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Irion, K.

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The independence of media regulatory authorities in Europe

Kristina Irion

**with Giacomo Delinavelli, Mariana Francese Coutinho, Ronan Ó Fathaigh,
Tarik Jusić, Beata Klimkiewicz, Carles Llorens, Krisztina Rozgonyi,
Sara Svensson, Tanja Kerševan Smokvina, Gijs van Til**



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Editorial team – Francisco Javier Cabrera Blázquez, Sophie Valais, Legal Analysts

Research assistant - Alexia Dubreu

European Audiovisual Observatory

Authors

Kristina Irion

with (in alphabetical order) Giacomo Delinavelli, Mariana Francese Coutinho, Ronan Ó Fathaigh, Tarik Jusić, Beata Klimkiewicz, Carles Llorens, Krisztina Rozgonyi, Sara Svensson, Tanja Kerševan Smokvina, Gijs van Til

Translation

France Courrèges, Nathalie Sturlèse, Erwin Rohwer, Roland Schmid, Ulrike Welsch

Proofreading

Anthony Mills, Philippe Chesnel, Gianna Iacino

Editorial assistant – Sabine Bouajaja

Marketing – Nathalie Fundone, nathalie.fundone@coe.int

Press and Public Relations – Alison Hindhaugh, alison.hindhaugh@coe.int

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European Audiovisual Observatory

76, allée de la Robertsau

F-67000 Strasbourg, France

Tél. : +33 (0)3 90 21 60 00

Fax : +33 (0)3 90 21 60 19

iris.obs@coe.int

www.obs.coe.int

Contributing Partner Institution

Institute for Information Law (IViR), University of Amsterdam

Nieuwe Achtergracht 166

1018 WV Amsterdam, The Netherlands

Tel: +31 (0) 20 525 3406

Fax: +31 (0) 20 525 3033

ivir@ivir.nl

www.ivir.nl

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4. The INDIREG study and methodology

Kristina Irion, Institute for Information Law (IViR), University of Amsterdam

4.1. Introduction

Setting up independent regulatory agencies has been a wider European trend in the course of revamping countries' public administration into what has become the regulatory state. The underlying assumption is that through independent regulation better regulatory outcomes can be achieved. However, "for independence to lead to better policy outcomes, a complex causal chain needs to operate, leading from statutory provisions granting independence to behavioural patterns demonstrating independence, to policy decisions, and, ultimately, to policy outcomes."⁷³

In European countries, independent regulatory bodies diffused early in what used to be referred to as the broadcasting and telecommunications sector (now, audiovisual media sector). The actual set-up of independent regulatory bodies that are part of the public sector varies according to countries' constitutional, political, and cultural traditions and practices. Democratic traditions and practices in particular are determinants that can "influence the prospects for regulatory authority independence".⁷⁴ Legal frameworks alone don't imbue independence, and require conditions in which functional or operational independence can manifest in "the impartial application of the law, without fear or favour".⁷⁵ This chapter is dedicated to the INDIREG study which has helped to advance our theoretical understanding of what makes and breaks an independent regulatory authority for the audiovisual media sector in a democratic European society.

4.2. The INDIREG study

To identify the essence of independent and functioning media regulators, the European Commission requested in 2009 a comprehensive study. In 2011, a European consortium published its final study entitled "Indicators for independence and efficient functioning of

⁷³ Hanretty C. and Koop C. (2012), "Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies", in *Regulation and Governance*, p. 195.

⁷⁴ Jakubowicz (2013) xi.

⁷⁵ *Ibid.*, xiv.



audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive”, which has come to be known as the INDIREG study.⁷⁶ The study pursued three general objectives:

- (1) a detailed legal description and analysis of the audiovisual media services regulatory bodies in the member states, in candidate and potential candidate countries of the EU and the EFTA countries, as well as in four non-European countries;
- (2) an analysis of the effective implementation of the legal framework in these countries; and
- (3) the identification of key characteristics constituting an independent regulatory body in light of the AVMS Directive.⁷⁷

Recognising that independence “is a multi-faceted concept, the interpretation of which depends heavily on context,”⁷⁸ the INDIREG study reviews the extensive literature on the emergence and spread of independent regulatory bodies and what is meant by ‘independence’. The study comes to the conclusion that absolute independence does not exist and is perhaps not even desirable, since a regulator always has to interact with the government and other stakeholders, as well as correspond with democratic legitimacy and accountability requirements. Independence is therefore better conceptualised as “a necessity for a regulator to keep an equal distance from all possible interests in order to balance them impartially and aim at achieving long-term results benefitting all stakeholders as contrary to serving short-term interests of various groups”.⁷⁹

Independence, or ‘the absence of dependence’, can be better understood from a perspective of influence or control. From this starting point, a link to regulatory theory can be established in which the concept of independence is perceived as the area or frame in which an entity or object is not subject to control by someone or something else. Subsequently, independence can be studied as the position of an entity within a specific governance structure, where regulatory mediums, such as power, money and knowledge, can be used to try to influence or control this object or entity.⁸⁰ The extent to which an entity enjoys independence is then further determined by the factors that make it more likely for that object to act according to its own rules rather than giving in to pressure from outside. In the context of regulatory authorities, a regulator is deemed to be independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary.⁸¹

From this understanding of independence rise a few distinctions and definitions that need to be elaborated on. In the first place, it is important to point out the distinction

⁷⁶ INDIREG Study (2011).

⁷⁷ Ibid., p. 9.

⁷⁸ Ibid., p. 19.

⁷⁹ Lamanuskas T. (2006): The key features of independence of national telecommunication regulatory authorities and securing them in law, In *Law* (61), pp. 73-80.

⁸⁰ INDIREG Study (2011), p. 47.

⁸¹ INDIREG Study (2011), p. 46.



between formal or *de jure* independence, on the one hand, and actual or *de facto* independence on the other. Given its position within complex governance structures, independence is not solely governed by formal legal regulations, but also by social norms and non-normative practices. To determine the extent to which a regulator enjoys independence, it therefore cannot suffice to merely assess the legal framework in place. One must also assess the 'culture of independence', meaning the pattern of formal and informal norms and social practices - as regards the type of object in question - prevailing in any given society as a whole.⁸²

Secondly, it follows that it is not feasible, or even possible, to frame independence as something absolute, as an abstract level that can be defined in a consistent way for all regulatory purposes and regardless of the political, economic and cultural context. Rather, it is widely accepted that independence must be seen as a relative concept.⁸³ Relativity can, in the first instance then, be assessed in view of the relationships of a regulator with its partners in the political system, in the market and on the consumer side. Secondly, it is about context-relativity, meaning the assessment of independence with regard to the specific sector and its legal objectives, as well as the functional role of the regulator within the sector. Above all, the independence of an entity is linked closely to the functions such an entity fulfils within a society.

The knowledge of what exactly constitutes the independence and effective functioning of regulatory bodies from regional best practices and research informed the INDIREG methodology, briefly summarised below.

4.3. The INDIREG methodology

Empirical research to date is mostly concerned with measuring formal independence and concentrates on analysing the relative strength of a given agency's constituting legal framework.⁸⁴ In contrast, research into aspects of actual independence, i.e. not formalised in legal text but a practice that can be public or covert, has been very scarce. Changes to the decision-making body of an independent regulatory agency shortly after a new government came into power, for example, was considered a fairly reliable indicator for actual independence.⁸⁵ The scientifically-backed INDIREG methodology to assess formal and actual independence, and efficient functioning of audiovisual media regulators, went beyond this.⁸⁶

In a nutshell, the INDIREG methodology is a composite index assembling indicators for formal and *de facto* independence and allocating them to five dimensions:

⁸² Schulz (2013). p. 8.

⁸³ INDIREG Study (2011), p. 45.

⁸⁴ E.g. Gilardi F. (2008), *Delegation in the Regulatory State: Independent Regulatory Agencies in Western Europe*, Edward Elgar: Cheltenham; Lamanauskas T. (2006), "The Key Features of Independence of National Telecommunication Regulatory Authorities and Securing them in Law", in *Law* (61), pp. 73–80.

⁸⁵ Hanretty and Koop (2012).

⁸⁶ Irion and Ledger (2013), p. 143.



(1) status and powers; (2) financial autonomy; (3) autonomy of decision makers; (4) knowledge; and (5) accountability and transparency.⁸⁷ For each dimension, formal and actual independence are measured separately while retaining the complimentary relationship between the two sides. Due to the limitations of measuring a quality such as independence, rather than the intrinsic level of independence of regulators, this methodology measures the risk of influence by external players. The lesser the risk of external influence the better a particular agency's configuration performs in relation to a given indicator. Recognising that not every indicator holds the same relevance, the INDIREG methodology incorporates a weighted approach.⁸⁸ Indicators grouped in one dimension have been weighted on the basis of an indicator's relative impact in terms of external influence. The formula underlying the INDIREG methodology is embedded in a spread sheet⁸⁹ and automatically calculates the scores for each dimension, with separation into formal and actual spheres.

Despite the need for correct application of substantial background information, the INDIREG methodology was conceived as a user-friendly tool enabling both an agency's self-assessment, and independent assessments. Each indicator has been phrased as questions with a menu of answer options which taken together form a survey. The survey undergirding the INDIREG methodology is reproduced as an Annex to this report

Once the survey is completed, a graphical representation in the form of a spider web chart visualises the results separately for formal and actual independence.⁹⁰ The graphical representation provides an intuitive entry point for interpretation of the outcomes from applying the INDIREG methodology to a particular independent regulatory authority. The further spread out the spider web chart is, i.e. the further outward the measuring point's position is located, the better a given regulatory body is shielded from external influence. Only for the dimension of accountability and transparency should the result be interpreted differently, because these are legally foreseen routes to maintaining democratic accountability. For this dimension, the further outward the measuring point's position is the more effective are measures to ensure accountability and transparency.

⁸⁷ Ibid.

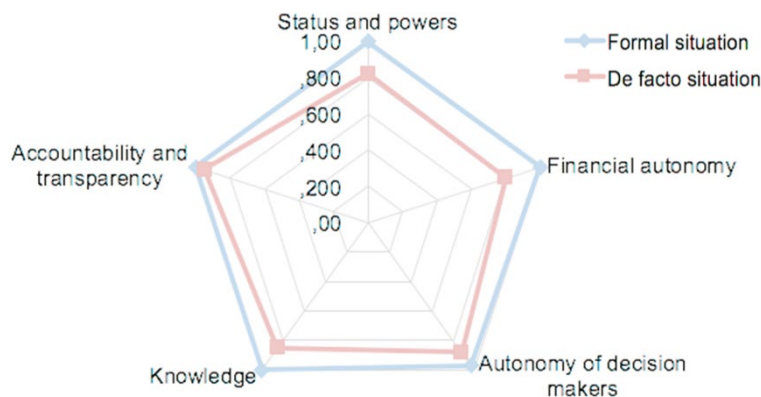
⁸⁸ INDIREG Study, p. 368.

⁸⁹ The INDIREG methodology can be downloaded from www.indireg.eu.

⁹⁰ INDIREG Study, p. 368.



Graphical representation of the INDIREG methodology



The application of the INDIREG methodology is not an end in itself but can reveal attention points for the interpretation of the results against the background of local circumstances. Through the informed interpretation of so derived attention points, it is possible to confirm or refute the identified risks to the independence of the media regulatory authority. Hence, the contextual interpretation of the attention points forms an additional step in the application of the INDIREG methodology, before conclusions can be drawn about the independence of a regulatory authority in the audiovisual media sector. In the next step, this section traces the regulators for which the INDIREG methodology has been applied, and what its practical effect has been.

4.4. Impact of the INDIREG study and methodology

The European Commission requested an assessment of member states' and third countries' media regulatory authorities based on the INDIREG study. The 2015 AVMS RADAR study delivered an update to the analysis of the institutional, legal and regulatory framework of audiovisual media regulatory bodies in 34 European countries.⁹¹ The AVMS RADAR study did not use the actual INDIREG methodology, i.e. the survey across the indicators grouped in five dimensions, but refreshed the collection of data on the formal independence of the regulators.⁹²

Among EU member states, the Italian independent regulator *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) ran an internal assessment which was not published. The Dutch *Commissariaat voor de Media* (CvdM), in one of its annual reports, referred to the findings of the in-depth assessment of their authority in the INDIREG

⁹¹ Institute of European Media Law (EMR) and the University of Luxembourg, "AVMS-RADAR AudioVisual Media Services- Regulatory Authorities' Independence And Efficiency Review", study commissioned by the European Commission, Luxembourg, 2015.

⁹² *Ibid.*, p. 8.



study.⁹³ In 2012, the Center for Media and Communications Studies (CMCS) published its assessment of the reform of Hungarian media law, and based parts of its comparison on the INDIREG study.⁹⁴ Moreover, the INDIREG study is the most cited source in the report of the European Regulators Group for the Audiovisual Media Services (ERGA) on the independence of national regulatory authorities.⁹⁵

The Council of Europe commissioned two external assessments using the INDIREG methodology, at the request of the Albanian government and the Serbian Regulatory Authority for Electronic Media.⁹⁶ Both countries are member states of the Council of Europe and candidate countries for accession to the EU, for which they must meet accession criteria including the guarantee of freedom of expression which covers inter alia maintaining an independent and functioning independent regulator for the audiovisual media sector. Additionally, in the context of international assistance to the Ukrainian independent regulator in the field of broadcasting and media, an assessment of the regulator's independence and effective functioning took place.⁹⁷

4.5. Synchronising the INDIREG methodology with the Article 30 of the revised AVMS Directive

The INDIREG methodology predates the 2018 revision of the AVMS Directive and has thus not yet been aligned with the terminology and requirements in the new Article 30. In order to use the methodology in light of the revised Directive, the following table shows which dimensions and indicators of the INDIREG methodology would correspond with the legal requirements of Article 30 in the revised AVMS Directive. The table is thus an aid to self-assessment of compliance of the set-up and functioning of an independent national regulatory authority with EU law in the audiovisual media sector.

⁹³ Commissariaat voor de Media (CvdM), "Beschrijving van Werkzaamheden en Taakuitoefening in de Jaren 2007-2011", 2013, p. 7, <http://www.cvdM.nl/wp-content/uploads/2013/12/beschrijving-van-werkzaamheden-en-taakuitoefening-in-de-jaren-2007-2011.pdf>.

⁹⁴ Center for Media and Communications Studies (CMCS), "Hungarian Media Laws in Europe: An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms," Budapest, March 2012, <https://cmds.cmu.edu/article/2014-03-09/hungarian-media-laws-europe-assessment>.

⁹⁵ European Regulatory Group for the Audiovisual Media Services (ERGA), "ERGA Report on the independence of NRAs", (fn. 68).

⁹⁶ Irion K., Svensson S., Ledger M. and Rsumovic N., "The Independence and Functioning of the Regulatory Authority for Electronic Media in Serbia," study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Belgrade, August, 2017, <https://www.ivir.nl/publicaties/download/REM-Report-IndiregMethodology-Nov17-FINAL-2.pdf>; Irion K., Ledger M., Svensson S. and Fejzulla E. (2014), The Independence and Functioning of the Audiovisual Media Authority in Albania, study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Tirana, October, 2014, <http://www.indireg.eu/wp-content/uploads/AMA/Indireg-AMA-Report-Nov11.pdf>.

⁹⁷ Unpublished.



Table outlining correspondence between Article 30 in revised AVMS Directive and the INDIREG methodology

Article 30, revised AVMS DIRECTIVE	INDIREG ranking tool
1) Legally distinct	Formal situation: Status and powers
1) Functionally independent	De facto situation: Status and powers De facto situation: Autonomy of decision-makers
2) Impartial and transparent exercise of powers	Formal situation: Accountability and transparency
2) Instructions	Formal situation: Autonomy of decision-makers Formal situation: Status and powers
3) Competences and powers	Formal situation: Status and powers
3) Accountable	De facto situation: Accountability and transparency De facto situation: Accountability and transparency
3) Clearly defined in law	Formal situation: Status and powers De facto situation: Status and powers
4) Adequate financial resources	Formal situation: Financial autonomy De facto situation: Financial autonomy
4) Adequate human resources	Formal situation: Knowledge De facto situation: Knowledge
4) Adequate enforcement powers	Formal situation: Status and powers
5) Appointment and dismissal procedures	Formal situation: Autonomy of decision makers
6) Appeal mechanisms	Formal situation: Accountability and transparency

4.6. Conclusion

The conceptual framework of the INDIREG study has contributed to a more nuanced understanding of what independence and effective functioning of regulatory authorities mean in the audiovisual media sector. This study and follow-up work have generated evidence about the formal and actual independence of audiovisual media regulatory bodies in most European countries. The study's findings are regularly and authoritatively cited in policy documents, and the INDIREG methodology has been used for self- and external assessment. Interestingly, applications of the INDIREG methodology transcended EU borders when they were commissioned by the Council of Europe.

The INDIREG study provided scientific backing for EU policy-makers to introduce new rules for independent regulators, in order to strengthen media governance. In 2018, the EU legislator passed a legislative update of the AVMS Directive mandating the existence of independent regulatory bodies in the member states, while specifying some



of the requirements to guarantee independence and effective functioning (see Chapter 3 in this report).

Since new laws requiring the setting up of independent regulators now appear imminent, it is important to be able to assess such bodies' formal and actual independence. This, in turn, will ensure that such regulators are modelled on best practices or – if not – can be criticised based on a scientifically-backed assessment. National and supra-national public scrutiny will be strengthened with the provision of appropriate methodology that can be used to argue for legislative reform or to hold regulators straying from their mandate or displaying bias accountable.