

Second Plenary Session
33rd EPRA Meeting, Ohrid, 26-27 May 2011

Effective functioning of Regulatory Authorities:

Focus on issues of Independence and Governance of Regulatory Authorities as a follow-up to the INDIREG study

Introduction & Objectives of the Session¹

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1. Background

The issue of independence of regulatory authorities has been discussed, whether directly or indirectly, during several EPRA meetings. In Prague in May 2007, a plenary session was dedicated exclusively to this topic (focusing mainly on the legal and administrative safeguards of independence) as a reflection of the renewed interest of European regulators for the subject, not least owing to the inclusion of the notion of independent regulatory authorities into the (then draft) Audiovisual Media Services Directive². The issue was also closely debated in Tallinn in May 2009 during a plenary session on transparency and accountability of regulators, where it was highlighted that these corollaries to independence also have the potential to safeguard it.

In fact, safeguarding independence seems to be a precarious, never-ending game with various factors that both enable and jeopardize it. It can never be isolated from the context in which it exists. This topic therefore does not cease to raise interest and does not lose relevance. This time, we will try to move away from the theoretical background and bring to the forefront the debate on its connection with efficient functioning and the factors of actual, *de facto* independence in light of the INDIREG study.

The INDIREG study: full title being "*Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive*", was conducted by Hans Bredow Institute for Media Research, the Interdisciplinary Centre for Law and ICT (ICRI), K.U. Leuven, the Centre for Media and Communication Studies (CMCS), CEU, Cullen International and Perspective Associates on behalf of the European Commission. The preliminary final report has been published in January 2011 and is available here:

http://www.cullen-international.com/cullen/cipublic/studies/Independence_media_regulators/Indicators_independence_efficient_functioning_AVMS_reg_bodies.htm

The publication of the final report (approved by the Commission) is pending.

¹ **Disclaimer:** *This document has been produced by the EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is a background information document aimed to facilitate and stimulate debate at EPRA meetings. It is not a comprehensive overview of the issues, nor does it purport to represent the views or the official position of the EPRA or of any member within the EPRA network.*

² See EPRA paper EPRA/2007/02 by the Secretariat on The Independence of Regulatory Authorities: http://www.epra.org/content/english/press/papers/independence_final_public.pdf

Its three general objectives are (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 Directive³.

The AVMS Directive does not contain a requirement for an independent regulatory body; but there is a requirement for efficient functioning of national regulatory bodies in the audiovisual media sector. Art. 30 of the consolidated AVMS Directive instructs:

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 implication of this provision is furthermore explained in Recitals (94) and (95):

(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 Directive 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. (...)

Art. 30 clearly does not contain a strict formal obligation for the Member States to create an independent regulatory body if one does not already exist. In fact, Member States are completely free to choose the appropriate instrument for the implementation of the Directive; however, in the light of recitals it can be construed that independent regulatory bodies are most capable of enforcing the aims of the directive in an efficient and impartial manner.

2. Independence and efficient functioning

How is independence linked to the effectiveness of regulatory authorities? Effectiveness requires that regulatory authorities are able to deploy their functions and powers in a way that ensures impact on the protection of public interest and correction of market failures as their main tasks. In theory, they should be granted enough powers and resources as well as be free from political and industry pressures in order to make that impact in a credible, committed, transparent and impartial manner.

But there is unlikely to be a universal model of independence. Regulators operate within a highly complex system that requires constant interaction with those same factors that they strive to be independent from. Furthermore, formal independence is no guarantee of actual independence – even if compliance with

³ <http://www.indireg.eu/?p=53>

formal provisions is achieved, there can be other, more or less subtle forms of interference present. Lastly, as it was emphasized during debates on this topic at earlier EPRA meetings, in addition to having the right legal and institutional framework and the right level of awareness in the society, the independence is also a matter of personal responsibility.

Acknowledging the fact that a) absolute independence is impossible and b) there is no such thing as fully effective system to safeguard the independence either from political pressure or regulatory capture, a balance should be found that would render the regulator, given the context it operates in, best equipped for efficient functioning.

In what way can the INDIREG study help regulatory authorities to attain this balance? Starting from the premise that independence is closely linked to the efficient functioning of regulatory bodies, the study identifies key characteristics of independence as the precondition for an effective implementation of the AVMS Directive regardless of the system in place. It furthermore identifies best practice characteristics that can enhance the capacity of the regulatory authority to effectively complete its tasks, which are to be applied and interpreted in the light of the country-specific circumstances.

Finally, a ranking tool has been developed whose aim is not to assess the actual level of independence, but rather to provide regulators with a tool for the self-assessment of their risk potential for the influence of external players. Two benchmarking tools have been devised, one for formal and one for *de facto* criteria.

3. Objective of the session

The objective of the session is to revisit some of the key concepts of the independence of regulatory authorities as the precondition for their effective functioning in the light of the INDIREG study, focusing on the factors that compose their actual independence. Finally, possible practical implications of the study on asserting, safeguarding and preserving the independence will be explored.

Structure of the session and possible venues for discussion

The session will start with a **keynote address** by *Sebastiano Sortino* (AGCOM - IT) on the concepts of independence and will be followed by a panel discussion.

The **first part of the panel discussion** will be dedicated to *key characteristics of a functioning independent regulatory body in the light of the INDIREG study*, focusing on the concepts of formal vs. de facto independence to be highlighted by *Michèle Ledger* (Cullen International).

It will also include presentations by *Helena Mandić*, CRA (BA) and *Marc Janssen*, CSA (BE) who will reflect on the actual state of affairs behind formal guarantees of independence in their respective countries.

Further discussion could attempt to identify some factors that determine informal independence and their impact on effective functioning. Independence implies a constant dialogue with various stakeholders.

- In what ways is independence in reality dependent on legal, administrative or political culture, custom and tradition?

- Conversely, can there be highlighted some good practices that compensate for the lack of legally imposed, formal independence mechanisms?

During the **second part of the panel discussion**, independence will be considered from the point of view of its *interdependence with the regulated industry*. An introductory note by Ross Biggam (ACT) will be followed by a debate dealing with questions such as:

- How is independence of regulatory authorities connected to the quality and effectiveness of regulatory intervention and its impact on market performance?

- What about the credibility of the regulator stemming from industry's faith in qualifications, expertise and adequacy of its staff?

- Can we say that bias diminishes with higher regulatory independence? Independence presupposes impartiality, high degree of regulatory commitment that can have a substantial impact in terms of investments, more predictability and thus certainty. Less interference from the government, too. On the other hand, is there such thing as too much independence?

- How important is industry's support for the independence of regulators?

- What about potential threats from market players (regulatory capture, asymmetric access to information...)?

The third and final part of panel discussion will deal with *possible practical implications of the INDIREG study and follow-up activities*:

- Is it perceived as a useful instrument to preserve the independence of regulators?

- In that vein, there seem to be different criteria applying to EU potential candidates and EU members: in case of EU member states, there is no formal requirement of independence, but it is one of the criteria to be fulfilled by EU candidate countries in view of future membership. How can the study's results contribute to achieving this requirement?

- Do RAs intend to use the ranking tool as an instrument to highlight their independence? Does anyone intend to for instance publish the result of the ranking tool on their website?

- Any concrete follow-up of the study by EPRA and other organizations?

The panel will be followed by a discussion with the audience.