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Keynote Speech

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Mr. Chairman,

It may surprise you to hear that, but standing here I feel as if I have died and gone to heaven. There is a special reason for that. When the Polish Broadcasting Law was being written, one of the MPs – looking at the range of powers the law was giving the National Broadcasting Council and the temptations to which this would expose its members – said: "Well, it will take angels to do the job properly". Since all of you are members, or employees, of your regulatory authorities in good standing, then you must be angels or candidate angels. So, logically, this must be heaven.

We are here to talk about the independence of regulatory authorities. Theoretically, everyone agrees, at least in the Council of Europe. Recommendation Rec (2000) 23 of the Council of Europe Committee of Ministers on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector was supported by all 46 member states. It recommends that the governments of member States "establish, if they have not already done so, independent regulatory authorities for the broadcasting sector" and extensively describes how that independence should be safeguarded.

The European Union is also making an effort to promote the idea of independent broadcasting regulatory bodies, though in a less decisive way. The original European Commission draft of the proposed Audiovisual Media Services Directive called on Member States in Article 23 b to "guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently". Recital 47 explained that the authorities should be independent of national governments as well as of audiovisual media service providers.

However, when it came to negotiating the text in intergovernmental bodies and in the European Parliament, the language changed somewhat. The draft political agreement (common position) submitted informally to the European Parliament (as distributed in April 2007) says in para. 2 of Article 23 b that

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*" (emphasis added).

Recital 46c explains:

According to the duties conferred upon Member States by the Treaty, they are responsible for the implementation and effective compliance with 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" (emphasis added).

At first glance, it looks as if the need for the existence of independent regulatory bodies is being taken for granted in the text. However, if you look more closely, it is clear from Recital 46c that Member States are free to choose whether they want to create regulatory bodies or not. On the other hand, it may be comforting that the draft implies that if there is to be a regulatory body, then it should be independent by definition.

A number of reasons are given for the creation of independent regulatory authorities. When given the right terms of reference and properly organized, staffed and supported, they should be characterized by expertise; flexibility; credibility; stability and predictability of the regulatory environment, efficacy and efficiency; public participation and transparency, as they can be more open and transparent than government departments. Ironically, one more reason why politicians sometimes like to create an independent regulatory authority is that this enables them to avoid blame for potential regulatory failures, or for unpopular decisions, when these have to be taken.

How theory translates into practice is something everyone here knows at first hand. The CoE Steering Committee on the Media and New Communication Services is collecting information on the implementation of Recommendation (2000) 23. If it decides to prepare a report, it will tell us just how well, or badly, this recommendation is being implemented by member states. I am not sure the picture will be very optimistic.

Still, even before that happens, we know that while regulatory authorities are full of angels, they are not necessarily surrounded by angels. You may be familiar with the book “Comparing Media Systems” by Daniel Hallin and Paolo Mancini. They identify three such systems in Western Europe: liberal (Northern Europe), democratic corporatist (West Central Europe), and one of polarized pluralism (Mediterranean countries). What sets them apart is the degree of advancement of political system development, including consolidation of democracy, and the level of existing or potential societal conflict, resulting from the macrostructural features of society and a country’s history. This has a direct impact on the features of a media system, including what the authors call “political parallelism”, evident especially in democratic corporatist and polarized pluralist system. Where political parallelism is high, the media – in their system of governance (including regulatory authorities), content, even audiences – reflect political and other divisions of society. This may take the form of “politics-in-broadcasting” arrangements, for example turning regulatory bodies and governance bodies of PSB into mini-parliaments, or even “politics-above-broadcasting” arrangements, with broadcasting subordinated to political control.

This is why we have found in Central and Eastern Europe that it is really impossible to write a new broadcasting law until the country has a stable and working constitution. Otherwise, it is impossible to know who should appoint members of the regulatory authorities and how, what powers they should have and where to place them in the political and institutional framework of the state. In a paper on The Influence of Politics on Broadcasting prepared by Emmanuelle Machet for your 15th meeting in Brussels in May 2002, she lists five models of appointment: by the executive (“the Northern European model”); by the legislature (“the Central European model”); by both executive and legislature (“the French model”); by the judiciary; and by social movements and groups and civil society (the German model). Each of those models is a product of the shape, quality, and traditions of the political system of each country. The paper confirms that what really matters when it comes to appointing members of regulatory authorities, and to their functioning, is not the involvement of politicians as such, because that is inevitable, but the quality of that involvement. That is determined by the quality of democracy in a particular country and by the level of existing or potential societal conflict. Where a society is at peace and united by general acceptance of the democratic rules of the game, politicians feel they can afford to use kid gloves and devise

arm's-length solutions, though with a possibility of direct intervention, if needed, usually held somewhere in reserve. Where conflict is high, they will use the iron fist.

Only a mature, consolidated liberal democracy can create the prerequisites of media independence and constitute an enabling environment for a broadcasting regulatory authority to operate in conditions of independence. A liberal democracy is a representative democracy in which the ability of the elected representatives to exercise decision-making power is usually moderated by a constitution that sets a limit on the authority of the government and emphasizes the protection of the rights and freedoms of individuals. It also places constraints on the leaders and on the extent to which the will of the majority can be exercised against the rights of minorities. Liberal democracy emphasizes the separation of powers, an independent judiciary, and a system of checks and balances between branches of government. Governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedures.

Among those laws must be one that sets up a broadcasting regulatory authority and safeguards its independence and ability to act effectively.

According to political scientists, one of the hallmarks of a mature democracy is acceptance by the power establishment of restraints on its power. Without that, the power establishment will not stomach the independence of the broadcast media, given their importance in the public debate. And if broadcasting cannot be independent, then neither can the broadcasting regulatory authority.

However, this reasoning can be reversed. To paraphrase President Kennedy, ask not what democracy can do for you, ask what you can do for democracy. Democracy is never given; it must be fought for every day. In every political system under the sun, political parties and government seek in one way or another, openly or by stealth, to extend their power and their control over areas of public life. Article 10 of the European Convention on Human Rights says that everyone, and I repeat everyone, has the right to freedom of expression and information. Broadcasting regulation should – as far as technical constraints allow – serve the individual right to freedom of expression, not political or economic monopolies on the exercise of this right. Without individual freedom of expression, there can be no democracy. This makes broadcasting regulatory authorities guardians of a crucial aspect of democracy. The laws on the basis of which you operate probably never say so in so many words, but in the final analysis your work amounts precisely to the defence and promotion of democracy.

What also makes a broadcasting regulatory authority so important is that it is the lynchpin of the public interest in broadcasting, the only element of the broadcasting landscape dedicated to upholding and promoting it. Politicians obviously have short- and long-term political interests: at worst, they want to control broadcasting in order to impose ideological and cultural hegemony on the public. Where this is the case, the opposition usually does not really mind the governing parties doing that, as long as it can do the same if it wins the next election. The result may be what I have called “parliamentary-term pluralism”, especially in public service media. During one term of parliament, you get one view, or at least one dominant view, from them. During the next term, you get another view. If you live long enough, you will have been exposed to all the views, but only one at a time. It is almost like serial monogamy – many wives, but only one at a time.

Commercial broadcasters naturally have economic interests. Public service broadcasters have their own institutional interests. They may be dedicated to their public service mission in their programming, but in dealings with the regulator, their institutional interests come to the fore.

To adjudicate all these conflicting interests, and to serve as a countervailing force against the expansionist tendencies of the State and of politicians, but also of business, the

broadcasting regulator must be impartial and dedicated to defending the public interest. To do that, and to act without fear or favour, it must be independent.

Like democracy, however, independence is not given once and for all. It must be constantly justified, reaffirmed and strengthened. In addition to those I have already mentioned, other criteria used to evaluate regulatory authorities are market performance (i.e. their impact on the performance of the markets they regulate); regulatory quality and transparency and accountability.

Why is this important? Obviously because a regulatory body is created for a purpose and it must perform its duties well. Secondly, however, because it needs friends and supporters. If it wants to be independent of politicians, it cannot always count on their good will. There is likely to be friction between the regulatory authority and political bodies. Therefore, it 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 a conflict with politicians.

Broadcasters can be won over if the regulatory authority is fair and is seen to understand their problems and contribute to good market performance, even if at the same time it has to enforce the rules. Also, when the quality of its regulation is high and when it delivers on the promise of expertise, flexibility, credibility, stability and predictability of the regulatory environment, efficacy and efficiency.

As for the general public, it can be won over with a clear commitment to the public interest, public participation and transparency, and a sense that the regulator is accountable.

It would take too long to analyse here how a broadcasting regulatory authority can contribute to market performance and display regulatory quality. I would, however, like to stress the question of transparency and accountability because that is too often neglected in the work of some of these authorities.

There are a number of questions that can be asked to assess whether a regulator is indeed transparent and accountable:

- 1) Do governing laws stipulate the objectives of regulation?
- 2) In case of multiple objectives, are there explicit priorities?
- 3) Are the objectives quantified (or stated in unambiguous terms)?
- 4) Is there a periodic evaluation procedure assessing to what extent the regulatory objectives have been met?
- 8) Does the regulator provide an explicit rule or strategy that describes its policy?
- 9) Does the regulator explain policy decisions within a reasonable amount of time?
- 10) Does the regulator disclose how each decision was reached?
- 11) Does the regulator announce explicit indications of likely future actions?
- 12) Does the regulator regularly evaluate to what extent its objectives have been achieved?
- 13) Does the regulator consult advisory committees or the industry and the public?
- 14) Is the regulator seen to listen to the views of those it consults?
- 16) Can the regulator's decision be appealed against?

Failure on any of these counts undercuts the regulator's support and reduces the respect it may – and indeed should – enjoy. Without the good will and support of the industry and the public, it will, as I have said, be more vulnerable to political pressure.

I will not go into the details of the institutional, legal and financial guarantees of the independence of regulators. I want to stress, however, that it is not just the letter of the law that matters here. Hallin and Mancini point out in their book that often the same institutional arrangements for broadcast governance produce different results in different countries. Equally important, therefore, is the political, legal, administrative and what one might call personal culture.

I have often wondered about one of the provisions of the CoE Recommendation. It says that “rules should guarantee that the members of these authorities may not receive any mandate or take any instructions from any person or body”. I can understand the first part: under the rules, no one should have the competence to give members of regulatory authorities a binding mandate or instructions. But what about the second part: how do you guard against the members taking instructions, if they are prepared to do so?

I think we need to paraphrase another document, this time the UNESCO Constitution, to find the answer: “Since dependence begins in the minds of men (and women, of course), it is in the minds of men (and women) that the defenses of independence must be constructed”.

This is why I mentioned personal culture, in addition to the political one. President Truman had a sign on his desk with the words “The buck stops here” – in recognition of the fact that he could not pass the responsibility for his decisions on to anyone else. The same applies to members of regulatory authorities: they cannot pass responsibility for their independence on to anyone else, or look for excuses as to why they cannot be independent. In the final analysis, it is their personal responsibility to be independent. It is up to them, and they can preserve their independence if they want to.

Now, all this talk about independence may appear naïve, if one fails to take into account the political realities on the ground. There are very few countries anywhere which have fully mature, consolidated liberal democracies and which have succeeded in achieving relative societal peace by reducing conflicts to a manageable level. In this part of the world, most countries have developed hybrid forms of democracy. According to political scientists, these include the following:

1. Formal democracy – no counter-elites to oppose those in power, low level of political competition;
2. Elite democracy – competing oligarchies with low political participation of the citizens;
3. Partitocrazia – monopolization of public life by political parties which exclude other social actors from decision-making processes; rule by political oligarchs often connected to economic pressure groups. This may amount to political party capture of the state, corruption and low legitimacy of the system;
4. Tyrannical majority – forces returned to power disregard the political views and interests of other political or social forces; display no willingness to compromise and accept no restraints on their power. This type of hybrid democracy is promoted by political leaders convinced of their “historic and moral mission”, in the name of which they feel they have the right to impose a direction of the country’s development on the rest of society, despite its potential opposition.

If you believe some Western political scientists, the difference between post-Communist countries and some Western European ones is more of a degree than of kind. It is enough to look especially at systems of polarized pluralism, identified by Hallin and Mancini to notice many common features. After all, “partitocrazia” is not a Polish, Czech or Hungarian term.

The question therefore suggests itself: how can a broadcasting regulatory body be independent in an environment which does not respect its independence. After all, if you remember the distinction between “receiving” and “taking” mandates and instructions, there is – as noted in the paper for your 2002 Brussels meeting – “a great variety of informal ways to exert political influence and the legal form is little indication of the intensity of the influence exercised”.

How do you guard against such situations? Obviously, there are no fail-safe methods. I have suggested in Poland – only half seriously – that people should be elected or appointed to the National Broadcasting Council only at such an age that after their term of office they could go straight into retirement, i.e. at 54 for women and 59 for men. Legally that is impossible, of course, but you can easily understand that this would relieve them of the sword of Damocles hanging over them during their term of office, i.e. of the thought of having to return to where they came from and to face the question “What did you do for us, when you had the chance?”. This dread of post-term blues is actually institutionalized in one European country, where the law says: “After the expiry of the term of his/her authority as well as in the event of its pre-term termination on the basis of his/her personal application, a [regulatory authority] member retains the right to return to his/her previous job and if this is impossible, the right to occupy another equivalent job”. Notice the not-so-subtle hint: “in the event of its pre-term termination on the basis of his/her personal application”. This means that if the member is dismissed by the appointing authority, and in that country that is very easy, then the person is on his/her own afterwards. This could be an offer to toe the line that you would think twice about refusing.

There are no fully effective legal or institutional safeguards against informal political influence. This is why I have said that defenses of independence must be created in people’s minds and the individuals concerned must want to be independent. Civil society should support such independence and give expression of its appreciation of the people who are independent.

This is a matter of fundamental importance for a very special reason. In many countries, but especially in new democracies, parts of the broadcasting law should be read not so much as a description of an existing situation, but as a statement of intent, a set of goals to be achieved fully over time, in the process of the maturation of democracy.

However, the strength of democracy lies solely in acceptance by citizens of, and their dedication to, the rules of democracy. Accordingly, this situation very soon turns into a race against time. What will come sooner: full observance of the law as a result of successful consolidation of democracy, or public disillusionment and cynicism in a situation when parts of the law constituting a democratic institution may be honoured more in the breach than in the observance? Such frustration and disillusionment may prove dangerous, as public opinion may not be prepared to accept forever the existence of a flawed institution. This may contribute to a more general backlash, as people realize that democracy and societal change are failing to bring the expected benefits. Such a backlash may lead to a change of political course, for example in the direction of populism or managed democracy.

All this puts a huge burden of responsibility on you personally – as guardians of democracy, as defenders of the public interest, and as guarantors of the independence of your regulatory authority without which you cannot perform the other functions. In this way, you can help win the race against time, and in so doing you will be serving your countries and societies well.

Ladies and gentlemen,

There is a difference between angels and fallen angels. Members of broadcasting regulatory authorities must do everything they can to remain angels. A great deal depends on it.

I wish you success in your consideration of these issues.