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The independence of media regulatory authorities ‘on the books’ and ‘on the ground’

Kristina Irion

Introduction

Independence, as an institutional form of regulatory governance that should ensure the impartial and fair handling of a regulator’s competences, has become a widely accepted media regulatory paradigm. Independent media regulatory authorities have become a typical institutional set-up and shared form of institutional governance for countries across the world which guarantee media freedoms. Considered a safeguard for the independence and freedom of the media itself, the independence of the regulatory authorities has to ensure that interventions with the media are impartial and at arm’s length from government and stakeholder interests (Irion & Til, 2019a). The regulatory and institutional remit has been limited to broadcasting media and was later expanded to cover audio and audiovisual media which are available to the general public. That means that press publications and their electronic pendants are not part of this media governance paradigm.

Decades of regional standard-setting and EU harmonisation have consolidated a model for the proper set up of public organisations tasked with media governance. With the exception of Switzerland, there is to date no European country that does not have a media regulatory authority that is independent by name and/or its constituting statutes. But this does not mean that each and every media regulatory authority functions regardless of domestic politics and other vested interests. This Chapter will explore the state of knowledge about the relationship between formal independence (‘on the books’) and actual independence (‘on the ground’) (using terminology used by Bamberger & Mulligan, 2011, in a different legal context).

To make the stakes more plastic, politically motivated early dismissals of decision-makers tend to be quite noticeable. For example, the Albanian assembly dismissed the chair of its media regulator in 2014 on grounds of incompetence and, adding to the three vacant seats of the board, the regulatory authority had for several months no quorum to take decisions (Irion et al 2014). Another strategy to re-gain political influence is to reform the media regulatory authority, thereby ending the term of the mandate of all members of the decision-making body, which happened in Poland in 2006 (Klimkiewicz 2013). Politically motivated appointments by contrast can be taken very smoothly when one political party has a majority in the parliament which can be observed in Hungary (European Commission, 2022a). Where political power is more divisive, procedures for appointments to the decision-making body of media regulators can become protracted affairs as could be seen in Albania and Bosnia Herzegovina since the early 2000 (Irion et al 2014; Jusić 2019). While the countries implicated herein with political interference are from Central and Eastern Europe, it should not imply that problems are confined to this region and sometimes the cracks in the

independence are more subtle. Explanations advanced in the literature invoke regulatory, or more accurately, agency capture by political and business interest and systemic parallelism whereby different historical, cultural and political factors influence the prospects of a regulatory authority's independence. This understood, independence is first and foremost a quality of media governance that is determined by intrinsic and extrinsic conditions. Like in other situations labelling a regulatory authority independent is rhetoric, what matters is if it can function independently when discharging its competences.

This Chapter will focus on the independence of media supervisory authorities on the books and on the ground drawing from law and practice in European countries. In doing so it will endorse the conceptual separation between formal and actual independence of media regulatory authorities which can but must not converge. The literature this chapter draws from are regulatory theory and governance studies, media law and policy research as well as official documents. The empirical basis are country-level and comparative research on independent regulatory authorities in European countries. The reason for applying the focus on European countries is the availability of legal and empirical research about independent media regulatory authorities; however, the theoretical basis and criticism are no less viable in countries outside Europe.

Following this introduction, the first section will revisit the literature conceptualizing independent regulatory authorities in theory and in particular as the best practice of institutional governance in the media sector. The second section will recall relevant standards-setting by the Council of Europe and in rulemaking by the European Union for the audiovisual media sector. The third section will survey the literature on European countries' independent media authorities on the ground. The conclusion will summarize the argument and identify avenues for future research.

Governance by independent regulatory authorities

Independent agencies have their origins in the United States where these agencies exist and operate outside the federal government. Starting in the 1980ies, the delegation of public authority to independent regulatory authorities is one of the characteristics of 'regulatory state in Europe' (Majone, 1994) which is in turn the product of a wider paradigm shift from the positive and interventionist state to a new form of public management (Hood, 1991). This section will revisit the literature on independent regulatory authorities in general and in the media sector specifically.

Delegation to independent regulatory authorities

Across economic and social sectors independent regulatory authorities have become 'the natural institutional choice for regulatory governance' (Hans Bredow Institute for Media Research et al., 2011, p. 12). Independent regulatory authorities are tasked to implement economic regulation (e.g. competition, banking and financing), to supervise utility or

network-based sectors (e.g. rail, water, energy, electronic communications etc.), and to further public interest regulation in non-economic areas (e.g. the protection of fundamental rights such as the right to privacy and personal data protection, freedom of expression and non-discrimination, consumer protection and environmental protection) (Irion & Radu, 2013).

According to Thatcher (2002), an independent regulatory authority is:

a body with its own powers and responsibilities given under public law, which is organizationally separate from ministries and is neither directly elected nor managed by elected officials.

Public law not only provides for the democratic legitimacy of the delegation of public authority to the regulator but also for holding the regulator accountable for its decisions, which are moreover subject to judicial review (Koop, 2015). The fact that there are checks and balances already signposts that ‘independence’ is not an absolute but a relative notion (Schulz, 2013). A regulator moreover interacts with a wider institutional and social context which is bound to influence its course and preferences (Dreyer, 2013; Kickert, 1993; Schulz, 2013). In relative terms regulatory independence is thus the ability of a regulator to discharge its powers in line with its public mandate and without undue interference from politics and regulated firms (Geradin & Petit, 2004; Hans Bredow Institute for Media Research et al., 2011, p. 11f.).

Furthermore, the literature commonly draws a distinction between formal and actual independence of regulatory authorities. Formal independence is used to refer to the legislative framework (‘on the books’) which prescribes a regulator’s institutional design and conditions its activities (Gilardi, 2008). Actual independence by contrast is used to connote how the regulator discharges its mandate ‘on the ground’. Hanretty and Koop (2012) observe in this regard:

However, for independence to lead to better policy outcomes, a complex causal chain needs to operate, leading from statutory provisions granting independence to behavioral patterns demonstrating independence, to policy decisions, and, ultimately, to policy outcomes.

Achieving actual independence is not simply a function of calibrating formal independence but it is influenced by factors outside of the law too, such as rule of law, the political and administrative culture, or the political saliency of the regulator’s mandate (Hanretty & Koop, 2013). What is more, there are increasingly doubts as to whether formal guarantees of independence can prevent politicization since appointments of decision-makers remain the prerogative of politicians in power (Ennsner-Jedenastik, 2016).

Common rationales given in support of delegating public management functions to independent regulatory agencies are expertise, efficiency and effectiveness. After all independent regulatory authorities are ‘highly specialised organisations enjoying considerable autonomy of decision-making’ (Gilardi & Maggetti, 2013) which have been instituted precisely to deliver better regulation (Gilardi, 2008; Majone, 1994, 1997; Thatcher & Stone Sweet, 2002). Whether independent regulatory authorities outperform other regulatory

formations is increasingly contested, for example against the backdrop of the financial crisis which also exposes deficits of financial market supervision, adding to perceived democratic deficits in the regulatory state (Majone, 1999; Schmitter & Trechsel, 2004). Guarantees of independence should thus be properly aligned with democratic and public accountability of the decision-making of independent regulatory authorities (Puppis & Maggetti 2012; Scott, 2000).

Independent regulatory authorities in the media sector

Considered the ‘fourth estate’ the media fulfils an important social function in democratic societies which in turn constitutionally guarantee media freedoms (Oster, 2015). The normative values to be realized are media independence (Karppinen & Moe, 2016) as well as media plurality and diversity (Karppinen, 2013; Valcke, Picard, & Sükösd, 2015) which together underpin the deliberative fabric of democratic societies. Through its public interest reporting and investigative journalism, the media holds governments and politicians accountable. The resulting ‘specific and at times sensitive relationship’ (Irion & Ledger, 2013) between politics and the media’s watchdog function forms a special media policy concern.

In European countries media regulation and corresponding supervision primarily concerns the audiovisual media sector that has evolved from television broadcasting and now includes linear and non-linear audiovisual media services. Here, independent regulatory authorities have been instituted as a safeguard against politically motivated interferences with those media. Characteristic of the dual media system in European countries also supervisory arrangements tend to differ between public service media and private audiovisual media services. Press publications by contrast are traditionally self-governed by codes of conducts setting out editorial responsibilities and journalistic standards. Besides, there is a vast online media space that typically operates outside editorial responsibility and media regulation.

As a result of European standard-setting and European Union law that will be covered in more detail below, independent regulatory authorities are the ‘default choice for regulatory governance’ (Jakubowicz, 2013) in European countries’ audiovisual media sector. Mirroring the conceptual understanding above, the independence of media regulators is necessarily relative and also formal and actual independence ought to be distinguished (Hans Bredow Institute for Media Research et al., 2011). The relationship between the two is not linear meaning that higher levels of formal independence (‘on the books’) do not necessarily imply improved actual independence (‘on the ground’). Put differently, there are limits to institutional engineering via prescriptive legislation because other factors external to the law play out decisively for regulators’ actual independence.

In their influential book Hallin and Mancini (2004) introduce the concept of ‘political parallelism’ which posits that media systems are shaped by the socio-political and cultural factors of their respective countries. They find that as a reflexion of contextual factors similar media governance arrangements play out differently in different countries (Hallin & Mancini,

2004). This concerns independent media regulatory authorities too since they do not exist in isolation but interact with the media and political systems surrounding them:

Studying formal and de-facto independence of media regulatory bodies cannot be done in isolation, but will necessarily be influenced by the wider environment in a given country. (Hans Bredow Institute for Media Research et al., 2011)

In extending this theoretical framework to non-Western countries subsequent research questions the fittingness of Western democracies' media law and institutions to the situation in non-Western countries (Irion & Jusić, 2014; Jakubowicz & Sükösd, 2008; Voltmer, 2011).

A theoretical framework for operationalizing independence

A useful theoretical framework that operationalizes the independence and efficient functioning of audiovisual media services regulatory bodies is offered in the 2011 INDIREG study (Hans Bredow Institute for Media Research et al., 2011). Through the lens of the 'governance structure' it is possible to capture the complex interactions of a regulator with stakeholders and their norms and instruments with the aim to deduce "possible forms of control, influence, constraints and their respective countermeasures" (Dreyer, 2013). Hence, independent regulatory authorities "can be seen as objects positioned in a parallelogram of power" (Schulz, 2013) where independence is maintained through a system of checks and balances to the extent necessary to achieve the normative objectives the regulator is required for.

Through a mapping of the governance structure one can identify 'dependencers', i.e. factors that exert external influence, and 'autonomizers' that can neutralise external influence (Dreyer, 2013). To be more concrete, power, money and knowledge are common means to influence an organisation's behaviour. Corresponding 'autonomizers' are, for example, the delegation of clearly defined competences and powers as well as means to obtain adequate funding and to recruit experienced decision-makers and staff. Consistent with the literature on independent regulatory agencies, 'dependencers' and 'autonomizers' exist for both formal and actual independence. Safeguards to ensure transparency and accountability can anchor a regulator in its governance structure and are necessary to achieve democratic legitimacy of its decisions.

This theoretical framework has been operationalized as the INDIREG Ranking Tool which offers a methodology to 'measure' the independence of regulatory authorities in the audiovisual media sector (Hans Bredow Institute for Media Research et al., 2011). The INDIREG Ranking Tool builds on the literature on independent regulatory authorities (e.g., Gilardi, 2008), but particularizes it to conform with the situation and best practices of media regulatory authorities. The INDIREG Ranking Tool is essentially a composite index with 42 indicators for formal independence and 36 indicators for actual independence that are clustered on five dimensions: (1) status and powers; (2) financial autonomy; (3) autonomy of decision makers; (4) knowledge; and (5) accountability and transparency (Irion & Ledger, 2013). Acknowledging that indicators can have different effects, the methodology

incorporates a weighted approach. For details on the methodology and justifications of the indicators and their weighting see the INDIREG study (Hans Bredow Institute for Media Research et al., 2011). A recent review of the INDIREG methodology in light of the 2018 revision of the Audiovisual Media Services Directive of the European Union testifies to its continued relevance (Irion, 2019).

Provided that independence is a quality that is difficult to capture through indicators, the methodology is actually geared towards assessing the risks of influence by external stakeholders and the existence of checks and balances. As regards actual independence ('on the ground') the existence of informal practices to exert influence on a regulator can complicate the traceability of such practices:

... threats of actually making use of power are either anticipated only by the regulator itself or are being uttered on an informal level only. (Dreyer, 2013)

Such demonstrates the limitations of handling a universal concept of independence in a murky reality. This is the reason why the application of the INDIREG Ranking Tool to assess a media regulatory authority requires an interpretation of the findings against the local context.

European media governance 'on the books'

European media governance 'on the books' looks at the contributions from European guarantees of media freedom, the standard-setting of the Council of Europe and European Union law to the construction of independent regulatory authorities.

Media freedom in the European Convention on Human Rights

European guarantees of media freedom are derived from Article 10 of the European Convention on Human Rights (ECHR), which provides for the right to freedom of expression and information. In its case law, the European Court of Human Rights (ECtHR, 2009) underscores that "[d]emocracy thrives on freedom of expression" and "there can be no democracy without pluralism." Any interference with Article 10(1) ECHR must pursue a legitimate public interest and has to be prescribed by law and necessary in a democratic society. European countries' national media laws have to meet these benchmarks and so must the actions of authorities charged with implementing the legislative framework in the media sector.

Even though the interpretation of the ECHR does not explicitly require to set-up an independent regulatory authority (Valcke, Voorhoof, & Lievens, 2013), the Court ruled that states have a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism (ECtHR, 2012). Furthermore, its jurisprudence underscores the importance of procedural safeguards to "provide sufficient guarantees against arbitrariness of decisions" (ECtHR, 2007, 2008). It is not possible to understand if an authority has exercised its discretion lawfully when deliberations are kept secret or a decision does not give reasons (ECtHR, 2007). Additional procedural guarantees

are derived from the right to a fair trial in Article 6 ECHR and the right to an effective remedy in Article 13 ECHR (Valcke et al., 2013).

Standards-setting by the Council of Europe

The Council of Europe is an intergovernmental organisation in Strasbourg comprising of 46 Member States in Europe which all ratified the ECHR. In line with its mission to promote democracy and protect human rights and the rule of law in Europe the Council of Europe has been setting important standards for the media sectors. Among others, the Council of Europe has repeatedly called for the independence of media regulatory authorities (Council of Europe, 2000, 2008).

In 2000, the Council of Europe's (2000) Committee of Ministers to Member States adopted the Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector. It recommends that Member States' governments establish "independent regulatory authorities for the broadcasting sector" (Council of Europe, 2000). The guidelines in the appendix to this Recommendation advise "devising an appropriate legislative framework" in which "[t]he rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence." (Council of Europe, 2000). Aside from the general legislative framework, the guidelines consider rules on appointment, composition and functioning, financial independence, powers and competence, and accountability of the independent regulatory authority.

In 2008 the Committee of Ministers adopted a Declaration on the independence and functions of regulatory authorities for the broadcasting sector (Council of Europe, 2008). The Appendix to this Declaration contains an overview on the implementation of Recommendation Rec(2000)23 (Council of Europe, 2000) and additional information on the independence of regulatory authorities in the Council of Europe member states. The Appendix while being carefully worded and not naming specific countries, flags various means to exert influence on independent regulatory authorities that Recommendation Rec(2000)23 (Council of Europe, 2000) sought to eliminate. Notably, that in some countries appointments of members of regulatory authorities reproduced political power structures, that authorities which are funded from the state budget experienced pressure or that the broadcasting licensing procedures allegedly lack transparency, are arbitrary or politically biased (Council of Europe, 2008). From the Appendix to the Declaration transpires an important empirical insight:

The quantity and detail of the regulations vary considerably between member states. However, there does not seem to be a clear link between the amount of detail in a country's legislation on broadcasting regulation and the regulatory authority's independence. In fact, some of the regulatory authorities that are governed by a very limited set of rules are considered in practice to operate relatively independently. (ibid.)

This leads to the recognition that a solid legislative framework while being paramount for the existence and functioning of the independent supervisory authority needs to operate in a 'culture of independence' to yield the benefits of this institutional form of governance. The

declaration seeks to promote the notion of ‘a culture of independence’ as a prerequisite for independent media supervisory authorities (Council of Europe, 2008). This notion has two dimensions: First, “members of regulatory authorities in the broadcasting sector affirm and exercise their independence” and, secondly, “all members of society, public authorities and other relevant players including the media, respect the independence of the regulatory authorities” (Council of Europe, 2008).

In 2022 the Committee of Ministers released its Recommendation to Ministers to member States which recognizes the transformation of then media and defines procedural principles for media and communication governance (Council of Europe 2022).

Audiovisual media law of the European Union

The European Union is a supranational organisation which has 27 Member States whose founding treaties confer specific competences to the European Union to adopt measures. Even though the European Union has no competence on matters related to culture, based on its internal market competence the European Union has adopted a string of Directives that regulate first television and then audiovisual media services (Irion & Valcke, 2015). Even though the Audiovisual Media Services Directive of 2010 mentioned independent regulatory bodies it was not framed as an obligation to the Member States (Stevens, 2013). After the Audiovisual Media Services Directive was revised in 2018 (European Parliament and the Council, 2018) it now contains a very detailed obligation for Member States to designate independent regulatory authorities. Member States had to transpose the revised Directive into their national legal systems by September 2020; however, a handful of Member States are delayed.

Specifically, Article 30 of the Audiovisual Media Services Directive provides that:

1. Each Member State shall designate one or more national regulatory authorities, bodies, or both. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. [...]

With Article 30 of the Audiovisual Media Services Directive the European Union has extensively codified the independence and effective functioning of regulatory authorities in Member States’ audiovisual media sectors. As we conclude elsewhere:

The requirement of functional independence is a new and potentially significant element designed to complement the formal independence of national regulatory authorities codified in law (Irion & Til, 2019b).

Recital 53 provides additional information on the requisite degree of actual independence:

... national regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if those authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and of any other public or private body.

Pursuant to Article 30 of the Audiovisual Media Services Directive independent regulatory authorities “shall not seek or take instructions” from any other body when implementing the Directive. Besides, Article 30 of the Audiovisual Media Services Directive prescribes several conditions which are conducive for regulatory independence, notably:

- the competences and powers of the independent regulatory authorities are clearly defined (paragraph 4);
- the independent regulatory authorities have adequate financial and human resources and enforcement powers to carry out their functions effectively (paragraph 5);
- the independent regulatory authorities are provided with their own annual budgets, which shall be made public (paragraph 5); and
- the conditions and the procedures for the appointment and dismissal of the heads of independent regulatory authorities or the members of the collegiate body fulfilling that function, including the duration of the mandate, are laid down. A dismissal decision shall be duly justified, subject to prior notification and made available to the public (paragraph 6).

At the same time, the independent regulatory authorities have to “exercise their powers impartially and transparently” (paragraph 2) and are “accountable” pursuant to clearly defined standards in the law (paragraph 4), including “supervision in accordance with national constitutional law” (paragraph 2). Finally, Member States shall ensure that a right to an effective remedy exists at national level. The appeal body, that can be a court, “shall be independent of the parties involved in the appeal” (paragraph 6).

The 2018 revision of the Audiovisual Media Services Directive, in its Article 30b, establishes the European Regulators Group for Audiovisual Media Services (ERGA). ERGA is composed of representatives of independent regulatory authorities of the European Union Member States. ERGA is a network for cooperation between regulators in the context of the Audiovisual Media Services Directive.

Comparison between European Union law and Council of Europe standards

Both, European Union law and the Council of Europe framework entrust regulatory governance in the audiovisual media sector to independent regulatory authorities. Since 2020 Member States of the European Union have an obligation to designate independent regulatory authorities in the audiovisual media sector. While the ECHR is a binding instrument for the Member States of the Council of Europe, it does not require a specific institutional set-up. The jurisprudence of the ECtHR requires certain procedural guarantees against the arbitrariness of regulators’ decisions, notably reasoned decisions and an effective remedy. The Recommendation Rec(2000)23 and the 2008 Declaration (Council of Europe, 2000, 2008) by contrast are non-binding instruments that unfold traction in European countries as best practices.

Both, European Union law and the standard-setting of the Council of Europe, seek to ensure the effective or unimpeded functioning of the independent regulatory authorities in their constituent countries by devising an adequate legislative framework. A comparison between the substance of European Union law and the Council of Europe standards shows significant convergence on the particular elements that an adequate legislative framework should provide for, namely clearly defined competences and (enforcement) powers, adequate financial and human resources, independent sources of financing, clearly defined conditions and procedures for the appointment and dismissal of decision-makers as well as democratic accountability, reasoned decisions and effective remedies (Irion & Francese Coutinho, 2019). The 2008 Declaration (Council of Europe, 2008) highlights in addition that an independent media authority can only thrive in a country where a culture of independence prevails.

Independent media regulatory authorities ‘on the ground’

Having covered the theory as well as European Union law and Council of Europe standard-setting, it is time to turn to independent regulatory media authorities ‘on the ground’. On the one hand, there is variation in the way in which European countries have set-up their media regulatory authorities and, on the other hand, actual independence can deviate from formal independence leading to discrepancies in the way how media regulatory authorities operate ‘on the ground’.

Variations in organising independent media regulatory authorities

When setting-up their independent media regulatory authorities in conformity with the standard-setting of the Council of Europe and, as applicable, European Union law, European countries have some margin left. This is the space in which a country’s constitutional and legal traditions and other notions about regulatory institutions define the precise set-up of the national media regulatory authorities. While most countries have one competent authority for audiovisual media, federal states such as Belgium and Germany and autonomous regions such as in Spain have their own media regulatory authorities. There is moreover a growing trend to create converged independent regulatory authorities which are tasked with overseeing various regulated sectors such as communications, energy or postal next to the audiovisual media sector. Countries with converged regulatory authorities are for example Italy (AGCOM), Switzerland (BAKOM) and the United Kingdom (OFCOM).

Independence of media regulatory authorities ‘on the ground’

Owing to the unwavering relevance of this issue there is a host of country-level and comparative research that explores the independence and effective functioning of independent media regulatory authorities. While each survey delivers a snapshot at a given time, some trends and generalisable insights are possible.

The 2011 INDIREG study carried out eight in-depth country studies with the involvement of local experts, covering Estonia, Hungary, Italy, the Netherlands, Slovenia, the United Kingdom, North Macedonia and Bosnia and Herzegovina (Hans Bredow Institute for Media Research et al., 2011). At the time not yet all European countries had designated independent regulatory authorities, such as in Estonia and the Netherlands. From this small sample it transpires that levels of formal and actual independence do not always correspond directly. In a number of countries formal independence tends to outpace actual levels of independence. The most prevailing issues that were noted have been a lack of adequate funding and staff as well as politicized appointment of the regulators' decision-makers. Personal integrity of appointed decision-makers, a local culture of independence and active civil society as well as international scrutiny emerged as beneficial for the independence of media regulatory authorities 'on the ground'.

Subsequent implementations of the INDIREG methodology in Serbia and Albania offer many detailed findings but the respective independent regulatory authorities are often in a chokehold by their parliaments to approve reports and annual budget or to nominate and appoint new members to the board (Irion, Ledger, Svensson, & Fejzulla, 2014; Irion, Svensson, Ledger, & Rsumovic, 2017).

The Mediadem project carried out its own string of country-level and comparative research. An article about Poland states that the media regulatory authority and the public service media organisation "are interwoven into a complex set of relations with the political system, determined by political culture, democratic consolidation and political manners" (Klimkiewicz, 2013). A comparative analysis of Greece and Italy, which have been classified as polarized pluralist media system following Hallin and Mancini (2004), finds that despite institutional variations both media regulatory authorities "are marked by highly politicised procedures" (Psychogiopoulou, Casarosa, & Kandyla, 2013). Finland's and the United Kingdom's capacity to sustain independent media regulatory authorities has been more favourably assessed because both countries "display considerable commitment to regulatory independence in the media field" (Craufurd Smith, Lauk, Stolte, & Kuutti, 2013).

Surveys of five Western Balkans countries, namely Albania, Bosnia-Herzegovina, Kosovo, Macedonia, and Serbia, find rather fragile conditions for independent media regulatory authorities 'on the ground' even though the legislative frameworks tend to be extensive and conform to best practices (Irion & Jusic, 2018).

The 2019 IRIS Special on "The Independence of Media regulatory Authorities in Europe" offers an overview over nine European countries. As regards functional independence Spain and Slovenia are considered to conform with best practices, the Netherlands and Sweden, while not having a high level of independence guaranteed by law, act in practice very independent. Bosnia-Herzegovina's regulatory authority's independence is exposed to politicised appointments, while regulators in Hungary and Poland –

diplomatically phrased – “present issues in its functioning” (Irion & Francese Coutinho, 2019).

Illiberal democracies’ disregard for independent media and regulatory bodies

Hungary and Poland, both Member States of the European Union, are increasingly ferociously called out for the lack of independence in their media policies and of their regulators. The European Commission’s 2022 Rule of Law Report for Poland states:

Despite the legal safeguards being in place, as noted by different stakeholders, challenges relate to close political ties of some members of the KRRiT (European Commission, 2022b).

The 2022 Rule of Law Report for Hungary reads:

While the Media Act provides for a detailed legal framework for the establishment and operation of the Media Authority and while the authority is endowed with sufficient funding for the accomplishment of its tasks, concerns persist over the Authority’s functional independence. The decision-making body of the Authority - the Media Council - remains composed of members all nominated by the ruling party (European Commission, 2022a).

Arguably, it is possible that a politicised media regulatory authority conforms with the letter of the law in Article 30 of the Audiovisual Media Services Directive but when it adopts arbitrary decisions this may trigger infringements proceedings. Recently, the European Commission referred Hungary to the Court of Justice of the European Union over the Hungarian Media Council’s 2021 decisions to reject broadcaster Klubrádió’s application for a broadcasting licence, thereby violating the Electronic Communications Code (European Commission, 2022d). This is an example how supranational scrutiny, here by the European Commission and ultimately by the Court of Justice of the European Union, can be leveraged to contest a national regulatory body’s actual independence. Nonetheless, the independence and effective functioning of regulatory authorities are predominantly conditioned by the domestic context.

However, entrenching legal safeguards of independence can cause obstacles when repairing a politically captured media regulatory authority. When in 2023 a new Polish government came to power, it faced a legacy of captured institutions in the media sector (Wójcik, 2023). In such a situation, where the aim is to restore the independence of the authorities competent to supervise audiovisual media, ultra vires dismissals of its members would nevertheless conflict with the guarantees for independence laid down in the AVMSD as implemented in national law. This means that dismissals of members of the media regulator have to pass through the official procedures, which require proof of malfeasance in order to avoid illegal removals. This in turn can become a lengthy affair given the ability to appeal such decisions in a rule of law country.

Concluding remarks *in media res*

In the European media sectors independent regulatory authorities are primarily meant to serve as a buffer against media freedom being interfered with by political and private interests. There are increasingly sophisticated rules and standards that circumscribe how an adequate legislative and administrative framework for independent regulators should look like. However, ‘a culture of independence’ (Council of Europe, 2008) which is respected by the legislative and executive branches of government and defended by an independent judicial branch functions hardly as a prescriptive requirement but coins a quality of democratic governance. Where there is no favourable environment, also independent regulatory authorities are as prone to political capture (Jabubovics 2013) as any other form of regulatory governance, even state bureaucracy.

A survey of country-level research offers ample testimony that independence ‘on the books’ and ‘on the ground’ are not in a linear relationship but influenced by political traditions and democratic trajectories in the countries. This should not imply that an adequate legislative and administrative framework for regulatory governance of the media is superfluous but that a regulator’s actual independence and effective functioning is significantly conditioned by external factors, such as the rule of law, as explained in the literature (Ennsner-Jedenastik, 2016; Hanretty & Koop, 2013). For a number of Eastern European countries, it has been noted that formal arrangements would have to outperform their local context (Irion & Jusić, 2014) which is a delusion. Jakubowicz (2007) intriguingly pins it down by asking:

how can a broadcasting regulatory body be independent in an environment which does not respect its independence?

Ramping up formal requirements of independent regulatory authorities in the audiovisual media sector in the European Union cannot administer independence ‘on the ground’ where a Member State and its media is politically captured (Dragomir 2018). What the European Union can do is being vigilant vis-à-vis Member States whose media regulator has been found to act insufficiently independent and painstakingly scrutinize the impartiality of decisions adopted by these regulators. On the one hand, it would appear that there is no need for extensive methodologies for formal and actual independence, as is the INDIREG Ranking Tool, considering that many problems are publicly known and discussed. On the other hand, applying consistent methodologies for the state of independence over time is important for the legitimacy of the monitoring and possible infringement procedures.

Another European Commission’s initiative proposes a European Media Freedom Act which plans to infuse more transparency and to strengthen regulatory co-operation and to introduce small consistency mechanisms through a still to be established European Board for Media Services. It is however a much larger chapter to defend democracy and rule of law, which in turn would nurture civil society and an independent judiciary where eventually a culture of independence can take foothold. This is a long shot, for which the European Union

and the Council of Europe would have to join forces because of the limits to institutional engineering.

The digital transformation of the media may actually contribute to the depoliticization of independent media regulatory bodies. When attention shifts away from mass media, such as television, to non-linear content, which is increasingly supplied across borders, the whole point of controlling an audiovisual media regulatory authority may be lost. Directions for future research could be the political saliency of the audiovisual media sector, changing competences of media regulators in response digital media, the need for enhanced collaboration between regulators across sectors (Cabrera Blázquez, Denis, Mchet, & McNulty 2021), such as competition law and data protection law, as well as new priorities to regulate online platforms directly by the European Commission and the democratic governance of social media platforms (Kettemann & Schulz 2023). Ultimately, the knowledge about independence ‘on the book’ and ‘on the ground’ will continue to be relevant as long as there are independent regulators and external interests, be they politically or economically motivated.

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