

*Challenges of ensuring compliance and enforcement in a
changing media ecosystem*

Keynote address

44th EPRA meeting, Yerevan, 21st October 2016

Jean-François Furnémont

Founding partner [Wagner-Hatfield](#)

iff@wagner-hatfield.com

1. Introduction

The audience faces a dual risk in this session: first, the phrase “challenges of a changing media ecosystem” features in the title, second, the keynote speaker is a consultant. You might therefore dread another presentation by someone who is going to explain everything you should know about innovation, technological revolution, disruption, multi-screen environment, new business models, new consumption patterns, algorithms, shift in revenue streams, ... without any idea of the challenges you face in your daily work.

This is why, when I accepted the invitation from the EPRA Executive Board to give this keynote, I tried to find a different approach to deliver a keynote which would strike a balance between theory and practice, as well as between prospective and current challenges.

So let’s get rid about everything you nevertheless might wish to know about disruption with just one figure from BCG, whose goal is to acknowledge that indeed this is where we stand.

ONLINE/MOBILE DRIVING VIDEO CONSUMPTION GROWTH GLOBALLY

■ Mobile video ■ Online video ■ TV
 Nr. of hours per week spent per media type

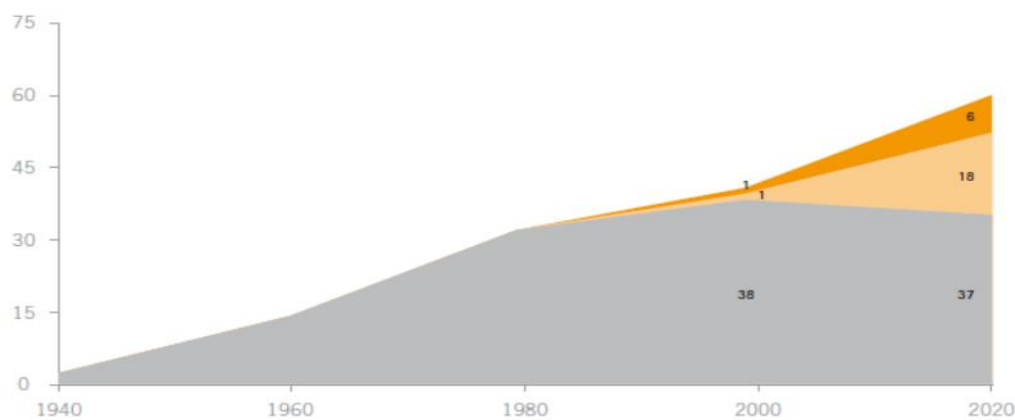


Exhibit 1.0
 Nr. of hours
 per week spent
 per media type

Source: Carat insight media survey; European Technographics Benchmark Survey; emarketer; Gallup TV meter; SKO; MMS; BARB AdvantEdge; Mediametrie; CIM TV; Eurodata TV; The Nielsen Company; BCG Analysis

What can we learn from this figure?

First of all a reminder of your legacy: the vast majority of the institutions represented in this room have been created between 1980 and 2000, at a time when the viewer was a “traditional, linear, fixed screen” viewer, whereas this viewer is now becoming a “video, non-linear, mobile” viewer. And we will see later that this raises issues in terms of enforcement.

The second thing we learn is that the media ecosystem is now very rapidly changing with a clear move towards new viewership habits.

This is a fact we all know. What I would like to try to do now is to share with you a few thoughts on how these disruptions impact media regulators.

2. “Media regulation is fine-tuning of democracy”

In order to do so my guiding principle will be a word which is unfortunately less much used than the ones that I mentioned earlier, namely the word “democracy”.

The first Chairperson of the Belgian CSA, Evelyne Lentzen, used to give the following definition of media regulation: “*media regulation is fine-tuning of democracy*”. Why talking about democracy in a session about challenges of ensuring compliance and enforcement? Because in my view what matters for regulators are not all these disruptions I quickly presented. What matters is that regulators continue to make sure that these changes feed and strengthen democracy instead of weakening it. I read and hear a lot about these disruptions, and what often disturbs me is not the technophile aspect, but the fact that it’s as if technology has the potential to solve everything and that any kind of new usage brought by technology should dictate the evolution of regulation (which most of the time simply means the abolishment of regulation). On the contrary, I believe that the goals of media regulation are enduring, no matter the growing difficulties to enforce them.

The best example of this is coming from an area at the boundaries of media regulation, which is privacy. You certainly all remember the founder of Facebook saying that “*privacy is no longer a social norm*”. And sometimes we hear statements like that one about media regulation: protection of minors is no longer possible, promotion of European works is no longer necessary, impartiality impossible is to achieve, etc.

Fortunately, I am not the only one to believe that media regulation, understood as a way to fine-tune democracy, remains necessary. Recently, ERGA produced a report on material jurisdiction which stresses that the goals of media regulation remain relevant, “*even if the mechanisms through which they are achieved may have to evolve*”. And I am convinced that the same conclusion could come from a report produced by a larger forum such as EPRA.

So it seems that indeed, we all agree that media regulators should ensure that media players comply with the main audiovisual public policy objectives.

At the same time, we all agree that it has become increasingly difficult for media regulators to do so.

So what shall we do? Do we get rid of the objectives?

No. We all disagree with this.

3. Adopt a specific compliance and enforcement strategy

The first thing to do is to show to all stakeholders that a satisfying level of compliance can still be reached. It is of course impossible to achieve 100% compliance and to address each and every case that could arise in era of abundance of media players and distribution patterns.

And this issue is not new. None of us is able to guarantee that no ad break exceeds its limit ever, that no sexist or racist comment is ever uttered on a small radio station somewhere, and that every single data received from media groups on transparency and ownership issue is completely accurate or updated. We do not need to shy away from this fact. And we do not need to accept the statement that 100% compliance is today more crucial than it was before.

We still need to aim for 100%, of course, and every rule, every procedure, every enforcement mechanism should contribute to that objective. But we lack the resources to guarantee 100% compliance, we always have and we always will. Plus, let's remind everybody what a 100% compliance system would entail and look like: a minute by minute strict monitoring of every single media outlet in our respective countries. Is this the kind of Orwellian set-up we're willing to spend public money on?

But as long as you make your best to get as close as possible to this 100% and that you have a strategy in this regard, then it becomes harder for those who claim that we should get rid all these regulations to make their case.

This is where I have some fears, since it appears from the background paper from your last session in Barcelona that the existence of a specific strategy about compliance and enforcement is quite rare among EPRA members. In a media environment which is changing so rapidly and which makes it increasingly difficult for media regulators to ensure that media players comply with the public policy objectives, it appears essential to have a coherent and consistent view on how your compliance policy will adapt to this changing environment.

So this is the first lesson we could learn from this session. It is rather obvious but it appears necessary to recall it: in the future each and every of you, when elaborating your annual or multi-annual work programme or your strategic plan, should dedicate a specific chapter to the issue of compliance and enforcement.

4. Seven principles to follow

My second thought is about a few principles to keep in mind when elaborating such a strategy. I will focus on seven of them.

4.1. *Think with a new mindset*

We identified earlier the clear tension between the values you still have to protect and the changes in the media ecosystem which make it much more difficult for you to do so. So the challenge is to find ways to deal with this tension and reconcile enduring values and effective enforcement. One way to do so is to adapt the relationship with the media players.

Let me take a very simple example in another sector, which is labour policy and where there is also a tension relatively similar to the one we face in audiovisual policy. On the one hand, it appears that a traditional value of the welfare State remains valid: it is the fact that people who are unemployed should benefit of a minimum of revenues in order to get through this difficult period. This policy was very easy to enforce when unemployment was under 5%. Now we realise that this system is put under increasing pressure: unemployment hardly falls under 10% and rockets to more than 20% in some countries, making the system unsustainable, especially when combined with long-term unemployment. It looks like we're stuck: unemployment benefits remains among our values, but we cannot afford them anymore due to the changing ecosystem. This where some countries have decided to fill this gap by creating something different than unemployment benefit: some sort of minimum revenue whose goal is not just compensate the loss of revenues but to create the conditions of re-inserting as fast as possible the unemployed within the labour market.

What's the difference? Mindset. The logic is not to compensate a loss by granting a benefit, but to create a joint agreement between a person and the State in which this person indeed has benefits, but also takes commitments which will contribute to its return on the labour market. The strategy is less to enforce rules but to create a dynamic around a contract between a person and the State.

How does it translate in media regulation? In terms of principles it is very clear: if there are so many difficulties to enforce some obligations, let's find a way to change the nature of the relationship between the player and the State, and instead of imposing obligations which are difficult to enforce let's try to create new relationships based on a real contract. You of course already have "contracts" with service providers. But let's face it: most of the time these "licence conditions" or "statutes" or "conventions" or "specifications" or "remits" are not really negotiated contracts in which the potential benefits for both parties clearly appear and in which clear incentives are present for your counterpart. Compliance would probably be better achieved:

- if the obligations were not seen by the players as a restriction to their freedom of communication but rather as a way for each of them to contribute to public interest as far as their means allow and also
- if it were not seen as a general obligation imposed blindly and indiscriminately on all, but as tailor-made contract which includes incentives to comply.

4.2. *Think about new tools*

It appears from the background paper of your last session in Barcelona that the main internal challenge in the field of compliance and enforcement is the lack of human and financial resources. I am sure that if we would collect data about the evolution of your human and financial resources in the recent years and compare it with the evolution in the amount of players you regulate, the result would be shocking.

One of the characteristics of the changing media ecosystem is the abundance of players and consumption patterns. What does it imply for a strategy in terms of compliance and enforcement? It implies the recognition of your own limits, and therefore a change in your ambition, which might not be to regulate all this content which is flowing on so many different distribution chains but rather to “regulate self-regulators”.

Beyond the traditional incantations about self-regulation which usually lead nowhere, there is practical work to do in this regard. If we take the 28 EU countries and the 3 main topics which fit for self-regulation (protection of minors, protection of consumers and journalism ethics), it appears from a quick research that for a total 84 possible co- or self-regulatory schemes, today only 51 currently seem to exist.

Self or co-regulatory schemes in EU 28																													
	A	B	B	C	C	D	D	E	E	E	F	F	G	G	H	H	I	I	L	L	L	M	N	P	P	R	S	S	S
	T	E	G	Y	Z	E	K	E	S	I	R	B	R	R	U	E	T	T	U	V	T	L	L	T	O	E	I	K	
Protection consumers 26/28	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Protection minors 7/28	Red	Red	Red	Red	Red	Green	Red	Red	Green	Red	Red	Red	Red	Red	Red	Red	Red	Green	Red	Red	Red	Red	Green	Green	Green	Green	Red	Red	Red
Journalism ethics 18/28	Green	Green	Green	Green	Red	Green	Green	Green	Green	Green	Red	Green	Red	Green	Green	Green	Green	Green	Green	Red	Red	Red	Green	Red	Red	Red	Green	Red	Red
TOTAL 51/84																													

Why not elaborate a strategy which would bring your country to a result of 3 out of 3 and thus lead the EU to a result of 81 out of 81? The energy spent regulating these issues which are may be implemented by co- or self-regulatory schemes could then be spent on enhancing compliance with other issues.

In practice, this means two roles for regulators:

- Create the conditions for the development of self and co-regulatory schemes, with the appropriate backstop powers in case of failure;
- Make sure that they function correctly once they exist, since the fact that they exist is not enough. We have seen in the past major failures of self-regulation such as in journalism ethics in the UK. A recent study on “Effectiveness of self- and co-regulation in the context of implementing the AVMS Directive” conducted by PANTEIA for the European commission has identified several breaches to the principles for better self and co-regulation in those schemes.

4.3. *Think about what really matters now*

This principle is closely related to the previous one. If you do not have the resources to enforce 100% of the rules 100% of the time on 100% of the players, then make choices and go for what really matters in each area.

For example, I remember an authority which spent quite a lot of time monitoring quantitative advertising, and found out that more than 12 minutes were broadcast, and entered in endless

deliberations on the question to know if the transition between each advertisement within an advertising break had to count in the 12 minutes allowed or could be taken off these 12 minutes. There might be more essential issues in terms of protection of consumers than this one.

I also remember another authority which had the duty to enforce a new law on transparency of ownership and in which some people argued that it was impossible because there were 1600 players on the market. There might have been a way to identify within those 1600 the really problematic players and have them comply first instead of thinking about an indeed impossible way to enforce the rules at the same time on 1600 players, especially with no additional staff to do so.

So do not micro-regulate. And simplify as much as you can.

4.4. *Think about what will matter in the future*

In a recent report on “Public service broadcasting in the internet age”, the British Ofcom notes that *“historical evidence, while instructive, is limited in the context of today’s rapidly changing media markets and the trends that we have identified above. The rapid changes noted in the past two years, since 2013/4, may mark a fundamental shift in audience attitudes and consumption”*. In the same vein, a recent report on “Territoriality and its impact on the financing of audiovisual works” of the European Audiovisual Observatory stresses that *“the trend is towards OTT video distribution, which favors tech players with the required technical know-how and consumer insights to take advantage of this situation. The shift in paradigm is underlined by the relatively rapid adoption of SVOD services in digitally mature countries, with OTT video gaining more market importance and traditional players being confronted with aggressive competitors”*.

My point here is very simple: I do not consider as a future-proof media regulator a regulator which either is not competent for (or neglects enforcement by) on-demand providers when market changes are not incremental anymore but increasingly clearly disruptive.

4.5. *Think outside your material jurisdiction*

It is obvious that no public body can act outside its jurisdiction, but this point is not about making decisions, but rather about contributing to the conditions in which players outside your material jurisdiction can contribute to compliance with some public policy objectives.

If we take for example the issue of protection of minors, if service providers have to comply in all EU countries with the AVMS Directive, it appears from a quick research that the role of platform providers is mentioned only in 5 countries out of 28, and when it comes to network

providers initiatives exists only in countries where the four main internet service providers have agreed to offer whole home filtering to all their subscribers.

Enforcement of protection of minors rules in EU 28		A	B	B	C	C	D	D	E	E	F	F	G	G	H	H	I	I	L	L	L	M	N	P	P	R	S	S	S	
		T	E	G	Y	Z	E	K	E	S	I	R	B	R	R	U	E	T	T	U	V	T	L	L	T	O	E	I	K	
Service providers	28/28	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green
Platform providers	5/28	Red	Green	Red	Red	Red	Red	Red	Red	Red	Red	Green	Red	Red	Red	Red	Red	Green	Red	Red	Red	Red	Red	Red	Red	Red	Red	Green	Red	Red
Network provider	1/28	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	SELF	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red	Red
TOTAL	34/84																													

Involving platforms and even network providers appears increasingly important since consumption is moving towards environments in which they might be in the best position to ensure compliance.

This has been highlighted by a recent report of the European Audiovisual Observatory on protection of minors, according to which “even though these players fall out of the material scope of the Directive, they play a crucial role in the all the range of measures which can be put in place with the view of protecting minors from accessing harmful content. Their role is even more important in a fully digital environment where more and more households consume linear and non-linear programmes through a set-top-box”.

And it also appears essential if you take a look at technological evolution such the development of personalised advertisement by platform providers, such as Proximus TV in Belgium.

4.6. Think outside your territorial jurisdiction

It is obvious that no public body can act outside its jurisdiction, but this point is not about making decisions, but rather about contributing to the conditions in which all players comply, no matter which audience they target.

Breakdown of video-on-demand services available in the EU in 2014

EU 28	National	Established in another EU country	Established in the US	Established in another country	Total VOD services	Share of EU cross-border services	Share of non-national services
Total	651	426	763	111	1951	22%	67%

Today, according to data from the European Audiovisual Observatory, 67% of VOD services are non-national services. This ratio goes up to:

- 77% in Cyprus, Estonia, Latvia and Slovenia;
- 81% in Finland;
- 83% in French-speaking Belgium and Greece;
- 86% in Austria;
- 90% in Ireland;
- 97% in Malta.

Do these comply? Is there enforcement by the NRA of the country-of-origin? I do not have the answer but I fear that the answer is most of the time probably no.

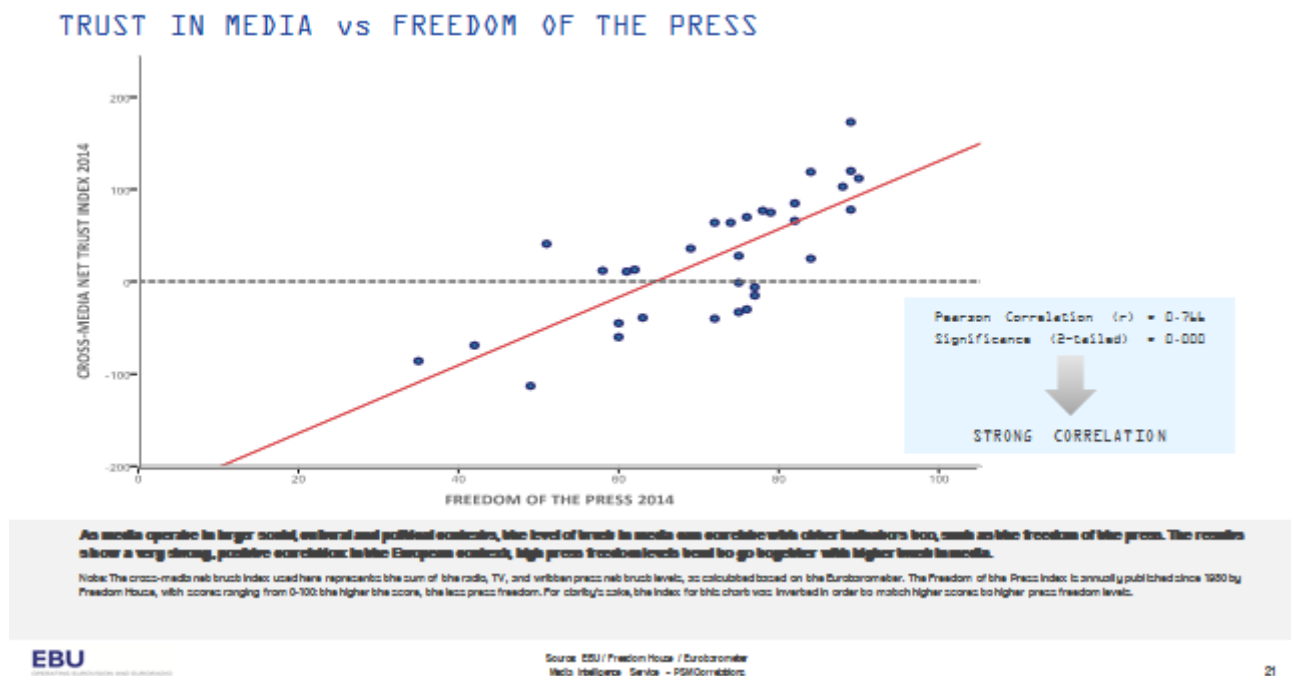
Now, this is a huge challenge in terms of compliance. It would mean otherwise admitting that enforcement can be relaxed for foreign services. When so many services cross borders, there should be more cooperation among NRAs to make sure that they comply, and I am afraid we have not taken this issue seriously enough. Most of us know that the mechanisms of the AVMSD about circumvention and the lack of competence of the Convention on transfrontier television on VOD services cannot solve this issue. What cannot be solved by law should thus be solved by stronger cooperation between regulators. But how many of you pay as much attention to services targeting your own citizens than to service targeting foreign audiences? A recent ERGA report contains several recommendations which should be put in place in order start to solve this issue. And this is an issue which goes beyond the EU and to which EPRA as well as the Observatory can contribute.

But beyond the implementation of formal and/or informal cooperation and circumvention procedures, it is rather a change of mindset which is required: when the goal of audiovisual policy is to create a common market (for the European Union) or to ensure free flow of information and ideas (for the Council of Europe), then there should be no difference in enforcement between providers depending on the audience they target.

4.7. Think about democracy

My seventh and last principle will bring us back to where I started: democracy. Compliance of private broadcasters is of course important, but compliance of public and local broadcasters is even more: if in our countries we fund these broadcasters, if we give them a large part of the spectrum, if we grant them must-carry and prominence, it is because we believe that they feed our democratic systems.

And it looks like it's not just a belief: a recent study conducted by the EBU-MIS has shown that in countries where PSB is strong and well-funded, some of the key indicators of a strong and healthy democracy are also present. This is true for trust in radio and TV, and this trust is important since a correlation also exists between trust in media and freedom of media.



The study also showed a correlation between a strong PSB and weakness of right-wing extremism as well as control of corruption.

This is why media regulators should have a closer look at compliance by public and local broadcasters. Not in a way which would translate in tighter control, but rather in a way which would contribute to the delivery of these contributions to democracy. What does it mean in practice? The situation of PSB is so different from one country to another that it's impossible to provide an answer for all of you. But I see three clear paths for stronger involvement of NRAs:

- one insisting on content issues and on compliance with the remit of the public service broadcasters in the countries where PSB is characterized by a high influence of private

competitors on its editorial positioning and therefore tends to have a too strong commercial profile; in one word : working on distinctiveness;

- one insisting on distribution issues and making sure that in the changing ecosystem public service and local content are given due prominence and that consumers can access to them no matter the platform or the interface they use;
- and one insisting on governance issues in the countries tempted to go back to the good old times of the state-controlled broadcaster, and where one of the most influential allies can be the regulatory authority itself.

5. Beware of regulatory tackiness

These are challenging times for regulators:

- mobile screen are replacing fixed ones;
- internet TV is replacing linear TV;
- applications are replacing channels.

And at the same time, most NRAs ensure compliance with systems that exclusively monitor linear channels broadcast on fixed screens...

Everything seems growingly difficult, and some goals appear out of reach. But let's not overestimate the difficulties, and let's not forget it's never been easy. Hubert Beuve-Méry, the founder of the daily newspaper Le Monde, said one day that *"in a world where the abundance of the media seems only to favour the proliferation of mistakes and lies, it becomes every day a little bit more difficult to establish and demonstrate the truth"*. And this was 80 years ago, in 1937, long before the internet, conspiracy theories and Fox News.

Indeed, things appear more difficult than ever, but you have no other choice than to find solutions and this is why the topic which was selected for this session is so essential. Because if you do not provide answers to these challenges on compliance and enforcement, I fear that policy makers will seize this opportunity to get rid of regulators and find other means of compliance.

I started talking about fine-tuning of democracy, and let me end with this. Media regulators have been created in an era in which fine-tuning of democracy was fashionable. But we can all see that we are going through a different period in which there is less concern for fine-tuning and an appeal for simplistic and authoritative solutions which do not fit in the complexity and openness which characterises the work of regulators. There is even sometimes a willingness to get rid of

regulators and let other public bodies under direct political control do the job. This is why media regulators should stop believing that they will be there forever and will forever be in charge of compliance with the enduring public policy objectives they still believe in.

In my former life, I was invited to numerous conferences and one frequent question was about the difference between media regulation and telecom regulation or regulation of other economic sectors such as energy or transport. My answer was that there were no regulatory holidays for media regulators. In other sectors, a satisfying economic balance can be found which makes regulatory intervention useless or unsuitable, but when we talk about the cultural goals of media regulation it's of course different. Today I am not sure I would still provide such an optimistic answer. This was true in a period of incremental change, but it appears less plausible in an era of disruption.

Actually, my fear is that media regulators face a bigger threat than being sent on holidays: this threat is regulatory tackiness, if not regulatory uselessness.

Against this background, compliance and enforcement issues clearly appear as the elephant in the room of media regulation, since:

- a regulator which ensures compliance strictly of traditional broadcasters when the audience rapidly moves elsewhere is doomed to become quickly old-fashioned;
- a regulator which regulates with old tools and an old mindset will not be respected;
- a regulator which ensures compliance strictly of domestic broadcasters is, at least in small countries, doomed to become useless for the vast majority of the audience.

Jean-François Furnémont

Founding partner [Wagner-Hatfield](#)

jff@wagner-hatfield.com

44th EPRA meeting, Yerevan, 21.10.2016
