

INDIREG

FINAL REPORT

Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive" (SMART 2009/0001)

by

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Perspective Associates – sub-contractor

February 2011

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Homepage: <http://www.indireg.eu>

Citation

Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/Perspective Associates (eds., 2011): INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study conducted on behalf of the European Commission. Final Report. February 2011.

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EXECUTIVE SUMMARY

1. This is the final report of the study entitled “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive” (SMART 2009/0001), which has been conducted on behalf of the European Commission, following the Commission’s Invitation to Tender dated May 16, 2009, published in the Official Journal 2009/S 94-134142. The study has three general objectives: (1) A detailed legal description and analysis of the audiovisual media services regulatory bodies in the Member States, in candidate and potential candidate countries of the European Union and the EFTA countries, as well as four non-European countries; (2) an analysis of the effective implementation of the legal framework in these countries; and (3) the identification of key characteristics constituting an independent regulatory body in light of the AVMS Directive.
2. Various theoretical approaches on independent regulatory bodies and reasons for their establishment are unfolded in the study. It can be concluded that there have been and are a number of arguments for separating the regulatory task from traditional public authorities (e.g. governments) and market players. However, the independence and autonomy of these regulatory bodies is seen to be associated with risks, which are usually minimalised by number of counterbalancing measures, such as appropriate accountability mechanisms.
3. Regulatory theory already provides tools to frame independence and introduce helpful distinctions, such as the differentiation between formal and *de facto* (often also referred to as “operational”, “informal” or “real”) independence. Moreover, it also contains references to the fact that the notion of independence is linked to the efficient functioning of regulatory bodies. All these different dimensions are taken into account in the functional working definition of “independence” we use throughout this study:
A regulator is independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary.
4. To map the regulator in a governance structure means to measure whether it is at arm’s length from all relevant actors, especially in the political sphere (government, parliament, other political forces), but also from the regulated industry and – although less likely to be considered problematic – from third parties in civil society. Based on this concept, our study is focussed on identifying and measuring factors that, on the one hand, reduce the interaction distance from an actor (dependencers) or, on the other hand, enable the regulator to keep distance (autonomisers).
5. The analysis of the institutional, regulatory and legal frameworks of the regulatory bodies in the media sector (chapter 2) demonstrates the great variety of institutional and organisational set-ups in the different Member States. Although different development paths have

been followed in Member States, the implementation and supervision of the rules in the AVMS Directive are typically entrusted to an independent regulatory body that in many cases has other media-related regulatory functions as well (e.g. publishing, transmission, distribution).

6. The objective of our study was not to assess the actual level of independence of the regulatory bodies in the different countries we have examined, but rather to provide regulators, Member States and the European institutions with a tool for the self-assessment of independence and efficient functioning. The research team has done so by devising two benchmarking tools, one for formal and one for *de facto* criteria, each consisting of a number of respective indicators that have been weighted and ranked according to the analytical work done. The outcome is an assessment of the level of independence and of the efficient functioning in five different dimensions: “status and powers”, “financial autonomy”, “autonomy of decision-makers”, “knowledge” and “accountability and transparency mechanisms” (see Appendix).
7. In addition to the formal frameworks the study analyses the practical implementation and effectiveness of institutional, regulatory and legal conditions within those regulatory bodies (chapter 3). Despite the fact that there was only a limited participation in the survey, it nevertheless delivered some interesting insights. While – generally speaking – the outcome of this stakeholder-survey-based part of the study indicates a high level of *de facto* independence among regulators, it also conveys the impression that there are some less obvious relationships between indicators. One important outcome in this respect is that the perception of transparency is strongly connected with the perception of the regulator being impartial in its decision-making. The same is true for the perception of the regulator having sufficient resources to fulfil the task of implementation and supervision. Furthermore, our work also indicates that there is at least a risk that structural changes in the regulatory system could be (mis)used by political forces to influence the policy and/or decision practice of a specific regulatory body (a risk which might have a ‘chilling’ effect not only on governing board members, but potentially even on staff members working for regulatory bodies).
8. Theoretical analysis supported the assumption of the project team that mathematical measures of independence derived from indicators for formal as well as *de facto* independence can only provide a certain degree of insight. Based on the analysis of practical implementation and effectiveness, eight countries were therefore chosen for in-depth analysis (chapter 3.5). The findings of those in-depth studies support the view that there are very subtle (and quite difficult to ‘measure’) ways to exert influence on regulators, especially for governments. In many countries, rather complex processes of nominating members of the highest decision-making organ of a regulatory body can lead to an informal politicisation of the respective decision-makers. Another reason why measuring *de facto* independence and efficient functioning could become problematic, is the fact that sometimes measures that look like an undue infringement of the independence of a regulator (e.g. the

removal of a high official by the government), might in fact have contributed to its independence (e.g. a dismissal could have been a reaction to that individual exercising undue influence within the regulatory body on behalf of a third party). In line with theoretical approaches, this part of the study highlights the importance of the regulatory culture and demonstrates the limits of applying a universal concept of independence.

9. Finally, the study identifies key characteristics of independent regulatory bodies in the light of the objectives of the AVMS Directive. On this issue, our study has shown that the AVMS Directive does not contain a strict formal obligation for the Member States to create an independent regulatory body if one does not already exist. However, this does not mean that there is no legal effect at all. Firstly, article 30 of the AVMS directive at least explicitly requires the Member States to have their independent regulatory bodies play a role in the obligation to collaborate with each other and with the European Commission. Furthermore, the basic requirement of independence of AVMS-regulatory bodies could find a broader legal basis in article 10 ECHR and article 288 para. 3 TFEU, especially when read in connection with the objectives of the AVMS Directive. Based on these provisions, Member States are obliged to put in place a regulatory framework that is structurally capable of implementing the aims of the directive in an impartial manner. Impartiality in this notion has to be effective against influences coming from the direction of the government or other political actors, as well as against influences coming from the media sector. To ensure this, a minimum requirement of independence is needed. Furthermore, article 30 AVMS, construed in the light of recital 94, highlights the long-term policy objective of creating incentives for Member States to establish independent regulatory bodies to make use of the advantages of those types of regulators, as described in the theoretical part of the study.
10. Against this background, essential characteristics for regulatory bodies can be identified that must be met when aiming to realise the AVMS objective of impartiality. As regards status and powers, the risk that a regulator is insufficiently autonomous is high when there is any other body or person other than a court that can, at its own discretion, overrule and/or instruct in any of the case-specific decisions of the regulatory body. Furthermore, the regulator must be equipped with powers by law that are binding for the regulatees beyond the status of mere recommendations, including sanctioning. While our study identifies several advantages in legal and organisational separation of a regulatory body from the state administration as well as from the regulatees, we also suggest that this can only be regarded as best practice, rather than a requirement. Adequate sanctioning powers are essential: however, it is not essential that the regulatory body itself applies the sanctions.

Regarding financial autonomy, it is essential that the regulator is equipped with sufficient financial resources; otherwise there are risks for both its independence and efficient functioning. As for the autonomy of decision makers, it is necessary that the nomination and appointment procedures are constructed in a way that prevents a considerable structural bi-

as in decision-making. Furthermore, rules against conflicts of interest with regard to both government and industry are essential.

As regards the knowledge dimension, it is, again, a general characteristic that the body should be equipped with sufficient human resources and adequate expertise. In view of accountability and transparency measures, a minimum obligation of transparency also seems an essential characteristic for any independent regulatory body.

11. In all these dimensions, the study develops various configurations that constitute best practice and can therefore be used to steer the developmental path in the Member States to a future-facing approach to audiovisual media regulation.

0. INTRODUCTION & AIM OF THE STUDY

This study, entitled “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive” (SMART 2009/0001), has three general objectives: (1) A detailed legal description and analysis of the audiovisual media services regulatory bodies in the Member States, in candidate and potential candidate countries to the European Union and in the EFTA countries, as well as four non-European countries; (2) an analysis of the effective implementation of the legal framework in these countries; and (3) the identification of key characteristics constituting an “independent regulatory body” in the light of the AVMS Directive.

Within this final report the conducted work and the results of the study are presented and explained. The study consisted of the following chapters:

Chapter 1, consisting of a stable framework for the understanding of the term independence, in which different dimensions and sets of indicators for measuring independence and efficient functioning were developed. These indicators formed the basis for the first wave of questionnaires that were answered by both the INDIREG’s Country Correspondents as well as the national regulatory bodies in charge of implementing the AVMS provisions.

Chapter 2, developing the Questionnaire to be handed out to the Country Correspondents and to the national regulatory authorities. From this data the study team generated Country and Issue Tables and Country and Issue Summaries.

Chapter 3, developing *de facto* indicators for independence and effective implementation. On the basis of the *de facto* indicators a country survey was developed which was sent to the relevant stakeholders. The empirical data were thoroughly scrutinised for correlations between *de facto* indicators.

Chapter 4, formulating essential characteristics of independent regulatory bodies capable to ensure an effective implementation of the Directive. Best practice characteristics are also developed, following the understanding of the role models developed for independent regulatory bodies in regulatory theory.

Chapter 5 contains a ranking tool for formal and *de facto* independence. This ranking tool allows interested parties to self-assess the independence and efficient functioning of their regulatory bodies. A user friendly web application of this tool can be found at www.indireg.eu.

The study team would like to thank the following professional experts who have participated in the study as Country Correspondents: Austria: Florian Saurwein, IPMZ, Institute of Mass Communication and Media Research, University of Zurich; Belgium: David Stevens, ICRI K.U. Leuven; Bulgaria: Danail Danov, Communications and Human Resources Development Centre, Sofia; Cyprus: Olga Georgiades, Lellos P. Demetriades Law Office en Lexact Solutions; Czech Republic: Milan Smid, Charles University Prague, Faculty of Social Sciences; Denmark: Prof. Per Jauert, Department of Information and Media Studies, University of Aarhus; Estonia: Andres Jõesaar, Tartu University; Finland: Marko Ala-Fossi, Department of Journalism and Mass Communication, University of Tampere; France: Bernard Guillou, Mediawise+; Germany: Dirk Arnold, University of Greifswald; Greece: Prof. Dr. Persephone Zeri, Department for Communication, Media and Culture of the Panteion University, Athens; Hungary: Szabolcs Koppanyi, Center for Media and Communications

Studies (CMCS), Central European University (CEU), Budapest; Ireland: Mary Macnamara, Perspective Associates, London; Italy: Prof. Dr. Roberto Mastroianni, University of Naples “Federico II”; Latvia: Andris Mellakauls, Latvian National Broadcasting Council; Lithuania: Zivile Stubryte, Center for Media and Communications Studies (CMCS), Central European University (CEU), Budapest; Luxembourg: Prof. Dr. Mark D. Cole, Faculté de Droit, d’Economie et de Finance, Université du Luxembourg; Malta: Pater Joseph Borg, University of Malta; Netherlands: Ad van Loon, X-Media Strategies; Poland: Dr. Beata Klimkiewicz, Institute of Journalism and Social Communication, Jagiellonian University, Krakow; Portugal: Prof. Dr. Joaquim Fidalgo, Social Sciences Department, University of Minho, Braga; Romania: Brindusa Armanca, Romanian Cultural Institute, Budapest; Slovakia: Dr. Andrej Skolkay, Faculty of Mass Media Communication, University of SS. Cyril and Methodius, Trnava; Slovenia: Brankica Petkovic, The Peace Institute – Institute for Contemporary Social and Political Studies, Ljubljana; Spain: Prof. Dr. Carles Llorens, Audiovisual Communication Department, University Autonomous of Barcelona; Sweden: Prof. Dr. Christian Christensen, Department of Informatics and Media, Uppsala University; United Kingdom: Tim Suter, Perspective Associates, London; Croatia Zrinjka Perusko, Department of Journalism, Centre for Media and Communication Research, Faculty of Political Science, University of Zagreb; Former Yugoslav Republic of Macedonia: Snezana Trpevska, School of Journalism and Public Relations, Skopje; Turkey: Dr. Burcu Sümer, Faculty of Communication (ILEF), Ankara University; Albania: Hydajet Kopani, Ministry of Education, Tirana, Albania; Bosnia and Herzegovina: Amer Dzihana, Center for Media and Communications Studies (CMCS), Central European University (CEU), Budapest; Kosovo: Samra Campara, OSCE Mission Kosovo, Pristina, Kosovo; Montenegro: Jelena Surculija, Faculty of Political Sciences, University of Belgrade; Serbia: Nevena Rusic, Commissioner for Information of Public Importance and Personal Data Protection, Belgrade, Serbia; Iceland: Prof. Thorbjörn Broddason, University of Iceland/Ragnar Karlsson, Statistics Iceland; Liechtenstein: Dr. Wilfried Marxer, Liechtenstein-Institut; Norway: Prof. Helge Østbye, Department of Information Science and Media Studies, University of Bergen; Switzerland: Florian Saurwein, IPMZ, Institute of Mass Communication and Media Research, University of Zurich; Australia: Mark Armstrong, Director of the Network Insight Institute, Sydney; Japan: Keiko Hatta, Info Com, Tokyo; Singapore: Prof. Ang Peng Hwa, Wee Kim Wee School of Communication and Information, Nanyang Technological University Singapore; USA: Benjamin Cramer, Central European University, Budapest, Hungary.

Also, we would like to thank our the regulatory bodies for their cooperation and express our gratitude for the knowledge and insight our advisory board – Prof. Dr. Robert G. Picard, Jönköping International Business School; Eve Salomon, International Media and Regulatory Consultant and Prof. Dr. Mark Thatcher, London School of Economics – provided us with. Last but not least, we would like to thank our student research assistants Anna Poetter, Lea Michalke, Martin Lose, Esther Loeck, Söhnke Greite and Andrej Pletter (HBI) and Roxana Radu (CMCS).

Hamburg, Brussels, Budapest, Leuven, London

February 2011

1. THEORETICAL FRAMEWORK: CHARACTERISTICS, MEASUREMENTS AND DEFINITIONS OF INDEPENDENCE AND EFFICIENT FUNCTIONING

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General research on independent regulatory bodies or agencies first emerged following the “rise of the regulatory state in Europe”¹ and the emergence of one of the institutional characteristics of the regulatory state, i.e. independent regulatory authorities. This chapter explores the conceptual implications for independence as put forward in theory and research. In order to define the theoretical framework for analysis, the literature review explores the general characteristics of independence and efficient functioning (Chapter 1.1) of independent regulatory authorities as well as options for measuring them (Chapter 1.2) derived from the existing body of theory and research.

1 Thatcher, M. (1994): 441.

From these findings a theoretical framework is developed, serving as a ground for the development of theoretical criteria for measuring independence and efficient functioning (Chapter 1.3).

1.1 General characteristics of independence and efficient functioning

A significant amount of research has been dedicated to the meaning and the implications of independent regulation through which the theoretical understanding of the function of independent regulation has been greatly advanced.² The aim of this literature review is to present and synthesize a thorough state of current understanding of the features and characteristics of independent regulatory authorities.

The following section gives the rationale for creating independent regulatory authorities (section 1.1.1) as well as their underlying theoretical concepts (section 1.1.2), reviews definitions of independence (section 1.1.3) and extracts theoretical elements of independence. In the next step, the formal and the *de facto* dimensions of independence are juxtaposed (section 1.1.5).

1.1.1 Rationales: **Why are independent regulatory bodies established?**

Regulation, regulatory agencies³ and the regulators' autonomy are increasing. Today, it seems that independent regulatory authorities have almost become a natural institutional form for regulatory governance. Independent regulatory authorities not only play a crucial role in a number of utility or network based sectors (e.g. rail, water, energy, electronic communications etc.), but also in other economic (e.g. banking and financing) or non-economic (e.g. the protection of fundamental rights and independent privacy commissions) areas.

This trend has economic and political roots, and corresponds to the increasingly refined questions of conflicts of interest between the public and private interest, as well as between different private interests. There are numerous normative arguments for creating independent regulatory authorities put forward in the international economic, social science and legal literature that are explored below. In many ways the benefits commonly attributed to independent regulatory agencies parallel the normative arguments for their inception presented below.

At an abstract level there are two different rationales for independent regulators in Europe: market regulation and the guarantee of human rights⁴, although in the latter case the normative arguments for setting up independent regulators are more subtle.

1.1.1.1 **Market regulation**

It is beyond doubt that one of the most important tasks of the new independent regulatory authorities is to correct market failures and act as the "**independent referee**"⁵ between various interests. However, this is not the main reason behind creating regulators or the rationale for regulation. In

2 Baudrier, A. (2001): 2.

3 Geradin, D. / Petit, N. (2004): 4.

4 Karkatsoulis, P. (2005): 38.

5 Baudrier, A. (2001): 2.

the realm of market regulation, independent regulatory authorities appear to be the predestined institutional model of governance.

At first sight, two basic questions must be addressed with regard to governance: first, why regulatory competencies should be delegated to an independent body, and second why it is important for the regulatory authority to be independent. According to Nicolaïdes⁶ the answer to the first question is effectiveness, and to the second is consistency. For Majone the main reasons are the reduction of decision-making costs and enhancing the credibility of long-term policy commitment.⁷ According to Gilardi, the rationale for the surge of independent regulatory agencies can be summarised as expertise, flexibility and credibility.⁸

Gilardi explains the diffusion of independent regulatory agencies across Europe with three scenarios: Bottom-up as a means to gain credibility and to overcome political uncertainty; top-down following Europeanisation; and horizontal emulation between European countries.⁹

Below, these conceptual approaches are presented together with others rationales and explanations discussed in the literature.

Limiting government failure: Although correcting market failure is often the most important task for independent regulators, the main reason for granting independence may be their role in limiting ‘government failure’.¹⁰ Independent regulators were often introduced to replace public ownership together with sector-specific regulation, and the separation of the regulatory and operational functions of the state is important for the liberalisation process to be credible.¹¹ Such an institution can decrease the so called ‘time inconsistency’¹² problem, where policies change over time and, thus, it can increase the long term credibility and predictability of regulation. A working, independent regulatory body model is able to limit political influence on business decisions, thereby making the risk of regulation more predictable. It has often been argued that such bodies have the benefit of not being necessarily tied to election cycles and can thus work on specific issues continuously and ideally develop long-term solutions.

Credible commitment¹³: The bigger the country’s investment in the respective industry sectors, the stronger is the government’s need to separate regulatory agencies from its short-term political goals.¹⁴ The state as the owner of public utilities must be separated from the state as regulator, the regulator from the regulatees, and short-term political interest from long-term welfare effects. In this concept, a strong regulator that is separated from the ministerial administration is desirable. An independent regulatory body can serve as a guarantor to companies that their investment in infrastructure which involves substantial sunk costs will be honoured in the future

6 Nicolaïdes, P. (2006): 29.

7 Majone, G. (2005a): 52.

8 Gilardi, F. (2005a): 102.

9 Gilardi, F. (2005c): 84 ff.

10 Larsen, A., et al. (2006).

11 Majone, G. (1996): 157 ff; Larsen, A., et al. (2006): 4.

12 Majone, G. (1996): 41; Gilardi, F. (2002): 875.

13 As advocated by Majone and now widely accepted, e.g. Majone, G. (1997b): 139 ff.

14 Radelli, C. M. (2004); Maxfield, S. (1997); Wilks, S. / Bartle, I. (2002).

and that short-term political interest cannot interfere with their long-term operational interest.¹⁵ Because of the lack of electoral constraints, regulatory agencies contribute to a higher level of credibility.¹⁶

Political uncertainty: This normative argument resonates already in the previous two hypotheses. Placing regulation into the hands of an independent regulatory body could allow it to outlive its government and to prevent future governments from revoking the current one's policies.¹⁷ However, since this political strategy firstly commits the incumbent government, it is uncertain if, and in which situation, a government would resort to the creation of an independent regulator to overcome political uncertainty. This theory also does not adequately capture legislative reforms of subsequent governments with the aim of leaving their distinct footprint on the institutional design of a given authority.

Rational choice theory: The decision to delegate competencies to independent regulatory authorities can also be explained in rational choice terms. From the point of view of self-interested politicians, different kinds of functional pressure can provide increased incentives to create independent regulatory authorities and delegate decision-making competencies to them. Thatcher¹⁸ mentions four typical kinds of functional pressure: (1) blame shifting, (2) the technical nature of regulation, (3) regulation as the implementation of EU policies, and (4) credibility.

Better regulation: This explanation emphasises the quality and effectiveness of regulatory intervention¹⁹ where specialised and independent regulatory agencies are better placed to focus on regulation without being distracted or misled by political calculation. Flexibility, expertise²⁰ and the 'continuity of concerns'²¹ are the most significant differences from the traditional bureaucratic model. These bodies have the combined competences of rule making and rule application in a particular field that distinguishes them from an executive branch of the government and the courts.²² Agencies can, furthermore, overcome information asymmetries in technical areas of governance and enhance the efficiency of rulemaking. For Gilardi the flexible organisational structure of independent regulators in contrast to ministerial bureaucracy can create attractive working conditions for experts.²³

Institutional isomorphism²⁴: This theory suggests that if an apparently successful model of a regulator exists, it is likely to be copied. Drivers for institutional isomorphism can be the experience with an independent regulatory body in a specific domain, which is then copied in other areas of regulation, or it can be **international policy learning**.²⁵ Europeanisation can be perceived as

15 Also referred to as hold-up theory, Baudrier, A. (2001): 6; Gilardi, F. (2002): 874; Gilardi, F. (2005c): 87.

16 Majone, G. (2005b): 131; Gilardi, F. (2005c): 84.

17 Gilardi, F. (2005c): 87. Gilardi, F. (2005): 103.

18 Thatcher, M. (2001).

19 Jacobzone, S. (2005a): 33.

20 Majone, G. (2005b): 135; Gilardi, F. (2005): 58; Baldwin, R. / Cave, M. (1999): 70.

21 Landis, J. M. (1938): 23.

22 Larsen, A. et al. (2006): 4.

23 Gilardi, F. (2005a): 102.

24 Thatcher, M. (2001): 3.

25 Thatcher, M. (2001): 21; Gilardi, F. (2005c): 88 ff.

a subset of institutional isomorphism²⁶ or it can be acknowledged as a self-standing normative argument for the proliferation of independent regulatory agencies across European Member States, candidate countries and accession countries, sometimes combined with European harmonisation.

European harmonisation: In practice, the creation and/or strengthening of independent regulatory agencies were often imposed on Member States by the European Union regulatory framework for a specific sector where liberalisation and harmonisation measures make explicit the requirement to set up such bodies. This is prescribed for utilities' sectors, such as electronic communications, energy, railways, post etc. but also under EU harmonised law on data protection. A discussion of the requirements is provided later in this section.

Successive new Member States and candidate countries have implemented independent regulatory agencies in preparation for becoming members of the European Union and implementing the *acquis communautaire*. Where exogenous factors have prompted the setting-up of independent regulatory authorities, there is a risk that these bodies will remain essentially anomalous and not embedded in the administration system, since administrative and procedural reforms do not automatically accompany the spread of the independent regulatory authorities.

In this section various normative arguments have been presented which can explain the shift towards delegating powers to independent regulatory authorities. Two important caveats must be made:

First, in many instances these normative arguments may be cumulative, in varying combinations, while in other instances only a particular strand or even one single rationale may apply. For example, a significant strand relates to the privatisation and re-regulation of utilities which is of little relevance for other areas of regulation.

Second, the reasons for creating independent regulatory authorities can differ depending on which country is the focus of the research. Some of the issues, such as credible commitment and time-inconsistency problems, have been developed against the background of countries that have been through an organic development in which independent regulators became the preferred mode of governance in certain areas in public policy. This may not adequately capture endogenous effects stemming, for example, from Europeanisation, where countries implemented independent regulators in line with, and as a consequence of, EU regulation. In addition, legal, economic, political and cultural factors influence the shaping of regulators, resulting in varying institutional designs and even organisations, which, though similar at the formal level, can nevertheless vary widely at the level of implementation and efficient functioning.²⁷

26 Gilardi, F. (2005c): 84 ff.

27 It must be noted for instance that blame shifting is typical for the British administrative system, which is not as centralized as the continental one, while in a hierarchic and centralised structure typical for the majority of the continental EU Member States it is less relevant.

1.1.1.2 **The guarantee of human rights**

Protecting and giving effect to certain fundamental rights vis-à-vis the state can require as an institutional safeguard the setting up of an independent regulatory body in order to keep oversight and enforcement at arm's length from politicians. Media and data protection are areas where there is a perceived need to separate politicians and executive branches of government from exercising control because they are otherwise highly susceptible to partisan interference.²⁸ In this area, independence is an institutional value of the regulator that should ensure impartial and fair handling of its competences.

The paradigmatic example is the media sector, where many countries have put independent regulatory authorities in charge to protect the independence of the media from political influence and thus give effect to the fundamental freedom of the media which is derived from the freedom of expression protected in country's constitution and as an international human right (cf. section 4.2.2.1).²⁹ Other examples are the national data protection commissioners, which are authorities dedicated to the protection of the individual's right to privacy against unjustified interferences from the private and the public sector (see section 4.2.7.1). In other network industries and economic areas, however, these aspects are not equally relevant.

1.1.2 Underlying theoretical concepts

In order to comprehend the role and function of independent regulatory authorities fully, it is necessary to embed this particular model of institutional governance in underlying theoretical concepts. Of particular relevance are public interest theory, the regulatory state and delegation theory, principal-agent theory and the concept of political veto points as applied to delegation to independent regulatory bodies.

1.1.2.1 Public interest theory

Public interest theory, going back to Arthur Pigou³⁰, suggests that regulation is supplied in response to the public demand for the correction of inefficient or inequitable market practices. Regulation should therefore benefit society as a whole, rather than any partisan interests, and regulators should represent the interest of society instead of any particular interests of the regulators themselves.³¹ By the same token, regulators are supposed to serve and further the public interest, which is often explicitly laid down in their legal mandate.

The practical relevance of public interest theory has been contested notably by George Stigler's theory of economic regulation, according to which it is the regulatees and other political participants who use the regulatory and cohesive powers of government to create a legal environment beneficial to their interests (also referred to as capture theory).³²

28 Geradin, D. / Petit, N. (2004): 8.

29 Cf. Jakubowicz, K. (2007): 3 ff.

30 Pigou, A. C. (1932).

31 Posner, R. A. (1974): 335 ff.

32 Stigler, G. J. (1971).

1.1.2.2 The regulatory state and delegation theory

Thatcher's theory of 'rise of the regulatory state in Europe'³³ is part of the paradigm shift from the positive or welfare state to a new form of public management of the national state. New public management refers to a range of recent state reforms aimed at modernising the public sector aiming for better management of public resources that is more oriented towards outcomes and efficiency.³⁴ It entails the disaggregation of traditional bureaucratic organisations and the introduction of private sector styles of management, performance measurement and output controls. In many ways, the concept of independent regulatory authorities is built on these principles.³⁵

Majone identifies three sets of strategies leading from the positive to the regulatory state: privatisation, the Europeanisation of policy making and the growth of indirect 'third party' government.³⁶

To guarantee that the public utilities – electricity, water, telecommunication, etc. – would not be dominated by private interests, those industries were originally put in the hands of the state. But public ownership did not always prove effective for the maintenance of public interests. So an alternative mode of governance had to be found. Public utilities were transferred into private hands and regulation through independent specialised *agencies* was introduced.

The second reason for the shift to the regulatory state identified by Majone is Europeanisation. The European Union has significantly catalysed the inception of independent regulatory authorities in its Member States and beyond. Though it may at first appear surprising that the delegation of competences to the EU is connected to an increase of regulation at national level, this is easily explained by the necessity of building new regulatory *agencies* and of adjustments to existing authorities in order to implement EU legislation.

At the institutional level, the shift from centralised bureaucracy to independent agencies which operate "at arm's length from central government"³⁷ is seen as the third element of the paradigm shift.³⁸ It has regularly been argued that independent regulatory bodies are a "key feature"³⁹ or "a necessary component"⁴⁰ of modern regulatory governance. The state can no longer exercise all functions and tasks itself, but needs to delegate them to *agencies* or regulatory bodies and control or regulate these agencies.

1.1.2.3 Principal-Agent-Theory

The delegation of competences to agencies brings benefits but also entails costs for the government, a dilemma referred to as the principal agent problem.⁴¹ Initially designed to explain delega-

33 Thatcher, M. (1994): 441.

34 Hood, C. (1991): 3.

35 Hood, C. (1991): 3.

36 Majone, G. (1997a).

37 Majone, G. (1997a).

38 Gilardi, F. (2002): 874.

39 Jacobzone, S. (2005b): 72.

40 Majone, G. (2005b): 130.

41 Pollack, M. A. (2002): 202; Majone, G. (1997a): 5.

tion of legislative authority of US Congress committees, this schema has also been used to analyse the delegation of executive functions to federal agencies. It describes the framework where the principal confers on the agent the power to regulate a specific area. The principal-agent approach is based on the assumption that any public authority is moved primarily by cost-benefit calculation: an authority will therefore regulate a given field on its own as long as the benefits outweigh the costs.⁴² The challenge is therefore to find the particular governance structure that maximises the net benefits to the principal(s), subject to various constraints.

There are four main reasons why an authority may believe that it has an interest in delegating one of its functions to an agent, which can be combined with each other:⁴³

- Delegation can help to reduce the problem of credible commitment due to time-inconsistency or non-compliance
- A non-governmental agent can also provide policy expertise needed by governments at low cost, including reduction of workload
- It enhances the efficiency of decision making, particularly in fields characterised by a high level of technicality
- It is also used for blame-shifting for unpopular decisions.

The benefits of delegation are, according to Thatcher, a reduction in the principal's decision-making costs, greater expertise, and greater policy credibility. In general, the broader the delegation (i.e. the more independence given to the agency) the greater the reduction in decision-making costs and the increase in expertise and policy credibility will occur. To be able to fulfil its regulatory tasks, the agent must be granted a certain amount of discretionary power which might at the same time cause a divergence between the interests of the principal and the agent and the ability of regulators to act in their own interest (referred to as "agency loss"). Such agency costs may be reduced by strict procedural requirements, transparency and public participation in agency decision-making, and reliance on judicial review.

The institutional design of an agency matters and principal-agent theory analyses how the governance structure and formal control mechanisms can constrain an agency's pursuit of own preferences.⁴⁴ Ultimately, retaining and using formal controls by elected officials is bound to impact on the independence of agencies in various ways.

1.1.2.4 Political veto points and delegation to independent agencies

This explanation applies the theory of veto players by Tsebelis⁴⁵ to the inception of independent regulatory authorities according to which the higher the number of veto players, the more difficult it will be to arrive at a policy change,⁴⁶ so that the number of veto players will affect the stability of policy arrangements. It follows that if there are a lot of veto points in a political system,

42 Magonette, P. (2005): 5.

43 Magonette, P. (2005): 5, referring to Pollack, M. (1997); Thatcher, M. / Stone Sweet, A. (2002).

44 Pollack, M. A. (2002): 201.

45 Tsebelis, G. (2002).

46 Thatcher, M. (2001); Hammond, Th. H. (2003).

the creation of independent regulatory authorities becomes more difficult. Conversely, for Gilardi the number of veto points can be considered an additional safeguard for making credible policy commitments, which renders the benefits of delegation to independent regulators greater and therefore “should be the incentives of politicians to delegate”.⁴⁷ Once there is an independent regulator, the use of formal means of control, such as the government’s legally reserved competence to overturn a decision, can become more difficult, which in turn can strengthen the regulator’s *de facto* independence. It must be recognised that this is of less importance if the government can achieve the same result with informal tools rather than formal ones.

1.1.3 Notions of independence

The independence of regulatory authorities is a multi-faceted concept, the interpretation of which depends heavily on context. According to Baudrier the notion of independence is problematic per se: “Although it is widely accepted that independence is a necessary feature for an effective regulator, the concept proves difficult to define because of its multiple dimensions”.⁴⁸

As the notion of independence has often been defined in the context of an institution, namely the regulators, the literature overview here focuses on general definitions of independent regulatory authorities or agencies, and independent regulatory bodies as they are referred to for the purpose of this study.

Regulators’ independence is a recent subject of research and in the literature various concepts and methods to conceptualise and operationalise independence are discussed.⁴⁹ As a result, independence is subject to different interpretations and definitions that often focus on specific characteristics, in which aspects of formal independence are much more discussed than *de facto* independence. Some use it interchangeably with autonomy;⁵⁰ others perceive greater or lesser differences in meaning between the terms.⁵¹

Often independence is understood to connote self-determination in the sense that actors can judge and follow their own interests and values.⁵² Accordingly, the central characteristic for independence is “the ability to transform self-set values into authoritative actions”.⁵³ In respect to political institutions, independence can be assessed from “the extent to which self-imposed goals and values can be distinguished from external determination”.⁵⁴ On an abstract level, this notion reinforces the understanding of independence as a dynamic variable in relation to various possible dependences stemming from particular interests.

47 Gilardi, F. (2002): 877 ff.

48 Baudrier, A. (2001): 4.

49 Verhoest, K. et al (2004): 102.

50 E.g. Gilardi, F. / Maggetti, M. (2009): 3; Verhoest, K. et al (2004): 101.

51 Smith, W. (1997): 1; According to Smith the two main elements of independence—insulation from improper influences and measures to foster the development and application of technical expertise—are mutually supporting: technical expertise can be a source of resistance to improper influences, and organisational autonomy helps in fostering (and applying) technical expertise.

52 Dahl, R. A. (1989).

53 Nordlinger, E. A. (1981).

54 Huntington, S. P. (1968).

In the US, where independent agencies were operating long before the concept was gaining popularity in Europe, an independent agency is a body outside the major executive departments which is “charged with making and implementing rules and regulations.”⁵⁵ Such bodies are also referred to as “governments in miniature”⁵⁶ because within their scope of competences they combine legislative (e.g. rule-making), judicial (e.g. adjudication and dispute-settlement) and executive (e.g. enforcement) functions.⁵⁷ Thus, the independent regulators may combine three functions that are normally separated: rule-making, rule application and litigation.⁵⁸

According to Michael Powell, former Chairman of the Federal Communications Commission, “to be independent, not only should a regulator be physically and operationally separated from those it regulates, but also be empowered to carry out policy by making objective, well-reasoned, written decisions arrived at through transparent processes, and based on a complete, public record. Regulators should be free from undue political influence during this process, and impartial decisions based on the record should not be undermined for political reasons. Finally, the scope and substance of a regulator’s jurisdiction should be clearly mandated by statute, and there should be adequate funding to carry out its responsibilities.”⁵⁹

Thatcher defines an independent regulatory body as “a body with its own powers and responsibilities given under public law, which is organisationally separate from ministries and is neither directly elected nor managed by elected officials”⁶⁰. The following definition by Gilardi and Maggetti combines characteristics which have been put forward by Majone and Thatcher, two leading authorities in this area of research. Independent regulatory authorities, they suggest, are commonly “highly specialised organisations enjoying considerable autonomy in decision-making as they are institutionally and organisationally disaggregated from the ordinary bureaucracy and constitutionally separated from elected politicians”.⁶¹

In the context of broadcasting, a recent World Bank study for instance stated that: “The regulation of broadcasting should be the responsibility of an independent regulatory body established on a statutory basis with powers and duties set out explicitly in law. The independence and institutional autonomy of the regulatory body should be adequately and explicitly protected from interference, particularly interference of a political or economic nature.”⁶²

Independence can be understood as “the absence of pressures from political and industry interests”⁶³. Fesler proposes (1) independence of control by the governor and legislature, (2) independence of control by [utility] companies, and (3) independence manifested in integrity and impartiality.⁶⁴ Fesler’s definition stresses independence not only from government but also from

55 Bardes, B. A. / Shelley, M. C. / Schmidt, S. W. (2007): 414.

56 Jacobzone, S. (2005b): 72.

57 Majone, G. (2005b): 133.

58 Demarigny, F. (1996).

59 Cited in Baudrier, A. (2001): 5.

60 Thatcher, M. (2002a): 125; Thatcher, M. / Stone Sweet, A. (2002): 2; Gilardi, F. (2008): 21 ff.

61 Gilardi F. / Maggetti, M. (forth coming).

62 Buckley, S., et al (2008): 160.

63 Geradin, D. / Petit, N. (2004): 49.

64 Fesler, J. W. (1942): 22.

regulated parties, ruling out traditional corporatist agreements. For Smith, independence consists of three elements: (1) an arm's-length relationship with regulated firms, consumers⁶⁵, and other private interests; (2) an arm's-length relationship with political authorities; (3) the attributes of organisational autonomy.⁶⁶

1.1.3.1 Two levels of autonomy

In the literature, autonomy is not always seen as a single dimension, but rather an asset like others that can be addressed at different levels. Verhoest et al draw a conceptual distinction between these two kinds of autonomy:

1. Autonomy at the level of decision-making competencies of the agency (concerning management on the one hand and concerning agency policy on the other hand) and;
2. Autonomy as the exemption of constraints on the actual use of decision-making competencies of the agency (referring to structural, financial, legal and interventional constraints on the agency's decision-making competencies).⁶⁷

According to Gilardi and Maggetti, independence consists of two components: (1) Self-determination, where interests and values are distinct from their environment and (2) ownership over the process and actions without external constraints.⁶⁸ Consequently, a distinction between formal and *de facto* independence of regulators can be made⁶⁹ which is also reflected in the scope of this study. While general conclusions on formal independence seem to be quite undisputed, a more complicated and disputed question is the extent to which criteria for *de facto* independence and efficient functioning can be developed, and how the emerging hypotheses can be validated with empirical evidence (see chapter 1.2).

1.1.3.2 Theoretical directions of independence

Acknowledging that there is not one definition of independence but rather many definitions which place independence in the context of their respective discipline and research, the boundaries of the concept are rather blurred and volatile. Yet these definitions for independence do contain a core of recurring theoretical elements that can be used to conceptualise independent regulatory authorities and synthesise dimensions of independence for further analysis.

65 Lamanauskas retains that independence from consumers might pose less of a threat to independence because "it is unlikely that regulator would be captured by unreasonable consumer interests", Lamanauskas, T. (2006): 73.

66 Smith, W. (1997): 1.

67 Verhoest, K. et al (2004):104.

68 Gilardi F. / Maggetti, M. (2009): 2.

69 Gilardi F. / Maggetti, M. (2009): 3.

It is becoming apparent that independence can be approached regarding its theoretical directions:

1. Independence from external interests
 - a. elected politicians
 - b. regulatees and
 - c. other private interests
2. Organisational autonomy
3. Impartial and credible regulation

Credibility is an element of independence, insofar as it serves as major determinant of strength in the case of conflict. In the field of audiovisual media services, this finding is supported by Jakubowicz: “It [the regulator] needs to win a good reputation in the industry it regulates and among the general public. If it can do that, it will not be left alone at a time of conflict with politicians“.⁷⁰

In the literature, much emphasis has been put on independence from elected politicians, which has been studied widely across disciplines. It is tightly linked to the high-level dimension of organisational autonomy which is in itself a combination of the institutional design, regulatory powers and access to independent funding vested in the regulatory authority. Fairly recently, independence from regulatees and the relationships of independence, and impartial and credible regulation, have emerged as a topic of research, too.⁷¹ Possible influences from the direction of the regulated industry can also be explained theoretically:

Agency loss: In principal-agent models, agency losses occur if the independent regulator behaves contrary to the preferences of its principals. According to Gilardi, “granting formal independence by no means implies that all controls are abandoned”⁷². According to Thatcher, agency losses can arise from two sources, from shirking and from slippage. “Shirking” happens if the agent follows its own preferences which diverge from those of its principal(s). Slippage on the other hand causes the agent to behave due to institutional incentives contrary to the wishes of its principal(s), which could result to the adoption of politically undesirable decisions. Thatcher stresses the function of institutional design to mitigate “agency losses”.⁷³ Principals can establish mechanisms, notably administrative procedures that apply before the agent acts, and ongoing devices that apply after delegation. *Ex ante* mechanisms could be, among others, screening and selection mechanisms for the choice of agents. Thus, principals create formal controls such as powers over appointment, dismissal, budget setting and review or reversal of agents’ decisions, in order to attempt to ensure that agents follow their preferences.⁷⁴

Regulatory Capture: Regulatory capture is quite a common phenomenon in the case of regulatory authorities. Some authors argue that sector-specific independent regulatory authorities are

70 Jakubowicz, K. (2007): 4.

71 Thatcher, M. (2002): 954 ff.

72 Gilardi, F. (2005b): 142.

73 Thatcher, M., (2006): 48.

74 Ibid: 48.

particularly vulnerable to regulatory capture.⁷⁵ The main reasons can be found in the expertise, and the special characteristic of the regulatory authorities. Due to the limited number of experts available in the sector, the staff of the regulators and the staff of the market players are recruited from the same pool of experts. The turnover in staff is limited due to the technical specialisation of sector-specific independent regulators.⁷⁶ As a consequence of the risk aversion of the regulators (will they get any job in the market later, if they act as a heavy handed regulator or against their former employer?), balanced and impartial decision-making may be endangered as well. Such regulators rarely have an active ‘public constituency’ to supply feedback pressure.⁷⁷ There is also a direct link between capture of staff and the issue of ‘revolving doors’. However, some scholars doubt that the revolving door automatically lead to capture, as it is a situational, rather than structural, problem.⁷⁸

In addition, the regulators’ **self-sustaining and lobbying power** is an unexpected result of independence, which is connected with capture, but from a different perspective. As a result of a gradual relocation of competences from ministries to the regulators, the regulators may be increasingly in a position to “capture” the principal, i.e. the relevant ministry, since the ministry is more and more lacking professional expertise, which the regulator possesses progressively more. As a consequence, regulators are getting able to affect government policy and, through the ministries, they can have a voice in shaping related EU rules. The reform of the common regulatory framework for electronic communications networks and services is a good example of this gradual shift. National regulatory authorities now hold a strong position as a result of the high level of EC harmonisation in some network industries. As competence gathers on the side of the regulators and regulatory tasks diminish, with the diminishing need for codification⁷⁹ the ministries are becoming ‘empty’ (lack of experts), and as a consequence they must rely increasingly on the expertise of regulatory authorities.

Information asymmetries: Another aspect of regulatory capture is the asymmetric access to information that every regulator is confronted with. The background to this problem is that the regulated stakeholders hold much of the information the regulator needs and they want to keep this advantage for themselves, which leads to a continuous conflict of interest and a resulting risk that the industry can manipulate the regulator due to the asymmetric access to this information.⁸⁰ This is understandable due to the well-known fact that in a strong negotiating position it is easier to reach a favourable result. Majone, however, argues that sector-specific regulators are more likely to be able to match the expert knowledge of the regulated industry and limit the problem

75 Mitnick, B. (1980); see also OECD, 1999, Background note on the relationship between regulators and competition authorities.

76 See Larsen, A et al. (2006): 2859.

77 Mitnick, B. (1980); quoted by Larsen, A et al. (2006): 2859.

78 Makkai, T. / Braithwaite, J. (1992): 61, 73 ff.

79 In the most of the network industries regulation was characterised by high level of EC harmonisation, periodical reviews of the regulatory frameworks and fluctuating but gradually diminishing need for regulatory personal in codifications. This resulted in the decreasing number of experts in the line ministries.

80 Larsen, A. et al. (2005): 9.

of asymmetric information.⁸¹ Nevertheless, information is of key importance in the regulatory processes and regulators do not normally enjoy full access to all necessary information, partly as a consequence of the diverging interests of the regulatee and regulator.

Undue interests in sector: Finally, there is a risk that the regulator's independence is compromised by the regulator's private interest in the sector, e.g. when the regulator holds stocks in a unit trust investing in the regulated industry.⁸² Most of these risks are addressed by formal safeguards for independence, such as conflict-of-interest rules, cooling-off periods, and exemption from civil servant rules; however, their implementation in practice has yet to be verified.

1.1.3.3 Risks of absolute independence

Beside the drivers and reasons for independent regulatory authorities, the risks and counter arguments to complete independence must be taken into consideration as well, as they certainly have an influence on independence and efficient functioning, too.

According to Majone, independence can lead to “excessive and unpredictable regulatory discretion, bureaucratic drift and agency capture”.⁸³ We must stress that many of possible shortcomings depend on the specific sector the regulator is dealing with. Nevertheless, it is possible to identify the main risk here: According to Demarigny⁸⁴, regulatory authorities enjoy three, previously separate functions which had belonged to the three branches earlier, namely rule-making, rule application and dispute settlement. The separation of these functions is important because each of the three needs different degrees and directions of autonomy, but at the same time must be evaluated and assessed as one, due to the fact that only one authority deals with all three: From the institutional point of view, independent regulators are seen as “constitutional anomalies”.⁸⁵ The justification of independent regulators in a democratic system here generally builds on the assumption that independent experts will make good decisions based on rationality, balancing divergent interest and thus favouring the public interest.⁸⁶ One argument for this view is that experts are more interested in making reasonable and fair decisions, because they have the most to lose from a ruined reputation in the long term.⁸⁷ However, since in many cases the board members of regulators are appointed rather than elected, the lack of solid democratic legitimacy is an important issue that requires compensating safeguards.

The lack of democratic legitimacy is not the only drawback in cases of potential absolute independence; there can also result a situation in which the regulator strays from its mandate, engages in corrupt practices, or becomes grossly inefficient.⁸⁸ In such cases, it is often maintained that greater independence would usually need to be balanced by stricter requirements for checks

81 Majone, G. (1996).

82 Smith, W. (1997): 2.

83 Majone, G. (2005a): 52.

84 Demarigny, F. (1996).

85 Majone, G. (1996).

86 Hall et al. (2000).

87 Milgrom, P. / Roberts, J. (1992); as cited by Larsen, A. et al. (2006).

88 Smith, W. (1997): 1 ff.

and balances. Thus, checks and balances, such as transparency and accountability mechanisms, auditing requirements or court-appeal possibilities can be considered as safeguards for both the democratic legitimacy and the efficient functioning of the regulator.

In the regulatory literature, the role of independence is especially examined in conjunction with accountability mechanisms as two concepts with contradicting interests, where it is stated that greater independence would usually need to be balanced by stricter requirements for accountability. With regard to the objective of balancing those values, Majone consequently maintains that “independence and accountability are complementary objectives and a regulatory framework should be mutually supportive of both values as much as possible, although tradeoffs do exist”.⁸⁹

1.1.3.4 Efficient functioning as an independency-intertwined issue

As shown above, the issue of independence is tightly connected to the examination of efficient functioning of regulatory bodies, which adds an additional dimension to an assessment which focuses on the question of whether regulatory bodies are equipped to meet their regulatory objectives in an efficient manner.

Initially the rationales for the creation and spread of independent regulatory authorities were linked to the argument that this model of institutional governance leads to better and more effective regulation. However, de Visser’s warning in relation to the ideal model for communications regulation in the European Union nevertheless holds true across sectors: “The utopian model of enforcement does not exist. This realism is a sobering call for tempered expectations by undertakings, institutions and the public”.⁹⁰

One strand of theory argues that delegation to independent bodies is conducive to specialisation and these bodies are in a better position to cope with increasingly complex regulatory environments that would in turn result in higher efficiency.

In this context, independence as such does not ensure efficient functioning regulators per se, but it is a pre-condition without which efficient functioning cannot otherwise be achieved. The intertwined relationship between efficient functioning and independence becomes even more clear when looking at other requirements that ensure efficient functioning: Accountability and transparency mechanisms.

Prescribing transparency and other good regulatory practices actually helps a regulator to stay accountable, fair and impartial to its stakeholders. It is argued that good regulations or “good governance is increasingly seen as a key determinant of the success or the failure of regulatory bodies.”⁹¹ Smith lists six accountability measures to be implemented as formal safeguards of independence:

1. Mandating rigorous transparency, including open decision-making and publication of decisions and the reasons for those decisions;

89 Majone, G. (2005): 52 ff.

90 De Visser, M. (2007): 29.

91 Geradin, D. / Petit, N. (2004): 6.

2. Prohibiting conflicts of interest;
3. Providing effective arrangements for appealing against the agency's decisions;
4. Providing for scrutiny of the agency's budget, usually by the legislature;
5. Subjecting the regulator's conduct and efficiency to scrutiny by external auditors or other public watchdogs; and
6. Permitting the regulator's removal from office in cases of proven misconduct or incapacity.

Applying normal rules of good governance and an increased role for public consultations may also improve the informal accountability without compromising the regulator's independence.

Another dimension for accountability is the availability of auditing, which can involve three possible dimensions: review of regulatory decisions, auditing and accounting, and overall economic assessment. The possibility of legal or judicial review exists in all OECD countries, albeit with different judicial and legal systems. The auditing dimension is of limited relevance for regulatory authorities, since these agencies are usually relatively small in public finance terms. An overall economic assessment can be ensured by instituting a mandatory release of performance assessment reports, to check whether regulators have fulfilled their objectives. These reports can be prepared by regulatory authorities themselves in their annual reports, or they can also result from an external assessment.⁹² Their availability can be considered as an important element for transparency and efficiency in public decision-making.

Good governance or regulatory practices are increasingly seen as a key determinant of the success or failure of regulatory bodies and may, thus, be considered a proxy for the efficient functioning of regulatory bodies.⁹³ For example, the UK Better Regulation Task Force advises that regulation – and its enforcement – should meet five Principles of Good Regulation:

1. Proportionality – Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed. Costs should be identified and minimised.
2. Accountability – Regulators must be able to justify decisions and be subject to public scrutiny.
3. Consistency – Government rules and standards must be joined up and implemented fairly.
4. Transparency – Regulators should be open and keep regulations simple and user-friendly.
5. Targeting – Regulation should be focused on the problem and minimise side effects.⁹⁴

Likewise, the European Commission has promulgated its own set of good governance principles: openness, participation, accountability, effectiveness and coherence.⁹⁵ For Geradin and Petit “principles of good governance are essential component of sound (economic) regulation”⁹⁶.

92 Cf. Geradin and Petit (2004): 55.

93 Geradin, D. / Petit, N. (2004): 20 ff.

94 Arculus, D. (2005): 49.

95 European Commission. European Governance: White Paper. COM(2001)428final.

96 Geradin, D. / Petit, N. (2004): 34.

With a view to efficient functioning, an additional point to look at is the question of whether the structure and powers of the regulator are optimally adapted to the context in which it has to operate. When looking at electricity regulation in the European Union for instance, Larsen maintains that, due to countries' legal and administrative traditions, national differences have supposedly "significant influence on the formal design of regulators, their practice and the market outcome as well."⁹⁷ Before this background, efficient functioning is inevitably linked to the (national) ecosystem in any given sector, while diversity of national situations can also imply a certain level of variety with regard to efficient functioning of national independent regulatory agencies.

1.1.4 Literature recommendations regarding independence – striking the balance

Majone (1996) and Hall, Scott and Hood (2000)⁹⁸ all stress that "the concept of a completely autonomous and absolute regulator may be very far from the practical reality of independent regulators." For Majone, an independent agency is "an oxymoron" because the two terms contradict each other.⁹⁹ He concedes that "the concept of agency implies a relationship in which the principle retains the power to control and direct the activities of the agent."¹⁰⁰ In spite of this "conceptual ambiguity"¹⁰¹ the notion of the independent agency is commonly used to refer to "a type of bureaucratic agency created through delegation from elected politicians".¹⁰² Moreover, he finds noticeable similarities to the concept of fiduciaries in commercial relationships where certain fiduciary duties towards the principle arise from the delegation of responsibilities.¹⁰³ Larsen *et al* concur because "there are certain limits to the degree of independence attainable (or desirable)"¹⁰⁴.

From the outset a number of authors recognise that independence is an essentially theoretical concept. "Since regulatory bodies are not self-referential autopoietic systems, but open to influences and interactions with other social systems, independence is to be understood as a relative figure."¹⁰⁵ Regulatory agencies are "neither fully autonomous nor fully dependent from their environment".¹⁰⁶ Between the two poles, independence is rather a continuum¹⁰⁷ and the degree of independence greatly varies between regulators, which can be attributed to different social, economical, and constitutional systems and modes of government.¹⁰⁸ Thus, research on the independence of regulatory bodies can be better described as research on the degree of independence.¹⁰⁹

97 Larsen, A. et al. (2005): 19.

98 Hall, C. et al. (2000).

99 Majone, G. (2005b): 126.

100 Majone, G. (2005b): 126.

101 Majone, G. (2005b): 126.

102 Thatcher, M. (2005): 349.

103 Majone, G. (2005b): 144; Jacobzone, S. (2005): 72.

104 Larsen, A. et al. (2005): 9.

105 Kickert, W. J. M. (1993).

106 Gilardi, F. / Maggetti, M. (2005): 3; Thatcher, M. (2005): 351; Gilardi, F. (2008): 56.

107 Gilardi, F. / Maggetti, M. (2009): 3.

108 Gilardi, F. (2008): 1.

109 Gilardi, F. (2008): 2.

For Lamanauskas, independence of a regulator is not “an absolute freedom from influence of interests of various stakeholders of the regulatory process but rather a necessity for a regulator to keep an equal distance from all possible interests in order to balance them impartially and aim at achieving long-term results benefitting all stakeholders as contrary to serving short term interests of various groups.”¹¹⁰

Similarly, Melody points out that the term “independence” is often misunderstood.¹¹¹ It does not imply independence from government policy, or usurping the power to make policy, but rather independence to implement policy without undue interference from politicians or industry lobbyists.¹¹² Government retains the primacy to legislate and sets the statutory frameworks, including the scope of the regulators’ competences, within which the regulator can be independent on the level of (subordinate) policy formulation and policy implementation.

This notion of the imperfection of independence also resonates in Majone’s reference to fiduciaries. Hence, further deliberations on independence are not referring to the absolute concept but rather to the best achievable practice of a regulator’s independence as embodied in the definitions for independent regulatory authorities.

1.1.5 Formal vs. *de facto* (or “operational” or “informal” or “real”) independence

In literature the dichotomy of formal and *de facto* – also referred to as functional and factual or real – independence is widely recognised (see above), although much of the research focuses on the dimensions of formal independence, where for example the relationship between institutional design and independence is arguably more straightforward.

1.1.5.1 Reasons for a differentiation between formal and *de facto* independence

Formal independence is essentially the product of the laws and statutes prescribing the institutional design and procedural safeguards of an independent regulatory body. The creation of formally independent regulatory agencies, however, just reallocates politicians’ initial commitment and it transforms “into whether or not the government is now credibly bound to accept and not undermine the independence of the regulator”.¹¹³ An exclusively formal approach would miss out when it comes “to the discretion allowed by the institutional framework and the effects of the relationships – less formalised – with other actors than the decision-makers, namely the regulatees, that possibly will affect the behaviour of IRAs”.¹¹⁴ Thus, formal independence needs to be accompanied by *de facto* independence (or “real” independence) which refers to the practical implementation of all safeguards for formal independence as well as the overall compliance with formal provisions.

110 Lamanauskas, T. (2006): 79.

111 Melody, W. H. (1997a): 197.

112 Melody, W. H. (1997a): 197.

113 Montoya, M. Á., / Trillas, F. (2007): 183.

114 Gilardi, F. (2008): 4.

1.1.5.2 Elements of formal independence

Formal independence refers to the legal framework under which the regulatory authority was set up and operates, such as legislation governing agencies' activities and rules of procedure. Regulators' independence is rarely protected under the constitution but in most cases is vested by way of their enabling legislation,¹¹⁵ which can include a declaratory statement on the independence and/or a set of provisions deemed necessary to infuse independence to the regulator.

Thatcher considers as minimum requirements of formal independence:

1. The agency has its own powers and responsibilities given under public law;
2. it is organisationally separated from ministries; and
3. it neither is directly elected nor formally managed by elected officials.¹¹⁶

Specific measures to support the arm's-length relationship with the political system are clearly defined and exclusive competencies including: the right to impose sanctions; the exception from the minister's discretionary powers; and a range of safeguards to ensure independence of members of the highest decision making organ of the independent regulatory body, notably with regards to the appointment, tenure and protection from dismissals on political ground.¹¹⁷

Gilardi identifies five dimensions of formal independence, namely:

1. Status of the agency head (e.g. term of office and appointment and dismissal procedure)¹¹⁸,
2. Status of the members of management board,
3. Relationship with government and parliament,
4. Financial and organisational autonomy¹¹⁹ and
5. Regulatory competencies.¹²⁰

Smith champions seven formal safeguards for independence, two of which provide, in addition to the above, an entry point for expertise:

1. Providing the regulator with a distinct legal mandate, free of ministerial control;
2. Prescribing professional criteria for appointment;
3. Involving both the executive and the legislative branches in the appointment process;
4. Appointing regulators for fixed terms and protecting them from arbitrary removal;
5. Staggering terms so that they do not coincide with the election cycle, and, for a board or commission, staggering the terms of the members;

115 Baudrier, A. (2001): 355.

116 Thatcher, M. (2005): 352.

117 Geradin, D. / Petit, N. (2004): 49; Fesler, J. W. (1942): 22; Smith, W. (1997): 1; Larsen, A. et al. (2005): 9; Majone, G. (1996); OECD, (2001).

118 Gilardi, F. (2005b): 146; Gilardi, F. (2008): 56.

119 See also Larsen, A. et al. (2005): 9.

120 Gilardi, F. (2008): 56.

6. Exempting the agency from civil service salary rules that make it difficult to attract and retain well-qualified staff; and
7. Providing the agency with a reliable source of funding, usually earmarked levies on regulated firms or consumers.¹²¹

These safeguards are especially important in countries that lack a long-term tradition of independent public institutions.¹²² Literature discussing in more detail certain specific formal safeguards of independence is presented below.

1.1.5.2.1 Status and regulatory powers

One of the dimensions of formal independence concerns the scope of decision making authority. According to Smith, regulators can be classified in the following way: There are those regulators which are separate units within a ministry, those that are separate agencies with the minister taking part in decision making, and finally those that can be said to be truly independent agencies, which make recommendations, have decision making powers and, last but not least, rule-making powers.¹²³

In the literature, many authors stress the distinction between regulatory agencies that are truly regulatory and possess actual decision-making powers, and agencies that are merely consultative. According to this position, independent regulatory authorities must hold exclusive decision-making powers. Ideally, independent regulatory authorities do not produce services or perform ordinary administrative tasks, nor do they engage in policy-making. Instead, they are given the power to lay down rules, regarding, for instance, the calculation of tariffs for network access, in order to attain the goals set out in the legislation.¹²⁴

Since certain independent regulatory bodies combine regulatory powers with elementary rule-making (e.g. by-laws), the concept blurs the established boundaries of executive, legislative and judiciary powers. The ability to pass general abstract rules is used as a criterion to classify independent regulatory bodies because exclusive decision-making powers are setting the scene for self-determination within the statutory remit and mandate of the authority.

Moreover, functional separation of regulatory and operational activities is often implemented as a formal safeguard for independence in the utilities sector.¹²⁵ Conflicts of interest can arise in relation to the incumbent and also in relation to the state where state ownership of the incumbent persists.¹²⁶ Where historically the regulatory and the operational activities were combined in public bodies holding special and exclusive rights, with liberalisation and privatisation of the incum-

121 Gilardi, F. (2008): 56.

122 Gilardi, F. (2008): 56.

123 Smith, W. (1997).

124 Teitgen-Colly, C. (1988).

125 Baudrier, A. (2001): 4; In the telecommunications sector: WTO Agreement on on Basic Telecommunications; Article 3 (2) 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 (Framework Directive).

126 Edwards, G. / Waverman, L. (2006): 23 ff.

bent the regulatory functions have been divested, and in most instances given to an independent regulator.¹²⁷

1.1.5.2.2 Financial autonomy

As Smith observes, measures of organisational autonomy may enhance the independence of the regulatory authority.¹²⁸ Organisations gain autonomy when they have maximum control of the input of resources on which they are dependent.¹²⁹ In particular, a stable source of funding, e.g. by a fee levied on the regulated industries, and the authority to control appointment, allocation, promotion, dismissal and salary policies in relation to the regulatory authority's staff, are important attributes.

1.1.5.2.3 Autonomy of decision makers

The most obvious safeguards to create an arm's length relation from elected politicians stem from a legal framework which prescribes how the members of the highest decision making organ of the independent regulatory body take office. Thus, the nomination, appointment, tenure and protection against dismissal are of utmost importance when looking at the formal independence of independent regulatory agencies.¹³⁰ There are different variations practised in different countries and this dimension of formal independence is certainly much influenced by national styles of government and political systems.¹³¹

Thus, the literature does not attempt to identify a single correct model for nomination and appointment procedures, but instead concentrates on whether it is conducive to the politicisation of appointments and whether a specific approach is more likely to mirror political majorities.

To avoid a situation where the regulator takes instructions from the appointer in order to get reappointed, appointment procedures that involve several parties (e.g. both parliament and government), and provisions against reappointment, can be made. For Thatcher, longer tenure offers greater expertise and independence, especially when it is longer than the election cycles, because regulators can outwait elected politicians.¹³² According to Smith, a second way to enhance independence is the use of staggered terms so that they do not coincide with the election cycle, and, for a board or commission, staggering the terms of the members.

For Smith, independence is positively linked to "the development and application of technical expertise"¹³³, because expertise can be a source of resistance against improper influences. Hence, measures to require and attract expertise must be implemented at the level of formal independ-

127 Geradin, D. / Petit N. (2004): 8.

128 Smith, W. (1997): 1 ff.

129 Pfeffer, J. / Salancik, G. (1978): 32.

130 Gilardi, F. (2005b): 146; Gilardi, F. (2008): 56.

131 See for example Machet, E. (2002).

132 Thatcher, M. (2005): 358.

133 Smith, W. (1997): 1 ff.

ence, such as applying professional criteria for appointment and also exempting the agency from civil service salary rules in order to attract highly qualified staff.¹³⁴

1.1.5.2.4 Transparency and accountability mechanisms

The institutional design of independent regulatory agencies is commonly used to hedge the risks of independence and to put checks and balances in place. Similarly, Smith stresses that checks and balances are required to ensure that the regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient.¹³⁵ It is maintained that greater independence would usually need to be balanced by stricter requirements for accountability. Thus, checks and balances such as transparency, formal accountability and auditing requirements can be considered safeguards for the independence of the regulator.

In sum, albeit that variations pertain especially regarding the importance and interpretation of some elements of formal independence, there can be established a list with regard to the dimensions that must be considered when asking for formal independence, i.e.:

- Status and powers (i.e. a general framework, institutional framework, and [clear delegation of] regulatory powers): cf. 1.4.5.2
- financial resources: cf. 1.4.5.3
- autonomy of decision makers (in particular nomination and appointment procedures, and dismissal): cf. 1.4.5.4
- knowledge (see Gilardi and Smith on formal independence in 1.1.6.2): qualification and expertise requirements of board and staff members; cf. 1.4.5.5
- Accountability and transparency (*inter alia* checks and balances, procedural legitimacy): cf. 1.4.5.6.

1.1.5.3 Elements of *de facto* independence

In the literature, *de facto* independence is mostly described as protection from political interference.¹³⁶ Also, interference of regulatees can take place on a *de facto* basis. Gilardi and Maggetti use *de facto* independence to “connote the extent of regulators’ effective autonomy as they manage their day-to-day regulatory action”.¹³⁷ It refers to “the autonomy of an agency in shaping the regulatory action applied to a target sector”.¹³⁸ *De facto* independence is accordingly reduced “if the regulatory action of an IRA [independent regulatory authority] is biased by other actors, *ex-ante* (by colonising the agency) or *ex-post* (by swaying the activity of regulation executed by the agency)”.¹³⁹

134 Smith, W. (1997): 1 ff.

135 Smith, W. (1997): 1 ff.

136 Nicolaïdes, P. (2005): 163.

137 Gilardi, F. / Maggetti, M. (forth coming); Maggetti, M. (2006): 3.

138 Maggetti, M. (2006): 3.

139 Maggetti, M. (2006): 3.

The question of *de facto* independence arises not only with regard to the question whether formal independence has been achieved in practice, but also with regard to independence from other or more subtle forms of interference.¹⁴⁰ Larsen *et al* state that even if regulators were granted formal independence “government can influence the regulators in numerous ways”.¹⁴¹ According to Jakubowicz “there are no fully effective legal or institutional safeguards against informal political influence.”¹⁴² Conversely, it is even argued that regulators can be *de facto* independent without being formally independent.¹⁴³

The risk of regulators being captured by endogenous interests is nothing other than the expression of the independence a regulator has achieved *de facto*. Apart from political actors, regulatees are also able to influence regulation in their own interests.¹⁴⁴ The regulatees in particular “have the incentives and resources to mould the regulatory action of agencies”¹⁴⁵. Maggetti sketches “the *de facto* independence of an agency as a two-dimensional space with two axes: the relationship with the political decision makers and the one with the regulatees.”¹⁴⁶

Conceptual approaches to *de facto* independence take a two-pronged approach. The first one mirrors the implementation of formal independence (“compliance”) and the second concerns other threats to *de facto* independence.

1.1.5.3.1 *De facto* independence as implementation of formal independence

The first aspect of *de facto* independence concerns the implementation of all formal dimensions of independence in practice and involves in essence a reality check on whether formal safeguards are indeed in place (“compliance”). Thus every dimension considered under formal independence has its expression in *de facto* independence.

1.1.5.3.2 Other threats to *de facto* independence

Other areas that have been discussed in the literature as potential external constraints for the independent regulatory body are:

- Legislative changes to the statutory laws of the regulator
- The actual use of formal control opportunities by elected politicians
- Politicisation of appointments
- Alternative compliance mechanisms
- Revolving-door and career paths
- Independence from regulatees and other third parties

140 Maggetti, M. (2006): 3 ff.

141 Larsen, A. et al. (2005): 9.

142 Jakubowicz, K. (2007): 6.

143 Gilardi, F. (2008): 24, 57; Maggetti, M. (2006).

144 Maggetti, M. (2006): 3; Thatcher, M. (2002b): 958.

145 Gilardi, F. / Maggetti, M. (forth coming).

146 Maggetti, M. (2006): 3.

1.1.5.3.2.1 *Legislative changes*

Politicians have the primacy to alter the formal institutional framework by passing or amending laws that may be used as a means of restraining an independent regulatory body. Examining the track record of changes to the original statute from a historical perspective shows whether changes have taken place which effectively reduce regulators' independence. Thatcher observes the tendency to "widen the competencies of IRA [independent regulatory authorities], sometimes by merging them and sometimes by transferring powers from other bodies"¹⁴⁷. While this can lead to a higher degree of independence on the one hand, the creation of a converged regulator can on the other hand be used as an opportunity to abolish an existing regulator that is politically unwanted.

1.1.5.3.2.2 *The de facto use of formal controls by politicians*

Legal provisions providing for formal controls are considered as elements of formal independence; however, where politicians make use of formal controls it relates to *de facto* independence. Where they have retained formal control, politicians can exert influence over the budget and staffing of independent regulatory authorities. The examination of trends over time can reveal significant changes in the budget or the staffing of regulators, which "might indicate elected politicians using their powers to punish or reward"¹⁴⁸. Conversely, relative stability and continuity in budget and headcount in spite of politicians having the formal means to exert influence can suggest otherwise.

Where politicians have the power to overturn the decisions of regulatory agencies the actual case numbers in which decisions have been reversed can be revealing.¹⁴⁹ However, where politicians have refrained from applying controls, alternative compliance mechanisms may nevertheless exist because regulators anticipate government's ability to use these controls.¹⁵⁰

Thatcher observes that "agencies appear to be autonomous" if politicians do not apply sanctions, but this can also be explained by agents rationally anticipating a principal's response and adjusting to it.¹⁵¹

1.1.5.3.2.3 *Appointment politicisation*

Some studies investigate the politicisation of appointments.¹⁵² Thatcher observes that "appointing individuals with clear party links reduces the public distance between IRAs (i.e. independent regulatory authorities) and partisan politics".¹⁵³ Alternatively, control can also take place through appointments based on policy preferences.¹⁵⁴ Conversely, professionalism and expertise are important assets for the regulator and can contribute to its *de facto* independence. Smith highlights

147 Thatcher, M. (2005): 362.

148 Thatcher, M. (2005): 361.

149 Thatcher, M. (2005): 362.

150 Thatcher, M. (2005): 365.

151 Thatcher, M. (2005): 351.

152 Gilardi, F. (2008): 355 ff.

153 Thatcher, M. (2005): 356.

154 Thatcher, M. (2005): 364.

that the persons appointed to leading positions in independent regulatory agencies must have personal qualities to resist improper pressures and inducements.¹⁵⁵ “They must exercise their authority with skill to win the respect of key stakeholders, enhance the legitimacy of their role and decisions, and build a constituency for their independence.”¹⁵⁶ Another indication of political influence can be the premature departure of members from office¹⁵⁷, which has to be assessed in the light of the circumstances surrounding the leaving or resignation and whether undue political pressure was asserted.

1.1.5.3.2.4 *Alternative mechanisms*

One way to interpret the scarce use of formal controls could be that alternative (informal) mechanisms provide an effective network for exercising control.¹⁵⁸ For example, informal relationships and networks can foster a climate of non-statutory control of independent regulatory agencies and elected politicians (e.g. part of the expert policy community, public sector careers, and expectations of future public appointments). Public sector recruitment patterns can be a web of personal ties linking IRAs with policy makers.

1.1.5.3.2.5 *Revolving door and carrier paths*

‘Revolving door’ studies examine the career paths of employees of regulatory agencies. The ‘revolving door’ opens in both directions: for industry employees wanting to pick up jobs in the agencies, as well as agency staff starting to work for the stakeholders. Although the ‘revolving door’ traditions differ enormously from country to country,¹⁵⁹ there is a perceived risk that “regulators are sympathetic to the views of industry”¹⁶⁰ in order to maintain the prospect of well-paid jobs. However, Makkai and Braithwaite conclude that the revolving door does not automatically lead to capture.¹⁶¹ They argue that the ‘revolving door’ is a situational, not a structural problem.

It can also amount to a movement between government and independent regulator. Thatcher studied the movement within the public sector and in his sample many members of regulators have been higher-ranking officials or advisors to government and ministries before their appointment.¹⁶²

1.2 Measuring independence and efficient functioning

There is no accepted methodology to measure formal and *de facto* independence as well as efficient functioning. It is particularly challenging to identify and collect relevant data about the dif-

155 Smith, W. (1997): 2; Jakubowicz, K. (2007): 5; Lamanauskas, T. (2006): 80.

156 Smith, W. (1997): 2.

157 Thatcher, M. (2005): 357.

158 Thatcher, M. (2005): 364 ff.

159 See Thatcher, M. (2002b): 963 ff; Thatcher has shown for the competition agencies that in Great Britain it is very common for agency staff to take a job in the industry they have regulated, while in Germany this is seldom the case.

160 Larsen, A. et al. (2005): 11.

161 Makkai, T. / Braithwaite, J. (1992): 73 ff.

162 Thatcher, M. (2005): 357.

ferent aspects of independence. Hallin and Mancini argue that similar institutional arrangements for broadcast governance produce different results in different countries¹⁶³, which points to the importance of the political, democratic, economic, and cultural environment.¹⁶⁴

1.2.1 Measuring formal independence

The bulk of available research work with regard to the measurement of independence of different regulatory agencies concern *de jure* or formal independence. This is partly due to the fact that concrete legal provisions can be identified and measured much more easily than any other form (real or *de facto*) of independence.

Based on the methodologies established for measuring the independence of central banks, most of the empirical studies concern analysis of independence in certain network industries, more specifically in telecommunications¹⁶⁵ and energy.¹⁶⁶ Nevertheless, some authors seek to follow a more generalised approach, by developing universal independence indices.¹⁶⁷

The first researches on independence measured independence simply as a binary dummy variable, for example in Bortolotti et al. (2002)¹⁶⁸, Fink et al. (2002)¹⁶⁹, Henisz et al. (2005)¹⁷⁰, Pargal (2003)¹⁷¹, Ros (2003)¹⁷² and Wallsten (2001, 2003)¹⁷³.

Cukierman et al (1992)¹⁷⁴ assessed the independence of the central banks using an extensive sequence of criteria (legal, institutional, cultural and personal), some of which are difficult to quantify and cannot be observed by the researcher. The independence index developed is made up of three dimensions:

1. Formal independence: consisting of formal rules and laws that show the level of independence that the executive government and the legislature are willing to confer on the Central Bank.
2. Real independence: measured by the turnover of directors/presidents of the Central Bank.
3. Questionnaires sent to monetary policy experts to appraise the level of independence of the institution.

Cukierman weighted each variable *ad hoc* and used simple and weighted averages as indicators. He also related the independence with the actual objective of the institution as a performance indicator.

163 Hallin, D. C. / Mancini, P. (2004).

164 See also Larsen, A. et al. (2005): 3.

165 Gutierrez, L. (2003); Edwards, G. / Waverman, L. (2006); Gual, J. / Trillas F. (2004, 2006); Montoya, M. Á. / Trillas, F. (2007).

166 Pedersen, L. / Sørensen, E. (2004).

167 Olivera, G. et al. (2005).

168 Bortolotti, B. / D'Souza, J. / Fantinie, M. / Megginson, W. (2002).

169 Fink, C. / Mattoo, A. / Rathindran, R. (2002).

170 Henisz, W. J. / Zellner, B. / Guillén, M. (2005).

171 Pargal, S. (2003).

172 Ros, A. (2003).

173 Wallsten, S. (2003); Wallsten, S. (2001).

174 Cukierman, A. (1992).

Gilardi (2001)¹⁷⁵ used the model of Cukierman *et al* (1992)¹⁷⁶, with some adaptations, to construct an index capable of appraising various dimensions of mainly formal independence.¹⁷⁷ According to Gilardi, Cukierman *et al.* failed to take into account the renewability of the appointment. In fact, a non-renewable office is typically associated with higher independence.¹⁷⁸ The analysis distinguishes between formal and informal independence. The former is divided into four dimensions:

1. Status of the head of the agency;
2. Status of the management board;
3. Relationship with the government and legislative; and
4. Financial and organisational autonomy.

Each indicator is appraised on a scale of 0 (lowest level of independence) to one (highest level of independence). Following this, each indicator is aggregated, representing the simple average of the indicators of each dimension.

In 2003 Gilardi¹⁷⁹ suggested an investigation of credibility in order to assess the importance of the independence of the regulatory agencies. Accordingly, the higher the level of independence of the regulatory agency, the higher is its credibility. It has to be noted with Gilardi, however, that it is notoriously difficult to measure the degree of credibility.¹⁸⁰ In his words: “Like beauty; credibility is in the eyes of the beholder.”¹⁸¹ Maggetti suggests using reputation in the media, essentially through content analysis, as a comparable indirect measurement approach.¹⁸²

Gutierrez’s studies in 2003¹⁸³ examined the effect of reforms on telecommunications performance using a Regulatory Framework Index. Gutierrez worked with 25 Latin-American countries between 1980 and 1997. The index summarises information on the following dimensions:

1. Legal mandate: creation of the agency by law or lower level norm
2. Separation variables: division of roles between telecommunications operations and regulation activities
3. Independence variables:
 - Autonomy of the regulator: budget and financial independence, turnover of heads of the regulator
 - Existence of clear mechanisms for dispute resolution between regulator and operators
 - Clarity in the roles of the regulator in his ability to set tariffs and fines
 - Transparency in the regulatory process: existence and extent of publishing and explaining regulatory decisions.

175 Gilardi, F. (2002).

176 Cukierman, A. (1992).

177 Gilardi, F. (2002).

178 Gilardi, F. (2002).

179 Gilardi, F. (2003).

180 Gilardi, F. (2005): 58.

181 Gilardi, F. (2008): 134.

182 Maggetti, M. (2010).

183 Gutierrez, L. (2003).

In the results, he found, both for static and dynamic models, that the index and its three individual dimensions had significant and positive effects on fixed line penetration rates and efficiency for a sample of 25 Latin American and Caribbean countries over 17 years.

Gual (2003)¹⁸⁴ proposed the development of two deregulation indices and two concerning the independence of regulatory agencies, all of which have the purpose of analysing in a multidimensional form the process of reforms that can introduce the regulatory agencies. The two independence indices of the regulatory agencies are based on the following items:

1. The degree of responsibility of the regulatory agency concerning certain policies;
2. The degree of independence of financial resources of the agency in relation to the government;
3. Rules for appointment of the director of the agency and its board of directors;
4. Duration of the term of office of the director and of the members of the board of directors;
5. Rules on obligations of reporting to the government, the legislature or to other official agencies.

In 2003 Gheventer¹⁸⁵ developed an index which takes into account the following factors:

1. Decision making process
2. Budgetary autonomy
3. Designation process
4. Technical specialisation
5. Stability of the leadership
6. Political interference in the decision process
7. Capability of enforcement (adequacy of implementing instruments, sanctions)

He used a simple average of the variables, varying between 0 and 1.

In 2004 Pedersen and Sørensen¹⁸⁶ used another method, which consists of ascribing qualitative scores to certain desired parameters of independent institutions. Such evaluation can be made in a historical or comparative perspective. Pedersen and Sørensen discussed the process of transformation of the European regulatory agencies of the oil and gas sector, comparing the historical and institutional perspective of each one of the countries. The data was gathered in interviews held with thirteen regulators, where the independence of the regulatory agencies was defined according to four dimensions containing a specific set of indicators. It must be stressed that the authors emphasised that these characteristics do not in themselves ensure that the agency is independent from political interests. The dimensions are:

184 Gual, J. / Trillas F. (2004).

185 Gheventer, A., *Autonomia versus controle: origens do novo marco regulatório antitruste na América Latina e seus efeitos sobre a democracia*. Ph.D thesis do Instituto Universitário de Pesquisas do Rio de Janeiro, 2003, quoted by Olivera, G. et al. (2005): 14.

186 Pedersen, L. / Sørensen, E. (2004).

Dimension A: Independence from the Government: Assesses if the nomination of the regulators occurs for long and fixed periods, avoiding their re-appointed due to political reasons. Another aspect is the credibility of the agency, attained through a transparent relationship between the agency and the government, avoiding short-term political interventions that affect investors' perception of risk.

Dimension B: Independence of Stakeholders: The regulated agents can “capture” the regulatory agencies by offering important positions and salaries, so as to favour the practices of the industry. The industry can also manipulate the agency due to information asymmetry.

Dimension C: Independence in Taking Decisions: Regulators must have the freedom to take decisions without fear of political punishment or sanctions.¹⁸⁷ One must differentiate the regulatory agencies from those that are mere consulting agencies. In order to be true regulatory agencies, they must have decision-taking power.

Dimension D: Autonomy of the Organisation: The autonomy of the regulatory organisation strengthens the authority of the regulatory agency. An organisation has more autonomy when it controls its resources. Thus, a stable source of resources, through a fee charged to the regulated industries, and the authority to control assignment, promotion and salary policies, are considered to be important resources.¹⁸⁸

The independence index calculated in this case is nothing more than the average obtained from the above four dimensions, with values varying from 0 to 1. A higher value indicates a greater level of independence.

In 2005 Larsen et al¹⁸⁹ continued the earlier Pedersen and Sørensen research in the electricity markets in 14 EU Member States. They used three dimensions, namely:

1. Formal independence from government and legislature: they used ten components including term, appointment (including renewability) and dismissal of agency head, whether independence is a formal requirement for the appointment, source and control of budget, competencies of shaping the internal organisation, and personnel policy of the regulator.
2. Independence of stakeholders: a four-component index including the position of the agency's head in industry/associations, cool-down periods after term, provisions forbidding discussions of pending cases with stakeholders, and the existence of personal or pecuniary interest in the sector.
3. Independent decision-making – which competency does the regulator exercise: this includes competence regarding tariffs, network access, licensing, terms of delivery, disputes, enforcement.

187 Ibid: 8.

188 Ibid: 9.

189 Larsen, A. / Pedersen, L. / Sørensen, E. / Olsen, O. J. (2006).

Gual and Trillas¹⁹⁰ used two principal component indices, one for liberalisation policies and another (11-component) one for telecommunications regulators' independence, for 37 countries in a single year, 1998. They correlated independence and liberalisation policies with a number of political and institutional variables, such as the ideology of the ruling party, interventionist tradition (measured as the legal requirements and number of procedures to set up a business), government quality and effectiveness, or the rule of law. They found that legal independence is more common in countries with a large incumbent and in countries assessed as having a poorer rule of law. They interpreted this as evidence that incumbent firms lobby for agency independence (to better protect their sunk investments), and as evidence that independence is a substitute for other forms to achieve regulatory commitment not to expropriate the incumbent's quasi-rents. They concluded that establishing a legally independent regulatory body is not correlated with the development level of a country. They also found that formal regulatory independence is compatible with different levels of general institutional or regulatory quality.¹⁹¹

Edwards and Waverman¹⁹² constructed a 13-component index of Regulatory Institutions' Independence for the 15 European Union countries prior to the 2004 accession of the ten new Member States from Central and Eastern Europe. They found that state ownership of the incumbent biased regulatory decisions in favour of the dominant firm. They argued that this bias diminishes with higher regulatory independence. They also showed that even among countries with similar economic characteristics, differences in the degree of regulatory commitment can have a substantial impact in terms of private sector investment and entry decisions.

In 2007 Montoya and Trillas¹⁹³ developed three indices that measure the degree of legal (de jure) independence of Telecommunications Regulatory Agencies in 23 Latin American countries for a fifteen-year period (1990-2004). They used a similar methodology to those of Gual and Trillas, Edwards and Waverman, and Gutierrez, with some minor modifications. In the first index they used nine of Gual and Trillas's 11 components for telecommunications regulators' independence, with another one measuring the agency's independence vis-à-vis public powers, by looking at whether the government, rather than the body to which the agency must report has, the ability to dismiss the agency's head. All of the three indices derived show the estimated positive impact of independence on fixed-line telecoms penetration rates.

1.2.2 Measuring *de facto* independence

De facto independence has emerged as a research topic fairly recently and it has become clear during the literature analysis that it's particularly challenging to find meaningful ways to measure it. One approach is an assessment of independence based upon the regulator's impact on the market (including the interests of both the consumers and market players). However, this is the subject of wide debate, balancing different interests, quality of regulation and respecting ac-

190 Gual, J. / Trillas F. (2004, 2006).

191 Montoya, M. Á. / Trillas, F. (2007): 184.

192 Edwards, G. / Waverman, L. (2006).

193 Montoya, M. Á. / Trillas, F. (2007).

countability measures.¹⁹⁴ For the evaluation of these elements, numerous methods have been elaborated. Gilardi used econometric methods (for the evaluation of the impact of independent regulators on the market and the level of regulation) and case-by-case evaluation (for accountability).¹⁹⁵

Besides those impact-centred studies there are only a few attempts to capture real or *de facto* independence based on fairly different methodological approaches.¹⁹⁶

According to Gilardi, “informal” independence is measured by the degree of power that is delegated to regulators, as this strengthens the level of independence of the agency, since it is plausible to find agencies that are formally independent, but with little power, resulting in a practically non-existing regulatory role.

The three following conditions appear to correlate with *de facto* independence: (1) An institutional context where many veto players exist, (2) The age of the regulator, (3) in conjunction with high formal independence.¹⁹⁷ The first conjecture on the influence of the number of veto players is supported by Thatcher, who argues that in the presence of fewer veto players for the exercise of formal controls, IRAs could be prompted to comply with political preferences voluntarily.¹⁹⁸ The participation in networks of agencies at the European level has also been named as conducive to *de facto* independence.¹⁹⁹ Cukierman et al.²⁰⁰ conclude that real independence in the financial sector is influenced by subjective aspects such as tradition, and the personalities of the president and the directors of the bank. Thus, an objective measure to assess the true independence of the central bank would be through the turnover of presidents and directors, based on the assumption that a greater turnover indicates a lower level of independence. They also developed a separate questionnaire for real independence, which complemented the measurement of the level of formal independence. As their main aim was to reflect the personal judgement of monetary experts on the real extent of independence, which was based on legal as well as other pertinent information, one consequence was that the “real” independence variables in the questionnaire sometimes overlapped with some of the legal variables. But they also reflect information about actual practice and independence that is not captured by the legal variables. The authors use as an example for such a situation the legal limitation of lending, which “may be tight but easy to adjust, or to evade, in practice.”²⁰¹

Maggetti advanced the operationalisation of *de facto* independence. He started from the hypothesis that formal independence alone cannot explain the variation of *de facto* independence. Consequently, he looked for other theoretical explanations, such as the life cycle of agencies, the path dependency of regulatory arrangements, implications from the variety of regulatory capital-

194 Nicolaidis, P (2006): 33; Gilardi, F. (2005): 58.

195 Gilardi, F. (2005a).

196 See Cukierman, A. et al. (1992) or Maggetti, M. (2006) in this regard.

197 Gilardi, F. (2008): 135; Thatcher, M. (2005): 364 ff; Maggetti, M. (2006): 4 ff; Gilardi, F. / Maggetti, M. (forthcoming).

198 Thatcher, M. (2005): 364 ff; Tsebelis, G. (2002); Gilardi, F. / Maggetti, M. (forthcoming).

199 Gilardi, F. / Maggetti, M. (forthcoming).

200 Cukierman, A. (1992).

201 Cukierman, A., (1992): 389.

ism and the concept of intermediary agencies to explain *de facto* independence.²⁰² He used the following variables: the degree of formal independence, the age of agencies, the previous mode of regulation, the degree on coordination of the economy and the link between *de facto* independence of agencies from political decision-makers and from regulatees.

He developed a framework of two distinct dimensions of *de facto* independence, i.e. one concerning the relationship with the political decision-makers and one concerning the relationship with the regulatees. In the first case, which Maggetti called “the self-determination of preferences”, agencies are fully independent if their actions follow an internal logic shaped by their organisational dynamic, which is inseparable from official goals. At the other extreme, independence reduces if the agency’s preferences are “hetero-determined”, that is, defined by external actors, beyond the proper mandate.²⁰³ The second component of *de facto* independence of an agency is the ability to translate its preferences into the activity of regulation, i.e. in regulatory texts (ordinances, directives, resolutions, recommendations etc.) and then in single decisions (sanctions etc.). Autonomy will be reduced, consequently, if external actors, once the agency’s preferences are established, can manipulate however crucially the activity of regulation, in order to override the will of the relevant regulatory body.

For his analysis, Maggetti used eight formally independent regulatory agencies, in seven leading European countries²⁰⁴, in the financial and banking and telecommunications sectors.

202 Maggetti, M. (2006): 4 ff.

203 Ibid: 8.

204 Austria, Belgium, Finland, Italy, Norway, Sweden, Switzerland.

Tab. 1 Maggetti's framework to assess the *de facto* independence of regulatory agencies from the political decision makers and from regulatees

Dimensions	Component	Indicators negatively affecting <i>de facto</i> independence
(1) Relationship IRA- Political Decision Makers	Indicators of self-determination of preferences of IRA	<ul style="list-style-type: none"> ▪ Frequency of revolving door ▪ Frequency of <i>ad hoc</i> contacts (internships, exchanges of expertise, regular meetings) ▪ Influence on budget setting ▪ Influence on organisation setting ▪ Weight of partisan membership on board members nominations, moderated by balance of powers and heterogeneity ▪ Political vulnerability (early departures of IRA chief and board members)
	Autonomy of the activity of regulation	<ul style="list-style-type: none"> ▪ Active participation in the IRA's rules-making process
(2) Relationship IRA- Regulatees	Indicators of self-determination of preferences of the IRA	<ul style="list-style-type: none"> ▪ Frequency of revolving door ▪ Frequency of <i>ad hoc</i> contacts (internships, exchanges of expertise, regular meetings) ▪ Relative (in)adequacy of budget dimensions ▪ Relative (in)adequacy of organisation dimension ▪ Closeness of the (former and current) professional activity of board members, moderated by full time positions ▪ Possible personal or business relations, episodes of corruption or intimidation
	Autonomy of the activity of regulation	<ul style="list-style-type: none"> ▪ Active participation to the IRA's rules-making process

Source: Maggetti, M. (2006). *Between Control and Autonomy: Implementing Independent Regulatory Agencies. An empirical comparison.* University of Bath, September 7th-8th, p. 4f.

In line with Maggetti's findings, although not representative of them, agencies show high *de facto* independence when

- they have been recently set-up and correspond to very high standards of formal independence, such as in the telecommunications sector; or
- mature agencies have been going through a process of autonomisation, such as banking and financial supervisory authorities.²⁰⁵

His findings also suggest that, with regard to young regulatory agencies, high *de facto* independence from regulatees can also be a consequence of low *de facto* independence from politicians.²⁰⁶

205 Maggetti, M. (2006): 15.

It follows that an agency that acts as an intermediary between politicians and industry cannot serve both masters.²⁰⁷

1.2.3 Measuring efficient functioning

It has been argued that independent regulators can be evaluated according to their impact on the performance of the markets they regulate (which includes the interests of both firms and consumers), their capacity to strike a balance between conflicting goals, the quality of their regulatory output and their respect for accountability standards.²⁰⁸ Several methods have been proposed for this evaluation. Nicolaïdes, for instance, mentions *ex-post* impact assessments of the effects of regulation on the economy and consumers (to assess the economic impact) and an analysis of how quickly individual decisions translate into action and what their specific effect may be (to assess effectiveness of enforcement).²⁰⁹ Gilardi refers to econometric analysis (for the effect of independent regulators on markets and on regulatory quality) and case-by-case examinations (for their accountability).²¹⁰

Gilardi²¹¹ argues that it should be investigated whether expertise (measured by the share of economists in the regulator), flexibility (measured by the delay between an increase of competition and the adaptation of regulation), credibility (measured through surveys of the perceptions of regulated firms), and stability (measured by the duration of regulatory instruments) have an impact on market performance and other goals.

Verhoest et al.²¹² argue that the empirical link between autonomy and performance is inconclusive. This means that only an integrated and combined study of the six different dimensions of autonomy (managerial and policy autonomy; structural, financial, legal and interventional autonomy) can shed a light on the autonomy-performance question. Such multi-dimensional analysis may be assumed to provide a different perspective on the ongoing academic debate on the causal links between autonomy and performance of public organisations.

1.2.4 Conclusion

After reviewing several different approaches for measuring independence and efficient functioning of regulatory agencies, there is a multitude of varieties of possible approaches that can be applied for the elaboration of a workable set of indicators measuring independence and effective functioning.

As the evidence shows, due to the high number of related empirical approaches, formal independence can be measured easily and in a sophisticated way. However, in order to assess the full spectrum of independence of the regulators properly, besides criteria on formal independence,

206 Maggetti, M. (2006): 15.

207 Gilardi, F. / Maggetti, M. (forthcoming).

208 Nicolaïdes, P. (2005): 33.

209 Ditto.

210 Gilardi, F. (2005a).

211 Ibid: 106.

212 Verhoest, K. et al. (2004).

aspects of *de facto* or real independence also need to be taken into account. *De facto* independence cannot be fully separated from formal independence criteria as they are – to a certain degree – in a complementary relationship with each other, as *de facto* independence builds upon formal independence, at least in regard to the compliance of the *de facto* procedures with the legal provisions.

Concerning *de facto* independence, although there have been interesting new approaches for creating a workable framework, it must be noted that this research still lacks a comprehensive concept that could be used as an initial framework.

The empirical and methodological basis for measuring efficient functioning of the regulators has evolved significantly over the recent years and involves a number of proven approaches and performance indicators. However, measuring efficient functioning involves a number of aspects that are sometimes overlapping, and sometimes different from the issue of independence, as shown above.

As almost all empirical studies and approaches concerned sectors different from the media sector, both variables and findings need to be evaluated with a certain caution. The banking and financial, telecommunications and energy sectors, although sharing more or less the same institution of independent regulators, are different from the media regulators regarding their goals and means.²¹³ Two aspects that are specific to the media sector are particularly relevant in this respect:

1. the double objectives of regulation in the media sector (legislation and regulation) not only aiming at guaranteeing fair competition on the market, but also at the protection of fundamental rights, such as freedom of speech
2. the specific (and sensitive) relationship between the media sector and the public authorities (i.e. the media as ‘fourth state power’)

1.3 Working definition of “independence” and identification of indicators for the study

1.3.1 Choosing a working definition for this study

Based on the theoretical insights made so far, one can first of all state that there is no such thing as an independent regulator, at least if that term refers to absolute independence. Regulators need power, financial resources, and knowledge, none of which can be produced by the regulator autonomously.

Furthermore, there is so far no comprehensive and consistent theory of independence that we could simply apply to derive criteria and indicators. This is not caused by lack of academic effort but is rather a consequence of the nature of independence. One can clearly see that independence is in many ways a relative term, the definition of which depends on the purpose of independence

213 Not to mention the significant smaller impact on the overall economic sector-performance.

within the given context. Therefore, different studies operate with variations of theoretical frameworks, and by consequence different indicators to measure independence.

The analytical framework suggested in academic literature that best reflects that insight is the construction of key features of independence by Tomas Lamanuskas²¹⁴. He describes independence as an arm's length relationship with market players, political influence and consumers, and focuses on identifying safeguards to ensure this arm's length from actors and interests.

Modern regulatory theory tends to describe the regulatory landscape as the governance structure.²¹⁵ The concept of governance is explicitly not state-centred but includes all constraints than an actor encounters – whether they stem from government, industry or others. What Lamanuskas does – described in governance theory terms – is to position the regulator within the governance structure. Analysing that structure will show which means the different actors have at their disposal to influence the decision making of the regulator. Organisations which are competent for decision-making – even traditional administrative bodies²¹⁶ – are to some degree autonomous; however, that does not mean that their decision-making process cannot be influenced. The mapping of the governance structures will show the actual interaction distance between regulators and those actors likely to exercise influence. To map this position, the analysis has to address both the resources of influence that – metaphorically speaking – pull the regulator towards an actor in the field, and possible safeguards that enlarge the interaction distance. Dependence on another actor pulling in a different direction might under specific circumstances be regarded as such a safeguard.

Against this background, our understanding of independence of regulators can be described as follows:

A regulator is independent if it has within the governance structure a position that ensures that the regulator performs the decision-making process meeting the normative requirements for which the independence of the regulator is called for.

The link between effective functioning of regulatory bodies and their independence can be delineated with the functional approach we have chosen for the working definition of this study. Under this concept, efficient functioning of the regulator is what independence is to secure:

Independence here is only addressed as far as it is relevant for the effective functioning of a given regulatory body. Therefore independence and effective functioning are closely interrelated and can hardly be separated from one another. When – later in this study – we nevertheless differentiate between “independence” and “effective functioning” it is to indicate factors caught by the study that assess the capability of the regulator to function effectively but which are not related to the regulator being independent.

Independence as outlined here addresses the organisation as such. It is, however, linked to the decision-making in individual cases. When the decision-making itself and its autonomy are ad-

214 Lamanuskas, T. (2006): 79.

215 Kehone, R.O. / Nye, J.S. (2001); Trute, H.H. / Kühlers, D. / Pilniok, A. (2007).

216 Cf. Luhmann, N. (2000).

dressed we use the phrase “impartiality”. Thus one can say that impartial decision making is the core of independence, but that the independence of an organisation such as a regulator is a much broader concept.

1.3.2 Characteristics and criteria to map governance structures

For the position of the regulator within the governance structure, two groups of factors must be taken into account. On the one hand, the relevant actors that might influence regulators need resources to exercise their influence.²¹⁷ To influence a regulatory body is equivalent to trying to control it, and the concept of regulatory mediums can therefore be helpful to analyse the means of influence and describe the government structure in which the regulator is set. This approach holds that control is exercised by making use of regulatory mediums, which are classically:

- power,
- money and
- knowledge.²¹⁸

Therefore one obvious way to structure the possible means of influence on the regulator is to differentiate between those three channels of influence, which can of course, in practice, be coupled to enhance the pressure.

On the other hand, there are specific means that enable an organisation like a regulatory body to resist attempts to influence it and its decision making process. This group of factors can be referred to as autonomisers. Unlike the first group of factors, these are not logically structured in the same way. Of course there can be factors that enable the regulatory body to resist specific means of influencing its decision-making process – for example autonomy measures regarding the financial side of its operations. However, at the same time, there might be other factors such as transparency which can be helpful in securing autonomy against different means of influence. Therefore, we have opted to structure these autonomisers alongside organisational structures such as human resources, financial resources and organisation designs and procedures.²¹⁹

The mapping of governance structures – which we have chosen as our analytical framework – allows for the inclusion of all those characteristics and indicators suggested in the academic literature that wield explanatory power as regards influence or autonomy. Consequently, in the following sections we will identify the characteristics and indicators with explanatory power to be included in the empirical study. We differentiate between information on the context characterising the position of the regulator, and factors that can be dependencers or autonomisers. In line with this approach, and especially with insights from the Council of Europe, we believe that many factors need contextual information before one can judge their power in a specific case –

217 The ECJ rightly assumes that the mere risk of influence is sufficient to call for measures to protect independence, ECJ, Case C-518/07, 9 March 2010, No. 36.

218 Willke, H. (2001): 150.

219 Since the above-mentioned grouping is theoretically plausible but not intuitive for practitioners, we have chosen not to reflect that in structuring the questionnaire.

such as whether it is a newly founded (and possibly vulnerable) regulator or a well-established body.

What is relevant is obviously not the situation as can be derived from the statute books, but the real location of the regulator in the governance environment. Because of this, some of the studies already carried out distinguish between the formal and *de facto* independence and, therefore, use different indicators to measure each. We will follow this approach. Our understanding is that “formal independence” is the formal perspective on “real” independence, describing the structural settings limiting dependences and strengthening autonomisers. We assume that there are two ways in which the *de facto* situation can differ from the formal, normative concept: firstly, there can be simply a lack of compliance and, secondly, there can be compliance but there are informal means of influencing or, on the other hand of safeguarding the regulator’s autonomy.

According to the literature study, and some debates revolving around independence in sector-specific regulation, one could assume that the separation of a regulator from general administration is one undisputed formal requirement for independence. Making use of the above-mentioned concept of control resources, this ostensibly clear factor becomes on close examination rather opaque. For example, organisational separation and being a legal entity do not necessarily mean that there is no co-ordination by hierarchy and formal power. On the other hand, there can be separation from the hierarchy of general administration even if there is no organisational and/or legal separation. Therefore, legal and organisational separation is a characteristic we have to map, but not necessarily an indicator for independence. This sophisticated approach enables us to deal adequately with the particularities of supervision of Public Service Broadcasting in some countries; however, the historically developed specific combination of regulatory tasks and the role of ensuring that the broadcaster meets the society’s needs, hinders a final decision on independence without having done an in-depth analysis.

Some of the studies refer only to “politicians” as actors whose influence has to be taken into account. Again we would argue that this is not precise enough, since, depending on the normative requirements that create calls the independence of the regulator, risks might stem from parliament, the government, political parties or other political actors.

The growing importance of the new species of actors empowered by public law but separate from traditional administrative structures has provoked questions about the legitimacy and, connected with that, accountability of those regulatory bodies. Legitimacy and accountability measures function as safeguards against the “absolute” independence of the regulatory body. The study would be incomplete without taking criteria of those types into account, as they are willingly implemented and have effects on both independence and efficient functioning. However, it falls beyond the scope of the study to elaborate the underlying concepts of accountability and procedural legitimacy completely. Rather, accountability and legitimacy measures are examined only as far as they constitute mechanisms that are simultaneously relevant for the used notion of independent regulatory bodies.

Moreover, it has to be pointed out that this study focuses on efficient functioning with specific regard to the fulfilment of the regulatory tasks of a regulator rather than on efficiency in the sense of general administrative performance that Verhoest et al focus on: They maintain that the

empirical link between autonomy and performance is inconclusive,²²⁰ which can also be attributed to the different survey designs. However their focus of a multi-dimensional analysis of six different dimensions (managerial and policy autonomy; structural, financial, legal and interventional autonomy) tries to “provide a different perspective on the ongoing academic debate on the causal links between autonomy and performance of public organisations”. Strictly speaking, contrary to such a performance-related notion of efficiency, the focus of efficient functioning used in this study is the achievement itself, and not the resources spent in achieving the desired effects. While it might be proper for an impact assessment to focus rather on performance than on the relative concept of efficient functioning, this is not true for the task of this study, which is designed to measure the capability of regulators to implement the objectives of the AVMS effectively.

1.3.3 Types and definitions of criteria

A relevant finding from the literature analysis has been that there are several definitions, approaches and theoretical frameworks when it comes to assessing the independence and efficient functioning of regulators. The following overview lists all criteria that have been developed on the grounds of literature analysis, where the methodology of the study rests on a common terminology which is outlined as follows:

Criteria: *Criteria are potential indicators, i.e. features that might have an impact on independence and/or functioning.*

Category: *A group of criteria that apply to a specific element of independence or efficient functioning.*

The methodology rests on a combination of context descriptors on the one hand and indicators that allow for measuring independence and/or efficient functioning.

Context descriptors: *Context descriptors describe the general framework but do not directly affect independence or efficient functioning of the regulatory body.*

Indicators: *An indicator is a feature that has an impact on independence and/or effective functioning.*

We further distinguish between formal indicators and *de facto* indicators.

Formal indicators: *A formal indicator is an indicator that refers to legal provisions, i.e. to what is laid down in law.*

De facto indicators: *De facto indicators are all indicators that apply to the real life situation (in contrast to formal indicators referring to the legal framework).*

220 Verhoest, K. et al. (2004): 114.

1.3.4 Context descriptors

As the theoretical analysis shows, the general legal frameworks as well as the exact layout of regulators appear to be dependent on national regulatory pathways. Hence, there are context descriptors that must be taken into account to get a picture of the general legal framework, with the descriptors unable to serve as stand-alone indicators for independence and efficient functioning:

- Different regulatory sectors and areas
- National development paths like grown structures, institutional histories, regulatory traditions
- Constitutional and legal framework
- Industry structure and market size²²¹
- Identification of main legal acts
- Staff and total amount of budget of regulatory body²²²

1.3.5 Derivation and illustration of theoretical dimensions and criteria to measure independence and efficient functioning

In this chapter, theoretically founded criteria will be developed that have the potential to serve as indicators for measuring the independence and efficient functioning of regulatory bodies within the scope of the AVMS Directive. However, it is clear from the literature analysis that, at this point in time, we can only ask for specific criteria and contextual information. Whether all of these criteria really are able to serve as indicators for independence, for implementation or for efficient functioning will be decided within the project step of elaborating the ranking tool.

Moreover, the literature analysis showed that independence is more an ideal-theoretic concept than a practically feasible way of establishing a regulatory body. The main focus of independence – given the fact that bodies are “neither fully autonomous nor fully dependent from their environment”²²³ – is to strike a balance between the different potentials of possible dependence in the directions of political decision makers and regulatees. Or, as Lamanauskas put it, independence is not “an absolute freedom from influence of interests of various stakeholders of the regulatory process but rather a necessity for a regulator to keep an equal distance from all possible interests in order to balance them impartially and aim at achieving long-term results benefitting all stakeholders as contrary to serving short term interests of various groups.”²²⁴ Hence, some criteria will serve as indicators for potential influences from one or more specific directions, while others will serve as indicators for potential safeguards against specific influences. As said before, our approach of mapping governance structures enables us to include all criteria where the literature makes it plausible that there is a link to either dependencers or autonomisers.

221 There might be individual situations where market data can be an indicator, too, as there is a possible interdependence between market data and independence e.g. when worsening market data leads to political pressure on regulatory bodies; Cukierman, A. / Webb, S. / Neyapti, B. (1992): 377.

222 The total amount of the budget doesn't say anything in regard to independence, as this information depends considerably on other context information and regulatory scope and tasks of the regulator.

223 Gilardi, F. / Maggetti, M. (forthcoming): 56.

224 Lamanauskas, T. (2006): 79.

The following chapters give an overview of theoretically extractable criteria and descriptors, categorised under different dimensions of independence.

1.3.5.1 Categories of criteria

Since there are no inbuilt categories in the concept of governance structures we chose the categories of criteria that relate to the regulatory mediums approach (power, money, knowledge, see above) and supplemented these categories by adding two more, namely the autonomy of the decision making organ and its personnel, as well as transparency and accountability:

- Status and Powers
- Autonomy of Decisions Makers
- Financial Autonomy
- Knowledge
- Transparency & Accountability mechanisms

1.3.5.2 Status and powers criteria

1.3.5.2.1 General legal framework including source of recognition of independence

General framework criteria might serve to show the clarity of the main legal backgrounds for a regulator. According to *Pollack* (2009) the richness of legal details can serve as a measurement criterion, as a higher level of detail prescribed by law can have the consequence of reducing autonomous behaviour by the regulator. Equally, if the descriptions of its objectives and competencies are unclear and subject to debate, a regulator might have its position within the regulatory system undermined. A similar situation can evolve if more than one regulator is competent for regulating a specific sector, without safeguards against conflicting competencies.

Furthermore, a fact that seems suitable as a criterion can be the recognition or tradition of independence in legal provisions or the constitution.

Formal criteria:

- Form of legal provisions that establish the regulatory body and specify its tasks and powers (parliament law, governmental bylaw, ministerial decree)²²⁵
- Clarity of legal provisions
- Clarity of objectives, powers, and tasks assigned to the regulatory body²²⁶
- Type of audiovisual regulator (single “converged” regulator²²⁷, traditional sector specific regulator) including scope of activities and sectors of regulatory powers of the body
- Exclusiveness of regulatory powers in the audiovisual media sector²²⁸ (i.e. one or more regulatory bodies competent in this sector)

225 Jacobzone, S. (2005b): 89.

226 Gilardi, F. (2005b): 149.

227 Gilardi, F. (2002): 883.

- Legal/constitutional provisions leading to independence as a value

De facto criteria:

- Amendments or changes to the legal provisions formulating the tasks and objectives (and the respective motives)
- Incidents of political pressure in form of threatening with the alteration of legal objectives

1.3.5.2.2 Legal status of regulatory bodies

According to Smith²²⁹ regulators can be classified in different ways: There are those regulators that are separate units within a ministry, those that are separate agencies with a minister taking part in decision making, and finally those that are separate legal entities.

Resulting formal criteria:

- Legal nature of the regulatory body²³⁰

Resulting de facto criteria:

- Geographical location of regulatory body²³¹

1.3.5.2.3 Regulatory powers criteria

The scope of regulatory competencies and powers might serve as measurement criteria due to their influence on the general power and strength of the regulatory body:

Another dimension of regulatory independence concerns the scope of decision making competence. In the literature, many authors stress the distinction between regulatory agencies that are truly regulatory and possess actual decision-making powers, and agencies that are merely consultative. Thus, according to this distinction, independent regulatory authorities are those that hold decision-making powers. Exclusive decision making powers that are clearly defined in law further strengthen the independence and efficient functioning of the regulatory body. The right to impose sanctions has a similar effect. Ideally, independent regulatory authorities do not produce services or perform ordinary administrative tasks. Instead, the power to lay down general rules in order to attain the goals set out in the legislation should be given to them.²³²

Resulting formal criteria:

- Nature and Scope of regulatory powers of the body:
- Possibility to create policies on its own²³³
- Powers to solve disputes between state institutions and regulatees (offering a board of complaints²³⁴ or moderating debates)
- Power to make rules (legally binding to third parties)

228 Larsen, A. et al. (2006); Jacobzone, S. (2005b): 90.

229 Smith, W. (1997): Note No.127.

230 Thatcher, M. (2002a): 130; Jacobzone, S. (2005b): 92.

231 Vatiéro, M. (2008).

232 Teitgen-Colly, C. (1988).

233 Larsen, A. et al. (2006).

234 Larsen, A. et al. (2006).

- Scope of power to monitor compliance by regulatees (areas and form of monitoring)²³⁵
- Power to sanction, and sanction instruments (e.g. warnings, fines, suspension or revocation of licences, where applicable)
- Limited consultative power²³⁶
- Right to initiate legislative acts
- Authority to consider third party complaints concerning broadcasters' activities²³⁷
- Market entry: competence for issuing broadcasting licenses and the supervision of the licence conditions²³⁸ (in regard to national broadcasting laws)
- Possibility to give binding instructions to regulatory body by state authority or industry body²³⁹ (and form of instructions: general policy / concrete decisions)²⁴⁰ resulting in limited regulatory powers
- Margin of discretion²⁴¹
- *Ex-ante* or *ex-post* regulation
- Scope of decisive power of the head/board:
- Possibility to decide on the regulator's internal organisation²⁴²; flexibility of the internal organisation
- Responsibility for personnel policy (hiring and firing staff, deciding on its allocation and composition)²⁴³
- Possibility to use third party contractors
- Possibility to determine staff salaries²⁴⁴

Resulting de facto criteria:

- Possibilities to create long-term policies²⁴⁵
- Application of a visible and important regulatory power²⁴⁶
- Reported cases of arbitrary or inconsistent rule application or sanctioning
- Reported accusations that sanctions have been too harsh, too lax or politically motivated²⁴⁷
- Legal or political conflicts, i.e. number of legal challenges to the decisions of the body²⁴⁸

235 Committee of Ministers (EC), Recommendation REC(2000)23 of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector.

236 Larsen, A. et al. (2006).

237 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

238 Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

239 EUGH, Case C-518/07, 9 March 2010, No. 28.

240 Hanretty, C. / Koop, C. (2009); Gilardi, F. (2005b): 149; Jacobzone, S. (2005b): 95.

241 Larsen, A. et al. (2006): 7.

242 Gilardi, F. (2002): 883.

243 Gilardi, F. (2002): 883; Jacobzone, S. (2005b): 97.

244 Vatiéro, M. (2010); Lamanauskas, T. (2006).

245 Cukierman, A. / Webb, S. / Neyapti, B. (1992): 363.

246 Thatcher, M. (2002a).

247 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

248 Thatcher, M. (2002b), 954-972.

- Sufficient flexibility of body in managing own resources²⁴⁹
- Reported cases of actual use of powers of elected politicians to overturn decisions²⁵⁰

1.3.5.3 Financial autonomy criteria

Another important indicator for dependency potential is the budget of the regulatory body.²⁵¹ Where external parties have legal influence on the level of the budget, they can both exert pressure to get politically motivated decisions from the body, as well as undermine its operational capacity through inadequate financing. This can occur intentionally or unintentionally, resulting from a lack of knowledge, e.g. due to missing market studies. The greater the influence of one single player regarding the budget allocation, the more likely it is to be used to punish or reward the body in order to generate politically motivated decisions. The less any one-sided influence on the budget is the higher is the “organisational autonomy”.²⁵² Safeguards against such influences can be procedures to earmark the funding, or to have adequate and different sources of income.

Resulting formal criteria:

- Source(s) of the body’s budget²⁵³, their legal basis and their respective percentages (e.g. concession fees; licences; public funds; taxes²⁵⁴)
- Level of autonomy in allocating the budget; involvements of other actors in the budget allocation process²⁵⁵
- Form of budget allocation procedures²⁵⁶
- Margin of discretion of body in charge of external budget allocation²⁵⁷

Resulting de facto criteria:

- Adequacy of the budget to perform delegated duties²⁵⁸
- Factual influence of third parties over the budget²⁵⁹
- Budget trends over time²⁶⁰; (at least) constant budget during recent years²⁶¹
- Reported cases of supervisory authorities threatening to cut funding plans or to use funding decisions as a leverage in political power struggles²⁶²

249 Lamanauskas, T. (2006).

250 Thatcher, M. (2002b).

251 Cf. Thatcher, M. (2002b).

252 Larsen, A. et al. (2005): 9.

253 Oliveira, G. et al (2005) 17 ff.; Gilardi, F (2002): 883.

254 Gilardi, F. (2005c): 149; Jacobzone, S. (2005b): 86, 97.

255 Especially the supervisory body, cf. Jacobzone, S. (2005b): 97.

256 Gilardi, F. (2002): 883.

257 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

258 Thatcher, M. (2002b); Maggetti, M. (2007).

259 Maggetti, M. (2007).

260 Thatcher, M. (2005): 361.

261 Vatiero, M. (2008).

262 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

1.3.5.4 Autonomy of decision makers

The background and experience of the staff is one of the key ways in which a regulatory body can either reinforce its independence, or have its independence compromised. The organisational structure can include safeguards that will prevent capture from regulatees and from political decisions makers. Furthermore, it can ensure professionalism and expertise, which can counter asymmetric access to information and to limit (potential) conflicts of interest.

More concrete components of this dimension of independence are the organisational layout of the management (i.e. director or board), nomination and appointment procedures for the director or the board and its chair, the tenures of office and grounds for dismissal, provisions for the composition of the board and its members' expertise.

1.3.5.4.1 Nature and composition of decision-making organ

The existence of a board can already be seen as an independence criteria, as – in theory – a board is supposed to offer more opportunities for collegiate decision-making, thus ensuring a greater level of independence and integrity in decision-making than a single-person head of the regulatory body,²⁶³ as it seems more possible to influence one person rather than a whole board. Other important indicators are the composition of the board, and the scope of the board's powers regarding the internal organisation of the regulatory body. Here, the division of powers between the chairman of the board and the board can be important.

Resulting formal criteria

- Form of decision-making organ (board/director/chambers)²⁶⁴
- Composition of the board and total number of board members²⁶⁵

Resulting de facto criteria

- Party politicisation of the highest decision making organ.

1.3.5.4.2 Appointment procedures

According to Thatcher (2002) the nomination of the regulatory bodies' board members offers the most visible and effective formal control. In effect, as a minimum requirement, the regulators' boards should be neither directly elected nor managed by elected officials.²⁶⁶ The potential for external, one-sided influence decreases with the number of players involved: independence will likely be higher if the nomination is confirmed by the government collectively. An even higher level of independence exists where the nomination has to be confirmed by Parliament or by an appointment procedure including both the executive as well as the legislative branch.²⁶⁷

263 Jacobzone, S. (2005b).

264 Majone, G. (1997); Lamanauskas, T. (2006); Döhler, M. (2002): 110.

265 Hanretty, C. / Koop, C. (2009).

266 Thatcher, M. (2002a): 127.

267 Jacobzone, S. (2005); Smith, W. (1997).

Resulting formal criteria:

- Procedure of nomination of director/board²⁶⁸/chairman²⁶⁹
- Procedure of appointment (who²⁷⁰ and how)²⁷¹, existence of safeguards that ensure impartiality
- Possibility for appointer(s) to ignore nomination²⁷²
- Independence of nominees as a formal requirement for the appointment²⁷³
- Renewability of appointment²⁷⁴
- Regulator taking part in the appointment process (e.g. proposal, right to vote)²⁷⁵

Resulting de facto criteria:

- Partisanship of nomination²⁷⁶
- Representation or reproduction of political power structures in actual board composition (due to appointment procedures or other reasons)²⁷⁷
- Factual behaviour of appointed members, e.g. acting on behalf of the nominating or appointing body²⁷⁸
- Possibilities (or reported cases) for the appointing body to exert pressure on the appointed member²⁷⁹
- Rotation of the board members²⁸⁰ (i.e. no change of the whole board, to avoid appointments always reflecting the political majority of the time as well as for the sake of efficiency)

1.3.5.4.3 Rules to prevent conflict of interest or capture

The more its preferences are shaped only by their internal organisational dynamics, the more independent the body will be. The more such preferences are pre-defined by the interests of external actors – namely political decision-makers or industry players – the less likely the body's decisions are to be in line with the aim of the neutral implementation of rules. Safeguards can help

268 Hanretty, C. & Koop, C. (2009). Comparing Regulatory Agencies. Report on the Results on a Worldwide Survey. EUI Working Paper.

269 Hanretty, C. / Koop, C. (2009); Gilardi, F (2002): 881.

270 Gilardi, F. (2005b): 147; Gilardi, F. (2002): 882.

271 Lamanuskas, T. (2006); Oliveira, G. et al. (2005): 17; Gilardi, F. (2005b): 147; Jacobzone, S. (2005b): 85, 93; Thatcher, M. (2002a): 130.

272 Hanretty, C. / Koop, C. (2009).

273 Gilardi, F. (2005c): 147-149; Gilardi, F. (2002): 881.

274 Gilardi, F. (2005b): 147-149; Gilardi, F. (2002): 881; ECJ, Case C-518/07, 9 March 2010, No. 44: Appointment by parliament or government does not impair independence.

275 Gilardi, F. (2005b): 147.

276 Thatcher, M. (2002).

277 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

278 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

279 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

280 Machet, E. (2002).

against capture, e.g. in forms of possible conflicts of interest or revolving-door issues²⁸¹, including cooling-off periods.²⁸²

Resulting formal criteria:

- Legal provisions against conflicts of interest regarding head/board members²⁸³
- political independence as a formal requirement for the appointment²⁸⁴
- Rules prohibiting holding other offices in the government at the same time²⁸⁵
- Rules prohibiting being member of parliament at the same time
- Rules prohibiting being under contract to, or associated with, a regulatee²⁸⁶
- Rules against exercising any function or possessing any interest in an enterprise or other organisation in the media or related sector (e.g. advertising and telecommunications)²⁸⁷
- Rules prohibiting taking instructions from external persons or bodies²⁸⁸
- Provisions against conflicts of interest²⁸⁹
- Provisions against conflicts of interest regarding family members/relatives²⁹⁰
- Rules regarding cooling-off periods²⁹¹
- If there are no provisions against conflicts of interests: behavioural rules that help to separate private interests from public ones²⁹²
- Rules of confidentiality

Resulting de facto criteria

- Proportion of revolving-door²⁹³
- Frequency of *ad hoc* contacts such as internships, collaborations, and regular meetings²⁹⁴
- Actual independence of board members and/or staff from personal interests in the market players²⁹⁵
- Adequacy of internal organisation²⁹⁶ in relation to regulatory tasks and national context

281 Cf. Thatcher, M (2002b).

282 Cf. Jacobzone, S. (2005b).

283 Gilardi, F. (2005b): 147; Jacobzone, S. (2005b): 94.

284 Jacobzone, S. (2005b).

285 Gilardi, F. (2005b): 147 ff.; Gilardi, F (2002): 881.

286 Larsen, A. et al. (2006).

287 Committee of Ministers (EC), Recommendation REC(2000)23 of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector

288 Committee of Ministers (EC), Recommendation REC(2000)23 of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector

289 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

290 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

291 Oliveira, G. et al. (2005); Larsen et al. (2006).

292 Lamanaukas, T (2006).

293 Maggetti, M. (2007); Thatcher, M (2002b): “relational distance”.

294 Maggetti, M. (2007).

295 Lamanaukas, T. (2006).

296 Thatcher, M. (2002b).

1.3.5.4.4 Tenure & Salaries

The stability and length of the board members’/head’s legal mandate can have a strong influence on potential dependencies: Ensuring a stable mandate, set in the middle of a parliamentary term, is more likely to prevent political appointments during the tenure, and can result in appointments that are not distinct from current political agendas. Also, the more experience and expertise the decision-makers of the regulatory body can accumulate during the tenure, the more likely they are able to behave independently from elected officials or other third parties.²⁹⁷

A set of criteria connected to tenure would include the level of salary of the head and/or the board members: where salaries are competitive with salaries paid in the regulated sector, the regulators may be less vulnerable to job offers from the industry. Also, with adjusted salaries, the chance to get high-profile people with sector specific knowledge is higher.

Resulting formal criteria:

- Duration of the term of office²⁹⁸
- Staggered terms so that they do not coincide with election cycles²⁹⁹
- Legal provisions allowing an adequate level of salaries

Resulting de facto criteria:

- Average effective term length³⁰⁰
- Early resignations, e.g. because of informal agreement to resign after the election of a new government³⁰¹ (higher turnover than election cycles can be an indicator of a lack of independence – in contrast a lower turnover than election cycles is no sign of higher independence!³⁰²)
- Term of office of political decision makers and term of office of head/Board of regulatory body *de facto* correspond with each other³⁰³
- (At least) constant levels of income of head/board members during the last years³⁰⁴

1.3.5.4.5 Dismissal

Legal provisions that allow the dismissal of the regulatory body’s head or board members are more difficult to use as independence criteria because of their ambivalence: On the one hand, it is obvious that board members are more politically vulnerable if they can be dismissed.³⁰⁵ On the other hand, it has been pointed out that in situations where there is no possibility of dismissing the head/board members, even in cases of malpractice, there could be detrimental effects on the

297 Thatcher, M. (2002b).

298 Thatcher, M. (2002b); Gilardi, F. (2005b): 147; Oliveira, G. et al (2005); Gilardi, F. (2002): 881; Jacobzone, S. (2005): 85, 93; OECD/IEA (2001).

299 Smith, W (1997).

300 Vatiero, M. (2008).

301 Cukierman, A. et al.(1992): 363.

302 Cukierman, A. et al.(1992): 363.

303 Cukierman, A. et al.(1992): 366, 367.

304 Vatiero, M. (2008).

305 Maggetti, M (2007).

overall accountability of the body.³⁰⁶ Hence, criteria have first to address whether there are any legal provisions that allow a dismissal and – if so – on what grounds the dismissal petition can be drawn, and by whom.

Resulting formal criteria:

- Possibility of dismissal before the end of the tenure³⁰⁷
- Reasons for dismissal (e.g. not obeying the rules of incompatibility; personal incapacity, violation of material law)
- Scope of dismissal (e.g. board member as such or only whole board)
- Competent body to dismiss
- Reasons for dismissal clearly defined in law
- Dismissal procedures³⁰⁸ (including appeal possibilities)

Resulting de facto criteria

- Details and circumstances of personnel changes (notably dates of start and end of office) regarding the head/board of the regulator³⁰⁹
- Reported cases of dismissals
- Departures (dismissals and resignation) of board members before the end of the term³¹⁰

1.3.5.5 Knowledge criteria

1.3.5.5.1 Qualifications and professional expertise of decision makers

The professionalism and expertise of the board members are effective in countering asymmetric access to information. Hence, safeguards that ensure a certain standard of sector-specific knowledge in the board's personnel can be used as criteria.

Resulting formal criteria

- Requirements of being an expert³¹¹ (in the broadcasting/media sector)
- Requirements of professional background³¹²

Resulting de facto criteria

- Board members actually being experts or having professional background

306 Annex to Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

307 Gilardi, F. (2005b): 147; Jacobzone, S. (2005b); Thatcher, M. (2002b); Gilardi, F. (2002): 881 ff.

308 Committee of Ministers (EC), Recommendation REC(2000)23 of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector

309 Jacobzone, T. (2005b).

310 Thatcher, M. (2002b).

311 Thatcher, M. (2002b); Oliveira, G. et al (2005): 17; Jacobzone, S. (2005b): 94.

312 Oliveira, G. et al. (2005): 17.

1.3.5.5.2 External advice

The possibility of gathering external advice from advisory boards, economic or scientific expert is a significant way to increase the knowledge of the regulatory body, and hence to minimise informational asymmetries.

Resulting formal criteria:

- Legal requirement or possibility to gather external advice

Resulting de facto criteria:

- Factual use of requirement or possibility to gather external advice

1.3.5.5.3 Cooperation with other regulatory bodies

Despite legal requirements to cooperate with other regulatory bodies – from the same state or from other Member States – systematic forms of co-operation can also have positive effects on the independence and efficient functioning of the body: During a formal international exchange of regulatory experiences and *de facto* procedures, best practices will evolve so that national regulators can adapt to optimise their own regulatory activities, depending on their respective national conditions. Moreover, by relying on international experiences with – for instance – new forms of regulatory measures or practices, a national regulatory body can decide on the adjustment of its own procedures without any third party influences.

Resulting formal criteria

- Legal requirements for cooperation with other regulatory bodies within the regulatory system
- Legal requirements for cooperation with regulatory bodies in other states³¹³

Resulting de facto criteria

- *De facto* cooperation with regulatory bodies in the same state
- *De facto* cooperation with regulatory bodies in other states³¹⁴
- Form and institutional level of cooperation (e.g. formalised network structures, systematic formal meetings, *ad-hoc* meetings)³¹⁵
- Existence of informal cooperative arrangements

1.3.5.6 Accountability and transparency mechanisms

The literature analysis showed that there are risks and drawbacks in granting formal independence to a regulatory body (see Chapter 1.1.3.3).³¹⁶ To ensure that the regulator does not stray from its mandate, engage in corrupt practices, or become grossly inefficient, checks and balances

313 Cf. Majone, G. (1997b).

314 Cf. Majone, G. (1997b).

315 Majone G. (1997b).

316 Cf. Gilardi, F. (2005b): 142.

must be put in place.³¹⁷ To see the whole picture, those criteria must be mapped as well, especially taking into account that those measures risk being both legitimisers and dependencers.

1.3.5.6.1 Transparency mechanisms

As shown above (see section 1.1.3.3), independent regulatory bodies inevitably show a shortfall when it comes to democratic legitimacy in form of accountability. Thatcher (2002) therefore shows that legitimacy has to be drawn from the procedures they use. This form of legitimacy can be described as “procedural legitimacy”, which is strongly connected to good governance principles. In general, good governance is increasingly regarded as a key determinant of the success or failure of regulatory bodies.³¹⁸ The European Commission also points out the importance of good governance principles, including independence, accountability, transparency and participation.³¹⁹ This not only covers the basic question of how a regulator is legally bound to be rational in favouring the common good or the public interest³²⁰ in this set of criteria; it is also the category that assesses if and how a regulator is “applying good governance”.³²¹

Transparency is a main aspect of good governance that directly influences its independence, as a failure of transparency will undercut the regulator’s support and reduce the respect it enjoys. As a consequence, without the goodwill and support of the industry and the public, it will be more vulnerable to political pressure.³²²

As transparency is a procedural meta-provision, it relates to practically all activities of the regulator.

Resulting formal criteria

- Are provisions on transparency embedded in law, rules of procedures, and internal codes of ethics, or just general provisions applicable to the civil service?³²³
- General openness (e.g. regarding rule making, public decisions sessions³²⁴ or public hearings in important cases³²⁵)
- Requirements to give reasons for the decisions³²⁶
- Answerability, i.e. actions being openly discussed in public with members of board³²⁷
- Publication of decisions³²⁸ and information, including models or guidelines on which their decisions are based³²⁹
- Dissemination of published information³³⁰

317 Smith, W. (1997): 1 ff.

318 Petit, N. (2004).

319 EU Commission: White paper on European Governance, COM(2001)428final.

320 Larsen, A. et al (2006).

321 Larsen A. et al. (2006).

322 Jakubowicz, K. (2007).

323 Machet, E. (2009).

324 Oliveira, G. et al. (2005); Thatcher, M. (2002b).

325 Oliveira, G. et al. (2005).

326 Thatcher, M. (2002b); Jacobzone, S. (2005): 99.

327 Thatcher, M. (2002b).

328 Oliveira, G. et al. (2005).

329 Thatcher, M. (2002b).

- Prohibition of informal discussions of pending cases with any of the parties involved³³¹
- Transparent procedure regarding the issuing of licenses³³²
- Developing models or guidelines, public doctrines and principles and conceptual frameworks for their actions³³³

Resulting de facto criteria:

- Actual transparency (especially when there is no statutory transparency rule)³³⁴
- Disclosure of decision procedures³³⁵ and reasoning³³⁶
- Indication or announcement of likely future actions
- Publication of board meeting minutes
- Forms of dissemination (e.g. print, website, directly to parliament, official journal, magazine etc.)

1.3.5.6.2 Consultation procedures

Using external expertise from researchers, academic experts or stakeholders (including regulatees) in the form of independent studies, or during consultation procedures, can be used as a means of preventing information asymmetries in the regulatory body. Moreover, the participation of third parties in the decision-making process increases the credibility of the body. This increase in credibility strengthens the independence of the regulatory body. Participation occurs when relevant parties effectively contribute to the regulatory process. This may take many forms, including formal consultation exercises, formal and informal hearings, and surveys of consumer views and priorities.³³⁷

Resulting formal criteria

- Legal framework for consultations (systematic/*ad-hoc*/mandatory/voluntarily)³³⁸

Resulting de facto criteria

- Forms of external advice acquisition (scientific advisory board³³⁹/external studies/consultations/expert hearings etc.)
- Public availability of the basic data relevant for the conduct of regulatory policy³⁴⁰
- Disclosure of basic data as integral part of the regulator's tasks/objectives³⁴¹
- Actual consultations of stakeholders and/or the public³⁴²

330 Thatcher, M. (2002b).

331 Larsen, A. et al. (2006).

332 Declaration of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008.

333 Thatcher, M. (2002b).

334 Thatcher, M. (2002b).

335 Jakubowicz, K. (2007).

336 Machet, E. (2009).

337 Abstract: Vatiéro, M. (2010).

338 Machet, E. (2009); Thatcher, M. (2002b).

339 Majone, G. (1997b).

340 Jacobzone, S. (2005b).

341 Jacobzone, S. (2005b).

- Number and kind of players involved in consultations³⁴³
- Actual consultation procedures for knowledge gain, e.g. white papers, consultation papers, invitation of comments on draft decisions³⁴⁴
- Inclusion of consultation results in the decision-making process, reaction of the regulator to arguments or claims³⁴⁵
- Stage of decision-making process where consultations have been integrated

1.3.5.6.3 Formal accountability and auditing mechanisms

The important role of accountability and its relationship to independence has been examined in Chapter 1.1.3.3: Provisions regarding accountability requirements are more than just formal safeguards. In fact they imply behavioural guidelines like transparency or other good regulatory practices³⁴⁶ that are able to help the regulator behave in a fair and impartial manner towards the stakeholders, while a key dimension of accountability is the availability of detailed, reliable and relevant performance evaluation.³⁴⁷

Resulting formal criteria:

- General requirement to produce periodic (i.e. annual) reports³⁴⁸ assessing the extent to which its objectives have been achieved³⁴⁹
- Formal accountability obligations vis-à-vis the parliament³⁵⁰ or the government³⁵¹ (e.g. no formal obligation; presentation of an annual report for information only; presentation of an annual report that must be approved³⁵²; body is fully accountable to the parliament)
- Formal pre-defined performance criteria (to be able to perform long-term goals)³⁵³
- External evaluation procedure³⁵⁴ (national audit office, private consulting firm, independent academic research etc.)
- Accountability requirements and objectives clearly defined in law³⁵⁵
- Objectives of regulation clearly defined in law³⁵⁶
- Prioritisation of multiple objectives stipulated in law³⁵⁷
- Measurability of regulatory objectives in statutes or decrees³⁵⁸

342 Jakubowicz, K. (2007).

343 Oliveira, G. et al. (2005); Thatcher M. (2002b); Larsen, A et al. (2006); Lamanaukas, T. (2006).

344 Thatcher, M. (2002b).

345 Cf. Jakubowicz, K. (2007).

346 Cf. Arculus, D. (2005): 49.

347 Lamanaukas, V. (2006); Jacobzone, S. (2005b).

348 Jacobzone, S. (2005):98.

349 Jacobzone, S. (2005b).

350 Gilardi, F. (2002): 882; Gilardi, F. (2005b): 147-149.

351 Cf. Thatcher, M. (2002b); Pollack, M. A. (2009).

352 Gilardi, F. (2005b): 148; Jacobzone, S. (2005): 98.

353 Lamanaukas, V. (2006).

354 Jacobzone, S. (2005b).

355 Jacobzone, S. (2005b).

356 Jacobzone, S. (2005b).

357 Jacobzone, S. (2005b).

358 Jacobzone, S. (2005b).

Resulting de facto criteria:

- Periodic internal or external evaluation procedures assessing to what extent the regulatory objectives have been met³⁵⁹
- Regulatory body explains rules or strategies that describe its policy³⁶⁰ and decision practices

1.3.5.6.4 Supervision of regulatory body

Rules and procedures of supervision are a necessary tool to ensure that the regulatory body is complying with its tasks and objectives.

Resulting formal criteria:

- Existence of legal provisions regarding supervision
- Form of supervision (systematically vs. *ad hoc*)³⁶¹
- Competent body/bodies for supervision
- Competence of third party (other than court) to overturn body's decision³⁶²

Resulting de facto criteria:

- Rights of co-determination regarding informal agreements or the publication of official documents by government/parliament³⁶³

1.3.5.6.5 Appeal procedures

Once the regulatory body takes decisions that are legally binding on third parties, a judicial review within an appeal procedure can also promote independence because such remedies ensure that decisions are not unduly influenced.³⁶⁴

Resulting formal criteria

- Existence of appeal procedures that are open to review the body's decisions
- Bodies/organs that are allowed to review decisions (internal appeals, organs from political branch, external commissions, judiciary branch i.e. courts)³⁶⁵
- In the case of a non-judicial review: Possibility of the appeal decisions undergoing judicial review³⁶⁶
- Scope of judicial review, e.g. margin of discretion left to the regulator³⁶⁷
- Groups of relevant appellants (consumer, market players, politicians/government)

359 Jakubowicz, K. (2007).

360 Jakubowicz, K. (2007).

361 Döhler, M. (2002): 112; Hanretty, C. / Koop, C. (2009).

362 Gilardi, F. (2005b): 147-149; Gilardi, F (2002): 883.

363 Döhler, M. (2002): 116.

364 Lamanauskas, V. (2006).

365 Lamanauskas, V. (2006); Oliveira, G. et al. (2005).

366 Lamanauskas, V. (2006).

367 Lamanauskas, V. (2006); Jacobzone, S. (2005): 89.

Resulting de facto criteria

- Number of legal challenges to the decisions of the body³⁶⁸
- Opportunities for legislator/government to overrule regulatory decisions through new legislation

1.3.6 Indicators chosen to be used in this study

After conducting the literature analysis, followed by the derivation of theoretical criteria for measuring the independence and efficient functioning of regulatory bodies, it became obvious that the study would not use all derived criteria for the project questionnaire. Reasons for deciding whether a criterion should be part of the surveys were its operability and the effort required to get specific information with regard to the expected outcome. Furthermore, the criterion's general capacity to serve as an indicator for independence and its suitability for comparison of different bodies was taken into account. It is important that the criteria ensure stable findings regarding potential risks for dependencies without being to a substantial degree influenced by the different national frameworks.

Caveat: The criteria chosen as indicators are nonetheless subject to national context information. Moreover, in order for the outcomes of the independence assessment of regulatory bodies to be significant, it is also essential to examine the existence of respective safeguards, which can be other criteria from the same or other indicator sets. Therefore criteria must be ranked and prioritised and different combinations of criteria must be developed to make statements on a regulatory body's overall independence reliable. The result of these steps can be found in the ranking tool, see Chapter 5.3.

1.3.6.1 Reasons for criteria not being considered to be workable indicators

Beside the fact that the resources of each Country Correspondent were limited³⁶⁹, there are three main arguments for not selecting specific criteria as indicators for the surveys conducted in WP 2. First and foremost, we focussed on criteria where theory suggests that within our approach the factors have explanatory value as regards dependencies or safeguards for autonomy. Furthermore there are reasons regarding the practical implementation of the study.

1.3.6.1.1 Straightforwardness of answers

When using standardised questionnaires, the variety of answers has to be limited. If answers can only be given by whole sentences and further explanations, the criteria won't be assessable during the analysis in a feasible way. Where listed criteria carried the risk of not being standardisable we refrained from using these criteria for the questionnaires. Instead we asked the Country

368 Thatcher, M. (2002b).

369 For each country correspondent two man-days had been allocated for answering all the questions in the survey and writing a full-text country report with further information on the general framework of the respective state. A survey consisting of more than 130 single criteria (most of them with different possible variables) would not have been realistic in this amount of time.

Correspondents to include the answers to these criteria into the Country Report. For the questionnaire, we focused on criteria that can be answered in a way that allows standardisation. Some criteria were of high importance but at the same time very complex to answer. In such cases we tried to standardise the possible answers in the questionnaire with a view to reducing complexity. To compensate, it was asked that complex procedures, for instance the concrete procedural steps necessary for the nomination or appointment of the board, should be included in the descriptive Country Report.

1.3.6.1.2 Objectifiability

Some of the theoretically derived criteria require a subjective assessment or evaluation. We decided not to take those criteria as indicators where a personal estimation had to be given. Judgments and estimations depend heavily on the personal expertise and position of the country correspondent, and are not suitable for an operationalised statistical analysis.

Taking into account the above-listed criteria, the type of questions that are mainly affected by this drawback are the *de facto* criteria. While legal provisions can be examined as facts, *de facto* behaviour is usually harder to prove. However, there are several *de facto* indicators – e.g. the number of actual conducted public consultations, or the number of dismissals before the end of the term – which are verifiable and were therefore included in the questionnaire.

1.3.6.1.3 Cost-benefit ratio

In cases where the information retrieval would request a considerable effort we balanced the requested effort with the potential gain from the information retrieval. Where the cost too heavily outweighed the benefit we decided to exclude the respective criterion from the surveys.

1.3.6.1.4 Comparability

There are some criteria in the theoretically derived list that seem to work out as indicators when considering solely a national perspective – for instance, the level of salaries of members of the regulatory body's board compared to industry salaries. However, from a comparative perspective, these numbers depend highly on the economic strength of the respective state and therefore are not suitable for an international comparison. Hence, such criteria were not selected as indicators in this survey.

1.3.6.2 Descriptors and criteria chosen for the questionnaire

The context descriptors to be taken into account to get a picture of the general legal framework cannot serve as indicators for independence and efficient functioning (see 1.5.2.). Nevertheless they are relevant context descriptors that should be included in the questionnaire and/or the Country Report to allow an understanding of the regulatory system. Therefore in the questionnaires we included the following context descriptors:

- Market data (Industry structure and market size) (Table 1)
- Identification of main legal acts (Table 2)
- General legal framework / institutional history (Table 6/Table 3)

- Sectors covered (Table 4)
- Staff and total amount of budget of regulatory body (Table 5)

The Country Correspondents were asked to describe national development paths, i.e. developed structures, institutional histories and regulatory traditions in the Country Reports. In addition to the context descriptors we chose the following criteria as potential formal indicators to be included into the questionnaire:

We asked for the form of legal provisions that create the regulatory body, as well as its tasks and powers in Table 6. The form of the legal provisions is of significance for independence and efficient functioning, because the form of the law or rule (constitution, parliamentary act, ministerial decree) determines the number of veto points (i.e. the conceivable means for actors to veto the change) which is deemed to be of relevance for independence in the literature. Furthermore, the value that is given by the legislative framework to the regulatory body is expressed by the value of the law that establishes the regulatory body.

The question of whether the legal provisions are clear and unambiguous cannot be answered in a strictly objective way. This question has therefore not been included in the questionnaire. In the Country Report we asked the Country Correspondents whether there had been frequent changes in the laws or the legislative developments, which in their point of view had led to a lack of clarity of the powers and obligations of the regulatory body. Also, we asked the Country Correspondents to explain major legal disputes regarding substantial provisions governing the audiovisual media sector.

In Table 4, we asked for the sectors covered by the regulatory body. This allows us to see whether the regulatory body is a converged regulator or not. From Table 2 and Table 3 the exclusiveness of regulatory powers in the audiovisual media sector can be derived.

The criterion of whether there have been amendments or changes to the legal provisions setting out the tasks and objectives (and their respective motives) has been included as a point of reference in the country report. We regarded this criterion as relevant because the amendment of the law could be a demonstration of power over the regulatory body. However, because politically motivated influence constitutes just one possible reason for amending the law (besides a lot of other potential reasons) we are of the opinion that this indicator does not have sufficient significance to be included as a *de facto* criterion into the questionnaire.

The criterion of incidence of political pressure in the form of threats to alter the legal objectives is too specific to be included into the standardised questionnaire. However, this has been included as a reference point into the Country Report.

1.3.6.2.1 Status and Powers

1.3.6.2.1.1 *Legal status*

Formal indicators:

- The legal nature of the regulatory body is a pivotal point for independence within the institutional design, even though we have seen that one criterion alone does not tell much. This criterion is addressed in Table 7 of the questionnaire. For the specific design of Public Service Broadcasting, which often operates with internal decision-making organs, Table 7

provides the opportunity to describe specific organisational characteristics. A more detailed description of specific organisational characteristics can be given in the Country Report.

De facto indicators:

- The geographical location of the regulatory body cannot be qualified as a formal indicator. However, as a context descriptor it has been included in Table 3.

1.3.6.2.1.2 Regulatory Powers

Formal indicators:

- Whether there are powers to solve disputes between state institutions and regulatees has not been included in the questionnaire, because whether or not such powers exist is greatly dependent on the regulatory system in place, and therefore not significant for the qualification as independent and/or efficient functioning.
- The power to make rules (legally binding to third parties), which gives the regulatory body the ability to create policies on its own, has been covered in Table 9. The Country Correspondents have been asked in the Country Report to explain whether self-commitments/long-term policies are in place.
- The scope of power to monitor compliance by regulatees (areas and form of monitoring) has been included in Table 10.
- Power to sanction, and sanction instruments (e.g. warnings, fines, suspension or revocation of licences, where applicable) are covered in Table 11.
- Consultative tasks – meaning ordinary administrative tasks or services – could be interpreted as being detrimental to independence. On the other hand, these tasks do not have negative effects on independence nor efficient functioning, provided they do not interfere with other, more specifically regulatory, tasks. Therefore we did not include the limitation of consultative powers as a potential indicator for independence and efficient functioning, and therefore did not include this criterion in the questionnaire.
- The right to initiate legislative acts does not necessarily provide the regulatory body with a higher degree of independence. Additionally, such a right can only be given to the regulatory body if a specific legal set-up is provided for. Because of the context-sensitivity of this criterion, it has not been included in the questionnaire.
- The body to consider third party complaints concerning broadcasters' activities is covered in Table 14 of the questionnaire.
- We did not include the criterion of whether the regulatory body has the competence to issue and supervise broadcasting licences in the questionnaire, as this criterion is only broadcasting-specific. Furthermore, the issuing and supervision of licences constitutes a regulatory power that does not necessarily have a positive effect on either the independence or the efficient functioning of the regulatory body: Whereas more powers can lead to a greater distance with regards to government and parliament, it can increase the risks of regulatory capture by the industry.

- The criterion of whether or not the regulatory body has a margin of discretion in its decision and/or rule making power has not been included in the questionnaire because this criterion is too complex to be asked for in a standardised manner. However, in Table 11 the Country Correspondents have been asked to indicate whether the regulatory bodies have a margin of discretion while applying their sanctioning powers.
- The question of whether the regulation is to be applied *ex ante* or *ex post* can be derived from Table 10. This table concerns monitoring power. Monitoring is a field in which the differentiation between these two forms of regulation is of relevance for the efficient functioning of the regulatory body.

De facto indicators:

- The *de facto* indicators resulting from the regulatory powers have not been included in the questionnaire. However, the Country Correspondents were asked to explain the *de facto* use of regulatory powers in the Country Report.
- The *de facto* indicator of whether or not the regulatory body has sufficient flexibility in managing resources requires a subjective assessment that is unsuitable for inclusion in a standardised questionnaire.

1.3.6.2.2 Financial autonomy

Formal indicators

- The source(s) of the body's budget, its legal basis and the respective percentages have been covered in Table 25. In Table 26 we asked about the actors involved in the budget-setting process. Also, we explicitly asked whether the regulatory body is involved in the budget-setting process and who is involved in the process of budget adjustment. We did not ask for the form of the budget allocation procedure because this criterion has been considered too complex and context-sensitive to be included in a standardised questionnaire.

De facto indicators

- We did not ask about the adequacy of the regulator budget because this involves a subjective assessment and is therefore not suitable for a standardised questionnaire.
- We asked whether there is a *de facto* influence of third parties (not formally involved in the process) on the budget in Table 26.
- If there were cases reported where supervisory authorities threatened to cut funding plans or to use funding decisions as leverage in political controversies, the Country Correspondents were asked to explain those in the Country Reports.

1.3.6.2.3 Autonomy of decision makers

1.3.6.2.3.1 Nature and composition of decision-making organ

Formal indicators

- We asked for the form and the composition of the decision-making organ (board/director/chambers) in Table 15. Furthermore, we asked for the total number of board members representing civil society, government, parliament, industry, experts and/or

other groups. County Correspondents were asked to specify the proportions that the respective groups of representatives have in the board.

- The possibility of deciding on the regulator's internal organisation and personnel policy is covered in Table 16. The possibility of using third party contractors is covered in Table 36.
- We did not include the criterion of whether or not the regulator has the opportunity to determine the staff salaries in the questionnaire, because from our point of view it is very context-sensitive and therefore too specific to be included.

De facto indicators

- The resulting *de facto* indicator of whether or not the regulatory body's highest decision-making organ is distinguished by party politicisation did not prove to be suitable to be asked in a standardised questionnaire.

1.3.6.2.3.2 *Appointment procedures*

Formal indicators

- The procedure for the nomination and appointment of the director/board and chairman of the board is covered in Table 17. We also asked about the potential for the appointer(s) to ignore nominations. The renewability of appointment has been covered in Table 18.
- We have not asked about the independence of nominees as a formal requirement for the appointment; instead we decided to scrutinise comprehensively the rules of incompatibility in Tables 20, 21 and 22. We found that the significance of a formal requirement of independence needs to be interpreted in context, whereas rules to prevent conflicts of interests are more precise and provide sufficient safeguards against personal dependencies.
- The information about whether the regulator takes part in the appointment process (e.g. proposal, right to vote) can be drawn from Table 17 in cases where the regulator has the decisive say in either the nomination or the appointment. A mere participation has not been covered because we are of the opinion that this would be of low significance.

De facto indicators

- Issues around the partisanship of the nomination and the appointment process should be covered in the Country Report. The representation or reproduction of political power structures in the actual board composition should also be explained in the Country Reports. In table 18 we asked whether the term of office (of the board members of the regulatory body) is staggered in order not to coincide with the election cycle. This would be a safeguard against a representation or reproduction of political power structures.
- The criterion asking for the factual behaviour of the appointed member with regards to the interests of the body nominating or appointing him or her has been considered too context-sensitive and to be too much of a subjective assessment to be included into the standardised questionnaire. Instead, the Study Team shall examine whether it should be included in the empirical analysis to develop *de facto* indicators in work package 3. Additionally, we encouraged the Country Correspondents to address problems regarding discrepancies between the provision of the law and the factual situation in the Country Reports. The same

applies to the potential (or reported cases) for the appointing body to exert pressure on appointed members.

- The rotation of the board members, i.e. a staggered term of office within the board, has not been covered in the Questionnaire because its significance for independence and efficient functioning is contradictory. On the one hand, a rotation within the board can prevent the board from reflecting political majorities and thereby increase its independence and efficient functioning. On the other hand, it can be detrimental to the consistency of the decision making processes within the board and therefore impair the efficient functioning of the board.

1.3.6.2.3.3 Rules to prevent conflict of interest or capture

Formal indicators

- Legal provisions against conflicts of interest regarding the head/board members have been asked for in Table 20, 21 and 22. In Table 20 we also asked about rules prohibiting the holding of other offices in government or parliament at the same time. The question of whether political independence is a formal requirement for the appointment has not been included because the term is too ambiguous to be included into a standardised questionnaire. Rules prohibiting being under contract to, or associated with, a regulatee, or rules against exercising any function or possessing any interest in an enterprise or other organisation in the media or media-related sector, would be part of rules to prevent conflicts of interests with the industry. In Table 22 we also asked whether there is a cooling-off period foreseen in law.
- Additionally we asked whether there are further obligations to prevent conflicts of interest and gave the obligation to disclose participations in companies as an example. Behavioural rules that help to separate private interests from public ones could be inserted as “others” in Table 20 as well. The same applies to rules of confidentiality, although it is debatable whether these are sufficient means to prevent conflicts of interest. In Table 31 we asked whether anybody has the right to give instructions to the regulatory body. Rules prohibiting instructions to individual board members from external persons or bodies have not been included in the examination because this depends very much on the nature and scope of the representation structure, which is not reflected by the tables in detail. We did not ask for provisions against conflicts of interest regarding family members/relatives but in the Country Reports asked to specify whether the Country deals problems of conflicting interests of family members.

De facto indicators

- The proportion of revolving-door appointments should have been covered in the Country Report as a *de facto* indicator. The frequency of *ad hoc* contacts such as internships, collaborations, and regular meetings has not been questioned because this criterion is too ambiguous to be qualified as an indicator for independence and efficient functioning. Equally, such contacts may improve independence because collaborations and regulatory meeting can support expertise and therefore also foster independence. The actual independence of

board members and/or staff from personal interests in market players would – if problematic – be addressed in the Country Report. The adequacy of the internal organisation in relation to regulatory tasks and the national context is too much of a subjective assessment to be included in the questionnaire.

1.3.6.2.3.4 *Tenure & Salaries*

Formal indicators

- The duration of the term of office and the question of whether the term of office is staggered in order not to coincide the election cycle have been included in Table 18. The question asking for legal provisions allowing an adequate level of salaries has not been included in the questionnaire because of its context sensitivity.

De facto indicators

- An (involuntary) early resignation, e.g. because of an informal agreement to resign after the election of new government, can be an indicator for a lack of independence that – if observed in the respective country – should be explained in the Country Reports. The level of income of the head/board members in recent years has been excluded as a formal criterion and therefore is also to be excluded as a *de facto* criterion. However, in cases where the level of income has been reduced during the last year in a way that could reduce the regulatory body's independence, this should be addressed in the Country Report.

1.3.6.2.3.5 *Dismissal*

Formal indicators

- The possibility of dismissal before the end of tenure, the necessary legal grounds for such a dismissal, its scope and the competent body for such an action have been asked in Table 23.

De facto indicators

- Reported cases of dismissals before the end of the term were to be reported in Table 24.

1.3.6.2.4 Knowledge

1.3.6.2.4.1 *Qualification and expertise*

Legal requirements of expertise and professional background have been covered in Table 19.

1.3.6.2.4.2 *Seeking opinions from experts and stakeholders*

Formal indicators

- The existence of a legal framework for seeking advice is discussed in Table 36.

De facto indicators

- The actual seeking of advice is asked for in Table 36.

1.3.6.2.4.3 Cooperation

Formal indicators

- The legal requirement for cooperation with other regulatory bodies within the regulatory system has been addressed in Table 40. Table 41 asks about international cooperation.

De facto indicators

- Where there are discrepancies between the formal and the *de facto* situation regarding cooperation, or other peculiarities on the *de facto* level, this should be addressed in the Country Report.

1.3.6.2.5 Accountability and transparency mechanisms

1.3.6.2.5.1 Transparency mechanisms

Formal indicators

- The question of whether the decision making process is transparent is covered in Table 16. Table 37 asks for detail about public consultation and Table 39 discusses the publication of the regulator's decisions and the obligation to explain those decisions.

De facto indicators

- In cases where there are discrepancies between the formal and the *de facto* situation, the resulting *de facto* indicators, which mainly address compliance issues and the forms of dissemination, should be addressed in the Country Report.

1.3.6.2.5.2 Seeking opinions from experts and stakeholders

Formal indicators

- The existence of a legal framework for consultations is discussed in Table 36.

De facto indicators

- If there are discrepancies occurring between the formal and the *de facto* situation, this should be discussed in the Country Report. The actual situation regarding public consultations is asked for in Table 38. The criterion of whether consultation responses are published has been included in Table 37.

1.3.6.2.5.3 Formal accountability and auditing mechanisms

Formal indicators

- Formal indicators regarding the formal accountability and the external evaluation procedure are addressed in Tables 28, 29 and 30. We did not include the question of whether formal pre-defined performance criteria exist, because this criterion seems too ambiguous to be included into a standardised analysis. The same applies to the question of whether legal provisions (in general) are clearly defined in law. The assessment of the clarity is to a certain degree subjective and therefore not suitable for a standardised questionnaire.

- The prioritisation of multiple objectives stipulated in law and the quantification of regulatory objectives are criteria that are very context-sensitive. Therefore they do not form part of the questionnaire.

De facto indicators

- If there is a discrepancy between the formal and the *de facto* situation this should be explained in the Country Report.

1.3.6.2.5.4 *Appeal procedures*

Formal indicators

- Table 32 discusses appeal procedures and the relevant appellants. Table 34 asks for the scope of judicial review and the margin of discretion left to the regulator.

De facto indicators

- We did not ask for the number of legal challenges to the decisions of the body, because this criterion cannot be qualified as a potential formal indicator for independence: The significance of the number of legal challenges cannot be determined without knowing the exact contextual circumstances for each appeal case.
- Moreover, the opportunity for the legislator/government to overrule regulatory decisions through new legislation is a very context-sensitive criterion and therefore cannot be included as a potential formal indicator for independence.

2. ANALYSIS OF INSTITUTIONAL, REGULATORY AND LEGAL FRAMEWORKS OF REGULATORY BODIES IN THE MEDIA SECTOR IN 43 COUNTRIES

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2.1 Methodology

In addition to the completion of the questionnaire, which took the form of a set of tables, the Country Correspondents were asked to write a description of the institutional, legal and regulatory framework in their respective countries. They were asked to include possible indications of *de facto* influences and non-compliance with formal provisions. The tables based on the context descriptors, formal and *de facto* indicators provide detailed information on the country's institu-

tional, legal and regulatory frameworks, as well as elements of the effective practical implementation of these frameworks. They allow a comparative overview of the situation across the countries covered. The standardised form facilitates the identification of differences and similarities among the regulatory bodies. At the same time, the tables are designed to reflect the particularities resulting from the institutional design of Public Service Broadcasting and of co-regulatory bodies.

To complement and – in the case of controversies – contrast the answers of the Country Correspondents, the regulatory bodies of all countries covered by the study were asked to fill out the questionnaire as well. The Country Correspondents were asked to identify the main regulatory bodies competent for audiovisual media services, including the regulatory bodies for Public Service Broadcasting. In cases where there was more than one regulatory body competent for supervising the application of the rules of the AVMS Directive, the additional bodies were contacted as well.

After receiving the answers, the consortium checked both the correspondent's and the regulatory body's answers for consistency. Where contradictions arose, the Country Correspondents were asked to clarify and explain the situation.

2.2 Development of institutional audiovisual media regulation – a historical overview

The history of state intervention in broadcast television media spurred the need for supervision and consequently the establishment of supervisory authorities. With radio and television being from the outset under the control of the European governments, the challenge of achieving independence for these regulatory bodies was even greater. It wasn't until after the 1980s that the pressure to avoid political interference began to rank highly on the public agenda, and regulators moved away from acting like the operational arm of political power. The acknowledgement that the primary aim of any communications and media policy is that of “securing the free and equal access”³⁷⁰ to media markets and means of transmission, and to protect a range of content standards in order to serve the needs of society, continues to legitimise a degree of intervention in media policy-making.

In their influential book entitled “Comparing media systems: three models of media and politics”, Hallin and Mancini³⁷¹ identify the following forms of state intervention: libel; privacy; defamation; right-of-reply laws; hate speech laws; professional secrecy laws for journalists; laws of access to information; laws regulating media concentration, ownership and competition; laws regulating political communication (especially during electoral periods); broadcast licensing laws; and laws regulating broadcast content. They conclude that “the most important form of

370 Van Cuilenburg, J. / McQuail, D. (2003): 205.

371 Hallin, D. / Mancini P. (2004).

state intervention is surely public service broadcasting³⁷², which stood at the origin of media plurality enhancement.

The evolution of media regulation and oversight over time reflects regulatory trends (public service, delegation to independent authorities) and developments in the market (the advent of private broadcasters in the beginning of the 1980s and convergence of television broadcasting and other forms of audio-visual media services and means of transmission), as well as in response to political changes in the Central and Eastern European region. As shown in Table 1 (below), the phases of developing independent authorities for the media sector require a set of conditions *sine qua non*, which explain the structural shifts in the activities performed by the regulator. State intervention – legitimised in the name of the public interest – is intended to protect against capture by specific interests and to ensure representation of all groups in society.³⁷³ It takes different forms in accordance not only with technological developments, but also with the traditional political legacies binding the decision-makers and the relevant stakeholders.

Tab. 2 Overview of paradigm shifts in media regulation in Europe, necessary conditions and their implications

Paradigm shift (time period)	Necessary conditions and determinant factors	Implications for the regulator and its independence
Public service paradigm (1950s – late 1970s)	In Western Europe: scarcity of spectrum (for radio and television) social equity and equal access considerations (universal service) nature of programming fostering national identity	State television, acting as the operational arm of the government, or public service broadcasting organisation under internal oversight
Competitive de-regulation paradigm (1980s – mid 1990s)	In Western Europe: market liberalisation due to the expansion of cable and satellite television, resulting in a diversification of content (except for France, where dirigisme prevailed initially) internationalisation of media markets brought about by the advent of satellites minimal state ideology (based primarily on economic rationales) transformation of state television to independent public service broadcasters	Establishment of independent regulatory agencies to oversee the new and numerous commercial broadcasters and in many instances also the public service broadcaster
Post-communist media paradigm (1989 – mid 2000s)	In Central and Eastern Europe: large-scale transition process towards a liberal democratic model (political, economic and social change) legacy of communism in the approach to media markets transformation of the party-controlled broadcaster into a public service broadcaster pressure from the international community to reform the media	Establishment of regulatory agencies that: retained a high degree of political control; or were shaped as independent after the available Western models
Post-conflict intervention paradigm	In countries of Ex-Yugoslavia: sharp ethnic divisions	Setting up independent media authorities to regulate against a

372 Hallin, D. / Mancini P. (2004): 43

373 Buckley, S. et al. (2008): 8.

Paradigm shift (time period)	Necessary conditions and determinant factors	Implications for the regulator and its independence
(1995 –mid 2000s)	post-conflict general reconstruction attempts by ethnic groups to take control over broadcasting for fuelling nationalist propaganda International intervention and institution building	monopoly of the media by partisan groups
Convergence paradigm (late 1990s – present)	In Europe: fast-changing globalised environment technological developments, converging trend of audio-visual platforms horizontal regulation of all audio-visual media services (AVMS)	Establishment of some converged independent authorities for electronic media and telecommunications

Source: INDIREG research

This chapter is structured as follows. The first part is dedicated to the origins of media regulation and points to the extensive state intervention in the early days of radio and television. The second part examines the market and policy changes in the aftermath of cable and satellite expansion, and considers the evolution of broadcasting in Western Europe against the background of the inception of regulatory authorities for television and electronic media. The transformation in Central and Eastern Europe after the collapse of communism, and the media intervention in the ex-Yugoslav conflict-torn territories, are tackled in the third and fourth sections. Next, the issue of media convergence and that of converged regulatory bodies are looked at in the European context. Finally, the European Union Audiovisual Media Services (AVMS) Directive from 2007 is analysed in the light of how it will influence the existing media regulatory agencies and contribute to new competences and powers in the regulation of audiovisual media services.

2.2.1 Origins of media regulation

Compared to the press sector, broadcasting media have been regulated – more or less strictly – right from the beginning. The radio became a mass-medium in the 1920s in Europe, technologically developing from the postal, telephone and telegraph (PTT) services. As such, the latter were owned by the state, which meant that the government soon expanded its control over the airwaves as well.³⁷⁴ In contrast to the American capitalist model, the most influential European states adopted a “public-utility” approach by retaining control over the newly introduced media, by subordinating them to the national interest³⁷⁵. This has been facilitated by the fact that, compared to other public services, the broadcast content had a zero marginal cost³⁷⁶, which was not influenced by the number of people in its audience.³⁷⁷

Moreover, radio played a crucial role during the First World War, causing some European governments to impose exclusive monopoly on it. Most notably, this was the case in Germany, Sweden and France³⁷⁸ Switzerland followed a different model, by having small public corpora-

374 In the US, radio industry was, from the start, a private sector activity.

375 Van Cuilenburg, J. / McQuail, D. (2003):188.

376 Nissen, C. (2006): 17.

377 In effect, the costs of producing a programme in the same territory are the same regardless of whether it reaches 10 or 10.000 people.

378 In France, some unofficial radio stations were still tolerated.

tions running the radio stations in large cities to serve different communities. In other countries, such as Belgium, Denmark and Norway, radio transmission began as a commercial enterprise but was later transformed into a state operated enterprise. Only in the United Kingdom was the state broadcaster (the BBC) transformed into a public service organisation (in 1927) which was distinct from government and public administration.

Examining the transition from postal services to television, Van Cuilenburg and McQuail emphasise that the distinctive feature of the early days of communication regulation was “the separation of regimes for different technologies, with particular reference to the means of distribution”³⁷⁹. The three spheres of policy demarcation were: print media, common carriers (telephony and telegraph) and broadcasting. Whereas the first sector remained minimally regulated for many decades, the other two were directly subjected to government control immediately after they came into public circulation.

Three different rationales³⁸⁰ – technical, economic and political – explained the need for public regulation following the expansion of wireless and, later on, television. In spite of the technological limitations in place, socio-political motivations prevailed³⁸¹; at a time of “mass democracy” and of state- and nation-building or restructuring in the post-war period, and the role of media in serving the public interest was upheld. The need for spectrum allocation legitimised the intervention of the state³⁸², especially as radio originally developed under state ownership. During World War II, the direct access of governments to this medium served the propaganda purposes of most European governments.

Nevertheless, state intervention was justified as safeguarding against market failures and abuses, especially for avoiding high prices and low-quality services. Given the commercial potential of the electronic means of communication as compared to the traditional press, there was an increased pressure to maintain the status-quo. At the same time, governments carried the responsibility of ensuring universal service provision and the primacy of access to information. Linked to the public interest argument, the political rationale was, however, much stronger. Retaining control over this influential means of communication appealed to state officials, especially as the media impact on behaviour change became more and more visible³⁸³. In the aftermath of the Nazi misuse of the medium, serious concerns with independence from government and from market interests came to the fore. On top of this, there was a need to ensure the democratic accountability of broadcasters. Yet different governments followed their own political traditions in acknowledging the role of broadcasting as a public asset.

Two divergent development paths are worth noting here. On the one hand, the case of Germany stands out with the role of broadcasting as a function of public administration, submissive to political power. In the German case, with a strong state tradition, exclusive monopoly over the radio was imposed from the start. During the Weimar Republic (1918-1933), all the transmission

379 Van Cuilenburg, J. / McQuail, D. (2003):187.

380 Humphreys, P. (1996).

381 Van Cuilenburg, J. / McQuail, D. (2003): 191.

382 Elstein, D. (2005).

383 Nissen, C. (2006).

facilities belonged to the *Reichspost*. In 1925, The *Reichspost* became part of the centralised Imperial Broadcasting Company. As in other European countries, in the early '30s, broadcasters were accountable to what the state authorities and elites considered as “public taste”. It was only after the 1960s that real concerns with representation of social groups and diversity were responded to.

On the other hand, and quite contrastingly, in Britain, the liberal state tradition initially allowed for a representation of private interests. In 1922, the British Broadcasting Company Ltd. (BBC) was established by the British General Post Office as a commercial venture owned by six telecommunications companies, whose primary task was to allocate frequencies, distribute licenses and the revenues from these. By 1927, the British Broadcasting Company had turned into a non-commercial entity, the British Broadcasting Corporation (BBC). The first broadcasting committee was set up in 1923 by the British Post Office and was led by Frederick Sykes, who considered that the “wavebands available in any country must be regarded as a valuable form of public property; and the right to use them for any purpose should be given after full and careful consideration”.³⁸⁴ Indirect state control through the mandatory licensing system granted by the Post Office was the solution agreed on.³⁸⁵

In line with that, the licence obtained on 18 January 1923 specified that the BBC “should not broadcast any news or information except that obtained and paid for from the news agencies”.³⁸⁶ The 1926 General Strike³⁸⁷, begun by miners against mine owners, revealed the extent to which the concept of impartial broadcasting was challenged in the functioning of the BBC.³⁸⁸ With the notable refusal of some newspapers to deliver information about the strike, BBC got the approval to broadcast news bulletins at any time starting on 3 May 1926 and soon became the most important news source. Later on, the BBC became the model after which the German media system was shaped³⁸⁹.

2.2.1.1 Internal oversight – the public-service paradigm

In the aftermath of World War II, the state monopoly on the media and its organisation as a branch of government came under scrutiny, and this gradually caused the paradigm shift. Ensuring the independence of broadcasting content from political interests has been acknowledged as a safeguard against the instrumentalisation of mass media, which also implied structural independence of broadcasting organisations from the state. This allowed broadcasters to distance themselves from the state and gain a degree of political independence. Media control was now driven

384 Sykes Committee (1923), Broadcasting Committee Report, Cmnd. 1951, London: HMSO, 11.

385 Scannell, P. (1990): 13.

386 Briggs, A. (1961): 133.

387 For a detailed account of the BBC's broadcasting during the General Strike, see Tracey, M. (2003).

388 “Assuming the BBC is for the people, and that the Government is for the people, it follows that the BBC must be for the Government in this crisis too.” Transcripts of Radio Broadcast, BBC Archives, as cited in Tracey, M. (2003).

389 Open Society Institute (2005): 34.

by the “public service” approach³⁹⁰ which eventually manifested itself in the gradual set-up of public service broadcasters (PSBs) inheriting the state operation of radio and television.

However, television broadcasting received different regulatory treatment, justified by the idea that the medium exerted opinion-forming powers over “captive audiences”, resulting in less freedom to decide on what was provided, or to manage a diversity of standpoints. In the case of the printed press, the reader could decide on what publication to buy, whereas the choice of broadcasters remained rather limited and made the few existing television channels even more influential. In light of the threat posed to the revenues in the press sector³⁹¹ (still very influential and politically embedded at that time), limits on advertising on radio and television were imposed from the beginning.

The emergence of public service broadcasting has been linked to the development of the political system in a particular historical context.³⁹² Different degrees of autonomy have been allowed by the original placing of the public broadcasters under different statutes. Being founded by a Charter and not by an act of Parliament, the BBC has operated in a tight legal framework which also ensured a considerable amount of independence from interference by political entities, which, in turn, protected this by a 10-year renewable statute. Back in 1926, the recommendations of the Crawford Committee (an official government inquiry into the broadcasting structure) in Britain held that the BBC should become a public enterprise free from government interference. In line with this, in 1927, the BBC was established as a public corporation through a Royal Charter³⁹³. BBC services were to be monitored by the board of Governors, nominated by the government entrusted to maintain its independence.³⁹⁴

After the Second World War, Germany was also among the pioneers of decentralised public broadcasting.³⁹⁵ In accordance with the federal construction of the country and with the 1949 Constitution (Basic Law), the regulation of broadcasting services fell under the jurisdiction of the 16 constituent parts (states or “*Länder*”). Between 1948 and 1956, nine regional public broadcasting corporations were set in place, governed by independent broadcasting councils (*Rundfunkräte*). The membership of these reflected the principle of regulatory power-sharing by “socially significant groups” or organised interests (businesses, church, parties etc.). The internal broadcasting councils would then chose the *Intendant* (director general) of the regional public service broadcaster. The nine regional broadcasting entities jointly act, to this day, in the Association of Public Broadcasting Corporations in Germany (*Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten Deutschlands – ARD*). Although it has been described as an ex-

390 Venturelli, S. (1998).

391 In countries such as Austria, Sweden and Switzerland, the press sector was granted privileged rights to co-determine official broadcasting policy.

392 Jakubowicz, K. (2008).

393 During John Reith’s leadership (1922-1938), however, the BBC followed the official governmental position on the relevant issues.

394 According to section 7(1a) of the BBC charter, the Governors should set and monitor a set of “clear objectives and promises for the Corporation’s services, programmes and other activities and monitor how far the Corporation has attained such objectives and met its pledges to its audiences”.

395 Humphreys, P. (1996): 132.

ample of “overregulation”³⁹⁶, the German media system had in place strong guarantees of non-interference and was later on taken as an example in shaping the post-communist media system. Diverging from the BBC model, the internal control of the German public service broadcasting was ensured by appointment and dismissal rights being placed in the hands of the representatives of the plural interests in society.

The decentralisation of broadcasting occurred at the end of 1950s in many other European countries, stemming, however, from a different logic. In states such as Norway and Belgium, this happened in order to cater for the linguistic and cultural needs of the constituent parts. There, the broadcasting system remained “purely public”³⁹⁷ till liberalisation in the 1980s. In France, the practice of broadcaster control by the political establishment remained in place long after the introduction of regulatory agencies³⁹⁸. Finland embraced the trend of liberalisation in the post-war period. In most Western European countries the activities of the commercial broadcasters remained, to a large extent, confined to the public-service paradigm. In 1950, the European Broadcasting Union was formed, with 23 broadcasting entities, among which was the BBC.

2.2.1.2 Regulation of commercial broadcasters: competitive de-regulation paradigm

The development of new technologies (in particular, cable and satellite) in the 1980s eliminated the technical constraint of scarcity of frequencies, thus allowing for the operation of a gradually higher number of commercial broadcasters. Justifying the maintenance of a public monopoly over television broadcasting became increasingly difficult when the transmission of a multitude of channels became feasible via satellite and cable TV-networks. At the same time, the possibility for circumventing national regulation by transmitting from neighbouring countries with lax legal limitations came about. The reasons that many states reconsidered their degree of intervention in media markets at that time were primarily economic: minimal state ideology, inward investment and revenues from advertising. In the words of Van Cuilenburg and McQuail, in the late 1970s, “the most influential causes of change [were] the ambitions of media corporations and governments alike to benefit from the economic opportunities offered by communication technologies”³⁹⁹. In the midst of the Cold War, no powerful European state could question the importance of the information technology revolution; however, some countries gave up exclusive rights rather late. The implications of the deregulatory move materialised in two forms: on the one hand, it further reduced political control; and on the other hand, it imposed few or no public service obligations on private broadcasters⁴⁰⁰, whose number increased constantly after exclusive rights to provide television broadcasting services have been lifted in order to allow market access by private and commercial television stations (liberalisation).

396 Open Society Institute (2005): 742.

397 Brants, K. and Siune, K. (1992): 104.

398 Coppens, T. and Saeys, F. (2006): 272.

399 Van Cuilenburg, J. / McQuail, D. (2003): 197.

400 Open Society Institute (2005): 45.

With the general understanding that the role of the public service broadcaster (PSB) should not be undermined by the new competitors, two different strategies pursued by the European governments of the time stand out: privatisation (deregulation) and public investment (protectionism)⁴⁰¹. The latter manifested itself as a late liberalisation. In France, it occurred in the mid-1980s under Mitterrand and it came to be labelled as “dirigisme”⁴⁰². Historically, it was grounded in the public service principle embedded in the 1946 Constitution of the Fourth French Republic⁴⁰³. The same state-controlled model was characteristic of the situation in Greece or Spain at that time⁴⁰⁴.

At the other end of the scale, Luxembourg, located at the heart of Europe, developed from the start a purely commercial broadcasting market⁴⁰⁵. Its regulation was entrusted to a for-profit monopoly, the *Compagnie Luxembourgoise de Télédiffusion* (CLT), which had limited public service remit. Similarly, as small states broadcasting into the larger neighbouring countries, Andorra and Monaco remained purely commercial⁴⁰⁶.

In the period of the above-mentioned patterns of de-regulation, two alternative types of relationships between the public broadcaster and the state in the European context emerged⁴⁰⁷: a) the proportionality model, in which the influence of the political parties and civil society groups was reproduced in the governance of the public broadcaster (such as in Germany, Austria and Netherlands); and b) the insulated public broadcaster model, which required the juxtaposition of intermediary, non-politically affiliated bodies (as in the UK, Ireland and the Scandinavian countries).

2.2.2 Setting-up independent regulatory authorities

The establishment of the national independent regulatory agencies (IRAs) in Europe coincided with the diversification of media platforms, as well as the expansion of commercial television. Given the development of media regulation, and the specifics of the political culture(s) in which this emerged, the adoption of legislation guaranteeing (a degree of) independence to the bodies in charge of supervising the activities of public and private broadcasters differed from country to country.

Starting from 1955, with the establishment of the private sector in the United Kingdom, a dual system of financing for the public broadcaster and for commercial stations was introduced. The sources of funding for each were kept separate, in order to discourage competition for revenues, which could have potentially impacted the quality of the services provided by BBC⁴⁰⁸. Accordingly, the licence fees would support the public broadcaster, whereas commercial televisions and

401 Van Cuilenburg, J. / McQuail, D. (2003): 195.

402 Venturelli, S. (1998): 189.

403 See the Preamble of the 1946 Constitution of the Fourth French Republic, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html> (last accessed 14 October 2010).

404 Dragomir, M. (2008): 25.

405 Humphreys, P. (1996): 124.

406 Humphreys, P. (1996): 125.

407 Dragomir, M. (2008): 24-25.

408 Humphreys, P. (1996).

radio stations would make profits from advertising. The way in which the commercial stations were set up initially made them part of the public service paradigm. In Britain, the Independent Television Authority (ITA), a public corporation, came into being by the 1954 Television Act with the mandate of creating the first independent television (ITV)⁴⁰⁹. The regulation of the British commercial sector remained influenced by the BBC model. During the 1980s, two entities presided over the satellite and cable transmissions. The Independent Broadcasting Authority (IBA)⁴¹⁰, evolving from the ITA, was founded in 1972 to oversee the allocation of franchises for 15 regional independent television (ITV) companies and a large number of independent local radio stations (ILR). By its statute, the IBA can be considered the first independent regulatory agency. The ITVs were established as regional monopolies (14 regions plus London, which had two companies⁴¹¹). The criteria for the selection of franchise-holders reflected the “public interest” approach⁴¹². In 1982, to avoid commercial competition with the newly launched minority-oriented station (Channel 4), the IBA set an annual subscription fee to be paid by commercial broadcasters for selling advertising, with the advertising revenues to be retained by the ITVs.

In the 1980s, with the introduction of private commercial broadcasting, the German Constitutional Court set the parameters within which each *Länder* would provide for regulation. The result of this was a new layer of media authorities created to oversee non-public service broadcasting. For pieces of legislation that would require national frameworks, a system of inter-state treaties based on collective agreements was established. In the tradition of public service media institutions, the new system of regulatory entities maintained structural guarantees for a certain degree of independence from political interference. Most notably, membership in these bodies would be assigned according to the principle of proportionality (ensuring all main parties would have a voice) and the fair representation of “socially significant groups”. However, this did not ensure complete separation from political influence: firstly, parliamentarians could be given a seat in such bodies; and secondly, the representatives of the “socially significant groups” already had strong political allegiances⁴¹³. The monopoly of the state over public service broadcasting ceased in 1982, allowing for a dual system⁴¹⁴ to be set in place. In 1990, the re-unification with East Germany resulted in the modelling of the media system in the former communist part of the country after the Western German rules.

In France, state monopoly over broadcasting was only abolished in 1982, with the introduction of the Law on Audiovisual Communication⁴¹⁵. The same act established the first independent regulatory agency for broadcasting in the country, the High Authority for Audiovisual Communications (*Haute autorité de l’audiovisuel*), which started supervising the appointments for pub-

409 Scannell, P. (1990): 18.

410 Initially, through the 1972 Sound Broadcasting Act, the predecessor of the IBA, the Independent Television Authority (ITA) became responsible for organising the independent local radio (ILR) stations.

411 In London, one company would broadcast during weekdays and the other one during weekends.

412 This included: limits on the content, timing and quantity of advertisements; strict limits on the prizes that could be offered in game shows; monitoring of the quality of the content provided.

413 Humphreys, P. (1996): 152.

414 Open Society Institute (2005):34.

415 Open Society Institute (2005):645.

lic service broadcasters, licensing radio and television programs and programming. Other European countries were also compelled to introduce new regulatory authorities to oversee the broadcasting sector, in addition to demonstrating a sufficient distance from political interests that made the independent regulator the favoured model.

2.2.3 Media regulation in Western-European democracies

Cable services became most popular in the mid-1980s in Western Europe. The Scandinavian countries benefited from it immediately, as their territories were densely cabled already⁴¹⁶. The late 1980s witnessed the rise of the pan-European Eutelsat and Astra satellites, as well as the expansion of Rupert Murdoch's commercial satellite television platform in Europe. Driven by these rapid and substantial changes, most Western European countries embarked on further deregulation, once pressure from commercial entities started to increase. Among the promoters of less strict regulation were the National Posts and Telecoms themselves, traditionally having the monopoly and an influential say in shaping media policy-making. To prevent the negative consequences of cross-border television, the 1989 Television without Frontiers (TwF) Directive of the European Community and preceding Council of Europe Convention on Transfrontier Television came into effect, which introduced harmonised regulatory standards for television with the aim of providing for cross-border dissemination and retransmission of television.

2.2.3.1 Declining public control

In light of the commercialisation trend across Western Europe, several safeguards were set in place to limit political interference in the work and functioning of public broadcasters. These included conferring the legal status of autonomous corporations, being regulated by special internal boards (the BBC Board of Governors and German broadcasting councils) or special external bodies (the IBA in the UK) or both internal and external supervision (as in Sweden), and allowing for a degree of autonomy over funding. The latter, however, was based on user licence fees still determined by the government.

In France, up to 1968, broadcasting was controlled by a governmental body, ORTF (*Office de la radio-télévision française*) under the Ministry of Information and later on under that of Culture⁴¹⁷. Even after 1968, when the funding of the ORTF would diversify to include limited revenues from advertising as well as from the licence fee, tight control by the government would not diminish. In 1974, the ORTF split up into seven public companies. The first independent regulatory authority was created in 1982 and, six years later, the Law on Freedom of Communication created the legal framework for the operation of a dual private-public system. This resulted in the broadening of the responsibilities of the regulatory agency for broadcasting – first renamed the National Commission for Communication and Freedoms (*Commission nationale de la communi-*

416 Humphreys, P. (1996):165.

417 Open Society Institute (2005):644.

cation et des libertés), then in 1989 the High Council for Broadcasting (*Conseil supérieur de l'audiovisuel* – CSA).

In Italy, the first restructuring of the national broadcaster, RAI, occurred in 1975. The media market was characterised by strong regulation for public service broadcasters and “wild deregulation”⁴¹⁸ for commercial broadcasters, relying heavily on entertainment and advertising. The relaxed policy environment has been regarded as the primary structural condition that allowed the concentration of media ownership in the hands of Berlusconi in a short period of time, by allowing him to create the Mediaset “empire”⁴¹⁹. The 1990 Broadcasting Act only came to legitimise the market developments till that point in time and had no impact on the status-quo⁴²⁰. The 1975 reform transferred the control of public television from the executive branch to the political parties represented in Parliament⁴²¹. A specific institutional arrangement – a parliamentary commission in charge of the monitoring of the public service broadcaster – emerged in the Italian context. With the passage of the 1990 Broadcasting Act, the authority to decide on a wide range of issues (such as ownership structures or compliance with viewers’ interests) was entrusted to a single individual, usually a magistrate.

2.2.3.2 First cases of independent media regulatory bodies

In the United Kingdom, the cable television industry was supervised by the Cable Authority, established by the Cable and Broadcasting Act in 1984. The functions of this regulatory body were two-fold: granting licenses following a competitive process, and regulating and monitoring the services provided (adherence to codes, norms and standards, practice of advertising etc.). The UK established an independent regulatory agency (IRA) for telecommunications in 1984⁴²², Of-tel, which was merged with other four bodies to create a converged regulator in 2004.

In France, the functioning of commercial broadcasters only came under oversight in 1986, when the High Authority was replaced by the National Commission for Communication and Freedom (*Commission Nationale de la Communication et des Libertés*). The privatisation of the cable sector in France was done during the cohabitation period under Mitterrand’s presidency (1986-1988), leading the French media market to what has been regarded as being “one of the most marketised” ones in Europe in the early 1990s⁴²³. However, the regulatory bodies in France remained highly politicised, with successive changes following the political shifts of power. In 1988, the Higher Audiovisual Council (*Conseil Supérieur de l’Audiovisuel*) took over the former National Commission, with more extensive powers, including suspending the transmission of broadcasters in cases of non-compliance with the existent regulation.

418 Humphreys, P. (1996): 179.

419 Open Society Institute (2005): 872.

420 Open Society Institute (2005): 913.

421 Open Society Institute (2005):

422 Giraldi, F. (2008): 22.

423 Humphreys, P. (1996): 165.

2.2.3.3 Media regulation and political culture

As the previous section shows, the media market remained deeply embedded in the specific political establishments and traditions of the different European countries. Looking at the structural conditions for the freedom of media, Hallin and Mancini⁴²⁴ distinguish between the following main systems: polarised-pluralist model (France, Greece, Italy, Portugal, Spain), democratic-corporatist model (Austria, Belgium, Denmark, Finland, Germany, Netherlands, Norway, Sweden, Switzerland) and liberal model (Britain, the United States, Canada, Ireland). Table 2 below summarises the most relevant dimensions that contributed to the historic transformation of the broadcasting industry.

Tab. 3 Selected characteristics of media systems

	Mediterranean/ Polarised Pluralist Model	Northern European/ Democratic Corporatist Model	North Atlantic/ Liberal Model
Political parallelism	High political parallelism; external pluralism, commentary-oriented journalism; parliamentary or government model of broadcast governance – politics-over-broadcasting systems	External pluralism especially in national press; historically strong party press; shift toward neutral commercial press; politics-in-broadcasting system with substantial autonomy	Neutral commercial press; information-oriented journalism; internal pluralism (but external in Britain); professional model of broadcast governance – formally autonomous system
Role of the state in media system	Strong; “savage” deregulation (except France)	Strong, but with protection for press freedom; strong public-service broadcasting	Market-dominated (except strong public broadcasting in Britain, Ireland)
Political history/ patterns of conflict and consensus	Late democratisation; polarised pluralism	Early democratisation; moderate pluralism (except Austria, Germany pre-1945)	Early democratisation; moderate pluralism
Consensus or majoritarian government	Both	Predominantly consensus	Predominantly majoritarian
Individual vs. organised pluralism	Organised pluralism; strong role of political parties	Organised pluralism; history of segmented pluralism; democratic corporatism	Individualised representation rather than organised pluralism (especially US)
Role of the state	Dirigisme, strong involvement of parties and state in economy; period of authoritarianism, strong welfare state in France and Italy	Strong welfare state, significant involvement of state in economy	Liberalism; weaker welfare state particularly in the US
Rational legal authority	Weaker development of rational legal authority (except for France); client-	Strong development of rational-legal authority	Strong development of rational-legal authority

424 Hallin, D. / Mancini, P. (2004).

	telism		
Professionalisation	Weaker; instrumentalisation	Strong; institutionalised self-regulation	Strong; non-institutionalised self-regulation

Source: Hallin, Daniel and Mancini, Paolo (2004). *Comparing media systems: three models of media and politics*. Cambridge: Cambridge University Press.

De facto, the important role played by “political parallelism” permeates all the other relevant features of the media system, including the independence of the regulatory agencies. Apart from historical market development, the mode of regulation chosen in a country is shaped by the legacy of the type of relationship between the state and the press sector over time. In countries with “high political parallelism”, the media represents a reflection of political control. Under the polarised pluralist model, the subordination of broadcasting to the government results in what Hallin and Mancini call “politics-over-broadcasting”. An alternative organisation model, politics-in-broadcasting, characteristic of corporatist states, allows for a degree of autonomy and ensures independence for media governance.

2.2.4 Media reform in post-communist countries

2.2.4.1 Media systems in Central and Eastern Europe after 1989

The rise of communist parties in Central and Eastern European (CEE) states in the late 1940s brought about exclusive media ownership and state monopoly and control in broadcasting; the television and the radio became the *porta-voce* of the regime and thus served as sources of propaganda and misinformation. There was a degree of liberalisation in the 1980s, after the glasnost reforms were initiated by Gorbachev in the Soviet Union, but the public broadcaster was still tightly controlled by the communist party.

The 1989 revolutions in Poland, Czechoslovakia, East Germany, Hungary and Romania stirred the transition from the “command-driven” model employed during communism, to the “demand driven” one characteristic of democratic societies. According to Mungiu-Pippidi, after 1989, media freedom “was not granted to the sector by governments via negotiations, but grew independently within most countries once it became clear that there were no longer any communist barriers to prevent free speech”.⁴²⁵ In the CEE countries, both liberalisation and media plurality were subsequent to the influence of the pressure for regulation on broadcasting, by virtue of acquiring membership to the Council of Europe and later on candidacy status to the European Union⁴²⁶.

In the early days after the regime change, when the public broadcaster was still in the hands of the government, reluctance to liberalise the media market produced different patterns of development in CEE countries. Apart from the Czech Republic and Slovakia, two Baltic countries were the pioneers of the dual private-public system in the early 1990s: Lithuania and Estonia (especially under the influence of Finnish television). The monopolistic position of the state end-

425 - Pippidi, A. (2003): 32.

426 - Open Society Institute (2005): 43.

ed in Albania and Bulgaria in mid-1990s, in Latvia in 1996 and Hungary in 1997⁴²⁷. In Poland and Romania, the licensing of the private broadcasters took place between 1993 and 1997. In a context in which “the freedom of the media soon came to mean first of all the freedom to run the media as a private business”⁴²⁸, policy dysfunctions with regard to the media environment came to be addressed, in most cases, in the late 1990s. Several examples illustrate this: in Lithuania, until 2000, no regulation applied to the commercial sector, whereas the public broadcasting sector was heavily regulated. In Slovenia, between 1990 and 1994, there was no legal provision for allocating licenses, but there existed the Telecommunications Office granting frequencies primarily to commercial broadcasters⁴²⁹. By the time the Mass Media Act of 1994 entered into force, and the Broadcasting Council was formed, the “law established a regulatory body that could no longer influence the future development of the country’s broadcasting sector”⁴³⁰.

2.2.4.2 Media transformation and political culture in CEE

A critical factor for future post-communist transition, the legacy of different forms of totalitarianism existent throughout Europe, remained profoundly present in that it did not create an equal starting point. The limitations imposed by the previous regime permeated the newly acquired freedom in the aftermath of communism and structured not only the behaviour of the audience, but also that of broadcasters, journalists and policy-makers.

Media played a key role in advancing democratic goals, but for many years it remained subordinated to the political ideologies of the political elites driving the transformation. The international efforts for modernising the media in CEE countries relied on a particular set of values that would fuel their development after debarking of the foreign donors. Among these, a strong respect and adherence to rule of law and institutional support (professional organisations, trade unions, training organisations) were considered necessary conditions for the “emergence of a genuine legal culture of standards related to freedom of expression and freedom of the media”⁴³¹.

Regardless of how tardily the transition countries managed to complete the reforms they committed to, and in spite of the extent to which they were able to abide by the previously-acknowledged democratic rules in the first post-communist decade, the endeavour in the 1990s generated a degree of foreign support rarely manifested before. Media were charged with promoting and shaping the new political values and thus determined, to a large extent, the alignment with democratic ideals.

According to communications scholars⁴³², the new media landscape of the CEE countries was shaped by two distinct models. The first one of them stemmed from the communist legacy and was based on retaining political influence in the media sector to the highest extent possible. In Poland, the National Broadcasting Council (*Krajowa Rada Radiofonii i Telewizji – KRRiT*), in-

427 Open Society Institute (2005): 35-36.

428 Open Society Institute (2005): 35.

429 Petkovic, B. (2004).

430 Petkovic, B. (2004): 16.

431 Kaminski, I. (2003): 64.

432 Petkovic, B. (2004).

stituted by the 1992 Broadcasting Law, though considered to be the first democratic body of the country⁴³³, was defined by statute as a “state institution”.⁴³⁴ In the case of Estonia and that of Republic of Macedonia till 2005, the allocation of broadcast licenses was not delegated to the IRAs, but remained with the Ministry of Culture and the government (in cooperation with the Broadcasting Council), respectively⁴³⁵. Traditionally, governmental intervention in the media markets of CEE countries also relied on state financing for broadcasting regulatory bodies, which is perceived as very dangerous to independence⁴³⁶.

While most of the broadcasting and public service media laws were passed by in the CEE region by 1994, the independence of regulatory agencies remained challenged by the heavily politicised appointment procedures⁴³⁷. In the Czech Republic, the appointment of the members of the Radio and Television Broadcasting Council, though formally subjected to approval by the Prime Minister, remained the sole responsibility of the lower chamber of the Parliament, thus affecting the degree of independence granted to the regulator⁴³⁸. In some of the countries in the region, although there have been legal provisions in place specifying that the members of the regulatory agency cannot be members of political parties, they rarely had no political past⁴³⁹. A number of corruption cases involving the members of the national media regulatory bodies made the headlines. Most notably, the Rywingate scandal in Poland in July 2002 involved accusations of corruption at the highest level, revealed by a respected Polish newspaper, *Gazeta Wyborcza*, six months later.⁴⁴⁰

The second model of transformation was influenced by the Western-European models and practices.⁴⁴¹ Post-communist countries tried to follow the European media standards⁴⁴² by imitation or adaptation. For example, the Albanian press law of 1993 was drafted after the law of one of the German states, with the help of the German Friedrich Ebert Foundation⁴⁴³, but was considered too restrictive and was replaced in 1997.

The Europeanisation impact also manifested itself in the attempts of the candidate countries to comply with EU regulation and harmonise their national legislation accordingly. Media plurality

433 Open Society Institute (2005): 1089.

434 The KRRiT remains accountable to the Chamber of Deputies (Sejm), Senate and Presidency, which are also the appointing institutions.

435 Dragomir, M. (2008): 7.

436 Open Society Institute (2005): 48.

437 Petkovic, B. (2004).

438 Open Society Institute (2005): 43.

439 Open Society Institute (2005): 1092.

440 According to this account, Lew Rywin, a famous Polish film producer (*Schindler's List* and *The Pianist*), claiming to act on behalf of “the group in power”, tried to persuade Adam Michnik, the chief-editor of *Gazeta*, to influence the amendments to the broadcasting law in exchange for US\$17.4 million, allegedly to be given to the Democratic Left Party ruling at that time. The amended law would have allowed AGORA SA to enter the television market, after its successful investments in the local and regional radio broadcasting. After the scandal was presented by *Gazeta* in December that year, Rywin received a two-year prison sentence that was later appealed.

441 Open Society Institute (2005): 34-38.

442 Petkovic, B. (2004):10.

443 Petkovic, B. (2004): 15.

and the transformation of the public broadcaster from state-controlled to public-service oriented⁴⁴⁴ marked this transition towards European standards. At present, in the region, the activities of the broadcasters are mostly overseen by independent bodies. In Romania, Lithuania, former Yugoslav Republic of Macedonia and Croatia, regulatory agencies were granted independent status from the beginning. In Lithuania, as in Germany, two separate regulators were set in place for public and private broadcasting (The Council of Lithuanian Radio and Television and the Radio and Television Commission of Lithuania, respectively)⁴⁴⁵. In line with the German model of involving “socially significant groups”, nine out of the thirteen members of the Radio and Television Commission of Lithuania – regulating commercial stations only – are appointed by professional organisations. Following the French example, media regulatory authorities also appoint the governing bodies of the public broadcasters in Bulgaria⁴⁴⁶, Estonia, Latvia and Poland.

2.2.5 Media intervention in post-conflict states

The media restructuring following the end of the wars in former Yugoslavia in 1995 (Bosnia-Herzegovina) and 1999 (Kosovo) represented a different attempt by the international community to prevent national monopolies over the sources of information. In particular, for the Western Balkans, this was intended to limit the effects of political propaganda in conflict-torn states. Historically, such efforts were preceded by the Allied Occupation Forces’ efforts to influence media in Germany and Japan after the Second World War⁴⁴⁷.

Prior to 1991, Slobodan Milosevic, ruling over the Yugoslav territory, heavily relied on the media for fuelling nationalist propaganda. In the cases of Bosnia and Herzegovina (BiH) and Kosovo, there was virtually none private media ownership before the conflict, but media appropriation by the state and complete control over the channels of information⁴⁴⁸. During Milosevic’s regime, the Albanian-speaking media was banned in Kosovo⁴⁴⁹.

2.2.5.1 Bosnia and Herzegovina

After the Dayton Peace Accords put an end to the war in November 1995, the involvement of the Office of the High Representative (OHR), Organisation for Security and Cooperation in Europe (OSCE), and numerous other NGOs, represented a real test in reshaping and reforming the media space as part of the democratic institution-building process. It was, in Karlowicz’s words, “an entirely new experiment in the field of media”.⁴⁵⁰ BiH was the only one of the Yugoslav repub-

444 Jakubowicz, K. / Sukosd, M. (2008): 16.

445 Open Society Institute (2005): 45.

446 In Bulgaria, the Communications Regulation Committee (CRC) operates alongside the Council for Electronic Media, but the appointment procedure for this body remains divided between the Parliament and the President of the Republic.

447 Price, M. / Thompson, M. (2002): 4.

448 Price, M. / Thompson, M. (2002). NB: Apart from a few private radio stations for example in Sarajevo.

449 Karlowicz, I. (2003)..

450 Karlowicz, I. (2003): 116.

lics not having a single titular nation, but three distinctive ethnic groups: Bosniaks, Serbs and Croats. Reflecting these, the media were divided according to ethnic lines.

In the period preceding elections, the Media Experts Commission (MEC) was set up by OSCE, but it did not manage to ensure equitable representation of all ethnic groups, as reflected in its staff composition and its activities. Yet other independent initiatives, such as the Open Broadcast Network and the Free Elections Radio Network, were set up with the aim of broadcasting countrywide without ethnic orientation. However, not being influential enough, they did not challenge the established position of the nationalist media. The formation of public service broadcasting started in mid-1999 initiated by the OHR⁴⁵¹ and went through a series of transformative processes in order to become a genuine public broadcasting service. This process however has not yet been finalized. At the moment, in BiH there is a Public Broadcasting System that, by the Law on Public Broadcasting System, should consist of 4 legal entities – Public Broadcasting Service of BiH, Radio television of the Federation of BiH, Radio Television of the Republic of Srpska, and the Corporation. The Corporation has not been established yet

It was only in June 1998 that the Independent Media Commission (IMC) was founded, to take lead in supervising frequency spectrum allocation, licensing broadcasters, devising codes of practice, dealing with complaints, monitoring media and imposing sanctions. The IMC, a Western-modelled regulatory regime, was separate from the OHC, but accountable to it. The IMC was conceived as a temporary regulatory body for print media and broadcasting, as well as for establishing codes for the press and for the Internet, and it was expected to transfer its authority to a local body as soon as possible. For the first time in the area, “legal access to the airwaves was liberated from political control. Stations had to respect frequency allocation, divulge their financial sponsorship or ownership arrangements and provide programming that avoided incitement to ethnic hatred or violence”⁴⁵². In 2001, the IMC and the telecommunications regulatory agency were merged into a new converged regulatory body, *Communications Regulatory Agency (CRA)* – the first of its kind in the region.

2.2.5.2 Kosovo

The UN Security Council Resolution 1244 from 10 June 1999 established an international security force (KFOR) and an international civil presence – UN Interim Mission in Kosovo (UNMIK), after 78 days of bombing. Part of the UNMIK, OSCE was mandated to develop “civil society, non-governmental organisations, political parties, and local media”.⁴⁵³ As in the case of Bosnia and the Dayton Agreements, the Rambouillet Accords ending the war did not include any media reform specification, except for guaranteeing freedom of expression.⁴⁵⁴

Delayed by the failure of the UN and OSCE to reconcile their views on media reform in the country, the creation of a media regulatory body materialised only after an incident of “vigilante

451 Jusic, T. / Dzihana, A. (2008).

452 OSCE (1998): 213.

453 Mertus, J. / Thompson, M. (2002): 260.

454 Mertus, J. / Thompson, M. (2002):261.

journalism”, resulting in the assassination of the 25-year old Petar Topoljski in May 2000. What led to his death was the publication of an article about Kosovo-Serb war criminals in the newspaper *Dita*, which included his photograph, together with address and workplace details (notably, he worked as a translator for UNMIK). Following this event, the Temporary Media Commissioner (TMC) was created in June 2000 as a temporary entity to end its mandate in 2004. From the outset, the TMC was given extensive powers, ranging from establishing codes of ethics that became prerequisites for granting broadcast licenses to the imposition of substantial fines for promoting hate speech. To balance this, an independent three-judge Media Appeals Board was put in place.

A public broadcaster, Radio-Television Kosovo (RTK) and two commercial televisions (KTV and TV 21) were funded primarily by international donors (and were public service oriented). As of 2003, a public financing system based on licence fee has been established for RTK. But in March 2004, the RTK misleadingly associated the death of three Albanian boys near Mitrovica with a Serbian attack, leading to three days of violent anti-Serb unrest. By mid-2005, the Independent Media Commission for Kosovo was created – with the help of OSCE – after the Bosnian model.

In conclusion, the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) and the Rambouillet Accords included almost no provisions on media reform⁴⁵⁵, thus diminishing very much the role of the media. This backfired and fuelled additional ethnic tension, which partially compromised the peaceful development in the two countries. BiH and Kosovo represent special cases of what concerns all relevant media legislation being devised by the international community. On the one hand criticism has been voiced that it was done without any significant involvement of local stakeholders or bottom-up articulation of real needs⁴⁵⁶ which put regulation at risk of being rather advanced achievements on paper but remaining inefficient in practice and unadapted to local specificities. On the other hand, it should also be noted that the establishment of the IMC was welcomed by the media community in BiH, which has seen it as an escape from the political and other control by local authorities. Moreover, the regulatory framework has been by contemporary standards very modern and functional well capable of assisting the transformation of the media sector under a regulatory umbrella.

2.2.6 Converging media, converged regulators

The idea of convergence gained support after the 1990 publishing of the “Critical Connections” study by the Office of Technology Assessment in the US.⁴⁵⁷ Convergence that impacts on the media sector comes from the blurring of boundaries between the formerly distinct information technology, media and telecommunication sector, and is largely attributable to digitalisation. Convergence manifests itself at the level of content (audiovisual media services), transmission

455 Except for Annexe 3, art. 1 and Annexe 7, art. 1.3b of the Dayton Peace Agreements (full text available at <http://www.nato.int/ifor/gfa/gfa-home.htm>)

456 Price, M. / Thompson, M. (2002).

457 US Congress, Office of Technology Assessment (1990).

and terminal (devices). It coincided with the advent of the Internet and the challenges of regulation in online space.

The growing trend to create converged regulators in response to a converging environment remains, however, embedded in the media policy traditions of the European states. Converging regulators can take various directions, by either converging the regulatory oversight over networked industries (gas, electricity, rail, and telecommunications) or over transmission and audiovisual content (telecommunications and television). The latter model has seen some precedents but it is by no means the predominant model in Europe. The prevailing model remains the independent media regulatory authority specialised on television and radio regulation.

The single regulator idea dates back to the creation of the Federal Communications Commission in the United States in 1934. In Europe, the broad conditions that have facilitated the shift towards convergence in the late 1990s were: the introduction of mixed broadcasting systems in the countries, new (especially digital) technological delivery infrastructures, and the advent of non-linear audiovisual services and hybrid services that are situated somewhere in between individual communications and electronic media.⁴⁵⁸ Where converged regulation is practised, the merged areas of competence include: spectrum planning, allocation of broadcasting licenses, content standards, and complaints handling. This is said to avoid duplication of functions and costs of regulation. Along with this, a reorganisation of the tasks and a simplification of procedures stand out as important advantages. It is believed that this facilitates communication with both the industry and the public, as it creates a single point of contact for information, and it avoids the passing of inconsistent cross-sectoral decisions.⁴⁵⁹

On the other hand, adapting from a “sector-based” perspective to a “technologically neutral” approach⁴⁶⁰ is the primary challenge⁴⁶¹ to converged regulation. The larger dangers associated with converged regulators revolve around the loss of transparency and a decreased level of accessibility to the consumer. Significantly, the different sectors within the converged agency might have divergent agendas⁴⁶², which might delay the adoption of policies by making the negotiation process longer. In specific contexts, the fear that the creation of a converged regulator might be used as a predicament for abolishing an unwanted one gained ground (as in the former Yugoslav Republic of Macedonia and Slovakia).

In Europe, there are six (or seven) different models for converged media regulators to date: The Office of Communications (Ofcom) in the UK, FICORA in Finland, the Communications Guarantee Committee (Autorità per le Garanzie nelle Comunicazioni – AGCOM) in Italy, the CRA in Bosnia-Herzegovina and recently the National Media, Electronic Communications Authority (NMHH) in Hungary and OFCOM in Switzerland. The case of APEK in Slovenia is less clear. The APEK provides support to two independent councils: one for electronic communications and one for broadcasting..

458 Buckley, Steve et al. (2008): 36.

459 Council of Europe (2008).

460 Mijatovic, D. (2008): 93.

461 McGougan, J. (1999).

462 Council of Europe (2008): 10.

The first two converged national regulatory bodies to appear in Western Europe have completely different histories: AGCOM was created directly as a converged authority in 1997, whereas Ofcom was the result of merging five different bodies.⁴⁶³ AGCOM, the Italian regulator, was established with the mission of overseeing press, broadcasting and telecoms. The AGCOM board is divided in two commissions, each of them composed of four members and the President: the Commission for Infrastructures and Network (managing network and access regulation, numbering and frequency allocation) and the one for Services and Products (supervising content regulation, provisions for media pluralism, as well as different services). To facilitate communication, a Council handles the new issues directly connected to convergence, including matters such as competition or market concentration.

In a significantly different environment, Ofcom began operating in 2003, retaining limited control over the BBC's non-public-service activities through a system of tiers. Independent by statute, Ofcom is accountable to parliamentary committees. Ofcom's mission is to "further the interests of citizens in relation to communications matters" and to "further the interests of consumers in relevant markets, where appropriate by promoting competition".⁴⁶⁴

The CRA in Bosnia-Herzegovina evolved from the Independent Media Commission and merged functions for broadcasting and telecommunications, including radio communications. It contains three main divisions: Broadcast, Telecommunications and General and Legal Affairs. A council of seven members handles complaints. It was defined as an autonomous and independent entity by the constituting OHR decision in 2001 which was maintained by the subsequent Communications Law passed in 2003.

In Hungary, on 18 August 2010, the merging of the National Radio and Television Commission and the National Communications Authority was announced⁴⁶⁵, raising concerns in Hungarian society and abroad⁴⁶⁶ regarding specific provisions impacting on the independence of the converged regulator, such as appointment procedures, the term in office and entrusted responsibilities.⁴⁶⁷

2.3 Country summaries

The questionnaire answers from each country were analysed, and summaries of the situation within each examined country were produced. As an introduction to each country summary, a short set of quick facts is provided.

To ensure the accuracy of the data, the summaries were sent to the country correspondents. Following this, the summaries were sent to the regulatory body concerned and to the respective national governments. Both were granted the opportunity to comment on the summaries. Where

463 Namely, the 5 previous regulatory bodies were: The Radiocommunications Agency (RA), The Office of Telecommunications (Ofotel), The Independent Television Commission (ITC), The Broadcasting Standard Commission and The Radio Authority (RAu).

464 Open Society Institute (2005): 1169

465 National Media and Electronic Communications Authority (2010).

466 Budapest Business Journal (2010); OSCE (2010).

467 Jakubowicz, K. (2010).

they made use of this opportunity, their comments have either – in the case of factual corrections – been integrated directly in the summary, or attached to the summary as an amendment.

The summaries reflect the data collected in the questionnaires as on May 1, 2010. Changes in the legislative framework that have occurred since May 31, 2010, and which have been notified to the consortium are mentioned in the country summaries, but are not reflected in the country tables.

2.3.1 EU Member States

2.3.1.1 Austria

Quick Facts

Austria is a Member State of the EU with 8.4 million inhabitants (2009). Public broadcaster ORF (radio and TV) dominated the Austrian media market for a long time. Initial competition came from German broadcasters via satellite/cable in the eighties. Competition from Austrian terrestrial private TV broadcasters (ATV, Puls4) emerged following the opening of the terrestrial TV market in 2001, especially in the Vienna area. Cable and satellite are the most widespread transmission modes in Austria, as both reach more than 90% of all homes. For this reason, the market shares of German networks (RTL Group, ProSiebenSat.1) have traditionally been very high. Source: Country Profile Austria, BBC website, May 2010

Executive Summary: KommAustria

General situation

In Austria, a comprehensive review of electronic media legislation led to the creation of a single regulatory authority (KommAustria) for public service and commercial broadcasting in October 2010. KommAustria is in charge of audiovisual content regulation, spectrum issues and transmission issues. The implementation of the AVMS Directive in October 2010 has also meant that relevant new audiovisual media services are also subject to the authority of KommAustria.

The Regulatory Authority for Broadcasting and Telecommunications (RTR) provides administrative support to KommAustria, which in turn relies on its services. KommAustria and RTR are separate legal entities, and KommAustria is fully independent from the government.

Decisions by KommAustria can be appealed before the Federal Communications Board (Bundeskommunikationssenat – BKS), also an independent regulatory authority.

Approximately 160 TV services, of which 45 are nationwide, are licensed/operate under notification under Austrian law.

Telecommunication matters are dealt with by a separate regulatory entity; however, RTR also provides support to this authority.

Powers

KommAustria has general policy-implementing and decision-making powers in its areas of responsibility, but does not have general policy-setting powers. It monitors services operated by

licensed operators to assess if they comply with the rules on quotas, advertising and the protection of minors, and holds a number of supervisory tasks, in particular regarding the economic aspects of public services broadcasting, as required by a Decision of the European Commission in relation to ORF, the public service broadcaster. KommAustria also has information collection powers in these areas.

Its powers of sanction include warnings, fines, publication of decisions and the revocation of the licence in serious cases of infringement by private broadcasters. KommAustria adopts individual decisions.

KommAustria is constituted by one head, one deputy head and three members, all full-time lawyers. The term of office is six years, which can be renewed. The members of KommAustria are appointed by the federal president on proposal of the federal government, and Parliament must agree with the federal government's proposal.

The highest decision-making organ

BKS is the highest decision-making authority in the field of the electronic media in Austria. It acts as judicial review body for KommAustria's decisions. As a judicial body, it has *ad-hoc* monitoring and information-collection powers. Its independence is granted constitutionally. BKS can issue individual decisions and has complaints-handling procedures.

BKS is a tribunal with five members, at least three judges and two other lawyers but these are not full-time positions. BKS members are appointed by the federal president following proposal by the federal government (and by the Supreme court and the President of the Higher regional Court of Vienna), for a period of six years.

Staffing and funding

The resources of KommAustria and BKS are generally regarded as sufficient. BKS is funded through the state budget.

RTR/KommAustria is funded by a contribution from the end-user licence fees and by market fees. The industry is consulted before RTR's budget is finally adopted.

Checks and balances

For BKS and KommAustria members, external offices can only be held at the same time if this is not incompatible.

Members of KommAustria can be dismissed by the plenary of KommAustria on the following grounds: because of incompatibility issues, serious physical/mental infirmity, or because they have been convicted of crimes which would impede election to parliament. The entire body cannot be dismissed. Members of the BKS can only be dismissed if they are absent, three consecutive times and without excuse, from meetings of the BKS. Dismissal requires a decision by the entire board.

The RTR is subject to periodic review by external private auditors.

KommAustria is accountable to the federal chancellor (who only has a right of information in relation to management questions) and to the court of auditors (for auditing purposes). The BKS is accountable to parliament and to the federal chancellor in relation to management questions.

With the new legislation, KommAustria has become constitutionally independent.

Decisions of BKS can be overturned by the constitutional or the administrative court. Pending an appeal, BKS decisions stand, unless the Constitutional Court or the administrative court suspend them.

Procedural legitimacy

KommAustria/RTR can rely on external advice.

Public consultations are provided for on market definitions in accordance with the EU-framework for electronic communications. Legislation also foresees a public consultation procedure in relation to public value tests for the public service broadcaster.

Decisions by KommAustria and BKS must be published.

2.3.1.2 Belgium

Quick Facts

Belgium is a relatively small country, with a population of 10.6 million. The rather complicated federal state structure includes three cultural communities (the Flemish, French and German-speaking communities) and three territorial regions (the Dutch-speaking Flemish region in the north, the French-speaking Walloon region in the south and the bi-lingual Brussels-capital region).

Belgian broadcasting mirrors the unique political and linguistic nature of the country. The cultural communities, rather than the federal authorities, are responsible for regulating radio and TV. The two public broadcasters (VRT for the Flemish community and RTBF for the French community) face competition from many commercial broadcasters (Dutch speaking VTM and VT4 and French speaking RTL). Some 95% of Belgians are connected to cable TV; one of the highest take-up rates in the world. Cable services offer dozens of domestic and foreign channels, including Dutch and French television stations. Source: Country Profile Belgium, BBC website, May 2010.

Executive Summary: Vlaamse Regulator voor de Media (VRM), Conseil supérieur de l'audiovisuel (CSA), Medienrat

General situation

Each cultural community has its own audiovisual media services regulatory body: the Flemish regulator for the Media (VRM) in the Flemish speaking community, the High Council for the Audiovisual sector (CSA) in the French speaking community, and the Media Council (Medienrat) in the German community.

These regulatory bodies are responsible for the content, transmission (including spectrum) and distribution aspects of broadcasting, including technical matters. All community regulatory

bodies must cooperate with each other and with the federal regulatory authority responsible for electronic communication services (BIPT).

Combined, they supervise 87 national television channels and 27 local or regional television stations, as well cable operators, IPTV operators, DTT, mobile TV and satellite operators. A significant number of national television channels are premium channels from the three largest broadcasting distributors Telenet (cable operator in Flanders), Voo (cable operator in Wallonia) and Belgacom (national IPTV provider).

Powers

The community regulatory bodies cannot define policy but are responsible for implementing it. They can all take binding decisions on market players. As well as issuing warnings, imposing fines, publishing decisions in the media or revoking licences, they can suspend the distribution of a service (requesting distributors or platform operators to stop offering the service).

All community regulatory bodies systematically monitor the services and operators they supervise. This includes monitoring of quotas, advertising, the protection of minors and of electronic programme guides (EPG) and of must-carry obligations.

The highest decision making organ

Each community's regulatory body is set up as a separate legal entity and their independence is explicitly recognised in the legal framework. The deciding organ in each regulatory body is entirely comprised of experts. The Flemish-speaking Community requires two of these to be magistrates.

While in office, members cannot simultaneously be in any government or on government staff, or be active in any market player. The CSA does have one representative of the French-speaking community, but only as an observer. Some advisory organs explicitly have representatives from industry. The VRM has a special committee dealing with the protection of minors that consists of journalists, psychologists and family representatives.

All appointments are done by the respective community government. In the French speaking community, three members are appointed by the Parliament, and the others by the Government. There are no nominations. Except for the CSA in the French speaking community, where there are internal rules, which are available on the website, no specific rules exist to guard against conflicts of interest during the appointment process or after the term of office. Terms of office are four or five years and unlimited renewal of a mandate is possible.

Each community government can dismiss individual members – not a whole organ or body – and the grounds for dismissal are set out in detail in the law. Dismissals have happened in the VRM and Medienrat, while some members of the executive organ of the CSA were replaced (i.e. not re-appointed) after their second term.

Staffing and funding

All community regulatory bodies are sufficiently funded and staffed. They are all funded by the state, i.e. their respective community. The VRM is also partly funded by spectrum fees.

No authorisation, licence, market surveillance or other fees serve to fund the regulatory bodies. The money coming from fines goes into the respective community's budget.

Each community regulatory body has to draft its own budget and propose it to its minister, who then defends it to the community parliament, which has to approve it. Industry players are not involved in this process.

Checks and balances

Each community government and parliament can at any time order an audit of its regulatory body. Each community regulatory body has to prepare a yearly activity report that is public, but that does not need to be approved by government or parliament.

Procedural legitimacy

Decisions are typically taken by majority vote with a casting vote for the president of the deciding organ. All decisions must be explained and published but no impact assessment is required. Meeting minutes are normally not public. All regulatory bodies can use external advice after a public tender.

Decisions do not have to be publicly consulted upon, except for market analyses. This requirement stems from the EU regulatory framework for electronic communications because the community regulatory bodies are also responsible for the transmission and distribution aspects of broadcasting, including technical matters. However, all regulatory bodies are allowed to hold public consultations and they do so, even if not required.

According to general administrative law, any decision of the regulatory bodies can be internally appealed. Formal administrative appeals can also be lodged before the council of state. Decisions stand pending appeal, unless the appeal body has suspended the decision.

Only courts can overturn decisions. They can in principle not replace the appealed decision. Each community government, however, can exert indirect power over the executive organs of their regulatory body, through the budget and management plan negotiations. The Flemish minister responsible for media can overrule decisions of the executive organ (for legal or general interest reasons) but not of the regulatory organ of the VRM. The French Community government can overturn and replace a decision after appeal by its representative in the CSA against a decision that is contrary to the legal framework or that endangers the finances of the regulatory body, but this rule applies only to decisions relating to the administrative and financial management of the CSA, and to the functioning of the CSA.

2.3.1.3 **Bulgaria**

Quick Facts

Bulgaria has a population of 7.5 million.

Bulgaria's broadcasting market is lively and a number of global media giants have stakes in operators. For example, Balkan News Corporation, part of News Corporation, operates, bTV, the country's first national commercial channel. In 2009, the Paris-based Reporters Without Borders

stated that investigative journalism and media pluralism were “seriously threatened” by organised crime and pressure from political and business quarters. Source: Country Profile Bulgaria, BBC website, May 2010.

Executive Summary: Council for Electronic Media – CEM

General situation

There are six public service TV channels in Bulgaria, created by the national public service provider of audiovisual media services, the Bulgarian National Television (BNT): one national and four regional terrestrial channels, together with one satellite channel. There are three TV commercial national terrestrial channels. There are also 123 commercial audiovisual services broadcasted by cable and satellite. Public TV services are also broadcasted by cable and satellite. There are five (the number increased from one of five over the summer and this is what is currently listed on CEM website) commercial video-on-demand services.

The Council for Electronic Media (CEM) regulates audiovisual content and electronic communications in Bulgaria. The regulation of activities relating to the management and effective use of transmission, such as spectrum, is however carried out by a separate body, the Communications Regulation Commission (CRC). The CEM was established in 2001; it replaced its predecessor, the National Council on Radio and TV. The CEM was established as a separate legal entity and the applicable legislation states that it is independent.

Apart from its role as regulator, the CEM is responsible for electing and terminating the mandate of the general director of the national public service broadcasting service, and approving the members of its managing board (following proposals by the director general).

Powers

The CEM has general implementing powers with regard to audiovisual content. Its powers include the powers to regulate freedom of speech and opinion, the right to information, right of privacy, right of reply, issues of incitement to violence and hate speech, protection of minors and people with disabilities, issues of taste and observation of copyright and related rights.

The CEM’s powers of sanction include the right to impose fines; also, in cases of systematic breaches of obligations, CEM may suspend or revoke an operator’s licence. The maximum fines it may impose in relation to infringements of obligations relating to advertising or protection of minors, for example, is the equivalent of approximately 10,500 euro.

In 2009, the CEM imposed fines totalling the equivalent of approximately €83,459.

The highest decision-making organ

The highest decision-making organ of the CEM is its board, which has five members (according to amendments in the Law for Radio and Televisions, adopted in May 2010, the number of CEM members has been reduced from nine to five). Three of these members are appointed by parliament and two by the president of Bulgaria. The chairman of the board is elected by the board. Decisions of the board are taken on a majority basis, with the chairman having the casting vote in the event of a tie.

The term of office of board members is six years. The term is staggered so as not to coincide with an election cycle. The term can be renewed a maximum of twice. The term of office for the chairman is one year; this term may be renewed a maximum of twice.

Candidates for board membership are required to have higher education in the area of electronic media and/or communications, journalism, economics or law, and to have an established name in the profession. Rules are also in place to address potential conflicts of interest issues during the selection process, during members' term of office and after their leaving office.

The CEM itself can dismiss the chairman or any other board member on certain stated grounds, e.g. permanent disability or proven incompatibility with the requirements of CEM board membership. In 2008, a board member was dismissed on the latter basis because of his affiliation with the Communist-era state security services.

The effectiveness of the CEM as an independent regulator is open to question, given: the political nature of the selection process to the board; the limited budget available to the CEM. An audit by the National Chamber of Audit into the activities of the CEM during 2008/9 concluded that its monitoring of broadcast content was inadequate and that the entire activity of the regulator in regard to supervision of operators was based on information which was insufficient, inadequate and out-of-date; furthermore, according to a former member of the CEM, "formally media regulation exists, though technically any political majority (in Parliament) can at any time pass amendments in the legislation that suit its purposes" – thus, during the twelve years of operation of the key relevant legislation it has been amended some 28 times (with the latest amendments), the reason usually being related to various political or economic interests.

The National Chamber of Audit has given its recommendations to the CEM. Some new priorities have been accepted as a result of the recommendations. They all seek to guarantee the effectiveness of the CEM.

A possible way out of the current practice concerning these frequent amendments to the Radio and Television Act, is an entirely new Media Law, which will contain more guarantees regarding the independence of the Council for Electronic Media.

Staffing and funding

According to the state budget law for 2010, the CEM has a total staff of five and an annual budget of around €716,000 (according to the current report – the annual budget of CEM is around €623,776), which is provided by the state. In terms of the approval procedure, the management of the national terrestrial public service TV and radio services submit an annual draft budget request to the CEM. The CEM then submits this, together with its own draft budget, to the Ministry of Finance. This overall budget is reviewed within the Ministry of Finance and the approved draft goes to Parliament where MPs vote on it, as part of the whole state annual budget.

Checks and balances

The CEM is required to provide a report to the Parliament on its work twice each year; it has also held two public discussions on its work in the last year. Furthermore, it is subject to an annual audit by the national audit office.

Decisions of the CEM can be appealed to the Supreme Administrative Court.

Procedural legitimacy

The CEM is required to publish in a monthly bulletin all its decisions, results of monitoring, sanctions, fines and decisions, including those that are subject to appeal before the Supreme Administrative Court.

2.3.1.4 Cyprus

Quick Facts

The Republic of Cyprus is the third largest island in the Mediterranean sea with approximately 871,000 inhabitants.

The Cypriot media situation reflects the island's political division, with the Turkish-controlled zone in the north operating its own press and broadcasters (Bayrak Radio TV being the public broadcaster).

Public broadcaster Cyprus Broadcasting Corporation (CyBC) operates national radio and TV networks. It faces competition from private stations such as Sigma.

Around 37 percent of the population have an internet connection. Source: Country Profile Cyprus, BBC website, June 2010.

Executive Summary: Cyprus Radio-Television Authority – CRTA

General situation

In Cyprus, the body in charge of audiovisual matters is the Cyprus Radio-Television Authority (CRTA). It is an independent regulatory body that was established in 1998. It has a chairman, a vice-chairman and five members appointed by the Council of Ministers for a six-year term. It is responsible only for audiovisual content matters.

The CRTA supervises the public Cyprus Broadcasting Corporation (operating the channels RIK1, RIK2 and RIK Sat), the two private channels (Sigma and CNC plus) and the sister channels of the main Greek commercial stations (ANT1 and Mega). The market is completed by two sets of pay-TV channels (Alfa TV and LTV), a number of specialist channels and around ten local channels.

Powers

The CRTA has general policy-implementing powers and can make proposals to the government on the need to adopt or adapt relevant legislation. It systematically monitors the services operated by licensed operators to assess whether they comply with the rules on quotas, advertising and the protection of minors. It also has information-collection powers in these areas.

It has a range of powers of sanction, ranging from warnings, the possibility to impose fines, the publication of decisions in the media (if ordered by the court), and suspension and revocation of licences (if warnings and fines are not effective).

The highest decision making organ

The highest decision making organ is the board, which is composed of a chairman, a vice-chairman and five other members. It has the power to take decisions on all regulatory matters within its area of responsibility. Board members are chosen on the basis of their expertise in the fields of arts and humanities, science or technology, or their recognised experience in mass media.

They are all appointed by the Council of Ministers for a term of six years. Renewal is possible but not foreseen by law.

To avoid conflicts of interest with political parties, all board members may not take up a position within a political party during their term of office. The Council of Ministers has the right to dismiss any board member who has of a connection with a political party, or for certain other grounds that are listed in the law.

Staffing and funding

The budget is voted on by the Parliament upon proposal by the board of the CRTA. The CRTA's income originates from licence fees paid by operators and fines (5%).

Checks and balances

The CRTA is subject to specific financial periodic external auditing for its spending. It is accountable for its work, through an annual reporting obligation to Parliament and to the Auditor General of the Republic.

It appears that nobody, apart from the Supreme Court of Cyprus, has the power to overturn decisions of the CRTA due to the fact that, according to Article 146 of the Constitution of the Republic, the decisions of administrative organs can only be reviewed by a the Supreme Court. Any person or organisation having a legitimate interest can lodge an application for judicial review against a decision of the CRTA. The Supreme Court can cancel the decision of the authority but cannot take a new decision on its behalf, it can only ask the authority to take a new decision.

Procedural legitimacy

The CRTA is not obliged to carry out a public consultation when drafting national strategy policy documents or when withdrawing or modifying licences. There is no obligation to publish the results of the consultation.

The CRTA's decisions do not need to be published by law. These decisions must however be duly reasoned.

2.3.1.5 **Czech Republic**

Quick Facts

The Czech Republic is a relatively small Central European country with 10.4 million inhabitants. It joined the European Union in 2004.

Private media in the Czech Republic mushroomed in the 1990s, and private radio and TV stations provide stiff competition for public broadcasters. Public broadcaster Ceska Televize operates two full-area TV networks and two digital channels: 24-hour news and sport channels (see <http://www.ceskatelevize.cz/english/about-czech-television/> – CT24, CT4 SPORT). Two major private TV channels, NOVA and Prima televize, broadcast nationally and there are scores of private radio stations.

The country is pressing ahead with the digitisation of TV broadcasting; there are plans to switch off analogue signals by the end of 2012. Source: Country Profile Czech Republic, BBC website, May 2010.

Executive Summary: Council for Radio and Television Broadcasting – RRTV

General situation

The media regulatory body is the Council for Radio and Television Broadcasting (Rada pro rozhlasové a televizní vysílání – RRTV). It was established in 1992 after the split of the Czech Republic and the Slovak Republic. It is responsible for audiovisual content and distribution aspects ('must-carry' and electronic programme guides – EPGs). Spectrum, including that used for broadcasting, is the responsibility of the Czech Telecommunications Office (CTU), the telecommunications regulatory authority.

The RRTV was established as an independent state office and its independence is explicitly recognised in the legal framework.

The AVMS directive has been implemented in Czech legislation. A new law on on-demand audiovisual media services and an amendment to the Broadcasting Act entered into force on June 1, 2010.

Powers

The RRTV has policy-implementing powers. It systematically monitors the services of licensed operators and public service broadcasters for compliance with the law and in particular with the rules on quotas, advertising and protection of minors. Viewers can file complaints about audiovisual services with the RRTV.

The RRTV can issue warnings and impose fines up to CZK10m (about €390,000). It publishes these decisions on its website, but cannot require any publication in the press. Upon repeated infringements, for example against the rules for protection of minors, the RRTV can suspend or revoke a broadcasting license. The RRTV has had to use all these sanction powers in the past.

The highest decision making organ

The board of the RRTV has thirteen members, all appointed by the prime minister on proposal of the Lower House of the Parliament for a term of six years, renewable once. It has the power to grant licences, handle complaints, and impose sanctions. The chairman is elected from amongst the board members themselves for a term of two years, with no limitation for re-election. .

No special requirements are defined for being a board member. Board members can be members of a political party, but they cannot hold any office within the political party. Also they cannot serve in another state office while being members of the board. Board members and persons “closely related” to them cannot be active in a company related to the audiovisual, advertising or mass media sectors. Any activity in academia, journalism or on audiovisual content creation has to be performed “in a way that does not endanger the trust in the independence and impartiality of the council”. There are no such rules for senior staff. There are no rules to guard against conflicts of interest after terms in office.

Rules against early dismissal of board members exist (the Broadcasting Act lists the grounds for dismissal), but the prime minister can dismiss the entire board upon proposal by Parliament. There have been no early dismissals in the last five years. However, earlier, the complete board of the RRTV was dismissed twice: in 1994 because the RRTV would not issue licenses to radio stations “recommended” by Parliament, and in 2003 because the Parliament needed a scapegoat after the Czech Republic was fined by an international court over a dispute with a US company invested in the commercial broadcaster NOVA.

Staffing and funding

The RRTV is fully funded from the state budget. After consultation with the board of the RRTV, the finance minister annually submits a budget to Parliament for approval.

In 2009, the RRTV had a staff of 44 on top of the 13 council members, and disposed of a budget of CZK59m (€2.3m).

Checks and balances

The RRTV is only accountable to Parliament. The board of the RRTV has to submit an annual report for approval by Parliament. If Parliament disapproves it “repeatedly” (meaning at least twice), the full board of the RRTV can be dismissed. This has happened twice in the past.

The RRTV accounts are audited annually by a private audit firm. No audit of the internal functioning or the work undertaken is foreseen.

It appears that only a court can overturn decisions by the board of the RRTV. Any party can appeal an RRTV decision, following the normal procedure to appeal administrative decisions (municipal court first, then supreme administrative court, and constitutional court). No internal appeal procedure exists. The RRTV decisions stand pending appeal. Only the constitutional court can replace an appealed decision with its own. Lesser courts can only remit a decision back to the board for a new decision.

Procedural legitimacy

The meeting minutes of the board of the RRTV and its decisions are published. Decisions must be motivated but do not need to include any impact assessment.

The regulator is not required to carry out public consultations and does not do so in practice. If any external advice is solicited, the RRTV has to follow public tender procedures.

2.3.1.6 Denmark

Quick Facts

Denmark has a population of 5.5 million. Although a member of the EU, it has retained its national currency and is not part of the Eurozone.

Denmark's main public service broadcaster is Danmarks Radio (DR). It operates six TV channels and four FM radio channels, funded by a licence fee. The other public service broadcaster is TV 2, which is a government-owned commercial broadcaster. It operates five TV channels and an internet-based on-demand service.

There are also private satellite and cable TV services. Source: Country Profile Denmark, BBC website, January 2010.

Executive Summary: Radio and Television Board – RTB

General situation

The regulatory body for radio, television and on-demand services in Denmark is the Radio and Television Board (RTB) (Radio- og TV-nævnet), established in 2001. It is part of the Danish Agency for Libraries and Media, which is an agency under the Ministry of Culture. It is a separate legal entity and its independence is explicitly stated as a value in the relevant legislation.

Powers

The Broadcasting Act sets out the general legal framework for the audiovisual sector (except film). Also, for all DR's public service TV channels and the eight TV 2 regional TV Channels, there are separate public service contracts in place with the Ministry of Culture, setting out the terms of their respective public service obligations. Furthermore, the financing and remits of the public service broadcasters are stipulated in a "Media Compact" running for four years, which is adopted by the parliament. The current Compact (2007-2010) is agreed upon by all but one political parties in the Danish parliament.

The RTB ensures compliance by operators through the regulatory requirements of the Broadcasting Act. The RTB does not have powers to issue fines, but it could suspend or withdraw an operating licence. These powers have, however, rarely been used. The RTB also issues an annual statement on compliance with the public service contracts of DR, and the eight regional TV 2 stations.

Since 2003, when TV 2 became a government-owned commercial broadcaster, its legal basis has been a public service license. The RTB can impose penalties under certain circumstances, in

line with the public service licence. It can also decide to recommend the withdrawal of the licence by the ministry of culture.

In practice, the RTB is constrained by its limited financial and staff resources.

The highest decision-making organ

The highest decision-making organ in the RTB is the board. The board has eight members, each appointed by the Minister of Culture; seven of these members are appointed as professional experts and one as a member of civil society.

The chairman⁴⁶⁸ and each board member of the RTB are appointed for a four-year term. This term may be renewed indefinitely.

Under Danish law, there are general rules to address the issue of potential conflicts of interest in public administration. These general rules apply to the appointment process, during and after the term of office of the RTB board members. There are no separate rules specifically applicable to the RTB in relation to conflicts of interest. In the past five years, there has been one instance of an RTB board member leaving the RTB as a result of a conflict of interest; this arose when the board member took a position with DR.

In addition only the general rules dealing with public administration generally apply to the situation of possible dismissal of an RFT board member. The law does not contain the grounds for dismissal of board members.

Staffing and funding

There is no information available on the annual budget of the RTB or on the total number of staff it employs.

The RTB is wholly funded by the state. The annual funding of the RTB is included as part of the funding of the Agency for Libraries and Media, which is provided in the annual Finance Act adopted by parliament.

Checks and balances

The RTB is subject to an annual financial audit by the National Audit Office.

The RTB is required to publish an annual report to the Minister of Culture on its activities, although the most recent report was in 2009. It also issues press releases on various occasions. The annual reports and press releases are available to the public.

Decisions of the RTB are subject to review by the courts. The courts have the power to annul the RTB's decision and remit the matter back to the RTB.

Whilst the Minister of Culture does not have a general power to overturn decisions of the RTB, there is one exception: If the Minister delegates a specific task to the RTB outside the specified and defined remit of the RTB, the Minister can overturn decisions or recommendations made by the RTB on the basis of this delegation.

⁴⁶⁸ We have been informed by the Danish agency for libraries and media that since January 1, 2011 a new law specifies that the chairman must be a lawyer.

Procedural legitimacy

The agendas of RTB meetings are published, but the minutes are not.

The RTB is required to engage in public consultation when it is considering changes in regulation

The RTB is required to publish⁴⁶⁹ its main decisions and these decisions must be reasoned.

2.3.1.7 Estonia

Quick Facts

Estonia has a population of 1.3 million. It became a member of the EU in May 2004. It has a reputation for being at the cutting edge of technology; by December 2008, 74% of the population were using the internet.⁴⁷⁰ Furthermore, the country held the world's first parliamentary 'e-vote', in 2007.

Estonia's broadcasting industry grew significantly in the 1990s and take-up of cable TV has been extensive. It has also attracted foreign media groups; the main privately-owned TV channels are run by Swedish and Norwegian concerns.

Source: Country Profile Estonia, BBC website, May 2010

Executive Summary: Ministry of Culture, Public Broadcasting Council, MoC, PBC

General situation

This summary describes the situation as of end-June 2010. By this time, Estonia had not yet implemented the AVMS Directive⁴⁷¹. It is anticipated that draft legislation which is currently before the government (a Media Services Bill to replace the current Broadcasting Act) will be adopted by the national Parliament in the near future.

There are currently two public service broadcasting channels in Estonia. There are also three commercial free to air TV services, one of which, Kanal2, is owned by the Norwegian media concern Schibsted and another of which, TV3, is owned by the Swedish Modern Times Group. There is also one non-linear commercial TV service.

The public service broadcast TV services are regulated by the **Public Broadcasting Council** (PBC). The members of the PBC are appointed by Parliament. Four of the appointees are appointed as "acknowledged experts in the field of activity of national broadcasting" and all others are appointed as current members of Parliament, one representative from each faction of Parliament. The expert appointees each have a mandate for five years. By contrast, the mandate of the Parliamentary appointees is only until "termination of the authority of the composition of the

⁴⁶⁹ The Danish Agency for Libraries and Media informs us that they also publish the annual reviews of the public service contracts and of TV2's public service permit. All decisions relating to advertisements are also systematically published.

⁴⁷⁰ tnsemor, <http://www.emor.ee/2009-aastal-oli-eestis-6-74-aastaseid-internetikasutajaid-861-000/>

⁴⁷¹ Estonia has implemented the AVMS Directive through the Media Services Act, which was adopted by the Parliament on December 16, 2010. It came into effect at the start of 2011.

Parliament. Upon termination of the authority of the composition of the Parliament, the Council members who are members of the Parliament shall stay with the Council until the entry into force of the decision to appoint members of the new composition of the Parliament to the Council.”

Regulatory supervision of commercial media is carried out by the **Media and Copyright Department in the Ministry of Culture (MoC)**. Under the current draft legislation to implement the AVMS Directive, the MoC would regulate the application of the new rules, including to public service broadcasters and to commercial on-demand services.

Powers

The MoC has general policy-setting and implementing powers, including licensing of commercial broadcasters. It can also impose fines, of the equivalent of up to just over €2,500 for infringements (for example, in relation to the rules on quotas, advertising and the protection of minors). Furthermore, in the event of repeated infringements, the MoC has the power to revoke a broadcasting licence.

In practice, however, regulatory supervision tends to be more liberal in approach. In order to monitor compliance with regulatory requirements, the MoC has a contract with an independent research company, which carries out constant monitoring and submits its results to the Ministry. In addition to this, data is provided by the commercial broadcasters themselves. This has led to a situation where, for example, in 2009 the MoC forced the commercial broadcasters to comply fully with the advertising requirements of the Television Without Frontiers Directive only after a formal warning from the EU Commission to Estonia of failure to achieve full compliance.

Similarly, the PBC has general powers of regulation over the public service broadcast services. In practice, however, Estonian public service broadcasting and the PBC have very limited budgets and are, therefore, significantly constrained in what they can do.

The highest decision-making organ

The highest decision-making organ in the MoC is the responsible government minister.

The PBC is the supervisory body of public service broadcasting. A chairman of the PBC is elected. Decisions of the PBC are taken on the basis of majority vote; a quorum for a valid vote is 50% of total members. Minutes and agendas of the PBC are published.

There are rules to guard against conflicts of interest during the term of office of a PBC member. In particular, he/she cannot be a member of the government, a member of the board of any broadcasting organisation, owner of any broadcasting organisation, or an employee or contractor of any broadcasting organisation. Once a member has left the PBC, however, he or she is not subject to any restrictions to address potential conflicts of interest.

There are no specific rules governing the dismissal of a PCB member during his/her term of office.

Staffing and funding

The current overall budget of the MoC is just over the equivalent of €97 million. The MoC has a staff of 69, four of whom work in the Department of Media and Copyright of the MoC.

The total number of members of the PBC depends on the number of fractions in Parliament (as each fraction is entitled to have a Parliamentary representative appointed). There are currently ten members, six Parliamentary representatives and four industry experts. All of the members work for the PBC on a part-time basis. They also have the services of an adviser (on a quarter-time basis). The current annual budget of the PBC is just over the equivalent of €94,000; it is wholly state-funded.

Checks and balances

The annual budget of the PBC is determined by Parliament. The PBC is also subject to an annual financial audit by a private audit firm.

The PBC issues an annual report to the Committee of Cultural Affairs of Parliament. The report is also available to the public.

Decisions of the PBC are not subject to appeal. Decisions of the MoC are subject to appeal and the appeal court has the power to cancel the decision and remit it back to the MoC for a new decision.

Procedural legitimacy

All decrees of the MoC regarding licensing tenders must be published.

There is no requirement, as such, to engage in public consultations. In practice, the MoC has engaged in consultations, although not generally with the wider public. In 2009, for example, the MoC carried out several consultations with broadcasters and media specialists to launch a functioning self-regulation system in the media sector. Under this process, broadcasters were encouraged to adopt common guidelines among themselves in certain areas (e.g. disabled people, protection of minors, advertisements for fatty foods).

2.3.1.8 Finland

Quick Facts

Finland, a country with land borders with Sweden, Norway and Russia, has a population of 5.3 million. Finland joined the EU in 1995.

DTT and cable are the two main broadcasting platforms at around 45% of the population each. The switch-off of analogue terrestrial TV took place on August 31, 2007. Digita (owned by TDF, France) has been the main DTT network transmission operator, but during 2010 the government has awarded competing network transmission licences.

Both mobile TV and IPTV have been available for several years, but have not enjoyed great success.

The public service broadcaster, Yle, operates four national TV channels on DVB-T. Advertising is not allowed on Yle's channels, and it is funded by TV licence fees. The main private free-

to-air competitors of Yle are MTV Media (owned by Bonnier Group, Sweden) and Nelonen (owned by Sanoma Group, Finland). The key pay-TV content provider is pan-Nordic operator Canal+ (owned by TV4 Group, Sweden).

In January 2010, fixed broadband penetration was 29.4% and mobile broadband 17.0%, both at the top end of the EU. Mobile penetration was 136.7%. (Figures refer to subscribers per 100 population). Source: Country Profile Finland, BBC website July 2010; European Commission; Cullen International and country correspondent.

Executive Summary: Finnish Communications Regulatory Authority (FICORA)

General situation

The Finnish Communications Regulatory Authority (FICORA), an agency under the administrative sector of the Ministry of Transport and Communications, is the main authority responsible for issues falling under the Audiovisual Media Services (AVMS) Directive.

Issues related to unfair advertising directed at minors lie within the exclusive competence of the Consumer Ombudsman, who is also the director-general of the Consumer Agency. In general, the Consumer Ombudsman may intervene in any case of unfair audiovisual commercial communication, according to consumer protection law.

Protection of minors in on-demand services (article 12 of the AVMS Directive) is part of the duties of the Finnish Board of Film Classification under the Act on the Classification of Audiovisual Programmes 775/2000.

FICORA supervises and implements all other rules covered by the AVMS Directive.

FICORA is a converged regulator, as it is also the designated regulator under the EU regulatory framework for electronic communications. Therefore, FICORA covers issues related to transmission for broadcasting services and ancillary services (must-carry, EPG, API).

In addition, FICORA is the regulator for postal services.

The independency of FICORA is implicit under the legal framework. The government (through the Council of State) appoints the director-general (DG) of FICORA, but apart from this the DG can decide independently on almost everything, including the organisation of the agency.

Powers

Whereas FICORA does not have policy-setting powers, it implements and applies policies adopted by the government.

It systematically monitors that rules, e.g. on quotas, advertising and the protection of minors, are complied with. It also carries out *ad-hoc* monitoring and information collection.

FICORA's powers of sanction cover warnings and penalty payments in the case of non-compliance with its decisions. In practice, FICORA has imposed a penalty payment only once during the past five years (case 144/9224/2010 on protection of minors).

FICORA's procedures to hear consumer complaints are rather informal. Anyone can send a letter of complaint/request for intervention either via normal or FICORA's website. FICORA then decides whether to proceed with the complaint/request.

The highest decision-making organ

The highest decision-making organ of FICORA is an individual, the Director General (DG). The DG has wide powers. Apart from having the power to take decisions on all matters within FICORA's area of responsibility, the DG decides on the agency's organisation and rules of procedure. Those rules of procedure may delegate decision making powers to other civil servants working under the supervision of the DG.

However, decisions concerning human resources (and budget) are made by the Ministry of Transport and Communications.

The DG is appointed by the government for an indefinite term. The Ministry of Transport and Communications is involved at the appointment stage (according to FICORA).

The DG of FICORA can be dismissed by the government only if he/she seriously neglects his/her duties or has committed a crime – or if the whole agency is shut down. In practice, in past there has never been any incident leading to a dismissal.

The legislation requires the DG to have a higher university degree and good knowledge of the responsibilities of the agency, as well as managerial experience.

The Finnish Civil Servant Act, which applies to all civil servants, includes rules to avoid possible conflicts of interest with the government, political parties and industry. The DG must declare his/her possible business activities and share holdings prior to nomination.

However, there are no rules to guard against conflicts of interest after the term (if the DG resigns). The Civil Servant Act does not provide any cooling-off period or restrictions for employment of former civil servants.

The previous DG, Ms Rauni Hagman, resigned in August 2010 to become DG of another state agency, the National Board of Patents and Registration of Finland. No new DG has been appointed for FICORA yet (as of end November 2010).

Staffing and funding

FICORA's budget falls under the state budget, which must be adopted by Parliament.

In practice, the Ministry of Transport and Communications evaluates and sets the economic goals for FICORA every year.

FICORA is a net budgeted agency, meaning that its expenses are for the most part covered by its revenues from payments (e.g. spectrum, numbering, domain name) and tax-like fees (e.g. communications market fee and TV and radio sector surveillance fee).

In 2009 FICORA's expenses were €34 million and its staff count was 245. As regards resources dedicated to audiovisual matters, according to FICORA, its budget is between €600,000 and €700,000, and the staff three to four employees.

FICORA is committed to reducing its staff by 19 man-years by 2015 compared to the level in 2006.

Checks and balances

The Ministry of Transport and Communications manages FICORA, and other agencies and authorities that lie within its administrative sector, through performance management.

Performance management is put into practice via four-year operating and financial plans and budget allocations. This is a contract-based management model aiming to find a balance between the available resources and the results that can be achieved with those resources.

In addition to annual reports and accounts, FICORA reports to the ministry every six months on its operating and financial performance. Apart from the ministry, FICORA is not formally accountable to other bodies (e.g. Parliament or government as a whole).

FICORA is subject to annual financial auditing by the national audit office. Internal control is undertaken by a private auditing firm (based on the COSO Enterprise Risk Management model).

Only an administrative court can overturn FICORA's decisions, the highest appeal body being the Supreme Administrative Court at the second appeal stage. FICORA's decisions stand pending the appeal, unless the appeal body suspends it. The appeal body can cancel the decision and remit it back to FICORA, but it cannot replace the original decision with its own.

The Ministry of Transport and Communications can instruct FICORA under the performance management framework (see above) but not on individual decisions.

Procedural legitimacy

FICORA can hire outside advice when fulfilling its tasks. According to the regulator, its annual budget for outside consultancy is around €150,000. Outside consultants are selected through a public call for tender if thresholds laid down in the Act on Public Contracts 348/2007 are exceeded.

Before FICORA can give any binding decision or impose a penalty, all interested parties must be given the possibility to give a statement. The length of the consultation period must be "sufficient". During the past five years, FICORA has not carried out consultations in the areas covered by the AVMS Directive.

All decisions of FICORA are published on its website, but not in other media such as the press. Minutes or agendas of the discussions leading to a decision are not published.

2.3.1.9 France

Quick Facts

France has a population of 62.3 million.

Public broadcaster France Télévisions operates national television channels (France 2, France 3 (includes regional windows), France 4, France 5 and RFO). It faces competition from more than one hundred commercial television channels, the state monopoly on television broadcasting having ended in 1982. Local and thematic channels have proliferated over time with the introduction of television over cable in the early 80s, over satellite in the 90s and over IP networks since 2003. However, despite this wide variety of programmes, the audience share is still concentrated in the hands of public and commercial hertzian channels.

Public radio broadcaster Radio France operates several national and local radio stations.

Audiovisuel Extérieur de la France is the public radio and television broadcaster for foreign broadcasting. Source: Country Profile France, BBC website, May 2010.

Executive Summary: Conseil Supérieur de l'Audiovisuel (CSA)

General situation

In France, the body in charge of audiovisual matters is the Audiovisual Council (Conseil Supérieur de l'Audiovisuel – CSA), set up in 1989. It is presented in french audiovisual law⁴⁷² as an independent authority. It succeeded the ‘Haute Autorité de la communication audiovisuelle’, which was established in 1982 when commercial television was introduced in France, and the ‘Commission nationale de la communication et des libertés’, which was set up in 1986.

The CSA is responsible for audiovisual content matters, transmission aspects of audiovisual content (only for frequencies allocated for broadcasting purposes) as well as distribution. Its competences were extended to on-demand audiovisual media services in 2009. France has a separate authority for electronic communications (ARCEP).

In the application of audiovisual French law, its overall mission is to ensure the freedom of audiovisual communication in France. Its objectives include: guaranteeing the independence and impartiality of public service broadcasting; favouring free competition and non-discriminatory relationships between services’ editors and distributors; ensuring the quality and diversity of programmes; the development of national audiovisual works; and protecting the French language and culture. The CSA must also contribute to social cohesion and the fight against discrimination, and ensure that programmes reflect the diversity of French society.

The CSA supervises more than 380 public and commercial television channels, (including local ones).

Powers

The CSA does not have general policy-setting powers but is empowered by audiovisual law to adopt policy-implementing rules on a number of topics, including product placement and the protection of minors. It also provides opinions to the government on draft laws and decrees in the audiovisual field, and to Parliament on request, as well as to the Competition Authority.

The CSA concludes agreements with television channels established in France that specify the requirements they must abide by (e.g. on promotion of European works, spending in original production, advertising, viewing by disabled people, ethical guidelines). In some cases (depending on the type of distribution platform and the annual budget), no agreement is necessary and the television channel must only be registered by the CSA. For terrestrial broadcasting, the CSA authorises spectrum use for television channels (and multiplex operators for DTT). More broadly on spectrum, it manages the frequency bands that have been allocated for broadcasting purposes and assigns frequencies to operators.

Its powers of sanction are quite broad and may apply to public as well as to commercial broadcasters. They range from warnings, public statements, suspension of services, programmes or programme elements for a limited period of time, fines (up to 5% of turnover) and withdrawal

472 Law 86-1067 of September 30, 1986 on communication freedom.

of licences. Sanctions can be imposed on television channels, distributors, satellite network operators and on-demand audiovisual services, as well as radio services.

The CSA monitors public and commercial television services to check compliance with fundamental principles, legislation, programming obligations and competition rules. It also has information collection powers.

In addition, the CSA has the authority to settle disputes relating to the distribution of television services.

The highest decision making organ

The highest decision making organ is the board, which is composed of a chairman and eight other members.

Three board members (including the president) are designated by the French president, three by the president of the Senate and three by the president of the National Assembly. They are appointed for six years and their mandate cannot be renewed. Members of the board can be dismissed, but only if they do not comply with the ethical guidelines.

None of the board members can hold elected office at the same time, or carry out another professional activity. Board members cannot receive any fee, or hold any interest in a media, advertising or telecommunications company, during the term of their mandate and for one year after the end of their mandate. If they hold such an interest at the time of appointment, they have three months to comply with the rules. In addition, they are submitted to further restrictions for three years after the end of their mandate.

Staff members are also subject to some rules to avoid conflicts of interest. They cannot carry out any other professional activity, with some limited exceptions. Prior to moving to another job (and to subsequent moves in a three-year period after they have left the CSA), they must inform the CSA in advance of their intention to change. The CSA can bring the case before an ethics commission for assessment of the compatibility of the foreseen position with the position held with the CSA.

There have been no instances of dismissal during the past five years.

Staffing and funding

The CSA has a staff of around 300 people. This number is allowed for in the annual budget law

The CSA is solely funded by state budget. Its budget was €35 million in 2009. The CSA makes annual proposals for the budget necessary to achieve its mission, when the draft budget law is prepared by the government. The draft law must be approved by Parliament.

Checks and balances

The CSA is accountable through an annual reporting obligation to the president, the government and the parliament. The annual report is made publicly available. Board members can also be heard by parliamentary commissions.

The accounts of the CSA are controlled by the ‘Cour des Comptes’. The implementation of the budget is the direct responsibility of the chairman and is discussed by the board twice a year. Board members can at any time, on request, be informed of the year to date expenses’ status.

Only the highest administrative court (‘Conseil d’Etat’) can overturn the decisions of the CSA. However, audiovisual law states that decisions of the CSA that have frequency implications or involve local governments must be sent to the prime minister, who can (within two weeks) request a new decision.

Procedural legitimacy

The CSA is required by law to organise public consultations prior to the adoption of certain decisions. It publishes a summary of the responses received and its position on the various topics.

17 consultations have been organised during the past five years.

All CSA decisions and opinions and all of its reports are published in the official journal.

2.3.1.10 Germany

Quick Facts

Germany is the largest EU Member State, with a population of 82.2 million inhabitants (2009). Germany’s competitive television market is the largest in Europe, with approximately 34 million TV households. Competition by commercial broadcasters started in the early 80s. Most of the country’s 16 regions regulate their own public service and commercial broadcasting. Around 90% of German households have cable or satellite TV, and viewers enjoy a comprehensive offer of public service and commercial broadcasters, which has hampered the development of pay-TV in Germany. Analogue terrestrial switch-off has already been completed.

Germany is home to some of the world’s largest media conglomerates, including Bertelsmann. Some of Germany’s top commercial channels are owned by the media group ProSiebenSat1. The main public service broadcasters are ARD and ZDF, who operate on a nation-wide basis (whereas the others are regional channels). The major commercial broadcasters are RTL, Sat1 and Pro7. Sky is the largest pay-TV service. Source: Country Profile Germany, BBC website, June 2010.

Executive Summary: Regional Media Authority (Landesmedienanstalten – LMA) and Broadcasting Councils (Rundfunkräte – RR)

General situation

In Germany, media issues lie in the competence of the 16 regions (Bundesländer). Thus, every region has its own regulator in charge of audiovisual matters that supervises commercial broadcasters (except two joint regulators, responsible for two Länder each). The 14 Regional Media Authorities (LMAs), which are separate legal entities under public law and were established between 1984 and 2007.

Supervision of public service broadcasters (PSBs) is in the responsibility of internal bodies of the broadcasters, the Broadcasting Council (RR), and the Administration Council (VR), equally organised on a regional basis, except for nation-wide PSB ZDF. The RR also supervises radio stations and digital services.

While the RR has responsibilities in all relevant supervisory aspects, the competences of the VR are focused on financial and management issues and are often carried out as preparation or requisite elements of final RR decisions.

The regional councils for public service broadcasting associated with the ARD coordinate their supervision (especially concerning supraregional ARD programming) in the Conference of Council Chairpersons of the ARD (the Gremienvorsitzendenkonferenz, or GVK). The decisions of the GVK are not legally binding for regional councils but do have strong impact. Recommendations of the GVK are, for example, codified in a three-step test (known as the “Amsterdam Test”) for digital services provided by the ARD.

Regarding supraregional issues, there are regulatory organs for the commercial sector: the Association of State Media Authorities (ALM), a coordinating body dealing with issues pertaining to all regional regulators, the Regulatory Affairs Commission (ZAK), a centralised internal organisation dealing in particular with licensing issues of nation-wide broadcasters, and the Commission on the Protection of Minors (KJM). Furthermore, there is the Commission on Concentration in the Media (KEK), dealing with pluralism issues.

Each LMA deals with audiovisual content and distribution issues in the relevant region. Spectrum issues and electronic communication issues are in the responsibility of the telecoms regulator, the Federal Network Agency (BNetzA). Transmission aspects are dealt with jointly by the relevant regional LMA and BNetzA.

All in all, the LMAs supervise 374 commercial television channels. Furthermore, the LMAs supervise commercial non-linear services (non-linear services are regulated in Germany). The RRs supervise 23 public service television channels in total, as well as the non-linear services provided by them (35 under the responsibility of ARD-PSB).

Powers

LMAs have general policy-implementing and third-party decision-making powers, especially in the field of advertising (together with the ZAK for nation-wide broadcasters), of human dignity issues and regarding the protection of minors (together with the KJM in for nation-wide broadcasters or content providers). Services are systematically monitored by the LMAs, who also have information collection powers. LMAs have a range of sanctions, ranging from warnings, fines (up to €500,000), with publication of decisions, to the suspension/revocation of licenses.

LMAs have regularly made use of their formally granted competences and their powers of sanction.

RRs have advisory and supervisory powers concerning programmes, organisation, personnel and budgetary matters. Their agreement is required for relevant fundamental issues such as the development and adoption of programme- and advertising-guidelines. In relation to the three-

step test, the RRs are empowered to conduct *ex-ante* examinations of new digital services planned by the PSBs.

The highest decision-making organ

The highest decision-making organs of the LMAs are usually Councils, or in some cases Assemblies or Executive Boards. The size of these bodies range from 5 to 47 members, depending whether they are an expert council or a pluralistic council. Pluralistic councils, are composed of: representatives of civil society (the majority of members), members of parliament, experts and a maximum of one government representative. The chairman is either elected by the Council/Assembly or by the regional parliament. The other members are in general delegated by their organisation.

The terms of office for chairmen/presidents of LMAs range from five to seven years, those of the Council/Assembly members from four to six years. Reappointment is possible. The chairman/president must have experience in the media sector, and in some cases must be qualified as a judge.

Regarding the appointment process, the following rules on conflicts of interest exist: state officials (including at EU level) and employees from stakeholders (commercial and PSB) are not eligible for the board. With a number of exceptions, other offices can be held at the same time. In general, the councils/assemblies of the LMAs have, in addition to their regulatory tasks, the following competencies: determination of their own rules of procedure, approval of the budget, appointment of the chairman/president. The reasons for dismissal of the chairman range from violation of obligations, important reasons. In general, dismissal lies in the competence of the Council/Assembly. As regards the other Council/Assembly members, they can be recalled from their function by the relevant organisation.

The ZAK is composed of 14 members, namely legal representatives of the various LMAs. The main tasks of the ZAK are: licensing issues; supervisory measures in relation to nation-wide broadcasters; and the establishment of common standards. The ZAK determines its own rules of procedures. The president of the Director's Conference of the LMAs (DLM, a coordinating body) is also the chairman of the ZAK, with other members being delegated by the various LMAs.

The KJM is composed of 12 members, six of whom are delegated by state entities and six of whom are representatives of LMAs. The representatives of LMAs are elected by the ALM and the other board members are delegated by various authorities.

The KEK is composed of 12 experts; six of whom are experts specialised in broadcasting and business law, and six of whom are representatives of LMAs. The experts are appointed unanimously by the Minister Presidents of the German States for a five-year term. The representatives of the LMAs are elected by the ALM for the KEK's full term of office. In fulfilling their tasks, the members of the KEK are not bound by instructions.

The RRs, the highest decision-making bodies for public service broadcasters, are comprised of between 26 (Radio Bremen) and 77 (ZDF) members.

In general, the RRs have the following competencies in addition to their regulatory tasks: monitoring and consulting the chairman of the broadcaster on programming; supervising the legality of programmes; determining general PSB rules and guidelines; election and dismissal of executive staff; election of the majority of VR members; approval of the annual budget; supervising the general management; approval of new digital services; and determination of their own rules of procedure.

The RRs elect their chairman. The representatives are delegated by each respective organisation entitled to a seat in the RR. The organisations are entitled to a seat in the RR by law as representatives of relevant groups in society. The RR members are only accountable to the public at large and not bound to orders by their parent organisation. RR membership for members of a national or regional government and parliaments (including EU-level) is limited to a certain number determined by law. In the case of ZDF, they are appointed by the minister president. There is an ongoing debate in relation to ZDF's appointment process.

The term of office of RR members ranges from five to nine years. Reappointment is admissible. Rules to guard against conflicts of interest usually exist, with exceptions made for delegates from government.

All regulatory bodies take decisions in accordance with their relevant rules of procedure, mostly by simple majority. There is no obligation to publish decisions⁴⁷³; annual reports of the bodies are published. Post-office conflict of interest rules do not exist.

There have been no dismissals in the past five years, except for one in 2007 due to the merger of two LMAs (Hamburg and Schleswig-Holstein). In the RR for Berlin-Brandenburg, a dismissal occurred for unknown reasons.

Staffing and funding

It appears that funding and staffing of the regulators is sufficient.

The budgets of the various LMAs lie between €1.6 million (Bremen) and €22 million (Bavaria). The budgetary resources mainly derive from public broadcasting licence fees, administrative fees and fines.

In the case of PSBs, the annual budget is prepared by the director/chairman and approved by the RR. The Commission for the Determination of the License Fee (KEF), an independent external body, periodically assesses the budgetary needs of the PSBs and recommends the necessary licence fee, which is then determined by the regional parliaments.

The PSB councils are equipped with their own staff members and have their own budget.

Checks and balances

Complaints handling procedures exist.

473 We have been informed by the ARD-Gremienvorsitzendenkonferenz in February 2011 that the RR's decisions in the three-step-test have to be published.

LMAs and RRs (usually not the RRs themselves but the PSBs) are subject to annual financial external auditing for their spending by the relevant courts of auditing, and sometimes also subject to checks by private auditors.

Neither LMAs nor RRs are specifically accountable to an entity, as they are under legal supervision by the relevant regional state authorities. Specific reporting obligations exist for the LMAs, which however are not sanctioned.

It appears that nobody, apart from courts, has the power to overturn the decisions of the LMAs or RRs. As mentioned, exceptions are made in relation to state authorities in the framework of legal supervision, within the strict limits of the independence of the media, which is constitutionally guaranteed.

In the case of decisions made by an LMA, addressees of the measures and, in certain cases, competitors are entitled to lodge an appeal. In relation to PSBs, general complaints are admissible.

In all cases, internal procedures must be followed before a matter is taken externally.

Decisions do not generally stand pending appeal. Decisions by courts are in principle limited to the legality decisions.

Procedural legitimacy

LMAs are obliged to carry out public tenders in relation to the allocation of channels. On a case-by-case basis, the LMAs consult stakeholders, e.g. on regulation in general or on advertising rules.

RRs are obliged to give stakeholders the opportunity to present their views in relation to new digital services, in accordance with the European Commission's state aid decision on this matter. These views must be taken into account for decisions in the three-step test. Since 2009 there have been public consultations in the context of 35 three-step tests held by the ARD RRs and three such tests held by the ZDF.

2.3.1.11 Greece

Quick Facts

Greece is an EU Member with 11.2 million inhabitants. State TV enjoyed a near-monopoly until the end of the 80s, when commercial channels emerged and quickly gained the lion's share of the audience.

Public broadcaster ERT operates national radio and TV networks. It faces competition from the major commercial channels Mega TV, ANT1 and Alpha TV.

According to data from 2006, 4.9 million people in Greece have an Internet connection. Source: Country Profile Greece, BBC website, May 2010.

Executive Summary: National Council for Radio and Television (NCRTV)

General situation

In Greece, the body in charge of audiovisual matters is the National Council for Radio and Television (NCRTV). The authority was set up in 1989 as an independent, separate entity.

135 TV channels hold a provisional license, and five non-linear services are licensed in Greece. Final licences have not been granted because of political implications. NCRTV supervises television and radio matters. Its competences include: the allocation of licenses for the provision of broadcasting and electronic media services; allocation of frequencies; public service broadcasting; regulation of audiovisual content, including quality control of broadcasts; and, during a certain period, media ownership rules. The latter competence was transferred to the Competition Commission, following a dispute between the former Greek government and the European Commission. According to the ministry, Greece has implemented the AVMS Directive since November 5, 2010.

Powers

The NCRTV has general policy-implementing powers in its areas of responsibility. It can issue instructions, opinions, recommendations, guidelines and take individual decisions. It systematically monitors the operators, in particular on compliance with advertising and political pluralism rules. It also has information collection powers in these areas.

The NCRTV has a range of powers of sanction, ranging from warnings, the imposition of fines (ranging from around €15.000 to €1.500.000)⁴⁷⁴, the publication of decisions, and suspension and revocation of licences. Fines are in practice mostly imposed for breaches of rules on advertising or and quality of programmes.

There are five working-groups within the NCRTV: citizen's complaints and quality programme control; transparency control; licensing; audience measurement; and control of political pluralism and frequency allocation for digital broadcasting on the regional and local level.

The highest decision making organ

The highest decision making organ is the NCRTV board, which is composed of a chairman, a vice-chairman and five members. These are appointed by the president of the parliament upon proposal of a parliamentary committee for a period of four years, and may be re-appointed once. These are all full-time working positions. According to the law, members should be distinguished scientists, professionals or public persons mainly (the latter does not apply to the chairman or the vice-chairman) from related sectors. In practice, the board reflects the political spectrum, although these offices are incompatible with state or party functions. Incompatibility rules also exist in relation to industry, which also apply in relation to senior staff at the NCRTV.

474 Fines ranging from €14.673, 51 (5.000.000 drachmas) to €1.467.351, 43 (500.000.000 drachmas). See art. 16 § 1 law 2644/1998.

There are rules to prevent former employees of the NCRTV being employed by former regulatees (a three-year cooling-off period for board members and a four-year one for experts and employees in the administration).

The chairman and board members can only be dismissed if they are sentenced for a felony or a series of other crimes. Otherwise, the law does not foresee that they can be dismissed before term.

The NCRTV board takes decisions by majority voting. The board operates in a transparent manner, as its agenda is published in advance and a press conference is held following meetings. The decisions are published on its website.

Staffing and funding

It appears that the NCRTV does not have enough staff, however the regulator appears to quite well funded. The annual budget for 2010 is €3.03 million. The NCRTV has 47⁴⁷⁵ employees, 12 of whom are scientific experts, ten are legal experts and 25 employees in the administration. The law requires 81 employees. The ministry informs us that 27 of the employees are experts (mostly legal) and 20 employees in the administration.

Checks and balances

The NCRTV was set up as an independent authority. However, broadcasting in Greece is under state control, which is delegated to the NCRTV.

The budget is planned by the Ministry of Economics, and the regulator is 100% funded by the state. The regulator's budget is controlled by both the State Audit Council and the General State Accounts office.

An annual report must be submitted to the responsible parliamentary committee, which may issue relevant recommendations. Furthermore, the NCRTV is accountable to the minister responsible for the media.

Nobody, except from the Supreme Administrative Court, has the power to overturn decisions of the NCRTV. The court can cancel decisions of the authority but cannot take a new decision on its behalf; it can only ask the authority to take a new decision. Decisions stand pending appeal. De facto, reviews took place in the field of audiovisual regulation and licensing. Any person who deems that his/her legal interests are affected, can lodge a complaint with the NCRTV. A complaints procedure exists.

Procedural legitimacy

Theoretically, decisions relating to three NCRTV codes (on advertising, on information programmes, and on entertainment programmes) should be subject to a consultation procedure including stakeholders and trade unions. However, these do not always take place in practice.

475 According to NCRTV, in February 2011, the NCRTV has a 26 employees (one of which is detached to another authority) and 25 scientific experts (10 of which are legal experts).

2.3.1.12 Hungary

Quick Facts

Hungary is a middle-sized country with a population of 10 million. Hungary joined the EU in May 2004.

Public television broadcasters are Hungarian Television (two channels) and Duna Television (two channels). They face competition from private stations (two national channels – RTL Klub and TV2 – and dozens of niche channels) which have mushroomed since the mid-1990s. The state broadcaster has faced financial struggles, dwindling audiences and allegations of political influence from government circles. Around 59% of the population have an Internet connection (2009). Source: Country Profile Hungary, BBC website, May 2010.

*Executive Summary: National Radio and Television Board (ORTT)*⁴⁷⁶

General situation

In Hungary the body in charge of audiovisual matters is the National Radio and Television Commission (ORTT). The Board currently consists of five members. The chairman, Mr. Majtényi, resigned in October 2009, since when no chairman has been elected.

The ORTT was established in 1996 and is responsible for audiovisual content matters (radio and television services). The ORTT qualifies itself as an independent legal entity under the supervision of Parliament. The ORTT supervises four public service television channels, and 541 linear commercial services on the basis of Act I of 1996 on Radio and Television Broadcasting. The law has not yet been adapted to cover non-linear audiovisual media services.

Hungary has a separate authority for electronic communications, the National Communication Authority (NHH) which covers transmission and distribution questions in relation to digital terrestrial television and spectrum allocation. Licensing of spectrum for broadcasting is the responsibility of the ORTT.

Powers

The ORTT has limited general policy-setting powers. It delivers opinions and proposals on theoretical issues concerning the development and improvement of the Hungarian broadcasting system.

Concerning general policy-implementing powers, the ORTT monitors, systematically and in an *ad-hoc* manner, the services operated by licensed operators, to assess if they comply with the rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the possibility to impose fines (between 10,000 forints and 1,000,000 forints) and the publication of

⁴⁷⁶ (prior to the August 2010 events, when the authority was dismissed, see Addendum submitted by the National Media and Info-communications Authority below)

decisions in the media. The ORTT cannot suspend or revoke a licence, but it can suspend broadcasting rights for a fixed period, with a maximum of thirty days.

A Complaints Committee has been set up within the ORTT to handle complaints from viewers.

The highest decision making organ

The highest decision making organ of the ORTT is the board. It has at least five members, nominated by the political groups represented in Parliament. Each of these groups can nominate one member. If there is only one party on the governing side or the opposition side, that party may nominate two members.

The chairman is proposed jointly by the President and the Prime Minister. The chairman and the board members are elected by Parliament by the majority of its members. The board decides on human resources, and determines the internal structure of the Commission. The decision making process is transparent, and minutes and agendas are published on the website. Responsibilities of the ORTT are listed in the law.

Staffing and funding

The total number of ORTT staff is not stated by law. The number provided by the ORTT is 122. Annual budget is fixed by Parliament decision each year, it was €5.6 million in 2009.

As a point of comparison, the the total number of NHH staff is not stated by law, but the website quotes a staff of 460. Its budget was €80 million in 2009.

Checks and balances

The ORTT is accountable for its work through an annual reporting obligation to the Parliament. The State Audit Office audits the financial management of the board, and a private audit company also audits the board annually. Nobody, apart from a court, has the power to overturn decisions of the ORTT, and nobody has the power to give instructions. Any civil organisation can lodge an appeal against a decision of the ORTT, if internal procedures are followed beforehand. The appeal body has the power to change a decision or to cancel it and remit it back to regulator for it to take a new decision.

Procedural legitimacy

The ORTT is obliged to carry out public consultations for decisions on frequency allocation, as two consultations are held during the tendering procedure. The decisions are published: the board has to publish its final resolution on establishing infringements on its official website and, if necessary, in the official journal of the ministry in charge of cultural affairs, and it must also notify the national news agency of these decisions.

Addendum submitted by the National Media and Info-communications Authority

Hungarian media regulation was modified substantially to cater for the needs of the digital environment. After the elections, the drafting of new legislation for the audiovisual sector started

without delay. More can be read on the changes on the EPRA website⁴⁷⁷. As regards regulation of the audiovisual sector, Act 82 of 2010 on the modification of certain legal acts regulating the media and communications was adopted on the July 22, 2010. The new act introduced substantial changes in the supervision of electronic media. The act is intended to replace the fragmented and outdated existing regulation – which cannot be applied to the digital environment – with an effective, clear, controllable and cost-effective organisational and institutional background, which can address the challenges posed by the 21st century.

A converged regulator

By merging the National Communications Authority with the National Radio and Television Commission a converged regulatory authority was established with powers similar to that of Ofcom in the United Kingdom. The new authority is an autonomous administrative body under the supervision of Parliament.

The National Media and Info-communications Authority is headed by the President, who is appointed by the Prime Minister for a term of nine years. The president of the NMCA – whose work is assisted by two deputies – has an important role within the new regulatory regime. The president will not only head the office of the new authority but – following her election by a two-thirds Parliamentary majority – she will also chair the meetings of the autonomous Media Council of the NMA. On 7 August 2010, the Prime Minister appointed Ms Annamária Szalai as the President of the National Media and Communications Authority.

The Media Council

The Media Council assumes the role and powers of the Board of the National Radio and Television Commission. The chairperson and its four members are elected by Parliament for a renewable term of nine years. The members of the Media Council are nominated by a Nominating Committee set up by the group of MPs. The voting rights of factions within the Nominating Committee are commensurate with their size within the Parliament. Strict rules on conflicts of interest apply to both the Chairperson and the members of the Media Council. The Chairperson and the four members of the Media Council were elected by Parliament and the Council started its operation on 11 October 2010.

The new act also provides for the position of the Commissioner for Communications and Media, whose main task is to intervene whenever a consumer's (subscriber, user) right is impinged upon by an electronic service provider, operator or distributor.

477 See also <http://cmcs.ceu.hu/node/297/>

2.3.1.13 Ireland

Quick Facts

Ireland is a small country with a population of 4.5 million. It has a president (Mary McAleese, in office since 2004, although the Irish presidency has a mainly ceremonial role) and Brian Cowen has been the prime minister since 2008.

The public broadcaster (RTE) operates national radio and TV networks RTE1 and RTE2. There is also a separate public service broadcaster operating the specialist Irish language service TG4. It faces competition from private stations (TV3, which operates also cable/satellite services) as well as from Sky. Source: Country Profile Ireland, BBC website, May 2010.

Executive Summary: Broadcasting Authority of Ireland- BAI

General situation

In Ireland, the body in charge of audiovisual matters is the Broadcasting Authority of Ireland (BAI). It is a body corporate consisting of three separate boards: the Authority, the Contract Awards Committee and the Compliance Committee. It is set up as an independent authority. It is accountable to the joint Parliament/Senate committee to which it submits an annual report. It was established in 2009 as a result of the passage of the new Broadcasting Act. It is responsible for audiovisual content matters, distribution aspects of audiovisual content (such as must-carry), and for authorising non-public broadcasting contractors to operate a broadcasting service. It is also responsible for distributing a fund for public service content made by providers other than the PSB. It is not responsible for radio spectrum. Ireland has a separate authority for electronic communications matters.

BAI supervises 14 private channels and three public service channels operated by RTE.

Powers

BAI has a range of policy-implementing powers in its areas of responsibility, defined as licensing, enforcement and monitoring. It systematically monitors the services operated by licensed operators to assess if they comply with the rules on advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, such as the option to impose fines, as well as the suspension and ultimately revocation of licences. In the case of non-compliance with a BAI decision, the Compliance Committee may make a recommendation to the High Court who then determines the appropriate fine, with a maximum of €250,000.

The highest decision making organ

The highest decision making organ of BAI is the board.

The board is composed of a Chairman, plus eight members. Of these, the Chairman and four members are nominated by the Minister and four are nominated following advice from a joint chamber (Senate and Parliament) Committee, set up by the Minister to advise him/her on the nominations.

The Board is responsible for developing the overall organisation, strategy and codes of practice, issuing guidance, licensing services, and reporting to Government and Ministry. Decisions are taken by majority vote. In the case of a tie, the Chairman has the casting vote.

The Contract Awards Committee, has eight members – four are nominated by the Minister, and the remaining four are appointed directly by the Authority Main Board. The Contract Awards committee is responsible for selecting and awarding contracts and licences. The vote is also by simple majority, with the Chairperson's having a decisive second vote in the case of an equal division of votes.

The Compliance Committee also consists of eight members – four are nominated by the Minister, and the remaining four are appointed directly by the Authority Main Board. The Compliance Committee is responsible for determining whether a breach has taken place and making a recommendation to the Authority Board and the High Court regarding sacncaitons. The voting system is the same as with the Board and the Contracts Awards Committee.

It is a statutory requirement that members of the Board and the two Committees be chosen for their expertise in the field of: media affairs; public broadcasting; commercial broadcasting or community broadcasting; broadcast content production; digital media technologies; trade union affairs; business or commercial affairs; matters pertaining to the development of the Irish language; matters pertaining to disabilities; arts, music, sports and culture; science, technology and environmental matters; legal and regulatory affairs; social, educational or community affairs; or Gaeltacht affairs.

All board members, including the chairman, are appointed for a term of five years, which can be renewed once.

There are rules to avoid conflicts of interest when appointing the Chairman of the Board and Members of the Authority, during and after their term in office. Senior staff must disclose to the Authority any potential conflict of interest, whether political or commercial.

There are rules to protect against early dismissal of the Chairman and members. The grounds for dismissal are listed in the law. However, between 2005 and 2009 there were no incidences of the Chairman or members of the board experiencing early dismissal.

Staffing and funding

There is no public data on the current staff count, although the last annual report (2007) of the BCI (the body that was replaced by the BAI) showed a staff of 40. The BAI budget for 2010 is €5.7 million. This is calculated by the BAI on the basis of real costs. The income is raised by a levy on broadcasters, based on their turnover. Before the 2009 Act, the predecessor body was funded directly by government.

Checks and balances

An external audit can take place at any time, on the direction of the Minister. It can be carried out by any person appointed by the Minister.

The BAI has to submit an annual financial report containing financial, auditing, income and expenditure information to the Minister of Communications, Energy and Natural Resources. It

also has to submit an annual progress report on its activities, its strategies for the future and records of board and committee attendance.

The Minister reviews the BAI annual report before it is submitted to a joint Parliament/Senate Committee.

The BAI must publish its financial accounts on an annual basis.

The High Court can overrule recommendations for financial sanctions made by the Compliance Committee.

Any licence holder can lodge an appeal against a BAI decision. A court can cancel the decision of the authority but cannot take a new decision on its behalf: instead it can ask the authority to take a new decision. The regulator's decision stands pending the appeals body's decision.

Procedural legitimacy

The BAI is obliged to adopt a strategy statement, and must hold a public consultation when preparing a broadcasting code, a broadcasting rule or adopting a strategy statement. The BAI is obliged to liaise and consult with the Communications Regulator (ComReg) in the preparation of the allocation plan for the frequency plan dedicated to radio and television broadcasting.

2.3.1.14 Italy

Quick Facts

Italy, a country having land borders with Austria, France, Slovenia and Switzerland (plus the Vatican City and San Marino) has a population of around 60 million. Administratively, Italy consists of 15 regions, and five regions with special autonomy.

Terrestrial TV is clearly the main broadcasting platform at around 85% (measured by monthly viewing share, May 2010). Satellite comes next (around 15%). IPTV's share is less than 1%. There are no coaxial cable TV networks in Italy.

In 2007, Italy peaked with more than one million mobile broadcast TV subscribers (DVB-H), but the figure decreased to 735,000 in 2008. This represents 67% of all EU DVB-H subscribers.

The public service broadcaster, RAI, operates 13 national TV channels on DVB-T, of which RAI1, RAI 2 and RAI 3 are the three traditional public service channels present also on the analogue platform. RAI is partly funded by advertising revenues.

The main private free-to-air competitors of RAI are Mediaset (controlled by the family of the prime minister, Silvio Berlusconi) and Telecom Italia Media (owned by Telecom Italia). The biggest pay-TV provider is Sky Italia (owned by NewsCorp) on the satellite platform, followed by Mediaset on DTT.

The gradual switch-off of analogue terrestrial TV is currently underway and should be completed by the end of 2012. Part of the digital dividend will be used to grant licences to new entrants in the DTT market. A call for tender is expected in 2010-11.

In July 2010, the European Commission lifted, subject to certain conditions, a ban preventing Sky Italia operating on DTT, which had been imposed in the context of the NewsCorp/Telepiù

merger in 2003. This means that Sky Italia can take part in the future call for tenders for the digital dividend broadcast spectrum.

In January 2010, fixed broadband penetration in Italy was 20.6% (below the EU average of 24.8%) and mobile broadband 6.8% (above the EU average of 5.2%). Mobile penetration was 146% (the second highest in the EU). (Figures refer to subscribers per 100 population). Source: Country Profile Italy, BBC website August 2010; European Commission; Cullen International.

Executive Summary; Autorità per le Garanzie nelle Comunicazioni (AGCOM)

General situation

Autorità per le Garanzie nelle Comunicazioni (AGCOM) is the sole authority responsible for issues falling under the Audiovisual Media Services (AVMS) Directive.

AGCOM is a converged regulator as it is also the designated regulator under the EU regulatory framework for electronic communications. Therefore, AGCOM also covers issues related to transmission for broadcasting services and ancillary services (must-carry, EPGs, APIs).

In addition, AGCOM is the regulator for the publishing sector.

The independence of AGCOM is explicit under the legal framework. Legislation setting up AGCOM states that it operates in full autonomy and with independence of judgment and evaluation.

In June 2010, one of AGCOM's commissioners resigned following a judicial inquiry into alleged pressures applied by Mr Berlusconi in order to stop certain broadcasts on RAI that were (highly) critical towards the government.

Powers

In addition to general policy-implementing powers, in all areas covered by the AVMS Directive AGCOM has regulatory decision-making powers (quotas, right of reply).

It systematically monitors compliance with the rules e.g. on quotas, advertising and the protection of minors. It also carries out *ad-hoc* monitoring and information collection.

During the five past years, AGCOM has actively used its powers to issue warnings and impose fines. About 40% of handled sanction proceedings handled by AGCOM each year are concluded with a fine. AGCOM has suspended/revoked a licence only once since its establishment. Decisions on the protection of minors and on the right to reply are also published in the media.

Specific complaints handling procedures exist only in the field of electronic communications services, pay-TV services and political communications, in addition to the general right to present complaints in any form in the case of audiovisual issues.

The highest decision making organ

The highest decision-making bodies are the council, the Commission for Infrastructures and Networks and the Commission for Services and Products. The responsibilities of these bodies are defined in the law, and each has specific fields of competence within the limits of the powers of AGCOM (telecom, broadcasting and publishing).

Both of these commissions consist of four commissioners and the AGCOM president. The council consists of all eight commissioners and the AGCOM president. Decisions are taken by majority voting. If the result is tied, the president will have the deciding vote.

The AGCOM president represents the authority, convenes the meetings of the collegiate bodies, determines the agenda, chairs over the proceedings, and supervises the implementation of decisions.

The lower and upper houses of Parliament each elect four commissioners who are then appointed by a Decree of the President of the Republic for seven years.

The AGCOM president is first designated by the prime minister, in consultation with the minister of economic development. The candidate is then submitted to the competent parliamentary committees (requiring approval by 2/3 of the members of these committees). Finally, the AGCOM president is appointed by a Decree of the President of the Republic for seven years.

The non-renewable terms of the president and the commissioners are staggered not to coincide with the political election cycle (five years).

The president and the commissioners must have high and recognised experience and expertise in the sector.

The legislation includes rules to avoid possible conflicts of interest with the government, political parties and industry. The president and the commissioners cannot hold other offices at the same time. There is also a cooling-off period of four years, during which the president and the commissioners cannot have a working relationship with companies active in AGCOM's field of competence.

Dismissal of AGCOM commissioners or the president is automatic if they do not resign from political posts or leave their interests in companies active in AGCOM's field of competence. There are no other grounds for dismissal.

Staffing and funding

The AGCOM council decides on the overall budget. The Ministry of Economy can adjust it when necessary.

In 2009 AGCOM's total revenues were €66.2 million.

The budget is made up of: (1) an annual contribution from operators in the sectors under AGCOM's responsibility (and certain other fees); and (2) state financing, indicated for each year in the State Budget Law.

In practice, state financing represents only a small part (4.8% in 2009) whereas the annual contributions from operators represent the main source of revenue (93.2% in 2009). In 2010 this contribution was set at 0.15% of turnover (0.145% in 2009 and 2008). AGCOM sets the level of the contribution annually, respecting the limits provided by the law.

Checks and balances

AGCOM is accountable to Parliament via an annual report. However, Parliament has no formal power to adopt or reject the report. AGCOM is not accountable to, nor can be instructed by, ministers/ministries or government as a whole.

AGCOM is subject to annual financial auditing.

Only an administrative court can overturn AGCOM's decisions, the highest appeal body being the Council of State at the second appeal stage. AGCOM's decisions stand pending appeal, unless the appeal body suspends them. The appeal body can cancel a decision and remit it back to AGCOM, but it cannot replace the original decision with its own.

Procedural legitimacy

AGCOM can hire outside advice when fulfilling its tasks, and each directorate has a certain budget for this. Public tender procedures apply.

AGCOM may conduct public consultations to acquire information and documentation concerning all questions under its competence.

There are no specific rules on who must be consulted, but in practice the regulator hears anybody with a specific interest in the issue to be dealt with by the AGCOM decision in question. The length of the consultation period is set separately for each consultation. Typically it is 30 days. During the last five years, AGCOM carried out eight consultations in the areas covered by the AVMS Directive.

The decision-making process provided by law is transparent.

2.3.1.15 Latvia

Quick Facts

Latvia is a small country with a population of 2.2 million. Latvia's TV market is dominated by the commercial LNT, two channels operated by the national public broadcaster (LTV1 and LTV7), commercial TV3 Latvia and the Baltic variants of the main Russian networks. Public radio and TV are financed by state subsidies and advertising. Source: Country Profile Latvia, BBC website, May 2010.

Executive Summary: National Electronic Media Council (NEPLP)

General situation

In Latvia, the body in charge of audiovisual matters is the **National Electronic Media Council (NEPLP)**. Until August 2010, when the new Electronic Media Law was adopted, it was named the National Broadcasting Council (NRTP). The Council was established in 1995 and has a chairman and four other members, who are answerable to parliament. It is responsible for audiovisual content matters, distribution aspects of audiovisual content (such as must-carry, EPGs, APIs) but is not responsible for spectrum. Latvia has a separate authority for electronic communications matters.

The NEPLP supervises the three national commercial terrestrial television operators (LNT, TV3, PRO100TV), eight satellite channels, the two national public service terrestrial television channels, regional and local television stations, and regional and local cable operators, as well as all public and commercial radio operators.

Powers

The NEPLP is involved in the overall development of the electronic media market, it issues licences, and interprets advertising and sponsorship rules, rules on quotas and language requirements. It systematically monitors the services operated by licensed operators to assess if they comply with the rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the possibility to impose fines, the publication of decisions in the media, and the suspension and revocation of licences (if the warnings and fines are not effective). The Council's monitoring centre employs two people. In 2009, the NRTP issued seven warnings and imposed ten fines. In 2005, it suspended one radio station licence for three days for surreptitious political advertising.

The highest decision making organ

The highest decision making organ is the Council, which is composed of a chairman and four other members. Until October 2009 there were nine members, but the law was amended, reducing the number to five. The Council has the power to take decisions on all regulatory matters within its area of responsibility. Previously, Council members had to be nominated by at least five members of the Parliament. The chair and the vice-chair are elected by Council members by secret ballot. The new law foresees nominations by the Parliamentary Commission on Human Rights and Public Affairs, after consultations with NGOs active in the media, education, culture, science and human rights fields.

All Council members, including the chairman are now appointed for a term of five years (previously four years) which can be renewed once. There are rules to guard against conflicts of interest during the term of office. After a term of office, a cooling-off period of two years is specified.

Grounds for dismissal before term are listed in the law – incompatibility, criminal offence, or unjustified non-attendance of meetings. Between 2005 and 2009, no board member was dismissed before term.

Staffing and funding

The NEPLP has 16 staff members. Its annual budget in 2010 is €332,000. 96.2% comes from state funding and advertising and 3.8% from licence tendering fees. Circumstances permitting, a budget is allowed for external consultations.

The NEPLP submits a proposal to the government for an annual budget. The government, in co-ordination with the NEPLP, makes adjustments and submits it to the parliament. The parliament adopts the budget.

Checks and balances

The NEPLP is subject to periodic audits by the State Audit Office. It must submit annual reports to the Office and publish them on its website and in the official gazette. The annual report should show how the finances were spent, but it is not linked to any specific indicators. Statistical data

about NEPLP performance must also be provided – covering licences, sanctions, international cooperation.

All decisions of the Council can be appealed. Results of licence tenders and decisions on sanctions are frequently appealed. No other body can give instructions to the NEPLP. Its decisions can only be overturned by the Court. The Council's decisions now stand pending a decision by an appeal body. Accepted grounds for appeal are errors of fact and errors of law. Appeal bodies have the power to cancel the decision and remit it back to the regulator, or to reduce fines. In the case of licence applications, they cannot instruct the regulator to award the licence to another applicant.

Procedural legitimacy

The NEPLP is obliged to carry out a public consultation when defining the remit of public service broadcasters. There are no requirements concerning the consultation period or any obligation to publish the results of the consultation. In 2009, the NEPLP organised one consultation.

Only Council decisions awarding or withdrawing licences need be published by law.

2.3.1.16 **Lithuania**

Quick Facts

Lithuania is a Northern European⁴⁷⁸ country with a population of 3.3 million. Since 2004, it has been a member of the European Union and NATO.

The public service broadcaster is the Lithuanian National Radio and Television (LRT). There are many private television channels that have eroded the public broadcaster's audiences. The radio market is similarly competitive, with dozens of stations competing for listeners and advertisers. The media operate independently of the state. There are no government-owned newspapers. Nonetheless, the national broadcaster has sometimes encountered attempts by politicians to influence its editorial policy. Source: Country Profile Lithuania, BBC website, May 2010.

Executive Summary: Lithuanian Radio and Television Commission (LRTK)

General situation

In Lithuania, the body in charge of audiovisual matters is the **Commission of Radio and Television of Lithuania (LRTK)** established in 1996. It is responsible for audiovisual content matters and distribution aspects of audiovisual content. The LRTK cooperates with the Communications Regulatory Authority (RRT), which is a separate authority for electronic communications, in setting the strategic plan for allocation of spectrum. The LRTK describes itself as a regulatory body and has a chairman elected for two years, and 12 other Commission members whose terms of office differ depending on the appointing organisation. The LRTK submits annual reports to the Seimas (the Lithuanian Parliament).

478 <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

The LRTK supervises three public TV and three public radio channels, 49 commercial radio stations, 51 commercial TV channels, 59 cable TV, 14 broadband and two wireless broadband operators.

Powers

The LRTK does not have general policy-setting powers. It has general policy-implementing powers in its areas of responsibility. It systematically monitors the services operated by licensed broadcasters, including European production quotas, advertising and the protection of minors. It also has information collection powers in these areas, including ownership data. It has a range of powers of sanction, ranging from warnings, the possibility to impose fines, the publication of decisions in the official journal (but not in the press), and suspension and revocation of licences (if the warnings and fines are not effective). Between 1996 and 2010 the LRTK issued 39 warnings and imposed €12,214 in fines, revoked 67 radio, TV and cable TV licences (including those revoked at the request of the broadcasters) and suspended nine licences. All those cases had to be sanctioned by court. Although specific legal rules concerning the handling of complaints from viewers are absent from the legal framework, in practice the LRTK deals with complaints from viewers against the conduct of audiovisual media service providers.

The highest decision making organ

The Commission is composed of 13 members. It has the power to take decisions on all regulatory matters within its area of responsibility.

The chairman is elected by members of LRTK by majority vote. The 13 members are appointed in the following way: one member by the President of the Republic, three members by the Seimas (Parliament), nine members are appointed by nine associations: Lithuanian Artists' Association, the Cinematographers' Union, the Composers' Union, the Writers' Union, the Theaters' Union, the Journalists' Union, the Journalists' Society, the Bishops' Conference, and the Periodical Press Publishers' Association.

The chairman is elected for a term of two years, and his term can be renewed, although the law does not specify anything on this. Terms of office of the Commission members are the following:

- one member, who is appointed by the President of the Republic, serves for five years;
- three members, who are appointed by the Seimas, serve four years.
- nine members, who are appointed by civil society organisations, serve the same term as the management body of the respective organisation.

During their term of office, the chairman and the Commission members cannot hold other public offices and cannot be employed by a media company or have shares in its capital. If they are members of a political party, they must suspend their membership and participation in the activities of that party. This also applies to members of staff, though no such rules are fixed in the law.

There are no rules to protect the Commission members against early dismissal, but the grounds for dismissal are listed in the law. The chairman can be dismissed by a majority vote of

the LRTK. Respective institutions can dismiss Commission members whom they have appointed ‘for a good cause’.

In the last five years, there have been no cases of early dismissal. In 2008 one Commission member resigned at his own will, as he took the post of Director of the News Department in Lithuanian Television (LRT).

Staffing and funding

The LRTK has a staff of 15. The LRTK’s overall budget for 2010 is €490,000. The budget is calculated on the basis of real costs and is decided by the LRTK. The income originates from monthly fees paid by broadcasters. For the purpose of financing the activities of the Commission, the broadcasters and re-broadcasters (except for the public service LRT) who make earnings from broadcasting and/or re-broadcasting activity, must transfer 0.8% of their earnings from advertising, subscription fees and other activities related to broadcasting and/or re-broadcasting every month to the Commission’s account.

Staffing is considered adequate, although the LRTK is concerned that there are no requirements for professional expertise and qualifications and no rules to guard against employee conflicts of interest after terms of office.

Funding seems to be adequate.

Checks and balances

The LRTK is not subject to specific financial periodic external auditing for its spending. It must present an annual report and a statement of financial activities each year to the Parliament, and an analytical survey on the implementation of Lithuania’s audiovisual policy every two years. Formal approval for the report is necessary.

The LRTK is subject to non-periodic audit by the National Audit Office of Lithuania, as specified under the Law on State Control,

It appears that nobody, apart from a court, has the power to overturn decisions of the LRTK. A person or organisation alleging the violation of their rights or interests can lodge an appeal against a decision of the LRTK. A court can cancel the decision of the authority but cannot take a new decision on its behalf, it can only ask the authority to take a new decision.

Procedural legitimacy

The LRTK is not obliged to carry out public consultations. However, the LRTK consults with shareholders on various decisions.

The LRTK is obliged to publish its decisions, including its motivation.

2.3.1.17 Luxembourg

Quick Facts

The Grand Duchy of Luxembourg is a small country with a population of 494,000.

Luxembourg has a particular position in the media landscape. There is no dedicated organisation for public service broadcasting, except for in the radio sector (with the radio station 100.7). For television, the government has entrusted a number of public-service functions to a commercial operator, CLT-UFA (part of RTL Group).

Luxembourg is the hub of the RTL Group, one of Europe's leading audiovisual media groups, which transmits channels to the Netherlands, France and Belgium. Luxembourg also hosts the largest European satellite operator, SES, which operates the Astra satellite fleet. The country is also the home of i-tunes, one of the largest on-demand service providers in Europe.

Audiovisual consumption is divided between the nationwide broadcaster RTL Lëtzebuerg, broadcasters in neighbouring countries, and broadcasters targeting immigrant communities, particularly RTPI (Portugal). This is a result of the small size of the market, the multilingual population and the fact that 40% of the country's residents are foreigners. Source: Country Profile Luxembourg, BBC website, May 2010.

Executive Summary: National Council of Programmes (CNP)

General situation

There are several authorities in Luxembourg that share responsibilities in the audiovisual media sector.

The National Council of Programmes (CNP) is the body responsible for advising the government in the supervision of all programmes licensed, authorised or distributed in the Grand-Duchy of Luxembourg. Its main task is to monitor the compliance of broadcasters' programmes with audiovisual content rules, such as the protection of minors. It has a hybrid status in the sense that it is independent when carrying out its monitoring mission, but is dependent on the government for administrative and budget matters, as it has been legally established as an advisory body of the minister in charge of media.

The Media and Communications Service (SMC) is an administrative body under the authority of the Minister for Communications and Media. Its main function is to assist the minister in the definition and implementation of media and communications policy. Its area of responsibility covers all relevant sectors, i.e. audiovisual content aspects, audiovisual transmission and distribution, spectrum and electronic communications.

Two other bodies are also competent in the audiovisual media sector: the Independent Commission for Broadcasting (CIR), whose main responsibility is to advise the government before granting broadcasting programme licences, and the Consultative Media Commission (CCM), which aims to maintain a dialogue between the government and media companies.

The Luxembourg Institute of Regulation (ILR) is a separate authority responsible for electronic communications matters.

The summary below mainly covers the description of the CNP. It also covers the SMC where necessary.

Powers

Although it is not a separate legal entity, the CNP works independently of the government. As it mainly advises the government in its area of responsibility, it does not have general policy-setting powers, general policy-implementing powers or specific rule-making powers. Its powers are more of a monitoring nature (systematic, *ad-hoc*, after-complaints) and include information collection.

The CNP's monitoring powers cover compliance with the rules on the protection of minors and minorities, and the protection of audiences against offensive or harmful material (race, sex, opinions, religion or nationality). Powers also encompass compliance with rules on advertising (only where it is a content-related matter), unfairness (e.g. imbalance in the political coverage) and privacy.

However, ensuring compliance with other rules, such as advertising (when it is not a content-related matter, such as the length of an advertising spot), quotas and broadcasting of major events, remains in the hands of the minister/SMC.

The CNP has no powers of sanction. In its area of responsibility (mainly protection of minors, incitement to hatred and advertising content-related aspects), it can only inform the minister of breaches of the legislation and propose a reaction where necessary. The power to revoke licences and authorisations is the hands of the government. However, although not provided for in law, the CNP has addressed warnings to broadcasters in the past five years.

The CNP also deals with complaints that are lodged by any private person or organisation who feels offended by the content of a programme.

The highest decision-making organ

The highest decision-making organ of the CNP is the board, which is composed of a maximum of 25 members coming from organisations representing groups active in social and cultural life (political parties represented in Parliament, unions, chambers of commerce, national federations of non-governmental organisations, etc).

Lists of organisations entitled to be represented in the CNP are set by decree and published in the official journal. Each allowed organisation selects its candidate member (and a substitute), who will be formally appointed by a decree of the minister in charge of media.

The board has a president and two vice-presidents, appointed by the members. The president can have a decisive role in tied decisions, as the board has currently 24 members.

In addition to a secretariat that assists CNP members, the CNP has also created on its own initiative an executive committee of ten members (the president, the vice-presidents and seven other members) to undertake meetings and decisions, adopt decisions in urgent cases and set up internal rules of procedures.

All members (including the president and the vice-presidents) are appointed for five-year terms, which are renewable. Specialist knowledge or experience in the field of the media are not required to be member of the CNP.

Members can hold other offices as CNP membership is only honorary. There are therefore no rules to guard against conflicts of interest, except that the president and the two vice-presidents

are not allowed to be members of the government administration. There are no rules on dismissal and no cases of dismissal before term took place in the past five years.

Staffing and funding

The CNP's staff is composed of two administrative assistants, in addition to external consultants and the non-remunerated 24 members.

The CNP is 100% financed by state budget (which was €60,000 in 2009). The CNP proposes its budget to the SMC, which includes it in governmental and parliamentary proceedings through the minister of communications. The final decision is made by the government.

It appears that the CNP has enough staff and that it is sufficiently well funded, but if its scope of competences increases, as is set out in a pending bill which aims to transpose the AVMS Directive and reform the institutional framework, additional staff and funding will be necessary.

There is no specific auditing of the CNP's annual budget, but it is audited in the context of the auditing of the state budget.

Checks and balances

The CNP is accountable to the minister of communications, as it depends on the ministry (or the government) for its budget.

There are no specific reporting obligations. The CNP voluntarily publishes its annual reports on its website and provides information to the minister and the SMC when requested to do so.

The power of the minister to give instruction to the CNP is limited to the request of including a topic in the agenda of the CNP.

There is no internal appeal procedure but any person/organisation, affected by the revocation of their licence or a restriction of their rights, can lodge an appeal against a decision of CNP/SMC before an administrative tribunal/court. A court can cancel a decision but cannot take a new decision on its behalf, it can only ask the CNP/SMC to take a new decision.

Procedural legitimacy

The SMC and CNP are not subject to any obligation for public consultation, but they must hear a broadcaster before a decision is taken. There are no obligations to publish decisions, except government decisions to revoke a licence, which must be published in the official journal.

2.3.1.18 Malta

Quick Facts

Malta is an island located between the south of Sicily and northern Africa. It has an area of 316 square kilometres and a population of 409,000. Malta joined the EU in May 2004, making it the smallest Member State.

Two television broadcasters have strong political affiliations. The main private stations One TV and Net TV are owned by the Labour and Nationalist Parties respectively. Television Malta (TVM) is the public broadcaster.

Italian television is popular and satellite television is widely watched. Cable TV was introduced in 1992. It has near-ubiquitous coverage. Source: Country Malta, BBC website, June 2010.

Executive Summary – Broadcasting Authority (BA)

General situation

The Broadcasting Authority (BA) is in charge of audiovisual regulation. It oversees six commercial television broadcasters and two public ones (TVM and Education 22).

The BA regulates audiovisual content as well as distribution aspects (e.g. must carry).

Powers

The BA supervises the broadcasters regarding quotas, advertising and the protection of minors. In the first two fields it can impose fines of up to €34,940. The maximum fine as regards the protection of minors is €2,329.

The BA can suspend/revoke licences (as it did in with UTV in 2008 and Family TV in 2009), publish decisions in the media and demand penalty payments in the case of non-compliance.

The highest decision making organ

The BA is composed of five persons, including the chairman.

They are officially appointed by the President, but he has to act on the binding advice of the Prime Minister. The Prime Minister seeks non-binding advice from the Leader of the Opposition. In practice, both major political parties nominate two persons. The Prime Minister and the Leader of the Opposition try to agree on the chairman.

BA board members have in practice a term of three years, which can be renewed, even though the Constitution of Malta allows for appointments to be made for a maximum period of five years, renewable. There are no formal requirements with regard to professional expertise or qualifications.

To exclude conflict of interest, members of parliament, parliamentary secretaries, election candidates and people holding public office are excluded from appointment. The Broadcasting Act provides rules to prevent conflicts of interest with industry.

The chairman and board members can not be employed by regulated parties until three years after the end of their term. No such rules exist for senior members of staff.

The criteria for dismissal (i.e. inability to discharge the function of office or misbehaviour) are listed in the Constitution of Malta and apply to the whole board as well as individual members. There have been no instances of early dismissal in the last five years.

However, the ties between BA members and the political parties are perceived to be close, which tends to constrain the BA's independence, even if this might not always be the case. At the time of gathering information for this report, the Prime Minister was offering to discuss the limitation of influence by political parties.

Staffing and funding

The BA budget for 2009 provided by the state was €600,000. Additional incimes consisted of authorisations/licence fees paid by operators (€240,000) and fines (€28,500). The budget is decided on by Parliament while the BA makes proposals.

The BA has a staff of 33 employees.

The BA's budget and staffing area not sufficient to fullfil its tasks, as its budget have not been revised in the light of new responsibilities which have been devolved by the State upon the BA.

Checks and balances

Parliament has very limited rights which it can exercise over the BA. In constitutional matters, Parliament has no say on BA decisions. It is only the courts which can review its constitutional decisions and such review is very narrow. The Government cannot review BA decisions, both under the Constitution and the Broadcasting Act. The BA draws up an Annual Report, including external audited data, which is published on its website.

The Courts can overturn the decisions of the authority. For non-constitutional matters, Parliament can by ordinary law (the Broadcasting Act) grant further powers to the BA and make such powers subject to judicial review (as is the case). The President cannot alter BA decisions, whether under the Constitution or under the Broadcasting Act. The Government's powers over the authority are limited to administrative matters that do not affect the Authority's constitutional and legal decision making procedures.

The BA is audited anually by a private firm. Auditors hired by the BA must be approved by the Prime Minister. He can also ask for an audit on demand, which is carried out by the Auditor General (not by the private auditing company). Audited accounts must be presented to the House of Representative at least once a year.

The work undertaken is also audited, but there is no fixed date for this.

Procedural legitimacy

The BA has adopted a policy document requiring the inclusion of public consultations. Six have taken place between 2007-2009.

There is a budget to procure external advice on regulatory matters.

There is a legal obligation to publish decisions.

2.3.1.19 Netherlands

Quick Facts

The Netherlands is a constitutional monarchy with 16.6 million inhabitants.

The Dutch approach to public service broadcasting (PSB) is unique. Airtime on radio and TV channels is shared by a large number of broadcasting associations (with members) and several other non-profit organisations (without members), which are granted broadcasting licences either because they are deemed representative of a particular segment of the population or on the basis of a specific programme remit.

The broadcasters given the most the broadcasting time on the national TV and radio channels are private broadcasting associations (the so-called ‘omroepverenigingen’), who have members reflecting some interests in society. They can provide a general programme offer. Furthermore, there are several PSB broadcasters without members who have a special legal task: the NOS (reporting on news, sports, national events) and the NTR (with a strong focus on education, arts and programmes for minorities and children). There are also organisations representing the main religions and spiritual movements in Dutch society; Catholic, Protestant, Muslims, Jewish, Humanists, etc. Compared to the other PSB organisations, these have less broadcasting time on national TV and radio channels, and they must only provide religious or spiritual programmes. Public radio and TV channels face stiff competition from commercial stations from the RTL and SBS groups.

Viewers have access to a wide range of domestic and foreign channels, thanks mainly to one of the highest cable take-up rates in Europe (although, in the past decade, the number of households subscribing to cable dropped from well above 90% to just above 75%). There are 12 provinces; 11 each have a regional public TV channel; the 12th province (Zuid-Holland) has two public TV channels (one focusing on the region of Rotterdam; the other on the region of The Hague). At local level (municipal level) there are an additional 135 public TV channels, which are only available via cable. The three national public TV channels enjoy high audience shares (taken together: 38%). Source: Country Profile The Netherlands, BBC website + X-Media Strategies, October 2010.

Executive Summary: Commissariaat voor de Media (CvdM)

General situation

The Commissariaat voor de Media (CvdM, or Media Authority) was established in 1988 as an independent administrative authority. The independence of the authority is explicitly defined in an act covering independent administrative authorities. The Media Act, however, limits the independence of the CvdM in that certain powers are assigned by law to the Minister responsible for media policies rather than to the CvdM, and the Minister can overrule decisions of the CvdM in certain cases.

The CvdM is responsible for audiovisual content and distribution matters. Spectrum matters are the responsibility of the Agentschap Telecom (Radio communications agency), which is part of the ministry of economic affairs. General electronic communications matters are the responsibility of the independent telecommunications regulatory authority Onafhankelijke Post en Telecommunicatie Autoriteit (OPTA).

The CvdM supervises the three main PSB TV channels, several thematic PSB TV channels, approximately 300 local PSB TV channels and almost 250 licensed commercial TV channels (including around ten main national commercial channels, many satellite channels and text TV services). Also the CvdM carries out supervision over providers of VOD services, radio channels (both PSB and private service providers) and the secondary activities of PSB broadcasters.

Powers

The CvdM only has policy-implementing powers, and no general policy-setting powers. It systematically monitors compliance with the rules on quotas, advertising and protection of minors, and has information collection powers in these areas.

The CvdM can issue warnings, impose fines and suspend or revoke a licence. The latter power is not used in practice as it is usually considered to be disproportionate. CvdM cannot require operators to issue an apology in the press or on TV, but it does publish all sanctions on its own website. If a sanction decision is not complied with, the CvdM can impose additional penalties.

The highest decision making organ

The board of the CvdM is composed of three or five experts but no formal criteria are defined. There is no government representation. The board decides by majority, but in practice all decisions are taken by consensus.

A new board member is appointed for a period of five years by the minister for Education, Culture and Science, with no formal nomination procedure, although in practice the other two board members are consulted. The term of a board member can be renewed once.

Board members cannot be politically active, employed in a public administration or in a media institution or company (public or private). They can hold academic positions. There are no rules to guard against conflicts of interest after their term of office. There are no explicit rules for senior staff members, but in practice the same regime is applied.

The minister for Education, Culture and Science can dismiss an individual board member, but only for well defined reasons, which are specified in the law (e.g. incapacity, or because the board member requested it). During the last five years there were no early dismissals.

Staffing and funding

The CvdM appears to be sufficiently staffed and funded (although it is a bit uncertain how it will be when the monitoring of non-linear audiovisual media services has been fully implemented). It has a staff of about 50 full-time equivalents. Three quarters of the budget comes from state funding and one quarter from surveillance fees paid by market players. Money from fines is transferred to the state budget but has to be used for purposes of media policy (in the widest sense).

The CvdM submits a yearly budget to the minister for approval. For 2010, the budget is €5.4 million (granted by the Minister and received from surveillance fees paid by market players).

Checks and balances

The finances of the CvdM are audited twice a year (interim control in November and final check in February) by one private firm. Every year, the CvdM makes a budget plan which needs the approval of the minister.

The CvdM also publishes an annual report, which is sent to parliament after the minister has approved it. The annual report and the annual accounts are published on the CvdM's website.

Once every five years, the CvdM is subject to an extensive auditing of its efficiency and effectiveness. This audit is performed by an independent, private firm under the supervision of the minister.

Every year the CvdM informs the minister about its intended policy (in the so-called ‘letter of enforcement’) for the upcoming year. Although formally not required, in practice the CvdM seeks consent of the ministry when assessing its policy for the next year.

Decisions by the board of the CvdM can only be overturned by a court. Any party can appeal a decision, but has to do so to the board of the CvdM first before going to court. Appealed decisions stand pending the court’s decision. The minister can suspend or annul a decision of the board of the CvdM only in two exceptional cases: being against the public interest, or a violation of law. This decision to suspend or annul has to be published in the ‘Staatscourant’.

In addition, the minister may undertake necessary measures if he thinks the authority’s tasks are seriously neglected. These arrangements are, except for urgent cases, not taken before the authority has had the opportunity, within a period specified by the minister, to carry out its tasks properly. The minister shall inform parliament immediately of the steps taken by him.

Procedural legitimacy

The CvdM is not obliged to carry out public consultations, but in practice does so regarding draft policy guidelines about eight times per year. The CvdM’s decisions must be justified but publication is not imposed by law. In practice, the CvdM publishes all its decisions.

2.3.1.20 Poland

Quick Facts

Poland is one of the largest European countries with 38.2 million inhabitants (30 August 2010).

Poland’s broadcasting market is the largest in Central and Eastern Europe and has attracted some investment from foreign media groups. Foreign ownership has been more prominent in radio markets, while it has been rather modest in TV markets. Poland has also been one of the few broadcasting markets in central and eastern Europe (CEE) with relatively strong and well-positioned domestic media owners. The public broadcaster, TVP, has the largest audience share through its two national TV channels. It also operates thematic channels, regional programmes and the international satellite channel TV Polonia.

There have been proposals (so far politically unsuccessful) to fund public broadcasting from the state budget, rather than the TV and radio subscription fee. Currently, public service media are financed both from subscription fee (about 25 – 30%) and advertising (about 60%).

Polsat and TVN operate the leading commercial TV channels. Polsat also operates several thematic channels and a digital pay-TV platform, and is present in the Baltic states. TVN operates thematic channels and ITI (which owns TVN) operates a digital pay-TV platform, ‘n’). The digital pay-TV platform Cyfra was launched by France’s Canal.

In 2009, 59% of Polish people had access to internet and 51% had a broadband connection. Source: Country Profile Poland, BBC website, July 2010 – Eurostat 2009 and information from correspondent.

Executive Summary: Krajowa Rada Radiofonii i Telewizji (KRRiT)

General situation

The **National Broadcasting Council (Krajowa Rada Radiofonii i Telewizji – KRRiT)** is responsible for audiovisual content on both public and private broadcasting channels.

All transmission and distribution matters (including spectrum, must-carry, electronic programming guides, conditional access systems and multiplexing) are the responsibility of the **Office of Electronic Communications (Urząd Komunikacji Elektronicznej – UKE)**, the **telecommunications regulatory authority**.

In practice however, both regulatory bodies cooperate where the UKE focuses on telecommunications aspects and the KRRiT on audiovisual media aspects across their respective competencies.

The KRRiT was established in 1993 as a separate state body, and was enshrined in the Polish constitution of 1997. Its independence however is not explicitly recognised.

Powers

The KRRiT does not have policy-setting powers, but it is responsible for advising on and contributing to media policy development, and for implementing media policy. In practice, the KRRiT has often been involved in the preparation of new policies, such as the upcoming transposition of the AVMS directive.

The KRRiT systematically monitors compliance with the provisions on quotas, advertising and protection of minors. It also monitors specific complaints.

The KRRiT can issue warnings and impose fines up to half the yearly frequency licence fee of a broadcasting channel. On top of that it can revoke broadcasting licences. Executives of broadcasters are personally liable for non-compliance with KRRiT decisions and can be imposed penalty payments up to six months' salary. The KRRiT has used all these sanction powers.

The highest decision making organ

The KRRiT is composed of five members. The Sejm (lower chamber of the Polish Parliament) appoints two and the Senat (upper chamber) appoints one. The president of Poland appoints two more members. Candidates must have a “distinguished record of knowledge and experience in mass media”.

The term of office for all members is six years. The members elect a president from among themselves. Decisions are taken by majority with a casting vote for the president of the KRRiT.

The KRRiT has the power to grant and revoke licenses, to set subscription fees and to define registration and licence fees.

On top of that, the KRRiT nominates up to five of the seven members of the two supervisory councils for the Polish public radio (Polskie Radio) and television (TVP) broadcasters. These

councils in turn appoint from one to three of the members of the management board of the Polish public radio and television broadcasters.

Through this, the KRRiT can exercise considerable influence on the management of the public service broadcasters.

A member of the KRRiT cannot belong to a political party, or be active in or be a shareholder of a radio or television broadcaster or producer. They also cannot be member of the governing body of any industry organisation, trade union, employer association or religious organisation. These rules to guard against conflict of interest are only applicable during the a member's term of office.

The law lists the grounds for dismissal of individual KRRiT members. The whole council is dismissed when both chambers of Parliament reject the KRRiT's annual report, unless the Polish president objects. In June 2010, Parliament found that the KRRiT did not exercise its role effectively. President Komorowski did not object and the full council was dismissed.

In 2005, the full council was also dismissed when an amendment to the law changed the number of members from nine to five.

Staffing and funding

The KRRiT has a staff of about 130 (including the five members of the KRRiT). It is fully funded from the state budget and gets monthly part payments of its planned yearly budget, agreed with the ministry of finance (for 2009, PLN14.7 million or €3.7 million; and for 2010 PLN15.7 million or €4 million) to finance its operations. All income from licence fees and fines is directly transferred to the treasury.

Every year, the KRRiT makes a budgetary proposal to the finance minister. Parliament approves the proposed budget by adopting a budget law.

Checks and balances

The KRRiT is accountable to Parliament, the prime minister and the Polish president. By the end of March each year, it has to submit an annual report on its activities and on key issues in radio and television broadcasting.

The KRRiT's accounts are audited annually by the Supreme Chamber of Control.

Only courts can overturn decisions by the KRRiT. Appeals must be lodged at a regional civil court. The KRRiT has no internal appeals body. Further appeal is possible to the appellation and supreme administrative courts. Decisions stand pending appeal, unless the appeal court has suspended the decision. All courts can replace the appealed decision with their own.

Procedural legitimacy

The KRRiT does not publish all its decisions or meeting minutes. The decisions are normally collected in the internal registers, but these are not automatically published. The registers can be accessed, but in some cases a special application to the department director is required. The 1992 Broadcasting Law does not require the decisions to be reasoned, but the KRRiT typically justifies its decisions in its annual report to Parliament and the Polish president, as all administrative

decisions under the Code of Administrative Procedure must be justified. No impact assessment is required.

According to the 1992 Broadcasting Act, the KRRiT is not obliged to carry out public consultations, and it does so only to a relatively limited extent according to the guidelines on public consultations procedure.

If any external advice is solicited, a public tender procedure must be followed if the budget exceeds €14,000.

2.3.1.21 Portugal

Quick facts

Portugal is a country with a population of 10.7 million. Its commercial TV stations provide tough competition to the public broadcaster, operated by RTP, which enjoyed a monopoly on the airwaves until the launch of commercial channel SIC in 1992.

Multichannel TV – via cable, satellite and recently-introduced digital terrestrial –reaches more than two million homes.

Public radio networks are also operated by RTP. The Catholic Church owns the widely-listened-to Radio Renascença. Source: Country Profile, Portugal, BBC website, July 2010.

Executive summary: Regulatory Entity for the Media (ERC)

General situation

In Portugal, the body in charge of audiovisual matters is the Regulatory Entity for the Media (ERC, Entidade Reguladora para a Comunicação Social). The ERC is a legal person under public law, with administrative and budgetary autonomy, and has its own assets. It was established in November 2005 and started its activities a few months later. The ERC replaced the AACS (Alta Autoridade para a Comunicação Social), the former Portuguese independent media regulatory authority, established in 1990.

Although an independent entity, the ERC is accountable to parliament, which elects its members and grants a substantial part (around 40%) of its budget. The decision to make the ERC dependent on parliament (instead of the government) and the requirement of a majority of two thirds of parliament's votes to elect four of its five members, are regarded as a way to ensure the independence of the regulatory body – from both the government and from any single political party.

ERC has responsibilities on general media content. This includes the audiovisual sector, all the printed press and the news agencies.

Powers

The ERC does not have general policy-setting powers, but must be formally consulted by parliament or the government before any measures concerning media activities are decided. It has general policy-implementing powers in its areas of responsibility. It systematically monitors the services operated by licensed operators, to assess if they comply with the rules on quotas,

advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the power to impose fines, the publication of decisions in the press (although this is unlikely to occur with respect to quotas and advertising related matters). It can also (issue), suspend and revoke licences.

The highest decision making organ

The highest decision making organ is the ERC board, which is composed of five members, four of whom are elected by parliament for a five-year term. Those members, by consensus, co-opt a fifth member, also for five years. The five members appoint the chairman and vice-president of the ERC board.

The law requires that the board members are persons of “recognised reliability, independence and professional and technical competence”.

There are clear rules on the appointment process and term of office of the chairman and board members, to avoid possible conflicts of interest with government and industry. There are no explicit rules against conflicts of interests with political parties, except that the board members must be functionally independent and must not be subject to any specific instructions or guidelines. Nothing is said regarding political affiliations. For senior members of staff, the law says that ERC staff cannot work or provide services under remuneration to undertakings that are subject to its supervision or whose activities overlap with the ERC’s competences.

After their term of office, the members of the board cannot have any executive functions in companies, unions, confederations or business associations in the media sector for a period of two years. No such rules exist for senior members of staff.

Only parliament can dismiss the board (as a whole) or its individual members (including the chairman). A resolution for this purpose must be approved by a two-thirds majority of the members of parliament. The grounds for dismissal are listed in the law and are related to serious breaches of statutory duties in the course of the performance of functions.

There have been no cases of dismissal before term in the last five years (the ERC began its activities in February 2006).

Staffing and funding

ERC staff numbered 72 in 2009, which is considered to be adequate.

Its budget for 2009 was €5,408,107. Parliament allocates state funding for the ERC in each annual state budget. The overall income originates from state funding (around 40%), broadcasting fees (circa 30%), licence fees paid by operators, fines, as well as a contribution from the national regulatory authority for electronic communications (ANACOM) which is based on spectrum fees.

Checks and balances

The ERC is subject to specific external auditing for its spending.

It is accountable to Parliament, to whom it presents an annual report on regulation, activities and budget. In addition, the ERC must submit its annual accounts for approval to the court of auditors.

A consultative council within the ERC, composed of representatives from various media sectors (both public and private), must also receive from the board some account of its work. The consultative council can give opinions and suggestions to the ERC on issues related to ERC areas of responsibility.

Finally, there is an informal accountability mechanism to the public at large, through:

- the publication of the ERC's annual report about the general situation of the media sector, and its activities regarding media regulation and media supervision; and
- the regular publication of all its decisions and activities on the public ERC website.

Nobody, apart from a court has the power to overturn decisions of the ERC. Appeals against ERC decisions are lodged with the ERC board. In principle, external appeals (to the court) replace the original ERC decision, but in certain cases replacement is not possible (for example, in tender procedures for the award of television licences). In principle, ERC decisions stand pending the appeal body decision.

Procedural legitimacy

The ERC must conduct public consultations on its proposed regulations (for ERC draft directives, which have the nature of general recommendations, public consultations are only optional). Public consultations are carried out for thirty days. Since 2008 the ERC has conducted, at least six consultations.

2.3.1.22 **Romania**

Quick Facts

Romania is the largest of the Balkan countries, with a population of 21.3 million. It acceded to the EU in 2007.

Romania has one of the most dynamic media markets in south-east Europe. Public broadcaster TVR operates six national (out of which TVRI is an international channel) and five regional TV channels. There are two terrestrial national public networks and four satellite public networks. ProTV and Antena 1 are the largest private TV stations. There are many small private TV and radio stations, some of them part of local networks.

The Romanian government adopted, in cooperation with the National Audiovisual Council, a strategic plan for the transition towards digital terrestrial television. The switchover is planned for January 1, 2012.

Statistics by the Ministry of Communications and Information Society report that 49% of Romania's 7.5 million households receive TV services over cable, 27% by satellite, and only 18% via terrestrial TV platform, while the rest of the population is unable to receive TV transmissions. Source: Country Profile Romania, BBC website, May 2010.

Executive Summary: National Audiovisual Council (CAN)

General situation

According to the Romanian Audiovisual Law, the **National Audiovisual Council (CNA)** is the sole regulatory authority for audiovisual services, and guarantees the public interest in the field of audiovisual communication. The CNA is an independent public body under parliamentary control. It was established in 1992 (Law 48/92).

The mission of the CNA is to ensure pluralism of expression and free competition in the media, the protection of human dignity and of minors, the protection of Romanian culture and language as well as of ethnic minorities, and transparency in the audiovisual sector. It is responsible for audiovisual content matters, licensing of analogue and digital audiovisual services, granting retransmission authorisations, and of distribution aspects, including must-carry obligations. Romania has a separate authority for electronic communications matters (ANCOM).

Spectrum policies in Romania, including for broadcasting, are defined by the Mixed Consultative Commission, a body composed of six members, three proposed by the CNA and three by the Ministry of Communications and Information Society (MCSI).

The Romanian Audiovisual Law (N. 504/2002) was amended in November 2009 to transpose the Audiovisual Media Service Directive (AVMS) into the national legislation.

Powers

The CNA is in charge of defining strategy for the development of the audiovisual industry. It exercises control over the content of the programs offered by audiovisual media (including on quotas, advertising and the protection of minors), on a periodical basis or whenever the the CNA board considers it necessary, or when a complaint is voiced.

It has a range of powers of investigation, information collection and sanction, ranging from warnings, to imposing fines, and suspension and revocation of licence. In 2009 CNA issued over 600 sanctions. Fines can reach up to around €50,000 for infringements related to protection of minors or advertising.

Anticompetitive practices or cartels, must be notified by the CNA to the competent authorities.

The highest decision-making organ

The highest decision-making organ is the board, which has the power to take decisions on all regulatory matters within its area of responsibility. It is composed of 11 members, including a president and a vice president.

The board members are appointed for a six-year mandate and are designated by majority in a joint session of Parliament. Members are selected and proposed as follows:

- **three members from the senate**
- **three members from the chamber of deputies**
- **three members from the government**
- **two members from the president of the republic**

Board members cannot belong to a political party during their term of office, or directly or indirectly own or have interests in activities in conflict with their mandate. Their position is incompatible with any other public or private office, except for academic activities, provided they do not result in a conflict of interest.

Board members can be dismissed upon proposal by a special commission of parliament, but only in the case of failure to carry out their functions for more than six months, or in the case of (final) criminal conviction. They are automatically dismissed in cases of conflict of interest or political affiliation.

The president of the CNA is selected from among the board members. He is proposed by the board members, and formally designated by the parliament. In the president's absence, the board is managed by the vice president, who is elected by the board by secret ballot, in the presence of at least nine of its members.

The board can issue decisions in the presence of at least eight members, with favorable vote from at least six.

Although, according to the law, board members cannot belong to a political party, members in practice always have a political affiliation. This was evident, for instance, during the presidential elections of 2009. Cases of conflict of interest were also reported over the last few years by the Romanian press (close relatives of members of the board being involved in the media business).

Staffing and funding

The CNA is funded by the state budget (budget for 2009: approx. €2.4 million). The staff of the CNA is composed of 133 public servants and 11 members of the board. More than half of the budget is spent on personnel costs.

Checks and balances

The CNA is subject to external auditing from the Romanian Court of Accounts at least once a year. It is accountable for its work, through an annual reporting obligation to the Parliament.

Regulatory decisions of the CNA can be appealed before the competent administrative court by any party that considers itself damaged by a decision. A court can suspend or cancel the decision of the authority but cannot take a new decision on its behalf; it can only ask the authority to take a new decision.

Procedural legitimacy

The CNA is obliged to carry out a public consultation when drafting regulatory decisions. Public consultations last 30 days, and results must be published. In the past five years, the CNA has organised 17 consultations.

Board decisions must be published (regulatory decisions are also published in the Official Gazette). The board meets twice a week and all meetings are public. Votes of board members are open, and must be reasoned.

2.3.1.23 **Slovakia**

Quick Facts

Slovakia is a small country with a population of 5.4 million. It joined the European Union in May 2004. Public broadcaster Slovak TV operates three national networks, including one genre-specific channel (a sport channel). It faces competition from two major commercial stations (TV Markiza, TV Joj). Markiza has the largest TV audience market share. Cable and satellite TV are widely watched, as are channels from neighbouring countries the Czech Republic and Hungary. In 2009, internet penetration was comparable to those in Bulgaria and Hungary, i.e. under 50% of the population. Broadband penetration in Slovakia was similar to that in Bulgaria or Romania – about 10%. However, the number of internet users has been growing steadily by 5-7% a year since 2008. The newest data show that in May 2010 almost 60% of the population used internet, most of them at home. Source: Country Profile Slovakia, BBC website, May 2010.

Executive Summary: Council for Broadcasting and Retransmission

General situation⁴⁷⁹

In Slovakia, the body in charge of audiovisual matters is the Council for Broadcasting and Retransmission. It was established in 1992. Public broadcasters are also supervised by the Council of Slovak Television (public television) and the Radio Council (public radio). The ministry of culture prepares the basic state media policies and most draft laws relating to media.

Regulation of broadcasting is separated from regulation of telecommunications; the latter is supervised by Telecommunication Office. However, there were some discussions about merging both regulators in one regulatory body in 2003-2004. The Telecommunications Office (established in 2004) manages the broadcasting frequency spectrum jointly with the ministry of transport, post and telecommunications. The Telecommunications Office updates plans of utilisation of the broadcast frequency spectrum every two years in cooperation with the Council for Broadcasting and Retransmission.

The sector is regulated based on Act No. 308/ 2000, as amended most recently in 2009 to ensure the implementation of the Audiovisual Media Services Directive. The Council for Broadcasting and Retransmission supervises the three public channels and around 130 linear commercial channels.

Powers

The Council for Broadcasting and Retransmission has general policy-setting and general policy-implementing powers. It monitors systematically the services operated by licensed operators to assess if they comply with the rules on quotas, on the protection of minors and on advertising. It also has information collection powers in this area.

479 See addendum submitted by the Ministry of Culture of the Slovak Republic at the end of this section.

The regulator has different tools for sanctioning. In the case of quotas and advertising rules, it can issue warnings or fine the operators, and penalty payments can be also imposed when rules on quotas are not respected. On the protection of minors, the sanctions can also lead to the temporary suspension of a licence.

The Council for Broadcasting and Retransmission handles complaints from viewers.

The highest decision-making organ

The highest decision-making organ is a board with nine members. Board members are nominated by political parties and civil organisations, and elected (appointed) by the Parliament. The Parliament can ignore⁴⁸⁰ these nominations and appoint a different board member. The chairman of the Council is chosen by the Council itself. The term of office of board members is six years, which can be renewed once. One third of the council's board members is renewed every two years.

The qualifications and professional expertise required to become a chairman or member of the highest decision making organ of the regulatory body are positive (must be) and negative (can not be). The criteria are specified by the law. The presence quorum is seven members of the Council, one of whom must be the chairman or vice-chairman. All decisions are published on the Council's website.

Staffing and funding

The total number of staff in the regulatory body is set out in Organisational Order approved by the Council. The current staff is 37 and it has a budget of €1 million (2008). It is completely funded by the state. The budget is decided by the Parliament, based on the budget proposal of the finance minister.

Checks and balances

The Council for Broadcasting and Retransmission has an annual reporting obligation to the Parliament. As with any state regulatory body, it is audited by the Supreme Audit Office.

Nobody, apart from a court, has the power to overturn decisions of the regulatory body. Any legal or natural person can lodge an appeal against a decision of the Council for Broadcasting and Retransmission, and no internal redress procedure is required to be followed beforehand.

The appeal body has the power to cancel a decision and remit it back to the regulator for a new decision. Although the law does not mention it, even if the supreme court agrees with the Council, it is still possible to appeal this decision in exceptional cases before the constitutional court.

480 According to the Ministry of Culture of the Slovak Republic, the Parliament cannot ignore these nominations in any case and is 'strictly obliged by that list of candidates and cannot elect from any other candidates that had not been nominated.

Procedural legitimacy

The Council for Broadcasting and Retransmission is not obliged to carry out public consultations. There are no legal requirements about the publication of the decisions of the Council, but it regularly publishes its decisions.

Addendum submitted by the Ministry of Culture of the Slovak Republic (February 2011)

First of all, it is necessary to update some facts since the new Act No. 532/2010 Coll. on Radio and Television Slovakia has been adopted and came into effect since 1st January 2011. According to this law, the Slovak Radio and the Slovak Television had merged into one subject - Radio and Television Slovakia. Therefore the Council of the Slovak Television and Radio Council had been abolished and new organ, Council of the Radio and Television Slovakia, had been created. This Council shall be created on professional basis in order to eliminate political influence, composed of three professionals from the television broadcasting area, three professionals from the radio broadcasting area, two economists and one lawyer.

The Act No 532/2010 Coll. had also amended Act. No. 308/2000 Coll. on Broadcasting and Retransmission in part dealing with proceedings of Council for Broadcasting and Retransmission (hereinafter Council). All proceedings of the Council shall be public, except from licensing procedure and procedure in retransmission registration. Council shall provide data protection while proceeding facts that shall be protected under law. Minutes from the Council meeting, including the minutes of voting, shall be published on the Council's website in five days from the end of Council's session. Final decisions of the Council shall be published on its website in manner protecting the data that shall be protected under law.

2.3.1.24 **Slovenia**

Quick Facts

Slovenia is a small country with a population of 2 million. It has a president (Danilo Turk, elected in November 2007) and Borut Pahor is the prime minister (Social Democrat), elected in September 2008 leading a coalition government. Slovenia joined the EU in May 2004. On 1 January 2007, it became the first of the new EU Member States to join the eurozone.

Public broadcaster RTV Slovenia operates two national TV channels and regional services. It faces competition from private stations (Pop TV, Kanal A) About two thirds of TV households are connected to cable or satellite. Around 65% of the population have an Internet connection (2009). Source: Country Profile Slovenia, BBC website, May 2010.

Executive Summary: Agency for Post and Electronic Communication (APEK)

General situation

In Slovenia, a number of bodies are involved in the supervision of the audiovisual sector. The **Agency for Post and Electronic Communication (APEK)** was established in 2001 to integrate regulation of telecommunications, broadcasting and postal services. The Broadcasting Council was set up as an independent expert body within the APEK with some powers of supervision and information collection.

Since the establishment of the APEK, different parts of the Government have been in charge of the fields regulated by the agency. The Ministry of Culture and, within the ministry, the Inspectorate for Culture and Media-Media Inspector is in charge of the sector.

The APEK supervises public television and 72 linear commercial services.

Powers

The Ministry of Culture has general policy-setting powers. General policy-implementing power is shared between the Ministry of Culture and the APEK⁴⁸¹ (EU audiovisual works, rules on advertising and protection of minors). The APEK exercises systematic monitoring according to a set strategy and methodology to assess if broadcasters comply with the rules on quotas, advertising and the protection of minors. It has information collection powers in the area of quotas. The Ministry of Culture has information collection powers on quotas and the protection of minors, while the Broadcasting Council has information collection powers on the protection of minors.

The powers of sanction are also shared between the APEK and the Ministry of Culture. The APEK can issue warnings to the market players, it can suspend or revoke their licences, and it also has the option to impose penalty payment (in the field of quotas, advertising and the protection of minors). The Ministry of Culture can also issue warnings and impose fines.

Complaints from viewers are handled by the APEK (in compliance with the General Administrative Procedure Act) and by the Ministry of Culture (in compliance with the Inspections Act, the Minor Offences Act and the General Administrative Procedure Act).

The highest decision making organ

The APEK has an individual decision-making organ (the Director General), and no board. The Director General is appointed by the Government after a public competition. Among other competences, the Director General organises monitoring activities, forms *ad-hoc* and permanent working groups, is responsible for the preparation and realisation of the APEK annual plan, including its financial plan, and decides on employment of APEK staff.

481 According to information from the APEK in February 2011 they also have third party decision making powers.

Staffing and funding

Total number of staff provided for in the law is 75 in the APEK as a whole (including post, electronic communications and broadcasting). Currently there are 16 employees linked to audiovisual matters⁴⁸². Its annual budget provided for in law and is €1.2 million for direct costs and €774.958 for indirect costs (finance, IT, law department, other). These figures are linked to AV matters only.

Checks and balances

The APEK submits an annual report and a financial plan to the government. The APEK also publishes all information of general interest on its website and provides the public with information upon individual requests.

The regulator is also obliged to publish all reports and general acts in the Official Gazette of Slovenia.

The APEK submits its statuses for preliminary opinion to the Broadcasting Council, and the Electronic Communications Council within the APEK reports to them on its activities on the field of broadcasting and electronic communications and provides them with information on issues of their interest.

The APEK is not subject to compulsory yearly external audit by the court of audit, but since it uses public funds its business operations and actions can be subject to auditing by the court of audit. No-one, apart from a court, has the power to overturn decisions of the APEK and nobody has the power to give it instructions. Any party to a proceeding can lodge an appeal against a decision of the APEK and internal procedures are not necessary. The administrative court has the power to cancel a decision and remit it back to the regulator for a new decision. In some cases, the court can also replace the regulator's decision if the conditions provided for this in the Administrative Dispute Act are met.

Procedural legitimacy

The APEK is obliged to carry out a public consultation in the case of amendments to general acts and policies. Interested parties, in the broad sense, are involved in the consultations. The APEK takes into account all responses and views that are sufficiently reasoned. The consultation period is 30 days.

The new media regulations also require the ministry of culture to organise public consultations. Interested parties must be involved (industry, association of journalists, academics, civil society etc). The consultation period is 30-60 days after publication of a draft regulation on the website of the ministry.

482 According to data submitted by APEK in February 2011, the total number of staff was defined by the Human Resources Plan of the Government. However for the year 2011 and 2012 the total number of staff in APEK is no longer within this plan. Among the 16 employees who work on audiovisual matters, 4 deal with radio spectrum management and are not directly involved in content regulation or monitoring of programmes.

2.3.1.25 Spain

Quick Facts

Spain is the second-largest country of the European Union in size, with a population of 45 million. It is a constitutional monarchy divided into 17 regions ('Comunidades Autónomas') that have their own directly elected authorities and competences.

The audiovisual regulatory framework was the subject of a reform which culminated with the adoption of the Law on Public Radio and Television in June 2006 and the General Audiovisual Law in March 2010.

This law unified the fragmented Spanish legislative framework for audiovisual services, transposed the AVMS Directive, and created a national audiovisual authority (the National Audiovisual Council – CEMA). Before CEMA's creation, only three regions had created an audiovisual authority: Andalusia (the CAA), Navarra (CoAN) and Catalonia (CAC).

In this context, Spanish broadcasting rapidly expanded in recent years with the emergence of new commercial operators, the steady growth of the cable and satellite markets and the launch of digital services. Spain successfully switched off its analogue TV signal in April 2010.

National public radio and TV are run by Radio Television Espanola (RTVE), which is funded by state subsidies and a new tax on commercial broadcasters and electronic communications providers' revenues (under the European Commission's scrutiny), to compensate RTVE for the recent removal of advertising. Source: Country Profile Spain, BBC website, May 2010.

Executive Summary: Consejo Estatal de Medios Audiovisuales (CEMA), Consejo Audiovisual de Andalusia (CAA), Consejo Audiovisual de Navarra (CAN), Consejo Audiovisual de Catalonia (CAC)

General situation

In Spain, the body in charge of audiovisual matters at national level is the newly created National Audiovisual Council (CEMA), which has not started its activities yet. It is described by the general audiovisual law as an independent public regulatory authority under the auspices of the Ministry of the Presidency.

It is responsible for audiovisual content matters and for monitoring market concentration aspects of broadcasting companies with national coverage. However, CEMA does not have the power to grant broadcasting licences, which remains within the competence of the government, even though CEMA has the power to renew – or not – broadcasting licences.

CEMA supervises the national public service television broadcaster RTVE and six national commercial operators, each with four digital channels.

At regional level only three regions have set up their own audiovisual regulatory body: Navarra (CoAN), Catalonia (CAC) and Andalusia (CAA). However, two other regions are in the process of setting-up an audiovisual council: the Balearic Islands (CAIB), which adopted a law for that purpose in June 2010 and the Canary Islands, whose government presented a draft law in August 2010. Those regions will not be covered in the summary or the tables, as this development is too recent.

The regional regulatory bodies are responsible within their territories for audiovisual content matters. CAC supervises eight regional commercial channels and 34 public service channels, and CoAN supervises nine regional commercial channels.

Spain also has a separate authority for telecommunications matters, which is the CMT. This authority is also responsible for distribution and competition aspects of audiovisual content.

Powers

The Spanish regulatory bodies do not have general policy-setting powers, but provide advice to their respective government on audiovisual matters. They can also take binding decisions on market players.

CEMA has information collection powers to assess if the services operated by licensed operators comply with the rules on quotas, advertising and the protection of minors. It has a range of sanctioning powers, from warnings, to the possibility to impose fines, to the publication of decisions in the media, and the suspension and the revocation of licences (if the warnings and fines have remained uneffective).

The regional regulatory bodies CAC and CoAN can issue warnings, impose fines, publish decisions in the media or revoke licences when licensed operators do not comply with the rules on quotas, advertising and the protection of minors. CAA can only impose warnings and fines and its powers are limited to the protection of minors and illegal advertising.

An office for the protection of the audience has been set up within each of the regional regulatory bodies to handle complaints from viewers.

The highest decision making organ

All regulatory bodies in Spain are set up as separate legal entities and their independence is explicitly recognised in their respective audiovisual law. Their highest decision making organ is the board, whose composition varies from seven to eleven members (including the chairman and the deputy chair).

Board members have prestige and expertise in the audiovisual field. They also have to be proposed by the competent parliament (either national or regional) and appointed by the competent government for a period of five or six years, generally not renewable (although in CAA and CoAN, board members' terms can be renewed once).

During members' term of office, there are rules to avoid conflicts of interest with the government, political parties and industry. However, no rules prevent board members from being employed in the media sector after their term of office.

There are no rules to protect board members against early dismissal, but the grounds for dismissal are listed in the law. The government (national or regional one) can dismiss individual members of the board if the parliament agrees (the majority varies).

No dismissal has happened so far. However, the Chairman of the Andalusian authority voluntarily resigned in May 2008 as he considered that the independence of the authority was not effectively guaranteed.

Staffing and funding

All the regulatory bodies are sufficiently funded and staffed. The regional bodies are almost solely funded by state resources. The funding of CEMA is determined by regulation.

Of the regional bodies, the catalonian body has the biggest staff with 104 people as well as the most important budget with €10.6 million. Navarra (the smallest region with an authority) only has a staff of 14 people and a budget of €0.65 million. CEMA's staff number and budget are still unknown.

Each regulatory body (including CEMA) has to draft its own budget and propose it to its government to be included in the draft general budget.

Checks and balances

CEMA is subject to specific financial periodic external auditing for its spending by the National Audit Office (periodicity still not defined). The same is true for the regional bodies, which are subject to a yearly auditing from their respective regional audit office.

Each regulatory body is accountable for its work, through an annual reporting obligation on its activities and the state of the Spanish audiovisual sector, to its parliament. CAC and CoAN must also present this report to their governments. However, their reports do not need to be approved.

It appears that nobody, apart from a court, has the power to overturn the decisions of the regulatory bodies. Any person or organisation can lodge an appeal against a decision of the regulatory bodies, provided internal redress procedures are followed beforehand. This will have the effect of suspending the decision of the regulatory bodies. The appeal must be lodged before an administrative court in the first and last instance.

The court can cancel the decision of the authorities but cannot take a new decision on their behalf; it can only ask the authorities to take a new decision.

Procedural legitimacy

Regional regulatory bodies' decisions do not have to be publicly consulted on, except for under the mandatory guidelines of CAC. However, all regulatory bodies are allowed to hold public consultations and they do so, even if not required. They also take external advice on a regular basis (after following a public tender).

According to the Spanish administrative law, the decisions of all the regulatory bodies must be reasoned and published in order to have a legal effect.

The general audiovisual law does not specify whether CEMA has to launch a consultation phase before adopting a decision. However, it creates a consultative committee, which can be consulted on every topic of interest for CEMA. A regulation on the internal organisation of CEMA is still pending and could clarify the scope and procedures of the consultation process.

2.3.1.26 Sweden

Quick Facts

Sweden has a population of 9.2 million. It is one of the world's most highly-developed post-industrial societies, where unemployment is low and the economy is strong. It is a member of the EU, although not part of the Eurozone, as it retains its national currency.

The Swedish public service broadcaster is Sveriges Television (SVT). Until recently, it had a near-monopoly. Its main competitor is the commercial TV channel TV4, which launched in 1992. Most Swedish households have cable or satellite TV. Source: Country Profile Sweden, BBC website, May 2010.

Executive Summary: Radio and Television Authority (RTA)⁴⁸³

General situation

The Swedish public service broadcaster, Sveriges Television (SVT), broadcasts four channels. Consumers in Sweden also have available to them a range of channels on cable and satellite. Digital terrestrial broadcasting was launched in 1999; pay TV channels, along with the SVT channels are available in this format. The analogue TV signal was switched off in 2007.

A new Radio and Television Law came into force in Sweden on 1 August 2010. Among other things, the new law implements the provisions of the AVMS Directive. It also merges the functions of the two main regulators in the audiovisual media sector, the Swedish Broadcasting Commission and the Swedish Radio and TV Authority (which have been in existence since 1994) into a new, single regulatory body called the Broadcasting Authority.

This summary describes the legal situation before the coming into force of this new law, whilst making brief reference to provisions of the new law.

Prior to 1 August 2010, the main relevant authority was the Swedish Broadcasting Commission, whose role was to regulate content on television and radio. Its role in regulating content was complemented by the role of the Chancellor of Justice, which deals with criminal aspects of media content such as child pornography, and the Swedish Consumer Agency which regulates advertising to children. The role of the Swedish Radio and Television Authority, on the other hand, includes granting and monitoring compliance with licences for the provision of radio and TV services, managing licence fee payments and monitoring technological developments in the media industry.

The new authority will serve to eliminate the complications arising from the overlaps in the roles of the two previous authorities, for example in relation to regulation of on-demand content.

Powers

Some AVMS Directive issues (hate speech, protection of minors) are regulated by the new Broadcasting Authority, but are also dealt with under criminal law by the Chancellor of Justice.

⁴⁸³ See addendum submitted by the Broadcasting Authority at the end of this section.

Furthermore, the regulation of TV advertising on commercial TV is carried out by the Swedish Consumer Agency – advertising is not permitted on the public service channels.

The Swedish Consumers Agency has the power to object to advertising by commercial operators; any such objections can be taken to the Administrative Court. The commercial operators can be subject to a fine if they fail to comply with the decision of the administrative court. The Swedish Broadcasting Commission can apply to the Administrative Court to request that broadcasters who infringe the rules on advertising, sponsorship and undue prominence should be liable to a fine. Also, in the area of protection of minors, the Swedish Broadcasting Commission has the power to issue warnings and formal objections.

The highest decision-making organ

The highest decision-making organ in the Swedish Broadcasting Commission is the board of the Commission, which has 11 members (seven ordinary commissioners and four deputy commissioners). The Chairman and the Vice-Chairman are required to be judges of high judicial office. The other members come from a wide range of backgrounds, with broad experience in the social, cultural and media fields – no specific industry experience is required.

The chairman and each board member of the Swedish Broadcasting Commission are appointed by the government for a three-year term (no nomination process is applied). This term may be renewed indefinitely.

Decision making by this board is on the basis of majority vote, with the chairman being entitled to take unilateral decisions on matters of lesser importance.

The highest decision-making authority of the Swedish Radio and TV Authority is the director-general. He is also appointed by the government (no nomination process applies). He is required to be a lawyer, with judicial experience. His term is for six years, which can be renewed indefinitely.

General rules apply to address conflict of interest issues in relation to the appointment and term of office of commissioners on the Swedish Broadcasting Commission. Also, whilst commissioners could hold other roles while also being members of the Swedish Broadcasting Commission, government approval is required for such concurrent offices or other sources of income. Furthermore, the commissioners are subject to rules relating to the declaration of financial interests, including share ownerships. No rules apply to prevent former commissioners working with former regulatees after leaving office.

The Swedish Radio and Television Authority is not subject to such rules aimed at addressing potential conflict of interest concerns.

The government can remove a commissioner, including the chairman, from his or her position on the board to the Swedish Broadcasting Authority (although the person would then have to be given another position, as he or she could not be removed from employment). This has been done on a number of occasions, in 2008 (failure to attend adequate number of meetings), for example, and 2007 (two board members were removed, as they were concurrently participating on work relating to strategy for the public sector broadcaster). No such governmental powers of removal exist in respect of the Swedish Radio and Television Authority.

Staffing and funding

The Swedish Radio and Television Authority has a staff of 15 and an annual budget of just over €1.3 million, substantially all of which is provided by the state. Its annual budget is determined by the national parliament.

The Swedish Broadcasting Commission has a staff of 13 and an annual budget of approximately €1.1 million (one-third of which comes from the state and two-thirds from a licence fee). Its annual budget is set by government, with parliamentary approval.

Checks and balances

Both the Swedish Broadcasting Commission and the Swedish Radio and Television Authority are accountable to the Swedish government; they both provide annual reports to the Ministry of Culture on their activities. They are both also subject to national audits by the National Audit Office.

Decisions of the Radio and Television Authority are subject to review by the courts. The government does not have any role, as political/ministerial intervention in the individual decision-making activities of regulators is forbidden by the Swedish constitution.

Procedural legitimacy

The Swedish Broadcasting Commission and Swedish Radio and Television Authority are not required to engage in public consultations prior to adopting decisions and, between them; they have issued very few public consultations over the past five years.

Addendum submitted by the Broadcasting Authority

This summary concerns the situation following the entry into force of the Radio and Television Law of August 1, 2010 and relates to the new Broadcasting Authority (information provided by the Broadcasting Authority)

Powers

Some AVMS Directive issues (hate speech, protection of minors) are regulated by the new Broadcasting Authority, but are also dealt with under criminal law by the Chancellor of Justice. Furthermore, the regulation of TV advertising on commercial TV is carried out by the Swedish Consumer Agency – advertising is not permitted on the public service channels.

The new Swedish Broadcasting Authority has one department that handles licensing and registration and one department that oversees compliance. Decisions regarding content are taken by the Broadcasting Commission. The Broadcasting Commission can apply to the Administrative Court to request that broadcasters who infringe the rules on advertising, sponsorship and undue prominence should pay a fine. Also, in the area of protection of minors, the Swedish Broadcasting Commission has the power to issue warnings and formal objections.

The highest decision making organ

The highest decision-making authority of the Broadcasting Authority is the Director General. He is appointed by the government after an open application process. His term is for six years, which could be renewed for another three years.

The board of the (previous) Broadcasting Commission still exists within the new Broadcasting Authority and it is exclusively competent to decide on issues regarding content.

The Swedish Broadcasting Commission within the Broadcasting Authority has 11 members (seven ordinary commissioners and four deputy commissioners). The Chairman and the Vice-Chairman are required to be judges of high judicial office. The other members come from a wide range of backgrounds, with broad experience in the social, cultural and media fields – no specific industry experience is required.

The chairman and each board member of the Swedish Broadcasting Commission are appointed by the government for a three-year term (no nomination process applied). This term may be renewed.

Decision-making by this board is on the basis of majority vote, with the chairman being entitled to take unilateral decisions on matters of lesser importance.

The government can remove a commissioner, including the chairman, from his or her position on the board to the Swedish Broadcasting Commission (although the person would then have to be given another position, as he or she could not be removed from employment). This has been done on a number of occasions, in 2008 (failure to attend adequate number of meetings), for example, and 2007 (two board members were removed, as they were concurrently participating on work relating to strategy for the public sector broadcaster). No such governmental powers of removal exist in respect of the Swedish Broadcasting Authority.

General rules apply to address conflict of interest issues in relation to the appointment and term of office of commissioners on the Swedish Broadcasting Commission. Also, whilst commissioners can hold other roles while also being members of the Swedish Broadcasting Commission, government approval is required for such concurrent offices or other sources of income. Furthermore, the commissioners are subject to rules relating to declaration of financial interests, including share ownerships. No rules apply to prevent former commissioners working with former regulatees after leaving office.

Staffing and funding

The Swedish Broadcasting Authority has a staff of 25 and an annual budget of just over €2.4 million. Two thirds of this comes from the state and one third from licence fees. . Its annual budget was determined by the national parliament.

Checks and balances

The Swedish Broadcasting Authority is accountable to the Swedish government; it provides annual reports to the Ministry of Culture and is subject to national audits by the National Audit Office.

The government does not have any role, as political/ministerial intervention in the individual decision-making activities of regulators is forbidden by the Swedish constitution.

Procedural legitimacy

The Swedish Broadcasting Authority is not required to engage in public consultations prior to adopting decisions, but such consultations do occur.

2.3.1.27 The United Kingdom

Quick Facts

The UK is a country with a population of 61.6 million.

The UK has a strong tradition of public service broadcasting with the BBC, which began TV broadcasts in 1932 and quickly came to play a major role in national life. The BBC is funded by a licence fee, which all households with TV equipment (to watch or record any television programmes as they are being shown on TV) must pay. The other main publicly owned broadcaster is Channel 4 which, unlike the BBC, is funded through commercial activities, including advertising. Commercial TV began in 1955 with the launch of ITV to compete with the BBC, and which, along with the commercial Channel 5, established in 1997, carries other public service obligations. The other main commercial competitors are BSkyB, a company that operates Sky Digital the satellite subscription television platform, and Virgin Media, a company that operates the Virgin cable subscription television platform.

The media regulator is the Office of Communications (Ofcom), which has the statutory responsibility for regulating both the broadcasting and the telecommunications sectors. Source: Country Profile UK, BBC website, June 2010.

Executive Summary: Office of Communications – Ofcom

General situation

In the UK, the body in charge of audiovisual matters is the Office of Communications (Ofcom). It was established in 2002, merging into a single body the previous broadcasting and radio authorities with those responsible for regulating the telecommunications and spectrum sectors.

Ofcom is responsible for audiovisual content matters, transmission aspects of audiovisual content (spectrum used for broadcasting is within its responsibility) as well as distribution questions (such as must-carry). Other competences include consumer protection, regulation of electronic communications networks and services, online copyright infringement and promotion of media literacy.

Ofcom has delegated, under a co-regulatory framework, the regulation of broadcast advertising to the industry-led Advertising Standards Authority (ASA), and the regulation of on-demand services to the newly created Association of Television On-Demand (ATVOD).

Ofcom also has a statutory function in relation to the BBC. Ofcom's responsibilities in relation to the BBC are set out in the BBC Charter and Agreement between the Secretary of State for Culture Media and Sport and the BBC. Ofcom and the BBC Trust, the governing body of the

BBC, have a Memorandum of Understanding that sets out the sharing of competences between Ofcom and the BBC Trust. Generally speaking, Ofcom is responsible for BBC content areas that are covered by the Audiovisual Media Services Directive. This includes, for example, the enforcement of the relevant production quotas and compliance with codes on harmful and offensive content in TV programmes. The BBC Trust is responsible for setting the overall strategic direction of the BBC and exercising a general oversight of the work of its executive board, including ensuring the accuracy and impartiality of BBC news.

Powers

Ofcom is responsible for licensing commercial broadcasters; for setting and enforcing programming quotas for PSBs (e.g. in relation to original and independent productions); for setting and enforcing standards in programmes (including in relation to commercial references, such as product placement and sponsorship), for requiring broadcasters to comply with access requirements; and for considering and adjudicating on fairness and privacy complaints. Ofcom oversees the services operated by licensed operators to assess if they comply with the rules and in particular with those on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the publication of decisions, financial penalties and, in the most serious cases, suspension or revocation of the licence. All complaints from viewers are considered by Ofcom and the most serious cases are referred to a committee of the board for sanctions to be imposed, following an oral hearing.

As Ofcom's co-regulators, ATVOD and ASA are responsible for regulating editorial content included in on-demand programme services (ATVOD) and broadcast and on-demand advertising (ASA). They use their monitoring and information collection powers in their respective areas of responsibility to ensure that content providers comply with the applicable rules and requirements while Ofcom has retained back-stop enforcement powers to impose financial penalties and suspend or restrict provision of a service (in the case of VOD) or licence revocation (in the case of television and radio broadcasters).

The highest decision-making organ

The highest decision-making organ of Ofcom is the Ofcom Board, which is composed of a Chairman and eight executive and non-executive members, including a Chief Executive. The Board has a central governance function; it sets Ofcom's strategic direction. It has oversight over the fulfilment of Ofcom's general duties and specific responsibilities and over Ofcom's overall funding and expenditure. The executive members run the organisation and answer to the Board, which is itself informed by a number of advisory bodies.

The chairman and non-executive members of the Ofcom Board are appointed jointly by the Secretary of State for Business, Innovation and Skills (BIS) and by the Secretary of State for Culture, Media and Sport (DCMS) for a period of up to five years renewable. Executive members are appointed by the chairman and the non-executive members with the Chief Executive's appointment being subject to BIS/DCMS approval.

There are no legal qualification or expertise requirements to sit at the Ofcom Board. The Board is composed of up to ten members with at least a majority being non-executive members. During their term of office, there are rules to avoid conflicts of interest with the government, political parties and industry. After the term of office, there are rules to prevent board members from being employed by the organisations that are regulated by the authority for a period of time. No such rules exist for senior members of staff but the notice period makes clear that employees have an ongoing duty of confidentiality.

The grounds for dismissing board members are listed in the law. The Secretaries of State for Business, Innovation and Skills and for Culture, Media and Sport have the power to dismiss both the Chairman and the non-executive Ofcom Board members individually.

Staffing and funding

Ofcom's current staff accounts for 853 and its budget for 2010 is £143 million.

Ofcom is funded partly by income from regulated companies through broadcast licence fees, administrative and other charges, and partly by the BIS and the DCMS, primarily for managing radio spectrum. No revenues from fines are retained by Ofcom. Ofcom's annual budget is subject to spending caps set up for four years on a cash basis by HM Treasury.

Checks and balances

Ofcom is subject to biannual external auditing by the National Audit Office.

Ofcom is accountable for its work, through a number of annual reporting obligations to Parliament and to the Secretaries of State for Business, Industry and Skills and Culture, Media and Sport (but not to the government as a whole). It is also accountable through written and oral evidence sessions before Parliament committees. Lastly it is accountable to the public at large through public consultations.

Ofcom's decisions can only be overturned by judicial review by the High Court (for procedural matters) or a decision by the Competition Appeal Tribunal (for competition matters and decisions relating to the provision of electronic communications services and networks). In a judicial review, the High Court can refer the decision back to Ofcom for reconsideration (to correct any procedural flaws) but cannot replace the original decision. The Competition Appeal Tribunal, on the other hand, has jurisdiction to consider appeals on the merits. There is a prior route of appeal in relation to Ofcom's broadcasting decisions within Ofcom itself. These are examined by the broadcasting review committee (a sub-committee of the board) when an appeal is lodged by a party (complainant or broadcaster). The committee has the power to quash (partly or entirely) the decision and send it back for reconsideration, or substitute its own decision.

Procedural legitimacy

Ofcom is obliged to publish impact assessments on any proposals that have a significant effect and to consult on these assessments. It is obliged to consult any person affected and, for some issues, specified parties. Results of the consultation must also be published. A typical consultation period is ten weeks with a minimum duration of four weeks. In the past five years,

Ofcom has organised between ten and 12 consultations (on broadcasting issues: the number is much higher if you include the other areas of Ofcom's competences) per year.

Ofcom publishes all its decisions.

Cooperation

Relationships between Ofcom and the other bodies (ASA, ATVOD and the BBC Trust) are formalised by legal designation and/or memorandum of understanding as described above.

2.3.2 Candidate Countries to the European Union

2.3.2.1 Croatia

Quick Facts

Croatia has a population of 4.4 million. The country hopes to become a member of the European Union.

Croatian Radio-Television, HRT, is the state-owned public broadcaster; it is financed through advertising and a licence fee. There are also two terrestrial national commercial networks and many private local TV stations. Croatia's media operates in a climate of freedom. Source: Country Profile Croatia, BBC website, June 2010.

Executive Summary: Council for Electronic Media (VEM)

General situation

The national public service broadcaster is HRT, which broadcasts two national channels. There are also two commercial broadcasters, providing nationwide services, Nova TV and RTL TV. Furthermore, there are 21 local and regional commercial TV services and two commercial IPTV services, Max TV and Iskon TV, operating in Croatia.

The regulatory body for radio, television and on demand services in Croatia is the **Council for Electronic Media (VEM)** – it does not, however, have a role in the regulation of spectrum or telecommunications. The VEM and the president manages the Agency for Electronic Media (AEM).

The VEM runs the Agency for Electronic Media (AEM) which, together with the VEM, regulates this sector.

The VEM cooperates closely with the Ministry of Culture, in terms of both policy and development of the AEM. The Ministry appears supportive of the development of the VEM and AEM into a fully capable and competent independent regulator.

In December 2009, legislation was adopted to implement in national law the substance of the AVMS Directive. Market players have been given six months to comply with its provisions. This new legislation has served to increase the transparency of the regulatory process; for example, all VEM decisions and minutes of its meetings should now be publicly available on its website.

Powers

The AEM, with the CEM, has general policy-setting⁴⁸⁴ and policy-implementing powers in the regulation of audiovisual media services. In particular, the AEM ensures compliance with the law implementing the substance of the AVMS Directive in Croatia.

The AEM has general monitoring powers. It also has powers of sanction in cases of infringement of the regulatory requirements. It can impose fines, in certain cases, up to the equivalent of €140,000. These powers of sanction have only recently been granted to the AEM and according to the VEM, it has imposed financial fines on several occasions during 2009 and 2010..

The highest decision-making organ

The highest decision-making organ is the VEM. This is a board, comprised of seven members. Each of the members of the board is appointed by the national parliament, following a proposal by the national government. The term of office is five years; this may be renewed indefinitely.

The appointment process commences with a public invitation to apply for membership of the board. All applicants are required to meet a general qualifications requirement relating to “professional knowledge, ability and experience in radio and television, or publishing, cultural or similar activity”, and be “publicly renowned for support of democratic principles, rule of law, constitutional values, development of civil society, support for human rights, and freedom of expression”. A potential concern remains that this qualification standard may not be sufficient to ensure that VEM board members are sufficiently qualified to undertake complex regulatory activity.

Government or party officials are not entitled to become VEM members. Also, members of the VEM cannot hold any other office at the same time; nor can they serve on boards of companies, or have business dealings or own, an undertaking which is subject to the relevant audiovisual media legislation.

Also to address potential conflict of interest concerns, CEM board members may not, for a period of one year after leaving the VEM, be employed by a company regulated under the relevant audiovisual media legislation.

During their term of office, individual members of the board, including the chairman, may be removed from office by the national parliament, on the basis of a proposal from the government in cases specified in the law. No such dismissal has ever occurred.

Staffing and funding

There are seven members of the VEM; also, the AEM has a staff count of five⁴⁸⁵.

484 The regulator points out in February 2011 that the Ministry of Culture has general policy-setting powers and the CEM has the power to give more detailed instructions on certain areas covered by the Electronic Media Act, in the form of by-laws (ordinances).

485 According to the VEM (in February 2011), since November 2009, AEM has a staff count of 10.

Under the relevant legislation, the annual budget of the regulator is 0,5 % of the annual gross revenue of radio, television and other electronic media in the preceding year; the current annual budget is the equivalent of approximately €1.7 million.

Salaries of the CEM and AEM members are decided by the Parliament on the basis of a proposal from the government.

Checks and balances

The director of the AEM reports annually to the Croatian parliament on the work of the agency, including that of the VEM, which is the decision-making body. This report includes information on budget spending.

The AEM is also subject to an annual audit by the state audit office.

Decisions of the regulator may be appealed to the Administrative Court of the Republic of Croatia. The Court has the power to annul the decision of the regulator and refer the matter back to the regulator for a new decision; it also has the power to replace the regulator's decision with its own decision.

Procedural legitimacy

All VEM decisions and minutes of meetings are published on its website.

The AEM is not required to engage in any public consultation prior to adopting any decision. It is, however, required to publish its decisions and to provide reasons for its decisions.

2.3.2.2 Former Yugoslav Republic of Macedonia

Quick Facts

The former Yugoslav Republic of Macedonia has a population of 2 million.

The public service broadcaster, Public TV, broadcasts three national channels. It faces considerable competition from many private networks. The media outlets are strongly divided along ethnic lines. A recent EU report described the broadcasting market as overcrowded, with more than 100 TV and radio stations; many of the local broadcasters were barely surviving financially. Source: Country Profile former Yugoslav Republic of Macedonia, BBC website, May 2010.

Executive Summary: Broadcasting Council (BC)

General situation

The national public service broadcaster is Macedonian Radio and Television, which broadcasts three national TV channels. There are also 19 national, ten regional and 47 local commercial TV channels. Furthermore, there is a DTT operator (TV Boom) which operates three national multiplexes and an IPTV service offered by Macedonian Telecom.

The regulatory body for broadcasting activities is the Broadcasting Council (BC). Its powers are set out in a 2005 law, which follows the Television Without Frontiers Directive. It does not

have jurisdiction over on-demand services, which remain unregulated. Under the relevant law, the BC is stated to be an ‘independent’ regulatory body.

Whilst the 2005 law was designed to ensure the independence of the BC from the political process, for example in relation to the process of appointment of members, concerns remain. An October 2009 European Commission report, for example, noted political interference in the functions of the BC as a concern.

There have also been concerns about the financial independence of the BC, which have been raised by the European Commission, the OSCE and other international organisations. The main source of funding of the BC is a broadcasting tax. The public broadcaster, which is responsible under the 2005 law for collecting this tax, did not start implementing the relevant provisions of the 2005 law until end-2009.

Powers

The BC decides on allocating, revoking or renewing broadcasting licenses and supervises compliance with the provisions stipulated in the Law and in these licences. It is required to “...ensure the freedom and pluralism of expression, existence of diverse, independent and autonomous media, economic and technological development of broadcasting activity, and protection of the interests of citizens in broadcasting”.

The BC also has powers to handle complaints and can publish infringement decisions. It does not, however, have the power to impose fines (this can only be done on the basis of a court procedure). Also, a broadcasting licence can only be suspended or revoked for failure to pay the relevant broadcasting licence fee.

The highest decision-making organ

The highest decision-making organ is the BC. This is a board, comprised of nine members, all of whom are appointed on a full-time basis. The members are appointed by the national parliament, on the basis of nominations by four authorised nominators: the Macedonian Academy of Arts and Sciences (one nomination), the Inter-University Conference (three nominations), the Majority Journalists’ Association of the former Yugoslav Republic of Macedonia (two nominations) and the Committee of Elections and Appointments of the Assembly of the Republic of the former Yugoslav Republic of Macedonia (three nominations). The parliament does not have the power to veto these nominations or appoint alternative candidates. The appointments are for a period of six years, which is not renewable.

The criteria for nomination to membership of the BC board are sufficiently wide to allow scope for appointment of members without specific broadcasting industry experience.

The BC functions on the basis of majority vote and can function on the basis of a quorum of five members.

There are rules to address potential conflict of interest concerns in the appointment process and during the term of office of BC members. Also, following termination of their period as BC member, they are subject to a three-year cooling-off period.

A BC member can be dismissed by the national parliament, on the basis of a request from the BC, for stated reasons (such as incapacity, acting in violation of the relevant broadcasting law). In 2008, the president of the BC was ‘dismissed’ (without formal approval from parliament) two months before the expiry of his term. The reasons for the ‘dismissal’ were unclear and not stated in the BC Annual Report for 2008, although the BC press release from February 8 2008 stated “...it is necessary to make a qualitative change in the BC leading position in order to meet more successfully and more efficiently the upcoming challenges.”

Staffing and funding

The BC has nine members and 34 staff. The current annual budget of the BC is just under €1.5 million.

Checks and balances

The BC is required to submit an annual report and financial plan to the parliament. Parliament can review the annual financial plan and, if detects irregularities, can require the BC to submit a new one within 60 days. The BC is also subject to an annual audit by the State Audit Office.

No third party, such as parliament, has any role in instructing the BC on how to carry out its policy duties. Decisions of the BC are, however, subject to appeal to an administrative court. In certain circumstances, the administrative court can replace the BC’s decision with its own.

Procedural legitimacy

All decisions of the BC are required to be published. Also, the BC is obliged to publish agendas of its meetings in advance, its decisions and minutes of its meetings. Furthermore, the BC is obliged to organise public meetings with all the stakeholders, at least once every three months to enable them to be informed about the work of the Council and to provide the stakeholders with an opportunity to present their views.

2.3.2.3 Turkey

Quick Facts

Turkey is a large country with a population of 74.8 million. Turkey became an EU candidate country in 1999.

Public broadcaster Turkish Radio and Television (TRT) operates national radio and TV networks. It faces competition from a dozen private stations with national coverage (Star TV, Show TV, Kanal D are widely watched networks). Source: Country Profile Turkey, BBC website, June 2010.

Executive Summary: Radio and Television Supreme Council (RTÜK)

General situation

In Turkey, the body in charge of audiovisual matters is the Radio and Television Supreme Council (Radyo Televizyon Üst Kurulu – RTÜK). It is established as a regulatory body and has a

board that is answerable to a parliamentary commission. It was established in 1994. It is responsible for audiovisual content matters and distribution questions (such as must carry). On spectrum used for broadcasting, it shares responsibility with the authority for electronic communication matters, the Information and Communication Technologies Authority.

RTÜK supervises 22 national, 15 regional and 210 local TV stations, 77 cable TV channels as well 135 satellite TV channels. There are 98 regional and 934 local radio stations.

Powers

RTÜK monitors broadcasts to see if they comply with the obligations included in the Broadcasting Law of 1994 and has powers of sanction.

Initially, RTÜK was expected to allocate frequencies and award licences to broadcasters, but RTÜK has not been able to carry out the frequency allocations. In June 2002, the Telecommunications Authority took over the responsibility for frequency planning and the Communications High Council (HYK) was entitled to approve the frequency plan and decide the numbers and the timing of the frequency allocations.

As a result RTÜK lost its main regulatory function in the area of frequencies and became a monitoring body only responsible to initiate the tender process for allocating frequencies once adopted by the HYK.

A new law is currently being prepared which will adapt the existing legislation to the Audiovisual Media Services Directive. It will also assign the role of frequency planning and allocation to RTÜK.

The highest decision making organ

The highest decision making organ is the board, which is composed of a chairman, a deputy chair and seven other members. It has the power to take decisions on all regulatory matters within its area of responsibility. To be elected, board members should be qualified to become a state employee, be over 30 years old and have expertise in public and private organisations in the field of mass media, technology, culture, religion and education.

All the board members are appointed by the Parliament from candidates nominated by the political parties. The chairman and the deputy chair are elected by the board members at its inaugural meeting.

The board members are appointed for a term of six years, and one third of them should be renewed every two years during their term of office. The chairman should be renewed every two years during his term of office.

The board members cannot hold other offices during their terms of office. They are civil service officials who are considered on leave without pay from their organisation for the duration of their term of office.

In order to prevent any conflicts of interests with the industry, board members (and their relatives by blood or by marriage) cannot not be partners or managers in private radio and television enterprises and in the enterprises that have direct or indirect partnership affiliation with these companies.

There are rules to protect the board members against early dismissal. No early dismissal has taken place.

Staffing and funding

The total number of staff is not foreseen in the law, but the current staff count is 422. Its budget for 2010 is budgeted to be €71.9 million. Its current budget is €34.3 million. The budget is decided by the Parliament upon proposal by the board of the RTÜK. The RTÜK's main source of income is a 5% share of the annual gross advertising receipts of private radio and TV companies.

Checks and balances

The RTÜK is subject to specific periodic external auditing for its spendings by the Turkish Court of Accounts (TCA). The TCA is a constitutional body responsible for auditing on behalf of the Parliament the revenues, expenditures and property of government offices operated under the general and annexed budgets.

It is also subject to occasional external auditing for its work by the State Audit Board of the Presidency of the Republic. Regular auditing by the Turkish Court of Accounts also takes place.

It appears that nobody, apart from a court, has the power to overturn decisions of the RTÜK. Broadcasters can lodge an appeal against a decision of the RTÜK. The appeal decision cancels RTÜK decisions but does not replace them.

Procedural legitimacy

There is no obligation to carry out a public consultation when drafting national strategy policy documents or when withdrawing or modifying licences. There is no requirement on the consultation period or on any obligation to publish the results of the consultation. Board decisions awarding/withdrawing licences do not need to be published by law.

2.3.3 Potential Candidate Countries to the European Union

2.3.3.1 Albania

Quick Facts

Albania is a small country with a population of 3.2 million. It is a pre-accession candidate country to the EU.

Public broadcaster Albanian Radio and TV (RTSh) operates national radio and TV networks. It faces competition from private stations (Top Channel, TV Klan, Koha TV, Vizion Plus TV and digital platforms like DigitAlb and TRING, which operate as pay TV platforms) which have mushroomed since the late 1990s. Many viewers also watch Italian TV, France 5 and in some areas of South and Southeastern Albania, Greek television (in some south and south eastern parts of the country) through terrestrial reception. Around 18% of the population have an Internet connection. Source: Country Profile Albania, BBC website, May 2010.

Executive Summary: National Commission on Radio Television (NCRT)

General situation

In Albania, the body in charge of audiovisual matters is the National Commission on Radio Television (NCRT). It qualifies itself as a regulatory body and has a chairman and a board of members which is answerable to a parliamentary commission. It was established in 1998 but started its activities in 1999. It is responsible for audiovisual content matters, transmission aspects of audiovisual content (spectrum used for broadcasting is within its responsibility) as well as distribution questions (such as must carry). Albania has a separate authority for electronic communications matters (related regulations on electronic communication except broadcasting, and postal services).

The NCRT supervises the two national commercial television operators (Klan TV and Top Channel TV), one national public service television broadcaster, RTSh (ARtv), 69 regional and local television stations, two satellite operators and 48 regional and local cable operators. At the end of 2009, NCRT revoked a licence awarded to TV Arberia, which was the third national television operator, because it had stopped broadcasting.

Powers

The NCRT does not have general-policy-setting powers but provides its opinion to the government upon request in its areas of responsibility. It has general policy-implementing powers in its areas of responsibility. It systematically monitors the services operated by licensed operators to assess if they comply with the rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the power to impose fines, the publication of decisions in the official journal (but not in the press), and suspension and revocation of licence (if the warnings and fines are not effective). A special committee on ethics has been set up within the regulator to handle complaints from viewers.

The highest decision-making organ

The highest-decision making organ is the board, which is composed of a chairman, a deputy chair and five other members. It has the power to take decisions on all regulatory matters within its area of responsibility. The chairman and the deputy chair are full-time working positions while the other board members do not work on a full-time basis as board members. They are all chosen because they have an expertise in the field of politics, mass media, or in human sciences.

The chairman and the other board members are appointed by the Parliament and the deputy chair is elected by the board members by secret ballot at its inaugural meeting.

All board members, including the chairman, are appointed for a term of five years, which can be renewed once. The chairman and the deputy chair are the only board members that cannot hold other offices at the same time, but all board members have an obligation to disclose participations in companies at their time of appointment. There are no such rules for senior members of staff. During their term of office, there are rules to avoid conflicts of interest with the government, political parties and industry. After the term of office, there are rules to prevent

all board members from being employed by the organisations that are regulated by the authority. No such rules exist for senior members of staff.

There are no rules to protect the board members against early dismissal, but the grounds for dismissal are listed in the law. The parliament has the power to dismiss both the chairman and the board members and the whole board can be dismissed at the same time.

In the last five years, there have been incidences of early dismissal of the chairman (in 2009, 2007 and in 2006) and of individual board members (in 2009 and 2006). Reasons for dismissal include, among others, the fact the board member/chairman resigned to carry out other functions or an undeclared conflict of interest.

Staffing and funding

It also appears that the NCRT does not have enough staff, and that it is not sufficiently well funded.

There is no public data on the current staff count, but it is thought to be 49. Its budget for 2010 is €0.78 million. The budget is calculated on the basis of real costs and is decided by the government (ministry of finance and council of ministers upon proposal by the board of NCRT). The income originates from spectrum fees, licence fees paid by operators and fines (5%).

Checks and balances

The NCRT is not subject to specific financial periodic external auditing for its spending. It is accountable for its work, through an annual reporting obligation to a parliamentary committee (not to the government or the public at large). In at least two cases in the last two years, this report was not approved by the Parliament. The work undertaken by the NCRT is subject to periodic external auditing by a state authority, every three or four years.

It appears that nobody, apart from a court, has the power to overturn decisions of the NCRT. Any person/organisation can lodge an appeal against a decision of the NCRT, provided internal redress procedures are followed beforehand. A court can cancel the decision of the authority but cannot take a new decision on its behalf; it can only ask the authority to take a new decision.

Procedural legitimacy

The NCRT is obliged to carry out a public consultation when drafting national strategy policy documents or when withdrawing or modifying licences. It is obliged to consult licensed operators, consumer groups and viewers. There are no requirements on the consultation period or on any obligation to publish the results of the consultation. In the past five years, the NCRT has organised two consultations.

Only board decisions awarding/withdrawing licences need to be published by law. These decisions must be reasoned.

2.3.3.2 Bosnia and Herzegovina

Quick Facts

Bosnia-Herzegovina is an independent state consisting of two entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) with a population of 3.8 million inhabitants (2009).

There are 44 television channels, but their development has been hampered by a weak advertising market. In May 2009, 1.42 million internet users were counted. Source: Country Profile Bosnia-Herzegovina, BBC website, May 2010.

Executive Summary: Communications Regulatory Agency (CRA)

General situation

In Bosnia and Herzegovina, the body in charge of audiovisual matters is the Communications Regulatory Agency (CRA). It is a separate legal entity and has a board (the Council of the Agency) and a director-general. Decisions by the Director General can be appealed before the Agency Council.

The CRA was established in March 2001 by the Office of the High Representative (OHR) which merged the Independent Media Commission (licensing, audiovisual regulation, frequencies) and the Telecommunications Regulatory Agency (telecommunications). After a transition period in which the activities of the IMC and TRA continued unabated the converged regulator resumed its work. The Communications Law 2003 later affirmed the converged regulator with jurisdiction over the entire national territory.

The CRA is a functionally independent institution responsible for broadcasting matters and for public telecommunications networks and services, for spectrum management and allocation of frequencies to all broadcasters including public service broadcasting.

The CRA currently oversees 44 terrestrial TV channels, 30 satellite, cable or IPTV channels and three public service broadcasting channels (BHRT, RTVFBiH, RTRS). In the period 2005-2009, the CRA suspended ten licenses and revoked four due to non-payment of licence fees.

Powers

The CRA regulates in its areas of competence (broadcasting, telecommunication networks, frequency planning and allocation) and adopts the relevant rules and regulations. This means it has policy-setting and general policy-implementing powers but can also issue individual decisions. It also plans, coordinates, allocates and assigns radio frequencies. The CRA has monitoring and information collection powers to assess compliance with licensing conditions and Agency's rules and regulations. Its powers of sanction range from oral and written warnings, concrete demands for action or cessation, to be complied with within a specified time limit; fines, suspensions and revocation of licences.

Between 2005 and 2009, 160 warnings were issued and fines worth a total of €244,000 were imposed.

The highest decision-making organ

The highest decision-making organ is the Agency Council, which is composed of a chairman, a deputy chair and five other members. The chairman and his deputy are elected by the plenary. The Council guides the Agency with regard to strategic issues of law implementation and confers with and receives reports from the Director General. The Council of the Agency adopts codes of practice and rules for broadcasting and telecommunications. Additionally, the Council of the Agency serves as an appellate body for decisions of the Director General. In deciding upon appeals against decisions of the Director General, the Council of the Agency acts pursuant to the Law on Administrative Procedures of Bosnia and Herzegovina, and makes a full review of the appealed decision. Appeals against the decisions of the Director General do not suspend the effectiveness of those decisions. Decisions of the Council of the Agency are final and binding in administrative procedure. Legal review of the decision can be initiated before the State Court of Bosnia and Herzegovina.

Majority voting is the rule in the Agency Council.

Members must have a legal, economic, technical or other relevant expertise in the fields of broadcasting and telecommunications. In this context, problems may arise because political appointments normally depend on ethnicity in Bosnia, which may be in conflict with the criterion of expertise.

The Council of the Agency consists of seven members, nominated by the Council of Ministers on the basis of a list of candidates submitted by the Council of the Agency, which comprises twice as many candidates as posts available, and appointed by the Parliament of Bosnia and Herzegovina. The Parliament accepts or rejects these nominations within thirty days of the submission of the nominations. If the Parliament rejects a nomination, the Council of Ministers must nominate another person from the list of candidates submitted by the Council of the Agency, and submit this nomination to the Parliament of Bosnia and Herzegovina. The term is four years, and one re-election is possible. Incompatibility rules exist with other state and party functions. Relationships with stakeholders must only be declared in the case of conflict, the relevant member of the Agency Council then abstains from the case⁴⁸⁶. The Director General and senior staff however must not have any relationship with stakeholders.

There are no rules to prevent the board members from being employed by the organisations that are regulated by the authority after the term of office. The grounds for dismissal during the term of office are listed in the law: conviction for certain crimes, non-performance of duties or conflict of interest in accordance with the CRA's Code of Ethics. The parliament has the power to dismiss individual members of the board on those grounds.

The Director General's term of office expired in 2007 and the Council conducted the procedure set out by the Communications Law. However, the Council of Ministers has not given its formal approval. In addition, the Council's term of office expired in 2009, and the Council conducted the procedure as set out by the Communications Law. The Council of Ministers

486 According to the CRA, these relationships must always be declared, even if there is no conflict. In three is conflict of interest, the member would be recused from the case.

drafted a list of seven candidates, but the Parliament refused to make the appointment, with no specific explanation. The Council of Ministers has not sent the additional list so no appointments were made. This situation is still unresolved.

These incidences are clear attempts by the Council of Ministers to put political pressure on the CRA.

Staffing and funding

The CRA seems to be sufficiently well funded, but it appears to be understaffed.

For the broadcasting sector, there are currently 18 employees with a total of 32 planned for. The budget for 2010 is app €4.3 million.

The budget of the Agency consists of the licence fees, and it may include donations. The budget, which is prepared by the CRA, is first adopted by the CRA Council, then submitted to the Council of Ministers for approval, and finally adopted by the state presidency. Despite the fact that the CRA is a self-financed body, its budget is included in the State budget, so the Agency has not direct control of funds. .

Checks and balances

The CRA is subject to annual auditing by the State Audit Institution.

The CRA is accountable to parliament and government through an annual report. However, in the line of the obstruction policy mentioned above, the Council of Ministers has not acknowledged the reports since 2007 by simply not putting them on their agenda.

Another attempt, as it is viewed, on the statutory granted independence of CRA has been the incidence where investigators from the State Investigation and Protection Agency, an institution primarily dealing with organised crime, were sent to the CRA and spent three months reviewing documentation in its premises. Despite the Agency's insistence on an official explanation, no account has been given.

Procedural legitimacy

The CRA has to perform a public consultation before the adoption of rules and codes. The consultation period must be at least fourteen days. Between 2006 and 2008, five consultations have taken place in the audiovisual field. Access to information and documents may be requested under the Freedom of Information Act.

2.3.3.3 Montenegro

Quick Facts

Montenegro has been a small independent state since 2006 and has a population of 624,000. The main broadcasters are the state-funded public television TV Montenegro, which operates two networks and a satellite channel, and TV IN, ntv Montena, TV Elmag and Prink M, which are

the main commercial broadcasters. Source: Country Profile Montenegro, BBC website, May 2010.

*Executive Summary: Broadcasting Agency of Montenegro*⁴⁸⁷

General situation

In Montenegro, the body in charge of audiovisual matters is the Broadcasting Agency. It is responsible for the content and distribution aspects of audiovisual services, whereas the Agency for Electronic Communications and Postal Services is in charge of the transmission aspects, including of spectrum used for broadcasting. The Broadcasting Agency was established in 2003 as an independent regulatory authority; it is answerable to the parliament and to the public at large. Independence as a value is recognised in the main broadcasting law. The agency is headed by a board and a chairman.

The Broadcasting Agency supervises 20 local/regional private television channels and 41 local/regional private radio channels. It also supervises two national public service television channels, two national public service radio channels, three local public service television channels and 14 local public service radio channels. It has issued warnings, imposed fines and published decisions against broadcasters but it has never withdrawn or suspended a licence.

Powers

The Broadcasting Agency has general policy-setting and implementing powers in many areas, including on strategy for the development of the broadcasting sector, on the amount of advertising, on quotas for European works and independent productions, and on standards on the protection of minors. It has wide-ranging monitoring and supervision powers, as it systematically monitors programme contents to ensure compliance with rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the possibility to impose fines, to publish decisions and suspend and revoke licences (even if the authority has never made use of this power to revoke or suspend). Complaints handling procedures exist and are detailed in a book of rules.

The highest decision making organ

The highest decision making organ is the council, with five members, which are appointed by the parliament. The candidates are proposed by the government, the university, the association of broadcasters, and non-government organisations (representing the media and human rights). The chairman of the council is appointed by the council on the basis of a public tender procedure. The council member does not need to be part the organisation that proposed his/her nomination. They must all be experts in the field.

⁴⁸⁷ (summary based on situation prior to August 2010) a summary of the current situation is provided by the Broadcasting Agency of Montenegro as an Addendum

All council members, including the chairman, are appointed for a term of five years and their term of office does not coincide with the election cycle. Council members can be renewed once, whereas the law does not specify any restrictions to the chairman's term of office. There are rules to prevent the council members and the chairman from exercising other functions that could jeopardise the independence of the council (e.g. they cannot hold offices as members of parliament, as ministers in the government, or as an official of a political party). Neither can they have an interest in a broadcaster or related media group. These rules also exist in relation to senior members of staff. There are no rules to guard against conflicts of interest after the term of office, and nothing prevents any of them from being employed by former regulatees.

There are rules in the law to protect the council members against early dismissal: the grounds are listed in the law and members must be dismissed by parliament.

Staffing and funding

The Broadcasting Agency has a current staff count of 18 (including one trainee) whereas the law foresees a staff count of 17. For 2008 it had a total annual income of €1,015 million.

However, the agency is facing great financial difficulty as, since January 1, 2009, it no longer has a stable source of income. This is due to the fact that spectrum matters (including frequency fees) have now been transferred to the Agency for Electronic Communications and Postal Services. This situation is said to threaten the independence of the agency. The only remaining source of income is fines.⁴⁸⁸

Checks and balances

The Broadcasting Agency is subject to periodic specific financial external auditing for its spending. This is carried out every year by a private audit firm. It is also accountable to the parliament for its accounts but it is not specified in the law if the report on the annual accounts needs to be approved. The Parliament has never rejected a report of the broadcasting agency. The agency is not directly accountable for its work before the Parliament or the Government, but the Parliament needs to approve its annual financial plan, report and activity report. However, it has an obligation to publish operating reports. The agency is also subject to yearly external auditing of its work, which is done by a private authority.

Any person or organisation that considers that it has been adversely affected by a decision of the authority can initiate an administrative proceeding against that decision. An internal procedure needs to be followed (before the Director in the first instance and the Council in a second phase) before external administrative recourses can be followed (before the administrative court in a first stage and the Supreme Court in the final stage). The accepted grounds of appeal cover errors of fact and errors of law. The external appeal bodies do not have the power to replace the

488 After the completion of the data collection the study team has been informed by the European Commission that this situation has changed with the adoption of the Law on Electronic Media in July 2010. The new Council was appointed at the end of December 2010. The Broadcasting Agency was renamed into Agency for Electronic Media. The new director is expected to be appointed mid-March 2011.

original decision by its own. They can only cancel the decision and ask the agency to take a new decision.

Procedural legitimacy

The Broadcasting Agency is obliged by law to conduct a public consultation before adopting any bylaws, guidelines or other acts that relate to the rights and obligations of broadcasters. There are no requirements on who should be consulted but in practice it would seem that broadcasters are consulted. There are no requirements in the law on the consultation period or on whether the responses need to be published. In the last five years, the authority organised nine public consultations.

The only decisions that are required by law to be published are those that sanction broadcasters or that set the broadcasting registration and licence fees. The Broadcasting Council is also required by law to publish the list of licensed broadcasters.

Addendum submitted by the Broadcasting Agency of Montenegro following entry into force of the new Electronic Media Law in August 2010

General situation

In Montenegro, the body in charge of audiovisual matters is the Broadcasting Agency of Montenegro⁴⁸⁹. It is responsible for the content and distribution aspects of audiovisual services, whereas the Agency for Electronic Communications and Postal Services is in charge of transmission aspects, including planning, management and technical monitoring for the use of the spectrum for broadcasting. As of August 2010, the Broadcasting Agency has been returned responsibilities related to the allocation of broadcast spectrum. The Broadcasting Agency was established in 2003 as an independent regulatory authority, and it is answerable to the public at large. Independence as a value is recognised in the main law regulating its establishment and operation⁴⁹⁰. The agency is headed by the Council and the Agency Director.

The Broadcasting Agency supervises 21 local/regional private television channels and 41 local/regional private radio channels. It also supervises two national public service television channels, two national public service radio channels, three local public service television channels and 14 local public service radio channels. It has issued warnings, imposed fines⁴⁹¹ and published decisions against broadcasters but it has never withdrawn or suspended a licence.

489 According to the new Electronic Media Law (“Official Gazette of Montenegro”, No. 46/10, effective from Aug 2010) the Broadcasting Agency will change its name to the Agency for Electronic Media.

490 New Electronic Media Law abolished the Broadcasting Law from 2002.

491 According to the new Electronic Media Law, the Agency is not authorised to impose financial fines but only to initiate a court procedure for imposing fines for breaching of the Law.

Powers

The Broadcasting Agency has general policy-setting and implementing powers in many areas⁴⁹², such as, on the amount of advertising, on quotas for European works and independent productions, on standards on the protection of minors, copyright and neighbouring rights' protection in the AVMS providers' operation. It has wide-ranging monitoring and supervision powers, as it systematically monitors programme contents to ensure compliance with rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, to publish decisions and suspend and revoke licences (even if the authority has never made use of this power to revoke or suspend). Complaints handling procedures exist and are detailed in a book of rules.

The highest decision making organ

The highest decision making organ is the Council, with five members, which are appointed by the Parliament. The candidates are proposed by the universities, the Montenegrin P.E.N. Centre, the associations of commercial broadcasters, and non-government organisations (representing the media and human rights)⁴⁹³. The chairman of the Council is appointed by the Council from among its members. The Agency Director is appointed by the Council, following a public tender procedure. A Council member does not need to be part of the organisation that proposed his/her nomination. They must all be experts in the field of the Broadcasting Agency operation. All Council members, including the chairman are appointed for a term of five years and their term of office does not coincide with the election cycle (when first appointed, three members of the Council are appointed for five years, two members for four years). The term of office for the Agency Director is four years. Both the Council members' terms as well as the Agency Director's, can be renewed once. There are rules to prevent the council members and the Agency Director from exercising other functions that could jeopardise the independence of the council (e.g. they cannot hold offices as Members of Parliament, as ministers in the Government, or as an official of a political party). Neither can they have an interest in a broadcaster or related media group. These rules also exist in relation to senior members of staff. There are rules to guard against conflicts of interest after terms of office, and to prevent any of them from being employed by former regulatees for 12 months after the termination of their term (a Council Member may not be a founder of, or in any way involved in the submission of an application for obtaining a licence for providing of, an AVM service during the period of 12 months after the termination of their term as the Council Member – Article 17).

There are rules in the law to protect the Council members against early dismissal: the grounds are listed in the law and members must be dismissed by parliament.

492 According to the Article 8 of the new Law, the Agency for Electronic Media, the Council of the Agency for electronic media, following the public debate, prepares and defines proposal of the Program for development of audiovisual media services sector and submits it to the Government for adoption. The new Law does not have any provision related to the strategy for the AVM sector.

493 This is the list of designated subjects to propose candidates defined by the new Law. The first appointment procedure in line with the new Law is expected to be finalised by the end of 2010.

Staffing and funding

The Broadcasting Agency has a current staff count of 17. In 2008 it had a total annual income of €1,015 million.

However, the agency is facing great financial difficulty, as since January 1, 2009 it no longer has a stable source of income. This is due to the fact that spectrum matters (including frequency fees) were transferred to the Agency for Electronic Communications and Postal Services. This situation is said to threaten the independence of the agency. The only remaining source of income is fines. According to the new Law, the Agency will again be in charge for allocating broadcasting frequencies as well as collect fees from the AVMs providers. It is expected that will be the main source of its funding as of 2011.

Checks and balances

The Broadcasting Agency is subject to periodic specific financial external auditing for its spending. This is carried out every year by a private audit firm. The agency is not directly accountable for its work before the parliament or the government. However, it has an obligation to publish operating reports. The agency is also subject to yearly external auditing of its work, which is done by a private authority appointed by the Council.

Any person or organisation that considers that it has been adversely affected by a decision of the Agency can initiate an administrative proceeding against the decision. An internal procedure needs to be followed (before the director in the first instance and the council in a second phase) before external administrative recourses can be followed (before the Administrative Court in a first stage and the Supreme Court in the final stage). The accepted grounds of appeal cover errors of fact and errors of law. The external appeal bodies do not have the power to replace the original decision by its own. They can only cancel the decision and ask the agency to take a new decision.

Procedural legitimacy

The Broadcasting Agency is obliged by law to conduct a public consultation before adopting any bylaws, guidelines or other acts that relate to the rights and obligations of broadcasters. It is obliged to publish at its web site draft act and invite all interested subjects to submit their complaints, suggestions and proposals, in period that shall not be shorter than 15 days. There are no requirements in the law on whether the responses need to be published. In the last five years, the authority organised nine public consultations.

The Agency is required by law to publish different documents either on its website or in the Official Gazette of Montenegro. For example on the website of the Agency:

- The decisions and relevant information about the tender procedure for allocating broadcasting frequencies,*
- The decisions on imposed administrative supervisory measures,*
- All regulations and acts that refer to governance issues related to co-regulation or self-regulation.*

- *By the end of June of each year, a report must be submitted on the work of the Agency for the previous year, with special emphasis on the realisation of the obligations determined by the law, as well as a report on financial performance of the Agency for the previous year, with a supplementary report of the authorised auditor on the financial operations of the Agency.*

In the Official Gazette of Montenegro:

- *By-laws regulating the right and obligations of the AVMS providers in line with the Law,*
- *the tenders, as well as the decisions about the tender procedure, for allocating broadcasting frequencies.*
- *Data on all AVMS providers – the legal entity, its seat, i.e. name and surname, and seat of all legal and physical persons with direct or indirect shares in ownership of that AVM service provider, including data on share amounts.*

2.3.3.4 Serbia

Quick Facts

Serbia became a stand-alone sovereign republic in summer 2006, after Montenegro voted for independence in a referendum.

Serbia has a population of 9.8 million inhabitants (including Kosovo with 2 million). Boris Tadic, leader of the Democratic Party, took up the office of president in 2004. Mirko Cvetkovic was sworn in as prime minister in July 2008, and heads a coalition government between the Democratic Party and its former rival, the nationalist Socialist party, as well as smaller parties representing minorities.

There are two public service broadcasters: Radio Television Serbia (RTS) and Radio Television Vojvodina (RTV).

National TV licenses were awarded in 2006 to private operators B92, TV Pink, News Corp's Fox TV, TV Avala and to Kosava-Happy TV. Source: Country Profile Serbia, BBC website, May 2010.

Executive Summary: Republic Broadcasting Agency (RBA)

General situation

In Serbia, the body in charge of audiovisual matters is the Republic Broadcasting Agency (RBA). It is an autonomous entity and has a Council as its main body. It was established in 2002, but started its activities in 2003. It is responsible for audiovisual content matters, frequencies and distribution questions. License allocations are dealt with by the RBA together with the Republic Telecommunication Agency (RTA), the regulator in the field of telecoms.

The RBA is responsible both for public service and commercial channels. The RBA supervises the public service broadcasters RTS (two channels) and RTV (two channels) and 140 commercial channels. In Serbia, non-linear audiovisual services are currently not regulated.

Powers

The RBA has general policy-implementing and third-party decision-making powers. Its implementing powers also include the power to enforce licence revocations with the help of the police. The RBA monitors the services operated by licensed operators to assess whether they comply with the rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from reprimands, warnings, the power to impose fines, the publication of decisions in the official journal, and suspension and revocation of licences. In the last five years, 15 reprimands, eight warnings (including the publication of the decision) and 34 revocations were pronounced. Fines ranging from €3,000 – €10,000 were imposed.

The highest decision-making organ

The highest decision-making organ is the council, which is composed of nine members (of which one must be from Kosovo and Metohija), including a chairman and a vice-chairman. The appointment of the chairman requires two-thirds of the members' votes. The council has the power to take decisions on all regulatory matters within its area of responsibility. The members are nominated by several institutions: the parliament, the Vojvodina assembly, the university, professional associations in the media sector and civil society organisations. Once the members are nominated, they no longer represent their organisations. They must be experts in the field of the Council's work (e.g. media, advertising, telecommunications, law, economics). The term of office is six years and can be renewed an indefinite number of times. No other office can be held at the same time.

The statute of the council requires consent by parliament. The council decides by majority voting.

Conflict of interest rules state that offices in government, parties and industry can not be held by members (or their close relatives of such persons), either during the appointment process or their terms of office. This ceases to apply after their terms of office. The rules also apply to senior staff.

The reasons for early dismissal are listed in law: illness, the provision of false information and refusal to exercise office for a certain period. Parliament decides on the dismissal of a council member, which must be proposed by 20 members of parliament or a majority of two-thirds of the council members.

Irregularities in relation to the appointment process have been reported in the past. In protest, representatives of media and civil society associations resigned in 2003. In 2008, the chairman and the vice-chairman were dismissed for unclear reasons, but remained council members.

Staffing and funding

It appears that the RBA has enough staff and is sufficiently well funded.

The budget is €5.15 million (2008). It is proposed by the council and must be approved by the government. Any budget deficit is covered by the state budget, and revenue surplus reallocated

to the state budget. This procedure does not appear to be transparent. Until 2007, the RBA was funded by the state budget. The RBA is funded by licence fees.

The staff comprises 72 employees (in addition to the nine members of the council).

Checks and balances

The RBA is subject to annual financial auditing for its spending. However, this audit has never been performed by the state, due to a lack of resources. Audits by private institutions are available for 2007 and 2008 on the RBA's website.

The RBA must publish annual reports on its work, although is not accountable to a specific institution, but rather to the public at large. The report is published on the website. The RBA is further subject to the obligations of the Freedom of Information Act, and thereby subject to certain reporting obligations. However, the information currently available is outdated.

The Administrative Court of Serbia can overturn decisions by the council insofar as it can order the latter to take a new decision. Decisions do not stand pending appeal. Internal procedures need to be followed before external recourse. Any natural/legal person can lodge an appeal.

Procedural legitimacy

Public consultations are not compulsory and have not taken place in practice.

Although the publication of decisions is not compulsory, they are published on the RBA website in practice.

All in all, the RBA's formal powers do not appear to be adequate. Ever since its creation, the overall work of the council has been criticised for the lack of transparency and accountability. Frequent legislative amendments appear to reinforce government influence with the RBA.

2.3.3.5 Kosovo

Quick Facts

Kosovo⁴⁹⁴, has 1.8-2.4 million inhabitants (estimation). Kosovo unilaterally declared independence from Serbia in February 2008. Kosovo has a public broadcaster, Kosovo Radio-Television (RTK). It was set up as an editorially-independent service. There are also private television broadcasters, such as TV 21 and KohaVision (KTV). Source: Country Profile Kosovo, BBC website, May 2010.

494 Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo.

Executive Summary : Independent Media Commission

General situation

In Kosovo, the body in charge of audiovisual matters is the Independent Media Commission (IMC). It is responsible for audiovisual content matters, transmission aspects of audiovisual content as well as spectrum issues. Regulation of the distribution aspects of audiovisual content is controversial: The IMC still does not regulate distribution aspects but it is the only regulatory body that has competence in that field. The IMC also does not regulate satellite broadcasting, even though this is one of its main competences.

The IMC supervises 21 television stations (also the public broadcaster, RTK), ten cable operators and 28 program service providers.

Powers

The IMC sets guidelines or determines licence conditions. It has general policy-implementing powers in its areas of responsibility, in the form of monitoring and sanctioning. The IMC also has third-party decision making powers, and it selects the RTK Board and sets the amounts of advertising on RTK.

The regulator monitors (after complaints only) the services operated by licensed operators, to assess whether they comply with rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction, ranging from warnings, the possibility to impose fines, the publication of decisions in the media, suspension and revocation of licence and impose penalty payments.

The highest decision making organ

The highest decision making organs of the IMC are the Council and the Media Appeals Board.

The Council has seven members, one representing the Parliament (nomination is still pending), and six representing civil society. The decision making process is based on majority vote. Competences of the Council include the selection of Chief Executive; the approval of strategy documents, adopting rules and other acts which have a general “erga omnes” applicability; and decision making.

The Chair (Chief Executive) of the Board is nominated and appointed by the Council. Council members are nominated by the ad hoc commission of the Assembly and appointed by the Assembly of Kosovo. The term of office of the Council members is two years, and one or more renewal is possible.

The Media Appeals Board has three members, representing the civil society. The members are nominated by the IMC Council and appointed by the Supreme Court of Kosovo. The term of office of the board members is three years, one or more renewal is possible.

Staffing and funding

The current staff of the IMC is 29, the current annual budget is €1 million. This includes the state funding €869,416 and €131,160 in authorisation/licence fees paid by operators. The budget is

decided by the government (Ministry of Finance and Economy). The Office of General Auditor regularly audits the IMC (but no audit has been undertaken in recent years).

Checks and balances

The IMC is accountable for its work to the Parliament, through an annual reporting obligation, and to the public as a whole (publishing documents for public comments). Annual report includes regulatory activities and budget expenses.

Only the Supreme court has the power to overturn decisions of the IMC. Licensees can lodge an appeal against a decision of the regulator, but internal redress procedures are required (Media Appeals Board). The Media Appeals Board has the power to cancel the decision and remit it back to the IMC Council for new decision, or to just take its own decision as a final one.

Procedural legitimacy

The IMC is obliged to carry out a public consultation concerning regulatory issues and guidelines. The media industry, civil society, the general public, and international organisations are all involved in consultations and the consultation period is two weeks.

All acts, rules, regulations, and decisions must be published by law.

2.3.4 EFTA Countries

2.3.4.1 Iceland

Quick Facts

Iceland is a very small country of 318,000 inhabitants.

The public broadcaster RÚV operates national radio and TV networks. 365 ehf. is the main commercial broadcaster, operating both radio and TV networks, as well as being active in newspaper publishing. Stod 2 is the main commercial broadcaster, and Syn and Skjarinn ehf. is the other major commercial TV operator. Source: Country Profile Iceland, BBC website, May 2010.

Executive Summary Broadcasting Licensing Committee (BLC)

General situation

In Iceland, the body in charge of audiovisual matters is the Broadcasting Licensing Committee (BLC). It is officially qualified as an independent supervisory and administrative authority.

It was established on January 1, 1986, and is responsible for licensing and compliance issues in the private audiovisual sector. The public service broadcaster RÚV is supervised by its board and the minister of education, science and culture. The BLC is only in charge of issues relating to audiovisual content. Transmission and spectrum issues are dealt with by a separate regulatory authority, the Post and Telecom Administration.

The BLC supervises some 16 linear radio and TV channels and relay services of foreign satellite TV channels to subscribers, plus a number of linear channels holding short-term licenses. Non-linear services are not regulated as the AVMS Directive has not been implemented in Iceland.

Powers

The BLC has third-party decision-making powers. It monitors the licensed operators' services following complaints to assess if they comply with the rules on quotas, advertising or the protection of minors. It also has information collection powers in these areas.

It has a range of powers of sanction in relation to breaches of law in the field of advertising and the protection of minors, ranging from warnings, fines (two to ten times the revenue generated by the infringement), to the suspension/revocation of licences. The BLC has made use of its information collection powers, monitored services following complaints, and issued warnings. The BLC has, however, not suspended/revoked licenses in the past five years.

The highest decision making organ

The highest decision making organ is the BLC itself, which is composed of three members and three substitute members. It has the power to take decisions on all regulatory matters within its area of responsibility. Two members are representatives of civil society and are appointed by the minister for education, science and culture following the proposal of the supreme court. The chairman is a representative of the government, appointed by the minister for education, science and culture. All three members must be qualified as district court judges. The same applies to alternate members.

The term of office is four years. Reappointment is not possible.

The BLC determines its own internal procedures. Decisions are taken by majority vote.

There are no rules on conflicts of interest in relation to government or stakeholder positions, either with a view to the appointment process or during the term of office. Equally, no transparency rules exist in this regard. Other offices can be held at the same time.

There are no formal rules to protect the board members against early dismissal. In practice, no BLC member has been dismissed early.

Staffing and funding

It appears that the BLC does not have enough staff, and that it is not sufficiently well funded.

The BLC shares one employee with the ministry of education, science and culture, who is paid by the ministry.

The annual budget for the BLC in 2010 is €63,000, and the money comes directly from the state budget. The budget is proposed by the ministry of education, science and culture and decided by parliament. Fines are directly paid into the state budget.

Checks and balances

The BLC is subject to annual auditing by the national audit office.

Apart from this, the BLC is not accountable to anybody and thus is not obliged to report its activities. However, according to principles of best practice, the BLC publishes reports covering three or four years. The last report covers the period 2004-2008. The report is available online on the BLC's website.

It appears that nobody has the power to overturn decisions of the BLC, except in a few limited areas, where the broadcasters can lodge an appeal before the courts. In this case, the appeal suspends the decisions. The appeal body can cancel the decision and refer the case back to the BLC for new decision. Complaint procedures exist.

Procedural legitimacy

No public consultations of the regulator BLC are provided for in Iceland, and no public consultations have been held in practice

There is no requirement to publish agendas, minutes or decisions of the BLC.

2.3.4.2 Liechtenstein

Quick Facts

Liechtenstein is a tiny (160 square kilometres), landlocked country between Switzerland and Austria with a population of 36,000 people. It is a member of the Council of Europe, the United Nations, the European Free Trade Association (EFTA) and part of the European Economic Area (EEA).

Television is mostly provided by Swiss German-speaking channels. Liechtenstein only has one public radio station and one private television broadcaster. Source: Country Profile Liechtenstein, BBC website, June 2010.

Executive Summary: Media Commission ('Medienkommission')

General situation

Liechtenstein is so small that its domestic audiovisual media scene consists of only one public radio broadcaster (Radio Liechtenstein, active since 2004, which was a private station from 1995-2003) and one private television station (1 FL-TV active since 2009).

This leaves the Media Commission with few regulatory tasks. Its main activities are the funding of print media enterprises, as well as the professional training of journalists.

Powers

The Media Commission supervises the broadcasters regarding quotas, advertising and the protection of minors. It can impose fines of up to CHF 10,000 (about €7,400). In practice, it has not used its powers in the last five years, due to lack of a relevant TV offer.

The Media Commission can give opinions to the government, and reports on questions posed by the government.

The highest decision making organ

The Media Commission consists of five members – including a chair and vice-chair – and two substitutes. They are representatives from civil society, appointed by parliament, which also decides on the chairman. Informally, the political parties are involved in the nomination process.

Board members are appointed for a four-year term, renewable once. The Media Law stipulates that they should have sufficient knowledge of legal, media and economic affairs to fulfil their function properly.

The board works on a honorary basis, i.e. receives a moderate reimbursement of expenses for its six to eight meetings per year.

The independence of the Media Commission is set out in the Media Law and Broadcasting Law. Several positions – such as being a member of the administrative council of Liechtenstein Broadcasting, a member of parliament, government, etc. – cannot be combined with membership of the Media Council. There are no rules to guard against conflicts of interest after the term of office has ended.

Criteria for the dismissal of board members – including serious neglect of duty, and incompatibility with other functions after appointment – are listed in the Media Law.

Staffing and funding

The Media Commission has no staff, except for its board members. The day to day administrative work is done by the Press and Information Office, a department of the public administration.

The Media Commission is completely funded by the state, with no additional sources of income.

Budget and staffing appear to be sufficient, considering the limited tasks of the Media Commission.

Checks and balances

The Media Commission is accountable to parliament, which can ask questions, as well as to the government as a whole.

Appeals against decisions of the Commission can be made to the government. It can overturn the Media Commission's decisions, and force it to take action necessary to fulfil its legal obligations. The government can not replace a Commission decision with its own, but only refer it back to the Media Commission for a new decision.

Oversight is restricted to legal and financial aspects; there is no political supervision.

An annual financial audit is undertaken by the national finance control, parliament and the government. There are no private audit firms involved. There is no external audit of the work of the Media Commission.

Procedural legitimacy

There are no decisions that require a prior public consultation. No consultations have taken place in the last five years.

There is no legal obligation to publish decisions, but they are included in the annual report of the Media Commission to parliament and the government.

2.3.4.3 Norway

Quick Facts

Norway is a country with a population of 4.8 million inhabitants. It rejected EU membership after a general referendum on two occasions: 1972 and 1994.

Competition for the public service broadcaster NRK started in 1981, and since then, private and local stations have built up substantial audiences. Digital television via cable and satellite offer a wide range of specialist channels. Many Norwegian channels broadcast from abroad and are therefore not subject to Norwegian jurisdiction. Analogue switch-off occurred at the end of 2009. TV2 is NRK's most important competitor; other major competitors are TV3 Norge and TV Norge. Source: Country Profile Norway, BBC website, June 2010.

*Executive Summary: Norwegian Media Authority (MA)*⁴⁹⁵

General situation

The Media Authority and the Ministry of Culture are jointly responsible for the regulation of audiovisual services. The Media Authority (MA), established in its present form in 2005, when several regulators were merged, regulates the media pursuant to the Act on Broadcasting, the Act on Films and Videograms and the Media Ownership Act. The MA is an administrative body under the Ministry of Culture. The Ministry decides on complaints concerning the MA's decisions pursuant to the Broadcasting Act, and may as such reverse these decisions. The Ministry may also instruct the MA in general and in individual cases (see attached Addendum). None of these possibilities exists in the field of media ownership.

The Ministry of Transport and Communications and the Post and Telecommunications Authority are the bodies responsible for regulating electronic communications, including the licensing of spectrum. The right of reply is regulated in the General Civil Penal Code and the Broadcasting Act. The Press council is a self-regulatory body handling complaints on media according to its own Code of Ethics (i.a. the right of reply). The public service broadcaster's broadcasting council deals with audiovisual content matters relating to the public service broadcaster.

The AVMS Directive has not been implemented, pending negotiations between the EEA EFTA States and the Commission on adaptations. Thus, non-linear services are not currently regulated.

The MA supervises 27 national channels and co-supervises three public service TV channels from NRK.

⁴⁹⁵ See addendum submitted by the Ministry of Culture at the end of this section.

Powers

The Ministry of Culture has general policy setting powers, general policy implementing powers and third party decision-making powers in the broadcasting area. The MA has third party decision-making powers in its areas of responsibility. Whereas the Ministry does the policy making, decisions are mostly taken by the MA.

The MA systematically monitors the services operated by licensed and registered operators to assess whether they comply with the rules on quotas, advertising and the protection of minors. It also has information collection powers in these areas. It has a range of powers of sanction (including in the area of quotas), ranging from warnings, the power to impose fines (up to approximately €250.000) and suspension and revocation of licenses. Sanctions also include the prohibition of advertising for a limited period.

In the past few years, the following sanctions have been applied: warnings, fines, other financial penalties and a limited number of revocations/suspensions of licenses.

The highest decision making organ

The Director General of the MA is appointed by the Ministry of Culture. It is a permanent position.

It is not specified in general terms which qualifications and professional expertise are required but the Ministry of Culture has specified that the qualifications required of the current Director General were published when the position was announced vacant.

Regarding the appointment process and the term of office, rules on conflicts of interest exist in relation to government and industry, but not with regard to political parties. The conflict of interest rules also apply to senior staff.

There are no conflict of interest rules after termination of office.

According to the Ministry of Culture, conflicts of interest are regulated in the Public Administration Act, and they apply to all public servants that are involved in administrative decisions in the exercise of public authority (i.a. the Director General as well as the majority of the staff of the MA).

No dismissal has occurred during the past five years. It is noted in that context that Norwegian civil servants enjoy a high level of job protection.

Staffing and funding

It appears that the MA has enough staff. The current staff count is 45 employees.

The administrative budget for 2010 is approx. €5.3 million. The MA is funded solely by government funds. The Ministry of Culture submits a proposal for the funding of the MA annually over the state budget, which is then decided upon by the national assembly (Stortinget).

Checks and balances

The MA is subject to annual external auditing for its spending. Audits are performed by the National Audit Office, which is a body under the national assembly.

The MA is accountable to the Ministry of Culture, which in turn is accountable to the national assembly.

The MA submits annual reports to the Ministry of Culture, eg. on the decisions taken and the current state of the media sector in Norway. No approval of the report by the ministry is required.

The Ministry of Culture has the power to overturn decisions by the MA in all decisions relating to the Broadcasting Act. However, decisions relating to the public service remit and media ownership questions cannot be overturned by the Ministry, but can only be appealed against.

Within the MA, there are two internal stages of appeal, as the Authority may be requested to revisit issues in certain cases. Furthermore, a decision can be appealed externally with the ministry, the King and courts of law. External appeals can be lodged before the internal (MA) possibility of appeal is exhausted. All interested parties can lodge complaints. Complaints handling procedures do not exist. Suspensory action is awarded to decisions in individual cases in case of complaints. However, decisions are suspended pending appeal if appeals are lodged with courts. Annulled decisions are referred back to the MA for new decisions. For further details, see Addendum.

Procedural legitimacy

Major changes of law are often preceded by experts' reports and by public hearings. There is a general requirement that foresees that states that all public and private institutions and affected organisations should be heard. Between one and four consultations are organised by the Ministry of Culture on questions relating to the media.

There is no specific formal requirement that the decisions of the MA should be published, but they are generally publicly available in accordance with the Freedom of Information Act. In accordance with the Public Administration Act. Decisions must be motivated.

Addendum submitted by the Ministry of Culture

The current system on appeals may be outlined as follows:

The Ministry may issue both general instructions and instructions pertaining to individual cases to the MA.

Appeals concerning administrative decisions pursuant to the Broadcasting Act follow the general rules of the Public Administration Act, according to which

Individual decisions may be appealed, by a party or person having a legal interest in appealing the case, to the administrative agency (the appellate instance - the Ministry of Culture) which is the immediate superior of the administrative agency that made the administrative decision (the subordinate instance – the MA).

The subordinate instance may rescind or alter the administrative decision if it considers the appeal justified. If not, the documents in the case are sent to the appellate instance. The appellate instance is required to ensure that the case is clarified as thoroughly as possible before an ad-

ministrative decision is made. It may require the subordinate instance to undertake further investigations etc.

The appellate instance may try all aspects of the case and take new circumstances into account. The appellate instance may make a new administrative decision in the case or rescind the previous administrative decision and return the case to the subordinate instance for a new hearing of the case fully or partially.

The Ministry may also (on the proviso that certain conditions are fulfilled) reverse the subordinate agency's administrative decision even in the absence of an appeal.

The government has recently submitted a proposal⁴⁹⁶ to the national assembly amending the Broadcasting Act on this point. The proposal entails that:

An independent appeals body is to be established that will handle all appeals concerning administrative decisions made by the MA pursuant to the Broadcasting Act, except licensing of national broadcasting services and of broadcasting distribution infrastructure.

The Ministry may only issue general instructions to the MA, with the exception of individual cases concerning the licensing of national broadcasting services and of broadcasting distribution infrastructure.

The Council of State may in cases involving matters of principle or of major importance to society rescind decisions made by the MA or the appeals body.

2.3.4.4 Switzerland

Quick Facts

Switzerland is a small country with a population of 7.6 million. It is not an EU member; a referendum in 2001 went against opening talks on joining. However, Switzerland has close relations with the European Union on political, economic and cultural matters. These relations are governed by a whole structure of bilateral agreements, concluded over the years between Switzerland and the EC/EU.

The public broadcaster Swiss Broadcasting Corporation (SRG/SSR) operates eight TV channels. Private radio and TV stations operate at a regional level. Television stations from France, Germany and Italy are widely available, thanks in part to the very high take-up of multi-channel cable and satellite TV. According to OFCOM, in 2008, 77% of the population had an internet connection. Source: Country Profile Switzerland, BBC website, May 2010.

Executive Summary: Federal Office of Communications (OFCOM) and Independent Complaints Authority for Radio and Television

General situation

In Switzerland, the body in charge of audiovisual matters is the Bundesamt für Kommunikation (Federal Office of Communications)/ BAKOM (OFCOM). OFCOM is part of the Federal

496 <http://www.regjeringen.no/pages/14411658/PDFS/PRP201020110007000DDDPDFS.pdf>

Department of the Environment, Transport, Energy and Communications (DETEC). It is a converged regulator supervising the electronic communication and it was established in 1992.

The Independent Complaints Authority for Radio and Television (ICA) monitors the content of editorial programmes if there are complaints.

On demand media services are not regulated.

The regulatory bodies currently supervise eight television channels of the public service broadcaster (SRG), 13 local/regional channels with a performance mandate and 91 commercial channels.

Powers

OFCOM has general policy-setting powers, general policy-implementing powers and third party decision making powers in its areas of responsibility. The ICA only has third-party decision making powers.

OFCOM monitors in a systematic way (as well as after complaints) the services operated by licensed operators to assess in particular if they comply with the rules on quotas, advertising and the protection of minors . It also has information collection powers in these areas. The ICA monitors the operators only after complaints.

OFCOM has a range of powers of sanction, ranging from warnings, fines (e.g., in the case of advertising and the protection of minors), and the power to impose penalty payments. Publication of decisions is also possible, but there are no formal rules about the publication in the Act. The ICA has limited modes of sanctioning: warnings and fines can be given out. ICA is in charge of handling complaints from viewers.

The highest decision making organ

For OFCOM, the highest decision making organ is the Director General. The Director General is appointed by the Federal Council, following nomination by the competent minister. The term of office of the Director General is not specified.

The ICA's highest decision making organ is the board. It includes nine members (journalists, lawyers and professors in the media field) and gender parity is required. The decision-making process is based on majority vote, and the presence quorum is six. The chairman and board members are appointed by Federal Council for four years. The term of office is limited to 12 years (in particular cases, 16 years).

Staffing and funding

OFCOM's staff number 275 (26 people for audiovisual matters), and the budget is CHF 82 million (CHF 36 million for audiovisual matters). The annual budget comes from end-user fees (5%), state funding (25%), spectrum fees (37%), authorisation/licence fees (28%), fines (1%) and advertisement and sponsoring concession tax from radio and TV stations (4%). The regulatory body is audited by National Audit Office.

In the ICA besides the board (nine members) a secretariat is operated with two legal advisers (part time) and a part time administrative secretary. The annual budget of CHF 0.5 million is de-

cided by the General Secretariat of the Federal Department of the Environment, Transport, Energy and Communications (DETEC). The ICA has no other revenue, only state funding. The ICA is not audited.

Checks and balances

OFCOM is accountable to the Parliament (reports, parliamentary questions, consultations), to the Government (reports, questions), and to the Minister (consultations, reports). It has to prepare an annual report to the parliament/ministry about financial auditing, performance linked to objectives and clearly defined indicators. Approval of the Federal Finance Administration is required.

Only the Federal Administrative Court has a power to overturn decisions by OFCOM (it is only a legal supervision). Parties to a decision can lodge an appeal against a decision of the regulator (Federal Administrative Court and Federal Court). The Government, the Ministry and the Parliament have the power to give instructions to OFCOM. The Government and administration must act on the grounds of the Constitution and the laws.

The ICA is accountable to Parliament, to the Government, and to the public. It has to prepare an annual report to the federal council about its composition, financial state, complaints proceedings, legal precedents, decisions of the Supreme Court, and international activities. The plaintiff and the broadcasters have the right to lodge an appeal before the Federal Supreme Court. In its area of responsibility, the Independent Complaints Authority is not bound to any instructions from the Federal Assembly, the Federal Council and the Federal Administration.

Procedural legitimacy

OFCOM's projects (except for some decisions, such as those that are against operators) require a public consultation if they have major political, financial, economic, ecological, social or cultural significance or if their enforcement will to a substantial extent be the responsibility of bodies outside the Federal Administration. The consultation period depends on the project; the general target is three months. Participants of the consultation also depend on the project; however, as the consultations are public, everybody may submit an opinion. Consultation responses are published.

The ICA does not organise public consultations.

2.3.5 Selected Third Countries

2.3.5.1 Australia

Quick Facts

Australia has a population of 21.3 million. The national constitution adopted in 1901 combines a UK-style system of responsible government with a US-style federal system of six states (formerly British colonies), plus federal territories. Most powers affecting electronic media are held by the federal legislature.

There are two main national broadcasters in Australia that could be described as public service broadcasters: the Australian Broadcasting Corporation (ABC), which runs national and local public radio and TV stations, as well as Australia Network, a TV service for the Asia-Pacific region; the Special Broadcasting Service (SBS), which broadcasts in many different languages on its radio and TV networks. Commercial TV enjoys the lion's share of viewing and revenue. The main commercial TV operators are the Seven Network, Nine Network, Ten Network, Foxtel, and Austar. Source: Country Profile Australia, BBC website, June 2010.

Executive Summary: Australian Communications and Media Authority – ACMA

General situation

In Australia, significant powers relating to the regulation of audiovisual media are reserved to the responsible government minister, currently the Minister for Broadband, Communications and the Digital Economy. In the last 20 years, the legislature has incrementally increased governmental powers of regulation over audiovisual media, at the expense of the Australian Communications and Media Authority (ACMA) and its predecessor bodies.

The ACMA has various limited powers of regulation of audiovisual matters. In broad terms, however, the ACMA is often officially described as an 'enforcement' or 'implementation' body.

Apart from the key role of the responsible government minister, a number of functions that would typically be exercised by the audiovisual media industry regulator in a number of other countries, are in practice exercised in Australia by the Australian Competition and Consumer Commission (ACCC). The ACCC is considerably larger than the ACMA. With regard to audiovisual media, it has a role in relation to matters which are regarded as economic regulation. It has some powers affecting the granting and renewal of spectrum and other licences. It takes the prime role in relation to other matters, such as addressing competition concerns in the industry and protecting consumers from misleading advertising.

The ACMA was established in its current form on 1 July 2005, but it is the successor of a number of bodies with a similar role; starting with the Broadcasting Control Board, which was established in 1949. It is a statutory authority and exists as a distinct legal entity.

Powers

The ACMA describes itself on its website as 'the government body responsible for the regulation of broadcasting, the internet, radio communications and telecommunications'.

The ACMA has general powers of monitoring the industry and administering the licensing system. The legislation, gives the ACMA a number of specifically-prescribed powers to address issues in the audiovisual media industry, rather than a general mandate.

The ACMA's role in relation to the regulation of the public service broadcasters is negligible, its main role being to hear unresolved complaints and report them to parliament without any enforcement.

As for the regulation of content on commercial TV, the ACMA has a number of limited powers. For most issues relating to content regulation, various self-regulatory codes are established by industry bodies under the relevant legislation; the ACMA's role is to determine,

before initially registering those codes, whether the rules set out in them meet specified criteria (in particular, relating to ‘community standards’ set) out in the legislation so as to determine whether to register them. The ACMA can establish standards of its own initiative, if the self-regulatory codes do not satisfy the relevant statutory criteria. The ACMA has specific powers to establish its own content-related codes in only two areas: programmes for children and Australian content in program services.

There is a process for the ACMA, if it is established that a licensee has not complied with a code, to initiate a process of formal and informal measures, some of which may ultimately involve monetary and civil penalties (although this is rare), or suspending or cancelling a licence, which has not happened to date.

The highest decision-making organ

The highest decision making organ of the ACMA is the Authority, which is composed of a chairman and, currently, seven other Members. It has the power to take decisions on all regulatory matters within its area of responsibility. Authority decisions are made by consensus, although formal voting is possible, with a quorum of four members.

The chairman and members are appointed by the executive government for a term (or terms) that may not exceed ten years. These appointments follow, in recent practice, a selection process, based on applicants responding to a national advertisement for the post, a selection panel procedure involving a panel appointed by the government minister and nomination by the minister. There are no prescribed selection criteria, for example in relation to professional experience, that candidates for these posts must meet.

The chairman is prohibited from holding any other office during his term, unless special ministerial approval is obtained. As for other board members, part-time members may hold other offices, but the deputy-chairman and other full-time members may not, unless they obtain the special approval of the chairman. Senior ACMA staff are also prohibited from holding any other office, unless they obtain internal ACMA approval.

There are various rules in place covering the chairman, board members and ACMA staff to avoid conflicts of interest during the term of office and after (ie, restrictions on employment with regulatees).

There are rules enabling the chairman, individual board members or the whole board to be dismissed by the minister, on specified grounds, but this issue has not arisen since the ACMA was established.

Staffing and funding

The ACMA has 647 staff (614 full time equivalents). The majority of these staff are occupied in telecommunications and radiofrequency spectrum issues rather than broadcasting.

The annual budget of the ACMA is determined by the national parliament. The current budget is \$A102 million. There is no legislative process for this procedure yet.

Checks and balances

The ACMA is obliged to provide annual reports to the national parliament and the minister regarding its performance, including financial performance. It is also subject to an annual audit by the Australian National Audit Office.

Decisions of the ACMA are subject to review by the courts and, in some cases, appeal to the Administrative Appeals Tribunal. The overall power of the responsible government minister to issue directions to the ACMA in relation to broadcasting matters is limited by the requirement that those directions should be general in nature (ie, not in relation to particular cases) and must be made public. The minister's various specific powers of initiation, authorisation or approval of the ACMA action are not subject to this requirement.

Procedural legitimacy

ACMA is required to engage in a public consultation process prior to adoption of decisions relating to Imposition/variation of a program standard, Imposition/ variation/ revocation of a licence condition or registration of a code of practice.

2.3.5.2 USA

Quick Facts

The US has a population of almost 315 million. It is the most highly-developed mass media in the world. Its media content has a global audience. In the US, mass take-up of pay cable and satellite TV predominates. It also has significant national free-to-air TV networks: ABC, NBC and CBS. Around 72% of the population have an Internet connection. Source: Country Profile US, BBC website, June 2010.

Executive Summary: Federal Communications Commission (FCC)

General situation

The key body tasked with regulating the communications industry in the US is the Federal Communications Commission (FCC), which was established in 1934. The Federal Trade Commission (FTC) also has a role, albeit very limited, in relation to the regulation of advertising.

In the past, the FCC regulated broadcast content in the public interest, because broadcast signals were considered to be scarce (due to spectrum constraints) and readily available to all for free. These rationales for the regulation of broadcast content have eroded in recent years as the vast majority (possibly around 90%) of consumers now choose to subscribe to pay TV services via cable or satellite, so capacity is not a material issue and the content is only available to those who exercise the choice to pay to access it. The first amendment to the US constitution, which prohibits restrictions on free speech, also significantly limits the scope for regulation of broadcast content.

Audiovisual media regulation in the US has, therefore, essentially moved away from content regulation and focuses on regulation of pricing and access issues. There is also no direct

regulation of content for on-demand services. The only remaining exceptions are children's programming and political advertising, which the FCC can regulate, regardless of delivery method.

Powers

The FCC has broad policy formation and implementation powers in relation to broadcast (but not on-demand) content and broadcast advertising (only in relation to children's programming and political advertising).

For the reasons outlined above, however, the scope of the powers of the FCC to regulate audiovisual media content is actually very limited. In particular, the FCC does not have the powers to regulate most of the types of content that are subject to regulation in the EU under the AVMS Directive. For example, there is no broadcast content regulation in the US of major sporting events, short news reports, hate speech (any such speech could only be challenged in the courts on an *ex post* basis and taking account of the wide scope of the free speech protection under the first amendment to the US constitution).

The FCC does have powers to regulate children's programming and political advertising. General advertising, however, is subject only to *ex post* regulation (by the FTC, or the Food and Drug Administration in relation to food and drug advertising), for the benefit of consumers who have been deceived by false advertising.

In relation to children's and political advertising, the FCC sanction powers include the imposition of a fine; there is no set maximum or minimum fine, but fines take account of precedent and the economic condition of the party being fined. The FCC also has the power to suspend or revoke a relevant licence.

The highest decision-making organ

The highest decision-making organ of the FCC is the board of commissioners. This is composed of five commissioners, including a chairman. It has the power to take all decisions within its area of responsibility. Decisions of the FCC are taken on the basis of a majority vote of the commissioners.

All commissioners are appointed by the president of the US and are subject to confirmation by the US senate (the higher house of the legislature). The chairman of the board of commissioners is appointed by the president of the US (no confirmation by the senate is required for this appointment, as the senate will already have confirmed the individual in question as commissioner). The appointment of commissioners and chairman of the board of commissioners is for five years. The appointments take place on a staggered basis, however, which reduces the likelihood that any one president will be able to appoint all commissioners. The appointment of commissioners may be renewed indefinitely for commissioners, but there is no renewal of the term of the chairman, although the chairman may be reappointed as a commissioner.

There are no legally mandated requirements that must be met for candidates wishing to become FCC commissioner or chairman.

During their term of office, the chairman and other board members of the FCC are subject to rules preventing them from having industry connections while serving the FCC. On the other hand, however, it is expected that they will have political affiliations; the only relevant restriction is that no more than three commissioners can be from the same party. Also, there are no restrictions affecting what they may do once they have left the FCC.

The entire board cannot be dismissed. There is a procedure for dismissals of individual board members but there does not appear, to date, to have been any instance of dismissals from the board of commissioners. Any such dismissal would have to be enacted by the president and evaluated by the Senate in accordance with full impeachment procedures.

Staffing and funding

As of 2008, the FCC had a total staff of 1,800. This figure includes personnel engaged on tasks other than the regulation of audiovisual media.

The FCC submits an estimated budget, on an annual basis, to US Congress (legislature), which then approves it or returns it for alteration and re-submission. The budget for fiscal year 2010/11 is \$352.5 million. The vast majority of this budget (\$351.5 million) derives from authorisation/licence fees paid by operators.

Checks and balances

The FCC publishes an annual report to the US government on its work and finances. Also, the FCC is subject to audit by the Government Accountability Office or the Office of the Inspector General, both federal government agencies, on a semi-annual basis or on the basis of a demand by congress (the legislature) or executive arm of government.

All decisions of the FCC are subject to appeal through the US court system. The US courts have full powers to overturn FCC decisions.

Procedural legitimacy

All FCC policy-making decisions and some of its dispute resolution decisions are subject to requirements of prior public consultation. In 2009, for example, the FCC held 309 such public consultations and, in 2008, the figure was 353.

Also, all FCC policy-making decisions and dispute resolution decisions must be published and must be reasoned.

2.3.5.3 Japan

Quick facts

Japan has a population of 127 million. Its broadcasting scene is advanced and vibrant, with established public and commercial outlets competing for audiences.

The public broadcaster is NHK, which also runs national radio networks. Most of NHK's funding comes from the licence fees paid by viewers. Many millions of viewers subscribe to sat-

ellite and cable pay TV. Digital TV switchover – terrestrial and satellite – will be completed in 2011. Source: Country Profile Japan, BBC website, August 2010.

Executive summary: Ministry of Internal Affairs and Communications (MIC)

General situation

In Japan, the body in charge of audiovisual matters is the Ministry of Internal Affairs and Communications (MIC), in particular, its Information and Communications Bureau (there is not an independent regulator in Japan). The MIC has competences in audiovisual content, transmission and distribution aspects as well as in spectrum. It is also the authority responsible for electronic communications.

The current ruling party, the Democratic Party of Japan (DPJ), has been keen to set up the “Japanese version of the US Federal Communications Commission”, an independent regulator that would oversee the communications and broadcast sectors. Meetings to discuss such a regulator started in December 2009 and are expected to continue for about one year.

Powers

The law establishing the MIC states that the ministry is responsible for the administration of the ICT which includes the promotion and regulation of electronic communications, broadcasting and spectrum management, enforcement as well as research and development.

(Broadcasting programming is mainly governed through industry’s self-regulation).

The law does not provide for the establishment of a monitoring authority. However, the MIC may require information for the purposes of law enforcement, and regulatory action is expected to be taken on an *ex-post* basis. In response to the Kansai Telecasting Corporation (KTV) scandal in 2007 (in which KTV faked scientific data concerning a food product largely known by Japanese), the MIC sent a warning to the TV station but it decided not to revoke the channel’s licence (which the ministry could have done at its own discretion).

A special committee on ethics (the BPO – Broadcasting Ethics and Program Improvement Organisation) was set up in 2003. The BPO was initially established to handle complaints from viewers but its powers have evolved and it now conducts investigations into human rights infringements as well as falsified data produced by TV channels. Based on the findings it collects, the BPO issues recommendations to broadcasters or the industry in general.

The highest decision making level and rules against conflict of interest

The highest level decisions are taken by the minister, not by a decision making organ.

Rules against conflicts of interest apply during the minister’s term of office only (no such rules exist during the appointment process or after the minister’s term of office). The minister must:

- not occupy a position in a profit making organisation or in a public interest corporation;
- refrain from dealing with marketable securities or investing in real estate;
- disclose the assets held by his/her spouse and children;

- not organise excessively large gatherings such as parties for political fund raising that would attract public attention.

Staffing and funding

The total staff of the MIC numbers 5,238 people, among which, 279 are part of the Information and Communications Bureau.

The annual budget of the MIC is decided by the Diet by the end of March (start of the fiscal year). In 2008, the MIC budget request for ICT was above ¥103.5 billion (out of which ¥67.36 billion derived from spectrum fees).

Checks and balances

The MIC is subject to a yearly external auditing by the Board of Audit (the board does not belong to any ministry and is independent from the cabinet).

It is also accountable for its work to:

- parliament, through answers to parliamentary questions and submission of policy evaluation reports (all ministries must conduct policy evaluation through reports that are submitted to the Diet);
- the government as a whole, through mutual coordination and liaison among the administrative bodies;
- specific ministries, including to the MIC itself (to its Administrative Evaluation Bureau) through the submission of policy evaluation reports; and
- the public at large, through disclosure for example of policy evaluation reports. Although not required by law, the MIC also publishes a white paper each year for the general public.

Decisions by the MIC taken in relation to the enforcement of the rules listed in the AVMS directive can be cancelled by the Radio Regulatory Council (an advisory body of the MIC) and the Tokyo High Court. However, these entities cannot take a new decision on the behalf of the ministry (they can only send it back to the MIC for a new decision).

Regardless of an appeal lodged against a decision only the prime minister can overturn a decision taken by the MIC.

Procedural legitimacy

The MIC is obliged to carry out public consultations when drafting a number of decisions such as administrative orders, orders established pursuant to acts and rules, review standards, etc. It consults all interested parties for a period of over 30 days.

In the past five years, the ministry carried out 21 public consultations on issues such as programming, distribution, privacy and pluralism.

Only ministerial ordinances must be published by law and they must be motivated.

2.3.5.4 Singapore

Quick Facts

Singapore is a very prosperous high-tech city-state. It has a population of 4.7 million, which inhabit a very small area (660 sq km).

Singapore's media environment is highly regulated and censorship is common. Singapore Press Holdings and MediaCorp (which is owned by a state investment company) dominate the media scene. The two companies merged two newspapers and four TV channels in 2005. SHP continues to operate 17 newspapers independently of MediaCorp. MediaCorp wholly owns and runs four other TV channels. As for the internet, those who post political material on the internet are expected to register with the authorities. Source: Country Profile Singapore, BBC website, November 2010.

Executive Summary: Media Development Authority (MDA)

General situation

All seven linear TV services in Singapore are wholly-owned by a government-owned company. There are also six non-linear commercial services and five commercial IPTV services; the latter have been licensed and launch is pending.

The Media Development Authority (MDA) regulates all media in Singapore, with minor exceptions. Unusually, it also has a role as a promoter of media. It was formed in 2003 by the merger of Singapore Broadcasting Authority, the Films and Publications Department and the Singapore Film Commission. The MDA is a separate legal entity, which reports to the responsible government minister.

Advertising is regulated by the Advertising Standards Authority of Singapore (ASAS), an association of media associations which has been set up on a non-statutory basis. The MDA is a council member of ASAS and provides input on a range of matters, including on potentially harmful content, public interest or social norms.

The MDA Act, which governs the establishment and powers of the MDA, states that the MDA is a separate legal entity. However, the government minister has the power to override decisions of the MDA and to give it instructions (in line with the MDA Act).

Powers

The MDA has general policy-setting and policy-implementing powers with regard to TV content, films and internet content. Under the Broadcasting Act, for example, the MDA can regulate content, for the protection of minors; it can also regulate the provision of a right of reply. On issues concerning taste, the MDA usually consults specific committees set up for this purpose. These committees are appointed by the MDA and have an advisory nature.

In the event of operation of a broadcasting service without a valid licence, the MDA can impose fines up to \$200,000 or three years jail with a daily \$10,000 fine. Also, the MDA may impose fines of up to \$50,000 for infringements of the rules relating to protection of minors and for breaches of content standards, including advertising standards.

The highest decision-making organ

The highest decision-making organ of the MDA is its board, which has 16 members. According to the 2008/9 annual report of the MDA, five of these board members are representatives of government, six are industry representatives and the other six are experts.

The chairman of the MDA is appointed by the government minister, for a term of three years. This term may be renewed for an unspecified number of times. The other members of the MDA board are also appointed, again for renewable three-year terms, by the minister. There are no formal requirements that must be met by an individual in order to be appointed to the board of the MDA.

There are no specific rules to address potential conflict of interest issues that might arise with the government, political parties or industry in the appointment process of a board member/chairman. This is unsurprising, given the political context. There are, however, rules in the MDA Act to deal with possible conflicts of interest during the term of office of an MDA board member or chairman. When there is industry-sensitive information, sometimes it is not shared even with members of the board (other than the chairman). Once the chairman or board member has left the MDA, he/she is free to work for former regulatees, subject to a cooling-off period.

The relevant legislation permits the minister to remove the chairman or member of the board of the MDA. A board member can be dismissed “in the interest of the effective performance of the functions of the Authority under this Act, or in the public interest”. In practice, however, the issue of dismissal has not arisen, as those appointed to the board are carefully vetted in advance.

Staffing and funding

The MDA currently has a staff of 283.

According to the 2008/9 MDA annual report, its budget is \$218 million. This budget includes media industry promotion costs.

Checks and balances

The MDA is required to issue an annual report to the parliament and to the responsible government minister. The minister must accept the report before it goes to parliament and is made publicly-available. The reports on the work done by the MDA on controversial areas such as censorship is missing from the post-2004 annual reports as the MDA’s emphasis was on classification and co-regulation. In the 2008/09 annual report, the word censorship is completely absent.

Also, the annual accounts of the MDA must be audited by external auditors and the government’s auditor general in order for them to be accepted.

The responsible minister has the power to give instructions to the MDA, provided such instructions are not inconsistent with the relevant legislation (the MDA Act). It is also the minister who hears appeals on decisions of the MDA. The Minister’s decisions can be subject to judicial review by courts.

Procedural legitimacy

The MDA has a cluster of ten advisory committees on all types of media, which are consulted on specific issues. According to internal MDA guidelines, the relevant advisory committee must be consulted before “judgment-call” decisions are taken.

Consultation responses are not published, although the MDA provides summaries.

For industry-sensitive issues, the relevant industry players are consulted; the regulator publishes a summary of the consultation responses, but this is essentially a closed-door process.

There is no requirement, as such, to publish reports and decisions of the MDA; as a matter of practice, however, this is usually done, following a thorough vetting. For “operational” decisions — e.g. the age rating for a controversial movie — the decision is given to the applicant. The ratings are published on the MDA’s website.

2.4 Issue Summaries

In the following chapters the results of the questionnaires⁴⁹⁷ are presented in summarised overview, analysed by issue. The subchapters reflect the structure of the questionnaire given to the county correspondents and the national regulatory authorities.

2.4.1 General information

2.4.1.1 Market data

The tables cover data on the number of audiovisual media services that are supervised in each of the countries (radio has been excluded). The information covers the number of linear commercial services, the number of public service channels and the number of non-linear commercial services.

2.4.1.1.1 Linear services (commercial and public)

For all groups of countries there are very large differences in the number of services that are licensed/supervised. Liechtenstein and the regulator for the German community of Belgium only have one service to supervise, while some regulators supervise vast numbers of services, such as Ofcom in the UK that supervises 905 commercial services and AGCOM in Italy, supervising 889.

It would be meaningless to calculate the average number of services per countries, given these vast differences.

Obviously, there are fewer public service channels. Some countries have more than ten (Denmark (18), Germany (23), Poland (25), Switzerland (21), Turkey (21) and the UK (12)). In The Netherlands, there are 343 public service channels.

⁴⁹⁷ The information contained in the issue summaries is valid as on May 1. The summaries were produced on the basis of this information in September 2010. Correction, comments and remarks of the responsible governments and ministries and regulatory bodies made in November 2010 and February 2011 have been included.

In all the other countries, there are fewer than ten and usually less than five and Liechtenstein and Luxembourg have none.

2.4.1.1.2 Number of non-linear commercial services

In 27 out of the 43 countries covered, no non-linear commercial services are currently being supervised.

In the remaining countries, the number of services that are supervised is quite low, except for Germany (around 300 services) and Italy (93). Then the figure drops to around 20 for Belgium and well under ten for each of the rest. Japan supervises 22 services. In the US, the FCC does not regulate the content side of on-demand services.

2.4.1.2 Supervision of audiovisual media service providers

In general (the detail is explained under the following sections) we see that in 39 of the European countries the main supervisory functions are carried out by a separate media authority. In only three of the countries are these functions not carried out by a separate authority (see below).

2.4.1.2.1 Single v. multiple authorities

2.4.1.2.1.1 Member States

In some Member States and for some of the areas covered by the AVMS Directive, other authorities (than the main supervisory authority) are also involved. This is in particular the case for the right of reply, hate speech, advertising and the protection of minors, where other authorities can also be involved.

- Right of reply: in seven countries (or regions) questions dealing with the right of reply are covered not by the main supervisory authority but by courts (Austria, Flemish speaking community of Belgium, France, Germany, Poland and the Netherlands⁴⁹⁸). In Denmark, the Press Council supervises the application of the right of reply.
- Hate speech: in six countries, the following authorities are involved: Finland (courts), Germany (the KJM, the Commission for the protection of minors and the media); the Netherlands (courts), Slovenia (Courts and the media inspector within the ministry of culture), Sweden (the Chancellor of Justice), Lithuania (ZEI, the Journalists' Ethics Inspector).
- Advertising: in five countries other authorities are involved, sometimes in combination with the main regulator: Finland (Consumer Ombudsman), UK (the ASA, the Advertising Standards Authority), Portugal (the Directorate general of the consumer and Commission for the application of financial penalties in economic advertising matters), Sweden (the Consumer Protection Agency and the Medicinal Products Agency), Netherlands (the Advertising Code Foundation, and the Advertising Code Commission).

498 According to data submitted by APEK in February 2011, in Slovenia, courts deal with the right of reply.

- Protection of minors. In four countries, the following authorities are also involved in combination with the main authority: Germany (the KJM, the Commission for the protection of minors, in Lithuania (the ZEI, the Journalists' Ethics Inspector), the Netherlands (Nicam, through a co-regulatory regime, the Netherlands institute for the classification of audiovisual media), Sweden (the Chancellor of Justice).

Lastly, three of the Member States have regional media authorities to deal with. Belgium has three (the VRM, the CSA and the MRat), Germany has 14 state media authorities to deal with commercial services and Spain has a new national authority (CEMA, the national authority, CoAN – the Audiovisual Council of Navarre, CAC – the Audiovisual Council of Catalonia, CAA the Audiovisual Council of Andalucia).

2.4.1.2.1.2 Candidate and potential candidate countries

In all the candidate and the potential candidate countries, except for Serbia, a single supervisory body is in charge of supervising the application of the media legislation for commercial and public service televisions.

In Serbia, the situation is a bit more complicated as, the ministry of culture is in charge of some aspects (right of reply and information duties).

2.4.1.2.1.3 EFTA countries

In Norway and Switzerland, there is more than one authority involved in the supervision of the areas that are covered in the AVMS Directive. In Norway, the Ministry of Culture is involved on advertising questions with the Media Authority, courts are involved on hate speech matters and the Press Council is responsible for the right of reply. In Switzerland, the Independent Complaints Authority for Radio and Television is responsible for advertising⁴⁹⁹, for questions linked to the protection of minors and for hate speech. Courts are responsible for the right of reply.

2.4.1.2.1.4 Selected third countries

In Australia, the Communications and Media Authority is in charge of most of the aspects that are covered by the AVMS directive, where they exist. The minister is in charge of setting the events of major importance but the authority monitors and investigates compliance. In the US, similarly, the FCC is mainly responsible but the Federal Trade Commission and the Bureau of Consumer Protection and the Food and Drug Administration are also involved for some aspects. In Japan, the Ministry of Internal Affairs and Communications is the only entity that is involved and in Singapore, the Advertising Standards Authority is responsible for advertising, while the Media Development Authority is responsible for the rest.

⁴⁹⁹ According to information from the ICA in February 2011 the ICA is not responsible for advertisement, but for the editorial programme that includes surreptitious advertising.

2.4.1.2.2 Supervision of commercial (linear) broadcasters and of public service broadcasting

We have gathered information on whether public service broadcasters are supervised in a different manner from commercial broadcasters in relation to the rules contained in the AVMS directive. We see that in the vast majority of countries, the supervision of PSBs is carried out in the same way.

2.4.1.2.2.1 Member States

In the vast majority (22 out of 27) of the Member States, all broadcasters (i.e. commercial and PSBs) are supervised in the same manner. In five countries (the Czech Republic, Denmark, Estonia, Germany and Slovenia), different supervisory authorities are involved.

- In the Czech Republic, the Broadcasting Council (i.e. the regulatory authority) is involved on all the aspects of supervision but the Czech Television Council is also involved on accessibility questions.
- In Estonia, where there is no separate regulator, the ministry of culture and the broadcasting council of the public service broadcaster have joint supervision powers. The ministry of culture is mostly competent, except for information requirements, accessibility, and cooperation with other regulatory bodies and the Commission. These are areas where the Estonian Public Broadcasting Council is responsible.
- In Denmark, we see that whereas, the regulator (RTB) is competent to supervise the application of the rules in relation to commercial broadcasters, this responsibility is shared with the ministry of culture, in relation to PSB.
- Germany is different in that the internal supervising bodies of the public service broadcasters are exclusively competent to supervise the application of all the areas listed in the AVMS directive. The media authorities have no competence in the area.
- In Slovenia, for commercial and public service broadcasting, there appears to be a shared responsibility of supervision by the regulator on the one side, and the ministry of culture on the other. The programme Council of RTV Slovenia is responsible with the ministry of culture in the area of accessibility for instance.⁵⁰⁰
- In Luxembourg, there is not public service television.

2.4.1.2.2.2 EFTA countries

In the EFTA countries, three elements are noteworthy:

- In Iceland, the regulator (the Broadcast Licence Committee) is not responsible for the supervision of the rules in relation to PSB. This function is carried out by the ministry of education, science and culture.

⁵⁰⁰ According to data submitted by APEK in February 2011, APEK is responsible for the supervision of commercial and public broadcasters of compliance of the rules on quotas, advertising and the protection of minors. But the programme Council of RTV Slovenia is responsible with the ministry of culture for aspects relating to accessibility.

- In Norway, the PSB is not supervised in quite the same manner as the commercial broadcasters, as the ministry is involved in aspects where, in relation to commercial broadcasting, only the Media Authority is involved (e.g. the promotion of European works).
- In Liechtenstein there is no PSB.

2.4.1.2.2.3 Candidate and potential candidate countries

In this group of countries, the only specific feature is that Turkey's regulator RTUK is not responsible for the supervision of PSB. In all other countries, the supervision of PSB is carried out in the same manner as for commercial television.

2.4.1.2.2.4 Selected third countries

In Australia, the supervision of PSB differs from that of commercial television because the regulator (the ACMA) is involved, but on the certain issues, such as the respect of the promotion of certain types of works, the public service broadcasters themselves are only involved.

In the US, Japan, and Singapore, PSBs are supervised in the same manner as other broadcasters.

2.4.1.2.3 Supervision of on-demand services

At the time we gathered the national information, seven Member States (Cyprus, Hungary, Latvia, Lithuania, Poland, Portugal and Slovenia) had still not transposed the AVMS Directive. In all the countries that have transposed the directive, the UK stands out because it has mandated ATVOD, under a co-regulatory regime with Ofcom to supervise the way in which on-demand audiovisual media service providers comply with the legislation. In all the other countries, the same authorities that supervise commercial broadcasters are in charge of non-linear services.

2.4.1.3 Converged regulators

2.4.1.3.1 EU Member States

Among the Member States, only Finland (FICORA), Italy (AGCOM) and the UK (Ofcom) have converged regulators with competences that cover audiovisual content, transmission, distribution and spectrum issues, and sometimes other sectors such as post or publishing. In Hungary, a converged regulator is in the process of being created. In Slovenia⁵⁰¹, it could also be argued that APEK is a converged regulator, but it could also be argued that it provides support for two independent councils, one for electronic communications and the other for broadcasting.

In the majority of the Member States, the media regulators do not have competences in other fields than those that are directly related to the media sector.

501 According to APEK, it is a converged regulator.

2.4.1.3.2 Candidate countries

In candidate countries there are no converged regulators.

In Croatia, the agency for electronic media is competent for audiovisual content and transmission aspects only (distribution aspects are not part of its competences). In the former Yugoslav Republic of Macedonia, the competences of the Broadcasting Council do not cover on-demand services. In Turkey, the media regulator, RTÜK, has competences for content, distribution and transmission (in cooperation with the Information and Communication Technologies Authority).

2.4.1.3.3 Potential candidate countries

Among the potential candidate countries, the only converged regulator is the Communications Regulatory Agency in Bosnia Herzegovina. It has competences on audiovisual content, transmission and distribution aspects, spectrum and electronic communications. It does not have competences on other sectors such as energy or post.

2.4.1.3.4 EFTA countries

In the EFTA countries, Switzerland (Federal Office of Communications) has a converged regulator.

2.4.1.3.5 Selected third countries

Australia (the Australian Communications and Media Authority) and the US (the Federal Communications Commission, FCC) have converged regulators. In Japan, all sectors (electronic communications and media) fall under the remit of the Ministry of Internal Communications. The current ruling party, the Democratic Party of Japan, is keen to set up the “Japanese version of the US FCC”. Meetings to discuss such a regulator started in December 2009.

2.4.1.4 Staff and overall budget

It is difficult to gather comparable data for the countries on the staff and overall budget of the regulatory authority, especially for their tasks in relation to the areas that are covered in the AVMS Directive. Very often a breakdown was not possible by sector where the regulator supervises other areas than those strictly related to the audiovisual sector. Also, as seen above, the size of the market is very different.

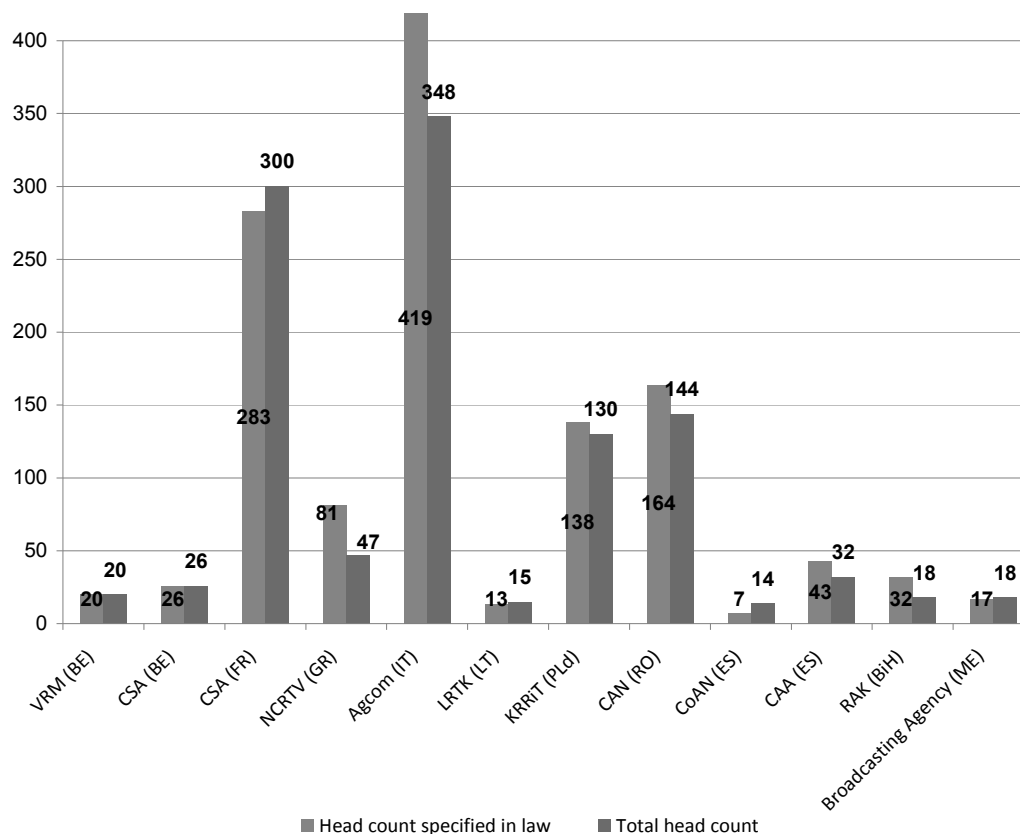
2.4.1.4.1 Staff

For the staff there are three groups of countries:

- countries (12) where the law specifies the number of overall staff (but where the regulator carries out other functions, there does not seem to be a breakdown by area);
- countries (9) where the law only specifies the number of board members but not the overall staff count;
- countries (20) where nothing is specified in the law.

For the countries where the overall count is specified, in six cases out of 14⁵⁰², the actual head count is lower than what is specified in the law.

Fig. 1: Specified and actual number of staff



2.4.1.4.2 Overall budget

We have gathered data on the whether the annual budget is foreseen in the law and on the current annual budget. Again, we have no comparable data on the breakdown in relation to the areas that are covered in the AVMS directive.

We have two groups of countries, where either the budget is foreseen in the law, or it is not. The largest group of countries is where the budget is not foreseen. Countries where the budget is foreseen are illustrated in the table below, with the difference between the foreseen budget and the actual budget.

Tab. 4 Overview on foreseen and actual budget

Budget foreseen in law	Amount specified	Current annual budget ⁵⁰³
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502 For Albania, the current head count is 54, the total number of staff is specified in the law, but this data is missing.

Austria (KommAustria)	€2.86m	€2.430m
Greece (NCRTV)	€3.12m	€3.03m
France	€34.78m	€35m
Malta (Broadcasting authority)	€606,000	€606,000
Poland (KRRiT)	€4.16m	€6.37m (has other sources of income)
Slovenia (APEK)	€1.2m (linked to AVMS)	€1.98m
Spain (CAC)	€10.67m	€10.67m
Spain (CoAn)	€0.64m	€0.64m
Spain (CAA)	€7.9m	€7.9m
Turkey (RTÜK)	€71.9m	€34.3m
Australia (ACMA)	108m (\$) (€77m)	108m (\$) (€77m)

In the following countries, no data was available on the current annual budget: Austria (BKS), Belgium (MRat), Cyprus, Denmark, and Liechtenstein.

On the current annual budgets, there are very large differences. The regulators with the smallest budgets are Albania (KRRT - €780,000 for 2010), CoAN in Spain (€645,000), the Broadcasting Authority of Malta (€606,000), LRTK in Lithuania (€485,000), the National Broadcasting Council of Latvia (€332,000). Ofcom in the UK has the largest budget with €170.93m. Agcom in Italy has a budget of €65m.

2.4.2 Institutional Framework

2.4.2.1 Legal status of supervisory authorities and independence as a value

In this set of tables, we have gathered information on the form taken by the regulatory body, whether it is a separate legal entity and if it is not, to what entity it belongs to. We have also asked whether independence is implicitly or explicitly recognised as a value in the legal framework.

We see that in 39 of the European countries, only four stand out because the media regulatory functions are not carried out by a separate legal entity, or because the authority in charge is under the direct authority of the ministry (Estonia, Norway and Switzerland). In Luxembourg the main functions are carried out by the ministry, with the exception of a very few areas, where the CNP, the Conseil National des Programmes, has advisory and monitoring functions. The situation is much more contrasted in the third countries we cover.

503 The figures are usually for 2009, the detail is specified in the table.

2.4.2.1.1 Member States

It is quite striking to see that in the Member States; only Estonia and Luxembourg do not have a separate regulator to supervise the commercial audiovisual sector. In Estonia, a special department within the ministry of culture is in charge.

In all the other Member States, separate legal entities have been set up which take different administrative forms, according to the national legal traditions.

In all Member States, independence is implicitly or explicitly recognised as a value in the legal framework. Independence is recognised usually in the respective broadcasting acts, but also in higher sources such as in the constitutions of the countries concerned. This is the case in particular for Austria, Germany, Greece, Malta and Portugal.

Estonia is a country where this notion of independence is not recognised, because the regulatory and supervisory functions are carried out by the ministry and not by a separate regulatory authority.

In Luxembourg the CNP, the Conseil National des Programmes, has advisory and monitoring functions but independence is recognised as a value.

2.4.2.1.2 EFTA countries

For the EFTA countries, we have a split situation, with two countries (Iceland and Liechtenstein) having systems that resemble what we see in the member States, i.e. separate authorities with independence clearly recognised as a value in the legal texts.

Two countries are different. The Norwegian authority (the Media Authority) is clearly under the authority of the ministry of culture, which can reverse the decisions of the authority (except for decisions on media ownership and media concentration). Independence is recognised implicitly as a value to a certain extent, and in particular or matters relating to media ownership. The other particular situation is Switzerland, where OFCOM is not a separate legal entity but part of the Swiss Confederation. Independence is not recognised as a value, neither implicitly or explicitly.

2.4.2.1.3 Candidate countries and potential candidate countries

The three candidate countries and the five potential candidate countries have separate authorities and independence is recognised as a value in the broadcasting acts.

2.4.2.1.4 Selected third countries

We have a number of different models in the selected third countries we have chosen.

In Australia, significant powers relating to the regulation of audiovisual media are reserved for the responsible minister. Successive governments have frequently increased governmental powers of regulation over audiovisual media, through incremental legislative amendments.

The Australian Media and Communications Authority (AMCA) has narrow powers on audiovisual matters. In broad terms, however, the AMCA is generally described as the 'enforcement' and 'implementation' body of the executive government. It is a separate legal entity but is controlled by the government as if it were a government department, for most areas,

(staff, budget, etc.) but not for decisions affecting the content of the programs. Independence as a value is neither implicitly nor explicitly recognised as a value in the legal framework. In many areas, the minister has the power to instruct the ACMA.

In the US, the Federal Communications Commission (FCC) takes the form of an independent government agency which means that it operates under its own statute, in terms of its functional and structural characteristics. But the agency is part of the US federal government, and it is therefore not a separate legal entity. Independence is explicitly recognised as a value in the legal framework (but the term only has a functional or structural meaning).

In Japan, there is no separate authority, and the Ministry of Internal Affairs and Communications supervises the sector. Obviously, independence is not recognised as a value.

Singapore's Media Development Authority is a separate legal entity. Independence is not recognised as a value, neither implicitly, nor explicitly in the legislative framework.

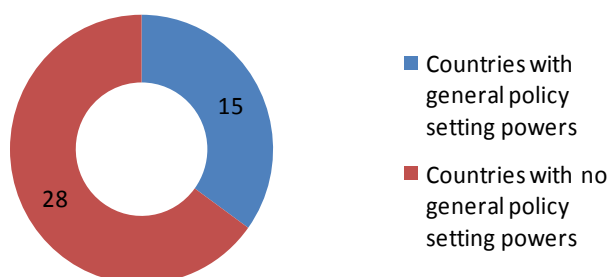
2.4.3 Powers of the regulatory bodies

2.4.3.1 Regulatory powers

2.4.3.1.1 General policy-setting powers

In two third of the countries surveyed (43), broadcasting regulatory authorities do not have general policy setting powers, i.e. the power to decide on the general orientation of the rules to be followed (for instance the power to decide on the amount of quotas).

Fig. 2: General policy-setting powers



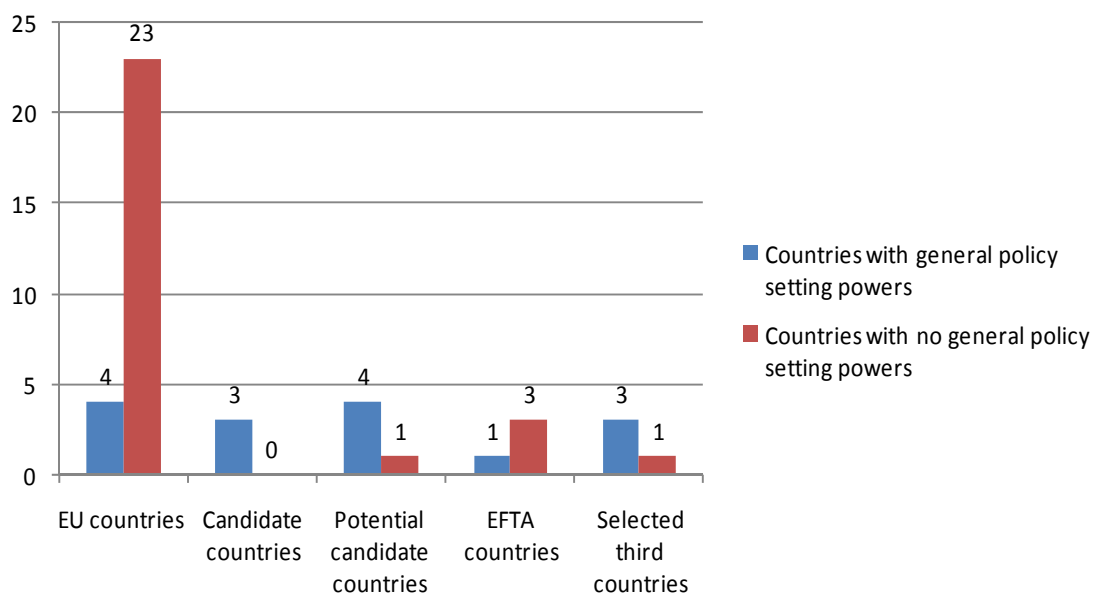
In EU and EFTA countries, only the regulatory authorities in Ireland, Latvia, Romania, the UK and Switzerland have these powers.

In Estonia, Norway and Slovenia, it is the ministry of culture that holds this power, but these are countries where the regulator is either non-existent (Estonia) or where the ministry plays a very large role in the supervision of the media sector.

Where this power exists, in most cases, it only covers limited areas. In Latvia, it covers for example the development of the electronic market and the determination of the public service remit. In Romania, it includes designing the strategy for the development of the media industry.

In candidate countries, potential candidate countries and selected third countries, most regulatory authorities seem to have general policy setting powers.

Fig. 3: General policy setting powers by category of countries



General policy setting powers broadly cover the possibility to decide on the setting up the national broadcasting strategy, quotas, licensing regime, media ownership, advertising, content and privacy standards, the protection of minors, fees and the determination of the public service remit.

In many countries with these powers, powers derive from the general broadcasting legislation and/or the constitution. In Kosovo⁵⁰⁴, Montenegro and Singapore powers also come from specific legislation.

All authorities having general policy setting powers have made use of these powers in the areas covered by the AVMS Directive within the past five years.

2.4.3.1.2 General policy implementing powers

In all countries, except Estonia, Norway and Australia (and Andalucía) broadcasting authorities do have general policy implementing powers (i.e. those which relate for example to how quotas should be applied and monitored).

In Estonia and Norway, this power is exercised by the ministry of culture. In Slovenia, it is exercised by both the broadcasting authority and the ministry. In Australia and Andalucía (Spain), the authority has only third-party binding policy application powers (see below).

Spain is a particular case, as it has created a new national authority (which has not yet started its activities) with no implementing powers while three communities (Catalonia, Navarra and

504 Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo

Andalusia) have created their own authorities among which two of them (Catalonia and Navarra) hold these powers.

Similarly to general policy setting powers, implementing powers mainly come from general broadcasting law, except in Kosovo, Montenegro and Singapore where the powers also come from specific legislation.

Powers mainly cover supervision and monitoring of compliance with rules in the AVMS Directive (e.g. on quotas, advertising, sponsorship, protection of minors...). It also covers defining licence criteria.

Almost all authorities having general policy implementing powers have made use of these powers in the areas covered by the AVMS Directive within the past 5 years. The exceptions are Liechtenstein (due to the absence of TV station at that time), Denmark (because the new powers of the authority only entered into force in 2009), Croatia⁵⁰⁵ and Japan (there are no justification for these two last countries). There is no information available for Iceland.

2.4.3.1.3 Third party binding policy application powers

Third-party binding policy application power (i.e. the power to take in a specific case a decision binding on specific operators) is a power that is exercised in all countries.

In Estonia and Slovenia, this power is exercised by the ministry of culture.

The powers cover the granting of licences (including cancelling, revoking, transferring such licences), assigning radio frequencies, issuing warnings, deciding on appointments of managers of PSBs, adopting sanctions (see below), dealing with appeal procedures, etc.

There are more countries (than for the policy setting and implementing powers – see above) where third-party binding application powers derive from specific legislation.

Almost all the authorities concerned have made use of these powers in the areas covered by the AVMS Directive within the past five years. Exceptions are Denmark (because the new powers of the authority were not yet enacted); Spain (as the newly created national authority was not yet set up); and Liechtenstein (due to the absence of TV station at that time).

2.4.3.2 Supervision and monitoring powers

The level of supervision powers range from systematic monitoring (the most complete power) to monitoring only after complaints.

2.4.3.2.1 Systematic monitoring

Systematic monitoring (in the sense that the authority supervises the conduct of actors according to a set strategy and/or methodology) is a power that is exercised by authorities in almost all EU

505 After the completion of the data collection the study team has been informed by the European Commission that this situation has recently changed in Croatia. The regulatory body has recently adopted four bylaws implementing the AVMS.

Member States (except Romania and Sweden) and candidate countries. In Spain, it is only exercised at the community level (i.e. Navarra) that the power is exercised.

Systematic monitoring also takes place in potential candidate countries, except in Kosovo. For Bosnia, the law does not specify anything on this point⁵⁰⁶. In Serbia, systematic monitoring appears to only be used during election campaigns.

In EFTA countries and selected third countries, about half the authorities exercise this power: Norway, Switzerland (for EFTA countries) and Australia and Singapore (for third countries).

In some of these countries, the power does not apply to certain sectors: protection of minors (Austria, Netherlands and Singapore), quotas (Andalucía, Turkey, and Serbia), and advertising (Andalucía, Singapore).

Systematic monitoring actually takes place except in three countries: Denmark and Spain because the authorities' new powers and legislation were not yet in force (see above) – and in Bosnia, where it has not been used due to a lack of technical and human resources.

2.4.3.2.2 Ad-hoc monitoring

Ad-hoc monitoring is also carried out by most authorities. In Spain the power is only exercised at community level by the authority of Navarra. The other Spanish authorities (at national and community level), and the authorities in Iceland and Japan only have information collection powers (see below). The Liechtenstein authority has can only monitor after complaints.

In some countries where ad-hoc monitoring exists, some sectors surveyed are not covered: quotas (in Austria, Netherlands, Serbia, USA and Singapore), protection of minors (Netherlands) and advertising (Australia). One of the reasons for this is that the sector is not in the scope of responsibilities of the authority (for example quotas in Serbia)

2.4.3.2.3 Information collection

The authorities in most countries have information collection powers except apparently in Catalonia and Andalusia (no explanation is given), and in Liechtenstein where the broadcasting authority only monitors after complaints.

2.4.3.3 Sanction powers

Sanction powers include: issuing warnings or formal objections, imposing lump sum fines, requiring the publication of decisions in the media and imposing penalty payments in the case of non-compliance with decisions.

All authorities have the power to adopt sanctions. In Estonia sanction powers are exercised by the ministry of culture. In Slovenia, sanction powers are split between the authority (warning, revocation of licence, penalty payments) and the ministry of culture (warning, lump sum fines).

⁵⁰⁶ According to the regulator, this means that the regulator can decide what kind of monitoring will be carried out.

2.4.3.3.1 Warning/formal objections

All authorities have the power to issue warnings or formal objections. In Estonia, this is exercised by the ministry of culture.

They have all made use of this power in the past five years, except in Liechtenstein (no cases occurred) and in Spain (newly created national authority).

2.4.3.3.2 Lump sum fines

The power to impose fines (lump sum) is also granted to all authorities, except for a few ones, i.e. Denmark, Finland, Slovenia (where the power is exercised by the ministry of culture), Sweden, former Yugoslav Republic of Macedonia and Japan. In Estonia the power exercised by the ministry of culture.

Lump sum fines have been imposed by all the authorities concerned in the past five years, except in Ireland (the power was not available to the previous authority), and Liechtenstein (no cases occurred).

2.4.3.3.3 Publication of decision in the media

The power to impose on broadcasters the obligation to publish decisions in the media exists in all of the countries surveyed, except Estonia, The Netherlands, Poland, Slovenia, Croatia, Iceland and Switzerland. In a small number of countries, the power is limited to specific sectors, such as the protection of minors (Italy, Slovakia, and Sweden). In Spain this power does not exist in Andalusia.

Furthermore this sanction does not apply to quotas in Germany, Greece, Italy, Slovakia, Turkey, Serbia, the USA and Singapore. It does not apply to advertising in Italy, Slovakia, Australia, and to the protection of minors in Navarra (Spain).

The power has not been used in the past five years in Belgium (Flanders and the German Community), Denmark (where the new authority's powers are not yet in force), Germany, Latvia, Lithuania, Spain and Liechtenstein. The main reason is that there have been no cases.

2.4.3.3.4 Suspension/revocation of licences

The authorities' power to revoke or suspend a licence exists in a large number of countries, except in Estonia, Finland, Romania, Sweden, former Yugoslav Republic of Macedonia, and Switzerland. In Liechtenstein the power is exercised by the parliament and/or the government and in Estonia by the ministry of culture. In Spain, it does not exist in Andalusia.

For some countries, only repeated or serious violations can justify a suspension or revocation of the licence (Austria, Bulgaria, Czech Republic, Slovenia, Spain (Catalonia and Navarra), Luxembourg and Iceland). In Albania, suspension or revocation can take place only after warnings have been sent and fines imposed. In Lithuania, such decisions need to be approved by a court.

2.4.3.3.5 Penalty fines

A dozen of authorities do not have the power to impose penalties in case of non-compliance with their decisions. These countries are Austria, Czech Republic, Denmark, Estonia (in this case the ministry of culture), Hungary, Ireland, Italy, Latvia, Lithuania, Albania, Serbia and Iceland.

In Spain, authorities in the autonomous communities do not have the power to issue penalty fines. In Belgium it is the German Community that does not have the power.

Penalty fines have not been imposed in the past five years in Ireland because the previous authority did not have that power and the new one has not yet made use of it. There were no cases of non-compliance with authorities' decisions in France, Malta, Slovenia, Spain, UK, Croatia, Montenegro, Liechtenstein, Japan, Switzerland and Singapore. No data are available for Cyprus.

Two countries (Cyprus and Turkey) have in the range of sanctions available to their authorities the power to impose prison sentences.

There is no mention in the countries surveyed of the possibility of adopting alternative (non-repressive) sanctions, such as functional separation.

2.4.3.4 Complaints handling

There are procedures for dealing with complaints coming from viewers in all countries except in Lithuania and Norway. In Spain, procedures only exist at community level.

In a few countries there is more than one complaint handling body: Austria, Estonia, Germany, Slovenia and Singapore.

In a large number of countries, procedures are formal (i.e. set out in legislation), while in others they are less formal (i.e. consisting in the sending of an email or a letter through the authority's website (such as in Finland).

In other countries there are different procedures for specific cases, e.g. the right of reply and of rectification (Portugal), protection of minors (Slovenia).

2.4.4 Internal organisation and staffing

2.4.4.1 Highest decision-making organ - composition

In the large majority of countries, the highest decision-making organ of the regulatory body is a board, composed of between three and 77 members.

There are only six countries where the regulatory body is governed by an individual. This is the case for Austria (for some competences of KommAustria which are granted to individual board members), Finland, Slovenia (APEK, the Agency for Post and Electronic Communication), Sweden (the Swedish Radio and TV Authority, which has now been replaced by the RTA), Norway (the Norwegian Media Authority) and Switzerland (OFCOM).

The composition of the highest decision-making organ varies widely between countries.

In most countries, it partly consists of experts; in at least 11 European countries, there is a requirement to have representatives of civil society. In a smaller number of countries, it is partly composed of industry representatives (e.g. Ireland, possibly Spain, the UK for ATVOD and

Montenegro). In several countries, it includes members appointed by the president (e.g. Bulgaria, France, Poland), the government (e.g. in many German Länder, Lithuania, Malta, Romania, Montenegro, Iceland) and/or the parliament (e.g. Bulgaria, the Czech Republic, Estonia, most German Länder, France, Lithuania, Poland, Portugal, Romania, Albania, Kosovo⁵⁰⁷). In most of these instances, these board members have the obligation to act independently but this is not explicitly foreseen in all cases.

In at least one country (Belgium, French Community), representatives of government and administration attend the meetings of the boards of two of the CSA committees, although they are formally not board members.

In three of the four selected third countries the regulatory authority is governed by a board. In Australia and the USA, there is no representative of civil society, government, parliament or industry in the board, while in Singapore, the board includes representatives of the government and of industry. In Japan, where there is no independent regulator and where it is the ministry of Internal Affairs and Communications that is in charge of audiovisual matters, the minister is the highest decision-making organ.

2.4.4.2 Highest decision-making organ - competences, decision-making process and transparency

2.4.4.2.1 Power to determine internal organisation and procedures

In all the countries where information has been provided (i.e. 21 countries), the highest decision-making organ of the regulatory body has the power to determine its own internal organisation and procedures.

This power is however sometimes subject to some restrictions - in three countries, an external approval is necessary. In Greece, the internal regulation must be ratified by a ministerial act. In Slovakia, the internal procedures must be approved by a parliamentary committee and the speaker of the parliament. In Spain, CEMA has the power to define its own internal rules of procedure and organisation but this must be approved by the government.

2.4.4.2.2 Power to decide on human resources

A large majority of regulatory bodies (in countries where information has been provided) have the power to decide on human resources.

This is however clearly not the case, in Austria, Finland (where the Ministry of Transport and Communications decides), and Greece (where the Minister of Economy and Finances decides).

2.4.4.2.3 Transparency of decision making process

Responses differ greatly on the transparency of the decision-making process.

507 Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo

In a majority of countries, the minutes and agendas of the meetings of the highest decision-making organ of the regulatory body are not published. The only Member States where they are published are Bulgaria, the Czech Republic (minutes only), Estonia (not all decisions), Bavaria (agendas only), Greece (agendas only), Hungary, Latvia (agendas only), Lithuania, Romania, Slovakia and the UK. In candidate countries, minutes and agendas are published in two (out of three) countries (Croatia and the former Yugoslav Republic of Macedonia). However, in one of these two countries, the content of the minutes is said to be very poor. Among the potential candidate countries, the minutes and agendas of meetings are published in Kosovo only and are available on request in Montenegro. Minutes and agendas are not published in EFTA countries.

In some countries, no decisions are systematically published. This situation happens for instance in Cyprus, the Czech Republic, Denmark⁵⁰⁸, Poland, Turkey, Bosnia and Herzegovina⁵⁰⁹. Sometimes, some information is available through press releases or press conferences (e.g. the Czech Republic, most German Länder, Greece and Latvia).

Responses to the open question on whether the decision-making process is transparent often reveal a lack of transparency (e.g. Belgium, Flemish and German Communities, Cyprus, France, Spain, Serbia, Iceland, Norway, Luxembourg for the CNP), or partial transparency only (e.g. Czech Republic, Denmark, Estonia, Finland, Latvia, Poland, former Yugoslav Republic of Macedonia, Liechtenstein). Meetings of the highest decision-making organ of the regulatory body are open to the public in a very small number of countries, such as Lithuania and Malta (on request).

In the selected third countries, the decision-making process was reported to be transparent in the USA and Australia, although in the latter agendas and minutes of ACMA are not published. The decision-making process is not transparent in Singapore.

2.4.4.3 Highest decision-making organ – appointment process

There are many different models on the nomination/appointment process of the members of the highest decision-making organ of the regulatory authority. In some countries, the appointment stage is preceded by a nomination stage. In some of these instances, the appointment stage is a formal step as the appointer is bound by the nominations, while in other cases the appointer can ignore the nominations.

2.4.4.3.1 Member States

No model is predominant in the European Union.

508 The Danish Agency for Libraries and Media informed us in February 2011 that the RTB publishes their annual review of the DR and the eight TV2 regions public service contracts and as well as the TV2 public service permit. Furthermore they also systematically publish all decisions on advertisement.

509 The regulator points out in February 2011 that although, decisions are not systematically published, some information is available through press releases.

Countries with no nomination stage

The Member States where there is no nomination stage include Belgium, Cyprus, Denmark, Finland, many German Landers, the Netherlands, Poland, Slovenia and the UK.

In the large majority of these countries, the appointing authority is the executive body (i.e. minister/government/council of ministers): Belgium (except for one of the committees of the CSA, French Community), Cyprus, Denmark, Finland, the Netherlands, Slovenia, and the UK. In others, the appointing authority is the parliament (some German Länder), in others it is the socially relevant groups and the parliamentary groups (some German Länder) and in Poland, it is a mix of parliament and the president.

Countries with nomination stage

In Member States where the appointment stage follows a nomination stage, the bodies involved at each stage vary greatly, as well as the margin of manoeuvre of the appointing authority. The following models exist:

Models with a predominance of the executive

- nomination by the government and appointment by president: Austria,
- nomination by the minister and appointment by the government: Ireland,
- nomination by the prime minister and the opposition and appointment by president: Malta.

Models with a predominance of parliament

- nomination by political parties and appointment by parliament: the Czech Republic,
- nomination by a parliamentary committee or by a minimum number of members of parliament and appointment by parliament: Estonia, Latvia, Portugal,
- nomination by the president of parliament and appointment by the conference of presidents of parliament: Greece.

Models involving both parliament and the executive

- nomination by the parliament and appointment by the president: Italy,
- nomination by the parliament and appointment by the government: Spain (CEMA),
- nomination by the parliament chambers, the government and the president and appointment by the parliament: Romania,
- nomination by the president and parliament and appointment by the president: France,

Models involving civil society and/or relevant professional organisations

- nomination by one or several of the following bodies (e.g. civil society, political parties, professional associations) and appointment by parliament and president: Bulgaria, some German Länder, Hungary,
- nomination by government committees and appointment by president, parliament and professional organisations: Lithuania.

2.4.4.3.2 Other countries

All candidate countries and potential candidate countries have both a nomination and an appointment stages. The appointment is always the responsibility of parliament but the bodies involved in the nomination stage vary among countries.

In EFTA countries, there is a split between countries with or without a nomination stage (no nomination stage in Liechtenstein and in Norway) and differences in the appointing authorities.

In the selected third countries, an executive body always has the decisive say in the appointment process, regardless of the situation of Japan where there is no independent regulator and where the Ministry of Internal Affairs and Communications is in charge of audiovisual matters. In the USA, the appointment of board members by the president must however be confirmed by the Senate.

2.4.4.4 Term of office and renewal

The term of office of the members of the highest decision-making organ of the regulatory body typically ranges between two and seven years.

The only exceptions are in countries where the highest decision-making organ is an individual (Finland, Norway and Switzerland). Either this individual has a permanent term of office (Norway) or the term of office is not specified (Finland, Switzerland). In Finland, the director general of FICORA stays in office until he retires or resigns. There is however one country where the highest decision-making organ is an individual who has a fixed term of office (Slovenia).

In most countries, the term of office of the highest decision-making organ does not coincide with the election cycle.

Countries where the term of office coincides with the election cycle include: Belgium (Flemish and German Communities, where it is explicitly said that there must be coincidence), Denmark, Estonia (where some members of the board are members of parliament and end their term of office with their parliament membership), Lithuania, Slovenia, Albania, Bosnia and Herzegovina and Serbia, and Iceland.

There are also a number of countries where there is no rule on this question such as Belgium (French Community), Ireland and the UK.

In countries with a fixed term of office, the question of whether members of the board can be renewed is dealt with in very different ways. Often, renewal is possible but is limited to one or two instances. There are however a number of countries where renewal is possible without limitation such as Belgium, Denmark, Estonia and Luxembourg for the CNP.

Some countries allow renewal without specifying if there is a limit to the number of renewals (e.g. Austria, Hungary, Slovenia, Croatia, Serbia) and some say nothing in their law on renewal (e.g. Cyprus).

Countries where renewal is not allowed for board members include: France, Italy, Poland, Portugal, Spain, former Yugoslav Republic of Macedonia and Iceland.

In the selected third countries, the situation is less clear. In Japan, the Ministry of Internal Affairs and Communications is in charge of audiovisual matters. In Australia, nothing is said in the law on the term office and renewals. In the USA, there is a fixed term of five years, which can be

renewed indefinitely for board members. The term of office is staggered so as not to coincide with the election cycle. In Singapore, the term of office is three years (not staggered) and can be renewed but it is not specified how many times.

2.4.4.5 Professional expertise/qualifications

Relatively few countries (e.g. Austria, Belgium, Finland, Hungary and Turkey) have specific and precise requirements on professional qualifications and expertise. In most countries, these requirements, where they exist, are laid down in general terms (typically referring to higher education such as in Bulgaria, or to relevant professional experience, such as in Italy and in Poland) Often the law does not distinguish clearly between educational qualifications and professional expertise.

In a few countries, some members of the board must be qualified as judge. This is the case in Belgium (Flemish Community), in some German Länder and in Sweden.

No requirement exists regarding qualifications and expertise in a number of countries such as some German Länder, the Czech Republic, France, Latvia, Lithuania, Malta, Romania, Slovakia, the UK and Liechtenstein.

Similarly, the four selected third countries do not formally require any specific qualifications and professional expertise for the members of the highest decision-making organ of their regulatory body.

2.4.4.6 Rules to guard against conflicts of interest – Appointment process

In most European countries, there are rules to guard against conflicts of interest at the appointment stage of the members of the highest decision making-organ of the regulatory body. These rules do not always apply to senior staff.

The countries with no specific rules include Belgium, Cyprus, Denmark, some German Länder (for the position of chairman only), Latvia, Iceland, Switzerland and Luxembourg for the CNP.

In countries with specific rules against conflicts of interest, the rules usually cover the whole range of incompatibilities, i.e. with government, parliament, political parties and industry.

However in some countries, the incompatibility rules do not cover the whole range of potential incompatibilities, as illustrated below:

- no rule to prevent conflicts of interest with government: e.g. some German Länder, Ireland, Poland, Slovenia, Spain (CEMA), Turkey, Iceland;
- no rule to prevent conflicts of interest with parliament: e.g. Ireland, Slovenia, Spain (CEMA), Turkey, Iceland. However, the absence of these rules can be offset by the existence of incompatibility rules with positions in political parties.
- no rule to prevent conflicts of interest with political parties: e.g. Estonia, some German Länder, France, Lithuania, Portugal, Slovakia, Slovenia, Spain, Turkey, Norway, Iceland;
- no rule to prevent conflicts of interest with industry: e.g. some German Landers, Ireland, Kosovo, Turkey, Iceland.

In the majority of countries, other offices cannot be held at the same time as the membership of the highest decision-making organ of the regulatory body.

This is not however the case at least in Austria and the Netherlands (as long as there is no conflict of interest), the Czech Republic (provided it is not a public office), Romania (only educational functions can be exercised), Germany, Ireland, Albania, Lithuania, Liechtenstein, Kosovo and Iceland. In a few instances, the ‘other’ activities that members of the highest decision-making organ are limited to scientific, teaching, artistic and literary activities (e.g. Hungary and Poland).

The four selected third countries differ from what can be observed in Europe as only the USA has specific incompatibility rules (limited to the industry).

2.4.4.7 Rules to guard against conflicts of interest – during term of office

In the large majority of countries, the same rules apply as during the appointment stage.

Some countries have additional rules that take the form of:

- rules on confidentiality: e.g. Greece;
- prohibition on carrying out political activities and making political statements on behalf of a party: e.g. Hungary;
- prohibition on working relationships with industry: e.g. Hungary, Italy, Portugal;
- prohibition on receiving instructions or guidelines: e.g. Portugal;
- impartiality duty: e.g. Slovenia, Montenegro.

In three of the four selected third countries, there are also a number of additional rules. In Australia, conflicts of interest that might arise during the term of office must be disclosed to the minister and the other members of the regulatory body. In Japan, the minister in charge of audiovisual affairs has to comply with a code of conduct that prohibits a number of activities, such as having a position in a commercial organisation or a public interest corporation, or the organisation of large gatherings attracting public attention. In Singapore, there are also rules to follow.

2.4.4.8 Rules to guard against conflicts of interest – after term of office

Most Member States do not have rules to prevent conflicts of interests after the term of office of the members of the highest decision-making organ of their regulatory body and of its senior staff have finished. These members and staff can generally be employed by companies regulated by the regulatory body after their term of office, without any restriction.

Rules to guard against conflicts of interest after the term of office exist in Bulgaria, France, Greece, Hungary, Malta, Italy, Latvia, Spain, Portugal and the UK. The minimum cooling-off period is six months (Hungary, UK). The longer one is four years (Italy and Greece for senior staff only).

The same split exists in candidate countries and in potential candidate countries (there are rules only in Croatia, the former Yugoslav Republic of Macedonia, Albania). None of the EFTA countries have this kind of rules in place.

Similarly these rules do not exist in the four selected third countries (except in Singapore, and only in relation to senior staff). Although there is no rule on this topic, a cooling-off period is typically applied in practice in Australia.

2.4.4.9 Rules to protect against dismissal

The large majority of countries have specific rules limiting the possibility for dismissal of the members of the highest decision-making organ of the regulatory body.

The only countries where those rules do not exist are (information is missing for a very small number of countries): Belgium (Flemish Community), Denmark, Estonia, Greece, Sweden, Iceland and Luxembourg (for the CNP). The absence of rules does not necessarily mean that dismissal cannot take place, but more often that the situation is unclear.

In countries with specific rules on dismissal, the dismissal authority is usually the appointing authority. However, in a limited number of countries (e.g. Austria, Bulgaria, some German Länder, France, Hungary), the highest decision-making organ itself has the power to dismiss its members. In Spain, if the dismissal is on the grounds of an offence, it can be ruled by a court only.

Usually, where the grounds for dismissal are listed in a legal instrument, there is some room for the discretion of the dismissing authority. The typical grounds for dismissal that may allow some discretion are: serious breach of duty (e.g. Austria, Portugal, Croatia, Liechtenstein), the request from a board member (e.g. Belgium, Flemish Community) or the ministry (e.g. Netherlands), complaints (e.g. Czech Republic), misbehaviour (e.g. Cyprus, Czech Republic, Ireland, Malta, the UK, Norway), important reason (e.g. some German Länder), conflicts of interest (e.g. Belgium, Hungary, some German Länder, Bosnia and Herzegovina), a 'good cause' (e.g. Lithuania), incompetence (e.g. Netherlands, Slovenia), non-performance of duties (Malta, Croatia), or breach of deontology rules (Belgium, France, Bosnia and Herzegovina).

Typical grounds of a more objective nature are: repeated absence, incompatibility with other positions, criminal prosecution/sentence, prolonged illness/disability, violation of the law, leaving the organisation or group that the member in question is representing, giving incorrect information at the appointment stage.

In the very large majority of countries, only individual members can be dismissed. However, in the Czech Republic, Hungary, Malta, Poland and Portugal, the whole board can be dismissed. Reasons for dismissal of the whole board include: repeated non-approval of the annual report by Parliament (Czech Republic, Poland), repeated serious infringement by the board of its obligations (Czech Republic), failure to grant broadcasting rights (Hungary), and serious irregularities on the functioning of the board (Portugal).

The whole board of the regulatory body can also be dismissed in two of the four selected third countries, Australia and the USA (the question is not relevant in Japan where there is no independent regulatory body and it is the minister who is in charge of audiovisual matters). In Australia, reasons for dismissal of the whole board are unsatisfactory performance for a significant period of time; and failure to compile a corporate plan or to file an annual report.

2.4.4.10 Dismissal before term

Dismissals before the term of office of board members/chairman of the highest decision-making organ of the regulatory body have happened in eleven European countries in the last five years. In a minority of cases, the dismissal was due to an objective reason (e.g. incompatibilities, merger of two media authorities, conflict of interest).

Early dismissals have happened in Belgium (Flemish and German communities), Bulgaria, Germany, Poland, Slovenia, Sweden, the former Yugoslav Republic of Macedonia, Albania, Montenegro and Serbia.

The whole board was dismissed in Poland in June 2010 on the grounds that the National Broadcasting Council (KRRiT) did not exercise its role effectively.

Some of the dismissal decisions have been appealed, for example in Slovenia and in the former Yugoslav Republic of Macedonia.

There has been no dismissal before term in the past five years in the four selected third countries.

2.4.5 Financial Resources

2.4.5.1 Sources of income

Two aspects are important in assessing the funding of regulators. The first is the amount of funding itself - without sufficient finance, the broadcasting regulators cannot carry out their activities. The second is the source of funding. If funding comes exclusively from the state budget for example, this can affect the independence of the regulators.

In the EU Member States and EFTA countries, the most common model of funding the broadcasting regulators is one where the funding comes directly from the state budgets.

In some countries, the budgets of the broadcasting regulators are supplemented by other sources, such as the end-user broadcasting licence fee, the revenues from technical fees or application fees, taxes on private broadcasters' income, donations and grants.

Austria, Germany, Ireland, Italy, Lithuania and Slovenia are countries where the regulators are mainly funded by sources other than the state budget. The regulators in Germany and the regulator responsible for the supervision of private broadcasters in Austria are allocated part of the revenue from the broadcasting licence fees collected from the end-users. In Germany, this is the main source of funding, while the regulator in Austria also relies on funding from the annual revenue-based fees paid by broadcasters. In Ireland, Italy and Lithuania, the revenue-based fees paid by broadcasters represent the main source of funding for the regulators. In Slovenia, the converged regulator mainly relies on spectrum fees, revenues from one-off authorisations and several other sources, including notification fees, numbering fees and fees paid by providers of postal services.

The situation in the EU candidate and potential candidate countries is more diverse. In Croatia, the regulator's sole source of funding is the revenue-based annual fee paid by broadcasters. In Turkey, in addition to the revenue-based annual fee paid by commercial broadcasters, the regulator also receives allocations from the Assembly budget and the tax on advertising revenue of

private broadcasters. In the former Yugoslav Republic of Macedonia, Albania, and Serbia, the main sources of funding are authorisation fees. In Bosnia and Herzegovina the converged regulator is mainly funded from market surveillance fees paid by telecommunications and broadcasting operators. In Kosovo⁵¹⁰, the funds are allocated from the state budget. In Montenegro, following the adoption of the new law on electronic communications and the transfer of the authority over broadcasting spectrum to the agency responsible for electronic communications, from January 1, 2009 the Broadcasting Agency has no stable and sustainable sources of income.

In Australia and Japan, the broadcasting regulators are financed from the state budget. In the USA, the main source of funding is the authorisation fees paid by broadcasters and to some extent, the annual spectrum fees. In Singapore, the regulator is funded from a number of sources, including part of the end-user broadcasting licence fees, authorisation fees and funds from the state budget.

2.4.5.2 Annual budget

In the majority of the EU Member States and EFTA countries where the budget of the broadcasting regulator is part of the overall state budget, its approval follows the standard procedure where the budget is first proposed by the government and is adopted following the approval of Parliament. In Greece, Italy, The Netherlands, Slovenia, Spain and the UK, the budgets of the broadcasting regulators are only subject to the approval by the government.

In Austria, Germany Ireland and Lithuania, the broadcasting regulators can decide independently on their budgets. In Ireland, however, the specific levy imposed on the industry as part of the regulator's budget is subject to the parliamentary approval.

In Croatia, the regulator's budget is approved by its Council based on the amount of the contributions by broadcasters defined in the law as a specific percentage of their revenue. Also, in the former Yugoslav Republic of Macedonia, the regulator approves its budget in accordance with the broadcasting licence fees and authorisation fees set out in the law. The budget, however, is subject to review by Parliament. In Turkey, the regulator prepares its own budget in accordance with its annual activities and income. In cases where it needs additional funding, the amount required is added to its annual budget document submitted to Parliament. In Albania, Bosnia and Herzegovina⁵¹¹ and Kosovo the budget is approved by the government, while in Serbia and in Montenegro the budget is approved by Parliament.

In the USA and Japan, the budget of the regulator is approved by Parliament, in Australia and Singapore by the government.

510 Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo

511 The regulator clarified in February 2011 that the budget adopted by the council of the CRA is included in the state institution's draft budget which is first approved by the Council of ministers, then by the Parliament assembly for final adoption.

2.4.5.3 Financial accountability – auditing

In most of the EU Member States and all EFTA countries, the broadcasting regulators are subject to regular - typically, annual – external audit. The exception is Lithuania where there is no requirement for regular auditing and it can be decided on the regulator’s discretion. In most of the countries, the external audit is carried out by the national audit office. In Austria, the Czech Republic, Estonia, Portugal and Slovenia, the audit can be performed by a private firm. In Belgium, Germany, Malta and The Netherlands the results of the private audit are reviewed by the body appointed by the state.

In the EU candidate countries, there is a requirement for a regular annual audit by the national audit body. In the former Yugoslav Republic of Macedonia, the audit must also be performed by a private firm.

Of the potential candidate countries, in Albania, there is no regular audit requirement, and in practice it is performed by the state office every three to four years. In Bosnia and Herzegovina, Serbia and Kosovo the regular annual audit is performed by state audit offices. Alternatively, the regulator in Bosnia and Herzegovina⁵¹² may also engage an independent auditor. In Montenegro, the audit is performed by a private firm.

In the USA and Japan, the audit is performed by the state audit bodies – in Japan once a year and in the USA twice a year. In Australia and Singapore, the annual audit is performed by both the state office and by a private firm.

2.4.6 Checks and Balances

2.4.6.1 Formal accountability and reporting obligation

Most of the audiovisual media regulators in the countries covered by this study are formally accountable to Parliament:

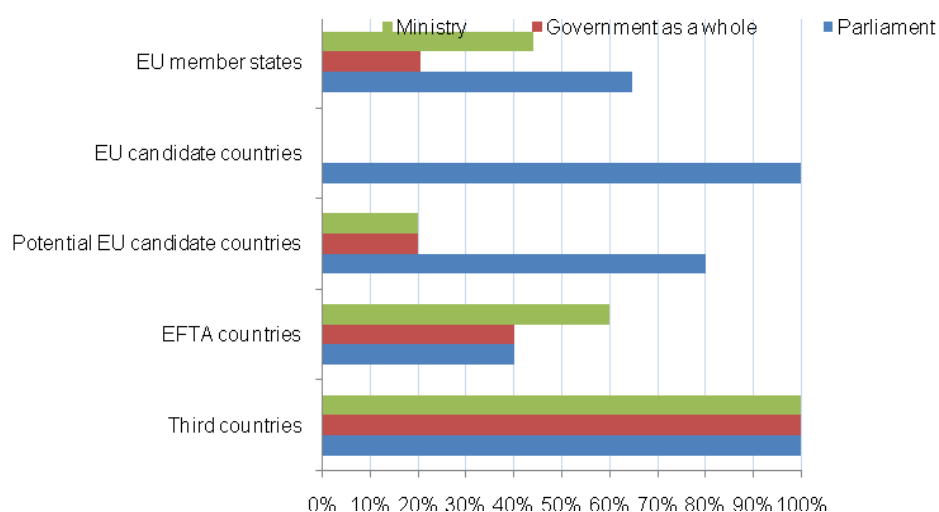
- 65% of regulators in the 27 EU Member States;
- all regulators in the three EU candidate countries;
- 80% of regulators in the five potential EU candidate countries; and
- 40% of regulators in the four EFTA countries; and
- all regulators in the four third countries.

It can be noted that none of the regulators in the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) is under a formal obligation to report to Parliament.

It appears that the regulators in the third countries (Australia, Japan, Singapore, the USA) are under a wider scrutiny than their peers in the EU as, in addition to Parliament, they are also accountable to their governments as a whole and certain individual ministries.

512 The regulator notes in February 2011 that in accordance with the Communications Law, the CRA should be subject to two obligatory audits each year – state audit and an independent audit. In practice however, the CRA, being included in the budgetary laws of the country, is subject only to the state audit, and under those regulations, it would be impossible to have the financial resources for an independent audit approved in the budget.

Fig. 4: Share of regulators⁵¹³ in each group of countries accountable to different bodies



Typically the accountability towards Parliament is in the form of an annual report that includes information on the regulator's activities and finances.

Parliament's formal approval of such a report is required in:

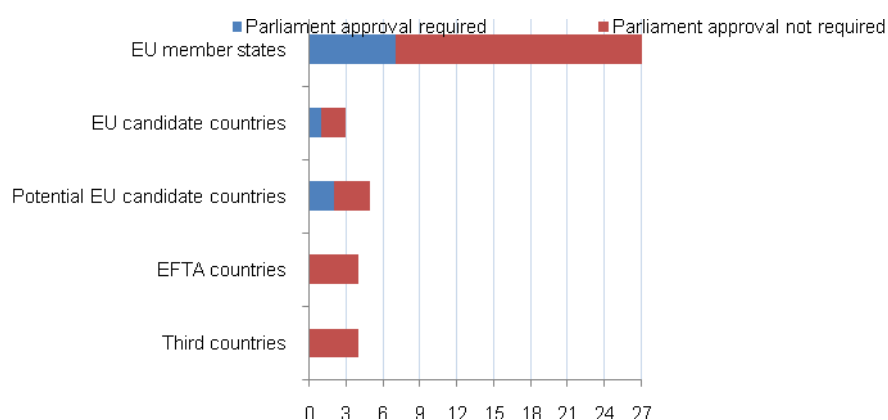
- seven EU member states (Cyprus, Czech Republic, Hungary, Malta, Poland, Romania and Slovakia) out of 27;
- one EU candidate country (Croatia) out of three;
- two potential EU candidate countries (Albania, Kosovo⁵¹⁴) out of five;
- none of the four EFTA countries; and
- none of the four third countries.

513 For the purpose of this graph, the following applies:

In a given country, there may be more than one national regulator. In such cases, each regulator is counted separately. Countries with regional regulators with the same (or similar) accountability obligations across the regions count as national regulators. Therefore: (1) Belgium (three regional regulators) counts as one regulator, because the accountability obligations are the same across the regions; (2) Spain (four regional regulators) counts as two separate regulators, because there are two pairs of regions where the accountability obligations are the same; and (3) Germany counts as two separate regulators because there are two different types of regulators at the regional level (regional Media Authorities and regional Broadcasting Councils), but the accountability obligations, respectively, are the same (or similar) across the regions.

514 Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo

Fig. 5: Requirement for formal Parliament approval of a periodic report submitted by regulator



In practice, Parliaments have formally disapproved reports in two EU Member States (Czech Republic, Poland) and in two potential EU candidate countries (Albania and Kosovo⁵¹⁵).

In the Czech Republic this resulted in the dismissal of the whole Broadcasting Council.

In Poland, in 2008 both the lower house (Sejm) and the Senate did not approve the annual report of the National Broadcasting Council (KRRiT), but the president did not support this. Earlier, in 2004 the Sejm did not approve the annual report but it was accepted by the Senate. Therefore, in practice, the term of KRRiT has never been shortened as a result of the rejection of its report by Parliament.

2.4.6.2 Performance auditing

In most of the countries covered by the study there are rules in place requiring an external performance audit⁵¹⁶ of audiovisual media regulators.

Such an audit is not required in:

- eight EU Member States (Czech Republic, Denmark, France, Greece, Italy, Luxembourg, Slovenia⁵¹⁷ and Spain) out of 27;
- one EU candidate country (Croatia) out of three; and
- two EFTA countries (Liechtenstein and Norway) out of four.
- one third country (Japan) out of four, where it seems the auditing is done internally by MIC.

In most of the cases where the requirement exists, the audit takes place periodically (usually annually).

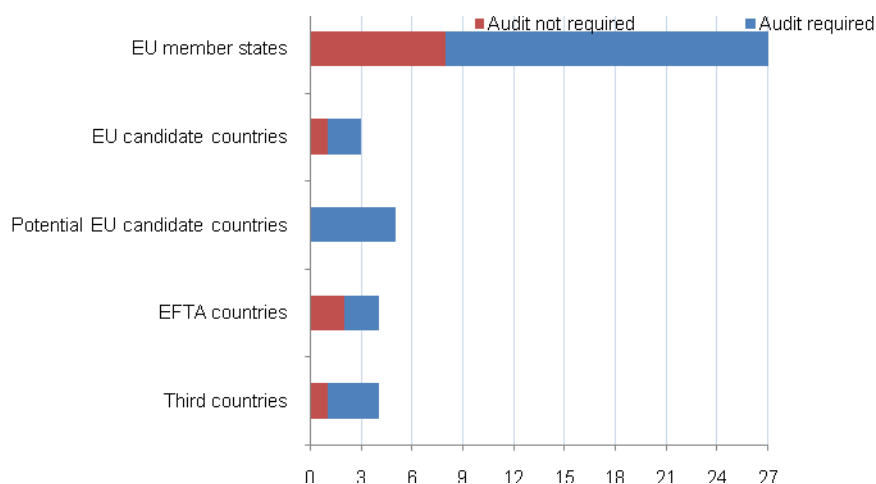
515 No further information is available on the consequences of this in Albania and Kosovo.

516 Financial accountability/audit (see Table 27) is not covered here.

517 However, in Slovenia some of APEK's operations/actions might be subject to occasional audit by the Court of Audit, depending on the case selected by the Court.

In some countries the legal requirement exists, but the audit may have not been carried out recently or at all (Slovakia⁵¹⁸, Serbia and Kosovo). It seems that in Serbia the audit has not been carried out because the State Audit Institution lacks resources.

Fig. 6: Requirement for performance audit by external auditor (public or private)



2.4.6.3 Power to overturn/instruct

Only in a few countries can bodies other than courts (or other special appeal bodies) can overturn decisions of the audiovisual media regulators.

Tab. 5 Countries where other instances than courts (or other special appeal bodies) can overturn regulator's decision

Country	Regulator	Who can overturn?
EU Member States	Belgium (Flemish speaking)	VRM, management board Ministry
	Belgium (French speaking)	CSA, bureau and CAC & CAV Government Via an appeal lodged by a government representative
	Belgium (German speaking)	MRat-REG Government Limited to violations of legal acts.
	Denmark	RTB The Minister of Culture. But only in specific cases where the minister has delegated a specific task to the RTB outside the specified and defined area for the RTB.
	The Netherlands	CvdM Minister If he/she is of the opinion that the authority's tasks are seriously neglected.
EU candidate countries	None	Not applicable

518 By the Supreme Audit Office. (Annual audit of the budget report by the Ministry of Finance is taking place).

Potential EU candidate countries	None	Not applicable	Not applicable
EFTA countries	Liechtenstein Norway	Media commission The Media Authority Norwegian Post and Telecommunications Authority	Government Ministry
Third countries	USA Japan	Federal Communications Commission MIC	US president, with special order US congress, with a new statute or alteration to existing statute Prime minister

There are more cases where other authorities, usually a minister/ministry or the government, have powers to give instructions to the regulatory body.

Tab. 6 Countries where other authorities (excluding courts) can instruct regulators

Country	Regulator	Who can instruct?
EU member states		
Belgium (Flemish speaking)	VRM, management board and chambers	Government At least indirect influence via management contract.
Belgium (French speaking)	CSA bureau	Government At least indirect influence via long-term financial contract.
	CSA CAC & CAV	Government At least indirect influence via long-term financial contract. Can also ask CAC to investigate issues or ask CAV to give advice.
Belgium (German speaking)	MRat-REG	Government Can point MRat-REG to infractions on legal framework. Also indirect influence via negotiations on budget or staff.
Bulgaria	CEM	National Audit Office No further information available.
Cyprus	Cyprus Radio-Television Authority	Minister of interior, government Instructions of general nature in cases that are necessary for the general interest.
Denmark	RTB	The Minister of Culture But only in specific cases where the minister has delegated a specific task to the RTB outside the specified and defined area for the RTB.
Finland	The Finnish Communications Market Authority	Ministry The Ministry of Transport and Communications sets the goals for FICORA.
France	CSA	Prime minister He can request a second deliberation on some very specific issues which have frequency implications or involve local governments
Ireland	Broadcasting Authority of Ireland	Minister May confer on the authority by order any additional functions as he/she may deem necessary.
Italy	Agcom	Parliament

Country	Regulator	Who can instruct?
Luxembourg	CNP	Minister Can request topics to be included in the agenda of the CNP to that the CNP is required to deal with it.
Malta	Broadcasting Authority	Parliament, the President of the Republic No further information available.
Slovenia	Ministry of Culture – Inspectorate for Culture and Media	Minister Limited to legal instructions or instructions aimed at efficient work of the body, and exclude instructions on political grounds.
Sweden	Swedish Broadcasting Commission (until July 31, 2010)	Minister/ministry, government Only in terms of general frameworks, not specific cases.
UK	Ofcom	Minister, government In relation to what can and cannot be advertised.
EU candidate countries	None	Not applicable
Potential EU candidate countries	Albania	KKRT Government By national strategies on radio and television broadcasting.
EFTA countries	Liechtenstein	Media commission Government Can force the media commission to omit something or to act in order to fulfil legal tasks and respect laws.
	Norway	The Media Authority Information not available The authority cannot be instructed when evaluating the public service broadcaster remit, and in decisions according to the Act on Ownership in Media.
	Switzerland	OFCOM Minister/ministry, government, Parliament Further information not available.
Third countries	USA	Federal Communications Commission US president, with special order. US congress, with a new statute or alteration to existing statute.
	Japan	MIC Prime minister Further information not available.
	Singapore	Media Development Authority Ministry/minister Provided instructions are not inconsistent with relevant legislation.

2.4.6.4 Appeal instances

With few exceptions, decisions taken in relation to the enforcement of the rules listed in the AVMS directive (eg. non-compliance with quota requirements if binding, advertising, protection of minors, etc.) can be appealed to courts of law.

In Estonia there is no appeal procedure in place for the decisions taken by the regulator (i.e. the Ministry of Culture).

In Iceland, rulings of the Broadcast Licensing Committee are final administrative rulings that cannot be the subject of an administrative appeal, subject to certain exceptions: decisions regarding the pricing of exclusive broadcasting rights to important events and decisions imposing fines can be appealed to the court.

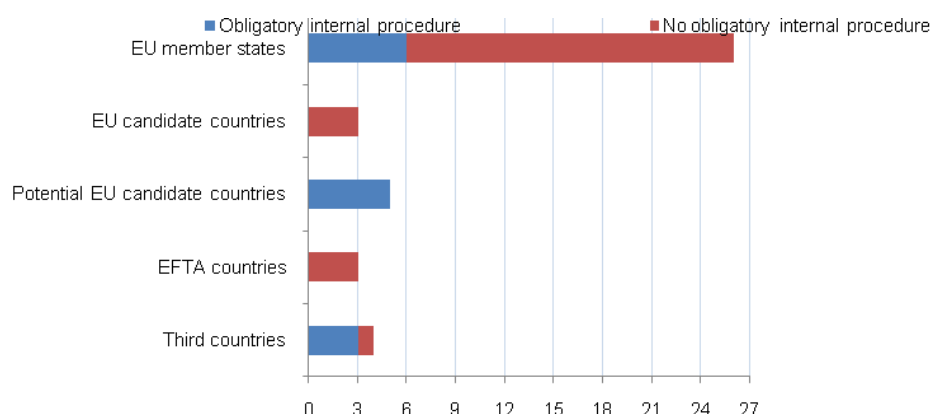
In Germany, there is no external appeal possibility against the decisions of the Broadcasting Councils⁵¹⁹ that supervise public service broadcasters (PSBs). Broadcasting Councils are internal bodies of PSBs.

In Singapore, appeals against the decisions of the Media Development Authority are decided by the minister. There is no external appeal route at all against the decisions of the Advertising Standards Authority.

Internal appeal procedures need to be followed before an external recourse in:

- six EU Member States (Belgium – French speaking⁵²⁰, Malta, the Netherlands, Slovenia⁵²¹, Spain⁵²², Sweden⁵²³) out of 26 where an appeal is possible⁵²⁴;
- none of the three EU candidate countries;
- all five potential EU candidate countries (Albania, Bosnia and Herzegovina, Montenegro, Serbia, Kosovo);
- none of the three EFTA countries where an appeal is possible⁵²⁵; and
- three third countries (Japan, Singapore⁵²⁶, USA) out of four.

Fig. 7: Obligatory internal appeal procedure required before external appeal



2.4.6.5 Does regulator's decision stand pending the appeal?

In the clear majority of cases, as a default, the regulator's decision stands pending the appeal body decision unless the appeal body suspends it.

The decisions do not stand pending the appeal in:

519 Regional, except for nationwide PSB ZDF.

520 Before administrative and civil appeals to courts.

521 Appeal against Ministry of Culture – Inspectorate for Culture and Media, not in the case of APEK..

522 Appeals against CoAN, CAA.

523 Depending on the claim.

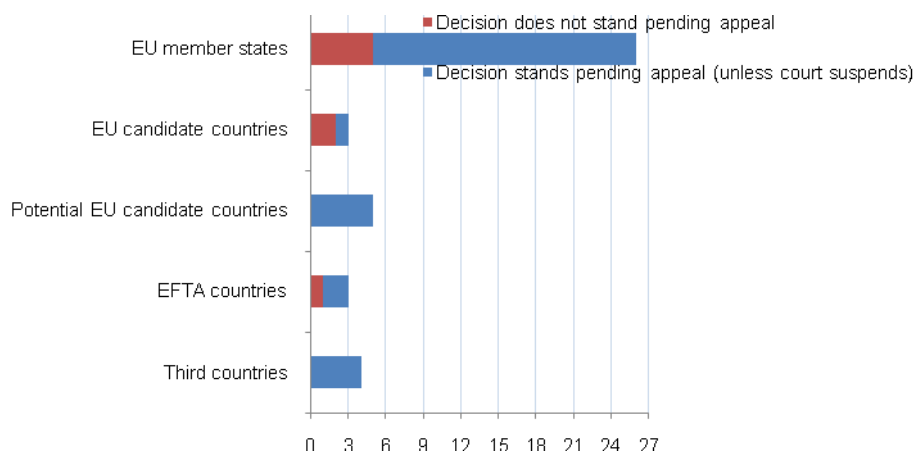
524 External appeal not available in Estonia.

525 External appeal not available in Iceland.

526 External appeal against the decision of the Media Development Authority External to the minister, not to a court.

- five EU member states (France, Latvia, Slovakia⁵²⁷, Slovenia⁵²⁸, Spain⁵²⁹) out of 26 where an appeal is possible⁵³⁰;
- two EU candidate countries (Croatia and Former Yugoslav Republic of Macedonia) out of three; and
- one EFTA country (Norway) out of three where an appeal is possible⁵³¹.

Fig. 8: Does regulator's decision stand pending the appeal?



2.4.6.6 Grounds for appeal

A judicial review (errors of fact or errors of law) is widely accepted as the grounds for an external appeal.

Full re-examination in an external appeal, on the other hand, is not an option in:

- nine EU Member States (Austria⁵³², Belgium, Cyprus, Hungary, Italy⁵³³, Latvia, Lithuania, Malta, UK) out of 26 where an appeal is possible⁵³⁴;
- one EU candidate country (Croatia) out of three;
- two EFTA countries (Liechtenstein⁵³⁵, Switzerland⁵³⁶) out of three where an appeal is possible⁵³⁷; and
- three third countries (Australia⁵³⁸, Japan, USA) out of four.

527 But only regards decisions on fines and decisions withdrawing a licence.

528 Appeals against the decisions of the Ministry of Culture – Inspectorate for Culture and Media that do not impose fines.

529 CAC, CoAN, CAA.

530 External appeal not available in Estonia.

531 External appeal not available in Iceland.

532 In appeals against the decisions of the Federal Communications Board.

533 Except in cases falling under the electronic communications package and in cases of request of compensation.

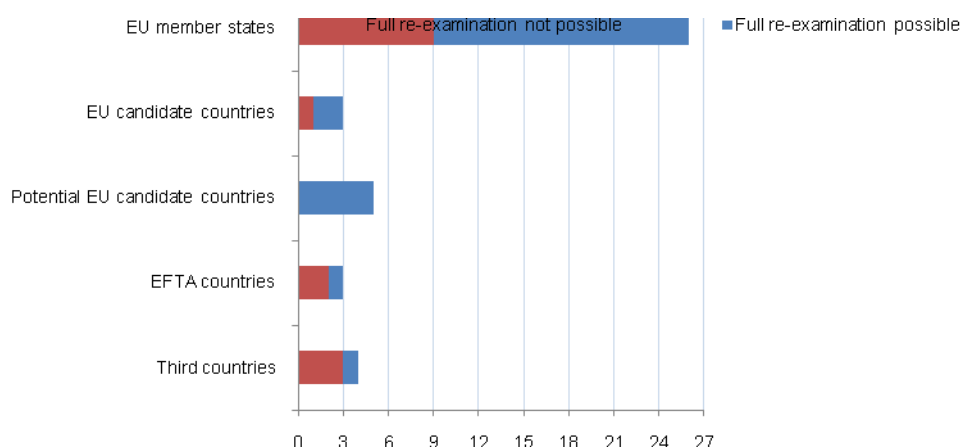
534 External appeal not available in Estonia.

535 But answer is uncertain as no decision has been appealed yet.

536 In the Federal Court. Available in Federal Administrative Court.

537 External appeal is not available in Iceland.

Fig. 9: Full re-examination of regulator's decision by external appeal body



2.4.6.7 Powers of the appeal body

In the majority of cases courts do not have the power to replace the regulator's decision with their own, but can cancel the decision and remit it back to the regulator.

Such powers are more common in cases where the appeal instance is not a court (but for example an internal appeals board, ministry or the government).

External appeal courts (i.e. internal appeal avenues not covered here) can replace regulators' decisions in:

- nine EU Member States (Ireland, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal⁵³⁹, Slovenia⁵⁴⁰, Sweden) out of 26 where an appeal is possible⁵⁴¹;
- two EU candidate countries (Croatia and Former Yugoslav Republic of Macedonia⁵⁴²) out of three;
- two EFTA countries (Norway, Switzerland) out of three where an appeal is possible⁵⁴³; and
- three third countries (Australia⁵⁴⁴, Singapore, the USA⁵⁴⁵) out of four.

538 The Court will usually confine itself to particular aspects involving alleged errors of law.

539 In certain cases replacement is not possible (for instance, in tender procedures for the award of television licences).

540 According to data provided by APEK in February 2011, despite the fact that courts can replace the regulator's decision, in practice, courts generally send the decision back to the regulator for a new decision to be taken.

541 External appeal is not available in Estonia.

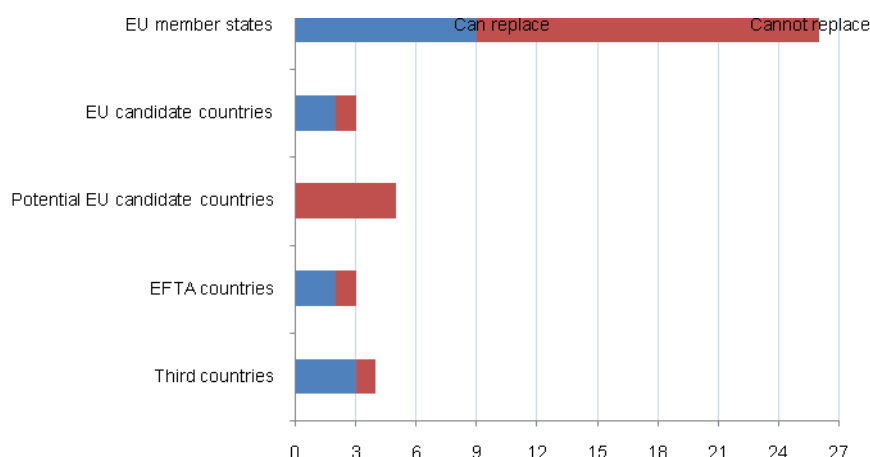
542 If the Court determines errors of law, it can remit back for new decision or it can replace the original decision with its own.

543 External appeal is not available in Iceland.

544 Although not usual at the court stage. The review does not relate to the merits of decision, but only to whether procedural or legal mistakes have been made.

545 Although unlikely due to modern US jurisprudence, in which courts are more likely to remand to the FCC for reconsideration or observance of proper procedure.

Fig. 10: Can external appeal court replace regulator's decision with its own



2.4.7 Procedural Legitimacy

2.4.7.1 External advice regarding regulatory matters

In the most of the EU Member States, the broadcasting regulatory authorities have an established practice to take external advice on a regular basis.

The exceptions are the regulators in Bulgaria, Estonia, Ireland, Lithuania, Romania and Slovakia where there is neither a specific budget foreseen for outside advice nor there is a practice of doing so. A similar situation is observed in EFTA countries.

At the same time, the regulators in Cyprus and Greece do not seek external advice, although they have funds reserved for this purpose.

In the EU candidate and potential candidate countries, external advice is used by the regulators in Croatia, Montenegro, Serbia and Kosovo⁵⁴⁶, but only the Serbian regulator reserves funds for this purpose.

The regulators in Australia, Japan and Singapore frequently use external advice and have also allocated budgets for this. In the USA, the FCC procedures are less transparent and there is no public information about using external consultants on regulatory matters.

In all countries, the regulators are required to follow public tender procedures to be able to procure external advice. Simplified procedures are envisaged in Cyprus, Finland, Poland and Spain if a certain budgetary threshold is not exceeded.

⁵⁴⁶ Under the United Nations Security Council Resolution 1244 of June 10, 1999 (UNSCR 1244), hereafter Kosovo.

2.4.7.2 Public consultations

In the EU, the consultation practices of broadcasting regulators vary widely across the countries, although regulators are required by law to publish their proposed decisions and secondary regulations for public consultation before adoption. In Austria, a requirement for public consultation on KommAustria draft decisions is envisaged in new legislation, although not yet applied in practice. In Greece, the requirement to hold public consultations is set out in the law but is deemed to have been applied only once in 2003. There are no requirements to hold public consultations for the broadcasting regulators in Bulgaria, Cyprus, the Czech Republic, Estonia, Lithuania, Luxembourg, Malta, The Netherlands, Italy, Poland, Slovakia and Spain. In some of these countries, for example in Italy and Poland, the regulators have established a practice of public consultations although there are no formal requirements.

The most common consultation period is 30 days, although in the UK it may vary from four to 12 weeks. In France the usual duration of the consultation period is three months. It is common practice for the regulators to publish consultation responses, either both full responses and summaries or only summaries— in Finland, Hungary, Portugal, Romania.

In EFTA countries, there are no requirements for regulators to publish their decisions for consultation. In Switzerland, OFCOM has an established practice of consulting on its most significant decisions for a period of up to three months.

In the EU candidate and potential candidate countries, the requirements to hold public consultations are set out for the regulators in the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina and Montenegro. However, there are no specific provisions on the duration of the consultation period, with the exception of Bosnia and Herzegovina where it cannot be shorter than 14 days. The publication of consultation responses is not mandatory either.

In Australia, the USA, Japan and Singapore, the broadcasting regulators are required to consult on (some of) their draft decisions before adoption. The duration of consultation periods is not explicitly defined and varies from the minimum four weeks applied in Australia, to over 30 days in Japan, and up to several months in Singapore. In the USA and Japan, the regulators are required to publish both the full responses and the summaries of the consultations. In Singapore there is only a requirement to publish the summaries. In Australia the publication of responses is not required for most of the regulator's decisions.

2.4.7.3 Public consultations - figures

The average number of public consultations per year held by regulatory bodies does not exceed one or two in the most of the EU Member States, although this goes up to four or five in Germany, France, Slovenia, Spain and Italy, eight in The Netherlands and over ten in Hungary and the UK. No consultations over the past five years were held in Cyprus, Greece and Slovakia.

In EFTA countries, there were one to four consultations a year in Norway and up to six consultations in Switzerland. No public consultations during the last five years were reported in Iceland and Liechtenstein.

In the EU candidate and potential candidate countries, no consultations were held by regulatory bodies in Croatia⁵⁴⁷, Turkey and Serbia. In the former Yugoslav Republic of Macedonia, the regulator has consulted on all of the major regulations issued over the past five years, ranging from one to eight decisions a year. One decision a year was subject to a public consultation in Albania, one to three in Bosnia and Herzegovina and one to four in Montenegro. In Kosovo, public consultations were used more frequently, ranging from two to nine decisions per year.

In the USA the number of consulted measures was typically over 300 per year, in Singapore – over 50 and in Japan – three to eight a year. No data is available for Australia.

2.4.7.4 Publication of regulator's decisions

The requirement to publish the regulator's decisions together with their motivation exists in Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany (for regulators of commercial broadcasters only), Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania and the UK. The regulators in Cyprus, Greece, Luxembourg, The Netherlands, Slovakia and Slovenia are not required to publish their decisions, and in Bulgaria, Estonia, Luxembourg and Spain there is no general obligation to motivate the decisions.

In EFTA countries, there are no specific regulations regarding the publication of decisions and their motivations by the broadcasting regulators, and only in Norway the regulator has been consistently publishing all its decisions together with their motivations.

In the EU candidate countries, the requirement to publish the decisions together with the motivation exists in Croatia. In the former Yugoslav Republic of Macedonia, all decisions must be published but there is no requirement for the regulator to motivate its decisions. None of these requirements exists in Turkey. In the potential candidate countries, only in Albania and Kosovo are the regulators required to publish their decisions and the motivations for them. In Montenegro, these requirements only apply to decisions on sanctions to broadcasters. There are no specific requirements in Bosnia and Herzegovina or in Serbia.

In most of the European countries, there are no obligations for the regulators to provide an impact assessment for their measures. The exceptions are Germany, Italy and the UK where the regulators are required to produce an *ex ante* impact assessment and Ireland where the regulator has to do this *ex post*.

In Australia, the regulator is required to publish most of its decisions with motivations and to produce an *ex ante* impact assessment as a part of the standard procedure. In the USA, all of the FCC decisions are published with motivations but there is no requirement to produce an impact assessment. In Japan, the regulator is required to publish its decisions and the motivation for these and to provide an *ex ante* and *ex post* impact assessment. In Singapore, on the contrary, there are no specific requirements concerning any of these aspects. In practice, the regulatory decisions are typically delivered to the affected parties but not to the general public.

⁵⁴⁷ In Croatia, the regulator informed us in February 2011 that it organised three consultations between 2008 and 2009.

2.5 Categories of institutional, regulatory and legal frameworks

The categorisation was aimed at identifying similar setups of formal criteria regarding the institutional, legal and regulatory framework of all the surveyed regulatory bodies. A categorisation gives the opportunity to examine details in similar or even equal formally arranged regulatory bodies. The goal of the categorisation was to find and display these clusters of similarly constructed regulatory bodies. It was thus not aimed at the assessment or measurement of the independence of the countries included in each category, but should primarily display similar groups of regulatory bodies.

2.5.1 Previous approaches in literature

Several approaches to classification or categorisation of regulatory bodies can be found within the literature.

According to Smith⁵⁴⁸ regulators can be classified in the following way: traditional ministerial models and fully independent authorities form the extreme poles of the possibilities of fulfilling regulatory tasks. In between these positions there are several options: There are those regulators which are separate units within ministry, those that are separate agencies with the minister taking part in decision making, and finally those that can be said truly independent agencies with limited powers to make recommendations.

Although Smith's differentiation allows the formation of categories, it is originally designed to describe the transition or path up to independent regulatory bodies and analyse the different intermediate steps needed to achieve this goal. Therefore it is not suitable for the solely descriptive categorisation of institutional legal frameworks required at this stage of the study.

Geradin and Petit⁵⁴⁹ describe a classification model that follows a functional typology. It distinguishes the different types of agencies at EU level by focusing on the duties they are entrusted with. According to this proposal, in the first group are those agencies which are entrusted with the implementation of EC regimes in a variety of fields. To the second group belong those that are entrusted with observatory roles. The third category is commonly referred to as the co-operational model. Agencies that are operating as subcontractors of EU public service belong to the fourth group. The fifth type of agency constitutes the yet-to-be-implemented network safety/interoperability model.

This classification is criticised by Geradin and Petit themselves, stating that it does not allow a clear and tight apportionment but leads to the fact that single authorities are listed in multiple categories. In addition to this, the categorisation is too specific and driven by the desire to distinguish different European regulatory bodies in all different sectors. It would not enable the Study Team to classify the different legal frameworks that set up regulatory bodies in the audiovisual media sector.

548 Smith, W. (1997): Note No. 127.

549 Geradin, D / Petit, N (2004):.42-44.

Geradin and Petit⁵⁵⁰ also proposed the classification of agencies based on legal criteria such as the intensity of prerogatives for carrying out their mission. The first category refers to executive agencies responsible for purely managerial tasks, observer roles, or missions of collaboration. The common point is of these agencies that they do not have decision-making power. The second category refers to decision-making agencies where these agencies have the power to enact legal instruments binding on third parties. The third category thus refers to the so-called true regulatory agencies that have discretionary power to translate broad legislative guidelines into concrete instruments.

This attempt focuses on a significant but single criterion to classify the different bodies, which – because of its mono-causal explanation – expresses very little about the legal framework setting up the regulatory body.

Another classification approach has been undertaken by Emmanuelle Machet. In her paper, presented at the 15th EPRA Meeting, Machet looks at two aspects of independence – the appointment of members of regulatory bodies, and the funding of regulatory bodies. She sketches five main models of appointment: Appointment by the executive (“the Northern European model”), by legislative (“the Central European model”), by both executive and legislative (“the French model”), by the judiciary, social movements and groups/civil society (“the German model”). She identifies three different models of funding: through the state budget, through a percentage of licence fees or advertising revenue, and through a mixed system.⁵⁵¹

Although the model introduced by Machet seems to distinguish between the existing regulatory bodies, it relies on single issues and thus does not provide a general grouping of the different legal frameworks. Besides that – as admitted by Machet – the labelling is misleading and not accurate.

2.5.2 Approach of the study

From the literature study we concluded that the existing “top-down” approaches in literature suffer from weaknesses. This resulted in the decision to try to use an empirically based approach for the categorisation approach to be conducted in this study.

For this statistical approach, the data of 62 regulatory bodies⁵⁵² has been encoded.⁵⁵³ In the cases where the displayed numbers do not sum up to 62, this is caused by single exceptions or missing data. Due to the variety of criteria covered in the questionnaire, it was necessary to restrict the number of criteria chosen for categorisation. A categorisation always demands a certain degree of loss of differentiation in order to be able to cluster the regulatory systems into categories, and by doing so reduce the risk of having as many categories as regulatory systems. Be-

550 Geradin, D. / Petit, N. (2004): 47-49.

551 ‘The Influence of Politics on Broadcasting’ prepared by Emmanuelle Machet of the 15th EPRA Meeting, (Brussels, 16-17 May 2002).

552 Because of the expected distortion of results the data for the similar set up, German State Media Authorities and the German Public Service Broadcasting Councils have been reduced to one prototype each.

553 Last updated 30 September 2010.

cause this could have led to categories that consist of factually very different regulators, this step has been conducted under thorough observation and with strong reservations.

2.5.2.1 Two step cluster analysis

In the first step, the coded data was used within a computer-based two-step-cluster analysis⁵⁵⁴. This (consciously experimental) attempt to get stable results for the development of framework categories by introducing a cluster analysis over all selected criteria produced no usable outcome: The clusters did not consist of well distinguished criteria or attributes but the result were mainly randomly gained. The same situation was given when differentiating between EU Member States and non EU Member States by feeding only EU Member States into the tool. The original goal to form significant statistical peaks could not be accomplished with this method.

2.5.2.2 Maximum number

One further attempt did not use the statistical algorithms within the cluster analysis but simply used crossed tables combing the different selected criteria with a maximum number of criteria. The goal of this was to detect manually patterns of mostly alike or similar legal frameworks setting up the regulatory bodies in the encoded countries. In order to reach stable results, only regulatory bodies with complete criteria sets were included.⁵⁵⁵ Criteria were selected on the one hand for their general impact and significance within the legal framework, and on the other hand for their ability to be harmonised in order to form significant categories. Unfortunately, despite the harmonisation of the possible answers to each criterion, the outcome showed a large variety of different arrangements of legal frameworks. Where the indicator “source of funding” has been used without a reduction of the possible answers, 42 different set-ups have been identified. Even after consolidating the indicator by grouping all the answers where the regulatory body receives funding from more then one source, 31 different set-ups have been found. However three relatively large groups containing eight, six and five regulatory bodies could be identified.

Tab. 7 Regulatory bodies within each maximum number of criteria group

Independence is recognised; separate legal entity; Board as a highest decision making organ; Overturn is not possible other than by a court; Instructions are not possible; funding is based on a mix; the body has general policy-setting powers, general policy-implementing powers and third party decision making powers	Independence is recognised; separate legal entity; Board as a highest decision making organ; Overturn is not possible other than by a court; Instructions are not possible; funding is based on a mix; the body has no general policy-setting powers but general policy-implementing powers and third party decision making powers	Independence is recognised; separate legal entity; Board as a highest decision making organ; Overturn is not possible other than by a court; Instructions are not possible; funding is based on state funds ; the body has no general policy-setting powers but general policy-implementing powers and third party decision making powers
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554 Based on SPSS 17.0 for Windows.

555 This led to a reduction of the number of included regulatory authorities to 49. The used indicators were: recognition of independence; separate legal entity; highest decision making organ; overturn other than court; instruct; source of funding; general policy-setting powers; general policy-implementing powers; third party decision making powers. Smith, W. (1997): Note No. 127.

Croatia – Agency for electronic media	Austria – KommAustria	Czech Republic – Broadcasting Council (RRTV)
Kosovo – IMC	Germany – State Media Authorities	France – CSA
Latvia – National Broadcasting Council	Hungary – National Radio and Television Board (ORTT)	Greece – National Council for Radio and Television (NCRTV)
former Yugoslav Republic of Macedonia – Broadcasting Council	Italy – Agcom	Slovakia – Council for Broadcasting and Retransmission
Romania – CNA	Lithuania – LRTK	Spain – CoAN
Serbia – Republic Broadcasting Agency	Portugal – ERC	
Turkey – RTÜK	Spain – CAC	

Although these groups of regulatory bodies were identified, it is not accurate to declare these groups as categories. First of all, the majority of regulatory bodies is not included in any of the groups. Furthermore, within the found groups there is no clear regional or historical pattern distinguishable. In addition to that the differences between the different set-ups are only minimal. The group that contains the Croatian Agency for electronic media differs from the group that contains the Austrian KommAustria only in regard to general policy implementing power, and from the group that contains the Czech Broadcasting Council only with respect to the appearance of funding. In addition, these groups could only be derived by harmonising the multiple different forms of funding of the regulatory body.

Therefore it has to be concluded that the attempt to form categories with a combination of a maximum number of indicators is not practicable.

2.5.2.3 Combination (Pattern Based Approach)

Another approach in seeking to form categories was to combine chosen criteria with a prospective variety of different types of legal frameworks as selection criterion. The approach was characterised by defining key criteria that have a meaningful impact on the legal framework for the status of the regulatory body, and use these to form prototypes. On a methodological basis, the first step was to develop such “role models”.

One tested set of criteria resulted in an approach in which the different combinations of the legal status, the highest decision making organ, the power to set binding decisions for third parties, and the question whether or not the regulatory body can be overruled and instructed, were examined.

The outcome of this combination led to one large group containing 23 of 49 regulatory bodies characterised by being a separate legal entity with a board that has third-party decision-making power and can not be influenced through overturning and instructions by any other organ than a court. The other bodies are all differently set up regarding the examined combination of criteria. The outcome therefore might display one common type of regulator but did not form any distinguishable groups.

The goal of forming categories could not be reached with other combinations of harmonised criteria either.

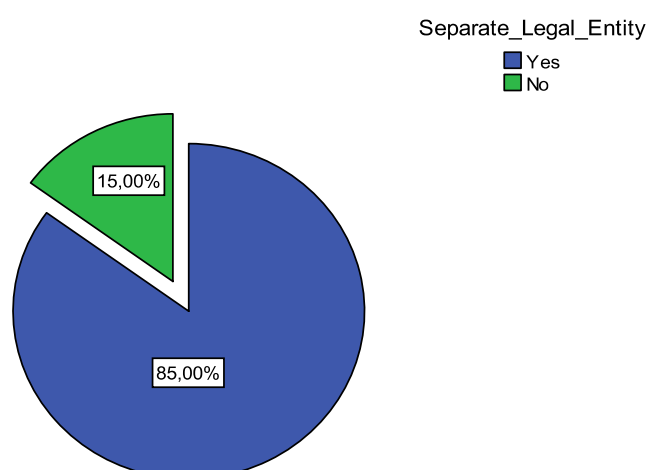
2.5.2.4 Single Criteria

The most basic form of creating categories is to reduce the distinguishing criteria to a single one. However, as pointed out above the categorisation is rather weak because it is mono-causal and therefore – because any criterion can be chosen – somewhat arbitrary.

2.5.2.4.1 Separate legal entity

One basic categorisation with only one criterion can be accomplished on the basis of the question of whether the regulatory body is a separate legal entity. As displayed below, 15% of 60 regulatory bodies are not separate legal entities. Due to the strong imbalance of the number of regulatory bodies in the groups, it is difficult to classify these groups as categories. Thus this displays more of a differentiation on the basis of a criterion than an option to distinguish completely different set-ups.

Fig. 11: Categorisation by legal status



Tab. 8 Regulatory bodies grouped by their legal status

Regulatory Bodies that are a separate legal entity ⁵⁵⁶	Regulatory Bodies that are <i>not</i> a separate legal entity
Albania – KKRT	Estonia – Ministry of Culture
Australia – Australian Communications and Media Authority	Germany – Public Service Broadcasting Councils
Austria – Federal Communications Board (BKS)	Japan – MIC
Austria – KommAustria	Singapore – ASAS
Belgium – BE-DE: MRat	Slovenia – Broadcasting Council
Belgium – BE-FR: CSA	Slovenia – Ministry of Culture (Inspectorate for Culture)

⁵⁵⁶ Within this group the Swiss Independent Complaints Authority for Radio and Television is missing.

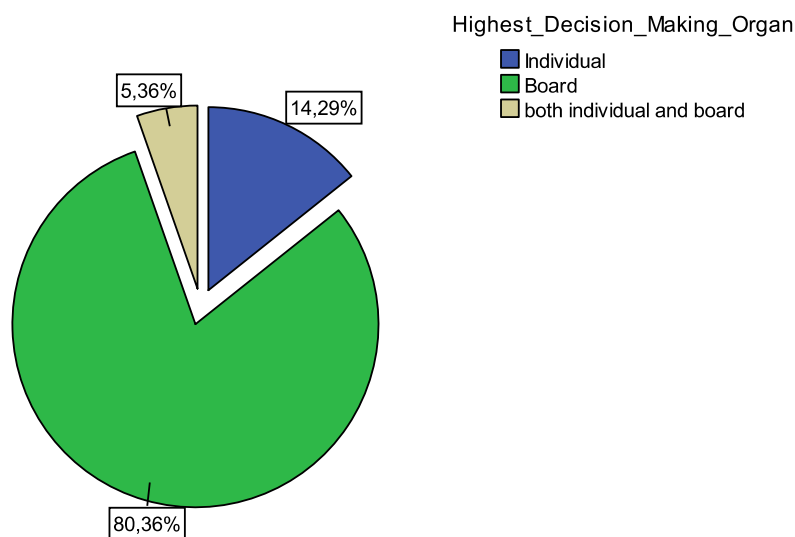
Regulatory Bodies that are a separate legal entity ⁵⁵⁶	Regulatory Bodies that are <i>not</i> a separate legal entity and Media)
Belgium – BE-VL: VRM	Switzerland – Federal Office of Communications
Bosnia and Herzegovina – Communications Regulatory Agency	UK – BBC Trust
Bulgaria – CEM	USA – Federal Communications Commission
Croatia – Agency for electronic media	
Cyprus – Cyprus Radio-Television Authority	
Czech Republic – Broadcasting Council (RRTV)	
Denmark – Radio And Television Board	
Estonia – Estonian Public Broadcasting Council	
Finland – FICORA	
France – CSA	
Germany – State Media Authorities	
Greece – National Council for Radio and Television (NCRTV)	
Hungary – National Radio and Television Board (ORTT)	
Iceland – Broadcast Licensing Committee	
Ireland – BAI	
Italy – Agcom	
Kosovo – IMC	
Latvia – National Broadcasting Council	
Liechtenstein – Media commission	
Lithuania – LRTK	
former Yugoslav Republic of Macedonia – Broadcasting Council	
Malta – Broadcasting Authority	
Montenegro – Broadcasting Agency of Montenegro	
Netherlands – CvdM	
Norway – Norwegian Post and Telecommunications Authority	
Norway – The Media Authority	
Poland – National Broadcasting Council	
Portugal – ERC	
Romania – CNA	
Serbia – Republic Broadcasting Agency	
Singapore – MDA	
Slovakia – Council for Broadcasting and Retransmission	
Slovenia – APEK	
Spain – CAA	

Regulatory Bodies that are a separate legal entity ⁵⁵⁶	Regulatory Bodies that are <i>not</i> a separate legal entity
Spain – CAC	
Spain – CEMA	
Spain – CMT	
Spain – CoAN	
Sweden – Swedish Broadcasting Commission (until July 31, 2010)	
Sweden – Swedish Radio & Television Authority (from 1 August, 2010)	
Turkey – RTÜK	
UK – ASA	
UK – ATVOD	
UK – Ofcom	

2.5.2.4.2 Highest decision making organ

Another attempt to form categories was made using the criterion of the nature of the highest decision-making organ. As displayed below, the majority of 80.36% of 56 regulatory bodies have a board as the highest decision making organ. Although the nature of the highest decision-making organ has a significant influence on the rest of the legal set up, it is difficult to declare these groups as categories, especially because the groups are strongly imbalanced.

Fig. 12: Categorisation by form of decision-making organ



Tab. 9 Regulatory bodies grouped by the nature of their highest decision making organ

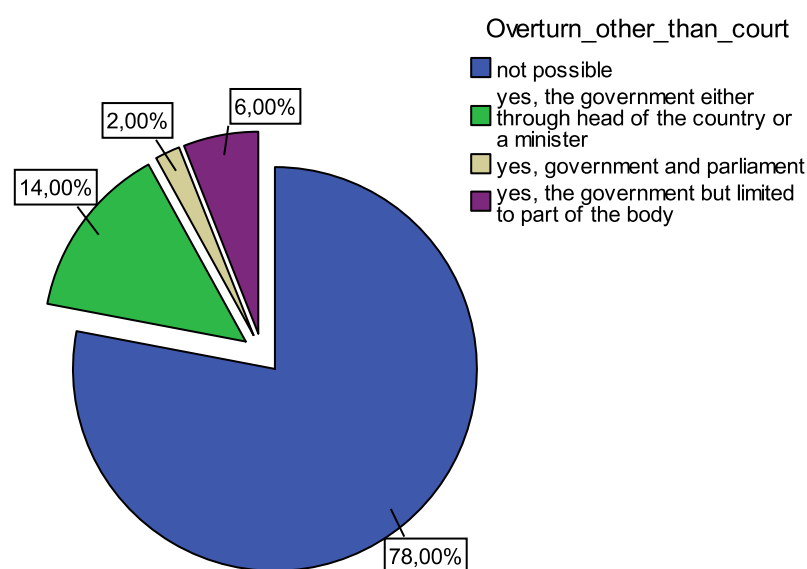
Individual	Board	Both individual and board
Estonia – Ministry of Culture	Albania – KKRT	Austria – Federal Communications Board (BKS)
Finland – FICORA	Australia – Australian Communications and Media Authority	Bosnia and Herzegovina – Communications Regulatory Agency
Japan – MIC	Austria – KommAustria	Liechtenstein – Media commission
Norway – The Media Authority	Belgium – BE-VL: VRM	
Slovenia – APEK	Belgium – BE-FR : CSA	
Slovenia – Ministry of Culture (Inspectorate for Culture and Media)	Belgium – BE-DE : MRat	
Sweden – Swedish Radio & Television Authority (from 1 August, 2010)	Bulgaria – CEM	
Switzerland – Federal Office of Communications	Croatia – Agency for electronic media	
	Cyprus – Cyprus Radio-Television Authority	
	Czech Republic – Broadcasting Council (RRTV)	
	Denmark – Radio And Television Board	
	Estonia – Estonian Public Broadcasting Council	
	France – CSA	
	Germany – State Media Authorities	
	Germany – Public Service Broadcasting Councils	
	Greece – National Council for Radio and Television (NCRTV)	
	Hungary – National Radio and Television Board (ORTT)	
	Iceland – Broadcast Licensing Committee	
	Ireland – BAI	
	Italy – Agcom	
	Kosovo – IMC	
	Latvia – National Broadcasting Council	
	Lithuania – LRTK	
	former Yugoslav Republic of Macedonia – Broadcasting Council	
	Malta – Broadcasting Authority	
	Montenegro – Broadcasting Agency of Montenegro	
	Netherlands – CvdM	
	Poland – National Broadcasting Council	
	Portugal – ERC	
	Romania – CNA	
	Serbia – Republic Broadcasting Agency	
	Singapore – MDA	
	Slovakia – Council for Broadcasting and Re-transmission	
	Slovenia – Broadcasting Council	
	Spain – CEMA	
	Spain – CAC	
	Spain – CoAN	
	Spain – CAA	
	Sweden – Swedish Broadcasting Commission (until July 31, 2010)	
	Switzerland – Independent Complaints Authority for Radio and Television	
	Turkey – RTÜK	
	UK – Ofcom	
	UK – ASA	
	UK – ATVOD	
	USA – Federal Communications Commission	

2.5.2.4.3 Overturning of decisions other than by a court

Furthermore, the question of whether the regulatory body can be overturned by any other body than a court can – because its strong influence on the sovereignty of the regulatory body – be

used to attempt to form categories. As displayed below, again no balanced and stable categories can be found from an analysis of 50 regulatory bodies. Instead, one large group containing 78% of the regulatory bodies, characterised by the fact that no other body than a court can overturn the decision of the regulatory body, can be distinguished that is.

Fig. 13: Categorisation by possible overturning



Tab. 10 Regulatory bodies grouped by the possibility of overturning their decisions

Not possible ⁵⁵⁷	Yes, the government either through the head of the country or a minister	Yes, government and parliament	Yes, the government but limited to part of the body
Albania – KKRT	Denmark – Radio And Television Board ⁵⁵⁸	USA – Federal Communications Commission	Belgium – BE-VL: VRM
Austria – Federal Communications Board (BKS)	Estonia – Ministry of Culture		Belgium – BE-FR : CSA
Austria – KommAustria	Japan – MIC		Belgium – BE-DE : MRat
Bosnia and Herzegovina – Communications Regulatory Agency	Liechtenstein – Media commission		
Bulgaria – CEM	Netherlands – CvdM		
Croatia – Agency for electronic media	Norway – The Media Authority		

557 Within the this group the Swiss Independent Complaints Authority for Radio and Television is missing.

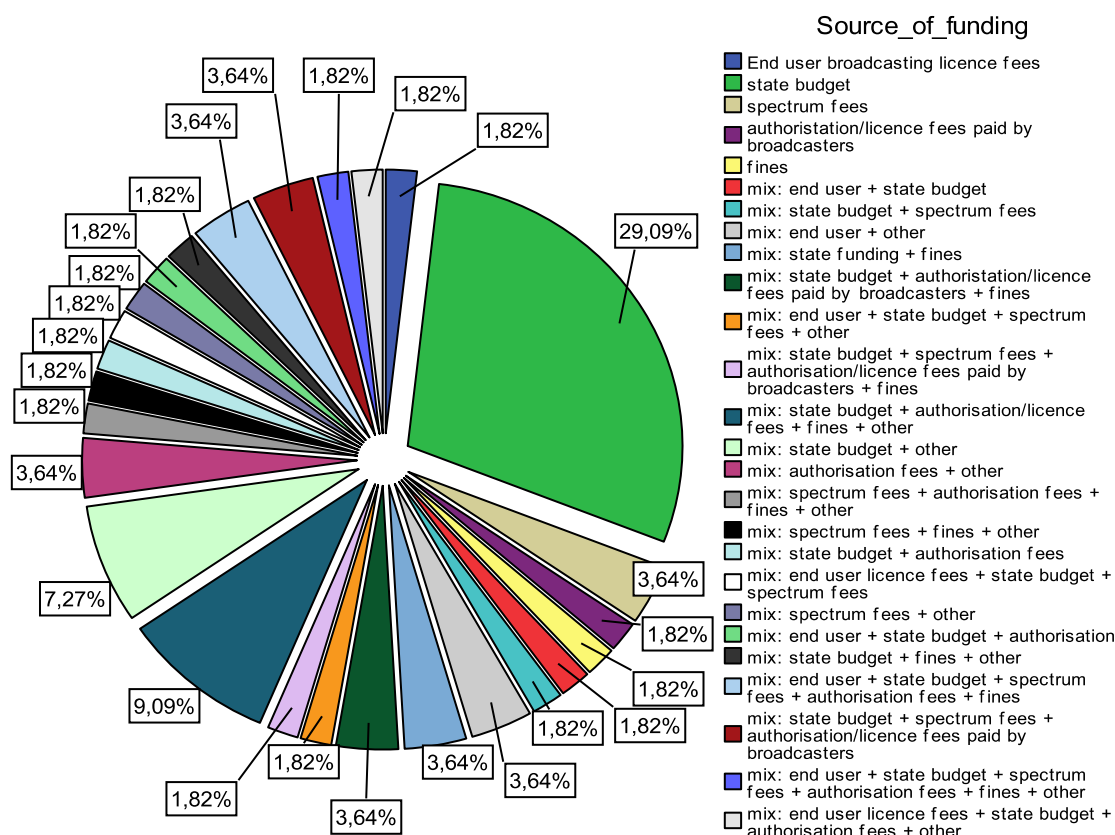
558 Due to the necessity to simplify and unify the different scenarios found in the examined countries in order to form categories, Denmark’s RTB has been included in this group. As displayed in the country summary of Denmark the situation is the following: “Whilst the Minister of Culture does not have a general power to overturn decisions of the RTB, there is one exception: If the Minister delegates a specific task to the RTB outside the specified and defined remit of the RTB, the Minister can overturn decisions or recommendations made by the RTB on the basis of this delegation.” However this inaccuracy did not have a grave influence on the outcome of the unsuccessful categorisation attempt.

Not possible ⁵⁵⁷	Yes, the government either through the head of the country or a minister	Yes, government and parliament	Yes, the government but limited to part of the body
Cyprus – Cyprus Radio-Television Authority	Slovenia – Ministry of Culture (Inspectorate for Culture and Media)		
Czech Republic – Broadcasting Council (RRTV)			
Estonia – Estonian Public Broadcasting Council			
Finland – FICORA			
France – CSA			
Germany – State Media Authorities			
Germany – Public Service Broadcasting Councils			
Greece – National Council for Radio and Television (NCRTV)			
Hungary – National Radio and Television Board (ORTT)			
Iceland – Broadcast Licensing Committee			
Ireland – BAI			
Italy – Agcom			
Kosovo – IMC			
Latvia – National Broadcasting Council			
Lithuania – LRTK			
former Yugoslav Republic of Macedonia – Broadcasting Council			
Malta – Broadcasting Authority			
Montenegro – Broadcasting Agency of Montenegro			
Poland – National Broadcasting Council			
Portugal – ERC			
Romania – CNA			
Serbia – Republic Broadcasting Agency			
Singapore – MDA			
Slovakia – Council for Broadcasting and Retransmission			
Slovenia – APEK			
Spain – CEMA			
Spain – CAC			
Spain – CoAN			
Spain – CAA			
Sweden – Swedish Broadcasting Commission (until July 31, 2010)			
Switzerland – Federal Office of Communications			
Turkey – RTÜK			
UK – Ofcom			

2.5.2.4.4 Sources of funding

Another indicator that can be used to form categories is the source of funding of the regulatory bodies. For this, 55 regulatory bodies have been compared and 26 different combinations could be identified. Even though the number of groups is tremendously high, it does not represent the situation accurately, since it is already the result of a harmonisation and unification. More precisely, it does not distinguish the proportion of funds that come from each source. The large diversity of forms of appearance nevertheless displays impressively the difficulty of forming categories of similar regulatory set-ups.

Fig. 14: Categorisation by sources of funding



Tab. 11 Regulatory bodies grouped by their source of funding

Concept of funding	Regulatory Body
End user broadcasting fees	Germany – Public Service Broadcasting Councils
State budget	Austria – Federal Communications Board (BKS)
	Belgium – BE-FR : CSA
	Belgium – BE-DE : MRat
	Czech Republic – Broadcasting Council (RRTV)
	Denmark – Radio And Television Board
	Estonia – Estonian Public Broadcasting Council
	France – CSA
	Greece – National Council for Radio and Television (NCRTV)
	Iceland – Broadcast Licensing Committee
	Liechtenstein – Media commission
	Norway – The Media Authority
	Slovakia – Council for Broadcasting and Retransmission
	Slovenia – Ministry of Culture (Inspectorate for Culture and Media)
	Spain – CoAN
	Spain – CAA
	Switzerland – Independent Complaints Authority for Radio and Television
Spectrum fees	UK – ASA
	UK – ATVOD
Authorisation/licence fees paid by broadcasters	Ireland – BAI
Fines	Montenegro – Broadcasting Agency of Montenegro
Mix: end user + state budget	Sweden – Swedish Broadcasting Commission (until July 31, 2010)
Mix: state budget + spectrum fees	Belgium – BE-VL: VRM
Mix: end user + other	Austria – KommAustria
	Germany – State Media Authorities

Mix: state funding + fines	Bulgaria – CEM Romania – CAN
Mix: state budget + authorisation/licence fees paid by broadcasters + fines	Cyprus – Cyprus Radio-Television Authority
Mix: end user + state budget + spectrum fees + other	Malta – Broadcasting Authority
Mix: state budget + spectrum fees + authorisation/licence fees paid by broadcasters + fines	Finland – FICORA
Mix: state budget + authorisation/licence fees + fines + other	Hungary – National Radio and Television Board (ORTT)
	Italy – Agcom
	Poland – National Broadcasting Council
	Portugal – ERC
	Spain – CAC
	Bosnia and Herzegovina – Communications Regulatory Agency ⁵⁵⁹
Mix: state budget + other	Latvia – National Broadcasting Council
	Netherlands – CvdM ⁵⁶⁰
	Spain – CEMA
	Australia – Australian Communications and Media Authority
Mix: authorisation fees + other	Lithuania – LRTK
	Serbia – Republic Broadcasting Agency
Mix: spectrum fees + authorisation fees + fines + other	Slovenia – APEK ⁵⁶¹
Mix: spectrum fees + fines + other	Slovenia – Broadcasting Council
Mix: state budget + authorisation fees	Sweden – Swedish Radio & Television Authority (from 1 August, 2010)
Mix: end user licence fees + state budget + spectrum fees	UK – Ofcom
Mix: spectrum fees + other	Croatia – Agency for electronic media
Mix: end user + state budget + authorisation	former Yugoslav Republic of Macedonia – Broadcasting Council
Mix: state budget + fines + other	Turkey – RTÜK
Mix: end user + state budget + spectrum fees + authorisation fees + fines	Albania – KKRT
Mix: state budget + spectrum fees + authorisation/licence fees paid by broadcasters	Singapore – MDA
Mix: end user + state budget + spectrum fees + authorisation fees + fines + other	Kosovo – IMC
	Japan – MIC
	Switzerland – Federal Office of Communications
Mix: end user licence fees + state budget + authorisation fees + other	USA – Federal Communications Commission

2.5.2.5 Conclusion

It must therefore be concluded that no attempt to categorise the examined regulatory bodies proved successful. Nevertheless, it has been an interesting experiment to examine the regulators in order to find categories of regulators and legal frameworks by making use of all relevant criteria describing the framework and thus approach the problem from the bottom up, rather than from the top down. It is, however, not completely surprising that this turned out not to be successful, since there is no analytical necessity for regulatory settings in different countries to fol-

559 The CRA clarified in February 2011 that its budget is not composed of fines but of recurrent technical licence fees and of grants and donations. The information presented in the table is based on the information collected from the country correspondents and the regulator in the questionnaire. The inaccuracy of this information did however only have a very small influence on the overall result of the unsuccessful attempt to derive categories of regulatory bodies.

560 The Commissariaat voor de Media pointed out in February 2011 that the budget of the CvdM is composed of two main resources, namely state budget and license fees. The information presented in the table is based on the information collected from the country correspondents and the regulator in the questionnaire. The inaccuracy of this information did however only have a very small influence on the overall result of the unsuccessful attempt to derive categories of regulatory bodies.

561 The APEK informed us in February 2011 that the APEK is not financed by the authorisation fees and by fines. Both represent the income of the state budget. The information presented in the table is based on the information collected from the country correspondents and the regulator in the questionnaire. The inaccuracy of this information did however only have a very small influence on the overall result of the unsuccessful attempt to derive categories of regulatory bodies.

low distinct patterns. Or, argued the other way around, it follows that given the very specific development paths of media regulation in different countries, the outcome is rather pro-intuitive.

3. ANALYSIS OF PRACTICAL IMPLEMENTATION AND EFFECTIVENESS OF INSTITUTIONAL, REGULATORY AND LEGAL CONDITIONS REGARDING REGULATORY BODIES

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3.1 Theoretical background: *De facto* implementation and effectiveness

This section examines the practical implementation and effectiveness of the institutional, regulatory and legal conditions concerning independent regulatory bodies competent for the regulation of audiovisual media services in the Member States of the European Union, the candidate countries and potential candidate countries to the European Union, in the EFTA countries and the sample of four third countries.

This section of the study aims at assessing whether the formal regulatory set-up delivers the expected outcome in the application of the audiovisual framework.

The theoretical analysis in chapter 1 already showed that that the proper implementation of a framework that indicates formal independence is at least in part a guarantee for an “effective implementation”.

3.2 Status quo: Transposition of AVMS Directive in national law

In July 2010, from the 27 EU Member States, so far 16 Member States had implemented the AVMS Directive into their national legislation. 11 Member States had not yet transposed the Directive by that point. The following table provides an overview over the status quo of national transpositions of the AVMS Directive (Date: July 2010). The information has been derived from the country reports and the European Commission’s website providing a reference list of national execution measures.⁵⁶²

Tab. 12 Status quo: Transposition of AVMS Directive in national law (July 2010)

Country	Transposition	Remarks
Austria	Yes	Implementation of the AVMS Directive in July 2010 by the “Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das KommAustria-Gesetz, das Telekommunikationsgesetz 2003, das Verwertungsgesellschaftengesetz 2006, das ORF-Gesetz, das Privatfernsehgesetz, das Privatradiogesetz und das Fernseh-Exklusivrechtegesetz geändert werden“ (BGBl. I 2010/50 July 19, 2010). ⁵⁶³
Belgium	Yes	Implementation of the AVMS Directive in 2009/ 2010 by the Decreet betreffende de radio-omroep en de televisie van 27 maart 2009, BS 30 april 2010 ⁵⁶⁴ Décret coordonné sur les services de médias audiovisuels du 30 avril 2009, BS 27 juillet 2009 ⁵⁶⁵ Dekret vom 27. Juni 2005 über den Rundfunk und die Kinovorstellungen, BS 6 september 2005 ⁵⁶⁶
Bulgaria	Yes	Implementation of the AVMS Directive in 2009/ 2010 by the Law on Radio and TV (Закон за изменение и допълнение на Закона за радиото и телевизията), last amended on 12.02.2010, State Gazette, issue 12/2010 ⁵⁶⁷
Cyprus	No ⁵⁶⁸	

562 See at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:72007L0065:EN:NOT; European Commission Press Release IP/10/803 of 24/06/2010: "Audiovisual Media Services Directive: Commission requests 12 Member States to implement in full", see at europa.eu/rapid/pressReleasesAction.do?reference=IP/10/803&format=HTML&aged=0&language=EN&guiLanguage=en.

563 See at www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_I_50/BGBLA_2010_I_50.pdf

564 See at www.vlaamseregulatormedia.be/media/9017/vrm-decreet.pdf

565 See at www.csa.be/documents/show/1057

566 See at www.medienrat.be/pdf/Dekret270605.pdf

567 See at lex.bg/laws/ldoc/2134447616

568 The study team has been informed that in the meantime the AVMS Directive has been implemented: Implementation of the AVMS Directive in December 2010 by two legal acts: Ο Περί Ραδιοφωνικού Ιδρύματος Κύπρου (Τροποποιητικός) Νόμος του 2010, number: N. 117(I)/2010; Official Journal: Cyprus Gazette, number: 4263, Publication date: 10/12/2010, Page: 00999-01019, Entry into force: 10/12/2010; Reference: (MNE(2010)57452); and Ο Περί Ραδιοφωνικών και Τηλεοπτικών Σταθμών (Τροποποιητικός) Νόμος

Czech Republic	Yes	Implementation of the AVMS Directive in May 2010 by Zákon č. 132/2010 Sb., (zákon o audiovizuálních mediálních službách na vyžádání)
Denmark	Yes	Implementation of the AVMS Directive in December 2009 by Lov om radio- og fjernsynsvirksomhed
Estonia	No ⁵⁶⁹	
Finland	No	
France	Yes	Implementation of the AVMS Directive in March 2009 by LOI no 2009-258 du 5 mars 2009 relative à la communication audiovisuelle et au nouveau service public de la télévision ⁵⁷⁰
Germany	Yes	Implementation of the AVMS Directive in March 2010 by Interstate Broadcasting Treaty, 31. August 1991. 13th amendment: 10.03.2010 (cp. GBl. p. 307) (Rundfunkstaatsvertrag – RStV)
Greece	No ⁵⁷¹	
Hungary	No	
Ireland	Yes	Implementation of the AVMS Directive in 2009 by Broadcasting act and European Communities (Audiovisual Media Services) regulation 2010
Italy	Yes	Implementation of the AVMS Directive in March 2010 by Attuazione della direttiva 2007/65/CE relativa al coordinamento di determinate disposizioni legislative, regolamentari e amministrative degli Stati membri concernenti l'esercizio delle attività televisive.
Latvia	No	
Lithuania	No	
Luxemburg	No	
Malta	Yes	Implementation of the AVMS Directive in 2010 by ACT No. IV of 2010 AN ACT to amend further the Broadcasting Act, Cap. 350 and by-laws
Netherlands	Yes	Implementation of the AVMS Directive in December 2009 by Wet van 10 december 2009 tot wijziging van de Mediawet 2008 en de Tabakswet ter implementatie van de richtlijn Audiovisuele mediadiensten
Poland	No	
Portugal	No	
Romania	Yes	The Romanian Audiovisual Law (N. 504/2002) was amended in November 2009 to transpose the Audiovisual Media Service Directive (AVMS).
Slovakia	Yes	Implementation of the AVMS Directive in December 2009 by Zákon č. 498/2009 Z. z., ktorým sa mení a dopĺňa zákon č. 308/2000 Z. z. o vysielaní a retransmisii a o zmene zákona č. 195/2000 Z. z. o telekomunikáciách v znení neskorších predpisov a o zmene a doplnení niektorých zákonov

του 2010; Legal act: Νόμος, number: N.118(I)/2010; Official Journal: Cyprus Gazette, number: 4263, Publication date: 10/12/2010, Page: 01020-01103, Entry into force: 10/12/2010; Reference: (MNE(2010)57445)

569 The study team has been informed that in the meantime the AVMS Directive has been implemented: Transposition of the AVMS Directive in November 2010 to Media Service Act by seadus, number: RT I, 06.01.2011, 1; Official Journal: Elektroonline Riigi Teataja, number: RT I, 06.01.2011, 1, Entry into force: 16/01/2011; Reference: (MNE(2011)50130)

570 See at legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020352071&categorieLien=id

571 The study team has been informed that in the meantime the AVMS Directive has been implemented: Implementation of the AVMS Directive in November 2010 by Προεδρικό Διάταγμα, number: 109; Official Journal: Εφημερίς της Κυβερνήσεως (ΦΕΚ) (Τεύχος Α), number: 190, Publication date: 05/11/2010, Page: 04233-04244, Entry into force: 19/12/2009; Reference: (MNE(2010)56743)

Slovenia	No	
Spain	Yes	Implementation of the AVMS Directive in March 2010 by Ley General de la Comunicación Audiovisual » Short name: Law 7/2010 of 31 March.
Sweden	Yes	A new Radio and Television Law came into force in Sweden on 1 August 2010. Amongst other things, the new law implements the provisions of the AVMS Directive.
United Kingdom	Yes	Implementation of the AVMS Directive in 2009 by amendment to the Communications Act 2003 ⁵⁷² and the Audiovisual Media Services Regulations 2009 ⁵⁷³

Source: INDIREG project research based on country reports and official information

3.3 Methodology

Because of the general difficulty of evaluating the *de facto* situation regarding independence, due to the subjectivity of judgments of the “real” situation, a stakeholder survey was conducted. The basic aim of a stakeholder survey is to receive a multi-perspective assessment by asking individuals or groups, who are likely to be affected by a special issue, for their judgment, and thus create a multi-perspective assessment of the issue. Specifically, stakeholders affected by, or interested in, decisions of regulatory bodies have been identified and addressed.

The stakeholder survey was conducted using a closed online survey hosted by www.globalpark.com. The respondents had to choose from multiple answer sets, and additionally had the opportunity to make further remarks in open text fields.

The relevant stakeholders in all 43 countries have been identified by the Country Correspondents according to provided lists of stakeholder categories.

Tab. 13 Categories of stakeholders

Category	Stakeholders
Broadcasters	<p>Main national public service television providers (if different: also main public service radio providers)</p> <p>Two major and one small commercial nation-wide television providers (including Pay TV) which are established in the country</p> <p>National associations of commercial television providers (if such exists: national association representing Pay-TV providers)</p>
Other relevant providers and their representations	<p>Providers of audiovisual services in new markets (at least two IPTV operators, and at least two Video on Demand providers if different from IPTV operators) (established in the country!)</p> <p>National associations representing online content providers</p> <p>National associations representing information technology corpora-</p>

572 See at www.opsi.gov.uk/ACTS/acts2003/ukpga_20030021_en_1

573 See at www.opsi.gov.uk/si/si2009/uksi_20092979_en_1

	tions (IT Sector) National associations of cable providers (if not existent: two cable-TV network operators)
Advertising	National advertising associations
Third sector media and civil society	National associations for community, non-profit or civil media radio and television (if not existent: two significant operators standing for this field) National associations representing viewers and listeners (or media consumers more generally) – if there is no Viewers and Listeners association: up to two associations or groups monitoring electronic media and holding media accountable National NGO or civil society advocacy groups promoting freedom of the media and freedom of expression National professional association of journalists and media professionals (if existent) National NGO or civil society advocacy groups promoting the protection of minors in TV/ Internet
Ombudsman	Media Ombudsman

The stakeholders were contacted and supplied with a password to prevent misuse by uninvited participants, as well as multiple voting. Furthermore, the stakeholders were assured that their individual answers would not be disclosed or attributed to them. The complete list of categories and identified stakeholders can be found in the Annex.

The online survey was open for contributions from 20 July until 10 September 2010.

3.3.1 Identification of *de facto* criteria for the stakeholder survey regarding practical implementation and effective functioning

A first set of indicators for the practical implementation and effectiveness of the institutional, regulatory and legal conditions concerning independent regulatory bodies (implementation and performance indicators I) was developed in WP 1 by an analysis of the literature study. These indicators became part of the questionnaire that was given to the Country Correspondents, and form part of the Country Reports that the Country Correspondents delivered. However, as *de facto* indicators could not easily be predetermined to be either beneficial or detrimental for the goals of independence and effective functioning, we needed to conduct a research step (a) to determine the significance of the identified *de facto* indicators and (b) to determine their influence regarding impartiality. Their impact may depend on the specific circumstances given in the country in question and may also be assessed unequally from the different perspectives of different stakeholders within the countries. This is why potential *de facto* indicators were assessed by asking

stakeholders in each country to answer an online survey according to their point of view. With the help of the stakeholder survey, correlations between the perception of different features of the *de facto* situation and the perception of impartiality can be drawn.

3.3.1.1 Compliance

One major aim of the stakeholder survey was to measure the compliance with the formal set-up of the regulatory body. The stakeholders were therefore asked to communicate their impression of the overall compliance with regard to the formal provision within the respective country (Question 28). Further question may also serve as compliance indicators – however this depends on the respective legal set-up establishing the independent regulatory body. Hence these questions were grouped within one of the previously used indicator categories.

3.3.1.2 Indicators for *de facto* independence

Following the same approach the *de facto* indicators were grouped according to the introduced categories:

- Status and Powers
- Autonomy of Decisions Makers
- Financial Autonomy
- Knowledge
- Transparency & Accountability mechanisms

3.3.1.2.1 Status and powers

3.3.1.2.1.1 *General legal framework*

The following *de facto* criteria regarding the general legal framework were identified above:

- Amendments or changes to the legal provisions formulating the tasks and objectives (and the respective motives)
- Incidences of political pressure in form of threatening with the alteration of legal objectives

Within the questionnaire, information on this indicator can be drawn from Table 6 in combination with contextual information retrievable from the country reports.

It is evident that formal safeguards of institutional independence and design are no protection against amendments and changes of the governing laws of the independent media regulatory body by the government. In most cases it is easier for a government with a majority in parliament to change the rules of the game without interfering with any formal or informal means in the structure or decision making of the regulator. The formal and *de facto* categories have developed in the context of rule of law, functioning democratic institutions and a culture of independence. If those fail and there is a change in law in order to influence independence, we must con-

sider that formal indicators need to be analyzed with caution, since they can be changed easily. And likewise, governments may exert pressure on independent media regulatory bodies by threatening to alter the legal objectives or other elements of the governing laws in order to achieve compliance by the regulator.

Therefore, questions addressing changes in the general legal framework and assumed causes and effect were asked in the survey (Question 1; 1.1.-1.4).

3.3.1.2.1.2 Regulatory Powers

The following compliance indicators can be used to assess the *de facto* use of formally granted powers.

- *De facto* use of formally granted competences
- *De facto* use of formally granted sanction powers
- Development of regulatory powers

Tables 12 and 13 of the questionnaire give information on whether a regulator has used its most important powers, i.e. general policy-making powers and policy-implementing powers and sanctioning powers.

The questionnaire necessarily took a general approach, did not allow conclusions on specific subject matters, and was limited in comparability. In addition the same questions were posed to the stakeholders.

The following *de facto* criteria regarding the regulatory powers have been identified above:

- Possibilities to create long-term policies
- Application of a visible and important regulatory power
- Reported cases of arbitrary or inconsistent rule application or sanctioning
- Reported accusations that sanctions have been too harsh or too lax or politically motivated
- Legal or political conflicts, i.e. number of legal challenges to the decisions of the body
- Sufficient flexibility in managing resources

Inconsistencies regarding rule application and the arbitrary use of sanctions can be seen as a sign of outside interference. It should be noted, however, that these inconsistencies may also be traced back to leadership issues (i.e. that the regulator is not well governed), to a lack of expertise or clear and detailed regulatory powers.

The development of the regulators' regulatory powers over the period of the last five years is an additional indicator of both the stability of regulatory powers and the overall tendency of their evolution (Question 4).

Since the powers to manage the regulator internally can also be one way to gain influence over the independent regulatory authority, this indicator is significant in demonstrating informal and *de facto* means of influence on the one hand, and the organisational autonomy to manage personnel and financial resources on the other. In order to find out how much autonomy the

regulator actually enjoys with regard to its own organisation, this indicator was raised as a question to the stakeholders in the survey (Question 5).

3.3.1.2.2 Financial autonomy

The following *de facto* criteria regarding financial autonomy have been derived from the literature analysis:

- Adequacy of the budget to perform delegated duties
- Factual influence of third parties over the budget
- Budget trends over time; (at least) constant budget during the last years
- Reported cases of supervisory authorities threatening to cut funding plans or to use funding decisions as a lever in political power struggles

Within the questionnaire, we asked about the influence of third parties on the setting of the regulator's budget (Table 26) and within the Country Reports we asked for factual incidence of threats regarding the cutting of annual budgets.

Furthermore, we asked for the stakeholders' judgement on the overall adequacy of the budget and staff of the regulatory body (Question 10; 11).

3.3.1.2.3 Autonomy of decision makers

3.3.1.2.3.1 Highest decision-making organ

The following *de facto* criterion regarding the autonomy of the highest decision-making body was derived from the literature analysis:

- Party politicisation of the decision-making organ

In order to find out whether political power structures are reflected in actual board composition, the Country Reports are again a source of information; thus the impression of the stakeholders regarding this issue was included in the stakeholder survey (Question 2).

An additional aspect to be looked at was how the interplay between highest decision-making organ and the staff may play out in practice, and how this may affect formal decision-making competences in practise. Most independent regulators in the media sector have a structure in which a board or a council is the highest decision-making organ and there is an administration supporting and executing. However, sometimes the members of the highest decision-making organ are only employed part-time. Hence, it may theoretically be possible that in those cases the regulator is effectively being run by the administration.

We wanted to test the assumption that the highest decision making organ sets the agenda and effectively makes the decisions, compared to the role of the staff which essentially involves the preparation and drawing up of agendas, strategies and decisions. These considerations resulted in a new indicator to be validated through the stakeholder survey.

The highest decision making organ is *de facto* the agenda setter and also effectively behind the decisions (Question 16; 17)

3.3.1.2.3.2 Appointment procedure

The following *de facto* criteria regarding the financial autonomy were derived from the literature analysis:

- Partisanship of nomination
- Representation or reproduction of political power structures in actual board composition (due to appointment procedures or other reasons)
- Factual behaviour of appointed members, e.g. acting on behalf of the nominating or appointing body
- Possibilities (or reported cases) of the appointing body to exert pressure on the appointed member

Already in the theoretical part it surfaced that there is seldom a depoliticisation of appointment procedures of board members of independent regulatory bodies, since there is regularly some involvement of state institutions (i.e. government, parliament, president, sometimes resort ministers) in different constellations. Apart from these formal ties to political power structures, there are numerous informal political communications, political links and affiliations based on interests that spread beyond formal institutional frameworks.⁵⁷⁴ Nevertheless it is worth studying the extent to which partisan issues in the nomination and the appointment processes play out in the actual board composition. An abundance of incidents and contextual information on this issue can be drawn from the Country Reports. Moreover, staggered appointments of the board members of the regulatory body can be deduced from table 18.

The analysis of factual behaviour of appointed members acting on behalf of the nominating or appointing body is more difficult to assess, because such incidents are often not publicly reported and in many cases subjective. It is highly context-sensitive, which has been the reason for not continuing with these criteria.

The last indicator referring to possibilities of the appointing body to exert pressure on the appointed member (or reported cases of such) is followed up in the Country Reports.

3.3.1.2.3.3 Rules to prevent conflicts of interest or capture

The following *de facto* criteria regarding conflicts of interest or capture have been derived from the literature analysis:

- Factual proportion of revolving-door incidences
- Factual independence of board members and/or staff from personal interests in the market players

The factual proportion of revolving door activity has been addressed within the Country Reports. Unfortunately the Country Reports did not deliver substantial information.

We included two questions regarding these issues in the stakeholder survey (13; 14).

574 As it has been noted by the country correspondents from Macedonia: Snezana Trpevska.

3.3.1.2.3.4 *Tenure & Salaries*

The following *de facto* criteria regarding tenures and salaries have been derived from the literature analysis:

- Average effective term length
- Early resignations, e.g. because of informal agreement to resign after the election of a new government (higher turnover than election cycles can be an indicator of a lack of independence – in contrast, a lower turnover than election cycles is no sign of higher independence!)
- Term of office of political decision makers and term of office of head/Board of regulatory body *de facto* correspond with each other

The stability and length of the board members' or head's legal mandate can have a strong influence on the level of independence of regulatory bodies. Whether the term of office of political decision makers and term of office of the head or board of the regulatory body *de facto* correspond with each other can be derived from the Questionnaire (Table 18). Early resignations should have been explained in the Country Reports. However the variety of perspectives of the stakeholders' promises an additional insight.

Therefore one question on the early resignation of members of the highest decision making organ was incorporated in the stakeholder survey (Question 3).

3.3.1.2.3.5 *Dismissal*

The following *de facto* criteria regarding dismissals were derived from the literature analysis:

- Details and circumstances of personnel changes (notably dates of start and end of office) regarding the head or board of the regulator
- Reported cases of dismissals
- Departures (dismissals and resignation) of board members before the end of the term

The details and circumstances of personnel changes regarding the head or board of the regulator are likewise reported in Table 24 and further detailed in the Country Reports.

Early dismissals should have been explained in the Country Reports. However the variety of perspectives of the stakeholders promises an additional insight here, too. Therefore within Question three dismissals of members of the highest decision making organ have been incorporated in the stakeholder survey.

3.3.1.2.4 Knowledge

3.3.1.2.4.1 *Professional expertise and qualifications*

The following *de facto* criterion regarding the qualification, professionalism and expertise of the board members was derived from the literature study.

- Board members actually being experts or having professional background

To elicit *de facto* information, we asked stakeholders about their impression concerning the qualification and professional background in Question 12 with the opportunity to point out underrepresented competences.

In addition, regarding the staff of the independent regulator, the attractiveness of the regulator as an employer was included in the stakeholder survey, asking about professional background and whether working for the independent regulatory body is an attractive career step for experts. The working assumption is that where independent media regulators present an unattractive career step for various reasons, these bodies will find it difficult to recruit and retain qualified staff (Question 15).

3.3.1.2.4.2 External Advice

In Table 36 the question was asked whether the regulatory body makes use of the formally foreseen external advice on a regular basis.

3.3.1.2.4.3 Cooperation criteria

The cooperation criteria listed below were derived from the literature study:

- *De facto* cooperations with regulatory bodies in the same state
- *De facto* cooperations with regulatory bodies in other states
- Form and institutional level of cooperation (e.g. formalised network structures, systematic formal meetings, *ad-hoc* meetings)
- Existence of informal cooperative arrangements

Additional information on the actual level and functioning of cooperation with regulatory bodies within a country and – less frequently – at the international level was available the Country Reports.

3.3.1.2.5 Transparency and Accountability mechanisms

3.3.1.2.5.1 Transparency mechanisms

The following *de facto* criteria regarding transparency were derived from the literature study:

- Actual transparency (especially when there is no statutory transparency rule)
- Disclosure of decision procedures and reasoning
- Indication or announcement of likely future actions
- Publication of board meeting minutes
- Forms of dissemination (e.g. print, website, directly to parliament, official journal, magazine etc.)

The actual level of transparency, disclosure of decisions, proposed rule-making and actions, minutes of boards and the dissemination practices can to a certain extent be appraised on the basis of the Country Reports. However, as transparency can consist of many facets and can be perceived quite differently, we asked the stakeholders on their impression of the overall transparen-

cy (Question 8). Moreover, the stakeholders were asked whether they could access the decisions publicly (Question 9).

3.3.1.2.5.2 Seeking opinions from experts and stakeholders

The following *de facto* criteria regarding the possibility to seek opinions from experts and stakeholders were derived from the literature study:

- Forms of external advice acquisition (scientific Advisory Board, external studies, consultations, expert hearings etc.)
- Public availability of the basic data relevant for the conduct of regulatory policy
- Disclosure of basic data as integral part of the regulator's tasks or objectives
- Actual consultations of stakeholders and/or the public
- Number and kind of players involved in consultations
- Actual consultation procedures for knowledge gain, e.g. white papers, consultation papers, comments invited regarding draft decisions
- Inclusion of consultation results in the decision-making process, reaction of the regulator to arguments or claims
- Stage of decision-making process where consultations have been integrated

The actual practice of external advice acquisition can be difficult to track down based on the Country Reports. However, it was addressed to point out discrepancies between formal obligations and actual practice. Furthermore, the actual situation regarding public consultations is asked for in Table 38. The criterion of whether consultations responses are published was included in Table 37. An additional insight can be derived by asking the stakeholders in the survey (Questions 18-20).

3.3.1.2.5.3 Formal accountability and auditing mechanisms

The following *de facto* criteria regarding formal accountability mechanisms was derived from the literature study.

- Periodic internal or external evaluation procedures assessing to what extent the regulatory objectives have been met
- Regulatory body explains rules or strategies that describe its policy and decisions practice

In the stakeholder survey, we asked whether the regulator publishes full reports which give account of its activities (Question 21).

3.3.1.2.6 Credibility

The credibility of the independent media regulator is used to make an overall assessment, resulting from the analysis of the legal framework in Chapter 1.3.2. Being the linchpin of the overall impression a stakeholder has on the respective regulatory body, this can be considered a feasible question that can correlate with many of the more concrete questions in the stakeholder survey (Question 22).

3.3.2 Stakeholder Survey Questions

The complete Stakeholder Survey can be found in the Annex.

3.4 Stakeholder survey results

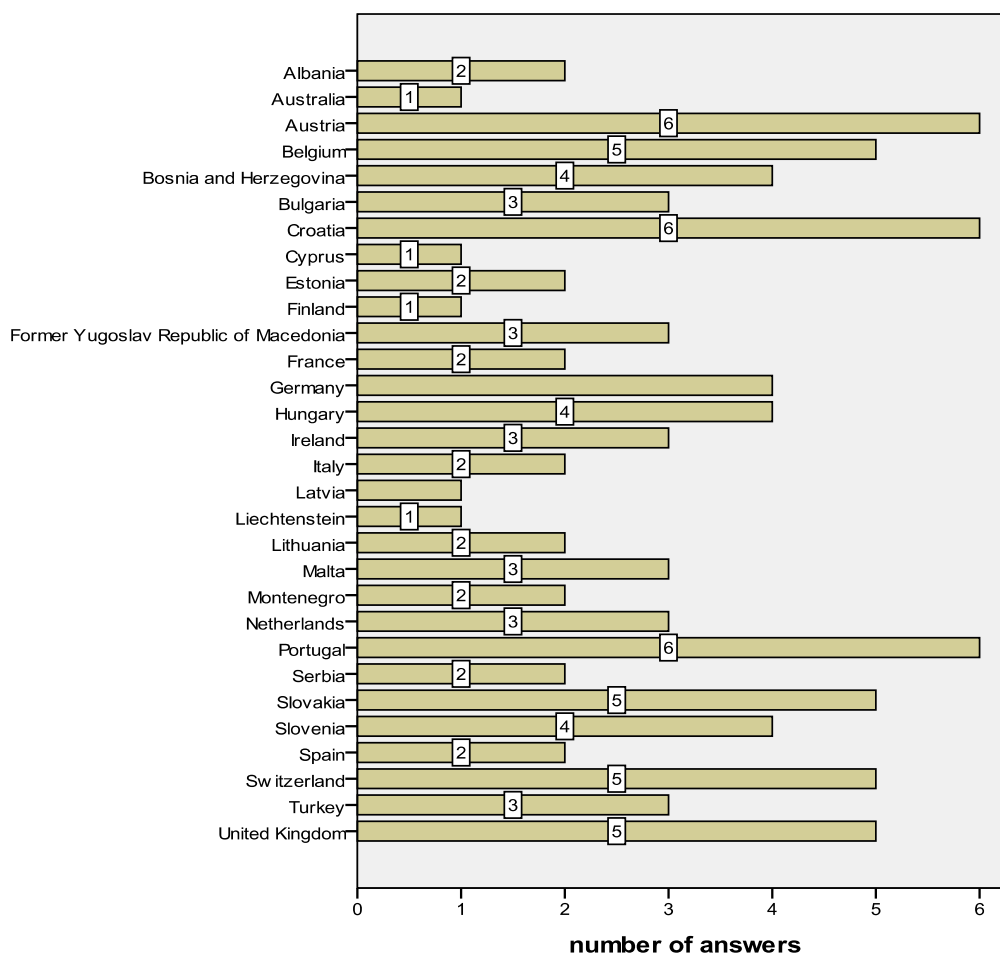
3.4.1 Difficulties in regard to the data collected through the stakeholder survey

Overall, the participation within the stakeholder survey was not as high as expected. 979 stakeholders were contacted.⁵⁷⁵ 20.65% logged on to the online questionnaire and 9.51% completed the questionnaire. This resulted in 93 answers from stakeholders, which represent in total 30 countries and 38 authorities.

Most answers were received from stakeholders from Austria, Croatia, Portugal, Belgium, Slovakia, Switzerland and the United Kingdom. Furthermore, answers were received from Albania, Australia, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, the former Yugoslav Republic of Macedonia, France, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Montenegro, Netherlands, Serbia, Slovenia, Spain and Turkey. The following table provides a detailed overview:

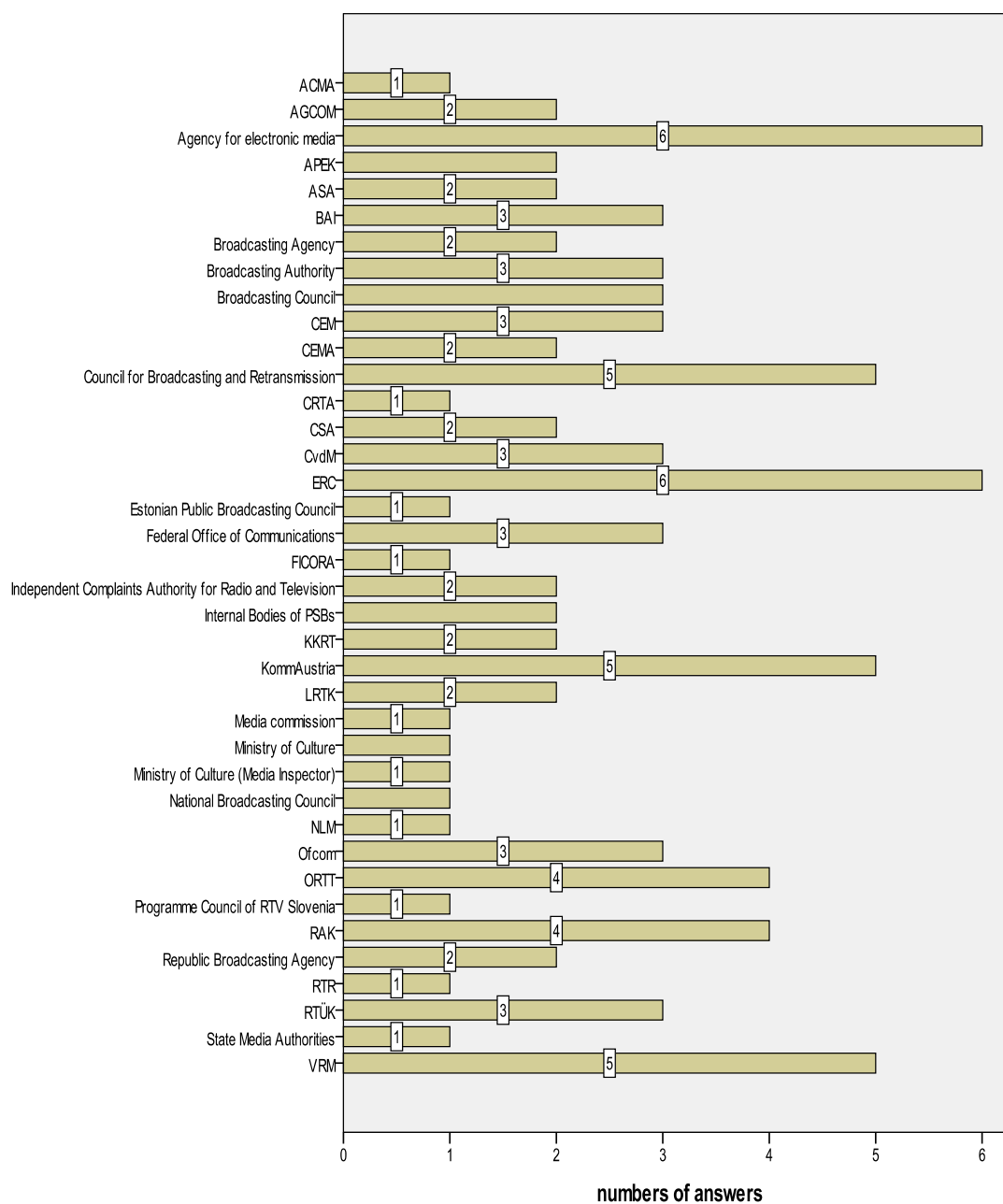
⁵⁷⁵ Stakeholders have been contacted via email and have been reminded two times. Online survey has been open for contributions from 20th of July until 10th of September 2010.

Fig. 15: Distribution of answers received per country



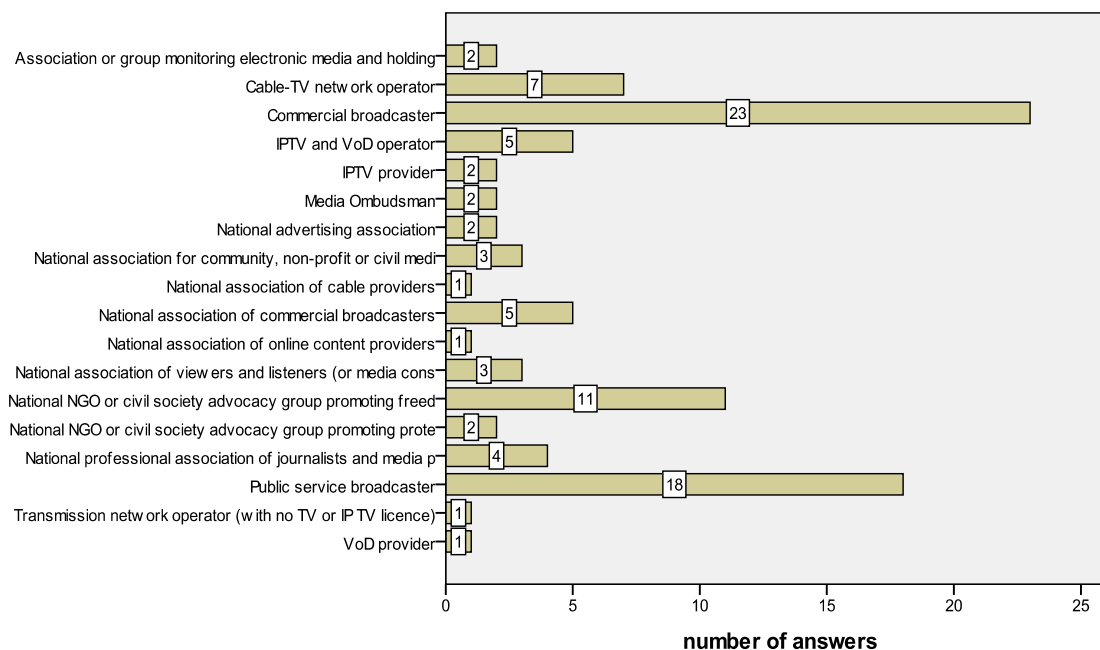
Regarding the distribution of answers per regulatory body, most answers were received regarding the Agency for Electronic Media (Croatia), ERC (Portugal), KommAustria (Austria), the Council for Broadcasting and Retransmission (Slovakia) and VRM (Belgium).

Fig. 16: Distribution of answers received per regulatory body



A variety of stakeholders participated in the survey. The largest groups were commercial and public service broadcasters, national NGOs or civil society advocacy groups promoting freedom of the media and freedom of expression, as well as cable-TV network operators.

Fig. 17: Distribution of the categories of participating stakeholders



The data is not equally balanced regarding the number of answers per regulatory body and the ratio of stakeholders per answer and regulatory body. Therefore, the correlations which result in the findings described below do not provide significant results for the respective regulatory bodies as institutional organisations. Neither are the different stakeholder perspectives reflected in the results. A stakeholder analysis is of high scientific value if it is applied to indicators which cannot easily be predetermined to be either beneficial or detrimental for the goals of independence and effective functioning. Therefore, *de facto* indicators were included in the survey the impact of which depends on the specific circumstances given in the country in question and which may also be assessed unequally from different perspectives of different actors within the countries. In the analytical approach, it was planned that the different perspectives given by the stakeholder would be examined, in order to determine the validity and impact of each of the *de facto* indicators included in the survey.

Unfortunately, the data received through the online survey did not represent a sufficiently high number of stakeholders to carry out a distinct approach comparing different stakeholder perspectives with regard to a certain issue and to a certain regulatory body. Therefore, due to this low number of respondents, a different approach was chosen. The information received from stakeholders was used as one single set and was analysed to detect correlations between different indicators within different set-ups.

However, this approach and the low number of respondents led to results that should be handled with caution. Since single regulators are overrepresented in comparison to the overall numbers, this might lead to a distortion of the results. Furthermore, it should be pointed out that the results of the survey provide information about the subjective perception of each stakeholder. This subjective perspective does not necessarily correlate with the *de facto* situation of the regulatory body in their country, assessed from an exclusively objective perspective. Also, the per-

spectives of the stakeholders that correlate with different interests and motivations with regards to the performance of the regulatory body remain disregarded. Nevertheless, the results reveal tendencies of correlation between different indicators.

3.4.2 Impact on impartial regulation

Within the stakeholder survey, the question on the perception of the impartial regulation of the regulator (Question No.22) is seen to have a pivotal position. Impartiality – assessed as a whole – reflects an equal arm’s-length distance to all stakeholders, which has been identified as crucial in the underlying concept of independence. Therefore, the following correlations of indicators are based on the presumption that the perception of the performance of the regulatory body, with regard to concrete *de facto* indicators within this survey, can have effects on the overall perception of the impartiality of the regulatory body while carrying out its obligation.

Nonetheless, it should be highlighted that all the results obtained do not constitute causally determined relationships, but indicate certain tendencies of correlation between the subjective perception of stakeholders regarding certain indicators, and their overall perception of the regulator’s ability to deliver impartial regulation.

3.4.2.1 Significant correlations

Many answers did not deliver statistically significant results, or did not prove to be logically explicable. In the following discussion, only the significant correlations are presented.

3.4.2.2 Removal of the head

Following the question of whether the stakeholders are aware of any changes of specific legal provisions governing the regulatory body in the past ten years (Question No. 1), which was affirmed by 81.9% of all stakeholders, the stakeholders were asked to describe the consequences of the changes in the law (Question No. 1.1).

24.8% of the stakeholders answered that, according to their knowledge, the amendments to the law resulted in the removal of the head of the regulator. Within this group, only 31.6% of the stakeholders regarded their regulatory body as delivering impartial regulation, meaning that 68.4% of the stakeholders perceived their regulator to regulate in a biased way.

The hypothesis can therefore be derived that changes in law that remove the head of the regulatory body are connected to perceptions that the regulator does not deliver impartial regulation.

3.4.2.3 Early resignations

In question No. 3, the stakeholders were asked if they were aware of any early resignation or dismissal of the head of the regulator or its board or council in the last five years.

41.9 % of stakeholders were aware of early resignations of the head of the regulatory body. In cases where early resignations occurred, 61.5% considered their regulator to be biased.

Where no early resignations occurred (58.1% of all cases) 72.7% of stakeholders described their regulator as impartial.

The hypothesis can therefore be derived that the early resignation of the head of the regulatory body correlates with a perception of the regulator as not carrying out its obligations in an impartial manner.

The common reason why stakeholders believed that an early resignations or dismissal occurred was the exertion of political pressure. 64.1% of stakeholders replied that this was the reason for the early dismissal. 38.5% the stakeholders identified personal reasons for an early resignation or dismissal, such as better job opportunities, conflicts of interests or a major disagreement within the highest decision-making organ. An additional 25.6% of stakeholders identified incapacity or malpractice as a reason for early resignation or dismissal. However, no significant correlation between the reasons and the perception of the impartiality of the regulatory body can be derived.

3.4.2.4 *De facto* use of formally granted powers despite breach of legal provisions

In question No. 7 the stakeholders were asked if ,in their opinion, the regulatory body had refrained from making use of its formally granted powers – namely issued warnings or fines, made a decision in programme/content-related matters, or suspended or revoked licences.

49.5 % of the stakeholders were of the opinion that their regulatory body has exhaustively made use of its formally granted powers. Within this group, 73.9% of the stakeholders considered their regulator as having delivered impartial regulation.

The hypothesis can therefore be drawn that a regulatory body is perceived to regulate impartially in cases where the stakeholders are of the opinion that it enforces punishments of breaches of legal provisions with significant stringency.

3.4.2.5 Transparency of the regulator's activities

In question No. 8 the stakeholders were asked to express their judgment of the overall transparency of the regulator's activities. They were asked to give their opinion on a scale containing six steps, ranging from strong disagreement to strong agreement. In order to increase the significance of the data, the different levels of disagreement/agreement were summarised/dichotomised to two groups.

Regarding the perception of transparency of the regulatory bodies, the majority (57.0%) of the stakeholders said they had easy public access to their regulator's decisions and work programmes.

Comparing this perception with the perception of the regulatory body as acting impartially, it can be seen that there is a correlation between the transparency of the regulator and the perception of impartial regulation.

Overall, it can be seen that, where stakeholders perceive their regulator as being transparent, they also tend to consider it impartial (71.7%). The majority of stakeholders who disagreed with

the statement that their regulator was sufficiently transparent (43.0%) also considers the regulatory body to be biased (61.5%).

This impression is strengthened when we examine the different levels of perceived transparency. When stakeholders (11.8% of all cases) judged the regulator to be very non-transparent, only 27.3% of stakeholders perceived the regulator's work as impartial. Whereas, at the other end of the scale, where the regulatory body was considered to be very transparent (20.4% of all cases) it was also regarded to be impartial in 84.2% of cases.

The conclusion can therefore be drawn that the perception of transparency is tightly connected with the perception of the regulator regulating in an impartial manner.

3.4.2.6 Accessibility of the regulator's decisions

In question No. 9 the stakeholders were asked if, to their knowledge, the decisions of the regulatory body were publicly accessible. 84.9% of the respondents replied that the decisions were indeed accessible. Within this group, 64.6% of stakeholders perceived their regulator to deliver impartial regulation. Within the complementary group of stakeholders that were not aware of publicly accessible decisions, the perception of impartial regulation was only stated by 21.4%, meaning that 78.6% considered their regulator to deliver biased regulation.

The conclusion can therefore be deduced that the accessibility of decisions of the regulatory body is positively connected with the perception of the impartiality of the regulatory body.

3.4.2.7 Impact of the expertise and qualification of the staff

In question No. 12 the stakeholders were asked to rate their agreement with the statement that the regulator's staff had adequate professional expertise and qualification to fulfil its tasks and duties. The stakeholders were asked to give their judgment on a scale containing six steps, ranging from strong disagreement to strong agreement. In order to increase the significance of the data, the different levels of disagreement/agreement were summarised/dichotomised to two groups.

59.1% of the stakeholders perceived the staff of their regulatory body as adequately qualified and equipped with sufficient expertise. The data shows that the majority of these stakeholders (78.2%) considered their regulator to deliver impartial regulation.

The contrasting number who disagreed on the adequacy of the expertise and qualification of the staff (40.9%) mainly also disagreed that the regulator was impartial (71.1%).

The hypothesis can therefore be deduced that the adequacy of the qualification and expertise of the staff is significantly connected to the perception of the regulator as regulating in an impartial manner.

NB: The stakeholders additionally reported that, in some cases, the staff could not fulfil their tasks completely, because there were not enough professionals with expertise regarding the media market. It was mentioned that the staff should be more familiar with the electronic media market and the rules of the profession.

In an in-depth analysis of which specific professional competence was missing, the stakeholders answered that, with regards to the overall situation, public policy experts are notably missing, followed by lawyers, economists and technical experts.

Significantly correlated with the perception of impartiality was the shortage of economists: 50% of the stakeholders who believed that the regulator's staff was not adequately qualified thought that economists were under-represented. The large majority (89.5%) of this group of stakeholders did not believe the regulatory body to be impartial.

3.4.2.8 Is the regulator an attractive career step?

In question No. 15 the stakeholders were asked if they considered that working for the regulator was an attractive career step for experts. 60.2% of the stakeholders agreed with this statement. 75.0% of these stakeholders believed that the regulator delivered impartial regulation. The counter sample shows that, if the regulator was not considered an attractive career step, the proportion of stakeholders that consider the regulator as carrying out their duties in an impartial manner dropped down to 34.2%.

The hypothesis can therefore be derived that considering working for the regulator as an attractive career step is positively connected with believing the regulator carries out its duties in an impartial manner.

Reasons given for why working for a regulatory body might not be an attractive career step for experts were various, with the most frequent ones being the limited career paths inside the regulatory body (59.5%), low salaries (40.5%), and limited career paths outside the regulator (35.1%). Others included the direct influence of the political parties in the decision making process and the resulting controversial reputation of specific regulators. Stakeholders also mentioned traditionally undynamic structures, intransparent hiring procedures that foster cronyism, and the perception that the regulatory body had minimal influence.

3.4.2.9 Who is effectively making the decisions?

In question No. 17 the stakeholders were asked about their opinion on who was effectively making the decisions in the regulatory body. Multiple answers were allowed.

In the majority (66.7%) of cases, the stakeholders reported that decisions were made by the highest decision-making organ, 37.2% by the senior staff, 34.4% by the government and 8.6% by industry.

Regarding the correlation with impartial regulation, it can be concluded that where the stakeholders perceived decisions to be carried out by the highest decision-making organ, the regulator was seen to be delivering impartial regulation (66.1%), whereas if the decisions were made by the government or the ministry in charge, the perception was different, namely only 37.5% of the stakeholders perceived the regulatory body as delivering impartial regulation. Where the opinion was that decisions were made by the senior staff or industry, no significant correlation could be observed.

The hypothesis can therefore be drawn that when decisions were perceived as being made by the highest decision making organ rather than by the government or a political party, stakeholders had a higher perception of impartiality.

3.4.2.10 Announcement and conduction of public consultations

In question No. 19 the stakeholders were asked if they thought that regulator consultations were announced and conducted in an inclusive fashion. The results showed that in 49.5% of all cases the public consultations were perceived to be announced and conducted in an inclusive fashion. From this group 69.6% of stakeholders considered the regulator to be carrying out their obligations in an impartial manner.

Where the public consultations were not perceived in the described manner, the ratio regarding the impartiality of regulation was almost balanced.

The hypothesis can be therefore constructed that the announcement and conduct of public consultation in an inclusive fashion correlates with the perception of impartiality in the regulator.

3.4.2.11 Overall compliance

In question No. 28 the stakeholders were asked about their view on the general compliance of the regulator with the formal legal provisions. Different exclusive possible answers were offered, namely non-compliance regarding the legal set-up of the regulatory body, the internal organisation, the composition of the board/council and regulatory tasks and duties. In addition, the option of stating that the stakeholder was not aware of any non compliance was provided.

The large majority of the stakeholders (76.3%) was not aware of any non-compliance. The complementary answers were diverse and no large group could be identified.

Regarding the overall compliance of the regulator with the formal legal provisions, it can be concluded that, if the regulatory body acts within its legal powers and duties, 64.8% perceive the regulator as acting impartially. If the regulatory body does not act within these limits 63.6% of the stakeholders regard the regulatory body as not acting in an impartial manner.

This leads to the hypothesis that the awareness among the stakeholders of strong compliance is connected to their perception of the impartiality of the regulator.

3.5 In-depth country analysis

3.5.1 Aim & Methodology

The in-depth country studies were intended to test the outcome and assumptions that could be derived from literature analysis (chapter 1), the analysis of the institutional, regulatory and legal frameworks (chapter 2) and the analysis of the stakeholder survey, as well as the *de facto* insights from the country reports. The aim of the following in-depth analysis of eight countries was therefore undertaken to validate and improve those interim results.

Although the large number of countries examined and the objective of providing practically applicable results call for a high degree of standardisation, this additional step was conducted because standardisation always triggers the risk of producing statistical or reasoning artefacts. The objective of the in-depth country analysis thus has not been to measure the level of independence and efficient functioning of the regulatory bodies as such, but aimed at validating interim indicators and findings in practice. Moreover, the analysis should show findings on possible relationships between formal and *de facto* independence and identify broader national contexts and cultures that cannot be captured with the ranking tool and the key characteristics, but nevertheless have a significant influence on the formal and/or *de facto* independence and functioning of the regulatory body.

As a methodology for the in-depth country reports, eight countries were chosen in a first step. Factors for choice were to have a sample representing the manifold approaches and configurations of regulatory bodies (see chapter 2 – issue tables and categorisation). Additional factors were different regulatory practices and the national pathways/chronological developments.

Tab. 14 Countries selected for the in-depth analysis

	Name of the country	Regulatory body/bodies
EU Member States	Estonia	Ministry of Culture of the Republic of Estonia
	Hungary	National Radio and Television Board (ORTT) NMHH
	Italy	AGCOM
	Netherlands	Commissariaat voor de Media (CvdM)
	Slovenia	APEK Broadcasting Council Ministry of Culture Inspectorate for Culture and Media – Media Inspector
Candidate country	United Kingdom	Ofcom
	former Yugoslav Republic of Macedonia	Broadcasting Council
Potential candidate country	Bosnia and Herzegovina	CRA

After the choice for the selected countries, the respective Country Correspondents were asked to identify three to four national experts regarding the country's media system, its policies in the AVMS sector, and thorough insight into the *de facto* situation. Further guidelines for choosing interview experts were an academic or a professional background, as well as relevant publica-

tions regarding the media system. The experts interviewed are listed at the beginning of each in-depth country analysis.

In a third step, the project team and the eight Country Correspondents of the selected countries applied the interim findings (prototype of the ranking tool, key characteristics) to the respective regulatory bodies. In the context of the country summaries and the country tables, the study team, together with the Country Correspondent, drafted hypotheses regarding those areas where the application had notable results, either on the formal or on the *de facto* side, and either positive or negative. These hypotheses were discussed with experts from the countries in semi-standardised phone interviews.⁵⁷⁶ After the interviews, which took place during November 1 and November 22, the statements of the experts were analysed with regard to the assumptions made in advance, as well as their implications for the validity and practicability of the interim ranking tool and key characteristics. The following reports show the outcome of the in-depth country analysis.

3.5.2 Estonia

In Estonia, the Copyright and Media Department within the Ministry of Culture was analysed. Estonia was chosen for in-depth country analysis because in this country, the regulatory body is integrated within the ministry.

Estonian expert interviews were conducted with

- Prof. Epp Lauk, University of Jyväskylä, Dept. of Communication,
- Sulev Valner, freelance radio journalist,
- Urmas Loit, University of Tartu,
- Jyri Pihel, Head of Digital Television Committee at Ministry of Economic Affairs and Communication.

3.5.2.1 Attention points after applying the interim tools and assumptions

Status and powers: When applying the interim results to the Copyright and Media Department it becomes apparent that the formal situation regarding the dimension of status and powers bears potential risks for influence from government. One reason for this is that the Department is not designed as a separate legal entity. Being part of the Ministry of Culture (MoC), the department is fully integrated in the federal administrative hierarchy. This consequently results in the possibility of the Minister giving instructions to the department or overturning its decisions (before they are formally issued).

Most experts pointed to problematic situations that could be seen as a consequence of the regulatory body being part of the ministry: Because of the lack of a functional separation between regulation (monitoring and supervision) on the one hand and law making and the political inter-

⁵⁷⁶ The interviews followed the same structure; however, regarding the hypothesis drafted in relation to the specific country or regulatory body, the interviewees were allowed to stick to country-specific findings.

est to foster economic development on the other, the regulatory body is sometimes driven by conflicting motivations.

Therefore, the regulation is characterised by negotiations with all affected parties. Also, the lack of functional separation sometimes results in a situation where the regulatory body is the addressee of industry lobbying. Two experts stated that, in addition, as the Copyright and Media Department has to take care of authors on the one hand and of the industry on the other, this makes it difficult for the regulator to come to decisions by means of negotiation where both interests must be taken into account.

The ministry-integrated structure of the department, one expert stated, also puts pressure on the department, which is always trying to prove that it is not influenced by politicians.

The Copyright and Media Department of the MoC is equipped with a wide range of powers, including policy-setting powers, while – as the country summaries showed – wide ranging policy-setting powers are rarely given to regulatory bodies that are organisationally separated from the state. Therefore, an advantage of having a regulator integrated in a Ministry could be that policy-setting powers are more likely to be given; three experts interviewed pointed out that while this assumption might be correct, there are also disadvantages resulting from the power to set policies: In cases where legislative and regulatory powers are not functionally separated, conflicts of interest can arise.

The observations made during the expert interviews supported our assumption that being a separate legal entity might not be the only way to prevent a regulator from being structurally biased, but it showed that structural separation can safeguard against state or industry influence on many levels (status and powers, autonomy of decisions makers, finance, knowledge). Moreover, the assumption that being adequately financed and staffed is essential to optimally fulfil the regulatory tasks has been backed.

Financial autonomy: The ranking tool prototype showed that the Department only has a small level of financial autonomy: The body does not have a separate budget within the MoC. However, all experts stated that, as influence can be exerted directly within the administrative hierarchy already, financial resources are a much less important mechanism of potential control. Still, two experts stated that the allocation of human and financial resources within a ministry is assumed to show the importance that is given to a certain field of governance.

Most of the experts stated that the regulatory body does not seem to have adequate financial and human resources to fulfil its regulatory task optimally. This obstacle, however, was not seen by the experts as a consequence of governmental bias, but rather due to the fact that Estonia is a small country with relatively small tax revenues – the private broadcasters generally have greater resources than the regulatory body itself.

Knowledge axis: With regard to the level of expertise within the regulatory body, the formal and *de facto* situation seem to be very divergent: While there are no legal provisions explicitly stating that the staff of the Copyright and Media Department has to be sufficiently qualified, the experts stated that it follows a general understanding that the staff of the ministerial department can *de facto* be considered as experts in their field of administration.

Accountability and transparency mechanisms: Decisions in Estonia are often based on round-table negotiations with the industry (see above). These consultations are not open to the general public, which makes this part of the regulatory process and the motivation for the decisions quite non-transparent, most of the experts thought. According to them, it would lead to more transparency if a right to be heard were given to affected third parties in decision cases.

Cooperation: According to the interviewed experts, the regulatory framework ensures straightforward linkages and cooperation duties between the regulatory bodies in Estonia. The experts stated that cooperation with the Public Service Broadcasting Council, which is a supervisory body for public service broadcasters, works well in practice.

3.5.2.2 Estonian context factors

The expert interviews made clear that in Estonia the media industry is quite strong. The market is more like a “small boutique” that makes it easy for the industry players to “direct the game of regulation”, one expert stated. From this, the general conclusion can be drawn that the adequacy of funding and staffing cannot be assessed without putting the funding and staffing in the media sector in relation to the overall level of funding and staffing of public bodies within one country.

In addition, there has been a tradition of guaranteeing the independence of the media since the sovereignty of Estonia in 1991; this is regarded as fundamental for balanced content, to provide media pluralism and to allocate limited frequency resources. This strength secures the media from being influenced by politicians.

Traditionally, civil society has not been very strong in Estonia, but more variable. In the field of media this is currently changing, because of the feeling of being bothered by too much commercialisation: Civil society is starting to raise its voice and to organise itself, two experts pointed out. The general political culture can be regarded as another reason for a regulatory approach characterised by negotiation.

3.5.3 Hungary

Hungary was chosen for the in-depth analysis because of the significant changes in its broadcasting legislation following the 2010 elections. The former regulator responsible for regulation of the broadcasting sector, the ORTT, was replaced by the newly established regulator, the NMHH. Because of these recent changes, Hungary offers the possibility of examining both regulating authorities, and of comparing the differences against the background of the ranking tool prototype.

Hungarian expert interviews have been conducted with

- Gábor Polyák, Janus Pannonius University,
- András Koltay, Pázmány Péter Catholic University, Member of the Media Council,
- Levente Nyakas, Károli University.

3.5.3.1 Attention points after applying the interim tools and assumptions

3.5.3.1.1 The ORTT

Status and powers: In terms of status and powers, the ORTT seemed to be well set up both formal and *de facto* cases. The experts especially pointed out that, due to the requirement of a two-thirds majority to change the legislative set-up, the rules remained mainly unchanged for a long period of time. They stated that this led to a situation in which the regulatory framework was not sufficiently up to date to meet the requirements of the changing media environment.

Autonomy of decision makers: On the autonomy of decision makers, the ORTT seemed to be vulnerable to external influence, especially from politics, due to the legal provisions regarding the nomination and appointment of the highest decision-making organ: The experts confirmed this result – as the members were chosen by the different parties of the parliament; every fraction appointed one of the members. Although these members were formally independent, according to some of the experts they were partly perceived to be *de facto* actors/agents of “their” political parties. This often led to a situation in which political agreements had to be reached in order to be able to make decisions. A consequence was that regularly within the board the same political debates as in the parliament were fought out. Two experts stated that this had a negative impact on the speed and distinctness of the decisions.

One expert additionally stated that towards the end of their tenure some board members acted even more strongly in favour of their nominator, in order to become re-elected.

The assumption that the combination of a potentially politicised board and the for board members to be reappointed could lead to a situation where external – especially political – influences could be exerted was confirmed by the experts.

Knowledge: In the area of knowledge, the ORTT was set up to be strongly resistant against external influence. Although the board members were perceived generally competent to fulfil their tasks by the experts, they were – as described above – sometimes perceived to represent party political interests.

Accountability and transparency mechanisms: Regarding accountability and transparency mechanisms, the formal and *de facto* ranking tool depicted a high level. Regarding the issue of consultations, a bias between the formal and *de facto* situation was displayed. This perception was also supported by two of the experts. Although the formal requirement to stage open consultations was met, the *de facto* outcome of the consultations has not turned out satisfactorily. However, one expert explained that this was mainly a result of the young political culture in Hungary, which has not nurtured a strong participation and involvement yet.

3.5.3.1.2 The NMHH

Concerning the replacement of the former regulatory body, it was agreed by the experts that the old media law dating back to 1996 no longer matched the requirements of current regulatory tasks. Before this background, the 2010 amendment of the media law established the Media Council within the converged NMHH regulator. One expert pointed out that ambitions to establish a converged regulator also existed before the 2010 elections.

The reasons for the construction of the NHMM were disputed by the experts: One opinion was that a converged regulator was formed in order to combine professional expertise and to create competence, while the other opinion was that the integration was aimed at a concentration of powers and was driven by personal ambitions.

Status and Powers: Formally and *de facto*, the NMHH seems to be well equipped against undue external influence regarding its status and powers. Two of the interviewed experts described the formal set-up of the new converged regulatory body as balanced and able to prevent risks of potential influences. However, they judged the *de facto* situation differently: First, although the Media Council is legally set up as a separate body within the NMHH, it was perceived by two experts that the formal separation is not kept up, when taking the NMHH as whole into consideration: The NMHH unites three different bodies, with different levels of independence, under the umbrella of one omnipotent president, who is appointed by the prime minister. As the NHMM's president is automatically the only electable person as the Media Council chairperson, there is a potential risk for a slight structural bias, according to two experts. Moreover, the Media Council has to rely on the resources of the NHMM.

Autonomy of decision makers: Regarding the degree of autonomy of decision makers, the ranking of the formal provisions suggested that the rules are suitable to prevent the exertion of influence. However, two experts explained that the *de facto* situation differs quite significantly from this, especially when it comes to the appointment and nomination of the members of the Media Council board: The formal requirement that the board members must be appointed by the parliament unanimously in the first round and – if no unanimous decisions can be drawn – with a two-thirds majority in the second round, are a sufficient formal safeguard against biased political influence in theory, according to all experts. However, since the governing party in Hungary has a two-thirds majority, this safeguard remains useless: The leading party is able to appoint all the members of the board without having to compromise and bargain politically with the other parties in the parliament; two experts agreed that the current situation can facilitate political influence.

The interim ranking tool ranked tenures that last longer than one election period highly, with some additional points for the possibility of appointment renewal. The Hungarian situation showed the limits of ranking such indicators, again because of the context of a two-thirds majority in parliament. The current term of Media Council board members is set to nine years, with appointment renewals being possible. One of the experts was of the opinion that this long term secures the independence of the members, while another expert considered the length of the tenure as possibly unconstitutional, as the long tenure is a factual cementation of current political power. This, though, can not reflect society's changing reality and the changing political powers during the next two parliament elections. One expert pointed out that this personal continuity within the highest decision-making organ is strengthened by the rules on dismissals, which are only possible for a limited set of reasons. Another expert stated that the current board is likely not to be reappointed after its current term, because political circumstances might have changed when it comes to the next set of appointments. Two experts also stated that the perfect term length

would be five to six years, including the possibility for a single term renewal, as this would allow assessment of the work delivered by the board before deciding.

In the case of Hungary, the assumption was supported that it is essential to establish and implement nomination and appointment procedures that prevent a structural bias, in order to create an independent regulatory body. The appointment and nomination procedures for electing the board – although set up formally in a way that prevents structural bias – *de facto* shows that a two-thirds majority of the governing party in parliament can undermine some of the safeguards in place. Most of the experts pointed out that, in order to prevent the continuity of the composition of the board and the conservation of political realities, it could be an additional safeguard to have staggered terms (rolling appointments) of board members. If this is secured, long tenures lose the risk of cementing the political situation, but enable the composition of the board to adapt.

Furthermore, it was pointed out by two of the experts that the fact that the president of the NMHH is the only electable candidate for the position of the chairman of the board of the Media Council should be seen as problematic, as this leads to possible influence by the government. It became obvious once more that the appointment and nomination procedure is a vulnerable step regarding the overall autonomy of a regulatory body.

Accountability and transparency mechanisms: The NMHH seems to be sufficiently accountable and transparent, according to the application of the ranking tool prototype. Regarding the transparency mechanisms, all experts agreed that the formal requirements for consultations are satisfactory but that the *de facto* situation is likely to differ. This statement was made mainly because only few people have been involved up to now; the experts stated that the political culture has not developed far enough yet, which must be seen in the light of the short democratic history of Hungary.

3.5.3.2 Hungarian context factors

All the experts explained that in Hungary the democratic and political culture is not very developed due to its short democratic history. This has the consequence that although the formal set-up contains a small risk of influence and non-transparency, the actual procedures are different and strongly rely on the people in charge. Furthermore the situation in Hungary with the leading party possessing a two-thirds majority is rather exceptional. The general assumption of two-thirds majorities requirements as a safeguard is effectless in the case where a single party manages to gain such a majority.

This potentially allows political influence on the Media Council within the NMHH. Besides the strong political majority of the ruling party leading to potential *de facto* risks, the current situation is also said to result from general political culture. The Hungarian system has only been in place for 20 years and it is therefore a very young democracy that is in a developing process – “the actors are still learning the new rules”, one expert pointed out. One expert pointed out that independence is less a question of the law, but more a question of personal beliefs, ethics and opinion.

3.5.4 Italy

The reasons for selecting AGCOM were mainly twofold: First, AGCOM is one of the oldest “converged” regulators. Therefore, AGCOM also covers issues related to transmission for broadcasting services and ancillary services (must-carry rules, EPGs, APIs). Another reason for having a particular research interest in the independence and effective functioning of AGCOM is the fact that the application of the interim results left questions regarding possible divergences between formal and *de facto* indicators open; in June 2010, one of AGCOM’s commissioners resigned following a judicial inquiry into alleged pressures applied by Mr. Berlusconi in order to stop certain broadcasts on RAI that were critical towards the government.

Although three interviews were planned, we only managed to conduct two of them, since the third national expert indicated just before the deadline that he was no longer willing to participate, because “this work is not really interesting for me” and because “I don’t agree with the method”.

The interviewed experts were:

- Prof. Filippo Donati, professor Media law and independent expert,
- Prof. Giulio Enea Vigevani, professor for media law (University of Milan) and independent expert.

3.5.4.1 Attention points after applying the interim tools and assumptions

Overall, the picture of the formal and *de facto* independence of AGCOM resulting from the application of the interim tools was quite complex: First, the formal situation was characterised by the highest scores in the dimensions of “status and powers” as well as “autonomy of decision makers”. For both these dimensions, the formal scores were also higher than the *de facto* scores. In contrast to this, the scores for the formal situation were significantly lower in the dimensions “financial autonomy”, “knowledge” and “accountability and transparency”, each time also leading to higher *de facto* scores.

In general, both experts expressed their appreciation for the work done. Although they did not all have the time to examine the ranking tool in detail, they nonetheless considered it a methodologically sound tool to evaluate the formal and *de facto* independence of the Italian AVMS regulatory authority, AGCOM. One of them, however, indicated concerns about the questions on the scope of the powers of AGCOM. In Italy, the government and parliament are responsible for developing general policy. By voting for acts or decrees, they can influence or “instruct” the regulator with general policy guidelines, but never in individual cases.

Status and powers: AGCOM is the sole authority responsible for issues related to the AVMS-directive. As an assumption we posed to experts that this clear responsibility for regulatory issues in the AVMS area increases the independence of AGCOM vis à vis industry and government, and also the efficient functioning of AGCOM. Both experts agreed to this and also considered the fact that AGCOM is the only authority to regulate the AVMS issues to be an important element in its independence and efficiency.

Furthermore, AGCOM is a “converged regulator” (i.e. it also has powers in electronic communications). As a hypothesis we stated that these additional powers (mainly relating to the

transmission of signals) increase the independence of AGCOM vis à vis industry and government, and also the effectiveness and/or efficiency of AGCOM. Both experts considered the fact that AGCOM is a convergent regulator to be an important element in its independence and efficient functioning, though one expert indicated that “the more powers a regulator has, the more political pressure the government is likely to put on you”.

Autonomy of decision makers: We tested whether the appointment of members of the highest decision-making organs of AGCOM by the president of the Republic could lead to the increased independence of AGCOM vis à vis industry or government. Both experts concluded that the powers assigned to the president of the republic are strictly formal and do not offer any guarantee for *de facto* independence.

We asked experts whether the four-year cooling-off period for members of AGCOM might increase its independence vis à vis industry or government. Both experts considered the existing cooling-off period to be an important guarantee for independence. Furthermore, one expert considered the meaning of the question about members’ resignation before the end of their term of office to be unclear. Resignation cannot be considered negative in all cases: In Italy, a member quite recently resigned because he was caught making phone calls with the prime minister about a programme on the public broadcaster that would have been too critical for the government. In this case, the expert considered the (forced) resignation had more of a positive effect on the independence of the regulatory authority.

Finally, one expert indicated that he considered the question about adequate expertise and qualification as too ‘black and white’: He suggested there should also be questions about the majority of the board members.

Financial autonomy: We assumed that both the low level of state financing (i.e. 4.8% in 2009) increases the independence of AGCOM vis à vis industry or government, as well as the high level of private financing (i.e. contribution of operators, 93.2% in 2009) could increase the independence of AGCOM vis à vis industry or government. Both experts considered the low level of state funding and high level of sector funding as an important aspect of the independence of the regulatory authority. The Italian case is specific, since the regulatory body itself can decide on the actual contribution rate of the private sector to its budget. This high level of involvement also corresponds to the high *de facto* score of AGCOM in the axis of financial autonomy.

Accountability and transparency mechanisms: We concluded that the fact that the annual report of AGCOM cannot be approved or rejected by Parliament increased the independence of AGCOM vis à vis industry, government, parliament and public society at large. Both experts agreed to this.

3.5.4.2 Relationship formal and *de facto* independence

One expert indicated that, in the case of Italy, the formal requirements were in general sufficient, but that this very much depended on the way these legal provisions were interpreted and applied. He considered the vague nomination and appointment procedure, and the absence of appropriate expertise and qualification requirements, as the most problematic in this respect.

3.5.4.3 Italian context factors

One expert referred to the concept of “lottizzazione”, meaning that since coalition governments must be formed, the government (from the top of the government to the lowest level public authority) is highly politicised. In his eyes, all powers of government are essentially characterised by balances between political parties. Another expert was of the opinion that the level of party political loyalty differs a lot on a case-by-case basis and between actual individuals. He however admitted that also inside AGCOM, party-political loyalty has in the past already created problems, at least in the case of some board members.

3.5.5 Netherlands

The “Commissariaat voor de Media” in the Netherlands was selected for the in-depth country analysis as a potential best-practice example of an independent and efficiently functioning regulatory body in the audiovisual media sector. This assumption of the project team was to a large extent also confirmed by the very high *de facto* scores in the interim ranking tool. The Commissariaat voor de Media scored the maximum points in almost all axes (i.e. “status and powers”, “financial autonomy”, “autonomy of decision makers” and “knowledge”). The Commissariaat only had a slightly lower score in the axis “accountability and transparency mechanisms”. For the Netherlands, we were able to perform four interviews.

The interviewed experts are:

- Prof. Nico van Eijk, professor of information law (University of Amsterdam), member of the board of public broadcaster and independent expert.
- Prof. Wouter Hins, professor Media law (University of Leiden) and professor of public law (University of Amsterdam), member of the complaint committee and independent expert.
- Mr. Koos Kalkman, independent media expert and former director of Mediaraad (policy advisory body).
- Prof. Jan Kabel, professor of information law (University of Amsterdam) and independent expert.

3.5.5.1 Attention points after applying the interim tools and assumptions

All experts expressed their overall appreciation for the tools developed, although several indicated that they considered them terminologically unclear regarding the delineation of powers of the regulatory body. Allocating more than case-by-case powers to an independent regulatory authority would be unconstitutional without real political checks and balances. Therefore, they considered questions referring to general policy-setting competences inappropriate. Furthermore, one expert stated that he considered all questions on the knowledge axis to be too ‘black and white’. Finally, one expert asked how the impact of existing (and in his view efficiently functioning) co- and self-regulatory instruments or institutions could be evaluated with our tools.

Status and powers: As indicated above, all experts considered that allocating more than case-by-case powers to an independent regulatory authority would be unconstitutional without real political checks and balances in the Netherlands.

According to the application of the interim ranking tool, the possibility for the minister to overrule decisions of the CvdM can have a negative impact on its independence from the government. One expert stated that the minister sometimes used his powers to overrule decisions of the regulator, leading to a relationship of “governance by threat”.

Another assumption made was that the fact that the CvdM is not competent for spectrum (i.e. Ag. Telecom) or transmission (i.e. OPTA) issues weakens its position as an AVMS-regulator. Although one expert stated that being a converged regulator would improve efficiency of the CvdM, two others stated that its lack of powers in radio frequency issues has no impact on the AVMS related powers of the CvdM.

One expert was of the opinion that the question on the possibility for the regulator to develop and implement broader policies was insufficiently clear. In the Netherlands, regulators can issue ‘policy guidelines’. These are general statements made by the regulator on how it shall apply its powers in the future. Do we consider this ‘broader policies’ or ‘case-by-case’ decisions? It is most likely something in between, but nevertheless an important aspect of the independency of the regulators.

Autonomy of decision makers: The question was asked whether the appointment procedure (i.e. appointment by the minister for education, culture and media) is a sufficient guarantee of the independence of the CvdM. Concerning the procedure, one expert stated that even on a formal level it is inadequate, because it is intransparent. Another expert added, however, that this has only a minor impact on the independence of the CvdM. A third expert even considered the current procedure to be sufficient.

Some experts indicated that ongoing discussions on the lack of staff (e.g. for monitoring non-linear AVMS) indicate that the CvdM is possibly insufficiently staffed. Others however indicated that it is difficult to judge these kinds of issue as an outsider. One expert considered that in questions about adequateness of resources (e.g. human), a distinction should be made between quantitative and qualitative aspects.

Knowledge: While, according to the country correspondent, the formal situation receives the lowest possible score, the *de facto* situation has been characterised with the highest score. Some country experts indicated that these extreme results were at least partially the consequence of the fact that the questions relating to this axis are too ‘black and white’, resulting in ‘under-‘ and ‘overestimation‘ of the true situation. Furthermore, we enquired if adding expertise requirements for the members of the board of the CvdM would increase the independence of the CvdM. Three experts considered that introducing (more clearly formulated) expertise requirements for board members would increase independence of the CvdM. One expert strongly argued in favour of additional expertise and qualification requirements in the law, while others did not assign great priority to this.

Accountability and transparency mechanisms: Formal requirements to organise public consultations for the publication of its decisions could be an important check and balance instrument. Two experts agreed on the idea that such formal requirements could serve as an important element of procedural legitimacy. A third expert stated that this is already possible according to general administrative law in the Netherlands.

3.5.5.2 Relationship between formal and *de facto* independence

On the relation between formal and *de facto* independence, one expert stated that he actually expected the CvdM to score lower than it did. This however was without prejudice to the fact that he considered that in reality the independence and efficient functioning of the CvdM are adequate.

3.5.5.3 Dutch context factors

One expert stated that, in the Netherlands, the relationship between the minister/government and the regulator is one of “governance by threat”. Although the minister/government has limited powers to control the decisions of the regulator, all kinds of informal (or “almost invisible”) alignment procedures exist in order to make sure the decisions of the regulator correspond to the political preferences of the government. This expert also referred to the ‘poldermodel’, which in essence means that consensus between all concerned parties has to be aimed at. Although he did not explicitly mention the issue of governance by threat, another expert raised similar concerns about the fact that the minister can in some cases overturn decisions of the regulator. Finally, one expert mentioned the particular system of public broadcasting in the Netherlands as creating its own specific dynamics in the area of media policy and regulation: for public broadcasters, it is the minister who decides on licences, while the regulator is responsible for monitoring compliance with it.

3.5.6 Slovenia

Slovenia was chosen as a country for the in-depth country analysis because its case is exemplary for countries where several regulatory bodies supervise the activities of audiovisual media services; in Slovenia, namely (1) the Agency for Post and Electronic Communication (APEK), (2) the Broadcasting Council, which is as an independent expert body within APEK, (3) the Ministry of Culture and within the ministry, (4) the Inspectorate for Culture and Media (Media Inspector) is in charge of the sector.

Experts interviewed

- Lenart J. Kucic, media and technology journalist in the biggest Slovenian newspaper
- Marko Milosavljevič, Professor at the University of Ljubljana, faculty of social sciences, head of journalism
- Suzana Žilic Fišer: Associate Professor in Institute of Mediacommunications, University of Maribor.

3.5.6.1 Attention points after applying the interim tools and assumptions

3.5.6.1.1 Agency for Post and Electronic Communication (APEK)

Status and powers: During the interviews, two experts criticised the use of sanctions by APEK in cases of material breach by an AVMS provider as not adequate, and that sanctions are not applied even-handed against all providers.⁵⁷⁷ However, one expert explained that most of APEK's activities were focused on telecommunications; the previous Director was from telecoms and telcoms have been considered strategically important. According to this expert, cable regulation for example has been more prominent as a telecommunications issue. Two experts stated that, in their view, APEK does not have sufficient staff to fulfil its tasks and duties in the field of audio-visual media regulation. Moreover, they pointed out that this is an important missing characteristic, along with a lack of an internal strategy, funds, technical reasons and also – sometimes – professional expertise of the staff.

Regarding missing systematic monitoring, the experts doubted whether this could be achieved in practice at all; two of them highlighted that to help APEK in supervising the AVMS providers, the ordinary citizen may currently find it difficult to know to which regulatory body one had to turn – “only professionals are able to use complaint mechanisms”. Hence, the experts suggested that, in addition to the supervision of compliance, the regulatory body could become more efficient in raising public awareness and introducing transparent complaints-handling procedures, as those are equally as important as strategic monitoring.

Autonomy of decision makers: As the interim ranking tool puts boards higher than individuals, APEK ranked lower in this dimension: The Director General is the head of the regulatory body. The experts agreed to the assumption that boards are better equipped against external influence than single-person bodies. Regarding APEK, one expert further explained that there are currently no checks and balances, and that consequently the ministry of higher education, science and technology retains *de facto* influence over APEK. Another expert highlighted that a board of relevant experts could bring solutions based on compromises and exchange of ideas.

Knowledge: Within the knowledge dimension it could be shown that APEK ranked lower here because it lacks legal requirements for professional expertise on the part of the senior staff. Most of the experts confirmed this assumption and stated that the professionalism and expertise of the senior staff are equally as important as those of the General Director.

Regarding the possibility of seeking external advice, it should be clarified that although the legal framework for APEK lacks this opportunity expressly, in practice the body does seek external advice. Experts said, however, that a legal mandate to do so would be considered a better situation.

Accountability and transparency mechanisms: In the context of public consultations, the experts stated that it would be a good idea to set standards on how to conduct public consulta-

⁵⁷⁷ NB: APEK has not the power to impose fines but only to propose to the Ministry of Culture, but can issue and enforce warnings with penalty payments.

tions, covering for example the transparency of public consultations, the publication of responses to the consultation, as well as the performance of these by the regulatory body.

3.5.6.1.2 The Broadcasting Council

The Broadcasting Council is a separate body within APEK; it is without enforcement and sanction powers, hence it is difficult even to classify the Broadcasting Council as a regulatory body in its core, as it is more a consultative body. Hence, the interim ranking tool did not fit it too well with this situation.

Status and powers: On the status and powers dimension, the Broadcasting Council fell short in many of the criteria, which may be simply a reflection of the fact that this body is not a fully-fledged regulator in the sense of this study regarding its design and functions.

Two experts agreed that the Broadcasting Council and the APEK were distinct regulatory bodies, but for the third expert the relation to APEK was not totally transparent in practice, resulting in certain possible dependencies.

Another result of its special status was the lack of ability to determine its own human resources and internal organisation, which further impedes its independence, according to most of the experts. Experts agreed that the structure by which the Broadcasting Council is embedded within APEK makes it difficult to speak about an independent regulatory body, which is also shown when applying the ranking tool with regard to financial independence.

3.5.6.1.3 Ministry of Culture and Media Inspector (Inspectorate for Culture and Media)

The Ministry of Culture also has regulatory powers, including oversight and enforcement in the audiovisual media sector. The issues raised in the application of the interim results to the Ministry can be compared to those we found in Estonia (see Chapter 3.5.2). What is different from the Estonian case is that the Ministry of Culture is only one of four public bodies operating in the field of audiovisual media regulation, which adds further complexity to the system.

The Media Inspector is part of the Inspectorate of Culture and Media under the Ministry of Culture. It is comprised of one individual, charged with enforcing audiovisual media regulation.

Status and powers: The Media Inspector is formally independent but can be instructed and overruled in some cases by the Ministry. All experts agreed that under these circumstances, and contrary to what is stated in the law, the Media Inspector is not independent in terms of status and powers. Moreover, as an assumption, we stated that a single Media Inspector might not be enough to fulfil its tasks and duties; the experts confirmed this and one explained that in practice, APEK undertakes most of the supervision and enforcement.

Accountability and transparency mechanisms: The decisions of the Media Inspector are currently not systematically published. The experts agreed that this would be better for transparency.

3.5.6.2 Slovenian context factors

In Slovenia, four bodies operate in the field of audiovisual media regulation, with partially overlapping competences, in particular in the field of supervision and enforcement between APEK,

the Ministry of Culture and the Media Inspector. Experts pointed out the complexity this creates and agreed that the system of media regulation in Slovenia can sometimes hamper the overall effective functioning of media regulation and supervision.

One expert emphasised that, as Slovenia is a small country, a small pool of competent people rotate in various functions, and they are all connected in one way or another.

Another expert pointed out that the political culture is also an important context: Slovenia is in some areas still close to Eastern European/Mediterranean culture, including cases of clientelism or nepotism, and the perception that everything is influenced by certain interests. There is also a perception that there is no culture of public debates and even where these do exist (such as in public consultations) they do not influence the outcome in the end.

3.5.7 United Kingdom

The UK's converged broadcasting and telecommunications regulator, Ofcom, was selected for further analysis as one of our specific case studies. Insofar as they relate to the implementation of the AVMS Directive, the obligations in the Communications Act remain in force and it will be for Ofcom, not ministers, to decide how to implement them

Experts interviewed:

- Professor Steven Barnett: Professor of Communications, University of Westminster (Department of Journalism and Mass Communications)
- Professor Sylvia Harvey: Visiting Professor in Communications Studies, Leeds University
- Robin Foster: Media commentator and advisor
- Steve Hewlett: Media Commentator and Journalist, The Guardian and BBC Radio4

3.5.7.1 Attention points after applying the interim tools and assumptions

Status and powers: The UK government has retained the right to instruct Ofcom in a number of cases, such as:

- requiring certain public service announcements in times of public emergency;
- television advertising, over and above any restrictions that are placed by Europe or other authorities;
- spectrum policy.

When the experts were asked if this would constitute a set-back to the formal independence of Ofcom, they were of the view that, provided it is clear that Ofcom can be instructed but not overruled by government, this does not represent an unacceptable infringement of Ofcom's independence – not least because this power to instruct has never been used, even on occasions when the government has clearly wanted Ofcom to take particular action (as in the case of banning certain kinds of food and drink advertising targeted at children).

The *de facto* ranking tool on the status and powers dimension places a higher value on systematic monitoring than on *ad hoc* monitoring and monitoring after complaints. It is argued by the experts that, as Ofcom licences many hundreds of channels on television and radio, it would be an inefficient use of scarce resources to commit to random monitoring, rather than being

complaint-driven or focusing on specific areas of content where there are known to be particular problems (e.g. in particular kinds of adult channels). All experts agreed that the absence of extensive monitoring does not appear to have led Ofcom to unacceptably missing issues of potential concern to viewers.

Autonomy of decision makers axis: The system of appointments to the board of Ofcom by the government is consistent with the overall approach to public appointments in the UK. These processes are governed by the “Nolan principles” as set out in the report by Lord Nolan in 1995. The recommendations relating to appointments to public bodies, which were accepted in full by the government, are set out below:

33. *The ultimate responsibility for appointments should remain with Ministers.*

34. *All public appointments should be governed by the overriding principle of appointment on merit.*

35. *Selection on merit should take account of the need to appoint boards which include a balance of skills and backgrounds. The basis on which members are appointed and how they are expected to fulfil their role should be explicit. The range of skills and background which are sought should be clearly specified.*

36. *All appointments to executive NDPBs or NHS bodies should be made after advice from a panel or committee which includes an independent element.*

37. *Each panel or committee should have at least one independent member and independent members should normally account for at least a third of membership.*

38. *A new independent Commissioner for Public Appointments should be appointed, who may be one of the Civil Service Commissioners.*

39. *The Public Appointments Commissioner should monitor, regulate and approve departmental appointments procedures.*

40. *The Public Appointments Commissioner should publish an annual report on the operation of the public appointments system.*

41. *The Public Appointments Unit should be taken out of the Cabinet Office and placed under the control of the Public Appointments Commissioner.*

42. *All Secretaries of State should report annually on the public appointments made by their departments.*

43. *Candidates for appointment should be required to declare any significant political activity (including office-holding, public speaking and candidature for election) which they have undertaken in the last five years.*

44. *The Public Appointments Commissioner should draw up a code of practice for public appointments procedures. Reasons for departures from the code on grounds of ‘proportionality’ should be documented and capable of review.*⁵⁷⁸

Although the first Chairman of Ofcom had previously taken the Labour whip in the House of Lords, the experts expressed no concern that the Nolan processes, as non-AVMS-specific safe-

578 <http://www.archive.official-documents.co.uk/document/parlment/nolan/nolan.htm>

guards, were deficient in maintaining a high level of trust and probity in the appointment procedure, with Ministers being able to take the final choice but having their room for capricious manoeuvre severely limited by the level of openness in application and consideration that is now required.

When it comes to conflict of interest of rules, there exist no bar to industry or political membership Ofcom's chair and board members. The Office of Communications Act 2002 sets out the requirement on the Secretary of State who makes the appointment that the Chair and other members of Ofcom members of the Ofcom Board "have no such financial or other interest as is likely to affect prejudicially the carrying out by him of his functions as a member of Ofcom".⁵⁷⁹

These absolute requirements to avoid conflicts of interest are embodied in codes of practice adopted by the board and senior management of Ofcom. Holding a senior position in a body or company that is licensed or regulated by Ofcom would constitute an unacceptable conflict of interest, as set out in the original Office of Communications Act: nevertheless, Ofcom board members have included individuals with senior experience in the sectors – and the expert interviewees agreed that this has been to the benefit of Ofcom. The fact that certain categories of individual are not excluded from membership of the board – e.g. members of either house of parliament, or individuals with deep industry experience – had worked in practice. The first Chairman of Ofcom was a widely respected economist, who is also a member of the House of Lords (the UK's second, revising chamber): although originally taking the Labour whip, he moved to the cross-benches on appointment. The constraints imposed by the conflict of interest rules and the required codes of conduct seemed to be sufficient *de facto* constraints on political or other direct influence.

In addition, the fact that the conflict of interest rules are not extended to wider family members did not appear to concern the experts, who felt that the double lock of the ban on conflicts of interest and the codes of conduct for board members would act as sufficient formal safeguard against impropriety.

In theory, dismissal of the whole board of Ofcom would be possible. Ofcom has no protection against the removal of the whole board at the same time. Nevertheless, the grounds for removal, which are listed above, would give a strong presumption against being able to find the grounds to dismiss all the board members at once. The experts did not raise concerns in relation to this indicator.

Financial autonomy: Ofcom is funded by mixed sources: Primarily by licence fees, funding directly from government (for instance, Ofcom's work on Media Literacy), and spectrum licence fees, dedicated to the spectrum management activity within Ofcom. All financial penalties raised as sanctions for breaches of the various Ofcom codes are paid directly to the Exchequer and form no part of Ofcom's funding. Experts were of the view that mixed funding, provided it is for clearly designated and specific activity, does not of itself endanger the independence of the regulator.

579 Office of Communications Act, 2002: Schedule 1.

Efficiency cuts currently recently imposed on the budget, in line with the cuts being extracted across the public sector, will undoubtedly result in the regulator doing many things differently and some things not at all any more— although it is not yet clear what the overall impact will be (see below).

Knowledge: There is no legal requirement for specific knowledge or qualifications for board members/chairman of Ofcom. While there are no formal criteria for membership in terms of specific knowledge or skills, the experts were nevertheless confident that the position *de facto* was one where the regulator had been able to attract people of the appropriate calibre and experience to take on the task of regulating the sector. Indeed, there is a view that prescribing specific characteristics for board members could limit the ability of those appointing the board to recruit on merit.

Accountability and transparency mechanisms: In the case of Ofcom, there is no formal mechanism of *ex-post* control by a democratically elected body, e.g. through the adoption of annual report by the parliament. Instead Ofcom is required to lay its annual report before Parliament: it is further required to attend meetings of the relevant parliamentary select committees to discuss it. However, this falls short of giving parliament any power to approve – and therefore reject – the annual report. Ofcom would argue that a requirement for parliament to approve their report would actually undermine their independence, rather than strengthening it. The experts pointed out that Ofcom is only allowed to operate within the boundaries given to it by parliament through the legislation; but within those boundaries, it alone is responsible for taking its own decisions. Giving parliament the right to approve its annual report would therefore undermine that independence.

If, however, this indicator has the narrower meaning of a requirement for the regulator to present its report to parliament and being required to account for it (which is quite different from giving parliament the power to “approve” the report) then Ofcom would score highly on this dimension as well.

3.5.7.2 Relationship between formal and *de facto* independence

No specific observations were given with regard to the relationship between formal and *de facto* independence. The concerns that have been expressed – in relation to independence – have tended to focus on the regulator potentially having too much independence from government, rather than too little: concerns about its role in policy development, or in pursuing a particular agenda of its own, have tended to outweigh concerns about political interference, while its perceived preference for market-based solutions has fed, in some quarters, a view that it is less inclined to put the “citizen interest” ahead of the interests of consumers.

Recent developments, however, may be relevant in this context. This study has taken place against a background of electoral change followed by administrative reform – and Ofcom has not been immune to this (see above). An incoming government, keen to cut the financial deficit and to rebalance the scope of the state’s activities, has demanded not only savings in the size and cost of Ofcom, but also a reduction in some areas of its activity. To this effect, the government has already removed from Ofcom the power to instigate its own review of public service broadcast-

ing, reserving this instead to ministers: it has also removed the role for Ofcom in assessing the forward programme policies of the major broadcasters.

3.5.7.3 British context factors

The wider political and public environment is seen as a protection against political or business interference at board level.

One expert was keen that the final report should reflect the impact of the wider political and administrative culture on regulatory procedures. Bald definitions of structural and legal frameworks, or of administrative processes, might not capture the wider, but unspoken, influence of a political system and culture on the room for manoeuvre a regulator might enjoy. This was obviously true in relation to broad political philosophy: but it could also be true in relation to more subtle prevailing orthodoxies prevalent at the time the legislation was passed or the body brought into being.

For two experts, however, the history is important in another respect: the impression given that, by virtue of the political climate in which it was formed, Ofcom had a pre-disposition to look for competition-based remedies rather than public interventions, which was consistent with the overall approach to regulation at the time. In this view, Ofcom shared with other regulatory bodies a philosophy of light-touch, risk-based regulation, where there was a bias against intervention and a bias in favour of the market delivering its own solutions.

3.5.8 Former Yugoslav Republic of Macedonia

The Macedonian Broadcasting Council was chosen for in-depth analysis because the regulatory body appears to be very strong on formal independence. However, the *de facto* situation was not obvious from the outset. As a candidate country, the former Yugoslav Republic of Macedonia provided an interesting constellation, which we wanted to test against the background of the ranking tool prototype and the interim key characteristics.

Macedonian expert interviews were conducted with

- Biljana Petkovska, Executive Director of the Macedonian Institute for Media, Skopje,
- Vesna Shopar, Professor at the University of Tourism and Management at the Faculty of Public Relations, Skopje,
- Roberto Belicanec: Executive Director of the Media Development Centre, Skopje.

3.5.8.1 Attention points after applying the interim tools and assumptions

Status and powers: The Broadcasting Council practises monitoring that cannot be classified as either *ad-hoc* or systematic. The *de facto* ranking tool on the status and powers dimension places higher value on systematic monitoring than on *ad-hoc* monitoring and monitoring after complaints. All experts agreed that systematic monitoring is preferable. Since 24/7 systematic monitoring of all audiovisual media services does not seem practicable, one expert pointed towards the need for a monitoring strategy and a methodology that would implement systematic monitoring in a meaningful way.

Regarding the indicator of whether the regulatory authority has taken adequate measures in form of sanctions in cases of material breaches, or even-handed sanctioning regarding several misconductors, some of the experts considered that the weak enforcement practice of the regulator can be interpreted as an attempt to not raise the stakes too high.

Autonomy of decision makers: Regarding the question of who has the decisive say in the nomination/appointment of the authority's highest decision making organ, the experts pointed out that the Macedonian nominators, i.e. the Inter-University Conference, Academy of Art and Sciences and Journalists Association, do not directly represent civil society organisations: One expert stated that these are actually professional organisations from which also professional competences are sought. Another expert pointed out that it had been the original idea to involve civil society in the nomination process, but since there was no stable civil society in the former Yugoslav Republic of Macedonia, nominating powers were given to professional associations.

The formal ranking tool questions whether there is a requirement on part of the board members to act in an independent capacity. In the former Yugoslav Republic of Macedonia, the Broadcasting Council's code of conduct stipulates that members of the council or of permanent service do not receive any mandate or instructions. Asked whether this might be a good measure to safeguard independence, the experts were uncertain about the added value of a formal provision in the law stipulating that board members act in an independent capacity. One expert found it rather declaratory in substance and thought that for it to have any effect would require effective sanctions against misuse. Another expert stressed that the independence of the regulatory authority is stated in the law, and so this would amount to a doubling-up of the same provision.

Apart from the rules to prevent conflicts of interest, other rules for board members/chairman coming from regulatees do not exist in the former Yugoslav Republic of Macedonia. All experts agreed with the assumption that those rules on the prevention of conflicts of interest that state that the highest decision making organ cannot be composed of members of government/parliament and industry are sufficient. However, one expert stressed that they are currently weakly implemented in practice.

Regarding nomination and appointment procedures, some experts stated that in the former Yugoslav Republic of Macedonia the procedural rules for the announcement of nominations have not been complied with in several instances. In this respect, one expert pointed out that the timely publication of nominated candidates can serve as a safeguard, as it allows time for public scrutiny, empowering the public to react in order to criticise unsuitable potential candidates.

Financial autonomy: Regarding the financial autonomy axis, the Broadcasting Council reaches high ranking levels. All experts pointed out that broadcasting fees should contribute to the regulator's budget, but that the fee collection procedures do not operate effectively in practice, resulting in income losses for the regulator. However, according to the experts interviewed, this fact has not diminished the Broadcasting Council's financial autonomy, because the body resorted to issuing more licenses in order to compensate for the lower income. Moreover, the Broadcasting Council received an extraordinary financial contribution in 2008 for monitoring the media coverage for the upcoming elections. The experts thus suggested encompassing such irregularly funding in the measurement tools.

Accountability and transparency mechanisms: The application of the ranking tool prototype revealed some compliance issues regarding accountability and transparency mechanisms; in particular that the Macedonian Broadcasting Council does not publish all its decisions with its reasons; that responses to the consultation are not published; and that the Broadcasting Council does not explain to what extent responses have been taken into account. The experts confirmed that this situation can have a detrimental effect on effective functioning, and that good consultation practice with regard to transparency of submitted responses, as well as a feedback document showing how and to what extent the authority has taken responses into account, can serve as a best practice characteristic.

3.5.8.2 Macedonian context factors

All experts were asked about the influence of external factors on the factual independence of the regulatory body by providing them with possible examples, such as appointment politicisation, political clientelism and other vehicles of informal influence on the regulatory body. Experts tended to agree that political influence was the reason for the lower level of *de facto* independence; however, other factors were also named, such as the influence of major telecoms companies. One expert explained that the Broadcasting Council will defend itself against an open attack, but it will be handled informally if informal channels are used. When asked about the small size of the country and the small pool of professionals with relevant expertise, the experts did not consider this a major impediment to the independence of the regulatory authority.

All experts were asked about their opinion on the relationship between formal safeguards of independence and *de facto* independence. They all agreed that these are two different matters that do not always correspond directly. One expert observed that the gap between formal independence and *de facto* independence is widening with respect to the Broadcasting Council in the former Yugoslav Republic of Macedonia. Another expert claimed that Macedonian broadcasting law provides for a very high level of formal independence, but that actual independence is low. These observations are largely in line with the conclusion of the European Commission Enlargement Strategy and Progress Reports 2010, which states that “the capacity of the Broadcasting Council has been strengthened, but it is still not adequate to monitor the market effectively.”⁵⁸⁰

3.5.9 Bosnia and Herzegovina

Bosnia and Herzegovina was chosen for an in-depth country analysis because its case shows two peculiarities: First, the Communications Regulatory Agency (CRA) is a converged regulator, combining competences for the regulation and oversight of audiovisual media and electronic communications. Second, the governing law (the Law on Communications of BiH) and, hence, the institutional design of the CRA was supervised by the Office of the High Representative

580 European Commission Enlargement Strategy and Progress Reports 2010 – Former Yugoslav Republic of Macedonia, p 42.
Available at <http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/mk_rapport_2010_en.pdf>

(OHR – the international institution responsible for the implementation of the Dayton Peace Agreement), which also ensured its initial funding. As a result, its formal independence was likely to take international standards into account; however, with the OHR’s direct influence phasing out, the sustainability of the CRA’s level of independence might come under scrutiny.

Experts interviewed:

- Dunja Mijatovic, OSCE Representative on Freedom of the Media,
- Emir Vajzovic, Senior Teaching Assistant in the Faculty of Political Science at the University of Sarajevo,
- Boro Kontic, Director of Mediacentar Sarajevo.

3.5.9.1 Attention points after applying the interim tools and assumptions

Status and powers: The high performance of the CRA on formal status and powers can perhaps be traced back to the quality of the governing law which was reviewed by the OHR to comply with international standards. This hypothesis has been tested with the experts, who confirmed that the governing law of the CRA in Bosnia-Herzegovina satisfies high standards; one expert stated that on the formal level it is almost like living in Scandinavia.

The actual practice of the CRA is a combination of monitoring when needed (e.g. elections), mandatory recordings regarding audiovisual media services providers, and monitoring after complaints, sometimes accompanied by on-the-spot monitoring. According to two experts, the CRA has placed emphasis on the initiation of public debate and awareness raising about audiovisual content, coupled with initiatives to inform and encourage the public to initiate complaints. The experts believe that making the public aware of audiovisual content standards could prove to be as effective as systematic monitoring of compliance by the regulator. In this context, one expert discussed whether the significance of systematic monitoring could be overstated in the interim results.

Autonomy of decision makers: At the formal level, certain safeguards against appointment politicisation and against conflicts of interests of board members have led to reductions which are somewhat counter-intuitive to the expected high quality of the governing law. Yet, at the same time international standards are not explicit about requiring terms not to coincide with the election cycle, or making board member appointments at different points in time (so-called staggered appointments). In practice, most of the experts stated that they perceived the appointments as being politicised and that the rules of nomination and appointments were not complied with by the government at all times.

Accountability and transparency mechanisms: Regarding accountability and transparency mechanisms, the law does not stipulate that the CRA’s decisions must be published. In practice, however, all experts mentioned that the authority in fact publishes all decisions and reasons. Regarding the obligation of having yearly reports formally approved, some experts pointed out that these reports have actually never been refused, although the ministry has also never tabled the annual report of the CRA for approval. This can be seen as a *de facto* refusal to acknowledge the report, according to one expert.

3.5.9.2 Bosnia and Herzegovina context factors

Experts agreed with the assumption that the CRA's formal and *de facto* independence has benefitted from international scrutiny of the government's attempts to limit the current situation of independence. When asked if the levels of international attention in the case of the CRA were still somewhat higher than elsewhere, the experts somewhat agreed because newcomers to the European Union and also ex-Yugoslavian countries in general are under international scrutiny.

Experts were also asked how ethnicity issues had become the basis for nomination/ appointments of the CRA council and Director General. All three experts agreed that such points are significant. One expert highlighted that ethnicity is not stated in the governing law of the CRA, while another expert highlighted that in Bosnia-Herzegovina the rule of equal representation is also a constitutional principle and also a principle for appointing high ranking staff in ministries, authorities and agencies. This being the case, multi-ethnicity and the quest for equal representation do not affect the ranking tool but are important external factors in the nomination and appointment procedures. Expressions of these influences include:

- In spite of the legal obligations requiring independent and professional appointees, the nomination and appointment practice of the CRA Council and General Director in Bosnia-Herzegovina has been reduced to the ethnical backgrounds of the candidates.
- Representatives of regions and minorities often contest the impartiality of CRA's decision making and often complain in the field of supervising audiovisual content.

Another assumption posed to the experts was that the CRA possesses and operates an internal "culture of independence" which has also helped to fend off politically motivated interferences thus far. One expert agreed and another expert, who found this theory rather philosophical, stated that the CRA's strength is more in its professionalism and expertise. The expert observed that the CRA is defending itself in accordance with the law and has been vocal about problems which may thwart its independence. Another expert thought that the CRA was defending itself more secretly than openly, and that they didn't put problematic issues to society as a whole, knowing that this would not prompt any reaction.

The application of the ranking tool to the CRA necessarily captures a 'snapshot' of the situation, and the general correspondence of the formal and *de facto* situations thus far may be subject to new shifts in the near future. However, it is difficult to predict the external "culture of independence" of the government and political parties, or in other words their acceptance of the independence of the regulatory authority in the coming years. The experts agreed that the situation of the CRA may change at any time. The *de facto* independence of the CRA is thus not consolidated but in a dynamic process. Reported examples for this transition, confirmed by the experts, which could weaken the independence of the authority are:

- Exemption from public service rule revoked: CRA operated its own salary scheme until 2008, when a new law took effect, subordinating CRA to public service rule (the Law on salaries and compensations in institutions of BiH 2008) contrary to the Law on Communications, which defines the financial independence of the CRA (Article 44). As a result, the salaries of certain CRA employees decreased significantly.

- New legal on changes and supplements to the Law on ministries and other bodies of the management of Bosnia and Herzegovina renders the CRA a managing organisation to the government.
- Appointments of the director of the agency, who has not been confirmed since 2007, and of the council of the agency, as well as in the process of adopting the annual reports of the CRA which has not been tabled since 2007.

These observations are in line with the European Commission Enlargement Strategy and Progress Reports 2010, which emphasizes that “challenges to the CRA’s independence have intensified.”⁵⁸¹

3.5.10 Concluding remarks on the in-depth country analysis

The in-depth analysis supports the assumption from theory-based analysis that the *de facto* independence of a regulator depends on many external factors, which vary considerably from country to country and which are – at least partly – not measurable structurally.

The mere size of the country might influence the position the regulator has within the overall governance structure. A limited pool of experts in small countries might limit the choice of board members for the regulator. The necessity of reflecting multi-ethnic structures in a board might reduce or, conversely, increase the risk of the regulator being “captured” by specific interests. Furthermore, countries differ considerably when it comes to the role of civil society and the strength and awareness of actors monitoring the media sector. Moreover, democratic consolidation might play a role and, generally speaking, the patterns of behaviour that have been shaped by the interaction of different institutions in the past. Finally, the political culture of different countries even within Europe is quite different and may influence the *de facto* situation confronting the regulator when applying the objectives of the AVMS. Action within an organisation and between organisations is to a high degree structured not only by formal law and its implementation but by social norms that reflect the social fabric of society.

It is beyond the scope of this study to enquire further into the role that external factors may play with regards to the independence of media regulatory bodies in their countries. However, accepting that the “culture of independence”⁵⁸² is a multi-dimensional concept where external factors are heavily involved has an important implication for our study: Studying formal and *de facto* independence of media regulatory bodies cannot be done in isolation, but will necessarily be influenced by the wider environment in a given country. Assessing the *de facto* independence of a regulatory body may reflect the influence of such external factors to some extent, but may not be capable of internalising them fully. As it is the case with “soft” factors, empirical valida-

581 European Commission, Commission Staff Working Paper, Bosnia and Herzegovina 2010 Progress Report, SEC(2010) 1331, p. 51, Available at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ba_rapport_2010_en.pdf.

582 See Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers’ Deputies).

tion is notoriously difficult. As a result, the ranking tool and the essential and best-practice characteristics must be applied and interpreted in the light of the country-specific circumstances.

4. KEY CHARACTERISTICS OF INDEPENDENT REGULATORY BODIES UNDER THE AVMS DIRECTIVE

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4.1 Aims & methodology

In this part of the study, key characteristics of a functioning “independent regulatory body” will be derived. Given the fact that the governance systems that have been set up to implement the AVMS Directive by the countries examined vary considerably across the countries examined, it is important to note that a one-size-fits-all concept for key characteristics cannot be devised.

The study has opted for a concept of key characteristics, which comprises two different kinds of characteristics that can be attributed to an independent regulatory body: essential characteristics and best practice characteristics.

The aim of developing essential characteristics is to identify characteristics concerning independence – and other preconditions for an effective implementation of the AVMS Directive – that are essential for a functioning, independent regulatory body, as referred to in the AVMS Directive, regardless of the system in place. These essential characteristics are an indispensable prerequisite for the correct application of the Directive. However, for the purposes of our study,

what is really essential to achieve – keeping in mind the leeway Member States must follow their traditions and policies, resulting in various designs for setting up regulatory bodies – cannot solely be derived from the normative texts, but calls for a structural assessment.

In addition, best practice characteristics for an independent regulatory body are developed, following the notion in Art. 30 AVMS Directive. These are not essential characteristics of a functioning independent regulatory body, but are features that, when in existence, enhance the capacity of the regulatory authority to complete its tasks effectively in accordance with the prerequisites of the AVMS Directive and with the national rules that transpose the Directive, or which are enacted in order to obtain appropriate, balanced, transparent and impartial regulation. These best practice characteristics will therefore equip all Member States with the analytical means specifically to improve the institutional arrangements of their audiovisual media regulatory bodies and the effective implementation of the Directive.

For the methodology, the following approach was chosen: In the first step, we applied our working definition to the normative requirements derived from the Directive. According to our working definition, a regulatory body is independent if it has, within the governance structure, a position that ensures that the regulator performs the decision-making process meeting the normative requirements for which the independence of the regulator is desired. From this, we can conclude that independence in the context of this study is related to the capability to implement the objectives and normative requirements of the AVMS Directive effectively. For developing working definitions for both essential and best practice characteristics, we ranked and combined the indicators for independence and effective functioning that were developed in the previous chapters. While for the essential characteristics, the normative requirements of the AVMS Directive set the benchmark, for the best practice characteristics, the focus of the analysis was the role models of independent regulatory bodies developed in regulatory theory.

In the second step, the working definitions were validated with an in-depth analysis conducted in eight countries. The aim of this in-depth analysis was to apply our working definition to regulatory bodies within a specific regulatory context. This is important because the regulatory context and country-specific externalities have a significant impact on the performance of the regulatory body. Therefore, without validating theoretically found results, the risk of creating artefacts exists. The countries were selected for their geographical location, their level of economic power, and because of special features identified within their regulatory system. Special attention was paid to countries where changes to the regulatory framework have occurred during the course of the study.

4.2 Sector-specific requirements of independence and efficient functioning

In this study, the concept of independent regulatory bodies has to be examined within the context of the AVMS Directive. The key characteristics of independent regulatory bodies developed in this study address features of independent regulatory bodies capable of ensuring a correct and effective application of the Directive., Sector-specific requirements and understandings of the legal

term “independent regulatory body” are therefore explored in this chapter. Besides the audiovisual media sector, the analysis focuses on related sectors, such as the electronic communications sector. Furthermore, for comparison, the requirements for independent regulatory bodies in other sectors are also taken into account.

4.2.1 Context

As the theoretical framework indicated, the independence of regulatory authorities is a very complex, even contradictory, concept⁵⁸³. Although the core requirements of independence are in most cases related, the actual shaping (or organisation) differs significantly, according to the state of liberalisation and harmonisation in the different sectors. Therefore, in order truly to understand the concept, it is important to understand that the sector being regulated, and the objective of the independence of the regulatory body, are important determinants of independence. While regulation – defined as orienting a system towards a set of more or less stable goals – generally profits from the independence of the regulatory body, there are sector-specific conditions. At least in the early stages of privatisation of the electronic communications sector, some national governments considered it in their interest to protect their incumbent operator. Therefore, the independence of regulators is obviously relevant to the implementation of Directives intended to create a level playing field. In the media sector another, more important, concern also applies. It is mainly the fundamental right to freedom of expression that calls for independence of regulators⁵⁸⁴. In broadcasting, the need for independent regulatory oversight was deemed vital against a background of the perceived pervasiveness and opinion forming powers of this particular mass medium and its delicate relationship with government or politics. In this context, Salomon argued that “in order to preserve broadcasting as part of the democratic process, governments should aim to create independent regulators for broadcasting.”⁵⁸⁵ The 2009 Communication of the European Commission on the application of state aid rules in Public Service Broadcasting formulates it as follows:

“Furthermore, broadcasting is generally perceived as a very reliable source of information and represents, for a not inconsiderable proportion of the population, the main source of information. It thus enriches public debate and ultimately can ensure that all citizens participate to a fair degree in public life. In this connection, safeguards for the independence of broadcasting are of key importance, in line with the general principle of freedom of expression as embodied in Article 11 of the Charter of Fundamental Rights of the European Union (OJ 2000 C 364, p. 1) and Article 10 of the European Convention of Human Rights, a general principle of law the re-

583 Majone, G. (2005b): 126.

584 The European Convention on Human Rights (adopted 4 November 1950 Council of Europe Convention no. 005) art 10; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 19.

585 Salomon, E. (2006): 12.

*spect of which is ensured by the European Courts (Judgement in case C-260/89 ERT, [1991] ECR I-2925).*⁵⁸⁶

In practice, the creation and/or strengthening of independent regulatory agencies was often imposed on Member States by the European regulatory framework for a specific sector (e.g. electronic communications, electricity, gas regulation, media, postal and railways sectors).⁵⁸⁷ Independent regulatory bodies were first established in the financial sector. Financial regulators were often located within the central bank, which enjoyed a greater degree of independence from central administration. The scope of the remit and powers of “independent regulatory authorities” significantly increased, starting from the mid-1980s in the field of telecommunications. In the electronic communications sector, the national regulatory authorities’ role as merely policy advisory bodies has been revised as a result of their obligation to implement the EU liberalisation, and to achieve harmonisation of market conditions. Today, national regulatory authorities in this sector must comply with a strict number of requirements on independence, while they enjoy wide discretionary powers in their decision-making processes. Without any doubt, the above-mentioned trends (“strict requirements regarding the institutional design combined with a wider power or remit”) could have an impact on the interpretation of the European regulatory framework for the audiovisual sector.

In this chapter, we provide an analysis of existing, legally binding requirements in relation to formal and informal independence as they are applicable to regulatory authorities in a number of relevant sectors. The objective of this chapter is to develop the legal framework for independent regulatory bodies in the audiovisual media sector. This framework is not only directly relevant because it lists the requirements audiovisual regulatory bodies must comply with. It also served as the basis for both the identification of theoretical dimensions and indicators of independence and later phases of the research.

The legal framework for the independence and efficient functioning of audiovisual media regulatory bodies is complex and made up of a number of different legal and regulatory sources, including broader policy documents and instruments, such as infringement procedures, case law, and Commission studies and reports.

In the first section of this chapter (section 1.4.2) we analyse the particular relevance for the audiovisual media sector of two sets of more general legal obligations. Besides the requirements in the area of the protection of freedom of expression (cf. Art. 10 European Convention on Human Rights), we also examine the possible impact of the general obligation on Member States to implement effectively EU-directives (cf. Art. 288 para. 3 TFEU).

The following section (section 1.4.3) analyses the core requirements as they are applicable to regulatory bodies in the European audiovisual media sector. This section focuses on the institutional requirements of the EU audiovisual media services regulatory framework, since, from a strictly legal point of view, these provisions are most relevant for identifying the core require-

586 Communication from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 10.

587 For a discussion of the broader context, see: Magnette, P. (2005): 280.

ments applicable to the regulatory bodies supervising the implementation and application of the audiovisual media services regulatory framework, or for formulating indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive⁵⁸⁸. In this sector, we first analyse the adoption process of Art. 30 of the AVMS Directive and the positions that were taken by the different institutions. Furthermore, we also turn to the interpretation of this article as it was proposed by the academic literature. Because of the limited number of sources, this part of the text is mainly based on the work done by Castendyk, Dommering and Scheuer in their book “European Media Law” (2008). In addition, we also examine a number of other provisions of the AVMS Directive relevant for delineating the precise role that the AVMS Directive assigns to the regulatory bodies.

However, as part of the broader legal and regulatory framework for independence of the regulatory authorities in the media sector, in section 1.4.4 we also examine requirements resulting from other relevant policy levels or sectors. Most relevant in this respect are the requirements stemming from the policy documents on media regulatory supervision of the Council of Europe. Although they are certainly less directly enforceable, these documents are especially relevant since they contain specific dimensions and indicators that can be used to evaluate the broader aspects of the level of independence and efficient functioning of the media regulatory authorities.

For similar reasons, the following sections examine the relevant legal provisions in a number of other existing EU sectors or frameworks, such as the directives on electronic communications (section 1.4.5) and/or the requirements resulting from the administrative practice of the European Commission in the area of the EU state aid rules and the Public Service Broadcasting task (section 1.4.6). From a strictly legal point of view, these provisions are not directly applicable or immediately relevant to determining indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. In practice however, the AVMS regulatory bodies are often also assigned competences in those areas (e.g. transmission, frequency allocation, CAS, API, EPG, etc.) and therefore – at least when performing these tasks – need to comply with the institutional requirements formulated in those frameworks. We can illustrate these “indirect legal requirements” with a practical example: Regulatory bodies in the AVMS sector that also have the power to regulate the technical aspects of the transmission or the electromagnetic transport of audiovisual media signals (e.g. audiovisual regulators in Belgium) will also have to comply with the independence requirements as they are formulated in the EU regulatory framework for electronic communications. Similarly, if those bodies are also assigned specific tasks in the area of monitoring the financial compensation of the Public Service Broadcasting remit, e.g. they must also take into account the requirements on independence as they are formulated by the EU Commission in its communication of 2009.⁵⁸⁹

588 Tender specifications, Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive, SMART 2009/0001.

589 Communication from the Commission on the application of State aid rules to public service broadcasting, Official Journal, October 27th 2009, C 257/1 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:257:0001:0014:EN:PDF>

The next section of this chapter (section 1.4.7) lists the requirements of independence and efficient functioning of regulatory bodies as they are applicable in a number of other sectors. Although these requirements are in most cases not even indirectly applied to the regulatory bodies in the media sector, they provide further useful background information on the dimensions and indicators for the concept of independence of regulatory bodies.

The final section of this chapter (section 1.4.8) contains a number of concluding observations on the requirement of independency of regulatory bodies in the audiovisual media services sector.

4.2.2 Requirements stemming from Art. 10 ECHR and Art. 288 para. 3 TFEU

4.2.2.1 Art. 10 ECHR⁵⁹⁰

Freedom of expression is a fundamental right in any democratic society, “one of the basic conditions for its progress and for the development of every man”.⁵⁹¹ This fundamental right is, *inter alia*., expressed in a number of international legislative texts.⁵⁹² At the European level, the core provision guaranteeing this right is Art. 10 of the ECHR:⁵⁹³

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Although the ECHR is an initiative of the Council of Europe, it is part of the legal framework of the European Union through Art. 6 para. 3 TFEU. Hence, Art. 10 ECHR is also of the utmost importance in the EU legislative framework. The European Court of Justice has confirmed this fundamental rights theory on several occasions, for instance:

“With regard to Article 10 of the European Convention on Human Rights, [...] it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral

590 The following paragraphs are mainly based on: Lievens, E., (2010): 303-310.

591 ECHR, *Perna v. Italy*, 06.05.2003, para. 39.

592 The two most important international sources are article 19 of the 1948 Universal Declaration on Human Rights and Article 19 of the 1966 International Covenant on Civil and Political Rights.

593 The importance of this article has been affirmed in COUNCIL OF EUROPE (COMMITTEE OF MINISTERS), Declaration on freedom of expression and information, 29.04.1982, retrieved from <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=601273&SecMode=1&DocId=675536&Usage=2> (on 12.12.2008).

*part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 Nold v Commission [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed”.*⁵⁹⁴

The right to freedom of expression is, at the EU level, also included in the Charter of Fundamental Rights of the European Union, and more specifically in Art. 11.⁵⁹⁵

Freedom of expression includes the freedom to hold opinions and to receive and impart information and ideas without interference by any public authority, and regardless of frontiers. This fundamental right encompasses two facets: States should not only refrain from interfering with the freedom of expression of their citizens (passive),⁵⁹⁶ but they might also have to ensure that the freedom of expression of these citizens is not too restricted by private persons or organisations (active ‘duty of care’).⁵⁹⁷ In this respect, the European Court of Human Rights has stated that

*“[g]enuine, effective exercise of this freedom [of expression] does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals”.*⁵⁹⁸

Ensuring pluralism and diversity of media output is also part of this active duty of care.⁵⁹⁹

With regard to the possible impact of these provisions on the issue at stake (independence of AVMS-regulatory bodies), it is interesting to mention the recent judgment of the European Court of Human Rights in the case *K.U. v. Finland*⁶⁰⁰. In that case, the Court ruled that Finland had failed to fulfil its positive obligation to provide a framework of privacy protection because no effective steps could be taken to identify and prosecute the person who placed an advertisement on a dating site, in the name of a 12-year-old boy. Although this decision caused some controversy because it could encourage Member States to reduce further the right to anonymity on the Inter-

594 ECJ, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, C-260/89, 18.06.1991.

595 “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected”: EUROPEAN UNION, Charter of Fundamental Rights of the European Union, OJ 18.12.2000, C 364, 1.

596 The wording “interference by public authority” does not preclude an indirect horizontal effect: Voorhoof, D. (2004): 922.

597 Voorhoof, D. (2004): 925. See for instance: ECHR, *Özgür Gündem v. Turkey*, 16.03.2000, para. 42-43.

598 ECHR, *Özgür Gündem v. Turkey*, 16.03.2000, para. 42-43.

599 Uyttendale, C. (2002): 169.

600 ECHR, *K.U. v. Finland*, 02.12.2008.

net, it is clear that the Court interprets the active obligation of the Member States in quite an extensive way, stating *inter alia*:

42. *The Court reiterates that, although the object of Article 8 is essentially to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, § 32).*

43. *These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. There are different ways of ensuring respect for private life and the nature of the State's obligation will depend on the particular aspect of private life that is at issue. While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions (see X and Y v. the Netherlands, §§ 23-24 and 27; August v. the United Kingdom (dec.), no. 36505/02, 21 January 2003 and M.C. v. Bulgaria, no. 39272/98, § 150, ECHR 2003-XII).*

It remains to be seen whether a similar extensive interpretation of the active obligation of the States could also be applied in the area of freedom of expression and the independence of AVMS regulatory bodies, in such a way that Art. 10 ECHR could serve as legal basis for the requirement to create such independent bodies. It is clear that concerns about media pluralism and freedom of expression could in particular rise because of the close and complex relationship between politics and the media sector.

The European Court on Human Rights also had the opportunity to judge on the issue of freedom of expression and independency of the public service broadcaster from state influence. Most relevant in this respect is the case of *Manole and others v. Moldova*. In its judgement, the Court concluded that the Moldovan authorities violated freedom of expression by not sufficiently guaranteeing the independence of Teleradio-Moldova, the public service broadcaster⁶⁰¹. The Court began its analysis by stating that there can be no democracy without pluralism and that democracy thrives on freedom of expression. Freedom of expression thus constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress⁶⁰². Furthermore, the Court stated: "It is incumbent on the press to impart information and ideas on political issues and on other subjects of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them"⁶⁰³. The Court also confirmed that audiovisual media have a particularly relevant role in this respect⁶⁰⁴, that no economic

601 *Manole and others v. Moldova*, 17 September 2009, para. 109-111: "The legislative framework throughout the period in question was flawed, in that it did not provide sufficient safeguards against the control of TRM's senior management, and thus its editorial policy, by the political organ of the Government".

602 *Manole and others v. Moldova*, 17 September 2009, para. 95.

603 *Manole and others v. Moldova*, 17 September 2009, para. 96.

604 *Manole and others v. Moldova*, 17 September 2009, para. 97.

or political group should be able to obtain a dominant position over the audiovisual media⁶⁰⁵ and that the effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice. Given the importance of what is at stake under Art. 10, the State must be the ultimate guarantor of pluralism⁶⁰⁶.

After having restated the possibility for States to put in place a public broadcasting service, the Court continued on the requirements of independence it has to comply with:

“1. Where a State does decide to create a public broadcasting system, it follows from the principles outlined above that domestic law and practice must guarantee that the system provides a pluralistic service. Particularly where private stations are still too weak to offer a genuine alternative and the public or State organisation is therefore the sole or the dominant broadcaster within a country or region, it is indispensable for the proper functioning of democracy that it transmits impartial, independent and balanced news, information and comment and in addition provides a forum for public discussion in which as broad a spectrum as possible of views and opinions can be expressed.

2. In this connection, the standards relating to public service broadcasting which have been agreed by the Contracting States through the Committee of Ministers of the Council of Europe [...] provide guidance as to the approach which should be taken to interpreting Article 10 in this field. The Court notes that in “Resolution No. 1 on The Future of Public Service Broadcasting” (1994), the participating States undertook “to guarantee the independence of public service broadcasters against political and economic interference”. Furthermore, in the Appendix to Recommendation no. R(96)10 on “The Guarantee of the Independence of Public Service Broadcasting” (1996), the Committee of Ministers adopted a number of detailed guidelines aimed at ensuring the independence of public service broadcasters. These included the recommendation that “the legal framework governing public service broadcasting organisations should clearly stipulate their editorial independence and institutional autonomy”, with reference in particular to a number of key areas of activity, including the editing and presentation of news and current affairs programmes and the recruitment, employment and management of staff. The Guidelines also emphasised that the rules governing the status and appointment of the members of the boards of management and the supervisory bodies of public service broadcasters should be defined in a way which avoids any risk of political or other interference. They provided in addition that:

“The legal framework governing public service broadcasting organisations should clearly stipulate that they shall ensure that news programmes fairly present facts and events and encourage the free formation of opinions.

The cases in which public service broadcasting organisations may be compelled to broadcast official messages, declarations or communications, or to report on the acts or deci-

605 Manole and others v. Moldova, 17 September 2009, para. 98.

606 Manole and others v. Moldova, 17 September 2009, para. 99.

sions of public authorities, or to grant airtime to such authorities, should be confined to exceptional circumstances expressly laid down in laws or regulations. ...”

Finally, in the Appendix to Recommendation Rec(2000)23 on “The Independence and Functions of Regulatory Authorities for the Broadcasting Sector”, the Committee of Ministers again stressed the importance for States to adopt detailed rules covering the membership and functioning of such regulatory authorities so as to protect against political interference and influence.“

In a number of other cases, the Court also confirmed that the principle of freedom of expression could be violated when some basic organisational or procedural requirements for administrative bodies are not met. In this respect, the Court considered it a violation of Art. 10 ECHR when an administrative body in the media sector did not sufficiently motivate its decisions, or where there was no possibility for judicial appeal⁶⁰⁷. Similar concerns have also applied in other cases, where administrative decisions or procedures limiting the freedom of expression were not sufficiently motivated or transparent⁶⁰⁸. Finally, the Court also applied Art. 10 ECHR in combination with other articles of the Convention, such as its Art. 6 (fair trial)⁶⁰⁹ and Art. 13 (effective remedy)⁶¹⁰.

In conclusion, the provisions on the protection of freedom of expression not only contain the (negative) prohibition of States interfering in the media sector, but also the (positive) obligation to guarantee sufficiently the freedom of expression. Moreover, the Court accepts that those principles can also apply in relation to independent regulatory authorities (e.g. when deciding about licensing). However, it remains unclear what the precise impact of these provisions could be on the issue at stake in our report (i.e. the creation and independence of AVMS regulatory bodies). On this point, it seems reasonable to conclude that Art. 10 ECHR in itself does not contain an obligation for States to *create* independent regulatory bodies in the media sectors. Nevertheless, it is also clear that the obligations stemming from Art. 10 ECHR are in fact applicable to any existing regulatory body. By consequence, these bodies should be organised in a way that neither

607 In its judgement of 21 February 2006 in the case *Tüzel v. Turkey*, the Court ruled that the lack of motivation of and judicial appeal against a decision of an administrative authority had to be considered as a violation of article 10 ECHR. See also: *Kita v. Poland*, 8 July 2008; *Mehmet Emin Yildiz v. Turkey*, 11 April 2006; *Mehmet Çolak v. Turkey*, 14 June 2007; *Saygili & Seyman v. Turkey*, 27 June 2006.

608 *Glas Nadezhda EOOD and Elenkov v. Bulgaria*, 11 October 2007. See also: *Meltex Ltd and Mesrup Movsesyan v. Armenia*, 17 June 2008, para. 81.: “*the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence*”.

609 *Steel and Morris v. United Kingdom*, 15 February 2005: “*the more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible “chilling” effect on others also are important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion (...). The lack of procedural fairness and equality therefore gave rise to a breach of Article 10 in the present case*”

610 *Kenedi v. Hungary*, 26 May 2009, § 48. “*in the instant case, the respondent State body, being itself in the first place bound by the rule of law, adamantly resisted the applicant’s lawful attempts to secure the enforcement of his right, as granted by the domestic courts. In these circumstances, the Court considers that the procedure designed to remedy the violation of the applicant’s Article 10 rights at the domestic level proved ineffective. It follows that there has been a violation of Article 13 read in conjunction with Article 10 of the Convention*”

any economic or political group nor the state should be able to obtain a dominant position over the audiovisual media content.

Bodies in charge of media supervision, especially with regard to implementing and enforcing the AVMS provisions, have a significant impact on the audiovisual media sector. The regulatory power can – theoretically – be used to regulate specific media in a partial manner. Different actors can therefore have an interest in influencing the general performance as well as the case-by-case decisions of regulatory bodies. Potential influences on the regulatory body can be exerted by political as well as governmental interests, and interests of competitors in the media market. In this context, Art. 10 ECHR should be interpreted in a way that biased media supervision has to be avoided. Therefore, Member States must ensure a national regulatory framework that is capable of providing impartial media supervision. A minimum requirement of structural independence is needed for this. Impartiality in this notion has to be effective against influences coming from the direction of the government or other political actors, as well as against influences coming from the media sector. Following this interpretation, we come to the conclusion that for the AVMS provisions to be implemented effectively, Member States must ensure that the regulatory bodies competent for the implementation of the provisions of the directive carry out their duties in an impartial manner.

4.2.2.2 Article 288 para. 3 TFEU⁶¹¹

Article 288 para. 3 TFEU stipulates that directives “shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. The fact that the choice of form and methods is left to the national authorities can be considered as an expression of the principle of subsidiarity.⁶¹² It has been argued that the reason for leaving this choice to the Member States is twofold: to respect the sovereignty of the Member States, and to allow Member States to take into account national sensitivities and particular circumstances.⁶¹³

However, the freedom to choose the form and methods of implementation is not absolute. The ECJ has developed a substantial body of case law in which the exact scope of Art. 288 para. 3 TFEU has been clarified. In the case of *Commission v. Germany*, the Court concluded that the manner in which a directive is implemented needs to:

“guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals [their] legal position [...] is sufficiently precise and clear and the persons concerned are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national courts”.⁶¹⁴

611 The following paragraphs are mainly based on: Lievens, E. (2010): 375–376 and 480–489.

612 Hans-Bredow-Institut / EMR (2006): 153; Lenaerts, K. / Van Nuffel, P. / Bray, R. (2005): 766.

613 Prechal, S (2005): 73.

614 ECJ, *Commission of the European Communities v. Federal Republic of Germany*, C-29/84, 23.05.1985, summary para. 1.

In the case of *Commission v. Italy*, the Court formulated it as follows:

“the provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty”.⁶¹⁵

A number of requirements do need to be fulfilled. Full effect and legal certainty are the cornerstones of the ECJ’s case law regarding the implementation of directives.⁶¹⁶ Hence, although it is left to the Member States to pick the most appropriate implementation method, they are nevertheless obliged to take every measure necessary to ensure that the directive is fully effective,^{617, 618} even when the Member State deems its *“own national provisions of better quality than the Community provisions”*.⁶¹⁹ Furthermore, they need to guarantee that the implementing measures are sufficiently clear, precise, transparent,⁶²⁰ publicised and accessible,⁶²¹ and are accompanied by effective judicial procedures so that individuals can assert their rights. Finally, interesting to note is that Prechal has stressed that *“the choice of the competent authority is made within the framework of national constitutional law”*.⁶²² The ECJ also clarified in the *Commission v. the Netherlands* case that Member States can delegate powers to domestic authorities, and, furthermore, that directives may be implemented by regional or local authorities⁶²³. Compliance with these requirements is checked on a case-by-case basis⁶²⁴.

Based on the principles mentioned above, it seems reasonable to conclude that, although Member States enjoy a considerable margin of discretion as regards the ways of implementing a

615 ECJ, *Commission v. Italy*, C-159/99, 17.05.2001, para. 32. See also: ECJ, *Commission v. France*, C-225/97, 19.05.1999, para. 37.

616 Lenaerts, K. / Nuffel, P. (2008): 463; Prechal, S. (2005): 75; Brent, R. (2001): 111.

617 ECJ, Jean Noël Royer (Reference for a preliminary ruling: Tribunal de première instance de Liège – Belgium), C-48/75, 08.04.1976, para. 73; ECJ, Theresa Emmot v. Minister for Social Welfare and Attorney General, C-208/90, 25.07.1991, para. 18; ECJ, *Commission of the European Communities v. Kingdom of Sweden*, C-478/99, 07.05.2002, para. 15; ECJ, *Commission of the European Communities v. French Republic*, C-233/00, 26.06.2003, para. 75. Highly criticised by: Grabitz, E. / Hilf, M. (2009): marginal 152.

618 In this context, we can also refer to article 4 para. 3 consolidated EU Treaty which states: *“Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.”*. See also: ECJ, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, C-14/83, 10.04.1984, para. 26; ECJ, *Commission of the European Communities v. Hellenic Republic*, C-68/88, 21.09.1989, para. 23; BRENT, Richard, *Directives: rights and remedies in English and Community law*, London, LLP, 2001, 131.

619 ECJ, *Commission of the European Communities v. Republic of Austria*, C-194/01, 29.04.2004, para. 25.

620 ECJ, *Commission of the European Communities v. Grand Duchy of Luxemburg*, C-220/94, 15.06.1995, para. 10.

621 ECJ, *Commission of the European Communities v. Kingdom of Sweden*, C-478/99, 07.05.2002, para. 12: *“In any event, in order to achieve the twofold objective pursued and to satisfy the requirements of legal certainty, it is essential for this list to be published as an integral part of the provisions of the Directive”*.

622 Prechal, S. (2005): 74; See also: Brent, R. (2001): 109.

623 ECJ, *Commission of the European Communities v. Kingdom of the Netherlands*, C-96/81, 25.05.1982, para. 12.

624 Prechal, S. (2005): 75.

directive, they are nevertheless obliged to choose the forms and methods that achieve the directive's aims effectively. Moreover, this requirement only refers to the normative structure of how to transpose the directives' aims into national law, rather than to organisational arrangements of implementation and supervision. Therefore, the general obligation for Member States to implement a directive effectively could in itself only lead to the obligation to create independent regulatory authorities when this specific form of institutional arrangement is necessary in order to achieve the goals of the directive. Applied to the AVMS-Directive, it would mean that Art. 288 para. 3 TFEU in itself would only require Member States to create an independent regulatory authority when this organisational model is considered necessary in order to achieve the objectives of that directive.

There is of course no doubt that, based on Art. 288 para 3. TFEU, Member States are obliged to achieve the goals of the AVMS Directive effectively, as they are stated in the recitals: ensuring fair competition, protecting freedom of speech and media pluralism, and guaranteeing the impartiality and transparency of the decisions of the regulatory bodies (cf. *infra*). In consequence, when transposing the specific aims of the directive, Member States must organise the regulation in a way to prevent undue influences on operational tasks. While Member States have leeway in deciding on the concrete form of implementing the AVMS provisions into national law (see Art. 288 para. 3 TFEU), e.g. with regard to the legal status, the organisational layout, the decision-making procedures etc., it follows from Art. 288 para 3 TFEU and is supported by Art. 4 para 3 TEU that Member States are obliged to transpose the directive in a way that the aims of the directive are implemented effectively, which includes an effective supervision of the provision of national law transposing the directive. This requirement is not met if the regulatory framework put in place is structurally incapable of implementing the aims of the directive in an impartial manner.

4.2.3 Audiovisual media sector

The main starting point for the analysis of the regulatory framework on independence and efficient functioning of regulatory bodies in the audiovisual media sector is the Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)⁶²⁵, as it was recently consolidated⁶²⁶.

625 Official Journal 15 April 2010, L. 95, 1 - 24.

626 The original 'Television without Frontiers' Directive (89/552/EEC) dates already from 1989 (Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ L 298, 17.10.1989, p. 23). This directive was later amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (*OJ L 202, 30.7.1997, p. 60–70*) and by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain

4.2.3.1 General objectives of the AVMS Directive

The general objectives of this directive are summarised in its recital 2, stating that audiovisual media services provided across frontiers by means of various technologies are one way of pursuing the objectives of the Union. Therefore, the recital states that certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition without prejudice to the public interest role to be discharged by the audiovisual media services⁶²⁷.

Furthermore, other recitals also explicitly refer to the growing importance of the audiovisual media sector for societies, democracy (in particular by ensuring freedom of information, diversity of opinion and media pluralism), education and culture as a justification for the application of specific rules⁶²⁸, and to the fact that it is essential for Member States to ensure the prevention of any acts that may prove detrimental to freedom of movement and trade in television programmes, or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole⁶²⁹.

4.2.3.2 AVMS specific institutional requirements

4.2.3.2.1 Art. 30 AVMS Directive – current text

The core requirements for independence and efficient functioning of national regulatory bodies in the audiovisual media sector are mainly to be found in Art. 30 of chapter XI (“Cooperation between regulatory bodies of the Member States”) of the consolidated AVMS-Directive. This article⁶³⁰ provides:

Article 30: Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 3 and 4 hereof, in particular through their competent independent regulatory bodies.”

The scope and impact of this provision is further explained in two specific recitals of the directive:

(94) In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Di-

provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (*OJ L 332, 18.12.2007, p. 27–45*).

627 Audiovisual Media Services Directive, recital 2.

628 Audiovisual Media Services Directive, recital 5.

629 Audiovisual Media Services Directive, recital 8.

630 Originally inserted as article 23b by the Audiovisual media services directive of 2007.

rective impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

(95) Close cooperation between competent regulatory bodies of the Member States and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between their regulatory bodies is particularly important with regard to the impact which broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by this Directive.

4.2.3.2.2 Art. 30 AVMS Directive – adoption process

The current text of Art. 30 AVMS Directive reflects a sensitive compromise between the visions of the European Parliament and the Commission and the Council⁶³¹. The following paragraphs provide an overview of the different positions taken were taken during the adoption process⁶³².

In its original proposal for a directive, the Commission proposed as a new Art. 23b:

“1. Member States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently.

2. National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive.”⁶³³

The draft report of the Committee on Culture and Education of the European Parliament already proposed to clarify that it is regulatory bodies under national law that are referred to by amending the first paragraph to “Member States shall guarantee, **in accordance with national law**, the independence of national regulatory **bodies and** ensure that they exercise their powers impartially and transparently”. The Committee on Culture and Education of the European Parliament did not oppose the recital as it was proposed by the Commission, stating: “Regulators should be independent from national governments as well as from audiovisual media service providers in order to be able to carry out their work impartially and transparently and to contribute to pluralism. Close cooperation among national regulatory authorities and the Commission is necessary to ensure the correct application of this Directive”.

Furthermore, the Committee was also of the opinion that compliance with the country of origin principle may be promoted by better cooperation between the national regulatory bodies, particularly as regards bilateral problems. It therefore proposed the amendment of the second paragraph into: “2. National regulatory bodies shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive. The national

631 Castendyk, O. et al. (2008): 996.

632 See also Kleist, T. / Scheuer, A. (2006): 210-221.

633 On the requirements stemming from this formulation, see: Holoubek, M. (2008): 105ff.; Stender-Vorwachs, J. / Theißen, N. (2007): 613.

regulatory bodies shall cooperate more closely, particularly in the resolution of problems as referred to in Art. 2(7) of the directive.”

Also important to note is the opinion of the European Economic and Social Committee (EESC) of 14 September 2006, in which the EESC states as a general comment (point 3.7): “The EESC believes that the proposal should make it necessary or mandatory for there to be regulatory authorities in all Member States, displaying not only impartiality and transparency, but also independence from governments in the way they are created, established and exercise their functions. We are convinced that in the future thought will have to be given as to whether a European agency, institution or similar supranational body should be set up.” The strong belief of the Committee in independent regulatory authorities is also reflected later in specific comments, where the committee also explicitly refers to the Recommendation of the Council of Europe: “The proposal should require all Member States to set up regulatory authorities with powers in the fields covered by the directive, establishing their independence, impartiality and transparency in their membership and the implementation of their duties, under the criteria of Recommendation 23(2000) of the Council of Europe.”

In its first reading (13 December 2006) the EU Parliament proposed to clarify the issue of regulatory authorities further by adding to the relevant recital: “[...] Similarly close cooperation between Member States and between Member States’ regulatory authorities is particularly important with regard to the impact which broadcasters established in one Member State might have in another Member State. Where licensing procedures are provided for in national law and if more than one Member State is involved, it is desirable that contacts between the respective authorities should take place before licences are granted. Such cooperation should cover all the fields coordinated by Directive 89/552/EEC and in particular Articles 2, 2a and 3 thereof.”

With regard to the operative part of the directive, the Parliament proposed the following Art. 23b: “1. Member States shall take appropriate measures to establish national regulatory bodies and institutions in accordance with national law, to guarantee their independence, to ensure that women and men are represented equally in them and to ensure that they exercise their powers impartially and transparently.

2. Member States shall entrust to national regulatory authorities the task of ensuring that media service providers comply with the provisions of this Directive, in particular those relating to freedom of expression, media pluralism, human dignity, the principle of non-discrimination and the protection of minors, the vulnerable and the disabled.

3. *National regulatory bodies shall cooperate more closely and provide each other and the Commission with the information necessary for the application of the provisions of this Directive.*”

In its modified proposal for a directive of 29 March 2007, the Commission proposes the amendment of the second and third paragraph of the new article into: “*National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive. National regulatory authorities shall cooperate closely in the resolution of problems arising from the application of this Directive.*”. Furthermore, the Com-

mission also proposes to modify the formulation of the recital slightly and to drop the explicit requirement of equal representation of women and men.

In its common position of 15 October 2007, the Council explicitly refers to the delicacy of the debate on the independency of the regulatory authorities, stating: *“The common position text reflects a sensitive compromise between the European Parliament and the Council on this issue. The heart of this compromise is found in the new article [23b] dealing with cooperation and the exchange of information.”* The common position concludes as follows: *“The common position, the result of informal negotiations between the European Parliament, the Council and the Commission, maintains the approach and legal architecture proposed by the Commission with a view to adapting the regulation of the audiovisual sector to market and technological change. Important clarifications have been made to the scope of the Directive and to the provisions dealing with jurisdiction, and a number of other important adjustments have been made, including on sensitive questions such as product placement, advertising (particularly to children), extracts for short news reports, regulatory authorities and access of disabled persons to services.”*

The Council proposes the amendment of the recitals of the directives as follows:

“(65) According to the duties conferred upon Member States by the Treaty, they are responsible for the transposition and effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and notably the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.”

(66) Close cooperation between competent Member States’ regulatory bodies and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between Member States’ regulatory bodies is particularly important with regard to the impact broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by Directive 89/552/EEC as amended by this Directive and in particular articles 2, 2a and 3 thereof.

Regarding the operative part of the directive, the Council proposes the amendment of the text to:

“Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 2a and 3 thereof, notably through their competent independent regulatory bodies.”

In its following communication on the common position the Commission states: *“With regard to the independence of regulatory authorities the Presidency proposed a reference in a recital referring to the faculty for Member States to create independent national regulatory bodies. These should be independent from national governments as well as from operators. The EP and the Commission found it necessary that the reference to such bodies be included in the operative part*

of the Directive. The compromise in Article 23b, which is acceptable to the Commission, reads: «Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 2a and 3 thereof, notably through their competent independent regulatory bodies.»

4.2.3.2.3 Art. 4 para. 6 AVMS Directive

For the discussion of the question of whether an obligation to establish independent regulatory bodies follows from the provisions of the AVMS, Article 4, para. 6 of the consolidated AVMS Directive is relevant as well, since it states:

*“Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.”*⁶³⁴

However, the article explicitly assigns the task of ensuring compliance with the provisions of the Directive to the Member States, and does not mention the “regulatory bodies”. Moreover, the article (again) explicitly mentions the freedom of Member States to choose the appropriate means. The background to this obligation for Member States is the discussion on the inter-border aspects of minimum standards in the audiovisual media sector. While Member States are, in principle, free to adopt stricter rules for broadcasters under their jurisdiction, they are, in principle, not allowed to prevent a broadcaster from abroad from offering its services in their national markets.

On the impact of this provision, Castendyk, Dommering and Scheuer in their book write that the binding force of the directive is *“not restricted to the mere transposition into national law of the directive’s aims but also involves the enforcement and safeguarding of effective compliance with the provisions of the respective directive”*. However, as this obligation could already be considered as a legal consequence of other provisions of primary Community law, such as the current Art. 288 al. 3 TFEU, the only additional function they see for this specific provision would be that when a Member State imposes stricter obligations, it is also obliged to ensure effective compliance. The authors further clarify that the “appropriate means” mentioned in the directive mainly relate to instruments that Member States have at their disposal, such as sanctions, penalties, prior authorisation, monitoring and self- and co-regulation⁶³⁵.

4.2.3.2.4 The concept of independence in Art. 30 AVMS Directive: academic literature

Also particularly relevant for the correct interpretation of the concept of independence as it is mentioned in Art. 30 AVMS Directive is the existing academic literature, which, however, consists almost entirely of the work done by Castendyk, Dommering and Scheuer. The following paragraphs briefly summarise their vision.

After having reminded us of the fact that the current wording of Art. 30 AVMS Directive is the result of a political compromise between the European Parliament and the Commission on

634 Audiovisual Media Services Directive, article 4, 6.

635 Castendyk, O. et al. (2008): 393-394.

the one hand, and several Member States on the other hand⁶³⁶, the authors write that “*contrary to the initial proposal by the Commission, the legislative decision of the European Parliament in first reading, and the first amended proposal by the Commission, [the finally approved article] does not explicitly prescribe the establishment of **independent regulatory bodies** (previous phrasing: ‘authorities’). Neither did the Council presidency take up dedicated requests by some delegations of Member States to this effect*”.⁶³⁷

The authors conclude that the article should be interpreted in such a way that it does not contain the obligation for Member States to establish independent regulatory bodies (“The present text clearly does not provide for such an obligation on Member States”), but that “given the legislative history, it may be said that by the suppression of any reference to a mandatory establishment of independent bodies (‘where they do not yet exist’), the legislature could only reach compromise at a level of commitment which reflects the initial interpretation of the Commission, i.e. regulatory bodies, **where they exist, must be independent**”.⁶³⁸ According to the Authors, 30 AVMS Directive should be interpreted in such a way that it does contain the obligation to organise *existing* regulatory bodies in a sufficiently independent manner.

The authors then suggest that such an interpretation (i.e. with the article not containing the obligation to establish independent regulatory authorities) does not however seem to conform strictly with the indications given in the preamble. More precisely, they refer to recital [94], which states that “Member States are free to choose the form of their competent independent regulatory bodies”. Although at first Castendyk, Dommering and Scheuer seem to suggest interpreting that recital as *only* allowing Member States to choose the form of their national regulatory body and thereby not leaving them the possibility of choosing whether or not to establish such a body, they immediately afterwards take the position that “*in view of the uncertainty which was expressed during the negotiations in the informal trilogue, whether the Community would be competent to formally oblige Member States to establish independent regulators, in particular whether the reasons given to this effect would be sufficient under an Internal Market legal basis, such an interpretation is probably too far reaching*”⁶³⁹. Concluding, and referring to a number of policy documents of the European Commission, Castendyk, Dommering and Scheuer write that Art. 30 AVMS Directive should be interpreted in such a way that “*Member States have to guarantee that an existing regulatory body is independent (i) from State interference as well as (ii) from the industry*”⁶⁴⁰.

Regarding the actual means of guaranteeing the independence of the regulatory bodies, Castendyk, Dommering and Scheuer write: “*It is not said by which means the Member States should ensure independence of the regulator. Obviously, the **choice** of the respective mechanisms shall lie in the responsibility of each Member State; thus, **different experiences and cultural factors** can be taken into account. This is underlined by rec. [94].*” The authors then pro-

636 Castendyk, O. et al. (2008): 996.

637 Castendyk, O. et al. (2008): 996.

638 Castendyk, O. et al. (2008): 996.

639 Castendyk, O. et al. (2008): 997.

640 Castendyk, O. et al. (2008): 997.

vide a wide range of possible instruments, such as constitutional law rules aiming at assuring the independence of the authority, legal provisions governing the appointment of the Director General and/or the members of the board heading such an authority, rules on incompatibility, rules on transparency, rules on organisational and/or financial independence of persons involved as well as of the authority itself, and rules on the operational independence of the authority.

Furthermore, Castendyk, Dommering and Scheuer argue that the directive requires two kinds of independence. Based on the objectives of the directive as they are explicitly mentioned in its recitals, based on the principles of freedom of expression and the freedom of the media (as enshrined in Art. 11 CFREU and Art. 10 ECHR), and on the concept of functional independence, they conclude that not only safeguards against potential *State* influence are needed, but also – at least in some cases – independence from broadcasting operators.

As a starting point the authors, *inter alia*, mention recital 94, which “refers to the aim that independence of the Member State’s regulatory body should enable it to carry out its work impartially and transparently and to contribute to pluralism”. “Thus”, they write, “functional independence is meant”⁶⁴¹. They continue by stating that (against the background of the principles of freedom of expression and of the media), the recitals relate mainly to safeguards against potential State influence: “The emphasis is laid on preventing too much involvement of the state, which could be detrimental to the process of free communication. Such freedom from state interference has to be ensured with view to both public service and commercial broadcasters”⁶⁴². About the level or organisation of the required independency, they come to the conclusion that “the extent to which independence from the state, better: from government, has to be ensured, is not defined more concretely”⁶⁴³. They then turn to similar obligations in the data protection area⁶⁴⁴ in order to conclude that “it might be advisable to opt for models of audiovisual regulatory authorities that especially ensure freedom from directions issued by governments”⁶⁴⁵.

On the independence of regulatory authorities from broadcasting operators, the authors write that this issue is mainly relevant “*with respect to such systems of public service broadcasting where no external supervisory authority is entrusted with the monitoring of, for example, the adherence by the broadcaster to positive as well as negative content requirements*”.⁶⁴⁶ They also raise the question of how functional independence of the regulatory body should be considered in cases where co- and self-regulation are applied for implementing the objectives of the directive.

641 Castendyk, O. et al. (2008): 998. See also: Kleist, T. / Scheuer, A. (2006): 211.

642 Castendyk, O. et al. (2008): 999.

643 Castendyk, O. et al. (2008): 999.

644 For the discussion of these provisions, cf. below.

645 Castendyk, O. et al. (2008): 999.

646 Castendyk, O. et al. (2008): 999.

4.2.3.2.5 The concept of independence in Art. 30 AVMS Directive: Role of regulatory bodies

The long history and many amendments that were made to the relevant article and the corresponding recitals indicate what was also explicitly referred to by the Council (cf. supra): the final text of the article is a compromise and therefore difficult to interpret precisely.

For the interpretation of Art 30 AVMS Directive, it is important to note that this provision mainly focuses on the sharing of information. In fact, the wording of the article mentions the competent independent regulatory bodies as preferred instruments for the Member States to provide each other and the European Commission with the information necessary for the application of the provisions of the AVMS Directive. It should however be noted that the relevant recitals seem to indicate a much more important role for the AVMS regulatory bodies, since they provide that these bodies should carry out their work in implementing the AVMS Directive impartially and transparently.

Against this background there are basically three ways how to construe the meaning of Art. 30 AVMS as regards the obligations of the Member States:

1. If an independent regulatory body is in existence, Member States have to choose from among possible options the independent regulatory body to fulfil the task mentioned in Art. 30. If there is no such body or the body in place does not meet specific requirements of independence, Member States are obliged to create it or to change the structure of the existing body accordingly.
2. The notion of independence is only declaratory and has no meaning as regards the obligations the Member States have to fulfil.
3. Member States have to choose from among possible options the independent regulatory body to fulfil the task mentioned in Art. 30, if there is such a body, but if there is no body or the body in place does not meet specific requirements of independence, there is no obligation to create it.

The first opinion is supported by the second part of Recital 94. However, as during the lawmaking process, there have been some amendments to the effect that the initial suggestion by the Commission and partly also the Parliament has at least been softened down when negotiating with the Council, this interpretation cannot be followed. Based on the positions as they were expressed during the adoption process of the current text⁶⁴⁷, it seems reasonable to conclude that although Art. 30 AVMS Directive presupposes that there already are “independent regulatory bodies” in the Member States, it in itself does not contain the obligation for Member States to create such an independent regulatory body.

At the same time, the controversial debate during the lawmaking process and the changes to the text of the Directive as it was suggested by the Commission and Parliament make it seem un-

⁶⁴⁷ Not least the Communication of the Commission of 18 October 2007 on the common position, where it refers to a proposal of the Presidency referring to the faculty for Member States to create independent national regulatory bodies (cf. supra).

likely that there is no meaning to be attached to this notion. This speaks against an understanding of the Directive as suggested in the second option.

Thus, the third pattern of interpretation is the most plausible one. This interpretation also makes sense in view of the specific requirements under Art. 30 AVMS. Through the requirements laid down in this provision a network of information exchange and co-operation among the main regulatory bodies in the field of AVMS regulators can be created. Notwithstanding the different aims of regulation, the telecommunications sector demonstrates the benefits a European Regulatory Group has for a coherent regulation. Furthermore, the theoretical considerations support the view that the capacity to deal with complex regulatory tasks can improve if there is a separation of the regulatory body from traditional forms of government and if the regulatory body can – at the same time – avoid being captured by the regulated industry. Even if the directive (in its final version) does not constitute an obligation, it has the long-term policy aim to steer the process in a way that creates incentives for Member States to establish such bodies and to participate in the described network. For this aim we can conclude that the notion “independence” refers to criteria as suggested in the theoretical consideration for best practise characteristics as elaborated in this study.

4.2.4 Council of Europe

During the last decade, the issue of the independence of audiovisual media regulatory authorities has also been high on the political agenda of the Council of Europe. In 2000, the Committee of Ministers of the Council of Europe adopted its *Recommendation to Member States on the independence and functions of regulatory authorities for the broadcasting sector* (Rec (2000)23)⁶⁴⁸, which was later followed by a declaration in 2008. Although, from a strictly legal perspective, neither of these documents is binding on Member States, they nevertheless contain indications on matters for which the Committee has agreed a common policy. The recommendation and declaration are also particularly relevant for developing factual dimensions and indicators of independence and efficient functioning.

4.2.4.1 Recommendation (2000)23

After recognising that there is a diversity with regard to the means by which – and the extent to which – independence, effective powers and transparency are achieved by the Member States, the recommendation considers that it is important that Member States should guarantee genuine independence for the regulatory authorities in the broadcasting sector, in particular, through a set of rules covering all aspects of their work, and through measures enabling them to perform their functions effectively and efficiently.

The precise recommendations of the Committee of Ministers are then to:

648 Committee of Ministers, Council of Europe, Recommendation to Member States on the independence and functions of regulatory authorities for the broadcasting sector (Rec (2000)23), available at: <https://wcd.coe.int/>. Further referred to as: “Recommendation 2000”.

- establish, if they have not already done so, independent regulatory authorities for the broadcasting sector;
- include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers that enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation;
- bring these guidelines to the attention of the regulatory authorities for the broadcasting sector, public authorities and professional groups concerned, as well as of the general public, while ensuring effective respect to the independence of the regulatory authorities with regard to any interference in their activities.

The appendix to the recommendation contains more precise guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector, which are grouped into the five following dimensions:

- general legislative framework;
- appointment, composition and functioning;
- financial independence;
- powers and competence;
- accountability.

For each of these dimensions, the appendix to the recommendation lists more precise criteria of the required level and organisation of independence.

Regarding the **general legislative framework**, the Committee of Ministers that recommends Member States ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework⁶⁴⁹. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence. Furthermore, it also recommends that the duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding, should be clearly defined in law⁶⁵⁰.

On the **appointment, composition and functioning** of regulatory authorities for the broadcasting sector, the recommendation stresses that the rules governing regulatory authorities in the broadcasting sector, especially their membership, are a key element of their independence⁶⁵¹. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests. The recommendation also states that specific rules should be developed as regards incompatibilities in order to avoid (a) regulatory authorities being under the influence of political power or (b) members of regulatory authorities exercising functions, or holding interests in enterprises or other organisations in the media or related sectors, that might lead to a conflict of interest in connection with membership of the regulatory authority⁶⁵². Fur-

649 Recommendation 2000, paragraph 1.

650 Recommendation 2000, paragraph 2.

651 Recommendation 2000, paragraph 3.

652 Recommendation 2000, paragraph 4.

thermore, rules should guarantee that the members of these authorities (a) are appointed in a democratic and transparent manner; (b) may not receive any mandate or take any instructions from any person or body; (c) do not make any statement or undertake any action that may prejudice the independence of their functions and do not take any advantage of them⁶⁵³.

The recommendation also pays specific attention to the issue of the dismissal of members of the audiovisual media regulatory authorities, by stating that precise rules should be defined to cover the grounds for dismissal of members of regulatory authorities, so as to avoid dismissal being used as a means of applying political pressure⁶⁵⁴. In particular, dismissal should only be possible in cases of breaches of the rules of incompatibility with which they must comply, or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence, either connected or not with their functions, should only be possible in serious instances clearly defined by law, subject to a final sentence by a court⁶⁵⁵.

It also stresses that, given the broadcasting sector's specific nature and the peculiarities of their mission, regulatory authorities should include experts in the areas that fall within their competence⁶⁵⁶.

Financial independence is also put forward as another key element in the independence of audiovisual regulatory authorities. In practice, the Committee of Ministers recommends to governments that arrangements for the funding of regulatory authorities should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently⁶⁵⁷. The recommendation also explicitly states that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Furthermore, recourse to the services or expertise of the national administration or third parties should not affect their independence⁶⁵⁸. Finally, it is proposed that funding arrangements should take advantage, where appropriate, of mechanisms that do not depend on the *ad-hoc* decision-making of public or private bodies⁶⁵⁹.

On the powers and competence of the regulatory authorities, the recommendation identifies four different aspects. First, on the *legal scope of the regulatory powers* of the regulators, the recommendation states that, subject to clearly defined delegation by the legislator, regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities. Within the framework of the law, they should also have the power to adopt internal rules⁶⁶⁰.

653 Recommendation 2000, paragraph 5.

654 Recommendation 2000, paragraph 6.

655 Recommendation 2000, paragraph 7.

656 Recommendation 2000, paragraph 8.

657 Recommendation 2000, paragraph 9.

658 Recommendation 2000, paragraph 10.

659 Recommendation 2000, paragraph 11.

660 Recommendation 2000, paragraph 12.

Second, the *granting of broadcasting licences* is normally considered to be one of the essential tasks of regulatory authorities, although the basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law⁶⁶¹. On this issue, the recommendation claims that the regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities should be subject to adequate publicity⁶⁶².

Specifically in the area of *radio spectrum allocation*, the recommendation states that regulatory authorities should be involved in the process of planning the range of national frequencies allocated to broadcasting services. They should have the power to authorise broadcasters to provide programme services on frequencies allocated to broadcasting, although this should have no bearing on the allocation of frequencies to transmission network operators under telecommunications legislation⁶⁶³. Once a list of frequencies has been drawn up, a call for tenders should be made public in appropriate ways by regulatory authorities. Calls for tender should define a number of specifications, such as type of service, minimum duration of programmes, geographical coverage, type of funding, any licensing fees and, as far as necessary for those tenders, technical parameters to be met by the applicants. Given the general interest involved, Member States may follow different procedures for allocating broadcasting frequencies to public service broadcasters⁶⁶⁴. Furthermore, calls for tender should also specify the content of the licence application and the documents to be submitted by candidates. In particular, candidates should indicate their company's structure, owners and capital, and the content and duration of the programmes they are proposing⁶⁶⁵.

According to the recommendation, another essential function of regulatory authorities should be the monitoring of compliance with the conditions laid down in law and in the licences granted to broadcasters. They should, in particular, ensure that broadcasters who fall within their jurisdiction respect the basic principles laid down in the European Convention on Transfrontier Television, and in particular those defined in Art. 7⁶⁶⁶. Regulatory authorities should however not exercise *a priori* control over programming and the monitoring of programmes should therefore always take place after the broadcasting of programmes⁶⁶⁷. In so far as this is necessary for the performance of their tasks, regulatory authorities should be given the right to request and receive information from broadcasters⁶⁶⁸. They should have the power to consider complaints, within their field of competence, concerning the broadcasters' activity and to publish their conclusions regularly⁶⁶⁹. When a broadcaster fails to respect the law or the conditions specified in his licence, the regulatory authorities should have the power to impose sanctions, in accordance with the

661 Recommendation 2000, paragraph 13.

662 Recommendation 2000, paragraph 14.

663 Recommendation 2000, paragraph 15.

664 Recommendation 2000, paragraph 16.

665 Recommendation 2000, paragraph 17.

666 Recommendation 2000, paragraph 18.

667 Recommendation 2000, paragraph 19.

668 Recommendation 2000, paragraph 20.

669 Recommendation 2000, paragraph 21.

law⁶⁷⁰. A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law⁶⁷¹.

Regarding the *powers in relation to public service broadcasters*, the recommendation is far less explicit, since it only states that regulatory authorities may also be given the mission to carry out tasks often incumbent on specific supervisory bodies of Public Service Broadcasting organisations, while at the same time respecting their editorial independence and their institutional autonomy⁶⁷².

It is interesting to note that the recommendation also contains a number of specific provisions and criteria relating to the **accountability** of the regulatory authorities. In this respect, the recommendation states that regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or *ad hoc* reports relevant to their work or the exercise of their duties. Furthermore, in order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised *a posteriori* only⁶⁷³. The regulations on responsibility and supervision of the regulatory authorities should be clearly defined in the laws applying to them⁶⁷⁴. Finally, all decisions taken and regulations adopted by the regulatory authorities should be first, duly reasoned, in accordance with national law; second, open to review by the competent jurisdictions according to national law; and third, made available to the public⁶⁷⁵.

4.2.4.2 Declaration 2008

Pursuant to its Recommendation, the Committee of Ministers on 26 March 2008 adopted a declaration *on the independence and functions of regulatory authorities for the broadcasting sector*⁶⁷⁶, in which the Committee of Ministers *inter alia* declares its firm attachment to the objectives of the independent functioning of broadcasting regulatory authorities in Member States⁶⁷⁷.

The explanatory memorandum to the declaration first recalls the broader context of the debate, therefore referring to Art. 10 ECHR, to the Recommendation (2003)9 on measures to promote the democratic and social contribution of digital broadcasting, to the Declaration of 27 September 2006 on the guarantee of independence for Public Service Broadcasting in the Member

670 Recommendation 2000, paragraph 22.

671 Recommendation 2000, paragraph 23.

672 Recommendation 2000, paragraph 24.

673 Recommendation 2000, paragraph 25.

674 Recommendation 2000, paragraph 26.

675 Recommendation 2000, paragraph 27.

676 Committee of Ministers, Council of Europe, declaration of 26th March 2008 on the independence and functions of regulatory authorities for the broadcasting sector, available at: <https://wcd.coe.int/>, Further referred to as: "Declaration 2008".

677 Declaration 2008, paragraph II.

States, to the jurisprudence and decisions of the European Court and Commission of Human Rights, as well as to the commitment made by the Member States in the Political Declaration of the 7th European Ministerial Conference on Mass Media Policy (Kyiv, 10 and 11 March 2005).

It then more explicitly evaluates the implementation of the Recommendation (2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, and concludes that in many Member States, the independent and efficient regulation of the broadcasting sector, as well as the independence, transparency and accountability of regulatory authorities for the broadcasting sector, are ensured by law and practice. Referring to a number of other Member States, the declaration expresses its concerns about the fact that the main principles underlining the recommendation are not fully respected in law and/or in practice. The most important reasons for the lack of independence (“negative dimensions”) that are mentioned in the recitals to the declaration are:

- the legal framework on broadcasting regulation that is unclear, contradictory or in conflict with the principles of Recommendation Rec(2000)23;
- the political and financial independence of regulatory authorities and its members that is not properly ensured;
- licences which are allocated and monitoring decisions that are made without due regard to national legislation or Council of Europe standards;
- broadcasting regulatory decisions that are not made available to the public or are not open to review.

The explanatory memorandum to the declaration also presents a new concept, the “culture of independence”. The basic elements of such a culture of independence relate to the fact that first, members of regulatory authorities in the broadcasting sector affirm and exercise their independence; and that second, all members of society, public authorities and other relevant players including the media, respect the independence of the regulatory authorities. A culture of independence is put forward as essential to independent broadcasting regulation and should therefore according to the actual declaration be preserved by all Member States. Moreover, where they are in place, independent broadcasting regulatory authorities in Member States need to be effective, transparent and accountable⁶⁷⁸.

Specifically for the independent broadcasting regulatory authorities, the explanatory memorandum to the declaration states that they can only function in an environment of transparency, accountability, clear separation of powers and due respect for the legal framework in force. The declaration therefore calls on the members states to:

- *“implement, if they have not yet done so, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, with particular reference to the guidelines appended thereto, and having regard to the opportunities and challenges brought about by political, economic and technological changes in Europe;*

678 Declaration 2008, paragraph I.

- *provide the legal, political, financial, technical and other means necessary to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political or economic interference;*
- *disseminate widely the present declaration and, in particular, bring it to the attention of the relevant authorities, the media and of broadcasting regulatory authorities in particular, as well as to that of other interested professional and business players.”*⁶⁷⁹

Moreover, the declaration also invites the broadcasting authorities to:

- *“be conscious of their particular role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape;*
- *ensure the independent and transparent allocation of broadcasting licences and monitoring of broadcasters in the public interest;*
- *contribute to the entrenchment of a ‘culture of independence’ and, in this context, develop and respect guidelines that guarantee their own independence and that of their members;*
- *make a commitment to transparency, effectiveness and accountability”*⁶⁸⁰.

Finally, the declaration also invites civil society and the media to contribute actively to the ‘culture of independence’, which it considers vital for the adequate regulation of broadcasting in the new technological environment. In practice, civil society and the media are asked to monitor closely the independence of these authorities, and to bring to the attention of the public good examples of independent broadcasting regulation as well as infringements of regulators’ independence⁶⁸¹.

The declaration also contains an annex, which provides a factual overview of the legislative framework of Member States and its practical implementation, as well as legal and institutional solutions developed in particular countries regarding regulatory authorities in the broadcasting sector. This document examines the legal framework and practice of broadcasting regulatory authorities and broadcasting regulation in Member States and the degree of compliance with regard to the guidelines set out in the Recommendation. Although we will not discuss it in detail, it nevertheless contains relevant factual information for the development of dimensions and indicators for independence of regulatory authorities in later phases of our research.

4.2.4.3 Recommendation (96)10

Finally, even in 1996 the Recommendation of the Committee of Ministers on “The Guarantee of the Independence of Public Service” already contained relevant provisions, since in its appendix it devotes a separate section on the supervisory bodies of public service broadcasting organisations, providing:

679 Declaration 2008, paragraph III.

680 Declaration 2008, paragraph IV.

681 Declaration 2008, paragraph V.

“1. Competences

The legal framework governing public service broadcasting organisations should define clearly and precisely the competences of their supervisory bodies. The supervisory bodies of public service broadcasting organisations should not exercise any a priori control over programming.

2. Status

The rules governing the status of the supervisory bodies of public service broadcasting organisations, especially their membership, should be defined in a way which avoids placing the bodies at risk of political or other interference.

These rules should, in particular, guarantee that the members of the supervisory bodies:

- are appointed in an open and pluralistic manner;*
- represent collectively the interests of society in general;*
- may not receive any mandate or take any instructions from any person or body other than the one which appointed them, subject to any contrary provisions prescribed by law in exceptional cases;*
- may not be dismissed, suspended or replaced during their term of office by any person or body other than the one which appointed them, except where the supervisory body has duly certified that they are incapable of or have been prevented from exercising their functions;*
- may not, directly or indirectly, exercise functions, receive payment or hold interests in enterprises or other organisations in media or media-related sectors where this would lead to a conflict of interest with their functions within the supervisory body.*

Rules on the payment of members of the supervisory bodies of public service broadcasting organisations should be defined in a clear and open manner by the texts governing these bodies.”

4.2.5 Electronic communications

The electronic communications directives provide for a wide range of powers, responsibilities and tasks to be vested in national regulatory authorities (NRAs) in order to ensure effective competition between market players. The NRAs play a central role in effectively implementing the regulatory framework, since many relevant powers and tasks are directly assigned to them. Under the existing electronic communications framework, NRAs are required to deal with important and complex issues such as determining relevant markets, conducting market analyses and imposing obligations on identified SMP-operators. They enjoy a significant level of independence, based on the “principle of separation of regulatory and operational functions”. Recently, the 2009 directives further increased the formal requirements of independence.

As indicated earlier, it is important to include the requirements dealing with regulatory authorities in the electronic communications sector in the analysis of the independence framework of the audiovisual media regulatory authorities for a number of different reasons:

- The close relationship between the audiovisual media sector and the electronic communications sector, both at European and national level: From a technological and economic perspective, the audiovisual media sector and the electronic communications sector are of

course highly intertwined. This close relationship is also mirrored at the legal level: since 2002, the scope of the electronic communications regulatory framework is no longer limited to the traditional “telecommunications” sector, but also includes the transmission of electromagnetic signals used for distributing audiovisual broadcasting content (e.g. provisions on market entry, market regulation, consumer protection, etc.)⁶⁸². Moreover, the electronic communications regulatory framework even contains a number of provisions which are directly applicable (or even exclusively relevant) to the audiovisual media sector, such as provisions on must-carry, on conditional access systems (CAS), on application programme interfaces (API), on electronic programme guides (EPG) and/or on standardisation).

- The functional definition of the national regulatory authority: Furthermore, the concept of “national regulatory authorities” as it is defined in the electronic communications regulatory framework itself is also one of the justifications for studying it in more detail. Art. 2 g) of the Framework Directive defines the “national regulatory authority” in a strictly functional way, as “*the body or bodies charged by a Member-State with any of the regulatory tasks assigned in this Directive and the Specific Directives*”. As a result, every body that performs a task that – according to the specific Articles of the Directives – should be assigned to a NRA, has to be considered as an NRA and therefore has to comply with all relevant institutional requirements. Applied to the audiovisual media sector: whenever an audiovisual media regulatory authority is carrying out one of the electronic communications regulatory tasks (e.g. frequency allocation, analysing broadcasting transmission markets and imposing of obligations, ...), it would *in principle* have to comply with the independence requirements of those directives.
- The independence of national regulatory authorities in electronic communications sector as *best practice*: In the electronic communications sector, the national regulatory authorities’ role as merely policy advisory bodies has been revised as a result of their obligation to implement the EU liberalisation, and to achieve harmonisation of the regulatory frameworks. Today, national regulatory authorities in this sector have to comply with a strict number of requirements for independence and collaboration, while having wide discretionary powers in their decision-making processes⁶⁸³. The electronic communications sector is without any doubt one of the sectors in which the institutional design is most developed (e.g. provisions on the formal level of independence of the regulatory authorities, on the regulatory objectives to be applied, on transparency, on appeal, on collaboration with other institutions, both at national and at European level). Finally, the institutional design in the electronic

682 de Stree, A. / Queck, R. / Vernet, P. (2002): 243-314; Geradin, D / Humpe, C. (2002): 99-127.

683 See: Court of Justice: case C-424/07 (European Commission v Germany), paragraph 61: “In carrying out those regulatory functions, the NRAs have a broad discretion in order to be able to determine the need to regulate a market according to each situation on a case-by-case basis (see, to that effect, Case C-55/06 Arcor [2008] ECR I-2931, paragraphs 153 to 156)”.

communications sector has also been highly debated in civil society (both at European and national level) and in the academic literature⁶⁸⁴.

4.2.5.1 Institutional framework applicable to e-communications NRAs

At a European level, following the full liberalisation of the telecommunications sector in 1998, the most important elements of the new regulatory framework for electronic communications networks and services were adopted on 7 March 2002. The package consists of a number of directives of the European Parliament and the Council under Art. 114 (harmonisation), one Commission directive under Art. 106 (liberalisation), and a number of secondary legislative texts.

The most important directives of the regulatory framework are:

- 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 (Framework Directive, FD), OJ. L. 24 April 2002, 108, 33;
- Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive, AUD), OJ. L. 24 April 2002, 108, 21;
- 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, AID), OJ. L. 24 April 2002, 108, 7;
- 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 (Universal Service Directive, USD), OJ. L. 24 April 2002, 108, 51;
- 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 (Directive on privacy and electronic communications, PRD), OJ. L. 31 July 2002, 201, 37;
- Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (Competition Directive, CD), OJ. L. 17 September 2002, 249, 21.

At the end of 2009 the EU also approved two directives modifying the 2002 package in a number of specific points, as well as a regulation about a new advisory European authority for the electronic communications sector, the Body of European Regulators for Electronic Communications (BEREC):

- Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the au-

684 de Streef, A. (2008a): 722-734; de Streef, A. (2005): 148-158; Stevens, D. / Valcke, P. (2003): 159-189; Geradin, D. (2000): 5-32; Melody, W. H. (1999): 7-34; Melody, W. H. (1997a): 195-199.

thorisation of electronic communications networks and services, OJ. L. 18 December 2009, 337, 37;

- 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 the 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, OJ. L. 18 December 2009, 337, 11;
- Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ. L. 18 December 2009, 337, 1.

The implementation period of these new directives has not yet passed, and the Member States will only need to transpose them into national laws by June 2011.

According to the provisions of the Framework directive, all relevant national regulatory authorities must comply with a number of institutional requirements. The most important ones relate to independence vis-à-vis market players and the obligation for NRAs to take all reasonable measures to achieve a limited number of policy objectives and regulatory principles⁶⁸⁵. Furthermore, the NRAs must also comply with a number of other requirements, such as the transparency of their competences, the ability to resolve disputes, the availability of a sufficient level of enforcement for their decisions and a right of appeal against them. A number of these requirements were reinforced by the directives of 2009, which *inter alia* aim at eliminating political interference in NRA's day to day duties as well as the protection against arbitrary dismissal for the head of the NRA.

4.2.5.2 Notion of Independence

4.2.5.2.1 Art. 3 Framework directive

The actual requirement for independence of the regulatory authorities is imposed by Art. 3 of the Framework Directive. As indicated in the relevant recitals, the objective of the obligation to be independent is mainly to avoid the risk of conflicts of interests between the regulation of the sector and operational (or financial) interests⁶⁸⁶ and to ensure the impartiality and transparency of

685 Court of Justice, case C-424/07 (European Commission v Germany), paragraph 59: "In carrying out their tasks, the NRAs are required, pursuant to Article 7(1) of the Framework Directive, to take the utmost account of Article 8 thereof. In accordance with Article 8(1) of that directive, Member States must ensure that the NRAs take all reasonable measures which are aimed at achieving the objectives set out in Article 8. Furthermore, that provision states that the measures taken by the NRA must be proportionate to those objectives."

686 As it is also the case in the WTO Agreement on Basic Telecommunications, where many countries commit, among other things, to establish a regulator that is separate from the incumbent operator.

the decisions of the NRAs, referred to in the recitals to directive as the “principle of separation of regulatory and operational functions”⁶⁸⁷.

The precise requirements are formulated by Art. 3, al. 2 of the Framework Directive. The first sentence of this provision applies to all Member States. They must all ensure that their NRAs are legally distinct from, and functionally independent of, market players. In practice, Member States must ensure at least two separate things. First of all, they must make sure that every NRA is a legal person separate from any undertaking providing electronic communications networks or services. Assigning the least part of the regulatory tasks to an undertaking would constitute a breach of this requirement. Furthermore, beside a strictly legal separation, this sentence also requires a “functional independence” of the NRA in its relationship with market players. Market players should not be able to interfere with or to influence the decisions of the regulatory body⁶⁸⁸.

Where a Member State retains ownership or control of a market player, it is obliged to ensure an *effective structural separation of the regulatory function from activities associated with ownership or control* (Art. 3, 2. second sentence Framework Directive). This article reflects the (legitimate) concern that Member States which retain part of the operational task are subject to an increased risk of conflicts of interest. The obligation to ensure such *effective structural separation* is stronger, because it imposes on Member States the obligation to realise this stricter separation between the regulatory function (defined in a very general way) and the activities associated with ownership or control. In practice, Member States are obliged to avoid as much as possible every conflict of interests between those different functions at every level of their administration⁶⁸⁹. Some lack of clarity still persists about the precise scope of the supervision of the NRAs. While some authors seem to defend the thesis that the directives do not require more than assigning the supervision over the NRA to another minister than the minister managing the State’s share in its incumbent operator⁶⁹⁰, others stay closer to the text of the Commission’s communication of 1995⁶⁹¹, indicating that the control over both the regulatory and operational

687 Recital 11 of the Framework Directive: “In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks.”. See also Court of Justice, case C-424/07 (European Commission v Germany), paragraph 54: “Pursuant to Article 3(2) and (3) of the Framework Directive and recital 11 in its preamble, in accordance with the principle of the separation of regulatory and operational functions, Member States must guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality and transparency of their decisions.”

688 Stevens, D. / Valcke, P. (2003): 166.

689 Schütz, R. / Attendorn, T. (2002): 25; Bender, G. (2001): 509.

690 Scherer, J. (2002): 279-280 and Geradin, D. (2000): 18-20.

691 Communication of the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services, OJ. C. 20 October 1995, 275, 2.

function can remain within the competence of a minister, as long as he cannot control more than the accounts and the legality of the decisions of NRAs.

It is important to note that many of these requirements for independence were included in national legal frameworks after the European Commission initiated a number of infringement procedures:

The European Commission launched an infringement procedure against Bulgaria in 2007, where the chairman of the authority was at the same time the member of the incumbent's board as well, which was clearly a conflict of interest according to the framework directive.⁶⁹² This threatened the independence of regulatory decisions. Moreover, the board of the Bulgarian regulator, the Communications Regulatory Commission (CRC) was not fully staffed, causing regulatory decisions to be significantly delayed or postponed. The case was closed following the appointment by the Bulgarian government of a new Chairman to the CRC, as well as the resignation of the Chairman of the state body from the incumbent's board in December 2007.

Another infringement procedure was launched against Bulgaria in 2007⁶⁹³ because the core tasks of the regulator under existing telecoms rules, such as conducting market analyses, weren't being undertaken. As a consequence, regulatory decisions had been significantly delayed or postponed. In addition, the incumbent telecoms operator's board had amongst its members the Chairperson of another authority with some regulatory competences – the State Agency for Information Technology and Communications. This raised a conflict of interest that jeopardised the independence of the national regulator.

The Commission emphasised the importance of the authority's independence regarding its organisational structure in Romania.⁶⁹⁴ The Romanian Ministry of Communications and Information Society exercised ownership and control activities in two companies providing telecoms networks and/or services (Romtelecom S.A. and S.N.R. S.A. – 'Radiocom'). Under EU telecoms rules, Member States that retain ownership or control companies providing these services must ensure effective structural separation of the regulatory function from activities associated with ownership or control. This procedure of the Committee points out that simply the formal adoption of the EU law is not enough, if the government can be abused by the dismissal opportunities.

An infringement procedure was also launched against Slovakia⁶⁹⁵ in 2005 because there were various discrepancies between the national law and the EU Framework Directive. National authorities initially failed to address the separation of the Ministry of Transport, Post and Telecoms' regulatory function from the activities associated with ownership or control of the incumbent operator. This issue was resolved, since the Ministry's shareholding in the incumbent was moved to the Ministry for Economy thus ensuring the separation of regulatory and management functions. Earlier similar procedures had been launched against Cyprus and Slovenia.⁶⁹⁶ The Lith-

692 Press releases IP/08/1018, 26 June 2008.

693 Press releases IP/07/1786, 28 November 2007.

694 Press releases IP/09/1624, 29 October 2009.

695 Press releases IP/05/430, 14 April 2005.

696 MEMO/05/372.

uanian⁶⁹⁷ and Latvian⁶⁹⁸ cases are still pending in connection with the separation of ownership and control functions, too.

Recently, even more stringent requirements for independence were put into place in the context of the 2009 amendments of the regulatory framework (to be implemented by Member States before June 2011). First, Member States will be obliged to ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. According to this new paragraph, Member States will also have to ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them⁶⁹⁹, and that that NRAs have separate annual budgets, which have to be made public⁷⁰⁰. The importance of these requirements was illustrated in a number of recent cases before the Court of Justice, and in the two most recent communications of the European Commission on the harmonisation of the electronic communications markets.

In connection with the issue of expertise and financial and human resources, the 13th report on the single European electronic communications market⁷⁰¹ points out that the NRAs in small Member States in particular can find it difficult to muster the expertise and resources needed to conduct market reviews and monitor implementation of remedies in increasingly complex markets. The Commission was examining continuing concerns as to resource constraints in Bulgaria, Greece, Luxembourg, Poland and Slovakia.⁷⁰²

According to the 14th report, financial and human resources remain an issue of concern in some Member States. In Bulgaria the issue emerged as a consequence of the budget consolidation; though the state organs' budget was cut, the staff number remained the same because of market review. In some cases the authority is still the part of the ministry that leads to the improper use of human and financial resources.

A number of other requirements are also added to Art. 3 of the Framework Directive. The newly added paragraph 3a of the Framework Directive obliges NRAs responsible for *ex-ante* market regulation or for the resolution of disputes between undertakings to act independently and prohibits them seeking or taking instructions from any other body in relation to the exercise of these tasks assigned to them under national law implementing Community law. The text however explicitly mentions that these obligations shall not prevent supervision in accordance with national constitutional law. In fact, this obligation should be understood in such a way that only the appeal bodies set up in accordance with the provisions of the directive should have the power to suspend or overturn decisions by the national regulatory authorities.

In the electronic communications sector, the independence of the regulatory authority's board is considered as a very important element of independence, which means personal independence

697 Press releases IP/09/1040, 29 October 2009.

698 Press releases IP/09/569, 14 April 2009.

699 Article 1, 3) (a) Better regulation directive. A similar requirement was under the 2002 directives only mentioned in the recitals, see: recital 11 of the 2002 Framework directive.

700 Article 1, 3) (b) Better regulation Directive.

701 Progress report on the single European electronic communications market 2007 (13th report){sec(2008) 356} Brussel 19 March 2008.

702 13th report p 11.

from the government and the market players as well. Therefore the head of the national regulatory authority must not seek or take instructions from any other body in relation to the exercise of these tasks, and appeal bodies set up in accordance with Art. 4 of the Framework Directive shall have the power to suspend or overturn decisions by the national regulatory authorities.

Another new requirement relates to the dismissal of the head(s) of the regulatory body. In this respect, Member States have to ensure that the head(s) of a national regulatory authority may only be dismissed if they no longer fulfil the conditions required for the performance of their duties. The decision to dismiss the head(s) has to be made public at the time of dismissal. The dismissed head(s) has to receive a statement of reasons and shall have the right to require its publication, where this would not otherwise take place, in which case it shall be published⁷⁰³. This specific requirement has also been shaped by a number of different cases and policy documents initiated by the European Commission.

In the case of Romania⁷⁰⁴ the Commission stresses the importance of the regulator's structural independence. In September 2008, the Bucharest Court of Appeal suspended the decision taken by Romania's Prime Minister one month earlier to replace the President of Romania's telecoms regulator. Following the court's decision, the regulator's president should have been reinstated in his position. However, the court ruling was not enforced because the Romanian government adopted emergency legislation, on the same day this ruling was made public, restructuring and renaming the national regulator and appointing a new President. This deprived the court ruling of its effect.

The above case is based on the incorrect transposition and application of the Framework Directive. The EU telecoms rules adopted in November 2009 (MEMO/09/513), and to be fully implemented by May 2011, reinforce the independence of national telecoms regulators by requiring Member States to eliminate any political interference in their day-to-day duties and by adding further protection against arbitrary dismissal of the heads of national regulators. In April 2009, the Romanian authorities informed the Commission that the Government had adopted a new emergency act (Emergency Ordinance 22/2009) reorganising the telecoms regulator as the National Regulatory and Administration Authority for Communications – ANCOM. The act has not yet been approved by the national parliament. This creates uncertainty around the regulator and leaves the independence of Romania's national regulatory authority open to question.⁷⁰⁵

In Slovakia, following a government proposal, the Slovak Parliament dismissed the chairman of the TÚSR, the national telecoms regulator, on 4 December 2008.⁷⁰⁶ The Slovak government said the regulator had failed to fulfil its tasks in accordance with the national legal framework and with the goals and principles of the national policy for electronic communications during a call for tender for digital terrestrial frequencies launched on 20 August 2008. The Commission observed that the chairman of an EU Member State's telecoms regulator has been removed be-

703 Article 1, 3) (b) Better regulation directive.

704 Press releases IP/09/165, 29 Januar 2009.

705 Press releases IP/10/519, 5 May 2010.

706 Press releases IP/09/775, 14 May 2009.

fore the end of the normal term of office and as a result the Slovak Government and Parliament is left with *de facto* unlimited discretion to act.

According to the Framework directive, national authorities can only remove the heads of their telecoms regulatory bodies in very restricted circumstances. In Slovenia,⁷⁰⁷ according to the Commission, the Government may have too much discretion to remove the director of the national telecoms regulator, potentially undermining his or her protection from external intervention or pressure.

As a result of decisions adopted by the Commission, Poland was taken to the European Court of Justice as legislative changes introduced in August 2006 did not ensure the full independence of the Polish regulator, as required by European rules. The Polish government controlled significant shareholdings in a number of telecoms companies and the President of the Council of Ministers had unlimited discretion to dismiss the head of the national regulator therefore undermining its effectiveness. The Polish government amended the national electronic communication rules in April 2009.

The 13th report on the single European electronic communications market⁷⁰⁸ points out that the NRAs in the small Member States in particular can find it difficult to muster the expertise and resources needed to conduct market reviews and monitor implementation of remedies in increasingly complex markets. While NRA effectiveness has been strengthened in a number of countries (Italy, Ireland, Hungary, Sweden, Netherlands), the Commission is examining continuing concerns as to resource constraints in Bulgaria, Greece, Luxembourg, Poland and Slovakia.

The Commission's 12th report on the single European electronic communications market⁷⁰⁹ points out that in general the NRAs have consolidated their authority and independence. The extent of political influence over day-to-day regulatory decisions in some Member States is an issue calling for further examination.

Finally, the 2009 directives contain a number of requirements in relation to the newly established Body of European Regulators for Electronic Communications (BEREC). In order to support the activities of BEREC, Member States have to ensure:

- that NRAs dispose of adequate financial and human resources to enable them to actively participate in and contribute to the BEREC;
- that the goals of BEREC of promoting greater regulatory coordination and coherence are actively supported by the respective national regulatory authorities;
- that national regulatory authorities take utmost account of opinions and common positions adopted by BEREC when adopting their own decisions for their national markets⁷¹⁰.

707 Press releases IP/10/321, 18 March 2010.

708 Progress report on the single European electronic communications market 2007 (13th report){sec(2008) 356} Brussel, 19 March 2008.

709 Progress report on the single European electronic communications market 2006 (12th report){sec(2007) 403} Brussel, 19 March 2008.

710 Article 1, 3) (b) Better regulation directive.

4.2.5.2.2 Ministries as NRAs?

For quite some time, one of the most problematic issues in the electronic communications sector had been the question of whether the concept of “national regulatory authorities” only refers to the authorities that are competent for “rule application”, or also those that are competent for “rule making”. In a recent judgement of the Court of Justice, it has become clear that a national regulatory authority is not necessarily limited to rule application⁷¹¹. However, a ministry can only serve as national regulatory authority if it is able to comply with all the institutional requirements that are applicable to national regulatory authorities (e.g. independence, policy objectives, appeal)⁷¹².

The Court of Justice thereby clarified one of the limits to the concept of independence, as already explicitly mentioned in the recitals to the Framework directive, which state that the concept of independence is without prejudice to the institutional autonomy and the constitutional obligations of the Member States, or to the principle of neutrality with regard to the property ownership⁷¹³. Therefore the obligation to avoid possible conflicts of interest does not require Member States to disregard their own constitutional or administrative framework and does not require Member States to privatise their incumbent operator further. In the judgement in the case of *Comisión del Mercado de las Telecomunicaciones v Administración del Estado*, the European Commission concluded that, where those functions are to be discharged, even partially, by ministerial authorities, each Member State must ensure that those authorities are neither directly nor indirectly involved in ‘operational functions’ within the meaning of the Framework Directive.

4.2.5.2.3 Legislators as NRAs?

In its judgement in case C-424/07 (*European Commission v Germany*) the Court of Justice followed another approach⁷¹⁴. In this case, the European Commission acted against a provision in the German act which stated that “new markets” (according to the act defined as “*a market for services or products which are significantly different from currently available services or products in terms of their effectiveness, their range, their availability for a large number of users (mass-market capacity), their price or their quality from the point of view of a knowledgeable buyer, and which do not simply replace those products...*”) would, in principle, not be subject to regulation by the national regulatory authority. In its judgement, the Court did not turn to the functional definition of the national regulatory authority, but instead followed the interpretation of the European Commission, by concluding that this provision encroaches on the wide powers

711 Case C-82/07 *Comisión del Mercado de las Telecomunicaciones v Administración del Estado* [2008] ECI, 6 March 2008.

712 Court of Justice, case C-82/07 (*Comisión del Mercado de las Telecomunicaciones v Administración del Estado*), paragraph 26: “As a consequence, where those functions are to be discharged, even partially, by ministerial authorities, each Member State must ensure that those authorities are neither directly nor indirectly involved in ‘operational functions’ within the meaning of the Framework Directive”.

713 Recital 11 Framework Directive.

714 A similar judgement was the result in case C-389/08, where the Belgian Constitutional Court asked the Court of Justice for a preliminary ruling about the question whether the legislator can evaluate the reasonableness of the cost of universal service, whereas the directives impose this task on the regulatory authority.

of the NRA, stating that “Therefore, by laying down a legal provision, according to which, as a general rule, the regulation of new markets by the NRA is excluded, Paragraph 9a of the TKG encroaches on the wide powers conferred on the NRA under the Community regulatory framework, preventing it from adopting regulatory measures appropriate to each particular case. As it is clear from point 54 in the Advocate General’s Opinion, the German legislature cannot alter a decision of the Community legislature and cannot, as a general rule, exempt new markets from regulation.”⁷¹⁵. Moreover, the Court not only concluded that the legislator cannot serve as an (independent) national regulatory authority, but also ruled that the strict institutional procedures for market definition, market analysis and the imposing of obligations were not applied correctly: “In that connection, it has already been held that the principle of non-regulation of new markets provided for in Paragraph 9a(1) of the TKG limits the discretion of the NRA under Articles 15(3) and 16 of the Framework Directive. The limitation of the NRA’s discretion to submit ‘new markets’ to a definition and to a market analysis necessarily involves a failure to comply in certain circumstances with the procedures provided for in Articles 6 and 7 of the Framework Directive”.⁷¹⁶

However, in his judgement *Base NV and others vs. Ministerraad* from 6 October 2010 the Court ruled that “Directive 2002/22 does not in principle preclude, by itself, the national legislature from acting as national regulatory authority within the meaning of the Framework Directive” provided that, in the exercise of that function, it meets the requirements of Article 3 of the Framework Directive. Therefore “Member States must, in particular, ensure that each of the tasks assigned to national regulatory authorities be undertaken by a competent body, guarantee the independence of those authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services and ensure that they exercise their powers impartially and transparently.”

4.2.5.3 Transparency

The transparent and efficient functioning of the NRA has always been central to the concerns of market players. In the early stages of the liberalisation process, market players often complained of confusion about which authority exercised which power and especially about the distribution of powers and responsibilities between the independent regulatory bodies and the relevant ministries. In the view of new entrants this confusion has undoubtedly had a negative impact on the liberalisation process. In order to avoid such confusion and provide for more transparency, the 2002 framework (Art. 3, 4 Framework Directive) requires the publication of the tasks to be undertaken by NRAs in the electronic communications sector in an easily accessible form, in particular where those tasks are assigned to more than one body⁷¹⁷. However, as *Nicolaïdes* indi-

715 Court of Justice, case C-424/07 (*European Commission v Germany*), paragraph 78.

716 Court of Justice, case C-424/07 (*European Commission v Germany*), paragraph 106.

717 See also: Court of Justice, case C-82/07 *Comisión del Mercado de las Telecomunicaciones v Administración del Estado* [2008] ECJ 6 March 2008, paragraph 25: “Thus, in accordance with Article 3(2), (4) and (6) of the Framework Directive, the Member States must not only guarantee the functional independence of regulatory authorities in relation to the organisations providing electronic communications networks, equipment or ser-

ates, the obligation of transparency does not contain for the Member States the obligation to evaluate the organisation or functioning of their NRAs⁷¹⁸.

4.2.5.4 Regulatory objectives and principles

Besides requirements for independence and transparency, the Framework Directive also requires Member States to ensure that all decisions of the NRAs are aimed at achieving a limited number of policy objectives. In practice, every decision of a NRA should aim at realising at least one of the stated objectives. Member States are in principle not allowed to impose other objectives or principles on their NRAs. Imposing such a harmonised set of objectives and principles to underpin the tasks of the NRAs was considered to be an essential tool to ensure that the increased flexibility of the material rules of the framework (e.g. in the area of market regulation) would not hamper the harmonisation of market conditions throughout the European Union⁷¹⁹. Supported in this interpretation by the jurisprudence of the Court of Justice⁷²⁰, the European Commission therefore attaches great value to these objectives and principles and to their correct implementation into national law.

The objectives that were imposed on the NRAs by Art. 8 of the Framework Directive mainly fell into three main categories:

- promoting competition in the provision of networks, services and associated facilities and services;
- contributing to the development of the internal EU market;
- promoting the interests of the citizens of the EU.

The Better Regulation directive of 2009 adds to this list the obligation on national regulatory authorities to apply objective, transparent, non-discriminatory and proportionate regulatory principles in their pursuit of these policy objectives⁷²¹.

For all those high-level objectives, the directive gives extensive lists of more specific ways in which the NRAs should pursue them. Beside those three general principles, the directives also require the NRAs to make their decisions (especially those aiming at ensuring effective competition) as technologically neutral as possible. In practice, when taking a decision, NRAs should neither impose nor discriminate in favour of the use of a particular type of technology. Only in

vices, but must also publish, in an easily accessible form, the tasks to be undertaken by the national regulatory authorities, and notify to the Commission the names of the regulatory authorities entrusted with carrying out those tasks, and their respective responsibilities.”

718 Nicolaïdes, P. (2005): 33-36.

719 Geradin, D. / Petit, N. (2004): 15.

720 See, most recently: Court of Justice, case C-424/07 (European Commission v Germany), paragraph 92: “In that context, the Court has interpreted Article 8 of the Framework Directive as placing on the Member States the obligation to ensure that the NRAs take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level (see, Case C-380/05 *Centro Europa 7* [2008] ECR I-349, paragraph 81, and Case C-227/07 *Commission v Poland* [2008] ECR I-0000, paragraph 63)”.

721 Article 1, 8) (h) Better regulation directive.

justified cases can the NRAs take proportionate measures to promote certain specific services (for example digital television as a means for increasing spectrum efficiency). Furthermore, Art. 8 of the Framework Directive explicitly mentions the possibility for NRAs to contribute to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

4.2.5.5 Enforcement

In its 13th report on e-Communications⁷²² the Commission deals with the difficulties of enforcing decisions, including the lengthy procedural acts. According to the Better Regulation Directive, Member States should ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner.⁷²³

The Commission launched an infringement procedure against Germany in 2005, as a result of a legal dispute in connection with market definition in call termination markets— market 16. The markets had been defined during the market analysis of BNetzA, and the procedure was filed by mobile-providers, regarding BNetzA's competence in the matter. This made the Commission suspicious that BNetzA's powers were not assured properly, regarding call termination market, causing legal uncertainty⁷²⁴. The Commission suspended the case after the German Federal Administrative Court (Bundesverwaltungsgericht) published a decision that approved the German regulator's general and extended power to all operators.⁷²⁵ This decision was mainly based on interpretations of EC law, and clearly illustrates that courts can have an active role in interpreting rules of competence, even according to EC law, which until now has not been the case in a number of EU Member States.

4.2.5.6 Broader institutional framework

The electronic communications directives not only prescribe in some detail the requirements regarding the legal position and the powers of the regulatory authorities in the electronic communications sector. Besides this, they also contain provisions and requirements about the broader institutional framework (e.g. issues such as information, consultation, collaboration and harmonisation procedures) in the electronic communications sector⁷²⁶. The impact of these procedures has been perceived by some scholars as significant in that they describe the current regulatory model in the electronic communications sector as a model of “managed decentralisation, or decentralisation with EU cooperation (or networking) mechanisms”⁷²⁷.

In practice, the different instruments relate to:

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- 722 Progress report on the single European electronic communications market 2007 (13th report){sec(2008) 356} Brussel, 19 March 2008.
- 723 Better regulation Directive Article (3).
- 724 Press releases IP/08/1018, 26 June 2008.
- 725 Press releases IP/08/1018, 26 June 2008 A Bundesverwaltungsgericht cases in 2008: 6 C 14.07 (T-Mobile), 6 C 15.07 (Vodafone), 6 C 16.07 (E-plus), 6 C 17.07 (O2).
- 726 Larouche, P. (2002): 145-148;
- 727 Geradin, D. / Petit, N. (2004): 15.

- obligations to publish certain information and/or notify concerned parties;
- obligations to consult other regulatory authorities;
- harmonisation or cooperation procedures;
- requirements on collaboration with competition law authorities;
- the obligation to collaborate with BEREC.

4.2.5.7 Appeal

Finally, Art. 4 of the Framework Directive assigns to any user and undertaking providing electronic communications networks and/or services, which is affected by a decision of an NRA, a right of appeal to a body that is independent of the parties involved. This body, which may be a court, must have the appropriate expertise available for functioning effectively and has to be competent to take the merits of the case duly into account. Pending the outcome of any such appeal, the decision of the NRA should stand, unless interim measures are granted in accordance with national law. Furthermore, Member States must collect information on the general subject matter of appeals, the number of requests for appeal, the duration of the appeal proceedings and the number of decisions to grant interim measures. After reasoned request of the European Commission or BEREC, Member States must provide them with such information⁷²⁸.

4.2.6 State aid and Public Service Broadcasting

In the previous section, we have shown the independence requirements as they are applicable in the electronic communications sector. Although they are not directly applicable to the regulatory authorities in the audiovisual media sector, they nevertheless could have an impact on their legal position and organisation in an indirect way. If the audiovisual media services regulatory authority performs some of the electronic communications regulatory tasks, it also has to comply with all the institutional requirements of the electronic communications directives. A similar reasoning also applies in the area of state aid and Public Service Broadcasting. State aid regulation has been the starting point for debates revolving around the specific supervisory structure some Member States have traditionally implemented for public broadcasting. Unlike the supervision of commercial audiovisual media service providers, the supervisory bodies of the public broadcaster are in some cases also required to make sure that the service meets the demands of the society.

On this issue, guidance on the dimensions and indicators used to evaluate the independence of supervisory bodies are contained in the recent communication of the European Commission⁷²⁹.

After describing the broader context of the compliance of financing mechanisms for Public Service Broadcasting with competition law in general, and with the provisions on state aid in particular, the European Commission elaborates on the tests it will apply in order to analyse the compliance of any particular financing scheme. In its test under Art. 106 TFEU, the Commission firstly recalls that the Court of Justice has consistently held that Art. 106 provides for derogation

728 Nihoul, P. / Rodford, P. (2004): 629-641 and Lasok, K. (2005): 787-801.

729 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, 1-14.

and must therefore be interpreted restrictively. The Court has clarified that, in order for a measure to benefit from derogation, it is necessary that all of the following conditions be fulfilled:

- The service in question must be a service of general economic interest and clearly defined as such by the Member State (definition);
- the undertaking in question must be explicitly entrusted by the Member State with the provision of that service (entrustment);
- the application of the competition rules of the Treaty (in this case, the ban on State aid) must obstruct the performance of the particular tasks assigned to the undertaking and the exemption from such rules must not affect the development of trade to an extent that would be contrary to the interests of the Community (proportionality test)⁷³⁰.

Summarising, the European Commission states:

“In the specific case of public broadcasting the above approach has to be adapted in the light of the interpretative provisions of the Amsterdam Protocol, which refers to the “public service remit as conferred, defined and organised by each Member State” (definition and entrustment) and provides for a derogation from the Treaty rules in the case of the funding of Public Service Broadcasting “insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit (...) and (...) does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account” (proportionality).”⁷³¹

Furthermore, the Commission indicates that, as guardian of the Treaty, it will assess whether these criteria are satisfied on the basis of the evidence provided by the Member States. As regards the definition of the public service remit, the Commission considers its role is mainly to check for manifest errors, while it will also verify whether there is an explicit entrustment and effective supervision of the fulfilment of the public service obligations⁷³².

The European Commission also develops a number of criteria relating to the necessity of effective supervision. On this issue, the Commission states:

“53. [...] It is therefore desirable that an appropriate authority or appointed body monitors its application in a transparent and effective manner. The need for such an appropriate authority or body in charge of supervision is apparent in the case of quality standards imposed on the entrusted operator. [...]

54. In line with the Amsterdam Protocol, it is within the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent

730 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraphs 36-37.

731 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 38.

732 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 39.

*from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations.*⁷³³

The Commission expresses similar concerns in relation to the financial control mechanisms, stating that “such control mechanisms would only seem effective if carried out by an external body independent from the public service broadcaster at regular intervals, preferably on a yearly basis.”⁷³⁴ According to the Commission, evaluating the appropriateness of “public service reserves” could only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster, including with regard to the appointment and removal of its members, and which has sufficient capacity and resources to exercise its duties. Finally, it explicitly mentions that such procedure can be proportionate to the size of the market and the market position of the public service broadcaster⁷³⁵.

In their article, Donders and Pauwels⁷³⁶ write about the issue of independent monitoring that “...objective, and therefore independent, control of what public broadcasters are doing is the second principle underlying State aid control in the field of public broadcasting. In response to the private sector’s concerns about the lack of control on public broadcasters, the Commission asks Member States to establish agencies that assess whether or not public broadcasters are living up to set, and paid for, objectives.”⁷³⁷

On the specific issue of external control, Donders and Pauwels refer to the discussions in Germany, observing that “All Member States agree, as is specified by the Prague Resolution on Public Broadcasting (Council of Europe 1994: 10), that “the control and accountability of public service broadcasters, especially as regards the discharge of their missions and use of their resources, must be guaranteed by appropriate means.” Whether this task is best performed by an external or internal agency, however, is a point of discussion”⁷³⁸. The authors themselves at least clearly express more reservations regarding the necessity to rely on external bodies⁷³⁹.

Summarising the issue, they state that the “Commission’s interference has created more awareness about not only the necessity of control but also the need for effective and credible control. Better and more accountable monitoring systems will benefit the legitimacy of public broadcasters expanding their activities to new media markets. This does not mean that Member States should accept each and every demand of the Commission concerning the monitoring of public broadcasters. It does, however, lead us to the conclusion that the European debate on

733 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 53-54.

734 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 78.

735 Communication no. 2009/C 257/01 from the Commission on the application of State aid rules to public service broadcasting, Official Journal C 257, 27 October 2009, paragraph 89.

736 Donders, K. / Pauwels, C. (2010): 117-131.

737 Donders, K. / Pauwels, C. (2010): 120.

738 Donders, K. / Pauwels, C. (2010): 124.

739 Donders, K. / Pauwels, C. (2010): 124-125.

*control also fosters urgent national discussions about an appropriate organisation of control systems for public broadcasting.*⁷⁴⁰

In our opinion, this conclusion is not only relevant for the discussion on state-aid and Public Service Broadcasting, but could *mutatis mutandis* also be applied to the independence requirements in AVMS Directive. The bodies accountable for Public Service Broadcasting typically have a range of responsibilities beyond the purely regulatory: If the bodies are charged with the overall delivery of public service goals, they are usually expected to take a more active role in directing the activities of the public service broadcaster, with a range of interventions available to them that can include budgetary control, and the appointment – and dismissal – of senior staff. These powers foster its autonomy even though there may be no organisational or legal separation between the regulated entity and its regulator. However, the recent debates about state aid and public broadcasting have required these bodies to demonstrate that, as well as being accountable for the delivery of public service goals, they can also act objectively and independently in assessing the appropriateness of any proposals for extending the service into new areas or media. This makes explicit the duality of their role: being both accountable for the public service broadcaster but also sufficiently independent to be able to take a dispassionate view.

4.2.7 Other sectors

4.2.7.1 Data protection

The independence of regulatory agencies has also been highly debated in the field of data protection law. At first sight, the study of this domain can produce interesting insights for the media sector since both involve fundamental rights (the right to privacy and freedom of expression respectively).

Contrary to most of the other sectors, Art. 28 para. 1 sent. 2 of Directive 95/46/EC however requires a “complete independence” of the supervisory authorities in the data protection area:

Art. 28.

(1) Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive.

These authorities shall act with complete independence in exercising the functions entrusted to them.

(2) Each Member State shall provide that the supervisory authorities are consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data.

(3) Each authority shall in particular be endowed with:

740 Donders, K. / Pauwels, C. (2010): 125.

- *investigative powers, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties,*
- *effective powers of intervention, such as, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,*
- *the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.*

Decisions by the supervisory authority which give rise to complaints may be appealed against through the courts.

Before the Court of Justice, the European Commission claimed that Germany had not correctly implemented this provision. For defining “complete independence” the Commission referred to the elements stated in Article 1 para. 3 of the explanatory report to the “Additional Protocol to the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows”⁷⁴¹, which also contains the notion of “complete independence”. The dimensions described in this document relate to:

- the composition of the authority,
- the method for appointing its members,
- the duration of exercise and conditions of cessation of their functions,
- the allocation of sufficient resources to the authority,
- the adoption of decisions without being subject to external orders or injunctions.

In addition, the Commission also refers to Article 44 para. 2 of Regulation (EC) No 45/2001⁷⁴², which regulates the independence of the European Data Protection Supervisor. According to this provision, the European Data Protection Supervisor shall, in the performance of his duties, neither seek nor take instructions from anybody.

The Commission particularly criticised the effect of dependence through state scrutiny in Germany as an incorrect implementation of the directive. German data protection authorities of the Länder are subject to legal, technical as well as administrative scrutiny.⁷⁴³ According to the

741 Council of Europe (EC) ETS 181 of 28 November 2001 Additional Protocol to the Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data Regarding Supervisory Authorities and Transborder Data Flows, <http://conventions.coe.int/Treaty/EN/Reports/Html/181.htm> accessed 28 August 2009.

742 Regulation (EC) 2001/45 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2001] OJ L8/L.

743 Due to the different legal provisions in the 16 German federal states the supervisory authorities are organised differently. Nevertheless all of them are subject to the three types of supervision in varying combinations.

Commission, all three types of supervision infringe upon the principle of complete independence.

In his opinion, the Advocate General Ján Mazák argued that the wording of the directive does not require an independent regulatory body as such, but rather a body having complete independence in carrying out its functions. In view of the functions of the directive, a legal, technical as well as administrative scrutiny would not conflict with the concept of complete independence as laid down by the directive.⁷⁴⁴

In its judgement of March 9 2010, the Court of Justice to a large extent follows the thesis of the European Commission, considering independence as necessary to create an equal level of protection of personal data and thereby to contribute to the free movement of data, which is necessary for the establishment and functioning of the internal market⁷⁴⁵.

The Court's main argument revolves around two different lines, of which the first one relates to the actual wording of Art. 28 of the directive. On this issue, the Court concludes that, because the words 'with complete independence' are not defined by the directive, it is necessary to take their usual meaning into account. The Court continues by stating that "*in relation to a public body, the term 'independence' normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure*". Furthermore, it dismisses all the arguments of the German Republic by explicitly stating that "*there is nothing to indicate that the requirement of independence concerns exclusively the relationship between the supervisory authorities and the bodies subject to that supervision. On the contrary, the concept of 'independence' is complemented by the adjective 'complete', which implies a decision-making power independent of any direct or indirect external influence on the supervisory authority.*"⁷⁴⁶

The second argument of the Court is built around its interpretation of the objectives and the context of the data protection directive, and of the requirement of independence. On the latter, the Court states that "*the guarantee of the independence of national supervisory authorities is intended to ensure the effectiveness and reliability of the supervision of compliance with the provisions on protection of individuals with regard to the processing of personal data. [...] It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the Länder, and not of the influence only of the supervised bodies*".⁷⁴⁷

The Court of Justice then turns to the analysis of whether the German state scrutiny over the data protection supervisory authorities is consistent with the requirement of complete independ-

744 Opinion of Advocate General Ján Mazák, Court of Justice, case C-518/07.

745 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 50.

746 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraphs 18-19.

747 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 25.

ence. Although it recognises that the state scrutiny *a priori* only seeks to guarantee that decisions of the authorities comply with the national and European legislation, and therefore does not aim to oblige those authorities potentially to pursue political objectives inconsistent with the protection of individuals with regard to the processing of personal data and with fundamental rights, the Court nevertheless concludes that the current organisation of state scrutiny does not exclude the possibility that the scrutinising authorities, which are part of the general administration and therefore under the control of the government of their respective *Land*, are not able to act objectively when they interpret and apply the provisions relating to the processing of personal data⁷⁴⁸. Furthermore, the Court also rules that the mere risk that the scrutinising authorities could exercise a political influence over the decisions of the supervisory authorities is enough to hinder the latter authorities' independent performance of their tasks. To support this finding, the Court refers to the possibility that there could be 'prior compliance' on the part of the data protection authorities, and to the necessity for the decisions of the regulatory authorities, and therefore for the authorities themselves, to remain above any suspicion of partiality⁷⁴⁹.

Concluding, the Court also dismisses the argument that a broad interpretation of the requirement of independence would be contrary to various principles of European Community law and to the principle of democracy, by stating that:

"42. That principle [of democracy] does not preclude the existence of public authorities outside the classic hierarchical administration and more or less independent of the government. The existence and conditions of operation of such authorities are, in the Member States, regulated by the law or even, in certain States, by the Constitution and those authorities are required to comply with the law subject to the review of the competent courts. Such independent administrative authorities, as exist moreover in the German judicial system, often have regulatory functions or carry out tasks which must be free from political influence, whilst still being required to comply with the law subject to the review of the competent courts. That is precisely the case with regard to the tasks of the supervisory authorities relating to the protection of data.

The Court however rules that the required balance between the requirement for independence and the principle of democracy does not oblige Member States to abolish every possible form of state scrutiny. In this respect, the Court explicitly states that the management of the supervisory authorities may be appointed by the parliament or by the government, and that the legislator may define the powers of those authorities. Furthermore, the legislator may impose also an obligation on the supervisory authorities to report their activities to the parliament.⁷⁵⁰

However, because of a much wider state scrutiny in Germany, the court declares that, by making the authorities responsible for monitoring the processing of personal data by non-public bod-

748 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 34.

749 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraph 36.

750 Court of Justice, case C-518/07 (Commission of the European Communities v Federal Republic of Germany), 2008, OJ C 37/9, paragraphs 43-45.

ies and undertakings governed by public law which compete on the market (öffentlich-rechtliche Wettbewerbsunternehmen) in the different *Länder* subject to State scrutiny, Germany has not correctly transposed the requirement that those authorities perform their functions ‘with complete independence’.

However, the direct impact of this judgement on the requirement of independence applicable to the audiovisual media regulatory authorities will most likely remain limited because, in most cases, the data protection regulatory authority will be separate from the AVMS regulatory authority. Moreover, the data protection situation is also particular because the directive explicitly requires a “complete independence”. The judgement however contains useful information on the dimensions and indicators that are used to judge the independence of the regulatory authority in its relationship with the government and/or state.

4.2.7.2 Energy

The 2003 directive for the internal market in electricity⁷⁵¹ requires that national regulatory authorities be fully independent from the interests of the electricity and gas industry. As a consequence, the European Council, during its meeting of 8-9 March 2007, invited the Commission to develop legislative proposals for the ‘effective separation of supply and generation activities from network operations’.⁷⁵² These proposals were worked out and implemented in a more detailed way in the new energy directive in 2009.

According to preamble paragraph 34 of the new electricity directive, regulators must be able to take decisions in relation to all relevant regulatory issues if the internal market in electricity is to function properly, and to be fully independent from any other public or private interests. This precludes neither judicial review nor parliamentary supervision in accordance with the constitutional laws of the Member States. In addition, approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy. The provisions relating to the autonomy in the implementation of the allocated budget of the regulatory authority should be harmonised with the framework defined by national budgetary law and rules.

According to the Directive 2009/72/EC concerning common rules for the internal market in electricity, and repealing Directive 2003/54/EC, Member States must guarantee the independence of the regulatory authority, and ensure that it exercises its powers impartially and transparently. For this purpose, Member States must ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority: (a) is legally distinct and functionally independent from any other public or private entity; (b) ensures that its staff and the persons responsible for its management: (i) act independently from any market interest; and (ii) do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. This requirement is without prejudice to close

751 Directive 2003/54/EC of The European Parliament and of The Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC Article 23 (1).

752 Directive 2009/72/EC of The European Parliament and of The Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

co-operation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under the Directive.⁷⁵³

The judgment of the European Court supports the practice of the European Commission regarding the separation of the regulatory and ownership functions in the case of Spain in 2008 March.⁷⁵⁴

It seems fair to say that, compared to electronic communications; the electricity directive applies stricter independence requirements for the position of the head of the regulatory authority. According to the new electricity directive in 2009, the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

Member States are even obliged to ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved of office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law.⁷⁵⁵

While contributing to the independence of the national regulatory authority from any political or economic interest through an appropriate rotation scheme, it should be possible for Member States to take due account of the availability of human resources and of the size of the board. About the enforcement of decisions, the European Commission launched infringement proceedings in the energy sector against a number of Member States because of improper implementation of powers regarding access to networks and tariffs due to the fact that the issue of these powers is significant – as a result of the lack of parallel networks – in assuring the equal opportunity of market players. According to the Commission, where the regulatory authorities' power is limited, inconsistent decisions are made, and non-compliance with the directives can be identified. This direct consequence was found by the Commission in this case during the examination of a given provision which was not directly connected to the issue of independence.

In the electricity sector the Commission is also concerned by the correct implementation of the powers of the regulatory authority. One example is the case it opened on 25 June 2008 against Sweden at the European Court of Justice, as the Swedish legislation did not properly apply the requirement of prior approval of the methodologies used to calculate or establish the terms and conditions for connection and access to national networks, including transmission and distribution tariffs in accordance with the 2003 electricity directive Art. 23 (2) a).⁷⁵⁶ The electrici-

753 Directive 2009/72/EC of The European Parliament and of The Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, recital 34.

754 Commission v. Spain , C-196/07. 8 March 2008.

755 Directive 2009/72/ec of the European Parliament and of the Council concerning common rules for the internal market in electricity and repealing directive 2003/54/EC article 35 (5).

756 Press releases IP/06/1411, 5 June 2008.

ty directive Art. 23 (2) a) deals with the prior approval of network tariffs, or at least the methodologies, used to calculate or establish the terms and conditions for connection and access to national networks, but the present Swedish regulation on methodology and requirements is based on *ex post* control system, so the power of the regulatory authority is not harmonised with the directive in this case. The European Court of Justice made a similar decision in connection with the former electronic communications regulation⁷⁵⁷

The report from the Commission to the Council and the European Parliament on the progress in creating the internal gas and electricity market in 2008⁷⁵⁸ points out that regulators are not sufficiently committed to making use of existing powers to encourage actively the implementation of legal requirements. ERGEG⁷⁵⁹ report to the 14th Madrid Forum⁷⁶⁰, for example, demonstrated only one case of a regulatory authority making use of its power to impose sanctions on a TSO not complying with legal requirements.

4.2.7.3 Rail transport

In the railway sector, the related EC sources are Directive 2001/13/EC amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14 EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification. Moreover, these directives, Directive 2007/58/EC amending Council Directive 91/440/EEC, on the development of the Community's railways, and Directive 2001/14/EC, on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure, contain more specific provisions such as independence from any competent authorities involved in the award of the public service contract under consideration, while 1371/2007/EC regulation on rail passengers' rights and obligations deals with independence regarding security rights of passengers.

According to the above mentioned four sources of law the regulatory authority responsible for railways works as an independent authority provided the following criteria are met:

- According to Directive 2001/13/ EC Article 3 “The task of issuing licenses shall be carried out by a body which does not provide rail transport services itself and is independent of bodies or undertakings that do so.”
- According to Directive 2001/14/ EC Article 30 (1) “This body, which can be the Ministry responsible for transport matters or any other body, shall be independent in its organisation, funding decisions, legal structure and decision-making from any infrastructure manager, charging body, allocation body or applicant.”

757 Commission v Belgium C-221/01. ECR I-7835.

758 Report from the Commission to the Council and the European Parliament: Progress in creating the internal gas and electricity market SEC(2008) 460., Brussels, 15 April 2008., COM(2008) p192.

759 European Regulators Group for Energy.

760 Conclusions of the 14th meeting of the European Gas Regulatory Forum Madrid, 22-23 May 2008, http://www.energy-regulators.eu/portal/page/portal/EER_HOME/EER_WORKSHOP/Stakeholder%20Fora/Madrid%20Fora/14supthsup%20Madrid%20Forum/Conclusions%20Madrid%2014_REVISED.pdf.

- According to Directive 2007/58/EC Article 2 (5) independence from any competent authority involved in the award of a public service contract (“It shall furthermore be functionally independent from any competent authority involved in the award of a public service contract.”)

According to Regulation 1370/2007/EC “Each body shall be independent in its organisation, funding decisions, legal structure and decision-making of any infrastructure manager, charging body, allocation body or railway undertaking.”

In its press release of 26 June 2008⁷⁶¹, the European Commission refers to the improper implementation of the First Rail Package, and launches infringement procedures against Member States that have failed to set up an independent regulatory body with strong powers to remedy competition problems in the railway sector. The importance of the issue can be seen from the fact that the Commission deals with the issue of independence as one of the main three implementation problems of the railway package. Such powers – which are connected to the independence of the authority – involve licensing⁷⁶², the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification⁷⁶³, access regulation or limitation.⁷⁶⁴

4.2.8 Closing observations

In this chapter the legal framework in regard to the independence of regulatory bodies in the audiovisual media sector has been examined. The applicable legal framework is made up of three different elements, namely Art. 10 ECHR, Art. 288 para. 3 TFEU, and the provisions of the AVMS Directive (with Art. 30 explicitly mentioning independent regulatory bodies).

- The section on the general legal framework has shown that the issue of the independence of the regulatory bodies responsible for the implementation of the AVMS Directive is closely related to a number of fundamental values, which are protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in turn is integrated into the legislative framework of the EU. Our analysis has shown that the independence and pluralism of the media is recognised as an important value Member States must take into account when effectively implementing the AVMS Directive. Art. 10 ECHR as interpreted by the European Court of Human Rights, requires that neither economic or political groups nor the state should be able to obtain a dominant position over the audiovisual media.

Following the interpretation of Art. 10 ECHR, we come to the conclusion that, for the effective implementation of the AVMS provisions, Member States must ensure that the regulatory bodies competent for the implementation of the provisions of the directive carry out their duties in an impartial manner: for this, a minimum requirement of independence is needed. Bodies in charge of media supervision, especially with regard to implementing and enforcing

761 Press releases IP 08/1031, 6 June 2008.

762 Directive 2001/13/EC of the European Parliament and of the Council of 26 February 2001 amending Council Directive 95/18/EC on the licensing of railway undertakings.

763 2001/14/EC.

764 2007/58/EC.

the AVMS provisions, have a significant impact on the national media market and its players. The regulatory power can – theoretically – be used to regulate specific media in a biased manner. Therefore different actors can have an interest in influencing the general performance, as well as the case-by-case decisions, of the regulatory bodies in a specific direction. Potential influences on the regulatory body can be exerted by political as well as governmental interests and interests of competitors in the media market. Before this background Art. 10 ECHR, which aims – *inter alia* – at guaranteeing media pluralism and diversity, can be interpreted as saying that biased media supervision has to be avoided. Therefore, Member States have to ensure a national regulatory framework that is capable of providing impartial media supervision. Impartiality in this notion has to be effective against influences coming from the direction of the government or other political actors as well as against influences coming from the media sector.

Moreover, one of the overarching objectives the AVMS Directive comprises a fair organisation of the market. In consequence, when transposing the specific aims of the directive, the regulation must be organised in a way that prevents undue influences on operational tasks. While Member States have some leeway in deciding on the concrete form of implementing the AVMS provisions into national law (see Art. 288 para. 3 TFEU), e.g. with regard to the legal status, the organisational layout, the decision-making procedures etc., it follows from Art. 288 para 3 TFEU, and is supported by Art. 4 para 3 TEU, that Member States are obliged to transpose the directive such that the aims of the directive are effectively implemented, which includes an effective supervision of the provision of national law transposing the directive. This requirement is not met if the regulatory framework put in place is structurally incapable of implementing the aims of the directive in an impartial manner.

In conclusion, for being able to carry out the aims of the Directive and thus to implement the Directive efficiently, the regulatory bodies responsible for implementing the AVMS Directive have to be set up in a way that enables them to carry out their duties in an impartial manner, preventing undue influences both from the political sector and from the regulated sector. Therefore, with regard to the regulatory bodies competent for implementing the AVMS Directive, a functional rather than an organisational understanding of independence should be adopted. This functional approach is supported by the wording of the AVMS Directive, which relates the notion of independent regulatory bodies to the action of carrying out specific duties and obligations imposed by the Directive. In contrast to the sector of data protection the Directive does not demand the “complete independence” of regulatory bodies.

- Regarding the explicit significance of Art. 30 AVMS, the result of the analysis of this specific provision shows two things: Firstly, Art. 30 AVMS indicates that the creators of the directive implicitly followed a clear concept regarding the national regulatory bodies. Secondly, in cases where there *is* an independent regulatory body established in the Member States, this body should be selected by the Member States for the execution of the tasks described in this provision. This conclusion is supported by the wording of the Directive, as well as the

underlying long-term objective to establish a network of information exchange and cooperation among the main regulatory bodies in the field of AVMS regulators.⁷⁶⁵ However, if an independent regulatory body has not been established in the Member State, an obligation to establish such a body does not follow from Art. 30 AVMS Directive.

As a long-term policy objective the AVMS Directive, especially in Art. 30 and Rec. 94, aims at steering the national policy processes in a way that results in creating incentives for Member States to establish independent regulatory bodies in the meaning of Art. 30. In this respect, “independence” specifically in Art. 30 is rather a principle and underlying assumption than a legal instruction for the Member States. Regarding this principle, we can conclude that the notion “independent regulatory bodies” refers to something more than just impartiality. Such criteria will be developed within the analysis of best practice characteristics (see below).

- Beside the requirements of independence within the audiovisual sector, we analysed a number of other sectors in which regulatory bodies are required to be independent. The analysis of these requirements in a number of closely related policy areas and sectors (e.g. mainly Council of Europe policy documents, institutional requirements in the e-communications sector, or in relation to the issue of state aid and PSBs) is relevant, because in some cases (i.e. when they are assigned with powers in that area, e.g. when assigning radio frequencies) the national regulatory bodies in the AVMS sector will also have to comply with the institutional and independence requirements as they are put forward in those other sectors.

The analysis also showed some aspects of best practice in the requirements of independence of regulatory authorities as they exist in other sectors, such as data protection or the energy sector. These sections aim to help identify the correct and relevant dimensions and criteria.

From the analysis of related sectors, one thing has become clear: All requirements in the different sectors have one similar objective in particular – impartiality of the decisions of the regulatory bodies. However, when looking at the related sectors in more detail it has become clear that the notion of independence has to be interpreted within the context of the regulatory system it has been designed for. For this interpretation, the underlying concepts of the regulation, the aim and objectives of the specific regulatory system, and the characteristics and particularities of the regulated sector, have to be taken into account.

4.3 Essential characteristics and best practices of independent regulatory bodies

From the analysis conducted in the previous chapter, it can be concluded that it is mandatory for Member States to create their regulatory system in a way that the aims of the Directive are effectively implemented and it is guaranteed by means of supervision that the audiovisual media ser-

⁷⁶⁵ Such a network functions more effectively if the regulatory bodies are independent and as “governments in miniature” combine within their scope of competences legislative (e.g. rule-making), judicial (e.g. adjudication and dispute-settlement) and executive (e.g. enforcement) functions, cf. Jacobzone, S. (2005b): 72; Majone, G. (2005b): 133.

vice providers under the jurisdiction of the Member States do indeed follow the rules that have been enacted to implement the Directive. The greater normative framework (consisting of Art. 10 ECHR, article 288 TFEU and the AVMS) requires that the legal set-up in the Member States is capable of ensuring an effective collaboration between the Member States on the enforcement of the national provisions.

For the purposes of our study, what really is essential to achieve – keeping in mind the leeway Member States have to follow their traditions and policies and that they have, consequently, devised various designs for setting up regulatory bodies – cannot solely be derived from the normative texts but calls for a structural assessment. As a central normative requirement we have elaborated *impartiality of the decision making process*. Applying our working definition, it is to say that those **characteristics** that ensure that the regulatory body carries out its duties in an impartial manner are to be regarded as **essential**. For ensuring this, a minimum requirement of independence is needed to place the regulator in a position in the governance field that enables the body to avoid undue influences. We would say that the design should not contain a structural bias (as regards governments', parliaments' or the media industries' interests) that precludes impartial decision making.

Unlike the essential characteristics, the best **practice characteristics** are not strict legal obligations. However, there is at least some normative basis, since we are of the opinion that article 30 AVMS follows the long-term policy objective to give incentives to establish independent regulatory bodies and to create a network of independent regulators.

Whereas the essential characteristics of an independent regulatory body, as referred to in the AVMS Directive, build upon the requirement that the regulatory body carries out its duties in an impartial manner, the concept of best practise characteristics builds upon a broader concept of independence.

Our theoretical research has indicated that regulatory theory suggests that in procedural regulation where social procedures are regulated rather than single actions and where all regulation follows overarching goals, it is advantageous to have regulatory bodies that perform as actors within the regulatory system. Especially regulations regarding advertising and the protection of minors are good examples of such procedural regulatory tasks. Academic literature has not formed a role model so far but our literature analysis, formal analysis, *de facto* analysis and in depth analysis suggest that the following key characteristics are significantly helping in becoming such.

4.3.1 Status and Powers

A minimum requirement of independence when performing the regulatory tasks seems to be essential to function in an adequate and especially impartial manner. From this perspective, a number of **essential characteristics** were developed. This minimum requirement of independence is not guaranteed if any other body or person other than a court or judge can at its own discretion *overrule or instruct* any of the case-specific decisions of the regulator. Of course, general instructions can be laid down in the law and statutes governing the regulatory body. However, the regulatory body cannot achieve the relevant degree of independence from the relevant actors if

any of the relevant actors, especially the government, can overturn or instruct any specific decision of the regulatory body. If overturning or instructions are possible, these must be limited to very exceptional cases, e.g. when the regulator obviously exceeds or abuses its competences. However, the in-depth analysis showed that formal rights of instruction can exist without any detrimental effect on the independence of the regulatory body, if they are not used in practice – even on occasions when the instructing body clearly wants the regulatory body to take particular action.⁷⁶⁶ On the other hand, if instructions are formally not possible there can be informal means of influence which have the same effect as giving an instruction.

Structurally, the points mentioned above can be achieved by establishing the regulatory body as a separate legal entity; however, it seems possible to reach the same by other means as well. Consequently being a separate legal entity cannot be regarded as essential.

As **best practice**, *instructions or overrulings* by any other body than the court should not be possible at all when it comes to *specific decisions* of the regulatory body. Only general instructions laid down in statutory rules are compatible with best practice requirements.

In line with the basic requirements for independent regulatory bodies that can be derived from the literature, we assume that there has to be delegation of power to the regulatory body by law. More specifically the regulator needs *monitoring and enforcement powers* at its own disposal to supervise the providers of audiovisual media services in an effective manner. Therefore, this kind of delegation of powers is regarded as **essential**. In addition to this, having a mandate for systematic monitoring, i.e. monitoring according to a set strategy and/or methodology, can be considered as best practice characteristic.⁷⁶⁷ However, if there is an efficient complaints handling procedure and complaints are reliably brought forward in cases of infringement, this can have a comparable effect to systematic monitoring and therefore can also be considered as best practice.⁷⁶⁸

As an **essential characteristic**, the regulatory body needs to be equipped with powers that are *binding for the regulatees* and go beyond the status of mere recommendations. Powers to formulate a regulatory policy are not essential for carrying out the duties of the AVMS Directive, however.

For reaching the goals of regulation, and to ensure the implementation of the law, the regulatory system must provide for adequate *sanctions*. However, it is not essential that the regulator be entrusted with the sanctioning itself, as long as it can start procedures that result in deterrent consequences.

As **best practice**, the regulatory body *should form a separate legal entity*. The importance of this issue has been indicated by our theoretical research on general characteristics of independence (chapter,1.1 *inter alia* the “credible commitment” argument). This idea is also further supported by our analysis of sector-specific requirements of independence and efficient functioning (chapter 4.2), since the issue was emphasised as one of the main conditions for achieving fair

766 See in-depth analysis UK.

767 See in-depth analysis Macedonia.

768 See in-depth analysis Bosnia and Herzegovina, UK, Slovenia.

competition in gradually liberalised markets in the electronic communications sector. While in that sector the concerns mainly had to do with the objective of better separating the operational (i.e. participation in the incumbent operator) and regulatory functions of Member States, the issue is also of particular relevance in the media sector, because of the delicate and controversial relationship between politics and the media. We could conclude from the analysis that being independent from industry and government somehow presupposes a basic level of self-determination for the regulatory body, resulting in fewer risks to impartiality in many of the areas examined.

From the in-depth country analysis we can conclude that, as best practice, a *functional separation* between the ministry and the regulatory body shelters the autonomy of the regulatory body from politics but also from industry, because industry capture can also be performed via political channels.⁷⁶⁹ Also, a functional separation prevents the regulatory body from taking up the government's mode of law making, which is mainly based on negotiating with all interested parties and which is not considered as very efficient when carrying out regulatory tasks.⁷⁷⁰ From the in-depth analysis it cannot be determined whether or not the characteristic of being a converged regulatory body fosters efficient functioning. Even within one regulatory system the experts did not provide unequivocal opinions.⁷⁷¹

Although it is generally accepted that for a regulatory body to be a successful institution, it should not be restricted to the task of supervision on a case-by-case basis, but should be able to form and implement broader policies as well. It should be remembered that in his work, Melody pointed out that the term 'independence' is often misunderstood, since it does not imply independence from government policy, or taking over the power to make policy, but rather independence to implement policy without undue interference from politicians or industry lobbyists (see section 1.1.4). If the regulatory body *possesses more abstract powers, i.e. powers that are not strictly limited to case-by-case decisions*, but include the power to establish priorities in implementing the rules, this can be considered as **best practice**. Also, if the regulator has a variety of powers of intervention, especially *going further than just ex post regulation*, this can be considered as **best practice** in this area. A practical example can illustrate this issue best: regulators often have the power to impose sanctions on regulatees and often also enjoy a certain (limited) level of discretion in deciding on a sanction in a particular case, but as best practice they also be allowed to decide which types of infringements should be prosecuted first, and to decide on some kind of "sanctioning policy" (i.e. providing guidance on how they will apply their sanctioning power in specific cases).

In previous chapters, we have already indicated that the independence of the regulatory authority needs to be counterbalanced by safeguards i.e. aiming to avoid 'agency loss' (see section 1.1.3.2). In our working definition of independence, it also is indicated that the regulatory authority needs to have a clearly defined place inside the governance system, implying that other

769 Berstein (1955); Majone (1994); Stigler (1971).

770 See in-depth analysis Estonia, Netherlands.

771 See in-depth analysis Hungary, Netherlands, Italy.

partners or authorities can also have a relevant role (see section 1.3). Larsen states that even if the regulator is not under political control, it must cooperate with its co-authorities and the stakeholders in the regulated market on other areas peripheral to regulation and rule application. We therefore consider as **best practice** the requirement that if more than one body is established, the regulatory framework should ensure *straightforward linkages and co-operation duties* between the regulatory bodies. This should also apply to relationships between regulatory bodies from different sectors. Cooperation between regulatory bodies should be formalised in order to allow the regulatory bodies to see the broader picture and co-develop coherent policies.

Furthermore, as a **best practice characteristic**, the value of the independence of the regulatory body should be *explicitly recognised in the Constitution, an act of Parliament or a high court decision* or – more generally – a legal source with significance.

4.3.2 Financial Autonomy

As mentioned above, like all organisations, regulators depend on resources to fulfil their tasks in an adequate and especially impartial manner. Therefore an **essential characteristic** is to be equipped with *sufficient financial resources*.⁷⁷²

It is not feasible to give an absolute threshold here, since the scope of tasks and the cost structure differs from system to system and from body to body.⁷⁷³ However, if actors from different perspectives agree on the assumption that funding is insufficient, this indicates serious risk potentials for the regulatory body's independence.

As regards autonomy during the budget setting procedure, the procedures vary significantly. It is conceivable that, if the budget of the regulatory body *solely depended on the discretion of government* without any safeguards, this could lead to a structural bias. However, this has to be assessed on a case-by-case basis, given the complex procedures of budget debates and budget decision procedures.

Regarding the financial autonomy of the regulatory authority, we have identified two different aspects as **best practices**. First, we consider the fact that the budget of the regulatory authority does not exclusively depend on the discretion of government as an important element of independence. Positively formulated, there have to be elements or instruments rendering the *budget allocation procedure* objective or transparent.

Furthermore, the regulatory authority should be able to play a *significant role in the budget setting process*, e.g. being able to make a reasoned proposal which can only be denied for (limited) reasons. The importance of being involved (at least in an advisory role) in the process of determining the appropriate level of the overall budget follows immediately from the theoretical framework of independence.

The assessment given above is backed by academic literature. In his definition, Powell stresses that a regulator should have adequate funding to carry out its responsibilities (see section 1.1.3). Several other authors have also explicitly mentioned financial and organisational auto-

772 See in-depth analysis Estonia.

773 Here, special attention has to be paid to small countries, see in-depth analysis Estonia, Macedonia.

my as a key dimension of independence. In their work, Pfeffer and Salancik state that organisations gain autonomy when they have a maximum control of the input of resources on which they are dependent (see section 1.1.5.2.2). In this area (and related to organisational autonomy), as a best practice characteristic, a regulatory body should have *autonomy in budget allocation within the set budget/ approval*.

Finally, we can conclude that a *mixed funding*, comprising fees levied from industry and government funding, can reduce risk potentials for dependencies and can therefore be qualified as best practice. This has been supported by the in-depth country analysis.⁷⁷⁴ However, we acknowledge that the precise impact of the funding system depends largely on the design of the broader (administrative and budgetary) system.

4.3.3 Autonomy of decision makers

In our theoretical research on the definition of independence, it was stated that autonomy and independence are closely related concepts, and that some literature even uses both concepts interchangeably, while others perceive greater or lesser differences in meaning between the terms. Particularly relevant for identifying essential characteristics and best practice characteristics are the different levels of autonomy that are distinguished. In this respect, Verhoest et al. differentiate between autonomy at the level of the decision-making competences of the agency (concerning management on the one hand and concerning policy on the other), and autonomy as a lack of constraints on the actual decisions of the agency (referring to structural, financial, legal and interventional constraints on the agency's decision-making competencies). In their work, Gilardi and Magetti state that independence is made up of two components: self-determination (where interests and values are distinct from their environment) and ownership over the process and actions without external constraints (see section 1.1.3.1).

A first set of essential characteristics within this dimension relates to the nomination and appointment procedure of the decision-making organ, rules to protect against conflicts of interest, and to the dismissal of a board member.

The nomination and appointment process regarding the highest decision-making organ can comprise influence factors. Therefore, *nomination and appointment procedures* have to be structured in a way that prevents a structural bias. For example, if only one political actor, i.e. government, is responsible for nomination and appointment, there should be safeguards such as a transparent appointment/nomination process with an appointment exclusively based on merits⁷⁷⁵ or the requirement for the timely publication of a list of nominated candidates.⁷⁷⁶

If the highest decision-making organ does not consist of a board but an individual, the individual should be *acting on his/her own* and not as a representative bound to the interests of any other person or body. Also, if the highest decision-making organ reflects political powers in parliament or government, the *length of the tenure* should not cement political powers. Such a cementing of

774 See in-depth analysis Italy.

775 See in-depth analysis UK.

776 See in-depth analysis Macedonia.

political powers could be preventing by establishing a rolling appointment leading to a staggered term of office of the members of the highest decision-making organ.⁷⁷⁷

To ensure that the members of the highest decision-making organ of the regulatory body are not bound to interests that prevent them from making impartial decisions, *rules against conflicts of interest* with regard to all relevant actors are needed as **an essential characteristic**.

There are some hints that insufficient safeguards against dismissal can trigger the potential risk of informal influence by the institution or person who has the power to dismiss. Almost all of the experts of the various in-depth analyses agreed that, as an essential characteristic, *dismissal* should only be possible for limited reasons strictly defined in law. Nevertheless, various experts correctly put emphasis on the problem that even though a dismissal is limited to strict reasons foreseen in law, through the exertion of political pressure, members of the regulatory body can also be forced to resign. This constitutes an influence factor that cannot be captured when assessing the formal provisions.

With regard to the nomination and appointment process, **best practice characteristics** can be developed with higher precision. A first dimension of impartiality relates to the finding that, as a best practice characteristic, the highest decision-making organ should be composed of a *board*.⁷⁷⁸ To influence a board informally is more difficult than to influence an individual. Also, a board decision calls for a compromise taking into account different arguments and perspectives.⁷⁷⁹ Furthermore, undue influence can not easily be kept under wraps in such a situation.

Moreover, regarding the nomination and appointment process, **best practice** can be achieved by a *procedure* that is most open (e.g. open nomination process and transparent appointment), since we consider this to offer the best possible way to avoid hidden (or non-transparent) dependencies.⁷⁸⁰ No prevailing influence of government or any other relevant actor should be given in the appointment and nomination process.

Another important element of independence relates to the time-horizon of decision-making and policy-setting. As indicated in our section on rationales for creating independent regulatory bodies, one crucial objective in the area of market regulation is limiting the government failure of ‘time inconsistency’, where policies can change over time and, thus, can increase the long-term credibility and predictability of regulation (see section 1.1.1.1). The issue of time-horizons is also relevant on a more practical level. Relatively long terms of office that do not coincide with election cycles increase independence from external interests such as interests of elected politicians, regulatees and/or other private interests (see section 1.1.5.2.3). In addition, a relatively long term of office allows continuity with regard to the building up of knowledge. Therefore, we consider a situation as **best practice** in which the *term of office of board members is longer than one election cycle and does not coincide with the election cycle*. However, in order to prevent a cementing of powers, it should not be longer than two election cycles. There should be a *rolling appointment of the board members*, i.e. not all members should be appointed at the same

777 See in-depth analysis Hungary.

778 See in-depth analysis Slovenia.

779 See in-depth analysis Slovenia.

780 See in-depth analysis Macedonia.

time (staggered appointment).⁷⁸¹ Furthermore, the *power of dismissal of board members* should be given to the regulatory body itself or to the judiciary, and it should *not be possible to dismiss the whole board* at once.

With regard to the possibility of a renewal of the term of office, the situation is double sided: on the one hand, the possibility to renew a term of office fosters the knowledge building of the regulatory body and the continuity of the regulatory practice. On the other hand, the possibility of renewal provokes informal influence potentials through the person or body responsible for re-appointment as members of the regulatory body are most likely eager to be reappointed. Therefore, the possibility of renewal cannot be qualified as best practice.

As a “*revolving-door*” situation can increase the expertise of the regulatory body, this phenomenon has to be regarded as double sided. To prevent influences resulting from the revolving-door situation, as best practice characteristics there should be rules clearly defined in law to ensure that former or promised professional affiliations do not influence the decision-making process.⁷⁸² One example for rules following this aim are the rules covering cooling-off periods.

Finally, as a best practice characteristic, autonomy in *internal organisation and decisions regarding human resources* should be guaranteed in order to enable the regulator to adapt to changed demands at its own discretion, allowing for the optimal internal pre-structuring of issues and decisions.

4.3.4 Knowledge

Knowledge becomes more and more important, both for fulfilling the regulatory task effectively and for wielding counteracting power when actors are trying to put pressure on a regulatory body. In the fast changing field of audiovisual media, it is especially true that only a regulatory body with genuine expertise has the potential to be a powerful actor. Therefore, the ability to gain and use information is paramount.⁷⁸³ This concern is also closely related to the reasons why independent regulatory bodies are created, such as – in the market regulation arena – the objectives to overcome political uncertainty and the objective of better regulation (issues such as flexibility, expertise and the continuity of concerns, see section 1.1.1.1). Although in the literature regarding the independence of regulatory bodies, the dimension of “knowledge” is not always used consistently, several authors in their definitions refer to aspects that form part of the knowledge dimension, such as the requirement of professional expertise for appointees, following from the observation that independence is positively linked to “the development and application of technical expertise”, because expertise can be a source of resistance against improper influences (see section 1.1.5.2.3).

In this respect, an **essential characteristic** of an independent regulatory body is for it to be equipped with sufficient human resources and *adequate expertise*, which comprise expertise of

781 See in-depth analysis Hungary.

782 A mean to reach this goal could also be a cooling-off period, see in-depth analysis Italy.

783 This has been stressed by almost all experts, see in-depth analysis Netherlands; Bosnia and Herzegovina.

the *members of the highest decision-making organ* itself and/or *expertise gained from external advice*.

In our work, we also identify a number of **best practices**. In order to judge the information coming from outside and not to become dependent on outside competence, *adequately qualified staff* are essential (which can only be attracted if working for the regulatory body is an attractive career path). The regulatory body should be staffed with experienced *professionals from all relevant areas* (lawyers, economists, social scientists and technicians etc.).⁷⁸⁴

Furthermore, the highest decision-making organ should have the *opportunity to gain outside advice*.⁷⁸⁵ Also, as information distortion can be one mean of regulatory capture⁷⁸⁶, in the field of *information collection* the regulatory body should be able to rely on its own source of information (and not solely be dependent on information given by government or industry).⁷⁸⁷

4.3.5 Accountability and transparency mechanisms

As outlined in the theoretical research conducted in this study, accountability and transparency mechanisms can help to deter undue influences by other actors or their attempts to influence public opinion (even if they have been put in place for purposes outside the scope of our study see sections 1.3.2).

Therefore a *minimum of transparency* regarding decision making is essential for all regulatory bodies to act in an impartial manner. This **essential characteristic** can be met by regulatory bodies that *provide their decisions publicly and give reasons for their decisions* or by delivering a meaningful annual activity report, or equivalent mechanisms. The importance of the publication and explanation of decisions as a transparency mechanism has been especially stressed by the experts interviewed for the in-depth analyses of the UK, Italy and Slovenia. Also, a *judicial review* – as a safeguard against regulatory capture – should be allowed for.⁷⁸⁸

In addition to these essential characteristics, broader *public accountability measures* (represented by parliament or by other actors) can be considered as **best practices**. According to our concept, they do not only provide *legitimacy* – which is outside the scope of our study – but also function as a means to provide the regulatory body with autonomy. In order to become a ‘relevant actor’, the regulatory body should have the capacity for *networking with all relevant actors and for interacting with the public*. This can foster public awareness of regulatory issues. If there is more than one regulatory body in place, it is especially important that the public is well informed about the body’s responsibility for complaints, and complaint-handling procedures.⁷⁸⁹ As a best practice characteristic, the regulatory body should therefore have an obligation to organise *open consultations* in all cases having a direct or indirect impact on more than one market player. Furthermore, the in-depth analysis showed that it is not only important that there is a formal re-

784 See in-depth analysis Slovenia.

785 See in-depth analysis Slovenia.

786 Bernstein (1955); Majone (1994); Stigler (1971).

787 This finding is supported by the in-depth analysis of Estonia.

788 See in-depth analysis Estonia.

789 See in-depth analysis Slovenia.

quirement to conduct consultations, but that on a *de facto* basis consultations are conducted in an *inclusive and transparent manner* and that the regulatory body regards the consultation process as an important element of its decision making process.⁷⁹⁰

Lastly, a *reporting obligation* to the public at large (represented by parliament or other legitimised bodies) should be specified in law. It is important to note that accountability and transparency mechanisms do not need to be laid down in the regulatory framework governing the audio-visual media sector, but can also follow from general administrative law.⁷⁹¹

790 See in-depth analysis Bosnia and Herzegovina, Estonia, Macedonia, Slovenia.

791 See in-depth analysis Netherlands.

5. RANKING TOOL FOR SELF-ASSESSMENT OF INDEPENDENCE AND EFFICIENT FUNCTIONING

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5.1 Methodology

The study team developed a tool to measure the risk of influence by external players (rather than a tool to measure the level of independence of the regulators). This enables a more objective method for ranking the indicators. The approach follows the overall distinction between formal (legal set-up) and *de facto* (actual situation) indicators, resulting in two separated visualisations.

It was decided to rank only those indicators that would give a clearer, and probably a more objective, result in terms of influence. If an indicator can be interpreted as being a route for influence, while at the same time being a source of autonomy, it is not included as an indicator. For each dimension, only indicators that are associated with the power to secure against potential influence (especially from politics and industry) were used.

The surveyed indicators both in the formal and in the *de facto* division are grouped according to different possible ways of influence by external players. This results in the following dimensions:

- Status and powers
- Financial autonomy
- Autonomy of decision makers
- Knowledge
- Transparency and accountability mechanisms

Within both divisions, all dimensions have the same weight and the total achievable number of points adds up to 100.

All the indicators within one dimension were weighted on the basis of their likeliness to be routes for potential influence. The weighting was undertaken by distinguishing indicators that have a low, a medium or a high likeliness of allowing the influence of external players.

Every possible answer of an indicator has in addition been ranked on a scale between 0 and 1 – With “0” displaying likeliness or a risk of the exertion of influence and “1” representing a strong safeguard against potential influences. Where there are non-binary answers for an indicator, the scale has been adjusted to represent and rank all different possibilities in a graded way. To increase the transparency of the tool, the attributed points within each dimension were multiplied in proportion to its weighting factor, so that the total sum of all achievable points within

each dimension adds up to 100. Because certain indicators correlate with answers given to other indicators, they are not applicable in all cases. In these cases, the additional option “not applicable” is offered. Where this answer is chosen, the points attributed to the indicator will not be taken into account within the dimension, leading to a reduction of the overall achievable points within that dimension. It is not possible to change the ranking associated to each of the indicators.

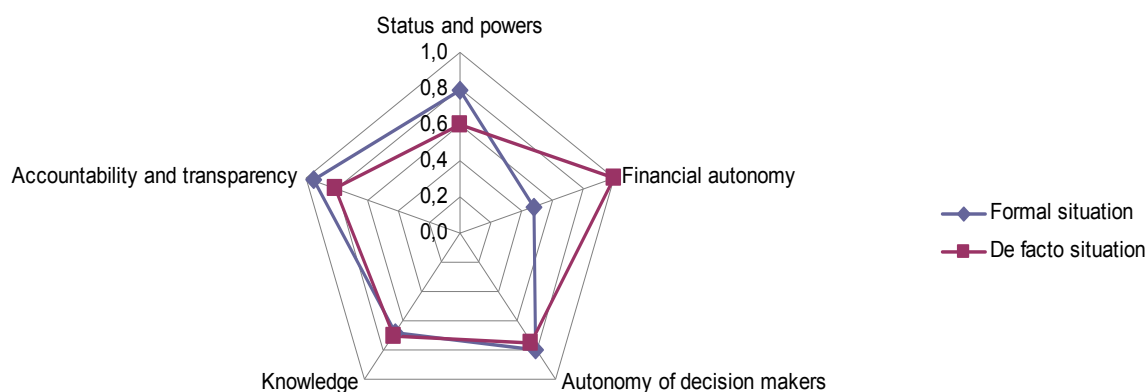
The graphic representation shown derives from the calculation of the total points in relation to the possible points. Where all possible points have been reached, this results in a full extension on the ‘spider’s web’. Correspondingly, if no points have been reached, this results in a graphical representation at the centre of the web.

Gilardi introduced a similar approach for a ranking tool to assess the level of formal independence of regulators (in the competition, electricity, environment, financial markets, food safety, pharmaceuticals and telecoms sectors). He proposed a ranking of between 0 and 1 to measure the independence of regulators according to five dimensions (Status of the agency head, status of the members of the management board, relationship with government and parliament, financial and organisational autonomy, and regulatory competences).

5.2 Usage, interpretation and significance of the tool

The result is a ranking tool to help interested parties self-assess their risk potential for the influence of external players. Interested parties should fill in the cells at the beginning with their country, authority, evaluator and date. Secondly, to apply the ranking tool, the evaluator should answer each question by selecting the most appropriate answer. After this, the tool will generate a result that will be translated into a graphical visualisation of the level of resistance against, and risk of, potential influences. It is only possible to use the tool to assess the risk potentials for a single regulatory body. Where there is more than regulator involved in the regulation of the AVMS-Directive-related matters in one country, the tool must be applied for each body separately. The tool represents the current situation, based on the answers given by the evaluator and should not be used to predict future trends. Below is an example of the resulting graphical visualisation of the applied ranking tool.

Fig. 18: Example of the applied ranking tool



Each axis (i.e. dimension) displays a potential sphere of influence. The largest expansion on one axis of the spider web indicates the highest degree of countermeasures against the influence of external players, or the smallest risk of being influenced by them.

The spider's web should be interpreted taking into account that, within the spheres of status and powers, financial autonomy, autonomy of decision makers and knowledge, the further the position of the point outwards along the relevant axis, the more the regulator can resist external influence. Regarding the dimension of accountability and transparency mechanisms, the assumption is different in the sense that accountability and transparency are legally foreseen routes for influence, and therefore tools to counterbalance the powers and autonomy given to regulators. The reading is therefore different for these, in the sense that 'the fuller the web', the more effective transparency and accountability mechanisms are in place.

Following the distinction between formal and *de facto* indicators, the formal ranking tool contains indicators that describe the legislative set-up. The weighting and ranking with regard to potential risks of influence is based on the assumptions derived from the key characteristics and the analysis conducted earlier. The *de facto* ranking tool contains, on the one hand, correlating compliance indicators and, on the other, further perceivable effects or phenomena that might indicate exerted influence or a *de facto* increased risk of influence. Therefore, the graphical visualisation of the *de facto* situation should not be seen as simply mirroring the formal situation, but as drawing attention to potential attempts to influence the regulatory body.

It should also be emphasised that the graphical visualisation is only as useful as the answers given in relation to each indicator. Some of the indicators require a subjective judgment of the evaluator, and the results therefore reflect the personal assessment of the respondents. Furthermore it, should be stressed that due to the varying number of indicators within each dimension, the presence of a single indicator can alter the resulting graphical visualisation drastically (e.g. in the *de facto* dimension of financial autonomy there is only one indicator, leading to a dichotomous representation, whereas the formal dimension includes four differently weighted indicators, therefore allow several possibilities of displaying the risk of influence).

5.3 Weighting and ranking of the formal and *de facto* indicators

For each described dimension, the indicators have been weighted and ranked. The findings of the analysis and the key characteristics exercise formed the basis for the weighting and ranking. However, without a natural order of indicators, the task of assigning point values to a specific element of the regulatory design necessarily involves a certain degree of simplification and artificiality. Therefore the reasons for the decision on the point values have been made transparent.

5.3.1 Justifications – Formal ranking tool

5.3.1.1 Status and powers

Formal Indicator 1.

What is the legal structure of the regulatory body?

- A separate legal entity/autonomous body
 - Not a separate legal entity/autonomous body but with the existence of sufficient safeguards (Chinese walls)
 - Not a separate legal entity/autonomous body and with no Chinese walls
-

The legal status of the regulatory authority gives an indication of whether it is intended, *prima facie*, to be a separate entity from the ministry/government. The most obvious way to achieve independence from the government/ministry is to ensure that the regulator is established as a separate legal entity.

Recommendation (2000) 23 of the Council of Europe does not address the legal structure to be taken by regulatory authorities. The ministerial declaration of March 26, 2008 (which, among other topics, covers how the recommendation has been implemented since its adoption) explains that, in most cases, autonomous bodies have been set up. Regulators under the authority of a ministry depend on the administrative support of the ministry to which they are attached, and often do not manage their own budget independently. In a small number of these cases, the document notes that the regulatory authority can nevertheless succeed in working independently (due either to long-standing practice of independence, or to the existence of a comprehensive regulatory framework that provides clear guidelines on the authorities' competences). This is particularly the case if they are rooted in 'long-standing democracies with relatively low levels of corruption, where the transparency of public bodies is ensured and where independent media and a vibrant civil society keep the regulatory authority under close scrutiny'.

In the telecoms sector, the Framework Directive 2002/21 does not require a separate legal entity, but it does say that Member States that retain ownership or control of undertakings providing electronic communications networks and/or services must ensure effective structural separation of the regulatory function from activities associated with ownership or control. The European Court of Justice has also affirmed in the context of this directive that, while Member States

enjoy institutional autonomy regarding the organisation and structuring of their regulatory authorities, nevertheless, where those functions are to be carried out, even partially, by ministerial authorities, those authorities should not be involved directly or indirectly in ‘operational functions’ (Case C-82/07, March 6, 2008).

In the electricity sector, Directive 2009/72 contains a stricter requirement that regulatory authorities should be legally distinct and functionally independent from other public or private entities. The Data Protection Directive 95/46 does not specify the legal structure to be taken by the data protection authority, but the European Court of Justice ruled in March 2010 (Case C-518/07), in a case concerning the German data protection authority, that the term ‘independence’ normally means a status that ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure.

We give a high weighting to the indicator “separate legal entity” as the legal form taken by the regulator gives a strong indication of its level of formal autonomy.

We have given high scores to the situation where the regulatory authority is established as a separate legal entity. In this case, it is not part of the ministerial administration and therefore no influence can be exerted through an organisational hierarchy within the ministry. No marks are given in cases where the authority is not a separate legal entity and where no safeguards against hierarchical influence are in place.

Formal Indicator 2.

How is the independence of the regulatory body guaranteed?

- In the constitution/a high court decision
 - In an act of parliament
 - In a secondary act
 - It is not recognised
-

The source of recognition of the independence of a regulatory authority reveals if independence is formally regarded an important value for the functioning of the regulatory authority. The idea is that if independence is not formally recognised as a value, there is a risk that there will be less of a culture of independence within the regulator. Furthermore, the higher in the legal order the source of recognition, the more likely it is that the regulatory authority can act in an independent manner, as the obligation will be an overriding principle to be followed in all cases. The higher the source of recognition, the more stable the instrument is likely to be, and the harder to amend. This is an additional safeguard against politically motivated changes.

Recommendation (2000)23 of the Council of Europe explicitly states that the rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence. Independence should therefore be guaranteed in the legal texts.

We give a medium weighting to this indicator: it is most important that all the conditions are in place for the regulator to behave independently, but it is better if independence is recognised as a value in the legal texts.

We give maximum points to the recognition of independence in a legal act that is high in the legal order of the country. Not only does this afford greater protection from external change; it is also likely to foster greater respect for the regulatory authority and its independence among politicians, stakeholders and society in general.

Formal Indicator 3.

What type of regulatory powers does the regulatory body have?

- Policy-implementing powers and third party decision making powers
 - Third party decision making powers only
 - Consultative powers only/no third party decision making powers
-

Formal Indicator 4.

Are these regulatory powers sufficiently defined in the law?

- Yes
 - No
-

It is generally accepted that one of the dimensions of regulatory independence is the scope of the regulator's decision-making competence. Another key point is to see if these powers are clearly defined in the law, with precise objectives to be achieved by the regulator.

Point B of Recommendation (2000)23 of the Council of Europe states that the law should give national authorities powers that enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation.

The explanatory memorandum recommends that, within the framework of the law, the regulatory authorities should have powers of regulation that enable them to respond flexibly and adequately to unforeseen and often complex questions, not all of which can be resolved, or even anticipated, by the legislative framework. In effect, it is considered that regulatory authorities are better placed to define the "rules of the game" in detail, since they have very good knowledge of the broadcasting sector. This clearly refers to policy-implementing powers.

This approach is corroborated by the doctrine that distinguishes between regulatory authorities that are truly regulatory and have decision making powers, and those that are simply consultative. Using this distinction, independent regulatory authorities are those with decision-making powers, as this is seen as a way to strengthen further their independence and efficient functioning (Larsen, A. et al. (2006)).

We give a high weighting to this indicator as, without appropriate powers, regulators would have very limited credibility, and would be unable to regulate the market and enforce its rules. It is also much more difficult to exert influence on a strong regulator with a wide variety of powers. Therefore, regulatory powers give at least some counterweight against capture by industry.

The best position is for the regulatory authority to have policy-implementing powers (i.e. to be able to define the rules of the game) and third-party decision-making powers, where these powers are clearly framed in the law. Top marks are therefore given to this situation. We give no marks where the regulator only has consultative powers, or where it cannot take decisions that are binding on others. Low points are given where the regulator only has third-party decision-making powers but no power to adapt the rules of the game.

We give additional points where the powers are sufficiently detailed in the law to ensure legal certainty about the powers of the regulator.

Formal Indicator 5.

Does the regulatory body have supervision powers?

- Yes
 - No
-

Formal Indicator 6.

Does the regulatory body have information collection powers towards regulatees (e. g. regarding quotas)?

- Yes
 - No
-

The question of whether the regulatory authority is given supervisory powers is an indication of the level of independence, and of the efficient functioning, of the regulator.

Recommendation (2000)23 of the Council of Europe states that an essential feature of regulatory authorities should be to monitor compliance with the conditions laid down in law and in the licences granted to broadcasters.

Recommendation (2000)23 provides that regulatory authorities should also be given the right to request and receive information from broadcasters, insofar as this is necessary for the performance of their tasks (point 20).

We give a high weighting to this indicator as one of the key roles of a regulator is to monitor compliance with the rules.

For this reason, we give top marks to the situation where the regulator has supervisory powers. Supervision enables the regulator to track precisely how all the operators are complying with their licence conditions, as well as the laws and regulations. It gives it a comprehensive overview of the situation.

We give the regulator extra points if it has information collection powers, since, without these powers, the regulator cannot investigate any failure by a media service provider to comply with

its obligations. Information collection powers constitute a safeguard against information asymmetries. Also, if it has information collection powers, the decisions of the regulatory body cannot be manipulated by third parties through incorrect or selective information.

Formal Indicator 7.

Can the regulatory body be instructed (other than by a court) in individual cases/decisions or in relation to its policy-implementing powers (notwithstanding possible democratic control mechanisms, such as by parliament)?

- No
 - Yes, by the parliament
 - Yes, by the government/minister in limited cases
 - Yes, by the government/minister in many cases
-

The extent to which the law allows that a regulator can receive instructions from another entity, such as the government or the minister, has an obvious bearing on the level of independence of that regulator. We are not concerned here with the situation where the regulator can be instructed to carry out a specific duty by a court, in the context of the judicial review of its decisions (see below).

In a very clear manner, Recommendation (2000) 23 of the Council of Europe foresees that members of the regulatory authorities cannot receive any mandate or take any instructions from any person or body (point 5 of the guidelines).

Similarly, this requirement is contained in the telecoms and energy regulatory frameworks. The Electricity Directive 2003/54 and the Framework Directive 2002/21 on electronic communications require that the regulatory authority can not seek or take direct instructions from any government or other public or private entity. The Electricity Directive specifies that this is without prejudice to close co-operation with other relevant national authorities, or to general policy guidelines from the government, provided they do not directly relate to the powers and duties of the regulatory authority. The Framework Directive states that this cannot prevent the supervision of regulatory authorities in line with constitutional law. The European Court of Justice (Case C-518/07) also clearly ruled in its decision of March 2010 that “in relation to a public body, the term ‘independence’ normally means a status which ensures that the body concerned can act completely freely, without taking any instructions or being put under any pressure”.

We give a high weighting to this indicator, since, if the regulator can be instructed by an outside body, its independence is seriously undermined. The power to instruct the regulatory body can be misused to influence its decisions. Additionally, even without the formal exercise of this influence, the mere knowledge that an instruction is possible can limit a regulatory body’s leeway.

Maximum marks are therefore given where the regulator cannot be instructed. Other situations are given lower marks. Their gradation is explained by the level of safeguard provided

against interference, instructions by the parliament being assumed to provide more safeguards against undue influence, because of its democratic nature.

Formal Indicator 8.

Can the regulatory body's decisions be overturned (other than by a court/ administrative tribunal)?

- No
 - Yes, by the parliament
 - Yes, by the government/minister in limited cases
 - Yes, by the government/minister in many cases
-

The question of whether the law allows a regulator's decision to be overturned by a body other than a court (in the context of judicial review) has a strong impact on the independence of a regulator. Where this power exists, it is usually given to a minister in charge of audiovisual matters.

Although Recommendation (2000)23 of the Council of Europe does not explicitly cover this question, it is obvious that it would be highly problematic if decisions of the regulator could be overturned outside a judicial review process. If such overturning is possible, this means that the regulator could be influenced on the decision it takes, to avoid having them overturned.

This situation is foreseen in the Framework Directive 2002/21 on electronic communications, which states that only appeal bodies set up in line with the directive can overturn the decisions of the regulatory authorities.

We give a high weighting to this indicator, since the ability of an outside body to overturn the regulator's decision would seriously undermine its independence. The power to overturn the regulatory body could be misused to influence its decisions. Additionally, even without an exertion of this influence, the expectation that its decisions could be overturned would limit the regulatory body's leeway.

Maximum points are given when decisions of the regulatory authority cannot be overturned by another body than a court.

Fewer points are given where decisions can be overturned by the parliament, the government or a minister. Given the democratic nature of parliament, a situation where decisions can be overturned by the parliament (and not by the government/minister) gives more safeguards against undue interference than a situation where the government or a minister can overturn decisions.

Formal Indicator 9.

What type of enforcement powers does the regulatory body have?

- A full range of proportional enforcement powers: (warnings, deterrent fines, suspension and revocation of licence)
 - A partial range of enforcement powers available, but power to impose deterrent fines
 - No power to impose deterrent fines
-

The range of enforcement powers given to a regulator dictates whether it can act independently or whether it needs to go to courts or another entity to enforce compliance with the rules.

Recommendation (2000) 23 of the Council of Europe states that if a broadcaster fails to respect the law or the conditions specified in its licence, the regulatory authorities should have the power to impose sanctions, in accordance with the law (point 22). It also says that a range of sanctions (which must be prescribed by law) should be available, starting with a warning. It is also explained that monitoring can never be effective without the power to impose sanctions, and that the regulatory authorities should have the power to impose sanctions (graded in severity to reflect the seriousness of the failure to comply), in accordance with the law.

Given the gravity of licence revocation, the recommendation emphasises that it should be applied only in extreme cases, where broadcasters are guilty of very serious compliance failures.

We give a high weighting to this indicator, as a regulator needs to be able to impose a wide range of enforcement powers, with deterrent sanctions as an ultimate recourse, to ensure that its regulations are respected and its decisions are enforced.

We give maximum point value to situations where the regulator has a range of proportional enforcement powers, ranging from warnings, through the ability to impose deterrent fines, to the suspension and revocation of licences, bearing in mind that this is an extreme sanction, to be used sparingly. Regulatory theory indicates that only a range of sanctions provides for a strong position in the interaction between regulators and regulatees. A less optimal solution is where the regulator only has the power to impose deterrent fines, with no possibility to suspend or revoke a licence. No points are given where the regulator cannot impose deterrent fines. In this case, the regulation is without any effect, being a “toothless tiger”.

Formal Indicator 10.

Does the regulatory body have sufficient legal power to decide on its internal organisation and human resources?

- Yes
 - No
-

Recommendation (2000)23 of the Council of Europe states that regulatory authorities should have the power to adopt internal rules. The explanatory memorandum explains that the power to adopt internal rules refers in particular to defining its organisation and decision-making in greater detail, in accordance with its administrative autonomy.

The regulator's ability to decide on internal organisation and human resource questions is an indication of the level of independence of the regulator. If the regulator does not have the power to decide on these questions, it means that it is dependent on the decision of another entity, which in turn reduces its level of autonomy. Instead, the other entity is able to exert influence through its decision-making power in this respect. The power to decide on the internal organisation and human resources indirectly influences the capacity of the regulatory body to act according to its own agenda.

Because of the indirect nature of the above described effects, we give a medium weighting to this indicator.

5.3.1.2 Financial autonomy

Formal Indicator 11.

How is the budget of the regulatory body determined?

- By the regulatory body only
 - By the parliament with involvement of the regulatory body
 - By the government/minister with the involvement of the regulatory body
 - Without the involvement of the regulatory body
-

Formal Indicator 12.

Does the law clearly specify the budget setting and approval procedure?

- Yes
 - No
-

Recommendation (2000)23 of the Council of Europe provides that the funding of regulatory authorities is a key element for their independence, and that the arrangements for their funding should be specified in law, in accordance with a clearly defined plan, and with reference to the estimated cost of the authorities' activities so as to allow them to carry out their functions fully and independently. This funding should not depend on *ad-hoc* decisions made by public or private bodies. The recommendation does not rule out financing from the state budget. However, because, in such a situation, regulatory authorities are more likely to be dependent on the budgetary favour of governments and parliaments, the recommendation states explicitly that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.

In relation to the supervisory authorities of public service broadcasters, the Commission communication on state aid and public service broadcasting (2009/C 257/01) mentions that they should have the necessary resources to carry out supervision regularly.

In the telecoms sector, the Framework Directive (2002/21) specifies that the Member States must ensure that regulators have adequate financial and human resources to carry out the task assigned to them. They are also obliged to have separate annual budgets and to make their budgets public.

To safeguard their independence, energy regulators must have separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out their duties. A recital of the Electricity Directive 2009/72 specifies that approval of the budget of the regulator by the national legislator does not constitute an obstacle to budgetary autonomy.

Regulatory theory suggests that control over its necessary financial resources gives control of the regulator.

The question of how the budget of the regulator is set and approved is therefore an important indicator of the level of autonomy of the regulator. Another important indicator is the level of the budget. Where external parties have a legal influence on the level of the budget, they can undermine its operational capacity by denying it adequate financing. This can occur intentionally, or unintentionally resulting from a lack of knowledge, e.g. due to missing market studies. Also, they are able to exert pressure to get politically motivated decisions from the body. The greater the influence of one single player over the budget allocation, the more likely that influence will be used to punish or reward the body, in order to generate politically motivated decisions. The less one-sided influence there is on the budget, the higher will be the “organisational autonomy”. Safeguards against such influences can be procedures to earmark the funding, or to have adequate and different sources of income.

Because of the great potential for influence arising from financial decision making powers, we give a high weighting to this indicator. Influence by means of financial resources is the most efficient way to influence an organisation indirectly.

We give top marks where the regulator alone is instrumental in the budget setting and approval. The assumption following from the arguments above is that if external bodies can decide on the budget of the regulator, there is a risk of interference with its independence. Fewer points are given in situations where other entities are involved, as this reduces the level of autonomy of the regulator. Given the democratic nature of parliament, a situation where the parliament is involved in the budget setting and approval receives more points than where the government or minister are involved, and no points are given where the regulator is not involved. We add points where the law clearly specifies a budget setting and approval procedure.

Formal Indicator 13.

What are the sources of income of the regulatory body?

- Fees levied from industry – own funds, spectrum fees
 - Mixed fees (industry and government funding)
 - Government funding only
-

Formal Indicator 14.

Does the law clearly specify the source of funding?

- Yes
 - No
-

The source of the regulator's income is an important indicator of its level of autonomy, as the less it has its own sources of income, the more likely it is to be under the influence of the income-generating entity.

Recommendation (2000)23 of the Council of Europe does not indicate concretely the possible sources of funding of regulatory authorities. But the explanatory memorandum does contain some useful indications. It recalls that in European countries there are two main sources for the funding of regulatory authorities, which can be combined, where appropriate. Funding can mainly come from concession fees or, where appropriate, a levy on turnover, paid by licensees. Provided the licence fees or levies are fixed at a level that does not constitute an operational impediment to broadcasters, this arrangement seems to be the best practice to safeguard the regulatory authorities' financial independence (in this way, they do not have to rely on the public authorities' goodwill).

At the same time, the recommendation does not rule out financing from the state budget. However, because in this case regulatory authorities are more likely to be dependent on the budgetary favour of governments and parliaments, it states explicitly that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.

The source of income bestows a structural influence on the parties involved in the financing. However, this is a rather indirect influence, being highly dependent on the institution having the decision-making power over sources and amounts of the funding.

Therefore, we give a low weighting to this indicator.

We give top points to the situation where the regulator is completely independent from a financial point of view, as this means that it does not depend on the decision of another entity. No points are given where the financing comes from the government alone, and medium points are given where the regulator benefits from a mixed source of income. We add points where the law clearly specifies the source of funding.

5.3.1.3 Autonomy of decision makers

Formal Indicator 15.

What is the nature of the highest decision-making organ of the regulatory body?

- A board
 - An individual
-

Governance of the regulatory authority by an individual or a board can have a different impact on its level of independence and integrity in decision making. A collegiate body is likely to be better equipped to resist external influence than a single individual, as it is easier to influence a single person than a whole board (see Jacobzone, S. (2005b)). This is therefore given the highest score. In addition, decisions taken by a body are more likely to be balanced and to be taken in the interest of the public at large.

However, nothing is said in the Recommendation 2000(23) of the Council of Europe on whether it is preferable to have the regulatory authority governed by a single individual or a collegial body.

By definition, a set of heterogeneous actors is harder to influence than one single person. Therefore, the existence of a board indicates greater safeguards against external influence than where a single person is the highest decision maker. The existence of a board is therefore given high points. However, a board might still consist of similar minded persons, while a single person can prove firm and not subject to “group-think” This indicator is therefore given a medium weighting.

Formal Indicator 16.

Who has a decisive say in nomination/appointment of the regulatory body’s highest decision making organ?

- Mix between Parliament/Government/civil society/professional associations
 - Ruling and opposition parties involved
 - Parliament and government
 - Parliament/prime minister, president
 - Parliament and political parties
 - Parliament only
 - Government only
 - President/prime minister/minister only
 - Not applicable/other procedures
-

Nomination and appointment procedures are a key dimension of the formal independence of regulatory authorities, as they are an obvious way to exercise political influence.

According to the Council of Europe Recommendation (2000)23, members of the board should be appointed in a democratic and transparent manner. The explanatory memorandum specifies that the term ‘democratic’ should be interpreted in a wide manner, as members of the board are sometimes elected, sometimes nominated by public authorities or by non-governmental organisations. It does not imply that any one of these nomination/appointment procedures is better than the others, and recognises that procedures may vary widely from country to country.

According to the literature, the potential for one-sided influence decreases with the number of players involved. Independence is therefore likely to be higher if the nomination is confirmed by the government collectively, or even better, by parliament or by a procedure involving both the executive and the legislative branches (see Jacobzone, S. (2005) and Smith, W. (1997)).

Where power is delegated, the decision over the nomination and appointment of the agent is the best way to influence his/her decisions. Therefore, we give a high weighting to this indicator for the reasons given above.

The top score is given to the situation where the greatest number of players are involved in the nomination/appointment procedures. The scores go down as the number of bodies involved in the process reduces. Gradations are explained by the nature of the bodies involved (higher points being given to the involvement of directly elected bodies and to collegial bodies, as these two characteristics are likely to create more integrity in decision making). We have chosen to give a relatively high score where the opposition party is involved, as this can introduce more diversity in the board membership and limit the risk of one-sided political influence.

Formal Indicator 17.

What is the term of office of the chairman/board members?

- A fixed term of office of a certain duration (longer than the election cycle)
 - A fixed term of office (shorter than or equal to the election cycle)
 - Not specified
-

The length and stability of the mandate of board members can have an influence on potential dependencies. The Electricity Directive 2009/72 implements this idea by stating that members of the board must be appointed for a fixed term of seven years.

According to the literature, a fixed term of office is presumed to be a way to protect members of the board from external pressure. Where the term of office is not fixed, a board member might act according to the (presumed) expectation of the institution deciding on the length of their term. However, the more experience and expertise they can accumulate during their mandate, the more likely they are able to behave independently from politicians and industry.

Therefore a longer term of office is beneficial for independent behaviour, and for developing a coherent strategic policy. In his Independence Index, Gilardi (2002) gives a term of office over eight years maximum points, while the lowest score is given to a fixed term under four years and to the situation where the appointer has the discretion over this question. From our point of view, at least for the audiovisual media sector, a term of office which is longer than eight years is not

necessary to fulfil the objectives of this indicator in the best manner. Also, the situation of a fixed term of office under four years cannot be equated to a fixed term of office, the length of which depends on the discretion of the appointer.

From our point of view, a fixed term of office longer than the election cycle should be given maximum point values. Medium point values are given for a fixed term of office below the election cycle. Zero point values are given to the situation that there is no fixed term of office.

Beside the length of term in office, there are many equally important factors that can be used to put pressure on board members. We therefore give a low ranking to this indicator.

Formal Indicator 18.

Does the term of office coincide with the election cycle?

- No
 - Yes/not specified
-

The literature (in particular Smith, W. (1997)) recommends the use of staggered terms, i.e. a term of office which does not coincide with the election cycle.

If the term of office of board members coincides with election cycles, there is an easy opportunity for newly elected politicians to exercise influence through the appointment of new board members. On the other hand, appointment during parliamentary tenure, and which extends beyond it, is generally more balanced with respect to political positions. A staggered term therefore ensures a more stable mandate.

Because of its structural (and not just timing) impact, we give a medium weighting to this indicator.

The highest score is given to situations where it is explicitly provided in the law that the term of office should not coincide with the election cycle.

Formal Indicator 19.

Does the law ensure that board members are appointed at different points in time (staggered appointment)?

- Yes
 - No
 - Not applicable (no board members)
-

Although this is not included in the Council of Europe Recommendation 2000(23), a regulator is more stable if its members are all renewed at different times. The Electricity Directive (2009/72) foresees that Member States should ensure a proper rotation scheme for the board or the top management.

We give a low weighting to this criterion.

Formal Indicator 20.

What is the situation regarding renewals of board members/chairman?

- Renewal not possible/limited to one or two instances
 - Allowed in more than two instances/not specified
 - Not applicable (no fixed term)
-

Having no, or a very limited number of, renewals is alleged in literature to be a way to avoid allegiance of board members to their appointing authority/authorities. The Electricity Directive (2009/72) implements this idea by limiting the renewal of board members to one instance. The Council of Europe Recommendation 2000(23) does not foresee this situation.

Renewal of the term of office could possibly lead to exertion of influence, as there is a risk that members of the board would be inclined to support positions that are in line with those of the body that could reappoint them.

We give a low weighting to this indicator.

The highest score is given to situations where renewal is not possible, or to instances where it is limited to maximum of two renewals. No points are given where renewal can take place in more than two instances, or where nothing is specified in the law on the possibility of renewal.

Formal Indicator 21.

Are there rules on incompatibility at the nomination/appointment stage of the members of the board/the chairman so that the highest decision making organ –

- Cannot be composed of members of government/parliament/industry
 - Can be composed of one or two of the following groups: government, parliament, industry
 - Can be composed of members of government/parliament/industry
-

Formal Indicator 22.

Incompatibility rules extended to relatives?

- Yes
 - No
 - Not applicable (no incompatibility rules)
-

Formal Indicator 23.

Requirement to act in an independent capacity?

- Yes
 - No
-

The rules on the composition of the board are a key element of the formal independence of regulatory authorities, as they can help protect them against interference by political forces and economic interests.

Recommendation 2000(23) clearly states that incompatibility rules should be defined to ensure that regulatory authorities are not under the influence of political power and do not exercise functions or hold interests in media companies/organisations (or in companies/organisations in a related sector) that could lead to a conflict of interest.

The explanatory memorandum adds that it is preferable that regulatory authorities' members are neither members of parliament or government nor hold any other political mandate during their term of office.

We give a low weighting to this indicator.

The highest score is therefore given to situations where neither members of government, parliament nor industry can be members of the board, and the lowest score where there is an absence of incompatibility rules. Additional points are granted where the law specifies that members of the board must act in an independent capacity, as this requirement can offset the absence or the limited scope of the incompatibility rules. Further additional points are given when the incompatibility rules also apply to relatives of board members.

Formal Indicator 24.

Are there rules preventing conflicts of interest of chairman/board members during their term of office?

- Yes
 - No
-

Recommendation 2000(23) clearly states that incompatibility rules should be defined to ensure that member of regulatory authorities are not under the influence of political power and do not exercise functions or hold interests in media companies/organisations (or in companies/organisations in a related sector) that could lead to a conflict of interest.

We give a low weighting to this indicator.

Formal Indicator 25.

Is there a period during which former board members are limited to work for the regulates (so-called cooling-off period)?

- Yes
 - No
-

The prospect of working, after their term of office as board members, for the regulated industry, can have an impact on the regulatory authority's independence.

The Council of Europe Recommendation 2000(23) does not refer to the need to prevent regulatory authorities' members joining companies supervised by the regulatory authority after their term of office. This is, however, seen by some authors (e.g. Larsen, A. et al. (2005)) as a way of preventing regulators being sympathetic to the views of industry, in the hope of getting a good job at a later stage. We therefore give maximum scores where the law contains rules to prevent 'revolving doors'.

The explanatory memorandum of the recommendation simply says that an obligation of confidentiality could be specified after the term, to avoid the disclosure of information on the functioning of the regulatory authority. This obligation, which of course is less stringent than an obligation not to work for a company supervised by the regulatory authority, is required in the Data Protection Directive 95/46.

Incentives for acting in line with specific interests can be given by the prospect of a certain career after a term of office. Because other factors can counterbalance such incentives (understanding of the office, culture of impartiality) we therefore give a low weighting to this indicator.

Formal Indicator 26.

How can the chairman/individual board members be dismissed?

- Dismissal not possible
 - Dismissal possible only for objective grounds listed in the law (no discretion)
 - Objective grounds listed in law, but margin of discretion. Power of dismissal given to the regulator/the judiciary
 - Objective grounds listed in the law, but margin for discretion. Power of dismissal not given to the regulator/the judiciary
 - Dismissal possible but grounds not listed in the law, or no rules on dismissal
-

Dismissal of a board member can be a way to exercise influence, as board members are more politically vulnerable if they can be dismissed. On the other hand, a situation where dismissal is not possible could give rise to concerns, as highlighted in the 2008 declaration of the Committee of Ministers, in situations where members of the board could not be held accountable and dismissed

even though they have adopted decisions contrary to national law. The rules on dismissal should therefore be defined in a way that does not allow them to be used as a means of political pressure.

According to the Council of Europe Recommendation (2000)²³, dismissal should only be allowed in a very limited number of situations that should be clearly defined: non-compliance with the rules on incompatibility, duly noted incapacity to carry out the function, or on grounds of an offence (but only in serious instances clearly defined by law). These situations should not leave a margin for discretion to the authority entitled to dismiss the board members.

Nothing is said in the recommendation and its explanatory memorandum on who should be empowered to dismiss board members. From the perspective of not allowing external pressure to be exercised at the time of dismissal, the best situation is where it is the regulator itself (the whole board) or the judicial authority who can dismiss a board member. Otherwise, dismissal could be used as a way of exercising pressure.

The risk of losing office makes it more likely that the office holder will give in to pressure. We therefore give a high weighting to this indicator.

The highest score is given to situations where dismissal is not possible or is limited to grounds listed in the law that do not leave any margin of discretion to the dismissing authority. A medium score is given where the grounds for dismissal are specified in the law but the dismissing authority has some margin for discretion. Other situations are given a zero score.

Formal Indicator 27.

Dismissal of the entire board – .

- Not possible to dismiss the entire board
 - Entire board can be dismissed
 - Not applicable (no board)
-

The explanatory memorandum to the Council of Europe Recommendation 2000(23) says that, although not specified in the recommendation, dismissal should only apply to individual members and never to the whole board. If the entire board can be dismissed, the score is therefore zero. This is a logical consequence of the fact that all the legitimate grounds of dismissal are closely linked to the personal situation or behaviour of a single individual.

The rules protecting individual board members can be bypassed if dismissal of the whole board is possible. Therefore we also give a high weighting to this indicator.

5.3.1.4 Knowledge

Formal Indicator 28.

Are requirements for professional expertise (i.e. knowledge/experience) specified in the law? For board members/chairman?

-
- Yes
 - No
-

Formal Indicator 29.

Are requirements for professional expertise specified in the law? For senior staff?

- Yes
 - No
 - Not applicable (no senior staff)
-

The knowledge or competence of the board members and staff has an impact on its ability to take appropriate decisions in the interest of the public at large, and therefore on its level of independence. The more the regulator is required to recruit members with professional expertise, the more the regulator will be knowledgeable and hence the more likely it will be to resist influence by outside sources, including from the entities that it is required to regulate. The level of competence is also justified by the complexity of the market to be regulated.

Recommendation 2000(23) of the Council of Europe specifies that, because of the specific nature and peculiarities of their missions, regulatory authorities should include experts in the areas that fall within their competence. The explanatory memorandum also explains that taking into account the different traditions and experience in member States, as well as the different composition of regulatory authorities (as mentioned above), it would be difficult to require that all the members of regulatory authorities should be experts in the field.

This is why the recommendation only indicates that regulatory authorities should include experts in the areas that fall within their competence. For the same reasons, the recommendation does not specify any professional background required for membership of a regulatory authority. Nevertheless, it would be natural that such members were experts in the audiovisual field, as well as in related areas (for example, advertising issues, technical aspects of broadcasting, etc.).

This is amply referred to in the literature (e. g. Willke, H. (2001): 150).

Knowledge is a prerequisite for behaving independently, as the ability to collect and process knowledge most likely strengthens an organisation and reduces information asymmetries. However, compared with financial aspects and direct power, the effects are more indirect. We give a medium weighting to this indicator.

We give top marks where the law explicitly foresees that the members of the highest decision-making authority and members of staff need to have a given level of professional expertise.

Formal Indicator 30.

Are requirements for qualifications (e. g. education, diploma requirements) specified in the law? For board members/chairman?

- Yes
-

-
- No
-

Formal Indicator 31.

Are requirements for qualifications specified in the law? For senior staff?

- Yes
 - No
 - Not applicable (no senior staff)
-

One of the ways to ensure that the regulator is knowledgeable is to require that the board members and senior staff have a given set of qualifications.

The recommendation 2000(23) specifies that, because of the specific nature and peculiarities of their missions, regulatory authorities should include experts in the areas that fall within their competence.

For the same reasons, the recommendation does not specify that any professional background should be required for membership of a regulatory authority. Nevertheless, it would be natural that such members were experts in the audiovisual field as well as in related areas (for example, advertising issues, technical aspects of broadcasting, etc.). In this respect, it can be noted that regulatory authorities in most cases include experts from different backgrounds, for example, media professionals, engineers, lawyers, sociologists, economists, etc.

We give a medium weighting to this indicator.

Formal Indicator 32.

Does the law foresee that the regulatory body can seek external advice?

- Yes
 - No
-

The extent to which the regulator can seek external advice has an impact on the level of its expertise. If the regulator is allowed by law to use external advice from researchers and stakeholders, this increases its level of knowledge. This in turn increases the credibility of its activities and strengthens its ability to resist external influence through its own competences (see Vatiéro, M. (2010).)

We give a low weighting to this indicator.

Formal Indicator 33.

Is the regulatory body legally obliged to cooperate with other national or foreign regulators and does it have the required mandate to do so?

- Yes
-

-
- No
-

The Audiovisual Media Services Directive requires regulators to cooperate with each other and with the European Commission.

The level of cooperation and contact with other regulatory bodies has an impact on the level of competence of the regulator. The idea is that, if regulators share information between themselves, this will increase their level of understanding and knowledge.

We give a low weighting to this indicator.

We give marks where the law explicitly foresees that the regulator must cooperate with other regulatory bodies and where they have the required mandate to do so.

5.3.1.5 Accountability and transparency

Accountability can work both ways. To be accountable to an organisation that is likely to exercise undue influence weakens a regulator, while accountability to others or the public can make it more difficult for a third party to exert undue influence. Therefore, the weighting of the following factors must take the addressees and the form of accountability into account.

Formal Indicator 34.

Does the law specify that the regulatory body's decisions need to be published?

- Yes
 - No
-

The question of whether the regulator is legally obliged to publish its decisions is an indication of whether it is required to act in a transparent manner. This question is also linked to the question of accountability since, if no one is aware of regulator's decisions, it is impossible to challenge them.

Council of Europe recommendation 2000(23) clearly states that all decisions taken, and all regulations adopted, by the regulatory authorities should be made available to the public. As the explanatory memorandum makes clear, this is key to allowing those affected by the decisions to challenge them through competent jurisdictions.

We give a medium weighting to this indicator.

Maximum points are given where the law explicitly states that decisions must be published.

Formal Indicator 35.

Does the law specify that the regulatory body's decisions need to be justified?

- Yes
 - No
-

The requirement for regulators to justify their decisions increases the transparency of the regulator. It enables the parties concerned in these decisions to understand the grounds on which they were adopted, their motivation, which serves in turn to ‘legitimise’ the decisions of the regulator. The requirement to motivate decisions is also important in the context of the legal challenge that could be brought to the decision in the context of a possible judicial review. The motivation of a decision is also ultimately important because it can show whether the decision was taken in an independent, impartial and fair manner.

The Council of Europe recommendation 2000(23) clearly states that all decisions taken and all regulations adopted by the regulatory authorities should be duly reasoned in accordance with national law.

We give a medium weighting to this indicator.

We give points where this requirement exists in the law, and no points where, conversely, the requirement does not exist.

Formal Indicator 36.

Is the regulatory body required by law to organise consultations?

- Yes, in all cases (which have a direct or indirect impact on more than one stakeholder)
 - Yes, but only in cases specified by law
 - No
-

Formal Indicator 37.

Is the regulatory body required to organise these consultations as open or closed consultations?

- Open consultations
 - Closed consultation
 - No consultations required
-

The obligation for regulators to organise consultations is an indication of whether the regulator needs to act in a transparent manner by seeking external views before it adopts its decisions.

There is no requirement to organise public consultations in the Council of Europe recommendation 2000(23), but this requirement exists in other sectors, such as the telecoms and energy sectors. In the telecoms sector, the Framework Directive 2002/21 foresees that regulators must organise public consultations in the context of the adoption of certain decisions that could have a significant impact on the relevant market. The directive gives considerable detail about such requirements as the publication by the regulator of its consultation procedures and the results of its consultations.

The obligation to organise consultations increases the transparency of the decision-making process of the regulator. We give a medium weighting to this indicator.

Maximum scores are given where the regulator is required by primary or secondary legislation to give an opportunity to comment on all decisions that have a direct or indirect impact on more than one market player. Fewer points are given if the regulator is obliged to organise consultations for some decisions. No points are given if the law does not specify that the body needs to organise consultations.

Additional points are given if the consultations are open to all stakeholders.

Formal Indicator 38.

Is the regulatory body subject to a reporting obligation and is it specified in law?

- Yes, the reporting obligation is specified in law and is addressed to the public at large (including public bodies)
 - Yes, the reporting obligation is specified in law and is limited to public bodies only (e. g. parliament and/or government)
 - No
-

One of the main ways to ensure that the powers given to regulators are sufficiently counterbalanced is to ensure that the regulator is obliged to report on its activities, by for instance publishing periodic reports.

Recommendation (2000)23 of the Council of Europe specifies that that regulatory authorities should be accountable to the public for their activities and should publish regular or *ad hoc* reports.

We give a medium weighting to this indicator.

Top marks are given in situations where the regulator must report to the public at large, because this is a way to ensure the transparency of their activities. According to the explanatory memorandum, this is the corollary of the obligation of regulatory authorities to act solely in the public interest.

Formal Indicator 39.

Does the law specify a mechanism of *ex-post* control by a democratically elected body (e. g. approval of annual report by the parliament or a political/public debate, with participation of the body)?

- . Yes
 - . No
-

The reporting obligation (see above) goes hand in hand with the fact that the regulator is controlled *ex-post* by a democratically elected body.

Recommendation (2000)23 clearly specifies that that regulatory authorities should be subject to democratic control, without specifying by whom and how the supervision should be organised. The regulations on supervision should be clearly defined in the laws applying to them. It also specifies that supervision should be limited to the lawfulness of the regulator's activities, and the correctness and transparency of their financial activities. The supervision of the legality of the activities can only take place *a posteriori* to prevent any forms of censorship.

It is interesting to note that the Electricity Directive 2009/72 only allows for 'parliamentary supervision' in accordance with the constitutional laws of the Member States.

Formal supervision, even if taking effect *ex post*, prevents the regulatory body from using its powers in an unlawful manner. We give a high weighting to this indicator.

We judge that the independence of the regulator could be undermined if this supervision is not carried out by a democratically elected body, as the control could be less impartial. Therefore, we give marks to the situation where the law specifies a mechanism of *ex-post* control of the activities of the regulator before a democratically elected body (such as the parliament).

Formal Indicator 40.

Is an appeal procedure against the decisions of the regulatory body foreseen in the law?

- . Yes, in all circumstances and before an external court/administrative tribunal
 - . Yes, in all circumstances but only before an independent body with no further appeal before a court/administrative tribunal
 - . Yes, but in some circumstances only and before an external court/administrative tribunal
 - . Yes, but in some circumstances only and only before an independent body (with no further appeal before a court/administrative tribunal)
 - . No
-

If the law foresees that the regulator's decision can be reviewed by a jurisdiction that is independent of the parties to the case, this increases the level of accountability of the regulator. If its decisions can be challenged, this can serve to increase the quality of the regulator's decisions.

Recommendation (2000)23 of the Council of Europe specifies that all decisions taken by the regulatory authorities should be duly reasoned and in accordance with national law, and should be subject to review by competent jurisdictions, according to national law. All those that are affected by these decisions should be able to challenge them through the competent jurisdictions. It does not specify whether the concept of a competent jurisdiction can encompass bodies other than courts.

In the telecoms sector, the Framework Directive 2002/21 explicitly foresees that the appeal can be brought before a body other than a court, provided that it is independent of the parties involved and its decision can be appealed before a court.

In the energy sector, the Electricity Directive 2009/72 goes a step further in specifying that the decisions must be appealable before a body independent of the parties involved and of any government.

In the field of data protection, the Data Protection Directive is stricter, as it foresees that decisions of the supervisory authority can be appealed against through courts.

We do not take into account the fact that the decision can be reviewed by the regulator itself, as we consider that the regulator is party to the decision, and this cannot be a mechanism of control of the regulator's activity.

We give a high weighting to this indicator.

We give top marks in situations where the law specifies that all of the decisions of the regulator can be appealed in all circumstances, before an external court/administrative tribunal (or before an independent body, provided its decisions can be appealed before a court). We give fewer points where the regulator's decisions can be appealed in all circumstances but only to an independent body that cannot itself be appealed before a court. Fewest points are given where only some of the regulator's decisions can be appealed, and no points at all where this is not foreseen at all.

Formal Indicator 41.

What are the accepted grounds for appeal?

- Errors of fact and errors of law (i.e. the merits)
 - Errors in law only
 - Errors of fact only
 - Not applicable (no appeal procedure exists)
-

The types of grounds that are accepted in the appeal are important in assessing the level of control that can be exercised on the regulator. If the appeal body can assess errors of fact and errors of law in the decision, this means that there is a greater control of the decision taken, which in turn means that the regulator is more accountable.

This is reflected in the telecoms sector as the Framework Directive 2002/11 specifies that the merits of the case must be taken into consideration.

We give a low weighting to this indicator.

We give top marks where all aspects of the case can be reviewed (the motivations in law as well as the factual context). Obviously, fewer points are given where only errors of law, and errors of fact, can be considered during the process of review of the decision.

Formal Indicator 42.

Is external auditing of the financial situation foreseen in the law?

- Yes
 - No
-

The existence of an external audit mechanism of the regulator's financial situation is an important mechanism for making sure that it is functioning in an appropriate manner, i.e. to make sure that it is spending money correctly in light of the tasks that it needs to fulfil.

Recommendation (2000)23 of the Council of Europe allows for the supervision of regulatory authorities with respect to the lawfulness of their activities and the correctness and transparency of their financial activities. It explicitly foresees that control of the financial arrangements can take place *a priori*, but it does not particularly encourage countries to put in place financial auditing mechanisms.

Because auditing has an impact on future budget plans and exposes the effectiveness of the regulator's use of resources, the auditing obligation has a considerable effect on the efficiency of the regulatory body. We give a medium weighting to this indicator.

We award points where a requirement for external auditing is foreseen in the law.

5.3.2 Justifications – *De facto* ranking tool

5.3.2.1 Status and powers

De facto Indicator 1

Has the act on the status of the regulatory body been modified in a way that has reduced its tasks and powers?

- No
 - Yes
 - Not applicable (not set up as separate body)
-

De facto Indicator 2

Has the governing law of the regulatory body been modified to influence a particular case/conflict?

- No
 - Yes
-

These indicators correspond partly with the identified essential characteristic that a *clear mandate should be given to the body by public law*. Beside the requirement that the regulatory body should have been granted a clear mandate in the first place, this mandate should also remain stable. A reduction of the tasks and powers, or even a case-specific exertion of influence by amending the underlying legal framework, is considered to be negative in regard to the *de facto* ability to resist external influence.

Any reduction of the tasks and powers might be a sign for exerted influence (although the multitude of reasons for changes or influence might naturally also contain reasons that arise from causes that are not related to the exertion of influence). Similarly, any change of law to influence a particular case/conflict diminishes the ability of the body to deal autonomously with the particular case, especially because the changing of a law shows that powers lie outside the regulatory body (i.e. is in political hands). Both the indicators have been attributed a medium weighting.

De facto Indicator 3

Have the formally granted powers (policy-implementing powers and third party decision-making powers, excluding sanctions) been used?

- Yes, for all types of powers and in all instances
 - Yes, but not for all types of powers or in all instances
 - No
-

This indicator is a compliance indicator reflecting the *de facto* situation of formal indicator 3.

If all powers have been used, this suggests that the body is sufficiently autonomous vis-à-vis the market players to be able to exercise its powers efficiently. If the body does not use its powers in all instances or does not use them at all, this indicates possible independence or efficiency flaws.

The indicator is attributed a medium weighting.

De facto Indicator 4

How does the regulatory body supervise whether the rules are correctly applied by the regulatees?

- Through monitoring according to a set strategy and/or methodology
 - Through *ad hoc* monitoring/monitoring after complaints, with concrete procedures to follow complaints
 - Through *ad hoc* monitoring/monitoring after complaints, without concrete procedures to follow complaints
-

If the body supervises how market players follow the rules by monitoring according to a set strategy and/or methodology, this shows that the body is gathering comprehensive information on the elements of the market situation which it is obliged to monitor. This indicates that all operators are observed in an equal manner and that the body is not acting for information collection purposes in a biased manner.

This indicator is a compliance indicator in the literature and was identified as a best practice characteristic following the in-depth analysis (see 4.3.1).

Fewer points are given if the monitoring is done only after complaints or in an *ad hoc* manner. Fewer points are given if the body does not need to follow-up on complaints according to set procedures.

The indicator is attributed a medium weighting.

De facto Indicator 5

Has the regulatory body received instructions by a body other than a court in individual cases/decisions or in relation to its policy-implementing powers in the last five years?

- No
 - Yes
-

If instructions have been sent in the last five years to the body by another entity, such as the government or the minister, it shows that this other entity has actually sought to exert influence over the body. Although it does not mean that the instructions have been followed, this clearly undermines the ability of the body to take decisions autonomously.

The ability to resist instructions has also been identified as an essential characteristic. Thus, the *de facto* use of the possibility to instruct the regulatory body reflects the risk of the exertion of influence.

Furthermore this indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 7.

The indicator is attributed a medium weighting.

De facto Indicator 6

Have the decisions of the regulatory body been overturned by a body other than a court/administrative tribunal in the last five years?

- No
 - Yes
-

If a body other than a court or an administrative tribunal has overturned some of the decisions of the body in the last five years, external influence has clearly been exercised up to the effect of negating the autonomy and power of the body to take decisions.

The capability of the regulatory body not to be overturned has been identified as an essential characteristic..

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 8.

The indicator is attributed with a medium weighting.

De facto Indicator 7

Has the regulatory body taken adequate measures in cases of material breach by an AVMS/TVwF provider?

- Yes
 - No
 - Not applicable (no material breach has occurred)
-

De facto Indicator 8

Has the regulatory body taken adequate sanctions in cases of continued breach by an AVMS/TVwF provider?

- Yes
 - No
 - Not applicable (no continued breach has occurred)
-

De facto Indicator 9

In the event of several breaches by different AVMS/TVwF providers, have even-handed/comparable measures been taken against all providers?

- Yes
 - No
 - Not applicable (no continued breach has occurred)
-

The fact that the body has taken adequate measures whenever there has been a material breach (and whenever there has been a continued breach) of the existing rules, shows that it seeks to implement the rules regarding the AVMS/TVwF Directive efficiently. The lack of adoption of adequate measures could be a sign that the regulator is under the influence of a market player or of another external stakeholder, or that it does not feel sufficiently strong to implement its powers. Similarly, inconsistencies in the application of the rules could also be an indication of outside interference. However, these practices – which reveal an inefficient functioning – cannot always be explained by a monocausal explanation, since they could – and most likely do – also stem from leadership issues, a lack of expertise, a lack of internal resources or insufficiently clear sanction powers. Nevertheless an inconsistent and inadequate behaviour where there are breaches suggests potential weak areas, or even exerted influence in regard to the autonomy of the regulatory body.

Furthermore the indicators are conditional compliance indicators reflecting the *de facto* situation of formal indicators 9.

Additionally the relevance of the indicators can be strengthened by the findings of the stakeholder survey, which show a correlation between the perception of the stakeholders that a regulator operates impartially and the fact that it adopts stringent sanctions against breaches of legal provisions.

The indicators are attributed a medium weighting.

De facto Indicator 10

Does the regulatory body effectively decide on internal organisation and human resources?

- Yes
 - No
-

This *de facto* indicator maps the formal indicator on the power to decide on internal organisation and human resources (see formal indicator 10). If the body does not decide on its internal organisation and human resources, it is dependent on the decision of another entity, which in turns reduces its level of autonomy.

The indicator is attributed a medium weighting.

De facto Indicator 11

Does the regulatory body have a sufficient number of staff to fulfil its tasks and duties?

- Yes
 - No
-

A body which does not have a sufficient number of staff is most likely not in a position to carry out its tasks and duties in an efficient manner. Although this does not mean that the regulatory

body is not independent, it shows that it will probably not be able to perform its task efficiently and may have to rely on (possibly biased) external actors and is therefore vulnerable in regard to undue influence.

The indicator is attributed a medium weighting.

5.3.2.2 Financial autonomy

De facto Indicator 12

Is the regulatory body's budget sufficient for it to carry out its tasks and duties?

- Yes
 - No
-

If the regulatory body does not have a sufficient budget, its operational capacity is undermined. It might therefore not be able to carry out its tasks in an autonomous and efficient manner. When a body is dependent on the state budget, if it is under-financed or if it does not receive its foreseen budget, this could mean that the political authorities are not willing to allow the body to function properly. The indicator has been identified as an essential characteristic (see 4.3.2)

This is the most important *de factor* indicator of the financial autonomy and is therefore attributed a high weighting.

De facto Indicator 13

Is the regulatory body's budget sufficiently stable over time?

- Yes
 - No
-

The stability of the budget over a number of years contributes to the good functioning of the regulatory body. It enables it to develop long-term policies and to act according to them, implementing them over a number of years. If the funding of the body has not been stable over the past years, or if it will not be stable in the coming years, this might have a negative impact on the ability of the body to carry out its tasks.

The indicator is attributed a medium weighting.

De facto Indicator 14

Does the regulatory body have sufficient autonomy to decide on which tasks to spend its budget?

- Yes
 - No
-

It is not sufficient for the regulatory body to receive adequate funds; it must also be able to decide by itself how to spend its allocated budget, in line with the general policy objectives that have been decided. When this possibility is not available to the regulatory body, it is damaging to the autonomy of the regulatory body.

The indicator is attributed a medium weighting.

De facto Indicator 15

Is the regulatory body under pressure to compensate a lack of stable funding from the state or from the market, by imposing fines or requesting *ad-hoc* financial contributions from the state?

- No
 - Yes
 - Not applicable
-

It is important that the sources of funding (whatever they are) are sufficiently secure. If they are not, the body may need to find other sources of income by soliciting market players or other public authorities. This will weaken the regulatory body, as it could become dependent on these external stakeholders. If it resorts to fines, it could be tempted to impose them in unjustified cases.

The indicator is attributed a medium weighting.

5.3.2.3 Autonomy of decision makers

De facto Indicator 16

Are political majorities or political power structures reflected in the composition of the highest decision making organ?

- No
 - Yes
 - Impossible to say
-

If political majorities or political power structures are reflected in the composition of the highest decision making organ, there is a risk of dependency from these majorities or structures, and the body will have more difficulties to behave efficiently and autonomously from any external influence.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 16.

The relevance of this indicator is at least indirectly strengthened by the findings of the stakeholder survey. From this, the correlation could be derived that when the decisions of the regula-

tory body are perceived to be made by the highest decision-making organ, rather than the government or a political party, the stakeholders have a higher perception of impartiality.

The danger of a reflection of political majorities within the highest decision-making organ was also reported to the study team in the in depth analyses. A direct representation of the political majorities in the highest decision making organ could lead to situations in which the general political discussions of the parliament are reflected in the highest decision-making organ.

The indicator is attributed a medium weighting.

De facto Indicator 17

Have there been cases where the appointer failed to appoint the nominated candidate?

- No
 - Yes
 - Not applicable (no nomination stage/no obligation to appoint nominees)
-

In countries where board members are appointed following a two stage procedure (nomination, appointment) and where the appointer cannot appoint any other candidate(s) than those who have been nominated, any failure by the appointer to appoint the nominated candidate could possibly reveal a will to counter the nomination and thereby to exert influence unduly on who will be appointed.

The indicator is attributed a medium weighting.

De facto Indicator 18

Have board members/chairman resigned before their term of office due to political conflicts?

- No
 - Yes
-

Early resignations due to political conflicts can be the consequence of possible pressures exercised on board members preventing them to carry out their duties in full autonomy.

The strong influence of the perceived early resignations of the members of the highest decision-making organ can also be derived from the correlations found in the stakeholder survey (see 3.4.2.3). There are links between the perception of the ability of the regulatory body to carry out its obligations in an impartial manner and the absence of early resignations.

The indicator is attributed a medium weighting.

De facto Indicator 19

Have one or more board members been dismissed for non-objective grounds in the past five years?

- No
 - Yes
-

As found in the essential characteristics (see 4.3.3) from a formal point of view, board members should only be dismissed in a very limited number of situations that do not leave any margin of discretion to the dismissal authority, otherwise dismissal could be a way to exercise influence. This *de facto* indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 26.

The indicator is attributed a medium weighting.

De facto Indicator 20

Has the entire board been dismissed or otherwise replaced before the end of term in the last five years?

- No
 - Yes
 - Not applicable (not possible)
-

If the entire board has been dismissed/replaced early, this denotes a serious interference in the autonomy of the regulatory body. It is widely recognised that only individual members can be dismissed for objective reasons listed in the law.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 27.

The indicator is attributed a medium weighting.

5.3.2.4 Knowledge

De facto Indicator 21

Do board members/chairman have adequate qualifications and professional expertise to fulfil the duties of the regulatory body?

- Yes, all
 - Yes, a majority
 - No
-

De facto Indicator 22

Do senior staff have adequate qualifications and professional expertise to fulfil the duties of the regulatory body?

- Yes, all
 - Yes, a majority
 - No
 - Not applicable (no senior staff)
-

These two indicators are conditional compliance indicators mirroring formal indicators (see 28, 29) and reflect the extent to which the highest decision-making organ and the senior members of staff *de facto* have the necessary level of expertise and qualifications to take informed decisions. The more the body is knowledgeable, the more likely it will be to resist influence or partial information from external sources.

These indicators are strengthened by the findings of the stakeholder survey, in which a correlation was found between the adequacy of the qualifications and expertise of the staff and the perception that the regulator operates in an impartial manner (see 3.4.2.7). There is also an indirect link between the perception that the regulator is an attractive career step and that the regulator carries out its duties in an impartial manner (3.4.2.8).

Furthermore, the adequacy of the knowledge and qualification of the members of the highest decision making organ and staff was identified as best practice characteristics (4.3.4).

Both indicators are attributed a high weighting.

De facto Indicator 23

Does the regulatory body seek external advice when needed?

- Yes
 - No
-

A regulatory body must be able to resort to external sources of expertise and knowledge when needed. If it does not have this possibility, there is a risk that it could take decisions without sufficient knowledge, or on the grounds of asymmetric information. This indicator is also a conditional compliance indicator reflecting the *de facto* situation of formal indicator 32 and was identified as a best practice characteristic.

The indicator is attributed a medium weighting.

De facto Indicator 24

Does the regulatory body cooperate with other national/foreign regulators in charge of audio-visual media regulation?

- Yes
 - No
-

Cooperation with other bodies increases the level of knowledge of the regulatory body. It enables the sharing of experience and best practice, especially, but not limited to, emerging issues. This helps the body to work in an autonomous and efficient manner.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 33.

The indicator is attributed a medium weighting.

5.3.2.5 Accountability and transparency

De facto Indicator 25

Does the regulatory body publish its decisions (together with motivations)?

- Yes, all decisions (and motivations) are published
 - Yes, but only some decisions are published
 - No
-

If the body publishes its decisions and motivations in all cases (except confidential elements) this shows that the body is transparent in all its acts, thereby enhancing its level of accountability. Obviously, if only some of the decisions are published this reduces the level of transparency of the body.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicators 34 and 35. The publicity of the regulator's decisions has been identified as an essential characteristic 4.3.5.

Additionally, the importance of the publication of the decisions is underlined by the results of the stakeholder survey, which showed that the accessibility of decisions of the regulatory body is positively connected with the perception of the impartiality of the regulatory body.

The indicator is attributed a medium weighting.

De facto Indicator 26

Where are the decisions published?

- On the websites (and eventually other official channels)
 - In the official journal or other official channels (but not on the website)
 - Not applicable (decisions are not published)
-

It also matters where the decisions are published – the more easily accessible they are, the better the level of transparency.

The indicator is attributed a low weighting.

De facto Indicator 27

Does the regulatory body organise consultations?

- Yes, in all cases (which have a direct or indirect impact on more than one stakeholder)
 - Yes, but only in cases specified by law
 - No
-

Consulting stakeholders is an important way to enhance the transparency of the decision-making process. It enables stakeholders to be aware of forthcoming initiatives and to provide their input so that the body can act by taking into account all interests at stake

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 36. The relevance of the organisation of consultations has also been pointed out in the stakeholder survey, which showed that the announcement and conduction of public consultations in an inclusive fashion correlate with the perception of the impartiality of the regulator.

The indicator is attributed a medium weighting.

De facto Indicator 28

Does the regulatory body organise these consultations as open or closed consultations?

- Open consultations
 - Closed consultations
 - No consultations
-

For transparency purposes, it is better for a regulatory body to organise open consultations, whereby all interested parties are invited to submit comments. Closed consultations do not necessarily provide as much transparency on the forthcoming initiatives and do not necessarily give all the parties that could be affected (even indirectly) by the initiative the opportunity to provide

their feedback. This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 37. Furthermore, the organisation of open consultations is considered a best practice characteristic (see 4.3.5).

The indicator is attributed a medium weighting.

De facto Indicator 29

Does the regulatory body publish responses to consultation?

- Yes
 - No
 - Not applicable (no consultations are organised)
-

If a regulatory body publishes the results (except if the respondent requests confidentiality) of its consultations, this shows a large degree of transparency.

The indicator is attributed a low weighting.

De facto Indicator 30

Does the regulatory body explain the extent to which responses are taken into account in final decisions?

- Yes
 - No
 - Not applicable (no consultations are organised)
-

Where consultations are organised, it is important for transparency purposes for the regulator to explain in its final decision, the extent to which the responses have been taken into account and why some of the positions or remarks have not been followed. This contributes to the good understanding and acceptance of the body's decision.

The indicator is attributed a medium weighting.

De facto Indicator 31

Does the regulatory body publish periodical reports on its activities?

- Yes
 - No
-

The fact that a regulatory body publishes periodical reports on its activities creates strong transparency of its activities and is one way to ensure accountability to the public. It enables the public to have an overview of whether the body has acted in the public interest.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 38.

The indicator is attributed a medium weighting.

De facto Indicator 32

Has the regulatory body been assessed/controlled by a democratically elected body in the last five years?

- Yes
 - No
-

Ex post control by a democratically elected body, e.g. the parliament, is an essential way to make sure that the body is accountable for its activities. This control can only concern the lawfulness of the activities and the correctness and transparency of its financial activities after they have taken place. This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 39, and has been considered a best practice characteristic (see 4.3.5) From the stakeholder survey, the general conclusion could be drawn that the perception of transparency is strongly connected with the perception of the regulator operating in an impartial manner (see 3.4.2.5).

The indicator is attributed a medium weighting.

De facto Indicator 33

Have there been cases where the report (or other form of approval by a democratically elected body) has been refused in the last five years?

- No
 - Yes
 - Not applicable (no requirement to have a report approved by an external body)
-

In countries where the annual report of the regulatory body has to be approved by an external body, and where the report has always been approved, this indicates that the body is performing as expected. This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 39.

The indicator is attributed a medium weighting.

De facto Indicator 34

Have the decisions of the regulatory body been overturned by a court/administrative tribunal in a significant number of cases?

- No
 - Yes
 - Not applicable (not possible)
-

If in a significant number of cases the decisions of the regulatory body have been overturned by a court or an administrative tribunal, it is likely that its decisions are not correctly motivated, are not based on the correct grounds, or that formal procedures have not been respected. ‘Overturning’ also covers cases where the decisions are repealed but not replaced.

This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 40.

The indicator is attributed a medium weighting.

De facto Indicator 35

Is the regulatory body subject to periodic external financial auditing?

- Yes
 - No
-

External financial auditing is an efficient way to control the correctness and lawfulness of the regulatory body’s financial activities. This indicator is a conditional compliance indicator reflecting the *de facto* situation of formal indicator 42.

The indicator is attributed a medium weighting.

De facto Indicator 36

Has auditing revealed serious financial malpractices?

- No
 - Yes
 - Not applicable (not subject to periodic external auditing)
-

If the regulatory body is subject to external periodic auditing, and if this has not revealed malpractice, this guarantees that the body is spending its money properly.

The indicator is attributed a medium weighting

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