

**The Independence of Regulatory Authorities**  
**25<sup>th</sup> EPRA meeting**  
**Public version**  
**Prague, 16-18 May 2007**  
**EPRA/2007/02**  
**Emmanuelle Machet, EPRA Secretariat**

**Introduction**

"(..)It appears to me crucial for an efficient implementation of the new regulatory framework that the full independence of national regulators is made a requirement under EU law<sup>1</sup>". This recent statement of EU Commissioner Viviane Reding illustrates the recent interest of the European Commission for the topic of the independence of regulatory authorities, which seemed, until recently, mainly a matter of concern for the Council of Europe. In her speech, the Commissioner also explicitly referred to the new provision in the draft audiovisual media services directive stating that Members States have to establish and to guarantee the independence of national regulatory authorities.

The clear ranking among EPRA preferred topics for the Prague meeting also seems to indicate a renewed interest from the part of European regulators for the subject. The agitated history experienced by the new independence provision in the above mentioned draft EU directive through the various stages of the co-decision process may partly account for this interest.

The topic of the independence of regulatory authorities has never been quite explicitly treated during EPRA meetings. However, the subject has indirectly been debated in Brussels in 2002 during a plenary session dedicated to the topic of *The direct and indirect influence of politics on broadcasting*<sup>2</sup>. In addition, the issue of the independence of regulators has been present in the background of many discussions at meetings. In Naples in 2003, some 21 regulatory authorities signed a *Statement on the independence of broadcasting regulators*<sup>3</sup> aiming at highlighting some of the principles anchored in the Council of Europe's Recommendation. A round table discussion on Reform and Convergence of Regulatory Authorities in Elsinore in May 2006 also raised the question of *how a single, convergent regulatory body can be protected in terms of independence and financial sustainability and of the appropriate legal mechanisms in order to preserve financial and any other kind of independence*<sup>4</sup>.

In 2002 in Brussels, the discussion paper focused on the independence from politics and dealt with two institutional/legal arrangements with a close connection to the independence of the regulatory authorities; i.e. the provisions governing the appointment of the members and the means of funding of regulatory bodies. This approach led to the identification of various models in use in Europe, which highlighted the diversity of the European broadcasting landscape but were however not necessarily positively correlated with the degree of independence.

This time, the approach has been widened in scope to reflect the complexity of the issue of independence and explore its different layers: independence from politics and market players, organizational and financial independence, formal and actual independence. The questionnaire (annexed) which was circulated to EPRA members included questions pertaining to legal instruments independence from politics and market players, organizational and financial independence, the issue of transparency and accountability of regulators (as the necessary

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<sup>1</sup> Speech at the occasion of the 20th meeting of the European Group of Telecom Regulators (ERG) of 15 February 2007 in Brussels,

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/86&format=HTML&aged=0&language=EN>

<sup>2</sup> See EPRA paper EPRA/2002/02 by the Secretariat on The direct and indirect influence of politics on broadcasting: [http://www.epra.org/content/english/members/working\\_papers/Brussels/EPRA200202.doc](http://www.epra.org/content/english/members/working_papers/Brussels/EPRA200202.doc)

<sup>3</sup> Statement on the independence of broadcasting regulators:

[http://www.epra.org/content/english/members/working\\_papers/Naples/Statement\\_amended\\_signed\\_en.doc](http://www.epra.org/content/english/members/working_papers/Naples/Statement_amended_signed_en.doc)

<sup>4</sup> Round table discussion, Information paper by Deirdre Kevin for the EPRA Secretariat, 23rd EPRA meeting, Elsinore May 17-18 2006.

pendant to independence), the perception of European instruments aimed at preserving the independence of regulators and current developments. In order to illustrate potential discrepancies between the levels of formal and actual independence, the questionnaire combines both a descriptive and (subjective) assessment approach.

The present paper is based on the 27 answers to the questionnaire from EPRA members<sup>5</sup>: KKRT (AL - Albania), KommAustria (AT - Austria), Communication regulatory Agency CRA (BA - Bosnia and Herzegovina), the VRM and CSA (BE - Belgium), AIEP, (CH - Switzerland), CRTA (CY - Cyprus), the Council for Radio and TV Broadcasting (CZ - Czech Republic), DLM (DE, Germany), The radio and Television Board (DK - Denmark), CMT (ES - Spain), CSA (FR - France), the Ofcom (GB - Great-Britain), the National Radio and Television Commission ORTT (HU - Hungary), BCI (IE - Ireland), The Communications Commission (IM - Isle of Man), AGCOM (IT- Italy), the Radio and Television Commission (LT - Lithuania), the Conseil des programmes (LU - Luxembourg), the National broadcasting Council (LV - Latvia), the Broadcasting Authority (MT - Malta), The Commissariaat voor de Media CvdM (NL - Netherlands), the Norwegian Media Authority (NO - Norway), The National Broadcasting Council (PL - Poland), the National Audiovisual Council (RO - Romania), The Swedish Broadcasting Commission (SE - Sweden), The National Television and Radio Broadcasting Council (UA - Ukraine).

But before starting with the analysis of the responses, it may be important to state a few general introductory remarks (or rather a series of truisms) about aspects of the topic of independence which will not be treated in detail in the paper.

#### *Absolute independence from politics and market players as a theoretical view*

It would be highly unrealistic to expect a tight waterproof line between politics, market players and regulators. Independence can only be relative. As an example, the question of whether a professional has political views is justified. Nevertheless, it is difficult to find a professional with a long experience in the field who does not have any political view. The same applies to previous professional experience in the broadcasting industry by members of regulatory authorities. It would make no sense to renounce using the expertise of professionals for the sake of absolute independence, especially considering the existence of conflict of interest/declaration of interest rules.

#### *Role played by social, economic, political environment and democratic traditions*

Maybe paradoxically at first sight, autonomy actually presupposes a series of complex interactions with the environment which constitute the prerequisites of relative independence. It would therefore be highly artificial to isolate the topic of the independence of regulators from the social, economic and political context of a particular country. In this context, Karol Jakubowicz's concept of "systemic parallelism" comes to mind, *i.e. a situation whereby media systems reflect the systemic features of the society within which they operate*<sup>6</sup>.

#### *Role played by national broadcasting landscape*

Much in the same vein, the issue of the independence of regulators is closely connected with that of the independence of broadcasters. It has been emphasized that, "*the best way of guaranteeing the independence of the supervisee is to guarantee the independence of the supervisor. The independence of the supervisor becomes then the guarantee of the independence of the supervisee but also of the efficiency and competence of the supervision*"<sup>7</sup>. This question is notably addressed in another key recommendation of the Council of Europe on the guarantee of the independence of public service broadcasting<sup>8</sup>.

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<sup>5</sup> The EPRA Secretary would like to take the opportunity to thank the members for their precious contribution to this paper. Special thanks to Susanne Nikoltchev, Karol Jakubowicz and Pawel Stepka for their very valuable help in the drafting of the questionnaire.

<sup>6</sup> Karol Jakubowicz, *Systemic Parallelism*, in the *Public Service Broadcasting Culture*, IRIS Special, EAO, 2007.

<sup>7</sup> François Jongen, *La Police de l'Audiovisuel, Analyse comparée de la régulation de la radio et de la télévision en Europe*, p. 372.

<sup>8</sup> Recommendation No. R(96) 10 on the guarantee of the independence of public service broadcasting adopted on 11 September 1996, adopted by the Committee of Ministers on 11 September 1996, at the 573rd meeting of the Ministers' Deputies,

[http://www.coe.int/t/e/human\\_rights/media/4\\_documentary\\_resources/CM/1Rec\(1996\)010&ExpMem\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/1Rec(1996)010&ExpMem_en.asp#TopOfPage)

### *Independent regulators require adequate powers*

Another important prerequisite is that broadcasting regulatory authorities should be vested adequate powers: supervision, licensing and sanction, in order to be properly independent and not merely toothless tigers. This has been recognized by the Council of Europe whose Recommendation devoted a whole section to the powers of regulators. However, the issue of the competence of regulators is a topic for itself and is thus not included in the present paper.

## **1. Legal Safeguards of Independence**

### **1.1 Rules against political interference**

#### *1.1.1 Descriptive part*

The annexed questionnaire identified 21 legal rules/mechanisms aimed at preserving the independence of regulatory authorities from political pressure classified in six categories:

- Rules pertaining to the nomination/appointment of Board/members,
- Rules on dismissal of members,
- Disqualification (incompatibilities) rules for members,
- Rules on expertise of members,
- Rules on duration/organization of mandates,
- Other rules.

The purpose of the question was not to venture into the minutiae of legal arrangements in place but rather to have a general picture of the level of rules in various countries and identify legal instruments generally considered the most important.

Basically, three categories of authorities can be identified (for more details see the table no.1 on page 14):

- Authorities with a low level of rules (less or equal to 5 instruments): Authorities from Cyprus, Denmark, Ireland, Netherlands and Sweden.
- Authorities with a medium level of rules (6 to 10 instruments): authorities from Belgium (VRM), Bosnia and Herzegovina, Czech Republic, Hungary, Isle of Man, Lithuania, Malta, Switzerland or Ukraine.
- Authorities with a high level of rules (more than 10 instruments): authorities from Albania, Belgium (CSA), France, Germany, Italy, Latvia, Luxembourg, Poland, Romania, Spain and the UK.

Considering the level of complexity of the subject and the basic information provided by the questionnaire, it is of course difficult and rather risky to draw clear conclusions from these results. It is however quite interesting to note that category 1 (with the low level of rules) is predominantly composed of Northern European countries with a long established tradition of independence. Each one of these countries also stated in the evaluation part that their traditions of independence compensate for this low level of rules. As an example, the Swedish Broadcasting Commission notes: *"From a theoretical point of view the Swedish system lacks a set of rules that secures independence. From the practical viewpoint there is no interference and it is unlikely to happen. The system with its tradition works very well"*.

On the other end of the scale (with the high level of rules), the predominant mix of "transition countries" (Albania, Latvia, Poland, Romania) and Mediterranean states (France, Italy Spain) can be remarked upon. Germany and the UK, countries which clearly do not fit into these groups however belong to the same category.

The most widespread provisions (also generally considered as key provisions concerning independence) are rule no. 18, 19, 8, 10 and 11 in the table, i.e. respectively *rules which guarantee that decisions of the RA cannot be overturned by the executive or parliament* (quoted 22 times), *rules which guarantee that no-one is in a position to give a mandate or issue instructions to members of RAs* (19 times), *rules which forbid the dismissal of members other than in cases of resignation, incompatibility, incapacity, serious violations of the law* (19 times), *incompatibility/ disqualification rules with political* (19 times) *or administrative posts*

(18 times) and *rules requiring expertise/professional experience for Board members* (19 times).

The less widespread rules concern the participation or consultation of civil society in the process of the nomination of Board members which seems to characterize only a few countries (notably Germany, Albania, Lithuania and Luxembourg). "Technical rules" dealing with conflict resolution mechanisms in case of a delayed/blocked appointment process (Latvia, the UK) are not very common either.

Last but not least, constitutional provisions have also been quoted by some countries as an important legal safeguard for the RA's independence. As an illustration, "*Art. 118 (1) of the Maltese Constitution which states that: "There shall be an Authority..." also provides for a certain safeguard for the regulator's political independence since a two-third Parliamentary majority is required to have this mandatory Constitutional obligation changed or removed"*. In Poland, the Constitution also mentions the national regulatory authority. In Germany, the Federal Constitutional Court has repeatedly stressed and upheld the independence of the German State Media Authorities. In other countries, even though such a constitutional guarantee may be lacking, political traditions may create an equivalent.

#### *1.1.2. Assessment of rules*

Nine regulatory authorities (out of the 27 respondents) consider that the level of rules in their countries with regard to the independence against political interference is not satisfactory.

Rules concerning the *appointment process of members* are most frequently quoted as the source of dissatisfaction.

Other grounds for dissatisfaction with the level of rules are the *lack of financial autonomy*<sup>9</sup>, the vagueness and the lack of respect of provisions regarding *competence/expertise of Council members, rules on the dismissal of Council members* following the rejection of the annual report by Parliament<sup>10</sup> and the recent cancellation of rules on staggered membership (Poland<sup>11</sup>).

#### *1.1.3. Culture/tradition of independence*

As pointed out by the Ofcom (GB) in its response, *a culture of independence and transparency is key to the well functioning of the system*. On the one hand, a high degree of legal safeguards aiming at preserving the independence of RAs against political pressure needs to be positively correlated with actual independence in order to fulfill its purpose. On the other hand, as mentioned previously, a strong culture of independence may compensate for a low level of rules. This brings us to the second level of independence, the actual practical as opposed to the formal one.

Six authorities, out of 27, declare that their country does not currently have a culture/tradition of independence: Albania, Belgium (CSA), Bosnia and Herzegovina, Latvia, Lithuania and Poland.

It is worth noting that the vast majority of these countries are often qualified as "transition countries" where the creation of an independent RA is a relatively new development. The case of Belgium though highlights the fact that it would be naïve to consider that traditions of independence are well established in all western countries.

### 1. 2. Rules against Independence from Market Players

Generally, the topic of independence of RAs from market players seems to be much less discussed than issues pertaining to political interference. However, the potential dangers of regulatory capture<sup>12</sup>, i.e. "*a phenomenon in which a government regulatory agency which is supposed to be acting in the public interest becomes dominated by the vested interests of the*

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<sup>9</sup> More about this in the section "Organisational and financial independence", p.6.

<sup>10</sup> More about this in the section "Transparency and accountability rules", p.11.

<sup>11</sup> Further to the recent law of December 2005.

<sup>12</sup> [http://en.wikipedia.org/wiki/Regulatory\\_capture](http://en.wikipedia.org/wiki/Regulatory_capture)

*existing incumbents in the industry that it oversees*" have often been stressed - at least in the US.

The annexed questionnaire identified seven legal rules/mechanisms, classified in two main categories, aimed at preserving the independence of regulatory authorities from market players:

- Incompatibility – disqualification rules
- Conflict of interest rules.

It is worth noticing at this point that the number of legal safeguards against the interference of market players which could be listed is rather small compared to those aiming at preventing political pressure. This seems to indicate that political interference has been a more pressing concern so far.

The most widespread provisions are rule no. 3, 7 and 1 in the table, i.e. respectively *the obligation imposed on members to disclose their interests in any company which is subject to regulation and to abstain from taking any decisions where a conflict of interest exist* (quoted 21 times), *rules on conflict of interests of staff such as civil servants rules, internal codes of ethics* (21) and *rules which provide that the position of member is incompatible with being employed by any company subject to regulation during the term of office* (20). Authorities from Italy, France, Latvia and the UK indicate that they have the highest level of rules.

Additional rules are linked to the so-called "cooling off" post-employment phase for former RA members or specific clauses in invitations to tender for frequencies.

- In France, the **CSA** notes that *"the salary of members is paid during one year following the end of their mandate"*, in order to compensate for a strict employment ban in the broadcasting sector during one year after the expiration of members mandates.
- In Latvia, the **Broadcasting Council** reports that *"invitations to tender for frequencies contain a clause warning applicants that any attempt to influence the decision of a Council member may lead to disqualification of the applicant"*.

The level of satisfaction with the rules is very high. As a rule, RAs tend to agree with the statement that the current degree of legal safeguards in their country against interference from market players is satisfactory. Only one regulator expressed dissatisfaction.

## **2. Organisational and financial independence**

### **2.1. Descriptive part**<sup>13</sup>

Arrangements for the funding of regulatory authorities are another key element in the independence of regulatory authorities. Basically, three different models of funding can be identified.

- *Main/exclusive source of funding through the State budget:*

This is the most usual system of funding of regulatory authorities in Europe. This system is notably to be found in Belgium (CSA), the Czech Republic, France, Ireland, Latvia, Poland, Romania, Switzerland (AIEP) and the Ukraine.

- *Main/exclusive source of funding through a percentage of licence fees, or advertising revenue:*

Some regulatory authorities may be financed by a percentage of the licence fee paid by all viewers in order to support public service television. As an example, the German regional authorities are mainly financed by 2% of the licence fee. Some regulatory authorities are mainly funded by the annual licence fees paid by private broadcasters or a percentage of the

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<sup>13</sup> For more details, please refer to annex no. 4.

advertising revenues of private broadcasters. This is for example the case in Bosnia and Herzegovina, Cyprus, Italy, Lithuania, Spain (CMT) and the UK.

For the UK, "Ofcom's financial independence is guaranteed by it being effectively self-financing through licence fee receipts. Ofcom does not receive any funding direct from Government as a matter of course, although it was necessary for the Government to provide Ofcom with a bridging loan in its start up phase and there are certain areas in which Ofcom receives grants in aid to discharge specific functions (e.g. funding for research activities). Ofcom is also accountable to the UK National Audit Office who act as external auditors and must sign off on Ofcom's annual report and accounts."

It is worth noticing that converged authorities usually belong to this category.

- *Funding through a mixed system:*

Some authorities such as the CvdM (Netherlands), the KommAustria, The Maltese Broadcasting Authority or the Danish Radio and Television Board are funded through a mixed system. As an example, in the Netherlands, the Commissariaat voor de Media is financed out of the broadcasting budget, i.e. the state broadcasting contribution (directly from tax revenues) and the revenues of advertising on public radio and television. Another 'source of income' are the costs that the Media Authority charges the commercial broadcasters to cover the expenses of the supervision. These costs are fixed by the Ministry. So, the Media Authority is financed by a mixed system of public and private funds.

## 2.2. Assessment of regulators on funding arrangements

Several respondents do not tend to agree with the statement that the current funding arrangements of their RA are a satisfactory guarantee against *political interference*.

It is worth noticing that the RAs which do not agree (partly or completely) with this statement are mainly or exclusively funded through the State budget. Indeed, the main drawback of this system is that public authorities are - potentially at least - in the position to use their financial decision-making power to interfere with the independence of regulatory authorities.

RAs funded through a percentage of licence fees or advertising revenue - which constitutes the highest degree of budget autonomy and guarantees financial independence from the State -, or those with a mixed system tend to consider their financing system as a satisfactory guarantee.

It is also important to distinguish between the RAs which believe that their current funding arrangements are not completely satisfactory as the lack of financial autonomy implies a potential risk of political interference which however never materialized so far (for instance Ireland<sup>14</sup>, France<sup>15</sup>, Luxembourg, Latvia) and those who declare that they currently encounter more serious problems.

In any event, it seems that where governments/Parliaments decide on the particulars of the RAs funding, a certain degree of political influence and interference is inevitable, as pointed out in the German response<sup>16</sup>. The Polish authority also reports that the budget discussion is a highly political question in Poland.

Even if budget negotiations are not misused for political pressure, it may still be difficult in certain cases to get sufficient funding that would allow regulators to fulfill their tasks set out by law as highlighted by the response of the Czech RRTV.

In contrast, all respondents tend to think that the current funding arrangements of their RA are a satisfactory guarantee against the interference of market players, including the RAs whose financing comes from a percentage of licence fees or advertising revenue.

## 2.3. Level of personal and technical resources

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<sup>14</sup> In Ireland, the assessment of funding arrangements is conducted by state officials with Ministerial sign off and is more a formality.

<sup>15</sup> In France, the CCA reports that the government may decide to reduce its budget during the year.

<sup>16</sup> "Although the funding of the State Media Authorities is guaranteed in principle by an interstate treaty (see question 2.1.2), the fact that the State legislatures decide about the details of the funding, makes a certain political influence and interference inevitable".

Many regulators complain about an insufficient *level of staff* in order to be able to fulfill all their tasks as set out in the law, as in Albania, Belgium, Cyprus, Denmark, Italy and Latvia.

Monitoring tasks seem increasingly difficult to perform owing to the explosion in the number of broadcasters and the necessary prerequisites constituted by quality technical equipment and specialized staff.

On this particular issue, the **CRA** from Bosnia and Herzegovina notes that:

*"Monitoring of the market and its evolution as well as having more qualified staff and management: information about the market, technical skills and effective management are critical for the regulated enterprise in order to manipulate the knowledge in their interest. Technique and qualified staff is key tool in performing regulatory duties and protection of independence. So far, we have been lacking essential equipment for content and technical monitoring, but this issue will hopefully be resolved this year."*

The Czech RRTV adds that *"The number of channels to be monitored and watched increased dramatically over the last years. When reality shows appeared it almost exhausted the capacity of our office. We have less than 40 people, which means that we are not able to analyze continuously even the most important programmes"*.

#### 2. 4. Organisational Structure - Converged regulators

The EPRA paper of 2002 in Brussels concluded that *"one interesting avenue for further research into the subject would be to examine whether the size of a regulatory authority has an impact on its independence from politics. As for now, proponents and opponents of convergent regulatory authorities alike claim that their respective form of organisation is the best guarantee for independence."*

The traditional arguments are well known. It has been claimed for instance that a single regulator charged with both carriage and content could effectively counteract, in terms of powers and resources, the "giant companies" it is called to regulate. It has also been noted that in many countries the level of political independence of traditional telecom regulators is lower than of broadcasting regulatory authorities, thus causing some concerns about the political independence of planned convergent regulatory body.

The majority of responses from converged regulators to the questionnaire seem however to indicate that this particular form of regulatory structure does not have any significant impact on the issue of political interference.

The Italian **AGCOM** considers that *"the nature of converged Regulator doesn't imply in itself any political interference, which depends rather on the nature of the matters such as media and telecommunication for which the regulator is responsible for"*.

For its part, the **Ofcom** (UK) believes that: *"it does not necessarily reduce the exposure to political interference, as this is something which is principally the result of appointment, transparency and conflict of interest rules, and less of the regulatory structure"*.

The **Communication Commission** from the Isle of Man reports that *"the Commission has been "converged" for 20 years, yet still has a political chairman"*.

Only the **CRA** from Bosnia and Herzegovina consider that *"Converged regulatory that replace traditional administrative bodies are more effective and efficient, because as they are highly specialized organisations and as such capable to avoid pressure from market players and traditional political powers"*.

Views seem to differ with regard to the statement according to which a convergent regulatory structure is less likely to be exposed to the interference of market players. While the Italian AGCOM and the Isle of Man Communications Commission generally disagree with the statement, the Ofcom and the CRA consider that such a regulatory structure contribute positively to reduce interference from market players.

In the **Communications Commission's** opinion: *"Regulatory action still tends to be sector specific, and therefore lobbying would only need to be sector specific to be effective"*.

For the **UK**, on the contrary: *the fact that Ofcom is converged does contribute positively to reduce interference from market players, especially those who are present in various markets. The regulator is less prone to be influenced by a particular set of players with specific interests, and there are no incentives for market players to present different messages to the different regulators depending on those interests.*

One particularity of the Ofcom, as mentioned in the Working group paper presented at the Elsinore EPRA meeting, is that it has a "unitary Board structure modelled on that of private companies –there is no single Director General and neither is there a 'Commission-type' structure". One of the aims of this structure is the "avoidance of 'fiefdoms' and 'regulatory capture' sometimes claimed as a downside of the US FCC structure".

### **3. Perception of European instruments to preserve independence**

#### **3.1. Council of Europe Recommendation No. R (2000) 23<sup>17</sup>**

All respondents but one consider that the Council of Europe's Recommendation No. R (2000) 23 is a useful instrument to preserve the independence as regulators. It is claimed that "Principles in the Recommendation, despite their non-binding character, represent a solid basis for the European and National legislator."<sup>18</sup>

Several RAs have reported about the positive role played by the Recommendation in their countries, notably Bosnia and Herzegovina, Belgium (Flemish speaking VRM), Cyprus, the Isle of Man, Poland, Romania and Spain (CMT). From the results to the questionnaire, the Recommendation seems to play a dual role. It is either used as a text of reference for drafting new laws or revising them, or as a lobbying instrument to preserve or promote the independence of regulatory authorities. As an example:

- In **Romania**, the Recommendation played a role in the drafting of Audiovisual Law no. 504/2002
- The **Italian AGCOM** considers that the Recommendation undoubtedly represents a cornerstone in the current project of law for reforming the Italian RA.
- In **Belgium**, Rec 2000 (23) was a very useful instrument at the time of the foundation of the Vlaamse regulator for the Media in 2005.
- In **Latvia**, the recommendation recently played an important role in a campaign against the proposed Radio & TV Law that would have given the Ministry of Culture licensing, supervisory and sanctioning powers over broadcasters.

#### **3.2. Audiovisual Media Services Directive**

Article 23b (1): "Member States shall take appropriate measures to establish national regulatory bodies and institutions in accordance with national law, to guarantee their independence and to ensure that they exercise their powers impartially and transparently".

(Status: Commission amended proposal, 29 March 07)

As a rule, regulatory authorities who replied to the questionnaire consider that, if it becomes law, Art. 23b (1) of the Audiovisual Media Services Directive is likely to have an impact on the independence of regulators. Even some non-EU members believe that it may contribute to influence attitudes well over the European Union borders.

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<sup>17</sup> Recommendation No. R (2000) 23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' deputies, available under:

[http://www.coe.int/t/e/human\\_rights/media/4\\_documentary\\_resources/CM/1Rec\(2000\)023&ExpMem\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/media/4_documentary_resources/CM/1Rec(2000)023&ExpMem_en.asp#TopOfPage)

<sup>18</sup> Source: Italian Response from the AGCOM.



The vast majority of respondents also consider that this would be a desirable development. As the **Ofcom** puts it: *"the adoption of this article will give a strong political signal as to the importance of the independence of regulators."*

The Italian AGCOM concurs: *"As stated in the formulation of the Commission it is a useful tool because it ensures an obligation not only to establish one body if it does not exist, but also to maintain it if already exists"*.

However, the latest developments concerning said article in the co-decision process tend to indicate that the Council's common position expected for 24 May will modify this provision substantially.

On this subject, the **AGCOM** informs that *"Nonetheless, the new text recently agreed upon by the Council and the European Parliament seems to weaken the formulation chosen by the Commission as it does not imply an obligation to establish independent authorities, but only to use the existing independent bodies where already established."*

The **Broadcasting Council** also reports that: *Latvia is at the forefront of the struggle to retain*

*Recital 47 and Article 23.b.1 of Commission's proposal for the Directive that would require independent national regulators. Latvia cannot understand why there is at worst so much resistance from Member States and at best indifference. The current proposal from the German presidency has practically removed this requirement. For example, this is the Presidency's revised version of the original Recital 47 (now 46.d), which gives MS the option to have independent regulators or not.*

*(46d) 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. This discretion includes the choice to supervise the application of this Directive through independent national regulatory bodies. Where this option is chosen, regulatory bodies 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."*

The latest available version of this recital<sup>19</sup> indicates a further rewriting of the text:

*(46c) 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. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.*

### **3. Accountability and transparency mechanisms<sup>20</sup>**

As highlighted by the explanatory memorandum of the Council of Europe Recommendation, a logical corollary to their duty to act exclusively in the public interest is that regulatory authorities should be accountable to the public.

The questionnaire listed four of these mechanisms aiming at accountability and making RAs activities more transparent:

- the publication of regular reports available to the public,

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<sup>19</sup> Draft political agreement (Common Position) as submitted informally to the European Parliament, dated 30 April 2007, available on the website of Mrs Ruth Hieronymi:

[http://www.hieronymi.de/PDF%20Dokumente/doc\\_media\\_070508\\_ratstext.pdf](http://www.hieronymi.de/PDF%20Dokumente/doc_media_070508_ratstext.pdf)

<sup>20</sup> For more details, refer to table 4.

- the presentation of an annual report to Parliament,
- all decisions and regulation are open to judicial review,
- all decisions and regulations are duly reasoned,
- all decisions and regulations are made available to the public

As a rule, the vast majority of the respondents declare that all these transparency and accountability instruments are applicable in their countries; the presentation of an annual report to parliament being slightly less widespread than the other mechanisms (quoted 20 times).

Other mechanisms frequently mentioned by regulators are the organization of regular public consultations before taking decisions, formulating policies or codes (Ireland, Malta, the UK), public seminars and conferences (Malta) or the yearly publication of the intended policy and supervision activities for the upcoming year (The Netherlands<sup>21</sup>).

Only a couple of respondents reported that specific accountability and transparency mechanisms may occasionally run counter to the independence of regulatory authorities. The issue of the binding character of the annual report to the Parliament seems to be particularly sensitive in Poland and the Czech Republic.

The **National Broadcasting Council** of Poland states that according to Art. 12 of the Broadcasting Act, members of the NBC can be dismissed if both Houses of Parliament (Sejm and Senate) reject the annual report and the President of Poland accepts this rejection.

## 5. Current/pending developments

Rather surprisingly, according to the results of the questionnaire, the independence of RAs seems to be a current concern in only a relatively small number of countries, i.e. in Austria, Bosnia Herzegovina, Belgium (Flemish speaking part), Hungary, The Isle of Man, Italy, Latvia, Norway and Poland.

- In Belgium (**VRM**), *“Even at the time of the foundation of the Vlaams commissariat voor de Media – the predecessor of the Vlaamse Regulator voor Media in December 2007, the issue of the independence of the RA was a current concern”.*
- In **Bosnia and Herzegovina**, *“although there is no immediate threat at this point, constant pressures from different parties involved are always to be expected and the regulator has to be ready to react appropriately to all possible interferences and threats, of course, using legal instruments.”*

Even though the issue of independence is on the agenda of nine countries, changes are expected in only five countries: Norway, Luxembourg, Italy, Latvia and possibly Austria.

- In **Norway**, a White Paper from the government with different suggestions for establishing greater independence for the Media Authority is expected this spring.
- In **Luxembourg**, the next internal reform of the CNP granting it sanctioning power and extra human resources is in preparation.
- In **Latvia**, the Council is currently drafting a new Radio and TV law, which should minimize political influence in the appointment process. At the very least the Ombudsman will have a say in the process. One suggestion is to give only the Ombudsman the right to nominate Council members who would then be confirmed by parliament.
- In **Italy**, the draft law reforming the RA foresees a more transparent procedure for the appointment of the RA’s members, both Commissioner and President: members must be selected through an open competition.

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<sup>21</sup> The CdvM states that “Each year in October we publish our intended policy and supervision activities for the upcoming year in a letter, which will be sent to the ministry and made available to the public.”

In addition, a more severe incompatibility regime is foreseen: new criteria forbidding eligibility for members who in the year before were in charge of political elective offices or former members of another RA. Moreover, the number of members is reduced from nine to five.

Finally, the Prime Minister will have the power to revoke the board in case of inactivity of RA or violation of RA's institutive law.

- In **Austria**, according to the programme of the new government, a review of the broadcasting regulatory authority is planned. Presumably the review will take reasonable account to the EC proposal on the Media service directive.

**Table No. 1: Rules against political interference**

Rules	DE	IE	UA	AL	FR	BA	LT	DK	RO	LU	MT	SE	CZ	BE VR M	GB	IM	HU	LV	BE	NL	ES CMT	IT	CY	CH	PL	
<b>Nomination/appointment of Board/ Members</b>																										
1. Several appointment authorities			X	X	X		X		X	X					X		X		X		X	X			X	12
2. Balance between political parties in nomination process				X					X	X	X						X		X			X				7
3. Direct participation of civil society in nomination process	X			X			X			X																4
4. Consultation with civil society, non political organizations	X			X						X																3
5. Chairperson elected by Board members	X		X			X	X		X	X								X						X		8
6. Transparency rules for appointment process	X		X	X					X				X		X	X		X			X			X(1)		10
7. Conflict resolution mechanisms if delayed/blocked appointment															X	X		X								2
<b>Dismissal of members:</b>																										
8. Rules which forbid dismissal	X	X	X		X	X	X	X			X		X		X	X	X	X	X	X	X	X		X	X	19
9. Possibility to appeal to Courts against dismissal			X		X				X	X			X	X	X	X					X			X	X	10
<b>Disqualification (incompatibilities) rules:</b>																										
10. With political posts	X	X		X	X	X	X		X		X		X	X	X		X	X	X	X		X	X	X	X	19
11. With administrative posts	X			X	X	X			X	X	X		X	X	X		X	X	X	X		X		X	X	18
12. With membership of political party				X		X(2)	X		X	X	X				X		X	X	X	X		X		X	X	8
<b>Expertise /professional qualifications:</b>																										
13. Requirement of expertise/professional experience for members	X(3)	X	X	X		X		X	X		X	X		X	X	X	X		X		X	X	X	X	X(4)	19
<b>Duration/organization of mandates:</b>																										
14. Rules which limit the possibility to renew the mandate	X		X	X	X	X	X						X		X			X		X				X	X	13
15. Rules on staggered membership of the board			X	X	X										X			X	X					X	X	6
16. Different term than pol. institutions involved in appointment			X	X	X								X		X	X	X				X	X		X	X	10
17. Swift replacement of members in case of vacancy	X				X		X		X	X								X	X			X	X	X	X	10
<b>Other rules:</b>																										
18. RA decisions cannot be overturned by executive/parliament	X	X		X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	22
19. Prohibition to give a mandate /issue instructions to members	X		X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	19
20. Prohibition of making statements/undertaking action likely to prejudice independence of their functions during mandate		X		X	X	X(5)	X		X				X	X	X	X			X		X	X	X	X(6)		13
21. Confidentiality rules for former members in "cooling-off period"				X	X									X	X				X		X			X		7
22. Other					X(7)					X(8)	X											X				5
TOTAL	12	5	10	14	14	10	9	3	13	11	9	3	10	8	15	7	10	12	11	5	11	12	5	10	15	

(1) PL: Transparency rules for appointment process are applied only to both chambers of Parliament.

(2) BA: The Communications Law of BiH forbids membership in the bodies of the political parties, not the parties per se.

(3) DE: Director/President Yes, Members of council in some Federal States

(4) This requirement is rather general (Art. 7.1 of Broadcasting Act): members shall be appointed from amongst persons with a distinguished record of knowledge and experience in mass media.

(5) This is prescribed in the CRA Code of Ethics and the Council's Rule of Procedure, and the existence of the Code of Ethics is prescribed by the Communications Law.

(6) There is general ban based on Art. 214 of the Constitution of The Republic of Poland: "A member of the National Broadcasting Council shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his function"

(7) FR: The number of members of the Board, the duration of their mandate (6 years) and the fact that they can't be reappointed strengthen the CSA's independence

(8) LU: The CNP has an internal regulation concerning its internal mode of functioning.

Please note for Germany: Due to the fact that there are 14 regional media authorities and 14 Media acts which vary with regard to the detail, the answers in the tables can only reflect a general tendency. Please also note the existence of "Special cases" such as Austria or Norway. KommAustria is an authority directly subordinate to the Federal Chancellor. As regards its external business practices, it is an autonomous authority. The Federal Communications Board (BKS) which is the appellate authority regarding broadcasting regulation is an independent body. In Norway, the Norwegian Media Authority is a regular administrative agency under the Ministry of Cultural and Church Affairs. The Authority does not have a board.

**Table No. 2: Rules against interference from media players**

Rules	UK	MT	PL	IE	RO	BE	UA	CZ	AL	DK	LT	BE CSA	BA	CH	DE	NL	LU	IT	CY	FR	IM	HU	LV	ES	SE	
<b>Disqualification rules (Incompatibilities)</b>																										
1. Specific employment ban	X	X	X		X	X	X	X	X	(2)	X	X	X	X	X	X		X	X	X		X	X	X		20
2. General employment ban	X		X	X(1)	X		X							X	X	X		X	X	X		X	X	X		11
<b>Conflict of interest rules:</b>																										
3. Disclosure of interests	X	X		X	X	X		X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X		21
4. Gifts or benefits	X	X		X	X	X	X		X	X		X	X	X				X	X	X	X	X	X		X	17
5. "cooling off period" post RA	X	X	X	X					X									X	X	X		X	X	X		10
6. Rules for relatives	X		X	X			X	X	X	X	X		X	X				X	X	X	X	X	X	X	X	17
7. conflict of interests of staff	X	X	X(3)	X	X	X	X	X	X	X		X	X			X		X	X	X	x	X	X	X	X	21
8. Other															X(4)		X(5)	X		X(6)			X(7)			
<b>TOTAL</b>	<b>7</b>	<b>5</b>	<b>5</b>	<b>6</b>	<b>5</b>			<b>4</b>	<b>6</b>	<b>4</b>	<b>3</b>		<b>5</b>	<b>5</b>	<b>3</b>	<b>4</b>	<b>1</b>	<b>7</b>	<b>5</b>	<b>8</b>	<b>4</b>	<b>6</b>	<b>7</b>	<b>5</b>	<b>3</b>	

(1) IE: By *some* other entity (Please note qualifier)

(2) DK: No specific incompatibilities rules, but general rules about incompatibility when taking decisions. This means that informal rules would hinder market players to be members of the Board. General rules specify that members who are in conflict of interest related to specific cases must disclose this and abstain from taking part in deliberation and decisions Informal rules about gifts etc. General rules about conflict of interests regarding close relatives of members and of staff.

(3) PL: General rules on civil servants.

BCI Code on Corporate governance and ethics

(4) DE: According to Art. 20 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz) certain persons may not participate in an administrative procedure on behalf of an authority. This applies inter alia to persons who are parties to the procedure, relatives to a party, persons who are employed by a party or a member of its organs and those persons who have a direct advantage or disadvantage from the decision to be taken.

(5) LU: Internal regulation prevents sufficiently from conflicts of interest.

(6) FR: Salary of members paid during one year following the end of mandate.

(7) LV: Invitations to tender for frequencies contain a clause warning applicants that any attempt to influence the decision of a Council member may lead to disqualification of the applicant.

Please note for Germany: Due to the fact that there are 14 regional media authorities and 14 Media acts which vary with regard to the detail, the answers in the tables can only reflect a general tendency

**Table No. 3: Accountability and Transparency Mechanisms**

Accountability transparency mechanisms	IT	IE	UA	DK	LT	BA	CH	PL	NL	DE	AT	CY	FR	NO	LU	CZ	BE VRM	UK	IM	HU	LV	SE	BE CSA	MT	RO	ES	
Publication of regular reports available to the public	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X		X	24
- Annual report made to Parliament	X	X	X		X	X		X	X		X	X	X			X	X	X	X	X	X		X	X	X	X	20
- Binding Character	NO	N/A	N/A	N/A	N/A	N/A	N/A	YES	N/A	N/A	NO	NO	N/A	N/A	N/A	N/A	N/A	N/A	NO	N/A	YES	N/A	N/A	N/A	NO	N/A	
Decisions & regulations open to judicial review	X	X	X	X	X	X	X	X(1)	X	X	X	X	X	X		X	X	X	X		X		X	X	X	X	23
Decisions & regulations duly reasoned	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X		X	X	X	X	X	X	X	25
All decisions & regulations available to the public	X	X	X	X	X	X	X	X	X	X	X(2)	X	X	X			X	X	X	X	X	X	X	X	X	X	23
Other		X(3)							X(4)									X(5)				X(6)		X(7)		5	
<b>TOTAL</b>	5	6	5	4	5	5	4	5	5	4	5	5	5	4	2	4	5	6	4	4	5		5	6	4	4	

(1) PL: some decisions are exempted from judicial review

(2) AT: according to KommAustria Act, only decisions of fundamental importance have to be published

(3) IE (BCI): high level of public consultation in the formulation of BCI policies/codes

(4) NL (CvdM): each year in October we publish our intended policy and supervision activities for the upcoming year in a letter, which will be send to the ministry and made available to the public.

(5) UK (Ofcom): regular consultation with stakeholders before taking decisions, extensive research of the evidence, freedom of information Act

(6) SE: Annual report to the government.

(7) MT: the authority initiates a consultation process before issuing, reviewing or amending any of its regulations, it also organizes public seminars and conferences whenever the need arises and its decisions are always given adequate publicity.

**Table No. 4: Table of funding of regulatory authorities (EPRA members)**

	State budget	Licence fees Public/private broadcaster	% advertising revenue	Other	Setting amount	Time span	Stability mechanism
<b>AL</b>	YES	Licensing fees		Fines, admin. fees	RA foresees and administers its annual budget but it is approved by government and parliament	1 year	Indexation of annual fees of licensed radio-television operators.
<b>AT</b>	YES			"supervision fees" paid by pub. and priv. broadcasters	Max. budget determined by law (Par. 10a KommAustria Act)	1 year	Indexation of budget
<b>BE VRM</b>	YES	PSB licence fee		Fines, admin. fees	Flemish Parliament, Flemish Government, regulator	1 year	Art 176 quinquies of the Media decree guarantees a stable budget of the VRM
<b>BE CSA</b>	YES				government	5 year financial agreement	
<b>BA</b>		recurrent technical licence fees for the regulation and supervision of telecom operators & broadcasters		grants or donations, other resources	Defined by RA approved by Council of Ministers. RA budget part of the integral budget of the State institutions which is approved by The State parliament. RA's budget on a separate account.	1 year	The Law on financing of the State Institutions of BiH sets out that the Council of Ministers cannot decrease the regulator's budget more than 20%.
<b>CY</b>			0,5 % levy on advertising annual income from all radio & TV stations	fines, admin fees	CRTA in annual budget	1 year	None
<b>CZ</b>	YES				Parliament	1 year	None
<b>DK</b>	YES	PSB Licence fee			Parliament, Minister for culture	1 year	Based on 4 years media agreement, i.e. provides basic funding
<b>FR</b>	YES				RA Chairman proposes annual budget to the government, adopted by Parliament	1 year	None
<b>DE</b>		2% of the licence fee for public broadcasters	In some federal states (negligible amount in relation to revenue from PSB licence fees)	Admin fees, fines	By law: Art. 10 Interstate Treaty on Broadcasting Funding	1 year	None
<b>HU</b>	YES	Broadcasting fees paid by commercial TV broadcasters		Fines	Parliament	1 year	None

<b>IE</b>	YES			Admin fees	Government	1 year	None
<b>IM</b>	YES	YES	YES	Admin fees	RA subject to approval of Treasury and government	1 year (estimates for succeeding 2 years also set)	Three year forward looking plan
<b>IT</b>	YES 3.9 Mio EUR FY 2007		0,15 % levy on revenue of all national operators (0,2% from 2007) 61 Mio EUR FY 2007	Satellite TV authorizations & certifications	Amount from State: Parliament RA decision for industry levy	1 year	The State contribution is set by the budget law without consulting the RA. The part from the players is determined by the RA's decision, based on its own budget and three years economic document plan within the maximum amount foreseen in the annual budget law
<b>LV</b>	Yes			Admin fees	RA	1 year	None
<b>LT</b>		Licence and tender fees from private broadcasters	0.8% of advertising revenue	Other such as support funds, publishing activities etc	By law Art 47.15 law on information to the public	1 year	Law 47.15
<b>LU</b>	YES			--	RA together with Min of Communications	1 year	
<b>MT</b>	YES approx. 60%	YES (from private broadcasters)		Fines, publications, admin fees	Min of finance in consultation with Office of Prime Minister and RA	1 year	Minimum annual budget of Lm 250,000 is guaranteed through the Broadcasting Act (section 24 (1) (b))
<b>NL</b>	YES	"Government licence fee", i.e. supplement to income tax	YES	Supervision costs for commercial broadcasters	Min Education, culture & science	1 year	Indexation budget
<b>NO</b>	YES				Min of Cultural and Church Affairs	1 year	None
<b>PL</b>	YES				Parliament	1 year	None
<b>RO</b>	YES				Parliament	1 year	Long term schedule
<b>ES</b>		YES (Telecom licences)		Admin fees	By Law Telecom law 32/2003	1 year	None
<b>SE</b>	YES	PSB licence fee			Parliament	1 year	None
<b>CH</b>	YES	YES			Ministry in discussion with RA	1 year	None
<b>UA</b>	YES				Parliament	1 year	Indexation of budget
<b>UK</b>	YES	YES	YES		Her Majesty's Treasury (equivalent to Min of Finances)	4 years	Budget & funding cap agreed for 4 years