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The independence of media regulatory authorities in Europe

Kristina Irion

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1. Introduction

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The independence of the media and its regulatory agencies has long been established as a cornerstone of a vital democracy.² Whereas demands of freedom of speech and freedom of the media on the one hand require states to refrain from interference with media production and to protect the independence of media organisations, it is widely accepted that states at the same time are required to set a normative framework in order to guarantee the existence of a diversified and pluralistic media landscape.³ The concept and institution of an independent regulatory authority is seen as the default choice for the regulatory governance of the audiovisual media sector, to ensure that interventions with the media are impartial and at arm's length from government and stakeholder interests.⁴

The complex relationship between best practice media governance and the independent regulatory authorities within European countries' media systems is at the centre of this IRIS *Special*, which seeks to provide an update on the current status of independent media regulation in Europe and some of the changes it has recently undergone. First, the Council of Europe defined the contours of independent regulatory authorities in the broadcasting and television sector of member countries in a specific recommendation (Rec (2000)23)⁵ which was reinforced with a 2008 declaration.⁶ At a programmatic level, both documents, however non-binding, treat the matter of independence for media regulators as the only way to organise media regulation, for

² Jakubowicz K. (2013), preface, "Broadcasting regulatory authorities: Work in progress", in Schulz W., Valcke P. & Irion K. (eds), *The independence of the media and its regulatory agencies: Shedding new light on formal and actual independence against the national context* (pp. xi-xxiv), Intellect, Bristol, UK (hereafter: Jakubowicz (2013)).

³ Schulz, W. (2013), "Introduction. Structural interconnection of free media and independent regulators", in W. Schulz, P. Valcke & K. Irion (eds.), *The independence of the media and its regulatory agencies: Shedding new light on formal and actual independence against the national context* (pp. 5-6), Intellect, Bristol, UK (hereafter: Schulz (2013)).

⁴ Jakubowicz (2013), p. ix.

⁵ Council of Europe, Recommendation (Rec (2000)23) of the Committee of Ministers to the Member States on the independence and functions of regulatory authorities for the broadcasting sector, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322.

⁶ Council of Europe, Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector, <https://rm.coe.int/09000016805d3c1e>.



which there is no viable democratic alternative.⁷ With the entering into force in the autumn of 2018 of the revised version of the Audiovisual Media Services Directive (AVMS Directive), this *IRIS Special* follows a significant legislative milestone in the European Union (EU) in the field of independent media regulation. The revised Directive's Article 30 introduces a detailed provision for EU member states to designate one or more independent regulatory authorities, while at the same time specifying some of the requirements and substantive safeguards to guarantee independence.⁸

In the light of this development, this *IRIS Special* assesses the legal framework in place for media regulatory authorities in European countries that are member states of the EU and/or the Council of Europe. It does so by looking at the value of independent regulation of the audiovisual media sector in standard-setting documents of the Council of Europe and in EU law, while seeking to understand the impact of the revised Directive.

1.1. The concept of independent regulation

Independent regulatory authorities have diffused throughout European countries to the extent that they have virtually become the natural institutional form for regulatory governance in the broadcasting and audiovisual media sector.⁹ As an institutional set-up, independent regulatory bodies can contribute to two aspects that are specific to the audiovisual media sector:

1. the objective of regulation in the media sector to guarantee media freedoms; and
2. the specific and at times sensitive relationship between the media sector and elected as well as non-elected politicians (i.e. the media as the 'fourth estate').¹⁰

As Schulz (2013) notes, this is however not to say that independence is the same concept as freedom, but that there are specific links between the two.¹¹ States are, for example, under a positive obligation to safeguard media pluralism, implying the organisation of an effective enforcement system for the regulatory framework guaranteeing the right of freedom of expression and media pluralism. Besides, the importance of broadcasting

⁷ Irion & Radu (2013), p. 17.

⁸ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

⁹ Irion, and Radu (2013), p. 17.

¹⁰ Irion K., and Ledger M. (2013), "Measuring independence: Approaches, limitations and a new ranking tool", in: W. Schulz, P. Valcke, and K. Irion, (eds.), *The Independence of the Media and Its Regulatory Agencies: Shedding new light on formal and actual independence against the national context* (pp. 139-165), Intellect, Bristol, UK, p. 2f.

¹¹ Schulz (2013), p. 9.



media in modern democratic societies is often highlighted¹² in support of independent media regulation. Additionally, the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication in order to reflect the diversity of ideas and opinions is recalled.¹³ European countries' express preference for this institutional form can certainly be attributed to the standard-setting by the Council of Europe.

Even if independent regulatory bodies are a common element, the institutional and organisational set-ups in the different member states vary greatly, as can be seen from the country chapters in this report. For instance, there are distinctions among European countries in the choice between sector-specific, integrated and convergent regulators. The first is responsible for the supervision of a specific sector, for example broadcasting, the second is, in addition, also responsible for the supervision of adjacent sectors, for example the telecommunications sector and the third comes into play when regulations across the fields regulated by the authority are harmonized. It is to be noted, in this context, that convergence is incomplete as long as content regulation remains unchanged.¹⁴

This IRIS *Special* will connect European standards and practices of independent regulation in the audiovisual media sector with research outcomes to understand the arm's length relationship that is to be maintained with all players that can influence at least one of the resources eventually determining a regulator's independence. From this understanding, it is possible to discuss how to assess, rank or measure the independence of regulatory bodies. A significant effort in this context is the 2011 INDIREG study¹⁵, conducted on behalf of the European Commission, among others.

1.2. Overview of this IRIS *Special*

This IRIS *Special* examines independent regulatory authorities in the audiovisual media sector starting with a description in chapter 2 of the standard-setting work that has been done in this context by the Council of Europe.

The revised version of the AVMS Directive self-evidently plays an important role in this IRIS *Special*. The newly worded Article 30, which hardwires the independence of media regulators into EU law, is therefore closely studied in chapter 3. To understand the

¹² Committee of Ministers, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, 20 December 2000, Preamble, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322.

¹³ Ibid.

¹⁴ Ibid., p. xviii.

¹⁵ Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/Perspective Associates (2011 ed.): INDIREG, "Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive", Study conducted on behalf of the European Commission, Final Report, February 2011 (in the following INDIREG study).



transition from the indirect reference to independence in the 2010 AVMS Directive version to the extensive provision on the independence of regulatory authorities and bodies in the 2018 version, one must not overlook other, earlier developments. In particular, research and high-level policy documents were central to the eventual harmonisation of independent regulatory authorities in the audiovisual media sector under EU law. Another, but related, aim of this IRIS *Special* is the evaluation of the INDIREG methodology in light of the revised Directive.

Lastly, this IRIS *Special*, for a selection of countries, assesses to what extent the current set-up and practices of the regulatory authority in the respective countries is up to par with European best practices and modernised EU law, and outlines whether legal adjustments might be required. In order to carry out this assessment, experts in each of the countries were approached to report on the current situation in their respective countries, using a harmonised structure based on relevant Council of Europe standard-setting instruments, the revised Article 30 of the 2018 AVMS Directive, and the INDIREG methodology. In some instances, the chapters were reviewed by members of the respective regulatory authority.

The brief remarks in this introduction serve to highlight some of the issues explored in subsequent chapters. They also offer a helpful backdrop, as the following chapters delve more deeply into the concept of independent media regulation.