Explanatory Memorandum
to Recommendation Rec (2000) 23
on the independence and functions of
regulatory authorities for the broadcasting sector

Introduction

1. More than ever before, the broadcast media now play a crucial role in society and, through their impact on the public, are essential to democratic processes. At the same time, the sector is rapidly evolving, as a result of its increased openness to competition (with commercial broadcasting services developing alongside their public-sector counterparts) and technical change (the emergence of digital broadcasting and the convergence between broadcasting, on-line services and telecommunications, etc).

2. The more the sector expands, and the more complex and dynamic it becomes, the more it needs well-considered and proportionate regulation to ensure that it functions properly. This is a pan-European issue, even though the experience of Council of Europe member States with broadcasting regulation is very different, reflecting in particular different political systems, levels of economic development and historic and cultural traditions.

3. Recognising this, the intergovernmental Group of Specialists on Media in a Pan-European Perspective (MM-S-EP) decided to prepare a Recommendation which sets a framework for the establishment, if they do not already exist, and the promotion of effective independent broadcasting regulatory authorities. The Group considered that such a Recommendation, the first international instrument in the field, could prove particularly useful to certain new member States of the Council of Europe or countries that had applied for membership, where relevant experience and information was lacking. In this respect, an exchange of information and co-operation among national regulatory authorities should be promoted along the lines of what is already taking place at the European level through co-operative bodies such as the European Platform of Regulatory Authorities (EPRA) and the network of regulatory bodies in Mediterranean countries.

Preamble

4. The preamble stipulates that broadcasting regulation should be effected within the framework of the law through specially appointed independent authorities with expert knowledge in this complex and rapidly developing area. To cope with the developments, member States should guarantee their broadcasting regulatory authorities genuine independence by establishing a set of rules governing the major aspects of their work.

5. Furthermore, the preamble indicates that evolutions in the broadcasting sector will certainly have an impact on the role of the authorities which have been entrusted with the task of regulating this sector. In order to ensure its proper functioning, in a context of ongoing changes, there will probably be a need for greater adaptability of regulation, over and above self-regulatory measures by broadcasters themselves.

Recommendation

6. It was considered that the recommendation itself should stipulate that the governments of member States establish independent regulatory authorities for the broadcasting sector, if they have not already done so, and include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner.

7. It is also explicitly recommended that governments ensure effective respect of the regulatory authorities' independence, so as to protect them against any interference by political forces or economic interests. This provision was deemed particularly necessary since, in some cases, despite the existence of a proper legal framework, and the fact that public authorities are committed to guaranteeing the independence of the broadcasting regulatory authorities, there is, in practice, interference in their activities.

8. It is up to each member State to determine, in accordance with its own legal system, the level at which the above principles should be implemented. In countries where a number of entities (such as federated states or communities) are in charge of broadcasting regulation, the Recommendation's principles must be applied by each.

I. General legislative framework

9. To ensure that broadcasting is efficiently regulated, while safeguarding broadcasters' effective independence with regard to programming, the regulatory authorities themselves must be protected from all forms of political and economic interference.

10. A legislative framework that clearly defines the legal status of regulatory authorities and the extent of their functions and powers is a prerequisite of their independence from public authorities, political forces and economic interests. Once it is in place, the legislative framework will shield regulatory authorities from external pressures.

11. The Recommendation provides that the legislative framework should lay down the rules and procedures governing or affecting the regulatory authorities' activities. While the scope of these rules and procedures may differ from one country to another, they should at least cover a number of essential elements such as the status, duties and powers of the regulatory bodies, their operating principles, the procedures for appointing their members and their funding arrangements.

II. Appointment, composition and functioning

12. Because of their role and the extent of their power, the members of regulatory authorities may come under pressure from various forces or interests. Given this danger, and subject to the limitations provided for in the other principles of the Recommendation (see, in particular, paragraph 26), the rules governing regulatory authorities for the broadcasting sector should be defined so as to protect them against any interference and to guarantee their effective independence.

13. The Recommendation stipulates that members of regulatory authorities for the broadcasting sector should be appointed in a democratic and transparent manner. The term "democratic" should be understood in its wider sense, given that the members of regulatory bodies are sometimes elected, sometimes nominated by public authorities (president, government or parliament) or by non-governmental organisations.

14. In this regard, nomination procedures may vary widely from country to country, although they fall into two main categories. In some countries, it is considered that regulatory bodies should represent the various interests, currents of thought and political and socio-occupational groups in society. In these cases, they will be fairly large bodies, whose members – nominated in many cases by NGOs or local authorities - are normally part-time and are not necessarily experts in the field.

15. In other countries, it is not deemed necessary for members of regulatory authorities to represent the full spectrum of society, as they tend to be regarded as independent "judges". In most such cases, the regulatory authority will be a collegial body including a limited number of professional experts, appointed by the legislative or executive authorities on a full-time basis for a reasonably long term of office, and enjoying some degree of decision-making power. Even regulatory authorities in the second category must, however, respect the principle of pluralism and must not be dominated by any particular group or political party. Moreover, regulatory bodies must, in every case, act in a transparent manner and be subject to democratic control, given the nature of the task they perform on behalf of society in general (see chapter V in this respect).

16. It is clearly stipulated that if these bodies are to enjoy maximum independence, rules of incompatibility should be defined so as to avoid that these bodies are under the influence of political power. The Recommendation also stipulates that clear rules should guarantee that the members of regulatory authorities do not receive any mandate or take any instructions from any person or body and do not make any statement or undertake any action which may prejudice the independence of their functions and do not take advantage of the latter for political purposes. Although it is not expressly indicated in the Recommendation, it is preferable for the independence of regulatory authorities that the members of such authorities are neither members of Parliament or Government nor hold any other political mandate for the period of their functions. This constitutes an important means of protection against external pressures and political interference. It does not preclude regulatory authority members from being ordinary political party members without a mandate, as there is less danger here of political pressure being exerted.

17. In Germany, for example, the Federal Constitutional Court has stressed and upheld the independence of the regulatory authorities for the broadcasting sector in the Länder (regional governments), by excluding any dominant influence by the State. However, the "principal organ" (Assembly or Council) of these authorities relies either on pluralistic representation, or on expertise and experience in the media sector, and may therefore include representatives of public or governmental bodies. To secure the independence of regulatory authorities, these representatives must constitute less than 25% of the total membership. Thus the organisational and financial framework of the Land regulatory authorities guarantees that they are independent and free from governmental influence, and therefore fully complies with the principles laid down in the Recommendation.

18. The incompatibilities under the Recommendation extend beyond politics to other fields that might impinge on the independence of regulatory authority members. They include the exercise of any function or possession of any interests, in enterprises or other organisations in the media or related sectors (such as advertising and telecommunications), which might lead to a conflict of interest in connection with membership of the regulatory authority. If, for example, a member of such an authority had financial interests, or occupied a post, in a broadcasting or cable company that came under the regulatory authority's purview, the two functions would clearly be incompatible.

19. On the other hand, the Recommendation does not disbar members of regulatory authorities from exercising other functions when to do so does not entail any conflict of interests (e.g. if a member of such an authority is a teacher). This being so, nothing prevents States making stricter rules that prohibit the exercise of any other function, whether or not it is liable to produce a conflict of interests. Likewise, there is nothing to prevent them requiring that regulatory authority members declare their assets when they are appointed and again at the end of their term of office, in order to prevent them profiting unduly from that office in any way.

20. Another means of ensuring greater independence for regulatory authorities is through the duration and nature of their mandate. With a view to affording the members of such authorities more protection from pressures, they should be appointed for a fixed term It should be noted that in some countries (which go further than the Recommendation in this respect), the term of office of regulatory authority members is not renewable or is renewable only once, the intention being to avoid their owing any allegiance to the powers that appointed them.

21. Finally, an additional means of guaranteeing the independence of regulatory authorities may be to require that their members refrain from making any statement or undertaking any action which may prejudice the independence of their functions or from taking advantage of them, for political, economic and other purposes. For the same purpose, when a member of a regulatory authority leaves his/her functions, it might be useful to foresee an obligation of confidentiality to avoid the disclosure of information related to the functioning of the regulatory authority.

22. With regard to the conditions under which members of regulatory authorities may be dismissed – which are also very important for the authorities' independence - the Recommendation indicates that precise rules should be defined in this respect, so as to avoid that the dismissal be used as a means of political pressure. The Recommendation indicates that dismissal should only be possible in case of non-respect by members of regulatory authorities of the rules of incompatibility with which they must comply or a duly noted incapacity (physical or mental) to exercise their functions. In both cases, the person concerned should have the possibility to appeal to the courts against the dismissal. Exceptionally, the Recommendation also foresees the possibility of dismissal on grounds of an offence connected or not with the exercise of functions of the members of regulatory authorities, but indicates that such a revocation should only be possible in serious instances clearly defined by law, subject to a final sentence by a court. It is understood, though not spelt out in the Recommendation, that dismissal can only apply to individual members of regulatory bodies and never to the body as a whole.

23. A separate question is that of professional qualifications for membership of regulatory bodies. Given the specific technical nature of the broadcasting sector, the Recommendation stipulates that regulatory authorities should include experts in the areas which fall within their competence. Taking into account the different traditions and experience in member States, as well as the different composition of regulatory authorities (as mentioned above), it would be difficult to demand that *all* the members of regulatory authorities were experts in the field. This is why the Recommendation solely indicates that regulatory authorities should *include* experts in the areas which fall within their competence. For the same reasons, the Recommendation does not specify any professional background required for membership of a regulatory authority. Nevertheless, it would be natural that such members were experts in the audio-visual field as well as in related areas (for example, advertising issues, technical aspects of broadcasting, etc.). In this respect, it can be noted that regulatory authorities in most cases include experts from different backgrounds, for example, media professionals, engineers, lawyers, sociologists, economists, etc.

III. Financial independence

24. The arrangements for funding regulatory authorities - like the procedures for appointing their members - have the potential to work both as levers for exerting pressure and as guarantees of independence. Experience shows that if regulatory authorities enjoy real financial independence, they will be less vulnerable to outside interference or pressure.

25. With this in mind, the Recommendation provides that arrangements for the funding of regulatory authorities should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently. As regards the question of whether regulatory authorities should only use their own human and financial resources, the Recommendation does not formally forbid national administrations or third parties from acting on a regulatory authority's behalf, provided such action is carried out in a context that safeguards the independence of the authority.

26. The Recommendation does not indicate in a concrete manner the possible funding sources of regulatory authorities. This being said, the practice in most European countries shows that there are two main sources for the funding of regulatory authorities, which can be combined where appropriate. Funding can mainly come from concession fees - or, where appropriate, a levy on turnover - paid by licensees. Provided such licence fees or levies are fixed at a level that does not constitute an operational impediment to broadcasters, this arrangement would seem the best way of safeguarding the regulatory authorities' financial independence inasmuch as it does not leave them reliant on the public authorities' goodwill. At the same time, the Recommendation does not rule out financing from the state budget. However, because in this case regulatory authorities are more likely to be dependent on the budgetary favour of governments and parliaments, it states explicitly that public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.

27. Whatever funding arrangements are adopted, account must be taken of the human, technical and other resources which regulatory authorities need in order to perform all their functions independently. Clearly, the more numerous and substantial those functions, the more important it is that the funding of the regulatory authority should match its needs.

28. Where funding levels are fixed annually, account must be taken of the estimated cost of the regulatory authorities' activities and of the fact that, in addition to the costs of regulation itself, there are related expenses essential to the effective performance of the authorities' tasks. In this respect, in order to perform those tasks competently, taking decisions based on close analyses of the current, and indeed future, situation of the broadcasting sector, regulatory authorities normally need to have recourse to consultants, carry out research, fact-finding missions and studies and issue publications, all of which clearly entails additional expenditure.

IV. Powers and competence

29. As indicated above, the extent of broadcasting regulatory authorities' powers and competence varies from one country to another. Some countries have several regulatory bodies to deal with different questions: considering complaints, monitoring programmes, granting licences etc. In other countries, a single body has the task of regulating the broadcasting sector in all its complexity. Looking beyond the diversity of these arrangements, the Recommendation suggests a number of approaches seen as fundamental to the proper regulation of the broadcasting sector.

Regulatory powers

30. Regulation of the broadcasting sector is understood in the Recommendation to mean the delegation to one or more authorities of the power to set standards for the sector in certain areas. The main purpose of the regulation of broadcasters' activities by independent bodies is to ensure that the broadcasting sector functions smoothly in a fair and pluralist manner, with due respect for the editorial freedom and independence of broadcasters.

31. There is great diversity among member States concerning the legal nature of these standards, depending on the constitutional framework and different legal traditions. In some cases, such authorities enjoy only consultative powers, their role thus being confined to making recommendations and delivering opinions. Regulation in these countries is a task incumbent on the legislator or government, under parliamentary control. However, regulatory authorities in some other countries have been given genuine regulatory powers by the legislature, enabling them to adopt specific regulations on the functioning of the broadcasting sector.

32. These regulations may cover areas such as the granting of licences and broadcasters' compliance with their commitments and obligations. In particular, the power to regulate may include the authority to issue, in co-operation with the professional circles concerned, binding rules on broadcasters' behaviour, in the form of recommendations or guidelines, on questions such as advertising and sponsorship, election campaign coverage and the protection of minors. As indicated in the preamble of the Recommendation, this regulatory power does not exclude the adoption of self-regulatory measures by broadcasters themselves.

33. It is recommended that, within the framework of the law, the regulatory authorities should have powers of regulation which enable them to respond flexibly and adequately to questions that may be unforeseen and are often complex, not all of which can be resolved, or even anticipated, by the legislative framework. In effect, it is considered that regulatory authorities are better placed to define the « rules of the game » in detail, since they have very good

knowledge of the broadcasting sector. Furthermore, regulatory authorities should, within the framework of the law, have the power to adopt internal rules in order to define their organisation and decision-making in greater detail, in accordance with its administrative autonomy.

Granting of licences

34. The Recommendation deems the granting of broadcast licences to be one of the essential tasks of regulatory authorities, although at present this is not the case in all the Council of Europe member States. It entails a heavy burden of responsibility, given that the choice of operators entitled to establish broadcasting services would determine the degree of balance and pluralism in the broadcasting sector. The term "licence" should be understood in its generic sense: in practice, licences may be termed "contracts", "conventions" or "agreements".

35. The Recommendation stipulates that regulatory authorities should be empowered, through the granting of licences, to authorise broadcasters to provide programme services on frequencies allocated to broadcasting. This does not have a bearing on the allocation of frequencies to transmission network operators under telecommunications legislation. Even though the continuing development of digital technology promises a spectacular increase in the number of channels, there is, for the time being, a relative shortage of frequencies that may be used for broadcasting, and it is therefore necessary in the public interest to allocate them to the operators offering the best service. In addition, the granting of licences makes it possible to ensure that broadcasters satisfy certain public interest objectives such as the protection of minors and the guarantee of pluralism.

36. The power to grant licences may be exercised in respect of many different types of operator, on the bases of type of service (radio or television), means of transmission/reception (terrestrial broadcast networks, satellite or cable), type of frequency (analogue or digital) or geographical coverage (national, regional or local). The Recommendation does not seek to tell the member States specifically which types of service should be subject to authorisation, as opposed simply to declaration. At the same time, it is stipulated that the licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner, and that the decisions taken by regulatory authorities in this respect should be subject to adequate publicity.

37. The selection of tenders for licences is a procedure of variable length, with a series of distinct phases. Once a list of frequencies has been drawn up, a call for tenders should be issued. In the interests of openness and free competition, it is recommended that the call for tenders be published in all appropriate ways, for example in official gazettes, the press etc. The call for tenders should specify a number of criteria, such as the type of service being offered for exploitation, the content and minimum duration of the programmes to be provided, the geographical coverage of the service, the type of funding, any licensing fees, and the technical parameters to be respected. It should also specify the content of the licence application and the documents to be submitted when tendering. In accordance with Recommendation No R (94) 13 on measures to promote media transparency, it is recommended that candidates tendering should indicate their company's structure, owners and capital. The call for tenders should also stipulate the deadline for the submission of applications and the date by which they will be considered.

38. The next phase is the consideration and selection of candidates from the tenders submitted. The tender documents should describe clearly how it is planned to run the service, focusing in particular on the economic and technical aspects and the proposed content. The Recommendation does not stipulate what criteria regulatory authorities should use in their selection from a number of competing tenders, it being incumbent on each State to determine the criteria most appropriate to its own circumstances, although the choice should be guided primarily by the content of the tenders.

39. In general, the successful candidates will then sign a contract setting out the key information contained in the tender documents they submitted, and the commitments that they have made and must fulfil for as long as they hold the licence.

40. In order to minimise the possibility of arbitrary decision-making, the Recommendation provides that the regulations governing the granting of licences should be defined and applied in an open and transparent manner. For the same reason, the conditions and criteria governing the granting and renewal of licences should be clearly defined in the law and/or by the regulatory authority, and regulatory authorities' decisions on the granting of licences should be published in all appropriate ways.

41. The Recommendation requires a further degree of openness by stipulating that the licensing procedure should be open to public scrutiny - a requirement which does not preclude consideration of the tenders behind closed doors in order to ensure fair competition by avoiding any external pressure, and to keep confidential certain information about the candidates contained in the tender documents (see, on this point, Recommendation No R (94) 13 on measures to promote media transparency, and in particular Guideline No 1 thereof).

Monitoring broadcasters' compliance with their commitments and obligations

42. In order to give real effect to existing statutes and regulations and to the commitments that broadcasters make, the regulatory authorities must be empowered to monitor their compliance in practice with the conditions laid down in the law and in the licences granted to them.

43. The Recommendation therefore emphasises that regulatory authorities should ensure that broadcasters under their jurisdiction respect the basic principles enunciated in the European Convention on Transfrontier Television, in particular those defined in Article 7 (which deals with the responsibilities of the broadcaster). This Article stipulates that all items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others (in particular, it prohibits pornography and programmes that give undue prominence to violence or are likely to incite racial hatred). It also prohibits the scheduling of programmes likely to impair the physical, mental or moral development of children and adolescents at times when they are likely to watch them.

44. It is recommended that complaints concerning broadcasters' activity which fall under the field of regulatory authorities' competencies (in particular in relation to programme content) or the violation of licensing procedures or laws (on broadcasting, rules governing advertising and sponsorship, competition etc) be examined by the latter. In order to make the procedure for examining complaints more efficient, both in the public interest and to provide legal certainty for operators, the regulatory authorities should publish the conclusions of such examinations regularly.

45. Depending on the resources available, there are various types of procedure for monitoring broadcasters' activity: they can be divided into two main categories. In the first, the monitoring is carried out by the regulatory authority itself, a practice obviously very demanding in terms of human and technical resources and therefore very costly. One solution to the problem - which is likely to grow as the number of broadcast services expands with the change to digital technology - may be to monitor on a sample basis, rather than continuously. The second type of procedure involves analysing evaluations carried out by the broadcasters themselves who, in certain countries, have established self-control structures in co-operation with the regulatory authority which supervises them. While this is naturally less costly, it has the disadvantage of being less reliable than the first approach. In every case, the general principle should be observed that all monitoring of programme content must be retrospective, in accordance with the right to freedom of information and of expression in broadcasting.

46. Regulatory authorities for the broadcasting sector should monitor compliance with rules on media pluralism and, in certain cases, with competition rules also. It should be noted here that Recommendation No R (99) 1 on measures to promote media pluralism advocates that member States "should examine the possibility of defining thresholds - in their law or authorisation, licensing or similar procedures - to limit the influence which a single commercial company or group may have in one or more media sectors". Moreover, it stipulates that "national bodies responsible for awarding licences to private broadcasters should pay particular attention to the promotion of media pluralism in the discharge of their mission".

47. Monitoring can never be effective without the power to impose sanctions. Under the Recommendation, when a broadcaster fails to respect the law or the conditions specified in the licence, the regulatory authorities should have the power to impose sanctions (graded in severity to reflect the seriousness of the failure), in accordance with the law.

48. The sanctions may range from a simple warning through moderate and heavier fines or the temporary suspension of a licence, to the ultimate penalty of withdrawing a licence. According to domestic law, sanctions can be made public in order to inform the public and ensure the transparency of the decisions of regulatory authorities. Given the gravity of licence withdrawal, it should be applied only in extreme cases where broadcasters are guilty of very serious failures of compliance.

49. It is stipulated that sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. In fact, it is the primary task of regulatory bodies not to "police" the broadcasting sector, but rather to ensure that it functions smoothly by establishing a climate of dialogue, openness and trust in dealings with broadcasters. Nonetheless, the application of sanctions without prior warning may be justified in certain exceptional cases. For the sake of operators' legal certainty, such exceptional cases should be defined in law.

50. In performing their tasks of monitoring and of applying fines or other sanctions, regulatory authorities should not only act equitably and impartially, treating all broadcasters equally, but should also have a concern for openness and responsibility. The Recommendation therefore stipulates that all sanctions should be open to review by competent jurisdictions according to national law.

Powers in relation to public service broadcasters

51. Given the distinct natures of, on the one hand, public service broadcasting and, on the other, commercial broadcasting, it has been normal practice in the member States to have separate regulatory frameworks for each sector. This separation also exists with regard to supervisory bodies and regulatory powers.

52. The Recommendation notes, however, that broadcasting regulatory authorities may also be empowered to carry out the tasks of regulating public service broadcasters, a function often incumbent on the supervisory bodies of the latter. Here, the Recommendation refers to the tasks of the supervisory bodies of public service broadcasting organisations as mentioned in Recommendation No R (96) 10 on the guarantee of the independence of public service broadcasting.

53. The task of regulating both commercial broadcasters and the public service broadcaster may be given to the same regulatory authority in order to, *inter alia*, guarantee fair competition between public service broadcasters and private broadcasters.

V. Accountability

54. The Recommendation highlights the fact that regulatory authorities should be accountable to the public, a logical corollary to their duty to act exclusively in the public interest. They can make their activities transparent to the public by, for example, publishing annual reports on their work or the exercise of their missions. These may contribute to a better understanding of the regulatory bodies' aims, functions and powers, and of the broadcasting sector.

55. As indicated above, regulatory authorities need wide-ranging powers and competence in order to regulate the broadcasting sector efficiently. Like all authorities in a democratic society, however, they must be answerable for their actions and must therefore be subject to democratic control. The key questions are by whom and how that control will be exercised. The Recommendation makes no stipulation on the first point, leaving it to each State to determine the authority or authorities which are, or will be, responsible for supervising the activities of the broadcasting regulatory bodies established there.

56. On the second point, the Recommendation stipulates that the regulatory authorities may be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. By contrast, no other control of regulatory authority decisions is permissible, In order to avoid that supervision of the legality of the activities of the regulatory authorities turns into a form of censorship, it should always take place *a posteriori*. On the other hand, according to domestic law, the supervision of the correctness and transparency of the financial activities of regulatory authorities can be exercised *a priori*.

57. Lastly, the Recommendation stipulates that all decisions taken and regulations adopted by regulatory authorities should be duly reasoned and, in accordance with national law, be open to review by competent jurisdictions according to national law. The requirement that decisions be duly reasoned - which is based on the principle of the rule of law and vital need for regulatory authorities' activities to be transparent - is a key to allow those who are affected by the decisions taken by the regulatory authorities to challenge these decisions through the competent jurisdictions. As transparency is one of the very basic principles concerning the

functioning of regulatory authorities and their accountability to the public, all decisions taken and regulations adopted should be made available to the public in an appropriate way.