit* case-law, the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised⁶¹, thus the national court represents an ‘evaluative filter’⁶² and thus remains the holder of a powerful evaluative (and, where appropriate, obstructive) power.

In short, to put it provocatively (because it is drawn from a different sphere, which is that of sanctions), here the theory of *full jurisdiction* is just not applied: the procedural deficits are not compensated for by a ‘full’ judicial phase, which we can in fact recognise as almost absent; therefore, there is neither one (the guarantee in the procedure) nor the other (the guarantee in the trial, at least until the executive act of the regulatory act intervenes). But the provocation is clear: the guarantee in the process could never fully make up for the participation deficits in regulatory procedures, given that for these the *ex-ante* consultation of the *stakeholders* represents not only a guarantee, nor even less a mere collaboration to increase the *parterre* of information unknown to the Authority, but rather and above all a source of democratic legitimisation for the independent regulator.

Oxford, Hart, 2023, 958. See also recital 143, where it states that the ‘right to an effective judicial remedy does not include other measures taken by the supervisory authorities that are not legally binding, such as opinions or advice given by the supervisory authority’.

⁵⁹ T-709/21 *WhatsApp Ireland v. EDPB* (pt. 42).

⁶⁰ T-709/21 *WhatsApp Ireland v. EDPB* (pt. 43).

⁶¹ ECJ, Judgment of 6 October 1982, C. 283/81, *Cilfit*.

⁶² Cons. Stato, sec. III, 16/12/2020, no. 8089.

Hence the inescapable need for a reform of the GDPR concerning the ways of exercising the regulatory powers prescribed therein.

First of all, it is considered opportune i) to envisage a provision of principle, of a binding nature, which requires the individual Data Protection Authorities to call for participatory procedures of prior consultation for the assumption of regulatory acts; secondly, it is considered necessary to identify common principles to guarantee the consistency of the national models of prior consultation. These provisions could be functionally integrated into the aforementioned paragraph 4 of Article 58 GDPR where it is already provided that *'The exercise of the powers conferred on the supervisory authority pursuant to this Article shall be subject to appropriate safeguards'*. Moreover, the GDPR should incorporate, as DPAs duties, the Gunning Principles discussed above: 1. consultation must take place when the proposal is still at a formative stage (not when the Authority has already a first draft, often considered almost final); 2. sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response; 3. adequate time must be given for consideration and response (art. 64 GDPR deadlines seem to be incompatible with this); and 4. the results of consultation must be conscientiously taken into account (this is a particularly relevant aspect, and would significantly change the EDPB and DPAs public consultation procedures and related results).

In addition, and in one, there is a proposal for action concerning the regulatory powers of the EDPB. The proposal has two alternatives. On the one hand, for each of the EDPB's regulatory powers, a detailed and differentiated regulation of consultation procedures could be laid down in prescriptive terms (the detailed regulation could then be left to the EDPB's internal regulations). On the other hand, and as an alternative, greater functional autonomy could be conferred on the EDPB, requiring the Board to give reasons on a case-by-case basis, on the basis of the content and substantive criteria (of abstractness and generality) of the act, as to why it does not consider it necessary to activate prior consultation of the stakeholders: the provision could be transposed in Article 70(4), replacing the current wording with the following: *'The Board shall give precise reasons for the decision not to submit the proposed act to prior consultation of the interested parties. The Board's rules of procedure shall define the forms and methods of prior consultation, as well as the parameters and criteria for excluding the act from prior consultation. Any natural or legal person has the right to bring an action before the Court of Justice for annulment of such decisions not to submit the proposed act to prior consultation'*.

With regard to procedural protection, it is worth noting what has been observed in doctrine in relation to acts of *soft regulation* that produce *crypto-hard* effects. This is a conceptual category to which many of the EDPB's powers can certainly be traced, given that, although they do not result in measures formally aimed at affecting *stakeholders*, they may nevertheless influence the future choices of the regulatory authorities (which are actually

bound by EDPB decisions, opinions and guidelines), the jurisprudence, and thus the *stakeholders* themselves. Therefore: "if *soft regulation* produces *crypto-hard* effects, even the judgement must be the classic *hard* one, i.e. a direct judgment against the measure in question", otherwise "*soft regulation*, which was created to satisfy undoubted interests of a general nature, would instead become a *contrivance* that would be difficult to reconcile with the basic values of our system"⁶³.

This principle could be transcribed into a regulatory precept, or positively enshrined in the law; anyway, at least, it should serve as a recommendation for case law. All the more so when some of the case law has already recognised its justification: for instance, although a Communication on the banking sector was not considered to have binding force (and thus did not fall within the ambit of Art. 263 TFEU), the Court of Justice nevertheless did not refrain from reviewing it, assessing its compliance with the general principles of the European legal system; moreover, the French *Conseil d'État* declared admissible an appeal against a Communiqué of the *Autorité des marchés financiers*, with the consequence that, as observed by the aforementioned doctrine, "even a press release issued by the regulator can be configured as an act directly challengeable before the administrative court"⁶⁴.

Ultimately, the time has come for a reform of the sector, because if the democratic legitimacy of the independent authority, prior consultation and direct control by the judge are lacking, then there is really no serious guarantee.

28 November, 2024

⁶³ M. Ramajoli, *Self regulation, soft regulation and hard regulation in financial markets*, in *Regolazione dei mercati*, 2016, no. 2, 53 ff., esp. 70 s.

⁶⁴ Ibid, 71. The cited precedents are also referred to by M. Ramajoli: CJEU, Grand Sect., 19 July 2016, C-526/14, Kotnik and others; Conseil d'État, 21 March 2016, Société Fairvesta International GMBH et autres, nos 368082, 368083, 368084.