

**34th EPRA meeting
Plenary session 2
Efficient Functioning of Regulators: Approaches to Monitoring
Brussels, 5-7 October 2011**

*Background document
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Introduction

EPRA's work programme identified the issue of "**Efficient functioning of regulators**" as a major theme for 2011. How regulators are structured, governed and funded and how they operate in practice is critical to the effective and successful performance of their regulatory functions and duties.

The plenary session in Ohrid (May 2011) explored issues of *Independence and Governance of Regulatory Authorities*. The session revisited 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. It also explored possible practical implications of the study on asserting, safeguarding and preserving the independence.

This session will look at another essential factor for the effective and successful performance by RAs of their regulatory functions and duties, namely *how they ensure the compliance with legal provisions in practice*.

Monitoring a recurrent issue at EPRA meetings

The issue of programme monitoring has been discussed on several occasions at EPRA meetings. In 1997 and 2005 working groups addressed the diversity of monitoring practices across Europe; while in 2000 and 2009 the focus shifted to more technical aspects.

Papers produced for the previous sessions highlight the great diversity between monitoring systems in Europe. This comes as a consequence of the differing remits of regulators (e.g. either for public or private broadcasters or both), but also of the size of the authorities and of the broadcasting landscapes they regulate, not to forget the inherent characteristics of the national media landscapes which may result in a higher emphasis placed on the monitoring of certain types of broadcasters or in a focus on specific monitoring activities.

Focus and structure of the plenary session

Three specific aspects will be covered, whereby the selection of the items was made to echo the leitmotifs of the plenary session taking place on the day before:

1. The *monitoring of on-demand audiovisual media services* and the specific challenges that it raises for RAs;
2. The *cooperation between RAs in Europe in the field of monitoring*. This includes examples of practical cooperation for instance in the framework of study visits or twinning programmes, exchange of experiences with regards to methodology or the technology employed but also examples of cooperation in the field of jurisdiction between regulators of the country of reception and RAs from the country of establishment.
3. *Recent developments in the field of monitoring, also including issues of methodology and technology*.

This document is based on the responses to a brief online survey prepared by the EPRA Secretariat. It compiles answers from 25 regulatory authorities: KommAustria (AT), The Communications Regulatory Agency (BA), The Flemish Council for the Media (BE), the CSA of the French Community of Belgium (BE), OFCOM/BAKOM (CH), the Council for Radio and TV Broadcasting (CZ), The Director's Conference of the Lander Media Authorities (DE), The Radio and Television Board (DK), The Catalan Audiovisual Council (ES), The Audiovisual Council of

Andalusia (ES), The FICORA (FI), The Conseil supérieur de l'audiovisuel - CSA (FR), the Media Council of the National Media and Infocommunications Authority (HU), The Broadcasting Authority of Ireland (IE), The Autorita per le Garanzie nelle Comunicazioni - AGCOM (IT), The Radio and Television Commission of Lithuania (LT), The Conseil National des Programmes (LU), the Broadcasting Authority (MT), the Commissariaat voor de Media (NL), the National Broadcasting Council - KRRiT (PL), the National Audiovisual Council (RO), The Swedish Broadcasting Authority (SE), The Post and Electronic Communication Agency of the Republic of Slovenia - APEK (SI), The Council for Broadcasting and Retransmission (SK) and The Independent Media Commission of Kosovo (XK)¹.

Additional information concerning the monitoring activities of regulators, especially on the areas monitored, may be found in the comparative tables produced by Cullen International in the framework of the INDIREG study².

The plenary session will mirror the structure of this paper.

First of all, a panel of EPRA members composed of *Prof. Wolfgang Thaenert*, DLM (DE), *Balazs Jo*, NMHH (HU) and *Lottie-Ann Lindström*, SBA (SE) will present the main features of their monitoring system, report on how they address the challenges raised by the monitoring of on-demand services and on examples of cooperation with fellow regulators in the field of monitoring. Then the three panel participants, joined by *Bernard Fruga* from AGB Nielsen Poland, will discuss on aspects of methodology and technology to ensure effective monitoring. The panel will be followed by a debate with the floor.

I. MONITORING ON-DEMAND AUDIOVISUAL MEDIA SERVICES

1.1. "Does your RA monitor ODAVMS?"

As a rule, as was hinted in the background paper for the session in Dublin³ (2008) and was confirmed by the working document for the Ohrid⁴ meeting (2011), regulatory authorities in charge of broadcasting matters are entrusted in most countries with the monitoring of ODAVMS.

The issue of the monitoring of non-linear audiovisual media services has not been decided in countries which have so far only partially (*Poland*) transposed the AVMS Directive or where transposition is still pending (*Slovenia*). In *Malta*, even if transposition has been achieved, a new legislative framework is being defined to address this new segment of broadcasting.

With regard to non-EU members, the AVMS Directive has not yet been implemented in *Norway*. EFTA countries are still negotiating with EU on adaptations and the directive has accordingly not been included in the EEA Agreement. In *Bosnia and Herzegovina*, the CRA has recently drafted a Rule on Audiovisual media services; a special chapter deals with on-demand media services and establishes a procedure of authorisation for the provision of these services. *Switzerland* has not implemented the provisions of the AVMS Directive concerning the regulation of non-linear services. However, the VOD services of the national PSB (SRG SSR) are regulated by OFCOM further to the PSB public service mandate. In *Kosovo*, on-demand services are not regulated so far.

1.2. How does your RA monitor ODAVMS?

- A first group of RAs report that monitoring relies solely on complaints ("Complaint-based only"):

¹ All references to Kosovo in this text shall be understood in full compliance with UNSCR 1244 and without prejudice to the status of Kosovo.

² Many thanks to Cullen International and Michele Ledger for their kind permission to use the tables as additional resource for the session.

³ http://www.epra.org/content/english/press/papers/Dublin/AVMS_Dublin_Plenary_paper_final.pdf

⁴ http://www.epra.org/content/english/press/papers/Ohrid/paper_session1_final_revised.pdf

The group includes the authorities from Finland, Denmark, Slovakia, Ireland, Romania, Spain (Andalusia) and Germany. It is worth noting that most countries of the group – though not all, e.g. *Slovakia* - have not introduced any obligation for ODAVMS to register.

In *Ireland*, monitoring is complaint-based with regard to a self regulatory programming code that reflects the AVMSD. Advertising complaints are reviewed by a self regulatory body that was in place prior to AVMSD. In *Bosnia and Herzegovina*, once it is implemented, the monitoring of ODAVMS will also be complaint-based.

- A second group of RAs report that the monitoring is based on ad-hoc checks in addition to examining complaints ("samples and complaint-based"):

The group includes the RAs from Lithuania, Netherlands, Belgium (CSA and VRM), Italy Switzerland and Sweden. Most countries of the group have introduced an obligation for providers of ODAVMS to register - which eases the task of identifying services.

In Italy, monitoring is based on the catalogue schedule. Programme recordings are requested from service providers only when necessary. In Belgium, the CSA is monitoring ODAVMS once a year, in particular in the area of the protection of minors. They are currently preparing a recommendation about the notion of ODAVMS. As soon as it is adopted, the new services falling under their competence will be monitored.

Random checks are, as a rule, conducted in-house.

According to the outcome of the survey, the monitoring of ODAVMS currently focus on:

- Protection of minors (e.g. Sweden, Belgium CSA, Italy).
- Advertising/product placement/sponsoring (e.g. Sweden, Belgium VRM, Italy)
- European works (Italy, Belgium CSA).

In addition to monitoring based on samples and complaints, RAs may perform (or outsource) *selective audits or studies*.

In Switzerland, OFCOM mandated the University of Zurich to conduct a study on the online service of the PSB (SRG SSR) in 2010. The University concluded that SRG SSR is fulfilling the regulations to a large extent.

- A third group of countries (France, Czech Republic) has engaged in far-reaching monitoring (sample and continuous monitoring)

The monitoring conducted by the Czech RA focused as a first step on the identification of services which have not registered with the authority even though they fulfill the registration requirements. The RA has developed specialised software which enables them to find potential ODAVMS which may fall under their competence. They also make use of external co-workers who monitor and report potential ODAVMS on the Internet. Registered ODAVMS are continuously monitored by the Council.

In France, the CSA monitors catch-up TV and VOD services as well as some platforms of user-generated content which retransmit TV programmes or which could (at least partly) fall under their jurisdiction. Monitoring is conducted continuously and by means of random checks through their monitoring department.

- A fourth group of countries has introduced a system of co-regulation for ODAVMS (UK and Hungary)

In Hungary, the new media law stipulates that platforms, such as VOD or the internet, will be supervised in the form of co-regulation. The RA favours such an approach, as they consider that self regulatory organisations such as the Association of the Hungarian Content Providers (MTE) have the means to successfully control the field, in terms of knowledge, expertise and infrastructure. The Media Council of the NMHH signed an agreement with the MTE concerning the supervision of VOD services. The MTE is responsible for supervising, sanctioning and investigating complaints launched against its members. The agreement establishes the responsibility of the MTE in monitoring the media providers' compliance with the legal regulations pertaining to human rights, protection of minors and the quotas. Media service providers, which do fall under the purview of the MTE, will be supervised by the RA.

The monitoring department is planning to use a hybrid monitoring method in this area, which is based on constant data provision by service providers on the one hand, and on standard

monitoring on the other. The Monitoring Department will download/mirror the catalogue and request for audiovisual contents.

1.3. Challenges encountered by the monitoring of ODAVMS

According to the outcome of the survey, RAs encounter different types of challenges when monitoring ODAVMS:

Challenges linked to the identification of all ODAVMS providers under their jurisdiction (e.g. Finland, Ireland, Hungary and France). The CSA points out at the difficulty to identify ODAVMS potentially falling within scope (especially those with a small-scale catalogue), in the absence of a database updated very regularly.

The Dutch RA states that regulatory authorities have a legitimate interest in prioritising their monitoring and supervision activities taking into account that the potential number of services that might need to be supervised can be immense.

Challenges linked to the interpretation of Art. 1 AVMSD (definition of ODAVMS)

The Czech RA reports on the difficulty to interpret and to apply the notion of "services in competition with television broadcasting" in practice.

The main challenge for the Dutch CvdM is to identify who is the editorially responsible service provider and how to deal with situations where different service providers are responsible for different aspects of the selection and organisation of content.

Video hosting and exchange platforms and services like YouTube constitute a special challenge, considering the trend towards increasingly professional content which may imply the editorial responsibility of channel owners or platform providers.

Challenges linked to some specific areas of monitoring

Monitoring of European works on on-demand services (Lithuania, Italy), protection of minors and the provision of general information (Germany).

Challenges linked to technical issues, such as the recording of programmes (IT, BA) or determining the detailed process for complaints and appeals (CH)

In Italy, some VOD providers have reported difficulties in keeping the recording of programmes. They claim that they cannot store the material for a long time, due to some security clauses in the licensing contracts. As Bosnia and Herzegovina mostly relies on recorded material submitted by the media service providers at the Agency's request, potential future problems could include proving whether the recorded material was authentic or available at the time claimed by the media service provider, or whether technical protection measures were in place for adult content etc.

Other challenges which were mentioned also include:

- Establishing a self-regulatory organization in the field of ODAVMS (Lithuania)
- Establishing contact with new media players, such as web media organisations (Denmark)
- Determining the respective remit of RAs where several RAs exist in the country (Switzerland)

It is planned that the Swiss Independent Complaints Authority (UBI/AIEP) will take over the task to handle complaints against online services provided by the PSB.

II. COOPERATION BETWEEN RAs IN THE FIELD OF MONITORING

Two main forms of cooperation between RAs can be distinguished:

- Exchange of experiences and best practices on monitoring:

As an example, a seminar on monitoring was organized by the Hungarian RA in the framework of Central European Regulatory Forum (CERF⁵) in Budapest.

Bilateral cooperation examples with RAs from neighbouring countries are numerous, especially, though not exclusively, in Central and Eastern Europe. The IMC from Kosovo has had

⁵ The CERF has six members (RAs in CZ, HU, RO, PL, RS, SK), for more info see: www.cerfportal.org

cooperation with the Broadcasting Council of the Rep. of Macedonia concerning monitoring methodology and the monitoring system. Their monitoring department will realise a study visit to the RA in Turkey at the end of October.

The Slovenian APEK reported that prior to establishing their system for digital recording of audiovisual content they exchanged information with the Hungarian and Croatian RAs.

In 2010, the Cyprus Radio-television Authority circulated a comprehensive information request within the EPRA network to collect information prior to upgrading their monitoring and archiving equipment.

The CAA from Andalusia reports on their regular contacts with the Catalan CAC with regard to monitoring practices. They have also have contacted the Portuguese RA.

The Broadcasting Authority in Malta mentioned exchanges with the Dutch and Cypriot RAs.

The Dutch CvdM exchanged information and views regarding monitoring and related issues with colleagues from Croatia and Norway.

The Slovenian APEK considers that it would be very useful to exchange information on monitoring on a more regular basis, especially on methodology as it should adapt to the legislative changes brought forward by the AVMS Directive.

The CSA of the French speaking Community of Belgium uses a monitoring system which was elaborated and has been installed very recently by staff members of the NRA of Morocco (HACA).

- Cooperation relating to monitoring & jurisdiction issues

The Danish and Irish RAs report on discussions with Ofcom in relation to interpretation of the rules (Ireland) and with regard to broadcasters established in the UK and aimed at Danish viewers (Denmark).

The MoU establishing the CERF provides for an enhanced cooperation in handling complaints lodged against broadcasters, which operate in one of the Member States party to the regional cooperation. The new CERF website enables users to upload recordings of assumed violations of the law.

The Polish RA reports on a positive example of cooperation with the Czech Authority (within CERF) further to Polish complaints concerning programmes of broadcasters under Czech jurisdiction received in Poland.

In January 2011, the Romanian CNA also resolved a complaint forwarded by the Hungarian NNMH against a Romanian broadcaster whose programmes are received in Hungary.

In contrast, the CSA from the French-speaking Community of Belgium seems less satisfied with the outcome of their cooperation with the authorities in Luxembourg. They forward complaints relating to the services RTL-TVi, Club RTL and Plug TV to the authorities in Luxemburg. The CNP however does not inform the CSA about the outcome of the complaints (and their decisions are not published). The SMC does not process complaints which concern broadcasts more than a month old; as the CSA does not monitor AVMS on a permanent basis (but rather on periodical and/or topical basis), this does not lead to effective procedures.

The Swiss and German RAs report on irregular meetings to exchange views on audiovisual issues such as youth protection, consumer protection or advertising windows.

The Dutch RA believes that cooperation and exchange of information is likely to increase in future, where Member States take into account market share thresholds when reporting on the application of the quota provisions. The market shares of media service providers in other countries than the country of origin should also be taken into account – a development likely to foster exchanges.

III. NEW DEVELOPMENTS, METHODOLOGY AND TECHNOLOGY ISSUES

3.1. Monitoring expanded to new areas or new media players

Monitoring has been expanded to cover new areas, inter alia further to the implementation of the AVMSD:

- **Product and prop placement**, e.g. IE, FR, RO, IT, LU, MT, HU

A special observatory has been established in Italy for the monitoring of product placement.

- **HFSS foods/fight against obesity**, e.g. FR, RO, MT, HU NL (pending)

The monitoring Department of the Broadcasting Authority in Malta is working with the Health Department to compile a report regarding food advertising in children's programmes as part of their project to deal with obesity in children. The Hungarian RA carried out a content analysis on commercials advertising food which contains trans fat and are broadcast in the commercial breaks of children programmes: expected publication of the findings of the research November 2011).

- **Diversity**, this includes issues of representation of minorities, of the disabled, gender coverage, (FR, BE - CSA). The Belgian CSA conducts a yearly one-week sample monitoring on issues of on-screen diversity and gender equality.

- **Accessibility** (HU)

The Media Council launched a new monitoring project together with the association of people with hearing disabilities. The Monitoring Department recruited coders who have difficulties in hearing, with a special data input application they analyze the broadcasters' output, and supply information on how broadcasters abide by their mandatory obligations.

- **Specific aspects of Commercial Communications**, e.g. FR, BE (CSA), DE, MT, HU

The German authorities are undertaking cross-sectional surveys on advertising and prize games. The French CSA is monitoring commercial communications for on-lines gambling. The Maltese RA started monitoring sponsorship in particular genres of programming, and is conducting monitoring on the interpretation of surreptitious advertising and the association between an informative slot and advertising content, the introduction of pop-up advertising within informative slots. They are presently preparing a report on advertising of medicinal and non medicinal products. The Belgian CSA recently conducted a monitoring on sponsorship practices and another on self-promotion mechanisms.

- **Further areas**

Media authorities in Germany are trying to identify programmes, which are licensed under different names in Germany, Great Britain or Turkey.

In France, radio broadcasters are also being monitored with regard to the compliance of their programmes with the CSA recommendations' on on-line gambling and protection of minors. This may involve assessing the reporting on sporting events. Controls are reinforced during the broadcast of major sporting events.

- **Monitoring expanded to new media/new players**

In Austria, monitoring was extended onto all AVMS and onto the public broadcaster's online-services, including websites.

In the Netherlands, monitoring will be expanded to websites and other media services that qualify as an ODAVMS and thus fall under the scope of the Dutch Media Act.

3.2. New Methodology

- **Trends in methodology towards thematic supervision**

The Dutch and Belgian (CSA) RAs report a shift in the focus of their methodology from integral/systematic supervision to thematic monitoring. In the French Community of Belgium, monitoring projects are mostly used to document and inform the work of the CSA on specific issues, rather than as a surveillance-type approach.

- **Changes in monitoring methodology**

The Irish BAI has reviewed their sampling approach to monitoring certain requirements.

In Belgium (CSA), the newly acquired hard- and software should gradually change the way they assess the fulfillment of various legal requirements (European works, music, language, advertising hourly-limits, etc).

- **Increased involvement of other stakeholders in monitoring system**

The French CSA relies increasingly on technical means provided by the Institut national de l'audiovisuel (INA) which enables them to store very large files over a long period (for the monitoring of ODAVMS, healthy food, diversity). In addition, the monitoring over European and French language content quotas on television now relies on a declaratory system from the service providers which is complemented by systematic checks.

3.3. New Software

In the Czech Republic, new software was developed which is able to track ODAVMS that are not registered. The software works with predetermined given parameters; it is a sophisticated search engine/tool which searches the web pages with relevant content (video listed in catalogue). The final decision as to whether the service can be classified as ODS is left with the employees of the monitoring department.

In 2010, the Slovenian APEK established a system (SW and HW) for the digital recording of audiovisual content.

In Spain (Catalonia), the CAC has developed new software concerning local TV and radio stations remote monitoring system (SARC). It consists of a set of 25 codifying stations that allow: (1) access to almost all radio broadcasters; (2) access to all local DVB-T channels; (3) capacity to record and store in the audiovisual archive of the CAC; (4) on-line viewing through a streaming system.

The Andalusian NRA (Spain) is currently finalising a development for the automatic monitoring of subtitles, audio description and sign language on television for disabled people.

In the French speaking Community of Belgium, the new software is HMS, which was developed and licensed by the HACA, the Moroccan NRA. It is hoped that it makes regulatory work less burdensome for broadcasters, faster and more manageable for the RA, as well as more statistically sound. Moreover, the system renders all radio and TV programmes accessible and searchable for every staff member directly on their PCs.

New database software is currently being developed in Luxembourg (expected completion end 2011).

IV. QUESTIONS FOR DEBATE

The panelists and EPRA members will be asked to **comment on the following issues**. We encourage all participants to think about these in advance of the meeting:

Monitoring new media services:

- What are the main challenges linked to the monitoring of new media services?
- Can you report on best practices?
- Can technology help?
- With the explosion in the number of media service providers, is the battle for monitoring already a lost one?

Cooperation in the field of monitoring:

- How could the exchange of experiences and best practices be reinforced?
- How to encourage effective cooperation in handling complaints lodged against broadcasters, which are established under the jurisdiction of another Member State than the country of reception?

Methodology & Technology

- What are the pro and cons of in-house vs. external monitoring?
- How can they complement each other in a meaningful manner?
- What are the pre-requisites for a successful use of external monitoring, especially with regard to the compliance with some provisions of the AVMSD?