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Working Group 2
Independence of NRAs: Tools and Best Practices
Background Document - Final public version of 1. December 2014¹
Summary of NRA Responses to EPRA Questionnaire
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In preparation of the autumn session of the EPRA yearly Working Group on Independence of Regulators, a questionnaire had been created in order to gain a better picture of different perceptions of independence (how regulators perceive their independence, how is their independence perceived by external players), as well as to gather information on actual tools, practices and work processes that may strengthen independence employed by regulators in their day-to-day work. This document should not be interpreted as a comprehensive overview of available tools and mechanisms to ensure independence. By asking mostly open-ended questions, the purpose of the questionnaire was rather to highlight aspects that RAs consider important, try to identify what it is that RAs can do themselves to enhance their independence, and to provide a starting point for further debate on these issues at the Working group session in Tbilisi.

The present paper is based on the responses to the questionnaire² provided by 28 regulatory authorities: Audiovisual Media Authority (AL); National Commission on TV and Radio of Armenia (AM); Communications Regulatory Agency (BA); Conseil supérieur de l'audiovisuel (CSA – BE); Flemish Regulatory Authority for the Media (VRM - BE); Council for Electronic Media (BG); Independent Complaints Authority (CH); Directors' Conference of the Länder Media Authorities (DE); National Authority for Markets and Competition (CNMC - ES); Audiovisual Council of Catalonia (CAC - ES); The Finnish Communications Regulatory Authority (FI); Conseil Supérieur de l'Audiovisuel (FR); Ofcom (GB); National Council for Radio and Television (GR); Agency for Electronic Media (HR); Broadcasting Authority of Ireland (IE); Communications Commission - IOMCC (IM); Agcom (IT); Radio and Television Commission of Lithuania (LT); Autorité Luxembourgeoise Indépendante de l'Audiovisuel (LU); National Electronic Media Council (LV); Agency for Electronic Media (ME); Agency for Audio and Audiovisual Media Services (MK); Commissariaat voor de Media (NL); Norwegian Media Authority (NO); National Broadcasting Council (PL); National Audiovisual Council (RO) and Swedish Broadcasting Authority (SE).

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

² <http://www.epra.org/surveys/epra-wg2-questionnaire-independence-of-nras-tools-and-best-practices-to-strengthen-independence>

I: PERCEPTION OF INDEPENDENCE (INTERNAL AND EXTERNAL)

1. Key prerequisites of independence

This question aimed to seek views of EPRA members on key prerequisites of their independence, taking into account all relevant factors and their particular background. Four categories were given as possible options, and respondents were invited to enlist any other aspect that may be relevant in the case of their respective country. All four categories (independence in decision-making process and enforcement measures; legal guarantees, regulatory powers; management of financial and human resources; appointment/dismissal of management/board) are consistently recognized in literature and debates on independence as essential elements of formal independence. The question did not seek regulators' views on the general importance of these formal guarantees but rather on their relevance in the context of a specific political and social environment within which the NRA operates.

Legal guarantees and regulatory powers were chosen by a high number of respondents (23) – not surprisingly since regulatory independence needs to be guaranteed by law and regulatory authorities need to have regulatory powers guaranteed in order to efficiently perform their tasks. However, a slightly larger number of respondents (26) ticked independence in decision-making process and enforcement measures as key for their specific situation, which suggests that legal guarantees are not enough; a regulator needs to be able to *de facto* make decisions and enforce them without interference.

Management of financial and human resources was chosen by 19 respondents and appointment/dismissal of management/board by 17 respondents. Again, this does not suggest that regulators see these categories as less important but rather indicate that these particular issues are generally not seen as problematic as the other two categories.

In addition to the four general categories above, several NRAs enlisted further issues that they find to be key to their independence:

- **Secure funding** independent of political developments and decisions; **planning security** at least for a medium-term period; not subject to any financial pressure (DE, GB); **budget control** – budgets are agreed for a significant period of time during which the regulator manages funding within set budget limits (GB)
- **Independence from the industry** or political interference to avoid conflict of interest (DE, LU, GB)
- **Expertise, professionalism and personal integrity** of the NRA management and staff (ME);
- **Knowledge** of the members of RAs' management/board: the more competent and specialized they are, the less likely they will be to follow external instructions (CSA-BE);
- Creation of an **atmosphere of independence** in which a regulator is free to pursue its tasks, which requires other bodies to implement their legal obligations (BA)³

³ The CRA reports that its credibility has often been questioned due to the fact that it does not have a legally appointed Director General – which is a situation created by the Council of Ministers by failing to make the appointment within the legally set deadline.

- Clear **public accountability**; regular scrutiny of the regulator (CSA-BE, GB)
- Clear and **transparent processes** (GB)
- **Accessibility**; financial circumstances should not be a prerequisite to accessing the system of regulation – e.g. setting up appropriate complaints handling mechanisms that are available at no cost to the complainant (GB).

Two major conclusions can be drawn from the answers of the regulators who participated in the survey:

First of all, funding issues and political interference are currently perceived as the biggest threats to independence.

Secondly, there seems to be an understanding among regulators that independence is not exclusively conditional upon external factors but is also a matter of internal conduct. In particular, this means insisting on clear and transparent regulatory processes and maintaining the focus on professional conduct and public interest even in unfavourable circumstances.

2. Independence as a topic of high-level discussion

The majority of respondents answered that that independence is not discussed by the executive or legislative branch⁴. Some regulators (VRM - BE, LT) pointed out that it is guaranteed by law and therefore not discussed. The CSA of the French-speaking Community in Belgium reports that the issue is not specifically discussed as such, but some issues linked to independence may be incidentally discussed by the Parliament. Similarly, the Irish BAI says that independence underpins operations but is not a recurring question which would be regularly assessed or commented on. Indeed, lack of discussion about independence may simply indicate the fact that it is recognized as a feature of regulatory authorities that is guaranteed by law and is undisputable as such. But formal guarantees can be changed⁵, debates on independence can be misused to serve a political agenda. Even if that is not the case, it is important that the concept is at least periodically revisited in terms of the evaluation of potential impacts caused by new developments such as adoption of new legislation, introduction of certain measures such as budget cuts etc. Independence – no matter how well guaranteed on paper – is not a fixed category and is prone to influence by various factors. It is very important that such discussions are not arbitrary, and thus subject to manipulation, but based on relevant and independent reports and objective indicators.

The Dutch CvdM points out that while independence is not discussed in particular when discussing the annual report, under the *Kaderwet zelfstandige bestuursorganen* (Framework act on independent administrative authorities) the efficiency and effectiveness of independent administrative authorities like the CvdM is evaluated every five years: *“in 2014 the government assessed the position of all the independent administrative authorities and concluded some*

⁴ It is worth pointing out in this context that in Luxembourg, ALIA is operational as of January 2014, and its first annual report will only be published in 2015. Also, the RAs in Germany do not have to present their annual reports to the executive or legislative branches. The reports are checked by the respective public auditor as the RAs are funded through the broadcasting fee and on behalf of the public. In Armenia, the RA's annual reports are being discussed at the National Assembly, but the National Assembly is not authorized to accept or not to accept the report of the Commission, moreover it has no right to change or to add anything in the report.

⁵ E.g. in the UK, there are provisions under the Public Bodies Act 2011, giving the UK Government the power to make changes to Ofcom's functions and funding arrangements via secondary legislation.

authorities can be suspended (terminated) and some can merge. Despite this fact, the autonomous legal position of the CvdM is to be maintained for the purpose of independent media monitoring and so the CvdM will not be transformed into an agency operating under direct control of the ministry. “

The Swiss AIEP/UBI points out that independence is discussed rarely and only if there is a reason (e.g. new law project that is not compatible with independence).

In Montenegro, independence is discussed only indirectly: the debate about the NRA's annual report is often used for daily political debate and issues that are beyond the NRA's competences or responsibilities. The discussions are not done on the basis of objective indicators – as AEM points out, objective indicators are not even sought after.

The Communications Commission of the Isle of Man reports that the independence of the regulator has been discussed on various occasions in the Isle of Man's Parliament, most recently in March 2014 in a debate on the future and funding of Public Service Broadcasting in the Island. It was not done on the basis of objective indicators.

3. The RA as a partner in drafting sector policies, strategies or laws

Whether a RA is consulted or in any way involved in the process of drafting sector policies, strategies or laws speaks volumes about the general perception of importance of an independent regulator and reliance on its expertise. Whereas it may seem self-evident that a RA is best equipped with knowledge to provide expert opinions on matters it regulates, refusing to do so can be used as a tool for undermining its competencies and sending a political message.

Fortunately, the vast majority of respondents reported a significant role in the process of drafting sector policies, strategies or laws, such as:

- **Consultations** in the process of drafting and amending acts or regulations related to the audiovisual media services; opportunity to provide comments or otherwise participate in the process of drafting legislation, sector policies and strategies (AM, AL, BA, CSA-BE, AIEP/UBI-CH, CNMC-ES, FI, FR, HR, IM, IT, LK, MK, NL, RO);
- Adopt and publish **guidelines, legal notes, directives** etc. to various questions especially concerning the **interpretation and application of media law** (DE); obligation to elaborate **reports** on draft regulations related to the audiovisual media services and sector (CAC-ES);
- Involved formally and informally by the Government as an expert, independent **adviser** at various stages in the process in relation to policy changes likely to affect the communications sector (UK); advises the Parliament, government and national regulators on matters related to audiovisual media including **drafting of regulation** (CNMC-ES), participates in various **working groups** of governmental level as experts (LT);

- May **suggest changes in laws and regulatory framework** (CSA-BE, VRM-BE, FR)/ proposals to adapt standards (NL);
- Provide **opinions** on the feasibility of rules in practice (NL); **assess** the workability of legal provisions in the light of technological and market developments in the industry that may require an amendment or creation of legislative tools (DE);
- **Prepare/adopt sector strategies and by-laws** (AL, ME, MK).

The only exception among the respondents seems to be the Greek authority: in Greece, the government has the main and almost exclusive role in creating media policy. Even so, the NCRT from time to time submits its suggestions for the amendment of the existing legislation, but without success.

The process of drafting new regulations can also be used as an opportunity to send a political message. In Bosnia and Herzegovina, the CRA is usually given an opportunity to provide comments on draft legislation, however its opinion is not always taken into account: *“during the public consultations on the changes to the Election Law, the Agency suggested some minor changes in terminology used in the section dealing with media in election campaign, all of which were dismissed on the grounds that the management of the Agency was not legal. Similarly, in 2012, the Agency was invited to take part in the working group in charge of preparation of the draft law on electronic communications. Initially, the representatives of the Agency were offered two chapters of the law for comments. They demanded to be given the full text of the draft in order to know exactly what the structure of the law and to see what the Agency's duties were – that was not possible, so the Agency had no chance to participate in the creation of the text, but was invited to provide comments to the draft within the public consultation process. The Agency provided a list of comments, mostly dealing with problematic points of the future Agency, as envisaged by the draft, with largely reduced powers, however, not one single comment has been taken into account and the draft went into further procedure, the details of which are not known to the Agency.”*

4. External reports on independence

As already pointed out, it is important that the debate on the independence of NRAs is not arbitrary but based on objective reports and indicators. 20 respondents (out of 28) state that there are no regular or periodic reports on independence done by independent organizations. Eight NRAs reported that they are aware of some developments in this regard, though none of the respondents commented on the relevance or the impact such reports may have on debates or developments.

In Ireland, there are some international bodies that review and report on media policy and practice and, in some instances, comment on the regulatory environment including independence.

In Romania, NGOs may publish regular reports assessing the independence of the NAC, and the results may be taken into account by decision makers.

The Albanian authority is also aware of certain international or domestic organizations that analyse the independence of the institution in relationship with politics or other possible factors.

In the UK, there are more general, ad hoc reviews on the principle of independence in economic regulations, conducted by think tanks such as the Institute for Government and the European Policy Forum.

Reports on the issue of the independence of RAs provided by independent organizations are quite common in Italy, although they are not made on a regular basis. Several institutes, foundations, agencies and universities largely and constantly debate this subject, at any level⁶.

In Armenia, the reports which are submitted to the Human Rights Office are being published mostly by non-governmental organizations.

Surprisingly, the INDIREG study was specifically mentioned only by the CvdM (NL), even though the study analysed the independence of audiovisual regulators in 43 countries.

Another European research project (which encompassed 14 European countries) was mentioned by the Greek authority, namely the MEDIADDEM project⁷. As the NCRT reports, this project had not made any impact on the competent authorities, in spite of following conclusions: *"a lack of sufficient regulatory independence, despite the existence of the National Council for Radio and Television (ESR), which is constitutionally established as an independent authority with responsibilities in the field of broadcasting...The cautious attitude of the state as to strengthen the independence of the ESR is expressed first in the manner of appointment of its members, in the manner the authority is formed to a body and the non-recognition of financial and organizational autonomy of the Council. In addition, the State has not taken the necessary steps to facilitate the supervision of the broadcasting activity from the ESR (including necessary amendments to the legislative framework) and has not assigned important regulatory functions to the Council."*

5. Current developments

Several respondents reported on certain current developments that may be potentially jeopardizing for their RA's independence.

It seems that **budget cuts, centralisation of the public sector and funding arrangements** in general represent a major cause for concern across several EPRA members. As Ofcom reports: *"some think tanks and commentators have observed a general tendency to centralise the functions of public bodies, particularly in the light of the on-going climate of austerity and cost-cutting in terms of public spending in the UK. This may be slow and incremental but may raise questions about the level of control/pressure exerted over independent regulators over time. However, we believe that Ofcom and*

⁶ Examples include recent works done by Arel - Agenzia di Ricerche e Legislazione, Astrid - Fondazione per l'analisi, gli studi e le ricerche sulla riforma delle istituzioni democratiche.

⁷ See http://www.epra.org/news_items/mediadem-publishes-comparative-findings-on-media-policy

the UK Government are currently striking the right balance in relation to independent regulation of the communications sector."

The Italian Agcom also reports on recently introduced reforms of public administration: *"The recently approved Decree of 24 June 2014, n. 90 ("Misure urgenti per la semplificazione e la trasparenza amministrativa e per l'efficienza degli uffici giudiziari"), partially promoting transparency and simplification within the Italian Public Administration tackles several aspects of the regulatory authorities, introducing relevant changes, on both the organizational and economic sides. According to Article 22, RAs should: "share among them recruitment and acquisitions procedures, use only public buildings as their seat, centralize 70% of HR and 80% of expenses in the Authority's headquarter, limit outsourcing in commissioning reports and study by 50% (not exceeding 2% of the overall budget), reduce by 20% bonus and additional salaries. The mid and long term effects of the Decree on the RAs should be carefully assessed. A possible weakness of their activities, as an unintended consequence of the above mentioned reform, should not be excluded. Furthermore, there might be potential problems arising from its financing system. Since the predominant part of Agcom's revenue comes from the fees paid by telecommunications and media operators, the constant lowering of operators' revenues in the last five years might raise some element of concern about the economic sustainability of the Authority."*

Budget cuts seem to be a cause for concern for the CSA of the French speaking Community of Belgium as well: *"The financial resources of our RA are currently becoming very tight and, in the future, this could prevent us to fully accomplish all our missions with all the attention they should need. It could have a negative impact on the independence of our decisions. Also, the economic weight of certain important players of the sector could potentially be used to try to interfere in a direct or indirect way on our decisions"*.

In the Netherlands, budget cuts have had a tangible impact: *"Since 2013 the CvdM has to cope with big budget cuts we are confronted with (EUR 711,000 yearly on structural basis from 2018). As from 1 September 2013 the total number of full-time equivalent employees has significantly decreased. The CvdM was forced to change its organization structure radically in order to keep fulfilling its legal tasks. As a consequence, when the ministry assigns a new task to the CvdM, we are forced to ask for additional budgets. Potentially this can make our position more vulnerable."*

The Croatian AEM was also affected by the revision of its budget in 2013, when the decision was made by the Croatian Ministry of Finance to transfer a certain percentage of the funding from public bodies/institutions to the State treasury. This decision has not yet been implemented.

In Luxembourg, the ALIA is currently relying solely on an annual dotation from public funds approved by the Parliament, but will also collect fees from the regulated sector in the future. As they report, while this will make the RA more independent from the government, there is a potential risk that the funding from collected fees may not be sufficient.

The AEM of Montenegro points out several developments that endanger its independence:

- **amendments of the legislative framework** without any consultations in 2011 and 2013;
- undermined ability to independently **manage financial or human resources** (obligation to transfer any surplus of annual income to the State budget instead of using it for achieving the NRA's mission; intention to introduce the obligation to ask the Ministry of Finance for approval to hire additional staff or increase salaries);
- undermined **ability to enforce the law** (by withdrawing the power of the NRA to impose financial fines).

The issue of **appointments** is reported by two NRAs. In Greece, *“the mandate of four out of seven members of ESR expired on 28.2.2012 and has since been extended by law many times. The chairmen of the political parties, the chairman and vice-presidents of the Parliament and the chairmen of the standing committees of the Parliament, comprising the Parliamentary body competent to elect the members of the statutory Independent Authorities, have not been able to reach a decision for the appointment of new members of the authority. The situation has consequences on the validity of the Authority's decisions as the Council of State, the Supreme Administrative Court, has adjudicated (Decision 1098/2011) that the extension of the mandate of the members of the Authority for indefinite time violates the Article 101A of the Constitution providing a fixed term”*.

In Bosnia and Herzegovina, the failure to appoint its Director General continues to pose risk for its independence: *“the newly elected CRA Council made the nomination of a candidate for this position at its session held on 21 May 2014 and submitted it to the BiH Council of Ministers for approval. According to the Law on Communications, the decision on the approval of the appointment of CRA's Director General should be adopted by the Council of Ministers within 30 days after submission of the nomination. However, even though this deadline had long expired, the Council of Ministers failed to even discuss the appointment. The item has been removed from the CoM agenda several times due to lack of agreement between ruling parties on a package of some 15 appointments in various State institutions.”*

A **positive development** is reported by the French CSA, whose independence has been even reinforced by the Law on the independence of public service of 15 November 2013 which introduced some major reforms such as:

- Reforms concerning the CSA Board (smaller number of members, reformed appointment procedure, strengthening of incompatibility rules);
- Reform of the CSA statute (the status of independent public authority granting the CSA greater functional, administrative and financial autonomy);
- The Act establishes a permanent rapporteur to the CSA, which will be charged with the duties of prosecution and investigation.
- New sanctioning procedure which strictly separates the functions of prosecution and investigation on the one hand, and imposing sanctions, on the other hand.

II: TOOLS AND PRACTICES

1. Practices or means to ensure accountability

The respondents reported on a wide range of practices or means to ensure accountability that can be categorized as follows:

Accountability towards executive or legislative powers

- Reporting obligations

In terms of reporting obligations, NRAs are accountable either to the government or the parliament, or both.

Annual reports are submitted only to the executive branch in several countries who responded to the questionnaire, such as Norway, Sweden, Switzerland and Bosnia and Herzegovina. This applies to financial reporting as well: in Sweden, the annual report to the government includes an audit by the Swedish National Audit Office. In Bosnia and Herzegovina, the budget for each fiscal year, previously adopted by the Council of the Agency, is sent to the Council of Ministers for approval. The use of funds by the Agency is subject to review by the State Audit Institution every year. Also in Romania, since the NAC is financed from the State budget, the national law on public finances and norms issued by the Ministry of Public Finances applies, including specific reporting obligations.

In the Netherlands, even though the CvdM is an independent administrative authority that is not hierarchically subordinate to the Ministry, there seems to be quite a strong formal relationship between the Ministry and the CvdM:

*“- The Minister shall appoint, suspend and dismiss the board members of the CvdM.
- The Minister receives the decisions of the CvdM.*

The Minister may annul or suspend a decision of the CvdM if it is in conflict with the law or the public interest. Since the CvdM was established in 1989 this happened only very rarely.

- The annual budget and financial statements must be approved by the Minister. They should also be available to the public.

- The CvdM is obliged to provide the Minister with all the information required to perform its duties.

- If the CvdM would seriously neglect its duties, the Minister may take the required measures.”

The other group of respondents have reporting obligations to the Parliament, as is the case in Albania, Belgium, Bulgaria, Croatia, Greece, Lithuania, Macedonia, Montenegro, Poland (who reports to both chambers of the Parliament and to the President), the CNMC of Spain and the UK, where Ofcom is also audited by the National Audit Office, an independent public authority which has a role to scrutinise public spending on behalf of Parliament.

Some NRAs report to both: the Catalan CAC submits an annual report on its activities and on the state of the audiovisual system in Catalonia (including the proposals and observations that may be necessary in order to enable the industry to develop in a balanced manner) to Parliament, via the

appropriate parliamentary committee, and to the Government. In France, the report is addressed to the President of the Republic, the Government and the Parliament. In Italy, Agcom should remit every year an Annual Report to the Government and to the Parliament where the main achievements and the scheduled activities for the next year are exposed.

The ALIA in Luxembourg presents its financial statement to the government, whereas the annual report is presented to and discussed with the members of the relevant commission of Parliament.

- **Appearance before a Parliamentary Committee**

In the UK, *“Ofcom appears before Parliamentary Committees from time-to-time, both in Westminster and in the devolved Parliaments/Assemblies in Scotland, Wales and Northern Ireland. Some of these appearances are fixed and others are ad-hoc.*

For example, the Chief Executive and the Chair appear annually before Parliament’s Culture, Media and Sport Committee. The purpose of this annual session is to scrutinise Ofcom’s annual plan and performance over the past financial year. Ofcom also attends specific enquiries into specific subjects, where we will give written and oral evidence to the inquiry and respond to the committee’s recommendations (the committees do not have the power to give Ofcom any instructions). Ofcom also advises on Parliamentary Questions as necessary, and responds to several questions it receives directly from MPs.”

KRRiT (PL) and Agcom (IT) also can appear before different Parliamentary Committees in case of need (e.g. if the Parliament is drafting or amending acts that affect the TLC and media markets). The Croatian AEM also participates in periodic meetings held by Croatian Parliament, committees and commissions of the Parliament such as, the Committee on Information, Informatization and Media, Gender Equality Committee, the Committee for Human Rights and National Minorities, or other according to specific meetings. Also in Bulgaria, members of the CEM have appeared before the Media Commission at the National Assembly.

The Spanish CNMC has a duty to present its annual report before the Parliament. The President must appear at least annually before the Members of the Parliament to detail the basic courses of action and the plans and priorities of the institution for the future. Every three years, CNMC also needs to present an impact assessment of its action plans and the results obtained. In addition, the corresponding Committee of the Parliament of the Senate can request the appearance of the President to attend ad hoc inquiries. In Catalonia, the President of the CAC appears before a Parliamentary Committee at least once a year to explain the CAC activity. The CAC President himself or the Parliamentary Committee can also ask the CAC President to appear in the Parliamentary Committee.

The Isle of Man Communications Commission reports that the Director and Chairman of the Commission recently appeared before a Parliamentary Select Committee on the future and funding on public service broadcasting on the Isle of Man.

Accountability to the regulated subjects / public

- **Obligation to justify decisions**

In France, the CSA has an obligation to justify its decisions, particularly decisions to reject applications and issued sanctions. The decisions are notified to the interested parties and published in the Official Gazette of the Republic.

In Luxembourg, decisions impacting third parties have to be reasoned. Public deliberation of cases is also a practice applied by Swiss AIEP/UBI.

The CRA (BA) reports that every Agency's decision is duly reasoned. Broadcasters are always given an opportunity to respond to and these comments are taken into account in final decision.

In Montenegro, all decisions related to the awarding or withdrawing/limiting rights or imposing/changing obligations to the AVMs providers are published on the NRA's web site.

Two important mechanisms for ensuring accountability in the decision-making process are reported by the Spanish CNMC: **internal control** body which supervises the appropriateness of decisions in terms of applicable procedural rules and **functional separation** between the investigative phase (carried out by CNMC staff) and decision-making phase (Board).

The majority of respondents also state that their decisions are open to judicial review.

- **Availability of documents & public consultations**

The availability of information to the public is in many countries regulated under freedom of information legislation. For example, CvdM (NL) and VRM (BE) report that any person can demand information related to an administrative matter if it is contained in documents held by their regulatory authority.

However, for the purposes of this overview, we are particularly interested in whether documents are made available to the public and whether the public has an opportunity to participate in the creation of regulation.

In Spain, under the Act on Transparency, Access to Information and Good Governance, there is an obligation of "active publication" of any relevant activities of public administration. Public consultations are carried out in all issues which might have a relevant impact on the market, including the authority's annual action plan for the forthcoming year. The documents and the results of public consultations are published on the CNMC's website.

In Sweden and Norway, the RAs also practice the principle of open government which entitles the general public access to official documents, so all decisions, reports, general information, results of public consultations and different steering documents are published on their websites.

The Catalan CAC publishes on its website the procedural obligations (e.g. statement of reasons), reports on fulfilment of the obligations, makes public the result of the consultations and its feedback opportunities, the code of conduct, ex-post evaluations of some issues, and judicial reviews, if applicable.

The CSA of the French speaking Community of Belgium, in addition to publishing reasoned decisions on its website, sometimes explains them further or explains other aspects of its mission on dedicated pages of its website or in its magazine. It also organizes public consultations about certain subjects in which they plan to intervene.

In Germany, *“under the German federal state system, cooperation of RAs to align policies and decision-making on national issues as well as active participation in the general political and public debate about the media and maximum transparency regarding day-to-day work, are applied”*.

In Ireland, *“the BAI is required to make drafts of codes and rules available for public and parliamentary review before they are introduced. The BAI is required to publish decisions and reasons for decisions. In certain instances the BAI is required to use published scoring matrices when awarding licences and contracts. The BAI is required if requested to make public or private presentations/reports to parliamentary committees. The BAI is required to publish and report against strategy statements and organisational budgets”*.

Public consultations are reported by some other respondents, too, such as the Communications Commission (IM) and KRRiT (PL). In Bosnia and Herzegovina and Montenegro, public consultations are required by law, and feedback is provided to all participating parties.

2. Voluntary transparency practices

In addition to accountability requirements, usually set down in legislation, there is a variety of transparency practices that are self-imposed. Judging by the responses of NRAs to this question, the overall impression is that NRAs are generally very committed to transparency beyond what is required by law. Information/documents which are made public by the RAs include the following:

- annual reports (AM, BA, CSA-BE, VRM-BE, CNMC-ES, IT, MK, NL, SE), incl. financial statements (CAC-ES, FI, RO);
- annual work plan / business plan (CSA-BE, CNMC-ES, IM, FI, ME, MK);
- structure and the job classification (CNMC-ES, CAC-ES, RO);
- procedures for investigating breaches, for considering and adjudicating on Fairness and Privacy complaints and for considering statutory sanctions (GB);
- initiation of sanction proceedings (CNMC-ES);
- decisions (AL, AM, CSA-BE, VRM-BE, DE, IE, FI, FR, GB⁸, GR⁹, LU, LV, MK, NL, NO, PL, RO, SE);

⁸ Ofcom publishes all its decisions and all the evidence used (minus any company data that is commercially sensitive) to reach those decisions on its website.

- agenda of board meetings (CSA-BE, BG, IT);
- minutes of meetings (DE, MK, RO);
- decisions/conclusions of Council meetings (BA), including reports on which the decisions are based (CNMC-ES), including the dissenting votes (CAC-ES);
- results of public consultations (CSA-BE, CAC-ES, IM, FI, MK, PL, SE);
- various other information for the public, bulletins/newsletters, statements, activity reports, strategic documents, reports etc. (BA, CSA-BE, BG, CNMC-ES, FI, GB, LT, MK, NO, PL, SE);
- guidance notes (GB);
- advice to the State Secretary (NL).

It should be noted that, in some cases, it is not entirely clear whether all of the above is published voluntarily. Some respondents like the Latvian RTCL pointed out that *“everything that the Commission does is foreseen in the law. All the documents and activities are reflected and are available on its web site”*. The Macedonian regulator also pointed out that *“the Agency is obliged by Law to publish at its web site adopted decisions/acts, annual reports, Annual Programme for work, public consultations and the position of the Agency upon them, minutes of Council sessions, etc. However, besides those documents that need to be published according to the Law, in terms of providing transparency of its work the Agency also publishes on the web site other information/acts in order the public to be informed on all activities of the Agency.”*

Some EPRA members share other relevant practices that have the capacity to enhance regulatory trust and public perception of independence.

For instance, in the Netherlands, the reports on hearings held at the office of the CvdM are open to the public. The German RAs also conduct decision-taking meetings in public and conduct dialogue with the public e.g. via public portals¹⁰. The Belgian CSA also puts emphasis on online communication with the public through their website or Twitter account.

A very interesting practice is reported by the Italian Agcom, which has a section of its website devoted to communicate in a transparent manner detailed information about its organization and its activities (*“Autorità trasparente”*). This includes information on organizational charts, salaries, public notices.

The Croatian AEM has been involved as a partner in some governmental and non-governmental initiatives in relation to the transparency of the work of public authorities in Croatia, and implements the Open Government Partnership, *“a multilateral initiative which aims to provide concrete progress in the area of transparency and openness of the work of public authorities, involvement and the empowerment of citizens and civil society, fight against corruption and the use of new technology to improve the quality of public administration provides to citizens”*.

⁹ In Greece, the NRA’s decisions are published in the State system called DIAVGIA (transparency), which was established by law with the aim to ensure publicity of governmental policies and administration activities and transparency and accountability of public authorities.

¹⁰ e.g. www.programmbeschwerde.de

3. Sanctions for non-compliance with accountability rules

EPRA members who responded to the questionnaire report on a wide range of mechanisms available in the event of non-compliance with accountability rules.

Several NRAs report on mechanisms set down by law in relation to NRA's annual reports and financial statements. In Poland, for instance, in case of rejection of the annual report by both the *Sejm* and the Senate, the term of office of all the members of the National Council shall expire within 14 days from the date of the last resolution to this effect, provided it is approved by the President of the Republic of Poland. In Montenegro, the Electronic Media Law prescribes that the NRA's board can be dismissed if it fails to publish the annual financial and operational report along with the auditor's report by end of June of the current year for the previous year. In Norway, the National Audit Office has the power to criticize the RA for failing to comply with the rules regarding auditing. If the Authority breaches the rules on official procurement this can be brought to the Board of Official procurements, which has the power to issue fines.

Some respondents state legally prescribed sanctions related to NRA board/council conduct. In Croatia, for instance, the AEM or its council members can be sanctioned in case of conflict of interest. The Irish legislation provides sanctions in certain instances, e.g. members can be removed if they consistently fail to attend meetings. In Montenegro, the NRA's board can be dismissed if it does not hold session for more than six months without a justified reason.

In relation to accountability for decisions taken by the regulator, they are mostly subject to court control. The CvdM (NL) reports that the Minister may annul or suspend a decision of the CvdM if it is in conflict with the law or the public interest. The CSA in France and Agcom in Italy can, as public institutions, be liable to pay damages if the court decides injury has been caused by their decision.

Accountability to the public is a dimension especially important for the purposes of discussion at this working group. Many respondents report on measures available for non-compliance with professional code of conduct and particularly for failure to act according to principles of public administration. A particularly interesting mechanism seems to be a possibility to file a complaint with a **national ombudsman**.

In Great Britain, if a person wishes to complain about Ofcom, and is dissatisfied with the results of a complaint made directly to them, they can take the complaint to the Parliamentary and Health Service Ombudsman - an independent body set up to investigate complaints from members of the public that feel they have been treated unfairly or have received poor service from government departments and other public organisations and the NHS in England. If the ombudsman finds that the organisation has not acted correctly then it will work with them to correct any issues. They can also be required to acknowledge their error, apologise and pay compensation.

In the Netherlands, any person can file a complaint with the National Ombudsman in any case of conflict with public administration. The National Ombudsman can carry out a thorough investigation. At the end of the investigation, the institution will write a report, stating whether the complaint was

founded and how the administrative authority can improve its functioning. Similarly, in Norway, the Ombudsman has the power to criticize the Authority in case of malpractice.

The VRM (BE) also states that any person can lodge a complaint at the Flemish Ombudsman. In addition, there are **internal rules** of procedure containing the professional code that the members of each of the two chambers of the VRM need to observe. Should a member of a chamber violate the rules of procedure, the board of presidents may subject the members of the chambers to a reprimand, a suspension of up to six months or a reduction in the attendance fees and/or fixed compensation as a disciplinary measure, providing justification for this. They can also recommend the dismissal of a member who violates the ethical rules.

In Finland and Sweden, there is an institution of the **Chancellor of Justice** whose task is to ensure that public administration complies with the law and fulfil their assigned obligations. As the Swedish SBA reports: *“the Chancellor of Justice is free to raise issues on the supervision of authorities of his or her own motion. The majority of cases are however initiated by private parties by means of submitting a written complaint, thus drawing the Chancellor's attention to malpractice or abuse of powers within the public administration. It falls within the competence of The Chancellor of Justice to reach out of court settlements on behalf of the State in actions for damages (“voluntary settlement of claim”). Individuals may therefore turn directly to the Chancellor of Justice with a written application for compensation. If the application is rejected by the Chancellor the right to initiate court proceedings remains”*.

4. Voluntary advocacy measures

The question on voluntary advocacy measures towards the government and/or stakeholders had the purpose of collecting best practice examples of keeping good relationship with the same forces that have the potential to exert influence on the independence of RAs. Availability and openness for discussion are important tools in a “battle” for independence, as is raising awareness about the importance of effective and unbiased regulation, and raising awareness about the activities of a regulator.

Out of a total of 28 respondents, 12 NRAs explicitly state that they do not undertake any advocacy measures. Others report on contacts between the NRA and the competent ministry, though mostly in the form of consultations on the matters from the media field rather than advocacy endeavours aimed at strengthening RA's independence.

In the Netherlands, for instance *“the Ministry of OCW and the CvdM maintain very frequent contact. Two to four times a year, there is a high level meeting between the State Secretary of OCW and the board of the CvdM. The officials have frequent meetings on specific topics as well. Also the CvdM has frequent contact with key stakeholders and attends media seminars and meetings to stay aware of what is happening in the media field. The CvdM also launches public consultations concerning its policy rules.”*

Frequent contacts between the regulatory authority and the Ministry of Media, as well as frequent formal and informal contacts with the stakeholders are also reported by VRM (BE).

In Macedonia, the NRA organizes public meetings at least once in three months in order to allow all interested parties to express their positions and opinions regarding the development of the audio and audiovisual media services, including the activities aimed at achieving the objectives from the Annual Programme for the operations of the Agency.

In Croatia, the AEM organizes an annual event called “Electronic Media Days”, bringing together all media stakeholders and other relevant institutions, organizations and associations.

In terms of advocacy concerning the status of NRAs, the Montenegrin AEM reports that it undertakes measures to advocate for different solutions when amendments to the laws or a specific draft law are proposed. The CSA of the French speaking Community of Belgium can take initiatives to suggest legal improvements to the government and/or parliament, for example ask for more financial resources.

The RTCL from Lithuania also states that advocacy measures are sometimes being undertaken, especially when issues of convergence are being discussed, whereas the Irish BAI “*at time advocates certain positions in the context of its statutory remit*”.

The CRA (BA) reports that it used to organize seminars, workshops and various conferences often dealing with the issue of independence, and the authorities were always invited to participate. Besides, the Agency is active in international projects dealing with independence organized by the Council of Europe. In the past, the CRA often addressed the governing structures to voice out its concerns regarding the issue of appointments.

5. Pro-active approach to safeguarding independence

Several respondents reported on specific cases when a pro-active approach of the RA played a role in safeguarding its independence. The circumstances in which the RA voiced its disagreement varied, from attempts to restructure the budget, amend legislation on NRA structure or competences, attempts to influence its decision-making... The examples below prove a point: **it is not enough to have independence guaranteed by law. There will always be attempts of influence, and a NRA needs to be alert and proactive: it should not be just an item on the agenda - it needs to participate in creating the agenda.** These attempts need not even be made with the aim of undermining the regulator but with completely different goals in mind, e.g. the reform of public administration, and the regulator can provide a voice of reason by offering expert opinion on drawbacks of certain solutions.

As the Croatian AEM reported, the Agency reacted to the proposal to transfer a certain percentage of AEM's income to the public finances, as a part of state budget restructuring, and has initiated several meetings with the Ministry of Finance.

In Poland, *“There were cases, when the Parliament did not notify the Council nor consulted the body when amending some regulations being within the scope of Council's competences. The Council's Chairman used to address letters to the Marshal of the Sejm and to the Prime Minister. At present the situation has improved”*.

The BAI in Ireland made a strong case for its retention as a separate body responsible for content regulation when a merger with the Irish telecoms regulator was proposed in 2010/2011.

In 2012 and 2013, the NRA in Montenegro *“reacted (by sending letters to the Presidents of the State, Parliament and Government) to amend or not adopt some of the legislative proposals that undermined the NRA's independence. The reasons were well received but the political agenda of the day prevailed. Nevertheless, the NRA's position was recognised and reflected in the EC Annual progress reports for 2011, 2012 and 2013.”*

A positive experience is shared by the Italian Agcom: *“Discussions over the copyright regulation before its approval (Delibera 680/13/CONS) came through three different public consultations between 2012 and 2013. Stakeholders have been also involved through hearings about the draft regulation on par condicio during non electoral periods between 2013 and the first months of 2014. Despite the peculiar and delicate nature of the subjects, and the different positions held by the stakeholders, the long-time running discussions allowed every player to fully express its view on the regulations and a high degree of openness showed by Agcom that might be considered as a sign of independence”*.

The CSA of the French speaking Community of Belgium reports on a voluntary internal measure that has the aim to avoid being subjected to external influence: the board can ask a member to recuse himself or herself in case of a conflict of interest. More than once, the recusation of a board member has actually helped to safeguard the independence of the RA's decisions in concrete cases.

An interesting example concerning a highly sensitive political issue is reported by the Dutch CvdM: *“The CvdM allocates once in five years national broadcasting time to organisations which represent the main religious and spiritual movements in our society (Article 2.42 Media Act). The CvdM can allocate broadcasting time to only one representative organisation of each main religion or spiritual movement in the Netherlands. The allocation of broadcasting time to a representative Muslim organization led to a lot of procedures. Since the licensee did not longer represent in a sufficient manner the Muslim community in our country the CvdM had to withdraw the license. This was a highly (politically) sensitive procedure. After many consultations and hearings the CvdM granted a license until 31 December 2015 to a new applicant, called SZW.”*

6. Tools and practices to maintain independence

For the sake of gathering best practice examples, the final question enquired about additional tools and practices (work processes) in the day-to-day functioning of a RA that are considered important for maintaining independence.

The Ofcom (GB) pointed out two particularly interesting practices:

- **Extensive transparency requirements** in relation to Board business – information such as registers of interests (members are required to disclose interests, including shareholdings, directorships and employments that they, their partners or minor children have in companies whose core business activities (and share price) could be affected by Ofcom’s decisions), terms of reference, rules of procedure, agendas, minutes and notes of the meetings and policy on conflict of interest are all available online.

- **The purdah rules** that apply during licensing procedures or spectrum awards designed to ensure that the process is not prejudiced: *“Companies with an interest in the process (i.e. applicants or companies whose share price can be affected by the process) are added to a published list, and the dates for which the purdah rules apply are published on the Ofcom website. During this period, no Ofcom colleague may have any contact with a company or person representing a company on the list other than for business purposes. Colleagues must also respect the following rules:*

- *Where possible, colleagues must ensure that meetings with companies on the purdah list are held on Ofcom premises;*
- *If while attending an event the subject of the licensing award in process is raised the Ofcom colleagues should excuse themselves;*
- *Nobody may accept any gift or hospitality from a company on the purdah list, or somebody representing that company.*

Colleagues are also required to disclose any potential conflict of interest. This includes ownership of shares in companies on the purdah list, or if a direct family member is employed by a company on the purdah list.”

The CRA (BA) reports on the following practice: *“In addition to holding mandatory public consultations before adopting a new rule or amending the existing ones, the Agency has established a voluntary practice of holding regional advisory panels with its licensees across the country. These meetings are usually attended by a large number of licensees and they provide an opportunity to discuss not only the draft document that is the subject of public consultations, but also any current issue that the licensees may have. Judging by the feedback, the licensees – especially those in more remote parts of the country – appreciate this added effort as well as the less formal environment for discussion, which in turn may underpin their trust in the regulator.”*

The Albanian AMA also believes that conferences with media operators in order to discuss and confront ideas are essential for creating an atmosphere of collaboration and interaction.

A very interesting angle to endeavours that may, inter alia, strengthen RAs’ independence is offered by the Croatian AEM who is dedicated to strengthening the capacity of its employees, by offering them opportunities for additional education. Other examples include cooperation with the scientific community on the development of public perception and the processes related to media literacy.

Some other respondents, even though they did not report on any specific tool or practice, pointed out some general but very relevant points:

- **expedient and timely fulfilment** of regulatory activities (LT);
- **maximum transparency** regarding activities to underpin accountability, thereby raising trust in the work of the RA on the part both of the General public and of the judiciary and legislative branches (DE);
- following the **code of conduct** which gathers the practices and polices established through years of work and sets standards for individual and business behaviour (MK);
- ensuring that the **RA is perceived as a trusted informed voice** on broadcasting matters and as such adds value is important in retaining its current status as an independent regulator for content (IE);
- **cooperation and exchange of experience** with other RAs is important because fighting against external influences is easier when all RAs show a united front (CSA-BE).

As some RAs remarked, the regulator can contribute to maintaining its own independence simply by doing a good job. Indeed, all the tools, practices and activities that a regulator can use in order to maintain its own independence are the very activities aimed at fulfilling its core task of serving the public interest: transparency, professionalism, knowledge, consistency.

It is quite interesting to note, however, that the use of self-assessment tools to measure independence or its variation levels across a period of time is not cited as a best practice in any of the responses even though it has been a prominent feature of the INDIREG study and some of its follow-up activities.

Conclusion

There is probably no such thing as absolute independence and no such thing as a fail-proof recipe for a truly independent regulator. But there are some general guidelines and, more importantly, good practice examples that should be kept in mind. First of all, striving for independence is a never-ending effort. Key prerequisites for independent and efficient functioning need to be enshrined in law. The law needs to be implemented. The politicians need to be reminded of the importance of RAs independence from time to time, especially at times of crises or financial problems.

But a significant deal of this effort lies in the hands of regulators, too. A regulator needs to foster the culture of independence, by demonstrating its own commitment to it, and by demanding from others to do the same.

As our regretted colleague *Karol Jakubowicz* eloquently phrased in its keynote address to EPRA members in Prague in 2007: *“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 to¹¹”*.

¹¹ http://epra3-production.s3.amazonaws.com/attachments/files/1380/original/EPRA_keynote_KJ.pdf?1323685662