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The independence of media regulatory authorities in Europe

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14. Conclusions

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14.1. Introduction

The experiences mentioned above aimed to assess to what extent the current set-up and practices of the regulatory authorities, within their respective countries, are up to par with the revised AVMS Directive and Council of Europe standard-setting instruments, as well as what legal adjustments might be required. This last section will attempt to compare the Council of Europe's main standard-setting texts with the requirements of the new AVMS Directive regarding independent regulatory authorities in the audiovisual media sector. Given the focus of this IRIS *Special*, the main points of comparison will be the Council of Europe's Recommendations Rec(2000)23 and CM/Rec(2018)1[1] of the Committee of Ministers to Member States – respectively, (i) on the independence and functions of regulatory authorities for the broadcasting sector and (ii) on media pluralism and transparency of media ownership – and the Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, in comparison with the new Article 30 of the AVMS Directive. Drawing from the country chapters in this report, the conclusions will highlight a few specific examples that demonstrate either existing points of contention with the Council of Europe standards or the new AVMS Directive, or certain instances where national legislation is already compliant or could be improved.

14.2. Similarities and differences between the Council of Europe standard-setting instruments and Article 30 of the revised AVMS Directive

Before entering such a comparative analysis, it is important to clarify the scope and function of the instruments and standards from each of the two jurisdictions. The Council of Europe's ECHR is a binding international human rights instrument for all its member states, and also the ECTT binds the signatory countries under public international law. The Council of Europe's recommendations and declarations, by contrast, are not enforceable but disseminate best European practices among its 47 member states. EU



membership is cast much more narrowly with presently (before Brexit) 28 member states and five candidate countries preparing for accession to the EU, and another two potential candidate countries. EU law is directly enforceable for its member states and conditional for candidate countries in order to accede to the EU.

Considering that the EU has no cultural competence but regulates the audiovisual media sector based on its internal market competences, the economic source of the competence does not produce significantly different outcomes for the institutions of media governance in EU member states.

Council of Europe standard-setting instruments and EU law differ to some extent with regards to material scope. EU law since the 2010 AVMS Directive operates the notion of audiovisual media services, which comprise television and broadcasting media, on-demand audiovisual media services and, after the 2018 revision, also video-sharing platform services. The Council of Europe's Recommendation Rec(2000)23 and the subsequent Declaration still seek recourse in television and broadcasting, for which they recommend independent regulatory authorities. With regard to other standard-setting instruments, on the other hand, a new notion of the media has developed,⁴⁸⁵ which shares with the EU legal concept of audiovisual media the defining emphasis on editorial control and public availability, but is conceptually even broader in that not only audiovisual media services but all media services are covered.

Turning to the substance of guarantees on independence, in addition to Article 30 of the revised AVMS Directive, it is useful to also mention its Recitals, 53 and 55. They highlight that EU member states should create national regulatory authorities or bodies legally distinct from the government, supervised according to national law, and that these bodies should be functionally and effectively independent of their respective governments and of any other public or private body, in order to secure impartiality in their actions. National regulatory authorities or bodies may have oversight over different sectors and should have the enforcement powers and resources necessary for the fulfilment of their tasks, in terms of staffing, expertise and financial means, and should also respect media pluralism, cultural diversity, consumer protection, the proper functioning of the internal market and the promotion of fair competition. Recital 55 determines that appeal mechanisms – which may be a court – should exist at national level and should also be independent from the parties involved and governed in accordance with national systems.

Article 30 of the AVMS Directive, in many ways, reaffirms those Recitals. It says that member states should have one or more independent national regulatory authority, legally distinct and functionally independent from any other public or private body, without seeking or taking any instructions from it regarding their Directive-specific tasks. And it reiterates that regulators may have oversight over different sectors. The authorities' powers must be used impartially and transparently and in accordance with the objectives of the Directive, in particular those related to media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition. It says that

⁴⁸⁵ Committee of Ministers, Recommendation CM/Rec(2011)7.



authorities' competences, powers and accountability must be clearly defined in law, and that they must have both adequate enforcement powers to carry out their functions effectively and rules for dismissal and public decision. Pursuant to the Directive, independent authorities must have separate public annual budgets and adequate financial and human resources to enable them to carry out their tasks, and they must provide effective mechanisms for appeal, accessible to users, media services providers and video-sharing platform providers.

Recommendation Rec(2000)23, similarly to the AVMS Directive, mentions the need for rules and procedures concerning regulatory authorities' activities (such as duties and powers of the regulatory bodies and their operating principles), and also focuses on the essential quality of genuine independence for effective performance of regulatory authorities' tasks and on the importance of transparency for the fulfilment of their missions. Both documents converge regarding the obligation to have rules governing the appointment of regulatory authorities' members, and while both documents touch on financial aspects of regulatory authorities, the AVMS Directive says only that authorities should have adequate financial resources and be provided with their own annual budgets (which must be public). Recommendation Rec(2000)23, on the other hand, details this aspect quite a bit, by saying that arrangements for funding of regulatory authorities should be specified in law and have a clearly defined plan and estimated cost, and that the independence of the regulatory authorities should not be affected by public authorities' financial decision-making power or recourse to third parties, among other things.

Concerning accountability, Recommendation Rec(2000)23 requires regulatory authorities to be accountable to the public for their activities and publish reports relevant to their work. It also says that regulatory authorities should be supervised in respect of their activities and transparency of their financial activities, and that all decisions taken and regulations adopted by the regulatory authorities should be duly reasoned, open to review and made available to the public. The Directive is less specific concerning public accountability and does not mention the obligation to publish reports or to submit to external supervision – although it does leave open supervision as a possibility and requires reasoning (only) for dismissal decisions. However, the Directive is more precise about characteristics of review or appeal mechanisms. In short, Recommendation Rec(2000)23 appears to be somewhat more detailed than the new AVMS Directive in certain aspects, since it further specifies some of the obligations and prerequisites for the effective activity of regulatory authorities. Of course, the Recommendation is considerably longer than Article 30 of the AVMS Directive, which may account for many of these features.

The Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector focuses on the importance of a wide range of independent and autonomous means of communication allowing for the dissemination of a diversity of ideas and opinions (which is an essential part of democratic societies). It highlights authorities' role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape, ensuring the independent and transparent allocation of licences and their monitoring, contributing to perpetuating a culture of independence and developing related guidelines, and making a



commitment to transparency, effectiveness and accountability. This Declaration, comparably to the documents above, stresses that member states of the Council of Europe should legally establish broadcasting regulators as independent authorities and require them to act independently of their respective governments and of any other public or private body, and that they should protect these authorities and their members against political pressure. The section on financial independence highlights how, in a number of Member States, the legal framework is unclear regarding funding of regulatory authorities and, in many others, there are no rules ensuring that the approval of funding is not up to the discretion of other state bodies. This is not a concern mentioned in the AVMS Directive.

Recommendation CM/Rec(2018)1[1] has a focus that is distinct from Recommendation Rec(2000)23 and the Declaration previously mentioned: it aims to safeguard the democratic process, freedom of expression, quality journalism and diversity, and to foster media pluralism and informed decision-making in the face of increasing concentration. The goals of Recommendation CM/Rec(2018)1[1] converge with the AVMS Directive's objectives when it comes to media pluralism and cultural and linguistic diversity. While Article 30 of the AVMS Directive does not explicitly address the democratic process, freedom of expression or quality journalism, it expresses other concerns not mentioned by Recommendation CM/Rec(2018)1[1], such as consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

14.3. Country experiences compared

14.3.1. Legal distinctiveness and functional independence

According to the individual country reports, many countries, such as Spain and Slovenia, appear to have high functional independence in accordance with both Council of Europe standards and the new AVMS Directive. In Bosnia and Herzegovina, though, despite the authority's high functional independence, the latter may be exposed due to the politicised nature of the appointment of the regulatory authority's key decision-making bodies. Some countries, including the Netherlands and Sweden, do not have a high level of independence guaranteed by law, but have high de facto independence. However, in other cases, the absence of specific legislation concerning the independence of the regulatory authority may expose it to political pressure, as in Poland or Hungary, where local legislation on independence may be satisfactory at the EU level, while the regulatory authority may present issues in its functioning.



14.3.2. Impartial and transparent exercise of powers

As for impartiality, there are countries in which the regulatory authorities are protected from political interference in their day-to-day decision-making, such as Bosnia and Herzegovina; and there are others where impartiality is provided for by the law, such as Hungary, but decision-making concerning specific sectors has been found to not be impartial in practice. In terms of transparency, many of the countries studied present widely satisfactory measures for making official documents available to the public: in Ireland, Bosnia and Herzegovina, the Netherlands and Slovenia, for instance, documents like authority decisions in specific cases and minutes of meetings are published online on the official websites, even though not all local legislation requires authorities to do so. In certain cases, the country reports also noted a few potential improvements in transparency: in Poland, for example, although the local authority provides broad information about its activities via its website, information about media organisations and providers could benefit from greater transparency; and in Spain, the authority's reports, yearly and multi-year plans are published online, but there is no publication of the Board meetings' minutes or deliberations and only a document with Board meeting agreements is published on a regular basis.

14.3.3. Competences, powers and accountability

Many of the countries studied, like the Netherlands and Spain, present convergences in competences, cumulating audiovisual media services with other services (often concerning telecommunications or media). Most, such as Ireland, Hungary and Bosnia and Herzegovina, have competences and powers that are broad and clearly defined by law. Regarding accountability, a number of agencies studied, such as those in Bosnia and Herzegovina, Hungary, Poland and Slovenia, are accountable to their local governments or to governmental bodies. Often, they need to draft and submit annual reports for review by these bodies, and sometimes, additionally, for financial audit. In Poland, the annual report has been rejected in a few instances, demonstrating that a part of the local authority's accountability is closely linked to political approval. In many countries, accountability obligations and transparency requirements overlap: in the Netherlands, Hungary, Poland, Ireland, Spain and Sweden, the accountability process involves the publication of annual reports and decisions. In Sweden, appropriate accountability procedures are in place even if not specified by law; and, as with Slovenia, the regulatory authority may carry out public consultations when amending general acts and policies.

14.3.4. Adequate financial and human resources

Some regulatory authorities, such as those in Bosnia and Herzegovina and Spain, receive portions of their budgets from the government. Some budgets derive mostly from licence fees and the authorities' own financial revenues (as in Bosnia and Herzegovina and



Hungary) or from the state (as in Sweden and the Netherlands). Yearly budgets often have to be approved by the government or a governmental body, for example in Hungary or the Netherlands (where there is also a private audit of annual budgets and accounts). Many regulatory authorities face challenges regarding funding and human resources and have raised concerns over a lack of human resources necessary for effective handling of their tasks. In Ireland, for example, the authority is experiencing difficulties in staffing and resourcing; in the Netherlands, in various annual reports, the authority has expressed a high risk of having insufficient funding both for the execution of its tasks and for attracting and retaining sufficiently skilled personnel necessary for the fulfilment of its duties. In other countries, such as Bosnia and Herzegovina, Poland and Sweden, the financial and human resources have in general been adequate and sufficient for the local authorities.

14.3.5. Adequate enforcement powers

All countries examined appear to have authorities with adequate enforcement powers. The authorities in Poland, Slovenia, Spain and the Netherlands all have broad powers of inspection with the remit to institute penalties depending on the gravity of the infringement, including fines and revocation of licence. In the Netherlands, the authority is also allowed to reduce or withdraw broadcasting airtime for public service media. Bosnia and Herzegovina's regulatory authority also has a broad set of enforcement measures, including warnings, inspections, demands for cessation of activities, financial penalties, orders for temporary interruption of broadcasting, and revocation of licence, which can be applied proportionally to the violations. The authority in Bosnia and Herzegovina also has the power to stop the operation of a telecommunications or broadcasting network or service if it does not have a license.

It should be noted that the Hungarian authority has an exceptionally extensive scope of enforcement powers and unprecedented powers of sanction compared with other European countries, with tools ranging from general inspections through specific market analysis procedures to strong sanctioning. Ireland and Slovenia both may face regulatory changes due to the AVMS Directive's requirement for adequate enforcement powers – Ireland due to the current limited role of its regulatory authority in relation to on-demand audiovisual media services, and Slovenia due to modest staffing levels in the media department of the authority, which may need further resources.

14.3.6. Appointment and dismissal procedures

Some regulatory authorities have politicised appointment procedures, which can expose the authority to a degree of political influence. As an example, the appointment of the key decision-making bodies of Bosnia and Herzegovina's regulatory authority has been the most contentious issue impinging on the requisite degree of independence. The chapter on Ireland also pointed out a high level of political involvement in the appointment of the



main media authority; and in Poland, the appointment procedure to regulatory authorities involves nomination by governing political parties, which means that candidates of the opposition will always constitute a minority. In Sweden, meanwhile, it was not uncommon to have members of parliament on the Broadcasting Commission, although this practice has since stopped, even though there is still no rule against it. The new AVMS Directive could therefore result in changes with regard to the lack of appointment and dismissal procedures.

In Spain, legal provisions for a dismissal may need to be changed to include a public justification for dismissal in the context of Article 30 of the AVMS Directive. In the Netherlands, regulatory authority board members are appointed and dismissed by the Minister of Education, Culture and Science, and there are several rules in place to prevent conflicts of interest on the part of the commissioners. In Slovenia, regulatory authority members are similarly appointed by the government.

14.3.7. Appeal mechanisms

Most of the regulatory authorities studied already respect, to some extent, the requirement to provide appeal mechanisms. The report on Poland highlighted the need for more effective and timely action by the courts involved in appeal mechanisms. Slovenia and Sweden's regulatory authorities' decisions may be appealed to administrative courts, while in Spain it is possible to appeal either administratively or to a judicial review court, depending on the character of the decision in question. Comparably, in Hungary it is possible to appeal certain decisions based on public administration procedures, while others may not be appealed but judicial review is provided for at the court of jurisdiction for administrative actions. In the Netherlands, appeal procedures must be pursued administratively before recourse to court is sought; a decision by an administrative court can subsequently be appealed before the Council of State. Similarly, in Bosnia and Herzegovina, appeals must be made through an administrative procedure, before they can be subject to judicial review in State Courts.

14.4. Outlook

Together, the key standard-setting instrument of the Council of Europe, the scientific background illustrating why legal and actual independence are significant for impartial regulatory outcomes, and the evolution of EU law in the audiovisual media sector, underscore the quest for a 'culture of independence' in pursuit of the right to freedom of expression and information, media freedoms and media pluralism. "Like democracy,"



Jakubowicz contends, “independence is not given once and for all. It must be constantly justified, reaffirmed and strengthened.”⁴⁸⁶

Whereas independent national regulatory authorities have long characterised audiovisual media governance in European countries, recent developments have led to the ‘uploading’ of existing national guarantees to the EU level. This, in turn, ensures a broader than national forum to guarantee independence of regulatory authorities in the media sector. The new Article 30 of the 2018 AVMS Directive stipulates binding law for EU member states and can unfold effects with regard to accession and candidate countries to the EU in the form of the EU conditionality mechanism.

National regulatory authorities in European countries continue today to implement and enforce audiovisual media laws while facing additional and evolving roles and responsibilities in view of new media services. “Far from shrinking”, Jakubowicz notes, “the role of independent regulatory bodies in the new media ecology is now being expanded, as new segments of the media (e.g. non-linear audiovisual media services) are put under their supervision and as they are assigned new tasks in relation to new platforms and new content services.”⁴⁸⁷

⁴⁸⁶ Jakubowicz K. (2007), “The Independence of Regulatory Authorities, Keynote address at the 25th EPRA meeting: Prague, Czech Republic, 16-19 May 2007, https://cdn.epra.org/attachments/files/1380/original/EPRA_keynote_KJ.pdf?1323685662.

⁴⁸⁷ Jakubowicz (2013), p. xxii.



15. Annex: Abbreviations

AGCOM	<i>Autorità per le Garanzie nelle Comunicazioni</i> (IT) - Authority for Media and Communication
AKOS	<i>Agencija za komunikacijska omrežja in storitve Republike Slovenije</i> (SI) - Agency for Communication Networks and Services of the Republic of Slovenia
AVMS DIRECTIVE	Audiovisual Media Services Directive
BAI	Broadcasting Authority of Ireland (IE)
CFREU	Charter of Fundamental Rights of the EU
CJEU	Court of Justice of the European Union
CMCS	Center for Media and Communications Studies
CNMC	<i>Comisión Nacional de los Mercados y de la Competencia</i> (ES) - National Markets and Competition Commission
CRA	Communications Regulatory Agency - <i>Regulatorna agencija za komunikacije</i> (BA)
CvdM	<i>Commissariaat voor de Media</i> (NL) – Dutch Media Authority
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECTT	European Convention on Transfrontier Television
ERGA	European Regulatory Group for Audiovisual Media Services
EU	European Union
KRRiT	<i>Krajowa Rada Radiofonii i Telewizji</i> (PL) - National Broadcasting Council
NMHH	<i>Nemzeti Média és Hírközlési Hatóság</i> (HU) - National Media and Infocommunications Authority
SVOD	Subscription Video on Demand
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
TVwFD	Television without Frontiers Directive
VOD	Video on Demand