

# **Converging media – convergent regulators?**

The future of broadcasting regulatory authorities  
in South-Eastern Europe

*Conference organised by the Council of Europe  
and the OSCE Mission to Skopje, 1-2 October 2007, Skopje*

Directorate General of Human Rights and Legal Affairs  
Council of Europe

Directorate General of Human Rights and Legal Affairs  
Council of Europe  
F-67075 Strasbourg Cedex

<http://www.coe.int/justice/>

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Printed at the Council of Europe

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## Foreword

Mass media, and broadcasting in particular, are of fundamental importance for the proper functioning of a democratic society. Broadcasting regulatory bodies have an essential role in making the existence of independent, professional, responsible and pluralistic broadcasting possible. Such a role, however, would hardly be possible if these bodies do not enjoy their own independence.

In recent years, some countries, like the United Kingdom, Italy and Bosnia and Herzegovina, have merged their previously separate broadcasting and telecommunications regulatory authorities into single “converged” bodies. Other countries, including some from South-Eastern Europe, have been looking at the possibility of doing the same.

These developments call for an in-depth exploration of the implications of such “mergers” in the light of Council of Europe standards concerning freedom of expression and the independence of broadcasting regulators. An open discussion placed in the specific context of South-Eastern Europe and of the individual countries and an exchange of practical experience among regulators and policy-makers are essential before taking decisions.

To address this need the Council of Europe, in co-operation with the OSCE Mission to Skopje, organised a conference under the title *Converging media – convergent regulators? The future of broadcasting regulatory authorities in South-Eastern Europe*. A total of 72 participants gathered in Skopje: policy-makers, members of parliaments, representatives of broadcasting and telecommunications regulatory authorities, of relevant governmental bodies and of the industry as well as representatives from the European Commission, the Organisation for Security and Co-operation in Europe (OSCE) and the European Platform of Regulatory Authorities (EPRA).

The conference explored the prospects for media regulation in South-Eastern Europe in light of media convergence. A lively exchange of ideas and experience focussed on the potential of converged regulatory bodies as well as on the accompanying challenges. Representatives of converged regulators and of the industry shared their experience, their concerns and lessons learned in the process of merging and the subsequent functioning of regulatory authorities. This broader discussion was put into the concrete context of today's South-Eastern Europe and addressed practical issues of immediate concern in the countries of the region. During the last session, the participants adopted conclusions and recommendations.

This publication is meant to serve as a reference tool for policy-makers and others involved in media regulation and considering the choice between separate or "converged" regulatory bodies. The publication contains the presentations made at the conference grouped under the titles of the respective sessions. It provides also the conclusions and recommendations, the agenda of the conference and the text of the relevant Council of Europe standard-setting documents.

Our special thanks go to the OSCE Mission to Skopje, and Sally Broughton in particular, for their great contribution to the organisation of the conference, to European Platform of Regulatory Authorities (EPRA) which supported the initiative, to the speakers and their organisations and to all participants.

## **Media convergence and the implications for media regulation**

This section presents a broad overview of the impact that the convergence of media in terms of technological change, new distribution methods, bundling of services and the multi-media approach of industry, has on the approaches to regulating the media industry. Perspectives are provided by a representative of a regulatory body and also a representative of the European commercial television sector.

## **Johanna E. Fell**

*European Representative/Assistant to the President of the  
Bayerische Landeszentrale für neue Medien (BLM),  
Germany*



### **Convergence as a matter of definition**

When I started to prepare my presentation, I first asked myself “What is convergence”? As we have become quite adept at using the Internet for research, I checked on Google, which offered me some 1 830 000 hits in 0.30 seconds. The score rate of the European Union website was also quite high with 9617 matches in 0.34 seconds.

For this presentation, I have adopted the following concept to underpin my thoughts: in the media sector, the various routes of transmission are becoming interchangeable, as are the services or contents provided via the various transmission platforms, implying that contents can be transmitted across different infrastructures.

In addition, with technical developments, especially digitising, the situation changes even further: there are more and new routes of transmission, and the role of infrastructure and content providers is changing. There are more infrastructures available, new contents develop alongside the types of media known so far, and media providers adapt to these new options and opportunities, e.g. by making their services available across new routes of transmission.

This, of course, presents some issues for media regulation. To date, media regulation sought to ensure pluralism in an environment where transmission capacity was scarce, and to safeguard societal standards and objectives that are considered important in the public interest, e.g. the protection of minors or the encouragement of local production. Media regulation thus has an important role to play in helping to shape the media landscape of a country.



## **Traditional media regulation – the German example**

Traditionally, the various sectors that make up “the media” were regulated separately. If I take Germany as an example, spectrum has always been managed by the Federal government, while broadcasting regulation is the competence of the German states – for historic reasons which I do not need to dwell on any further here. This is laid down in the German constitution. Coming from Bavaria, my regulatory environment must rank among the most non-converged in Europe. Not only is there the “division of power” regarding the regulation of infrastructure and contents respectively, but also within content regulation: The public broadcasting sector is entirely self-regulating, and the regulatory authorities, one of which I represent, are in charge of commercial media. The press sector is entirely self-regulated.

## **Media regulation in Europe – a truly plural matter**

The situation looks different elsewhere: Depending on the legal system, democratic and cultural traditions and the economic and media situation, there are probably as many regulatory systems as there are countries. When we get together for the European Platform of Regulatory Authorities meetings, we find that even our closest neighbours go about regulating the same thing in possibly quite a different way.

## **Examples of converged regulators**

Convergence has brought with it a review of the regulatory systems and some countries have therefore reviewed and adapted their regulatory regimes. The United Kingdom is an example where five regulators were merged into one converged regulator, Ofcom, which unites spectrum and content regulation. Bosnia and Herzegovina presents an example from this region where the same path was taken. In Italy, on the other hand, a converged regulator was designed “on the drawing board” so to speak, as no regulatory authority existed beforehand. Colleagues from these regulators will describe their regulatory systems later, so I will not go into detail about them here.

In other countries, such as France or Germany, however, the situation remains unchanged, with separate regulators in charge of infrastructure regulation and content regulation respectively, and I believe that this reflects the different ways in which media policy is seen in all of our countries.

## **The pros and cons of converged regulation**

There are many arguments put forward for converged media regulators:

- streamlining tasks and staff, thereby cutting the cost of regulation;
- a clearer identification of the regulator by the general public; or
- the “one-stop shop” for the industry

to name only some of the most frequently quoted.

There are, of course, also counter-arguments:

- the possible lack of transparency of a large regulator;
- diminished accessibility for the consumer;
- differing agendas of the various sections united in a converged regulator; or
- the potential risk of one section dominating the other.

You might compare this picture perhaps to the department store versus the specialist product shop.

## **The truly converged regulator – an impossibility**

Thinking about what a converged regulator for media would have to cover, I came across the following tasks:

- content regulation, which may relate to either commercial providers or public sector broadcasters, or to both;
- licensing of content;
- possibly the licensing of platforms;
- safeguarding media pluralism;
- dealing with cartel issues or competition law; and
- allocating infrastructure.

There are further issues to be taken into account such as:

- data protection;
- consumer issues and – quite importantly – the protection of human rights; and
- the safeguarding of free speech.

That to me seems an enormous list of tasks, which surely could not be all brought together under one roof. So there will always be a need to deal with a variety of issues through various regulators as is already the case, wherein reg-

ulators from the various fields co-operate with each other to deal with these issues. The co-operation may take place on a “need-to-do” basis. In Germany there is a provision in the Interstate Broadcasting Treaty for the cartel authorities and the Federal Network Agency to liaise and co-operate with the media regulators.

## **Old answers to a new phenomenon**

In a way, therefore, there have been answers to deal with the issues brought about by the convergence of the media, long before the concept existed, and if a need for change is envisaged, the question that we have to ask ourselves, in my opinion, is whether we want to revolutionise our media regulation system or evolutionise it.

## **Revolution or evolution – top-down or bottom-up?**

In some countries, and certainly in the European Commission, there appears to be a clear preference for converged regulation, and in the case of Brussels this seems to go as far as having a single telecommunications regulator, possibly responsible to the European Parliament, as was recently proposed in the papers for the review of the telecommunications regulation. These considerations are driven by the objective of completing the internal market and realising the objectives of the i2010 initiative and the information society. If you put yourself in the position of the EU, if you see the European Union as a whole, as one single market – much as the major players in the industry do as they can identify considerable business potential in a market with 350 million consumers – then this approach seems quite logical and adequate.

Personally, I see it the other way around, or “bottom-up” rather than “top-down”, and I do believe that there are quite natural limits within Europe for the extent to which you can standardise, converge or streamline regulation. If you compare the process of regulation to getting from point A to point B, the route you take will depend on the geography. If the two points are within visible distance, you can make a straight beeline to get from A to B. If, however, you have to cross a mountain or a river in order to get to B, you would have to take quite a different route. Media regulation is a bit like that: Its structure and geography reflect the social, democratic, legal and market situation of your country, and as we all know, the situation differs from country to country.

## **The question of priorities**

And then there is the question of what to choose as the priority for media regulation: the improvement of conditions for all participants, i.e. the content and platform providers as much as consumers and citizens, or the objectives that one particular player or that Brussels strives to achieve? To put it another way: Against which yardstick should media regulation be measured?

The answer is that one has to decide individually, and I think this is the best way to go about it. Challenges like the debate on converging regulation, streamlining the requirements of regulation and reviewing whether the regulation in place can be adapted in the light of developments is a good way for us to critically review whether we have not become too set in our ways and whether we react flexibly enough to developments. In that way these challenges to our present regulatory landscapes are therefore, actually, a good thing.

## **All business is local – even media regulation**

Where I do get a little worried, though, is when it comes to the imposition from above of a regulatory framework that is too remote from the situation in my own regulatory, social and legal environment, because there is the risk that something may suffer. Opening up opportunities for new business, as Commissioner Reding has tried to do by suggesting that transmission capacities could be auctioned, could well lead to a situation where the smaller, local or regional providers might lose out because they are simply unable to compete with big players in the market, which have considerable financial clout to secure transmission capacities for their business. However, these smaller providers contribute to a plural media environment just as much, if not more, than the larger ones. The more distant you are from your national market, the less likely you are to be able to contribute to that. The media landscape in each of our countries is a very valuable reflection of our respective societies, and in my view, media regulation should respect and reflect that – especially at a time of convergence and globalisation. With all the temptations and opportunities that both convergence and globalisation open up I think that it is important not to lose sight of what is right in front of you and valuable to your country and society.

## **Take your time!**

If there is one piece of advice that I would offer, then it is that you take your time to review your regulatory system. Media regulation in the more developed countries has a long history and tradition that has usually taken several decades to develop. All approaches regarding the convergence of regulation can draw on this regulatory culture. Going a little slower about this process may therefore take you to your objective of devising the optimum regulatory environment for the media in your country much quicker.

## **Ross Biggam**

*Association of Commercial Television in Europe*



Ross Biggam provided the perspective of the commercial television industry and explained the impact convergence and technological development have had on commercial broadcasters as regards needing to adjust their business models, to adapt to the movement from fixed schedules to an “any time, anywhere” model of delivery, and a rapid pace of change. Indeed, the identity of the broadcaster has changed as many now label themselves as “converged media operators”. He presented an informative graphical illustration that showed the intense development of new ideas and technologies over the last 10-15 years but most particularly, over the last 5 years.

His presentation addressed several questions:

- When do we assume adults are responsible for their own viewing?
- What happens to regulation when schedules disappear?
- Should regulation be bottom up, based on consumer complaints?

He noted that the industry recognises the need for certain content regulation, for example in relation to the protection of minors and the control of hate speech etc, and also that content regulation should be local. On the other hand, the industry’s view is that regulation can inhibit freedom of expression, business initiative and consumer choice. Mr Biggam stressed the recent call of Commissioner Reding for a “light touch approach” to transposing the new Audiovisual Media Services Directive.

The Association of Commercial Television, whilst claiming to have no preference for a converged or non-converged regulator, strongly stresses the importance of Council of Europe Recommendation (2000) 23 on the independence and functions of regulatory authorities for the broadcasting sector. This outlines criteria that are more important in the eyes of the broadcasters such as: independence; financial transparency; the regulation of both public and private media, the right of the operator to be heard; that National Regulatory Authorities (NRAs) have strategic plans; there are clear relationships between

NRAs and competition bodies; and that NRAs encourage self- and co-regulatory initiatives.



## **MEDIA CONVERGENCE AND ITS IMPLICATIONS FOR MEDIA REGULATION**

Skopje  
1-2 October 2007



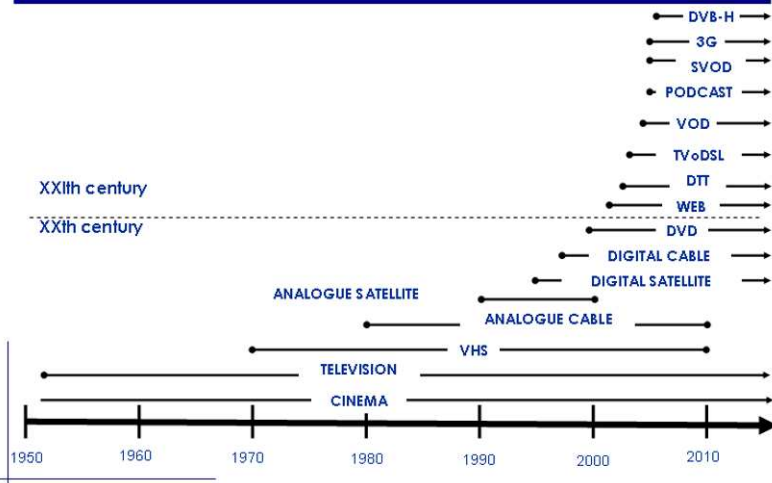
- MEDIA CONVERGENCE : IMPLICATIONS FOR BROADCASTERS
- MEDIA CONVERGENCE : IMPLICATIONS FOR REGULATORS
- MODELS OF REGULATION : CONVERGED/SEPARATE



## MEDIA CONVERGENCE : IMPLICATIONS FOR BROADCASTERS

- **Background:** proliferation of channels (from 47 to 1687) already requires reinvention of broadcast business model;
- **Media convergence** sees move to “anytime, anywhere, any platform” pattern of media consumption;
- **Pace of change** is accelerating...

### THE ACCELERATING PACE OF NEW TECHNOLOGIES WAYS TO DISTRIBUTE ELECTRONIC MEDIA CONTENT



## OUR RESPONSE?

- “We’re not broadcasters any more”;
- **Business strategies :**
  - **Senderfamilie**
  - **Exclusivity/live content**
  - **Changing sales patterns**
  - **Diversification of revenue**

## MEDIA CONVERGENCE : IMPLICATIONS FOR REGULATORS

- At what stage do we (or you...) assume the adult consumer is responsible for their own viewing?
- What future for quantitative regulation in a world of self-scheduling and PVRs?
- What must always be regulated...
- ... on which services...
- ... and by whom – the EU or the NRA?

## MODELS OF REGULATION : CONVERGED/SEPARATE

➤ *Starting points:*

- Regulation inhibits freedom of expression, entrepreneurial initiative, and consumer choice;
- Broadcasting remains hyper-regulated, and will continue to do so for the next decade (AMS)

➤ So there must be a high burden of proof for further regulatory intervention

- Indispensable
- Proportionate
- Discriminate
- In contradiction with other policy objectives

“A “light touch” transposition of the new directive, limiting the use of stricter rules, should help prevent frictions between Member States. We also must accept that we are in a single market where disproportionate rules, like some advertising bans, are problematic”

*Commissioner Reding, 21.9.07  
(unofficial translation from French original)*

### ARGUMENTS AGAINST SELF-REGULATION OF THE BROADCAST MEDIA:

- How sustainable is the argument of “privileged access to a scarce public resource”?
- Subsidiarity: national policymaking should, within the EU framework, retain priority. NRAs vital as and when the EU deregulates audiovisual content regulation,

### KEY CRITERIA FOR A BROADCAST NRA (WHETHER CONVERGED OR NOT)

- Genuine and unconditional operational independence from politicians;
  - Financial transparency;
  - Jurisdiction over all operators, whether in the private or public sector;
  - Operators’ right to be heard, and to judicial review;
  - NRA’s strategic plan: a clear direction of travel away from Micromanagement and quantitative regulation;
  - Clear relationship (whether MoU or concurrent powers) with the NCA;
  - Encourage self- and co-regulatory initiatives
- .... *This is not really original – cf Council of Europe Recommendation 2000/23*

## CONVERGED OR SEPARATE?

- not ACT policy to support one model of the other
- Experiences with converged regulators;
- Relationship with the EU;
- If introducing your first NRA, might it be logical to converge?

## CONCLUSION

*What is important is not so much the structure of the NRA, rather that the Council of Europe Recommendation be respected in full.*



## **European standards concerning the independence and functioning of broadcasting regulatory bodies**

**This section outlines the perspective of European intergovernmental organisations in relation to standards of independence and functioning of regulatory bodies and the work being carried out by these organisations in this area.**

## Ivan Nikoltchev

*Media and Information Society Division, Directorate  
General of Human Rights and Legal Affairs, Council of  
Europe*



Ivan Nikoltchev outlined the Council of Europe standards in this area and stressed that there is a need to constantly discuss, update and consider the issues of freedom of expression and ethics in the context of new threats and challenges. While the European Union focuses on market development, the Council of Europe focuses on the human rights issues, notably, on the right to freedom of expression. The work is based on Article 10 of the European Convention on Human Rights, an element also used in the assessment criteria of candidates for European Union membership.

He outlined Council of Europe Recommendation 2000 (23) on the independence and functions of regulatory authorities for the broadcasting sector, developed in the context of change, convergence and recognising the need for changing regulatory approaches that should take account of particular national situations. The Recommendation calls for member states to ensure *inter alia*:

- that regulatory bodies are given adequate powers to fulfil their missions (as prescribed by national law) in an effective, independent and transparent manner;
- the establishment and unimpeded functioning of regulatory authorities, with rules and procedures that should clearly affirm and protect their independence;
- that there are clear definitions of duties, powers and competences, transparency, appointments and funding.

Mr Nikoltchev stressed that free and independent mass media are vital for the functioning of a democratic society and also that National Regulatory Authorities (NRAs), whether converged or not, can play an important role in ensuring an enabling environment for the existence of such media.

Mr Nikoltchev reiterated the point that arguments for the convergence of NRAs need to refer to the particular context of the relevant country: the political culture, the legal system and accumulated experience. In other words, as



Johanna Fell had noted earlier, there are a variety of possible solutions to the challenges of convergence.

# **Independence and effectiveness in a dynamic media environment**

## **Council of Europe standards concerning broadcasting regulatory bodies**

Ivan Nikoltchev

Media and Information Society Division

Directorate General of Human Rights and Legal Affairs



Council of Europe

### **What are the European standards?**

Standards of the European Union related to the media:

- concern mainly the economics, the market environment in which media function
- pursue the main objective of the EU – the free flow of capital, labour, goods and services

Council of Europe standards:

- Pursue the Council's aim to defend and promote human rights, parliamentary democracy and the rule of law



Council of Europe

## Council of Europe standards

- Based on Article 10 and its interpretation in the case-law of the European Court of Human Rights
- Laid out in two kinds of instruments
  - legally binding (e.g., conventions)
  - legally not binding (e.g., recommendations and declarations)
- Recognised by the EU as part of its political criteria for accession



Council of Europe

## Article 10 ECHR

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.



Council of Europe

## **Council of Europe standards**

How do they relate to the topic of this conference



Council of Europe

### **Recommendation (2000) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector**

Recognised that, depending on their legal systems, democratic and cultural traditions, member states have established regulatory authorities in different ways.

Consequently various means are used, and with variable success, to achieve independence, effective powers and transparency.



Council of Europe

**Recommendation (2000) 23  
of the Committee of Ministers to member states on the  
independence and functions of regulatory  
authorities for the broadcasting sector**

Recognised that, depending on their legal systems, democratic and cultural traditions, member states have established regulatory authorities in different ways.

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Council of Europe

**Recommendation (2000) 23  
of the Committee of Ministers to member states on the  
independence and functions of regulatory  
authorities for the broadcasting sector**

- Recommended that the regulatory bodies are given adequate powers to fulfil their missions (as prescribed by national law) in an effective, independent and transparent manner;
- Formulated specific guidelines to this end.



Council of Europe

### **Appendix to Recommendation (2000) 23**

#### ***Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector***

##### **I. General legislative framework**

- Member states should ensure, through an appropriate legislative framework, the establishment and unimpeded functioning of regulatory authorities.
- The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.



Council of Europe

### **Appendix to Recommendation (2000) 23**

#### ***Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector***

##### **I. General legislative framework**

The law should clearly define:

- the duties and powers of regulatory authorities;
- the ways of making them accountable;
- the procedures for appointment of their members;
- the means of their funding.



Council of Europe

## Appendix to Recommendation (2000) 23

### *Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector*

#### II. Appointment, composition and functioning

- The rules should be defined so as to protect regulatory bodies against any interference, in particular by political forces or economic interests;
- Members should be appointed in a democratic and transparent manner;
- Potential conflicts of interest should be avoided;
- Members should be protected against arbitrary dismissal as a means of political pressure.



Council of Europe

## Appendix to Recommendation (2000) 23

### *Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector*

#### III. Financial independence

- Funding of regulatory authorities should be clearly specified in law so as to allow them to carry out their functions fully and independently.
- Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities.



Council of Europe

### Appendix to Recommendation (2000) 23

#### *Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector*

##### IV. Powers and competence

- Regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities;
- The regulations on the licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner;
- Regulatory bodies should be involved in the planning of national frequencies allocated to broadcasting services.



Council of Europe

### Appendix to Recommendation (2000) 23

#### *Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector*

##### IV. Accountability

Regulatory bodies should be accountable to the public, e.g., publish reports on their work.

Decisions and regulations adopted by the regulatory bodies should be:

- duly reasoned;
- open to review by the competent jurisdictions;
- made available to the public.



Council of Europe



**Recommendation (2000) 23  
of the Committee of Ministers to member states  
on the independence and functions of regulatory  
authorities for the broadcasting sector**

The Steering Committee on Media and New Communication Services (CDMC) is in the process of preparing an overview of the implementation of the recommendation



Council of Europe

**In conclusion**

- Free and independent mass media – both “old” and “new” – are vital for the functioning of a democratic society
- Broadcasting regulatory bodies – converged or not – can play an important role in ensuring an enabling environment for the existence of such media
- To converge or not to converge – the decision needs to be based not just on technological arguments



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## **Maria-Luisa Fernández Esteban**

*European Commission, DG Information Society and Media*



Maria-Luisa Fernández Esteban outlined the European Union regulatory framework and provided an update of the progress of the new Audiovisual Media Services Directive, which at that point had been the subject of a political agreement between the European Union institutions. It is expected that the European Parliament will adopt the new Directive in October or November of 2007. Also of relevance to the broadcasting sector, although focused on telecommunications, is the regulatory framework for electronic communications which is currently being reviewed by the European Commission. Ms Esteban also mentioned the work of the European Commission in the area of media development in the context of accession partnerships with countries in South-Eastern Europe.

She stressed that the European Commission's standpoint with regard to the issue of converged or non-converged regulators is that this is a matter for member states to decide. The independence of authorities is crucial in order to achieve the objectives in the legislation and co-operation both between regulators within the country and European regulators.

The European Union recognises the various national Constitutional arrangements, and that member states are free to choose the appropriate structure of the broadcasting regulator, according to the national situation. Of particular importance to the European Commission, in the event of a merger of regulatory bodies, is that the various authorities retain their independence before, during and after such a merger. The choice to converge regulatory authorities should not be used as an excuse to gain more control over regulatory authorities or to interfere with their independence. For converged authorities a clear division of competence is necessary. Ms Esteban noted that although the European Union focuses on internal market developments, in the context of the enlargement process the Council of Europe standards in this are as important as the *acquis* of the European Union, and that all these principles and standards play an equal role.

# THE INDEPENDENCE OF BROADCASTING AUTHORITIES IN THE EU REGULATORY FRAMEWORK

*Marisa Fernández Esteban*

European Commission

Directorate general for Information Society and  
Media

Audiovisual and Media Policies

1 October 2007



European Commission  
Directorate General for Information Society and Media

## Independent regulatory authorities in the EU framework

- Political Agreement on the future Audiovisual Media Services Directive
- EU regulatory framework for electronic communications.
- European and Accession partnerships with candidate countries to the European union and Western Balkan countries



European Commission  
Directorate General for Information Society and Media

## Independent regulatory authorities in the EU framework

- Separate-converged regulators: a decision for the Member States
- Independence is crucial to achieve the objectives of the EU regulatory framework including audiovisual
- Cooperation between regulatory bodies crucial too

... 3



European Commission  
Directorate-General for Media and Culture

## Separate -converged regulators

- Depends on constitutional arrangements and traditions
- If there is a merge:  
**Independence before**  
**Independence in the process**  
**Independence afterwards**

... 4



European Commission  
Directorate-General for Media and Culture

## Cooperation between regulatory authorities

- From different countries:
  - Regular bilateral contacts (Protocols of cooperation)
  - Contact committee
  - EPRA
  - Protocols of cooperation
- In the same country:
  - Broadcasting, Telecoms, Competition authorities
  - For converge regulators: clear division of competences

... 5



European Commission  
Internal Policy and Media

## Independence of regulatory bodies in the enlargement process

- European standards as important as the EC legal *acquis*
- *Effective* independence against any interference by political or economic forces
- In European and accession partnership and during accession negotiations

... 6



European Commission  
Internal Policy and Media

## **Christian Möller**

*OSCE Office of the Representative on Freedom of the Media*



Christian Möller focused the implications of convergence for media freedom issues, regardless of whether these challenges are addressed by converged or non-converged regulators. He presented an overview of the change from a media environment where previously the analogue spectrum was a scarce resource, to the increased potential of digital broadcasting, alongside the development of new platforms for broadcasting (Internet, etc.). He described in more detail the particular regulatory challenges in the current media environment concerning issues such as: whether licensing should be replaced by regulation with regard to platforms with abundant space and access; non-proprietary standards; non-discriminatory access to platforms; must carry rules; the strategies for digital switch-over and issues of competition. With regard to the latter he questioned whether the competition approach should also have a media-specific focus, as is the case in Germany with a specific regulatory authority focusing on issues of competition in the media markets (the KEK).

The OSCE also bases its work in this area on Article 10 of the European Convention on Human Rights. In addition, the OSCE outlined principles of broadcast regulation stressing: the importance of a freer wider dissemination of information of all kinds; the need to increase the use of all opportunities and all platforms and that regulation does not mean restriction but can be a safeguard for media pluralism and freedom. Mr Möller added that there is no global approach to media regulation, but rather that it is country and culture specific.

Further work that the OSCE does in this area includes the conducting of legal reviews of draft regulation and legislation. They are also examining best practices of regulators in the digital world throughout Europe and worldwide.



## Regulation and Freedom in the Digital Age

**Converging Media – Convergent Regulators?**

**Skopje, 1-2 October 2007**



## Introduction

---

### **Christian Möller**

Programme Officer

Office of the Representative on Freedom of the  
Media

[christian.moeller@osce.org](mailto:christian.moeller@osce.org)

[www.osce.org/fom](http://www.osce.org/fom)



## European Standards – Freedom and...

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(art. 10, European Convention on Human Rights)

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## ...Regulation

- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(art. 10, European Convention on Human Rights)

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## Television without Frontiers

- Council of Europe: Convention on Transfrontier Television
- EU: Television Without Frontiers Directive (TVWF)
- EU: Draft Directive on Audiovisual Media Services (AVMS)



## Principles of Broadcast Regulation

- According to OSCE principles
  - a “freer and wider dissemination of information of all kinds”
  - “take every opportunity offered by modern means of communication, including cables and satellites, to increase freer and wider dissemination”
- Regulation does not mean Restriction
- Guaranteeing Media Freedom and Pluralism
- Independent Regulatory Body
- No global uniform approach to regulation: “country and culture specific”

## Licensing in the Analogue World

- Scarce frequencies
  - especially in terrestrial TV
- Pluralism by content regulation
- No license without frequency



## Digital TV

- Digital Video Broadcasting (DVB)
  - Terrestrial (DVB-T)
  - Cable (DVB-C)
  - Satellite (DVB-S)
  - Mobile (DVB-H)
  - Internet TV (IPTV)



## The Digital Age

- “Digital Abundance”: Frequencies are not a scarce resource anymore?
- Less need for regulation and licensing?
  - Comparable to print press?
- Content Regulation vs. Network Regulation?



## Licensing in the Digital World

- Licenses for programs?
  - Moving to a regime of registration?
- Licenses for networks?
- License requirements for Internet media?
  - EU Audiovisual Media Services Directive (AVMS)
  - Linear vs. non-linear AV content
  - No licensing of radio, websites etc.

## Regulatory Challenges

- Non-discriminatory access to networks (gatekeeper function)
  - Non-proprietary technical standards, e.g. for CA, EPG, set-top boxes (MHP)
  - Must-carry obligations for PSB?
  - Simulcast and digital switchover?
- 

## Regulatory Bodies

- Increasing convergence of network and content regulators
- Strictly independent
  - From Governments, Parliament, Industry, etc.
  - Involvement of civil society to guarantee pluralism
  - Well sourced and transparent
- Anti-trust regulation?





## What's next?

- Moving from licensing to registration?
- Sectoral regulation for Internet media?
- Moving from content regulation to technical regulation?



## RFOM Activities

- The OSCE Representative on Freedom of the Media offers
  - legal reviews
  - development of good practices
  - 'Four Mandates' Meeting (December 2007)





## **When and how? The process and timing of convergence of regulators**

Representatives of several regulatory authorities provided an overview of if, when, and how regulatory authorities can be converged based on the experiences of their own authorities. The regulatory authorities of both Slovenia and the United Kingdom were converged, although following quite different processes. In the case of the regulatory authority of the French community in Belgium, an example of where the idea of convergence of authorities is almost impossible was presented, with an outline of the alternative approach taken in Belgium to addressing the regulation of converging media.

## **Miha Kriselj**

*Post and Electronic Communications Agency of the  
Republic of Slovenia (APEK), Slovenia*



Miha Kriselj provided an overview of the history of frequency allocation and the development of legislation, and of the ideas for the convergent regulator in Slovenia. He also explained how two different cultures of regulation, i.e. telecommunications and broadcasting, were brought together. As part of the process to regulate the broadcasting environment, the Broadcasting Council was established in 1994. A telecommunications authority was also established and both authorities played a role in the allocation of frequencies. However there were problems with the implementation of the regulation: the frequency assignment procedure was problematic and led to several court cases, and there seemed to be some contention between the authorities regarding decision-making in this area. Several proposals for change were made after this time, and a decision was taken in 2001 that the Broadcasting Council programme department would become part of a new converged agency. The outcome of the process, according to Mr Kriselj, was that the Broadcasting Council lost its programme department, while at the same time this department remains dislocated from the rest of the new agency, which is largely dealing with telecommunications. This is partly because the merging process took place too quickly and was not well prepared. In addition from 2005-2006, further legislative changes reduced the powers of the Broadcasting council, transferring more powers to the converged agency.

Convergence is almost formally concluded, after a process of over five years. Mr Kriselj further outlined how the system now works in reality, whereby despite convergence, two regulatory models apply to the different sectors of broadcasting and telecoms. The convergent regulator does have advantages: lessons learned from telecoms regulation can be used in convergent systems and broadcasting regulatory principles can be applied to telecommunications services.





**APEK**

Post and Electronic Communications  
Agency of the Republic of Slovenia

## When and how? The process and timing of convergence of regulators

mag. Miha Krišelj, Post and Electronic Communications Agency of the Republic of Slovenia (APEK), Slovenia

### Converging media – convergent regulators? The future of broadcasting regulatory authorities in South-Eastern Europe

Conference organized by the Council of Europe  
And the OSCE Mission to Skopje

1-2 October 2007, Holiday Inn, Skopje



**APEK**

## The Period 1991 - 1994

### •Before 1991

- Public broadcaster (RTV Slovenija) was a holder of all broadcasting frequency assignments (for its own PSB services as well as for other local broadcasting services)
- RTV Slovenija was managing radiofrequency spectrum through the federal ministry for transportation (Belgrade)

### •1991-1994

- Office for Telecommunications of the Republic of Slovenia attempting to regulate spectrum (public appeal to acquire the existing licenses to establish the frequency usage data base)
- Broadcasting frequencies were assigned on the first come first served basis

### •1994

- Broadcasting Council started the first public tender for the broadcasting frequencies
- Available frequencies were assigned on the basis of the beauty contest (no content criteria was set and the license contained no content requirements)



APEK

## Broadcasting Council in 1994

### •Established first in 1994 (ZJG 94, Law on Public Publications)

- 9 members appointed by the Parliament nominated by:
  - 4 members by the Government
  - 5 members broadcasting experts
- Financed by the Parliament
- Establishing the programme department under the jurisdiction of the Council

### •Tasks

- To protect the freedom of communication, the independence and pluralism of radio and TV programmes
- To monitor the activities of broadcasters and cable TV operators
- To establish the criteria for non-commercial radio and TV programmes
- To propose an assignment of the radio frequency
- ...

### •Drawbacks

- No final decisions
- Not participating in the administration procedures

Converging media – convergent regulators?  
1-2 October 2007, Holiday Inn, Skopje

3



APEK

## Ideas for the changes before 2001

### •1<sup>st</sup> proposal:

The broadcasting department (frequency management) of the Office for Telecommunications of the Republic of Slovenia should join the programme department which was already under the jurisdiction of the Broadcasting Council

### •2<sup>nd</sup> proposal:

Council's programme department should be transferred under the jurisdiction of the Culture Ministry

### •3<sup>rd</sup> proposal:

Council's programme department should become a part of the new established Agency for Telecommunications and Broadcasting (ATR)

### •The decision made in 2001:

3<sup>rd</sup> proposal prevailed and the Council's programme department became a part of the new Agency where the majority of the employees came from the old Office for Telecommunications

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APEK

## New Media Law (2001)

### ▪The Broadcasting Council gets more power

#### –Art.100 (ZMed)

- it shall provide the agency with initiatives for the conduct of expert supervision of the implementation of programming requirements and restrictions specified in the present act and shall adopt the annual plan for the conduct of such supervision.
- it shall adopt decisions on the issue, revocation and transfer of licences for performing radio and television activities, and provide the agency with binding proposals and approvals for the issue and revocation of licences for performing radio and television activities.

#### –Art 104(ZMed)

- The agency shall conduct the public tender procedure and make the selection on the basis of a binding proposal by the Broadcasting Council.

#### –Number of members changed from 9 to 7

#### –The President of the Council remains the same, the members are new

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APEK

## Merging the Council's Programme department

#### –The Council has lost the Programme department

#### –Despite the merging process Programme department remains dislocated from the Agency – bad communication with the Agency

#### –The merging process was too fast and unprepared

#### –Double management of the Programme department. Council continued to coordinate the work of Programme department

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1-2 October 2007, Holiday Inn, Skopje*

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APEK

2001 - 2004

### ▪Broadcasting licensing

–Art 104 (Zmed) provided more criteria regarding the performance of radio and/or television activities which shall primarily be taken into consideration but:

- Nevertheless the whole bouquet of available frequencies was published on the base of the same criteria
- There were still no content requirements for a certain assigned frequency

–The consequence of such licensing:

- Poor argumentation of the Council's decisions
- Numerous complaints ended at the Court
- Frequency assignment blocked for more than one year

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APEK

2005 - 2006

### ▪New approach in preparation of the Public tenders

- For each frequency special set of the programme criteria were developed by the Agency
- These criteria were confirmed by the Council

### ▪2006 New Broadcasting Council was appointed

- Some changes in the Mass media law were adopted:
  - New Art.100 ("decisions" made by the council were changed into "proposals")
  - New Art. 104a was added (provision for licensing digital broadcasting services)
  - Strategy on development of radio and television programmes should be prepared by the Agency (before: the Council was appointed to prepare the programme strategy)
- Strategy on development of radio and television programmes
  - Radio: consolidation of the radio market through reducing the number of radio stations by developing the criteria on merging radio stations into regional and national networks, digital radio to be an additional service to the analog media
  - Television: to support HDTV services and mobile TV and to speed up the transition period

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## The process of convergence

**•The process of convergence is formally finished but in the reality it is still in progress**

–Only the last year the Media Law changed and precisely defined the competences of the Broadcasting Council and strengthens the competences of the Agency

–In digital broadcasting the role of the Broadcasting Council is insignificant indicating that APEK is becoming the sole regulator in this sector – as the idea of the convergent regulator is followed

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## Convergent regulation

**•How much of traditional broadcasting regulation will be applicable in convergent media and networks?**

**•How much of traditional broadcasting regulation will be used in the telecommunication sector?**

**•Despite the converging media the regulation in APEK is in a certain sense still dual regulator**

–TK regulation is based on:

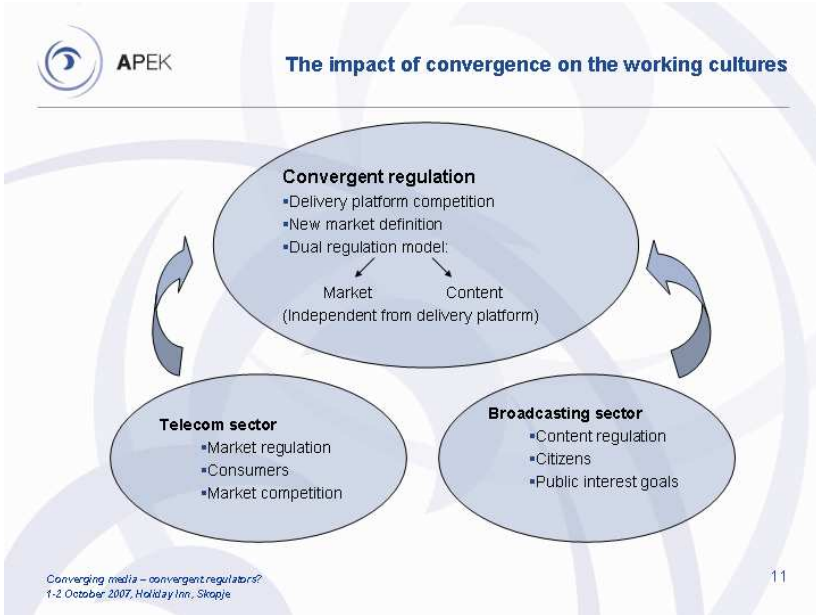
- the market analysis and securing the widespread accessibility of fixed telecommunications services through universal service obligations

–while broadcasting regulation is based on:

- Standards or the protections of the audiences against exposure to harmful or offensive content
- Standards to preserve the distinction between advertising and editorial content
- Range, quality, plurality and broad availability of broadcast audio visual and audio programming)

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## When and How?

- **The process of establishing the convergent regulator was fast and forced by the new Media Law in 2001,**
- **Yet the regulatory models remains the same – broadcasting is regulated differently than telecom sector,**
- **The lessons learned from telecom regulation can be efficiently used in the convergent systems, when needed,**
- **The broadcasting regulatory principles can be faster and easier implemented in Telecom sector (the new AVMS directive),**
- **APEK as a convergent regulator is able to efficiently respond to the new convergent market, when it comes.**

## **Jean-François Furnémont**

*Directeur, Conseil supérieur de l'audiovisuel, Belgium*



The Belgian media regulatory landscape is very specific, with three regions (French, Flemish and the region of the capital Brussels), and the existence of three language communities: French, Flemish and German. The communities have competences in areas such as culture, media, education and health, while the regulation of telecommunications and networks, and competition remains at the Federal level.

Mr Furnémont pointed out some of the advantages (including the control of the whole value chain, and a potentially better response to a converged market), and disadvantages (including the risk of conflict between the different goals of the regulatory traditions and that economic considerations may outweigh the cultural goals) of converged regulators. Although the competence for broadcasting was given to the communities, the concept of broadcasting was not clearly defined. As convergence has progressed, (on the part of both the federal government and the communities) legal cases regarding competence have been referred to the constitutional court, appealing against legislation adopted by other communities and the federal government. As the result of several court rulings, it was declared that the regulatory approach depended on the content and function of the service rather than the infrastructure. The court insisted that a solution be reached between the various authorities before the end of 2005.

Hence, in a country where convergence of the regulators was impossible, and not necessarily desired by the various actors, an agreement was reached (in 2006) regarding co-operation between the authorities, establishing a formal network where all would meet to consult on policy and exchange information. The Belgian case is therefore an example of where close co-operation offers an alternative to convergence.





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CoE Conference :  
*Converging media – convergent regulators?*

Panel 2 :  
*When and how? The process and timing of convergence of regulators*

Jean-François Furnémont,  
Director, CSA, French Community of Belgium  
[jean-francois.furnemont@csa.be](mailto:jean-francois.furnemont@csa.be)  
[www.csa.be](http://www.csa.be)



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## Plan

1. The Belgian institutional and regulatory landscape
2. Convergence :
  1. Avantages
  2. Disadvantages
  3. When
  4. How
  5. Future???




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# 1. The Belgian institutional and regulatory lanscape



Ceci n'est pas une pipe.



3

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4

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La Communauté flamande

6

This slide features a map of Belgium. The northern part of the country is shaded in blue, while the southern part is shaded in yellow. A black arrow points from the text 'La Communauté flamande' to the blue-shaded northern region. On the left side of the slide, there is a vertical text label 'Conseil supérieur de l'audiovisuel', a small square image with a colorful abstract pattern, and a circular logo with the letters 'CSA'.

Conseil supérieur de l'audiovisuel



La Communauté française

7

This slide features a map of Belgium. The southern part of the country is shaded in blue, while the northern part is shaded in yellow. A black arrow points from the text 'La Communauté française' to the blue-shaded southern region. On the left side of the slide, there is a vertical text label 'Conseil supérieur de l'audiovisuel', a small square image with a colorful abstract pattern, and a circular logo with the letters 'CSA'.

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La Communauté germanophone

8

This slide features a map of Belgium where the German-speaking community is highlighted in blue. The rest of the country is yellow. An arrow points from the text 'La Communauté germanophone' to the blue area. On the left side, there is a vertical logo for 'Conseil supérieur de l'audiovisuel' and a small square image with a colorful abstract pattern.

Conseil supérieur de l'audiovisuel



La Région flamande

9

This slide features a map of Belgium where the Flemish region is highlighted in blue. The rest of the country is yellow. An arrow points from the text 'La Région flamande' to the blue area. On the left side, there is a vertical logo for 'Conseil supérieur de l'audiovisuel' and a small square image with a colorful abstract pattern.

Conseil supérieur de l'audiovisuel



La Région wallonne

10

This slide features a map of Wallonia, Belgium, with the region shaded in blue. An arrow points from the text 'La Région wallonne' to the map. The slide includes a vertical logo on the left, a small square image, and a circular logo at the bottom left.

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La Région de Bruxelles-Capitale

11

This slide features a map of the Brussels-Capital Region, Belgium, with the region shaded in yellow. A blue dot marks the location of Brussels, with an arrow pointing from the text 'La Région de Bruxelles-Capitale' to it. The slide includes a vertical logo on the left, a small square image, and a circular logo at the bottom left.

- 3 Communities :
  - 6,5 millions dutch speaking
  - 4,5 millions french speaking
  - 70.000 german speaking
- Jurisdiction :
  - Culture (including media + broadcasting)
  - « Matières personnalisables » : education, health, sport, ...



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- 3 Regions :
  - 6 millions in Flanders
  - 3,5 millions in Wallonia
  - 1 million in Brussels
- Jurisdiction :
  - « Matières localisables » : economy, employment, housing, ...



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- 1 Federal state
- Jurisdiction :
  - Défence
  - Justice
  - Social security
  - Finances (partly)
  - Interior (party)
  - Foreign Affairs (partly)
  - Economy (partly)
    - (including telecommunications)
    - (including competition)

14



- 4 Regulators :
  - BIPT (Federal)
  - VRM (Dutch Comm.)
  - CSA (French Comm.)
  - Medienrat (German Comm.)



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## 2. Converging

- Advantages ?
  - response to the convergence and the horizontal integration of market players
  - allows control of the whole value chain
  - less cost for the state budget and less administrative burden for the players
  - better enforcement and coherence of regulation



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- Disadvantages ?
  - risk of conflict between the goals of broadcasting regulation and telecommunications regulation
  - risk of preferring economic goals to cultural goals
  - lasting quality: broadcasting regulation will never disappear
  - heaviness



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- When ?

- In 1970, Communities are created, competences are distributed (« radiodiffusion »), but not defined !
- Development of audiovisual legislations specific for the 3 Communities + evolution of the federal telecommunications legislation (about the technical aspects and infrastructures) ;
- Appeals to the constitutional court of :
  - the federal government against the legislation of some Communities
  - some Communities against the legislation of the federal State
  - some Communities against the legislation of other Communities !



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- When ?

- Even before convergence, constitutional court said that the Communities have jurisdiction about the « technical aspects » of broadcasting ;
- During convergence :
  - « broadcasting on one hand, telecommunications on the other hand, cannot be defined by technical criterias like the infrastructure which is used, the networks or the terminals, but on the basis of content and functional criterias » ;
  - « the federal authority is not the only competent authority to rule the matter of electronic communications networks, since the Communities can also adopt laws regarding that matter on the basis on their own jurisdiction about broadcasting ».

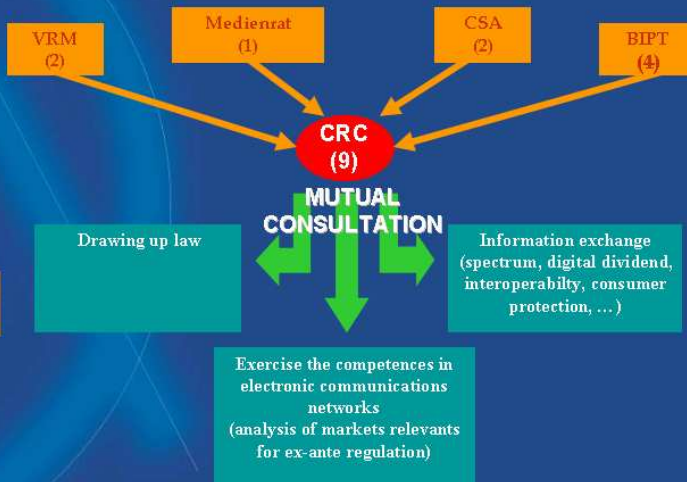


19

- How ?

- There must either a redistribution of jurisdiction between the Federal State and the Communities or a cooperation agreement between them in order to guarantee a coherent policy (06/2004)
- Solution must be found as late as 12/2005 otherwise all the legislations are cancelled
- Cooperation agreement of 11/2006 between the Federal State and the three communities :

<http://www.csa.be/documents/show/592>



- Future ?

- Merging of all regulators within the CRC ?
  - Impossible
- Exercice of more competences by the « big » federal regulator ?
  - Improbable
- Exercice of more (or all) competences by the three « small » regulators ?
  - What about telecoms ?
  - In accordance to the (slow ? fast?) dissolution of the Federal State...



## **Patricia Galvin**

*Ofcom, United Kingdom*



The British regulator Ofcom is responsible for television and radio, telecommunications, wireless services, spectrum management, and also aspects of competition. Patricia Galvin described the process of convergence of the five former regulatory bodies over a period of several years, from the first proposals in 1996 to the 2000 white paper on the future of communications, up to the establishment of Ofcom in 2003. The Ofcom act, introduced in 2002, was based on wide-ranging debate and consultations organised around a committee partly made up of people who would be involved in the running of Ofcom. This included 3 000 submissions from industry and more than 500 amendments to the bill that were tabled in parliament. This long consultative and planning process was considered vital for the successful convergence and future functioning of the converged authorities.

It was established as a statutory public corporation and the organisation involves a mixture of public and private sector models, with funding via levies and license fees from the industry. Different teams and steering groups were involved in the decisions on structuring. Specific rules were introduced in order to prevent political interference, and interference from market players on the work of the regulator. Her presentation outlines these rules in detail.



## Panel discussion 2: When and How? The Process and Timing of Convergence of Regulators

Patricia Galvin, Head of International Ofcom

### What is Ofcom?

Regulator for the UK communications industries  
Responsibilities across TV, radio, telecoms and wireless services

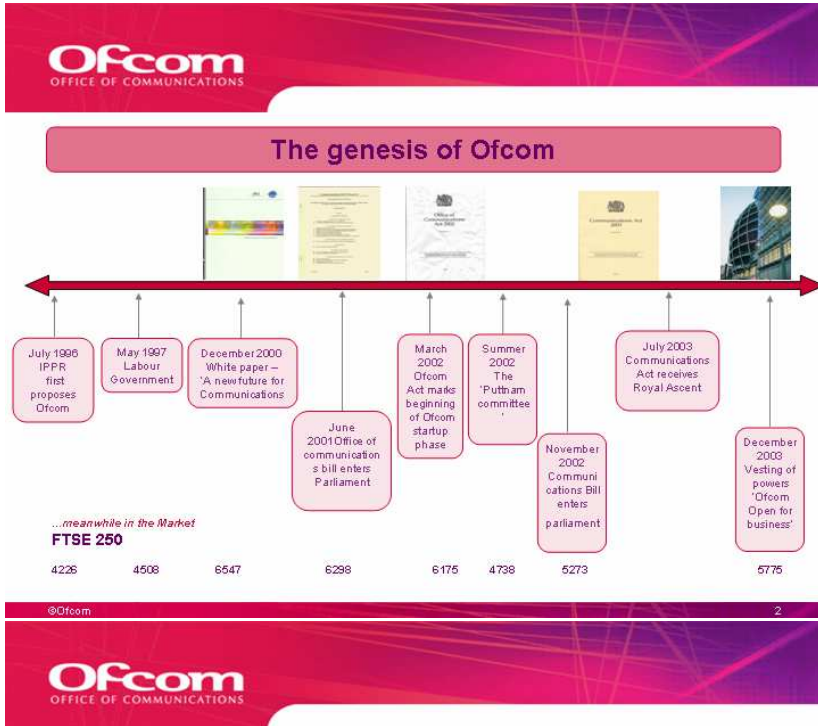
*"It shall be the principle duty of Ofcom in carrying out their functions:*

- to further the interests of **citizens** in relation to communications matters; and
- to further the interests of **consumers** in relevant markets, where appropriate by promoting competition"

### Why Ofcom?

- Debate back 1990s
- Boom in 1998-2001: momentum
- Policy drivers: media ownership; broadband; spectrum, BBC oversight,

*Idea strong enough to survive changing conditions between 1998 and 2003*



### Ofcom born in anticipation of convergence



**Ofcom went live on 29 December 2003**

**Ofcom assumed the duties and activities of the 5 previous regulatory bodies - plus took on 135 new statutory duties**



- ❑ A new regulator and competition authority for communications sector (concurrent competition powers with the Office of Fair Trading on broadcasting)
- ❑ A statutory public corporation – independent of Government; Public servants (not civil servants)... a hybrid of public and private sectors
- ❑ Funds raised by levy on telcos & broadcasters; also keep % of revenue raised from spectrum licences
- ❑ 1152 employees in legacy regulators; 776 in Ofcom (March '06)
- ❑ PLC Board structure – not DG / Commission

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**Extensive Consultation**

- White Paper December 2000
- Office of Communications Act 2002
- Joint Communications Bill Scrutiny Committee – 2002
- **Communications Bill**
  - 17 days of debate
  - 26 Commons Standing Committee sessions
  - more than 300 industry submissions
  - more than 500 amendments tabled
- **Communications Act 2003**
  - 263 statutory duties
  - but not a consolidating piece of legislation



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6



## Rules against political interference on Board

- Rules stipulating that members **appointed** by more than one authority
- **Transparency** rules for appointment process (job description, public interviews, publication of results)
- **Conflict resolution** mechanisms in case of delayed/blocked appointment process
- Rules which forbid **dismissal** (other than resignation, incompatibility, serious violations of law) + possibility to appeal
- **Incompatibilities**: political posts, administrative posts, membership of political party
- Rules limiting possibility to renew (only one renewal possible)
- Decisions cannot be overturned by Executive or Parliament





## Rules against interference from market players

- Disqualifications:
  - Incompatibilities with being employed by regulated company
  - Incompatibilities with being employed by another regulator (in the sector)
- Conflict of interest rules:
  - Obligation to disclose interest in any regulated company
  - Members not allowed to receive corporate gifts/preferential treatments
  - Post-employment rules (“cooling off” period)
  - Rules on conflict of interest regarding close relatives



## Ofcom Board - Appointments



## The Communications Act 2003

### The Act covers the transition to a converged, all-digital sector

- Incorporated European Telecoms framework
- Allowed Ofcom to introduce & implement spectrum trading
- Liberalised ownership rules for media assets
- Clarified new regime for broadcasting;
  - Content Standards (Child protection, fairness / privacy etc for all broadcasters)
  - Tougher quotas (original production, regional investment, independent commissioning, etc)
  - Greater self-regulation for PSB's
- Digital licences for ITV, C4 & C5 paves way for digital switchover
- Internet is not regulated (but Ofcom does have remit to promote media literacy)



## Ofcom

### Duties:

1. To further the interests of citizens
2. To further consumer interests... by promoting competition

### Approach:

1. Bias against intervention
2. Evidence-based decision making

## **Structure and functioning of converged regulators – best practices**

This last topic was addressed by representatives of three converged regulatory authorities, whose experience of convergence were very different. In the case of the Italian AGCOM, there had previously been no media regulatory authorities and a converged regulator was created from scratch. In contrast the creation of Ofcom in the United Kingdom involved the convergence of five existing regulators and this process was carried out over several years (as described in the previous section, page 68). In the case of the converged regulator in Bosnia and Herzegovina, the process of convergence took place overnight.

## **Lisa di Felicianonio**

*AGCOM, Italy*



The Italian AGCOM, similar to Ofcom is responsible for both broadcasting and telecommunications, and also for issues of competition in these markets. AGCOM was established from the outset as a converged regulator in 1997, in anticipation of developments in media convergence. Ms di Felicianonio proposed several factors, based on the ten years experience of the Italian regulator, which have contributed to the success of convergent regulation. These include clear organisational and decision-making structures, a multi-disciplinary staff working in teams, a transparent and consultative relationship with consumers and industry, and adequate and stable funding. Since 2006, this funding is 91% based on levies on the regulated operators.


Ms di Felicianonio claimed that the converged approach has proved a good basis for dealing with the regulation of new services such as mobile broadcasting and Internet broadcasting, as well as allowing the assessment of the entire market where divisions between sectors are becoming more blurred. On the other hand, it is difficult to merge the approaches of network regulation (technical and economic approach) and content regulation (political and social approach). In addition, in a converged regulator the issues of content such as advertising and protection of minors tend to become over shadowed by the regulation of access.



**AGCOM:**  
experiences and  
future challenges of a  
convergent regulator

Lisa Di Feliciantonio  
Skopje, October 2 2007

1



**AGCOM: some facts and figures**

AGCOM has been set up in 1997, in a forward looking perspective, as a "convergent body" with competences over broadcasting, telecoms and the press.

Independent from the Government and annually reporting to the Parliament (that is in charge for appointing members of the board).

Board: President + 8 Commissioners (in charge for a 7 years term)

Staff: 320 planned (current: about 250)

Structure, both for decisional bodies and operational offices, has been defined to enhance effectiveness and the convergent focus.

Headquarters: Naples and Rome

Current budget: around 60 million €

**AGCOM mission and organization**

2



## Main areas of competence

<b>Telecommunications</b> <ul style="list-style-type: none"><li>➤ Interconnection</li><li>➤ Numbering allocation</li><li>➤ Tariff regulation</li><li>➤ Monitoring of SMP operators</li><li>➤ Universal service</li><li>➤ Number portability</li><li>➤ Unbundling of local loop</li><li>➤ Quality of service</li><li>➤ Dispute resolution</li></ul>	<b>Broadcasting</b> <ul style="list-style-type: none"><li>➤ Terrestrial frequency plans</li><li>➤ Regulation of content (advertising; european quotas; right of reply; ecc)</li><li>➤ Protection of minors</li><li>➤ Pluralism</li><li>➤ Monitoring compliance with regulation</li><li>➤ Regulatory framework for the development of DTT</li></ul>
--	--

AGCOM mission and organization

3



## Key factors for managing convergence

10 years experience highlights some strategic factors for a successful management of convergence:

- **Organizational structure**
- **Organizational behavior and culture**
- **Relationship with external environment**
- **Resources and Financing**

4



## Key factors for managing convergence: organizational structure


**Three decisional bodies:**

- Council (President + 8 Commissioners)
- two commissions (President + 4 Commissioners):
  - Network and Infrastructure
  - Product and Services

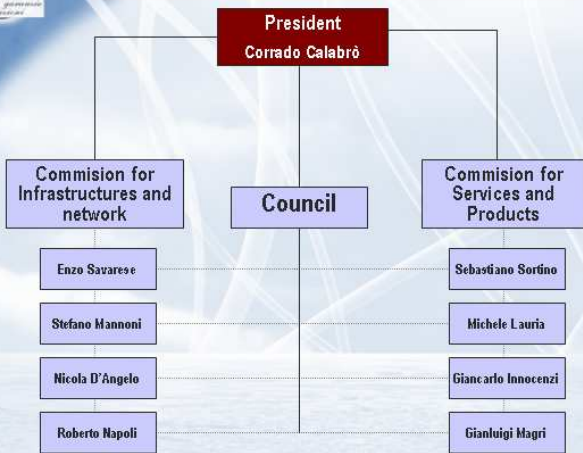
All decisional competences have been distributed among the two commissions according to a convergent approach in order to keep all commissioners involved both in telecom and media issues

**AGCOM organizational structure**

5



## The council and the commissions




```

graph TD
    President["President  
Corrado Calabrò"]
    Council["Council"]
    Commission1["Comission for  
Infrastructures and  
network"]
    Commission2["Comission for  
Services and  
Products"]
    
    President --- Council
    President --- Commission1
    President --- Commission2
    
    EnzoSavarese["Enzo Savarese"]
    StefanoMannoni["Stefano Mannoni"]
    NicolaD'Angelo["Nicola D'Angelo"]
    RobertoNapoli["Roberto Napoli"]
    
    SebastianoSortino["Sebastiano Sortino"]
    MicheleLauria["Michele Lauria"]
    GiancarloInnocenzi["Giancarlo Innocenzi"]
    GianluigiMagri["Gianluigi Magri"]
    
    Council --- EnzoSavarese
    Council --- StefanoMannoni
    Council --- NicolaD'Angelo
    Council --- RobertoNapoli
    
    Council --- SebastianoSortino
    Council --- MicheleLauria
    Council --- GiancarloInnocenzi
    Council --- GianluigiMagri
    
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**AGCOM organizational structure**


6



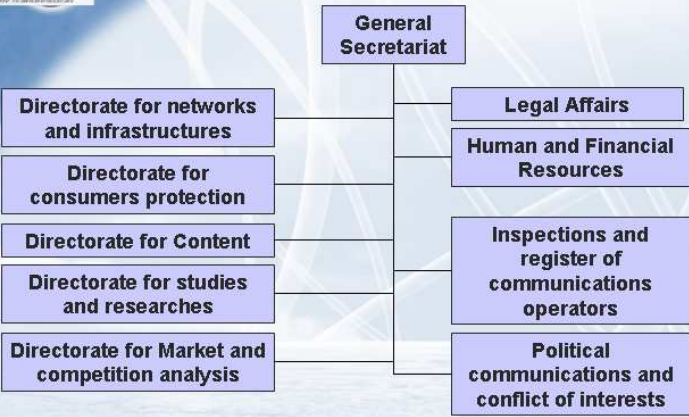
## Organizational structure: competences of the decisional bodies

- ➔ **Networks and Infrastructures:** network interconnection and access regulation, numbering and frequency planning;
- ➔ **Content and services:** regulation of contents carried over networks (political pluralism; protection of minors; advertising..) and services (including services on telecom networks)
- ➔ **Council:** new and convergent issues (price regulation and supervision; market concentration and competition issues)

AGCOM organizational structure 7




## The structure of the offices



```
graph TD; GS[General Secretariat] --- DNI[Directorate for networks and infrastructures]; GS --- DCP[Directorate for consumers protection]; GS --- DC[Directorate for Content]; GS --- DSR[Directorate for studies and researches]; GS --- DMCA[Directorate for Market and competition analysis]; GS --- LA[Legal Affairs]; GS --- HFR[Human and Financial Resources]; GS --- IRO[Inspections and register of communications operators]; GS --- PCOI[Political communications and conflict of interests];
```

AGCOM organizational structure 8





## Convergence as a challenge for an organization

**Effectiveness of convergent regulator depends by the ability of operational structure to cope with:**

- high degree of complexity of the problems
  - recruiting of talents on the market: officers coming from regulated companies, consultancies firms, other institutions; some degree of turnover.
- managing the knowledge mix (technical, economic, legal):
  - Each directorate has a mix of all the competences to avoid creation of closed teams unable of sharing their specific knowledge
- rapid environmental changes, due to continuous and fast technical innovation (the organizational paradigm might change over time!)

AGCOM organizational structure 9

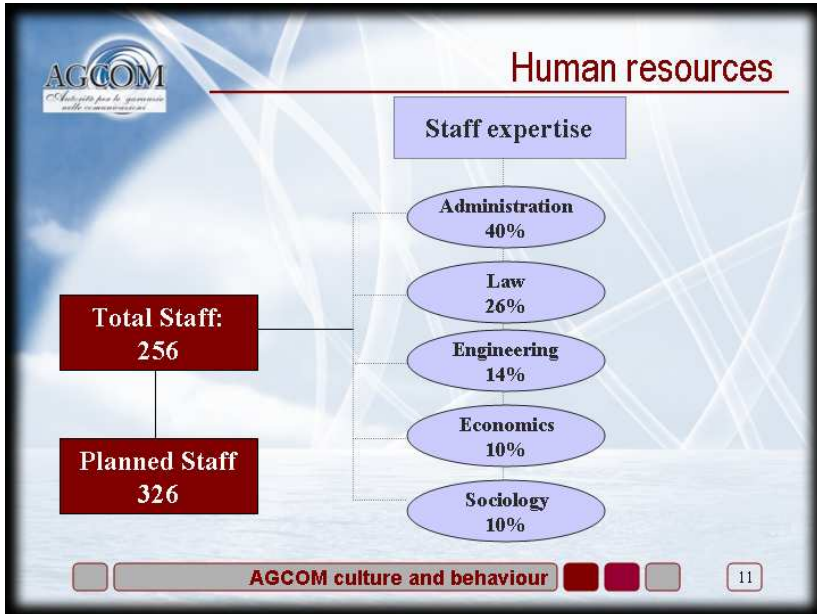


## Key factors for managing convergence: (2) culture and behavior

**A successful converged regulation needs:**

- the **right cultural mix** (staff with backgrounds in law, economics, engineer, sociology)
- the **capability of cross-fertilization** (teamwork and the development of a common cross-cultural language)
- a **“learning by doing”** organization (participative policy making; information sharing).

AGCOM culture and behavior 10



## Cross-fertilization as a dominant paradigm

Multidisciplinary teams successfully operational from the beginning also when dealing with sector specific issues:


- monitoring access to media by political parties;
- implementation of Television Without Frontiers Directive
- digital terrestrial television regulation;
- local loop unbundling regulation;
- mobile number portability regulation.

Cross-fertilization and the teamwork has become even more critical after 2003 EU regulatory framework

AGCOM culture and behavior

12


Detailed description: This slide discusses the concept of cross-fertilization in regulatory teams. It lists several issues where multidisciplinary teams were successful from the beginning: monitoring media access by political parties, implementing the Television Without Frontiers Directive, digital terrestrial television regulation, local loop unbundling regulation, and mobile number portability regulation. It notes that cross-fertilization and teamwork have become even more critical since the 2003 EU regulatory framework. The AGCOM logo is in the top left corner. At the bottom, there is a navigation bar with the text 'AGCOM culture and behavior' and a small box containing the number '12'.



**Key factors for managing convergence:**  
**(3) relationship with the external environment**

- **National politics**
  - Searching for the right balance between independence and cooperation
- **Market players expectations**
  - Gaining acceptance of regulator role and complying with market needs
- **Consumers expectations**
  - Giving responses proportionate with actual resources
- **International dimension**
  - Building up an international environment
  - Benchmarking performance and regulation policies

Relationship with external environment 13



**How does AGCOM manages the external environment**

- **Ensuring transparency:**
  - Publication of decisions on the official web site and on National Official Bulletin
  - Extensive use of public consultations
- **Interacting with consumers:**
  - Easy procedures for dispute settlement
  - on-line forms available for complaints
- **Giving high priority to the international dimension:**
  - Staff encouraged to take part to international activities;
  - Identification of best practices and benchmark decisions.


Relationship with external environment 14



## Key factors for managing convergence: (4) financial resources

- Adequate and stable funding availability is crucial for ensuring expected performances as well as responsiveness to emerging needs
- **Possible financing models:**
  - Public (100% State funding)
  - Private (100% operators' fees)
  - Mixed

Financial resources 15



## Agcom financial model

As of January 2006 AGCOM budget is almost exclusively financed through the contribution of regulated operators who devote 1,50 % of their revenues to the NRA

**2006 budget** → 60 mil €

- 6% from public financing
- 91% from the contribution of regulated operators
- 3% from other sources (direct contribution for authorizations or other administrative acts etc)

Financial resources 16



## Moving towards a convergent environment

- **For the first years of operations**, convergence has been a sort of “attitude” in facing regulatory issues, waiting for effective development of technologies and markets...;
- The implementation of the **EU regulatory framework for electronic communications networks** has further encouraged the effort towards a converged approach to regulation.



Convergence: from potential to reality



17



## A truly convergent marketplace

**Since 2003 boundaries between regulation of audiovisual and telecoms have progressively blurred:**

- provision for audiovisual services on 3G mobile services
- roll out of IPTV networks and services
- launch of DVBH networks and services

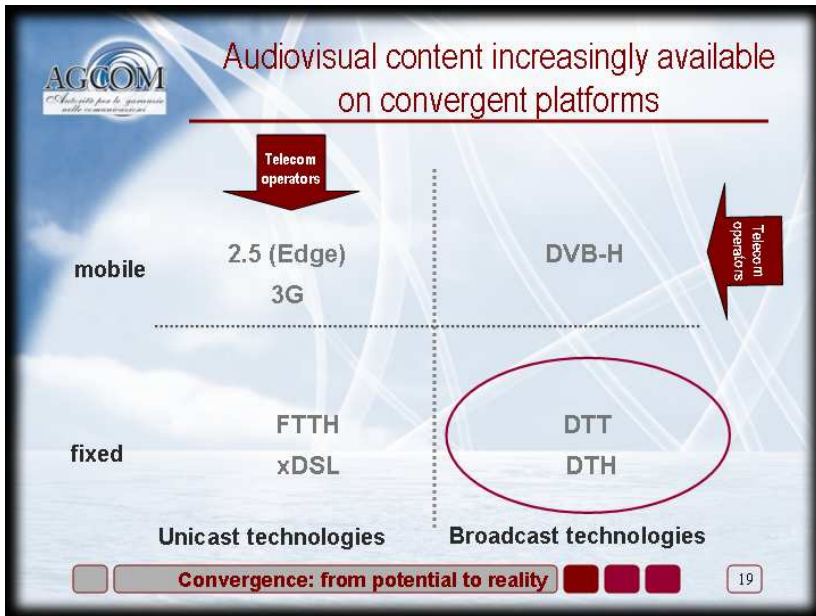
**Besides the specific issues connected, this has brought about the need to reassess the media market as a whole.**



Convergence: from potential to reality



18



AGCOM  
Autorità per le comunicazioni


### Pros and cons

**Some critical factors can be pointed out:**

- very hard to harmonise historically different approach for regulation: network based on technical-economic vs. content based on political-social approach;
- a non convergent regulator is easier to manage in terms of size and complexity
- in a converged regulator the **regulation of content** (advertising, protection of minors ecc) becomes less central compared to the regulation of access (access to networks, platforms and content)

Conclusions

20



## Conclusions

**A convergent Regulator needs a flexible organization ( able to adapt to fast changing scenario);**

**Teamwork and multidisciplinary teams are crucial means to success;**

**Regulatory tools themselves should be adjusted to specific needs of the new scenario.**

Conclusions

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## **Dunja Mijatovic**

*Director of Broadcasting, Communications Regulatory Agency, Bosnia and Herzegovina; Chairperson, European Platform of Regulatory Authorities*



Dunja Mijatovic talked about the evolutionary versus revolutionary approaches to the convergence of regulators. In Bosnia and Herzegovina the authorities were merged over-night, and although this may have been appropriate to the conditions in Bosnia and Herzegovina at that time, it is not necessarily the most appropriate example for other countries in the region. In relation to the success of a converged body, she stressed that the existing experience and skills of the former regulators and their staffs are very important for the success of a merged authority.

The authority was established with legal provisions regarding its independence and also the administrative organisation, which is in line with European Union standards. Ms Mijatovic outlined several factors necessary for the success of a converged regulator, again noting the importance of multi-disciplinary teams and flexibility, the balancing of public interest and freedom, and transparent and comprehensive policy approaches.





## Introduction:

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- Convergence means different things to different people and there is no accepted definition.
- The convergence of telecommunications, broadcasting and information services means that instead of each constituting a distinct market, they can all form one integrated communications market.

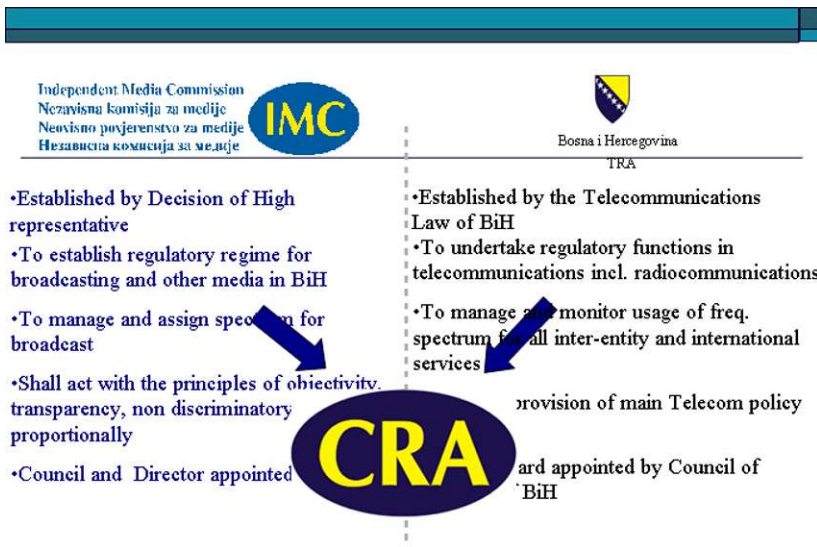


## Approaches towards convergence:

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- Some countries opted for a "revolutionary" approach towards convergence, with the creation of a single regulatory authority for broadcasting and telecommunications.
- Some have opted for a more "evolutionary" approach towards convergence, with some level of restructuring, or the simplification of the existing bodies coupled with a modification of the existing legal framework.

It is important for the new body to build on the experience and skills of the existing regulators and on their collective past, to succeed in the future.



## The Communications Regulatory Agency

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- The **first** unified Broadcast and Telecommunications Regulatory Agency **in the region** Operates at State Level across the country
- Established 2001;
- Organised into 3 main Divisions - Broadcast, Telecommunication and General and Legal Affairs, including three supporting departments: Monitoring, Spectrum, Public Affairs and two Regional Offices.
- Has Council of 7 who can act to hear appeals.

### The regulatory principles:

---

Broadcast :

- The protection of freedom of expression and diversity of opinion
- The development of professional and viable commercial and public broadcasters
- That broadcasters shall be separate from political control and manipulation,
- That licences shall be awarded on the basis of a process by which appropriate professional standards of programme content, technical operation and financing are ensured;
- That broadcast advertising shall be regulated so as to be consistent with best European practice.

## The regulatory principles:

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### Telecommunications:

- That all users shall have access to telecommunications services;
- That any user of telecommunications services shall have unrestricted access by means of that service to any other such user;
- That the interests of all users of telecommunications services shall be protected;
- That the quality levels for the provision of telecommunications services and telecommunications equipment shall be compatible;
- That tariffs charged for telecommunications services shall be transparent and non-discriminatory;
- That open entry into the provision of telecommunications services will be encouraged according to the Council of Ministers' sector policies.

## Communications Regulatory Agency of Bosnia and Herzegovina

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- The administrative autonomy of regulatory agency established in the Law on Communications is in line with existing EU standards
  
- The independence of the Agency is written into the Law on Communications

## Challenges for regulators:

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- to shift from a “sector based” approach to a “technologically neutral” one
- how to regulate access of content providers to networks and access of the new media platform to key content
- public interest objective
- the new regulatory regime has to seek to hold two things in tension- the public interest and what interests the public.
- The challenge is not so much that of regulation versus no regulation, but rather, not to ensure freedom without abuse.

## Concluding remarks:

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- convergence requires a clear and comprehensive regulatory approach and policy
- A convergent regulator needs a flexible organization capable of learning
- Team work and multidisciplinary teams are key to success
- The evolution of networks, service and content needs to rapid organisational response
- High quality broadcasting is vital for an informed and creative society.
- New technologies must serve the needs of society.

## **Patricia Galvin**

*Ofcom, United Kingdom*



Regarding the structure and functioning of Ofcom, Patricia Galvin provided a comprehensive overview of the regulatory approach taken at Ofcom. She reiterated the structural organisation designed to ensure political and financial independence and independence from the market. The funding is a mixture of government grants and industry fees and levies. As with the other converged authorities the approach divides decision-making issues between access and market regulation on the one hand, and content regulation on the other. Overall the Ofcom approach is to intervene in the market only where the market approach is not sufficient to solve problems. Ofcom carries out a great deal of research and consultancy in order to understand and anticipate technological changes. She stated that the regulation and policy must be transparent, evidence-based and consistent.



**Panel discussion 3: Structure and Function of a Converged Regulator**

**Patricia Galvin, Head of International Ofcom**

**Applying our approach in practice**

Engage with consumers and industry to understand changes and developments

Recognise dynamic nature of industries and avoid excessively static view of markets

Consider issues as they affect multiple markets, not just focus on economic markets in isolation



## How and when we regulate

### When we regulate

- We operate with a bias against intervention, but intervene firmly and promptly where required
- We intervene where there is a specific statutory duty to work towards, and a public policy goal that markets alone cannot achieve

### How we regulate

- We seek the least intrusive regulatory mechanisms to achieve our policy objectives
- We regulate with a clearly articulated and publicly reviewed annual plan, with stated policy objectives
- We ensure our interventions are evidence based, proportionate, consistent, accountable and transparent

### How we support regulation

- We research markets constantly – aiming to be at the forefront of technological understanding
- We consult widely with all relevant stakeholders and assess the impact of regulatory action before imposing regulation



## Ofcom – Organisational structure





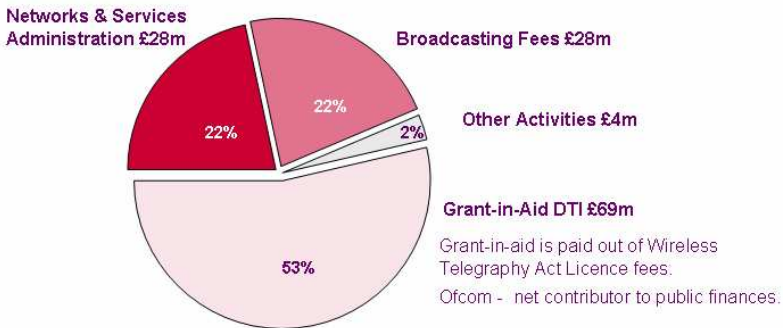


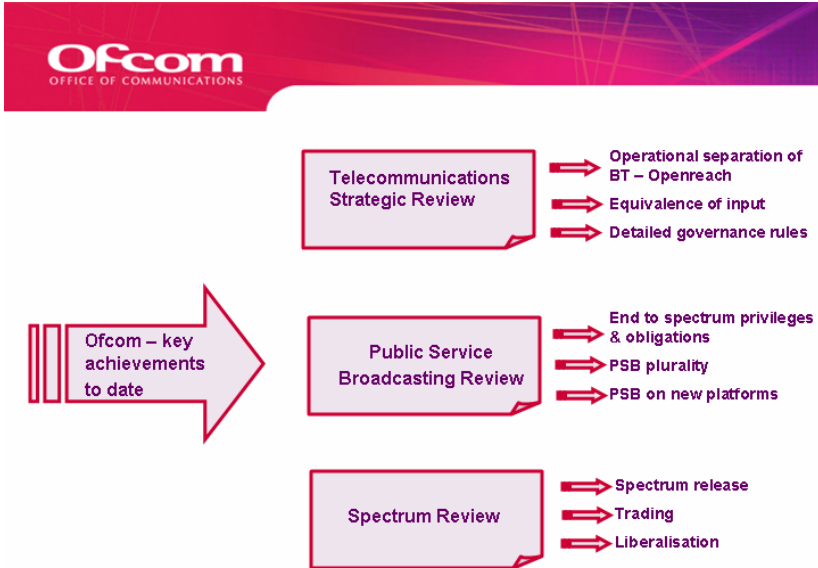
## Financial independence

- Sources of income:
  - **State budget** (HMT responsible)
  - **Industry fees**
- Income for 4 years –helps guarantee stable annual budget

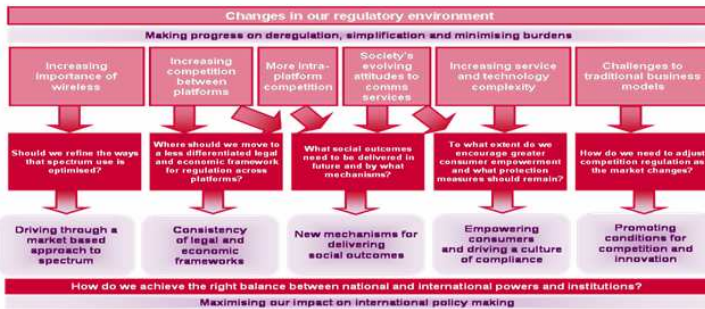


## Ofcom Sources of Funds 2006/7 Total Annual Budget = £129m





Ofcom priorities 2007/8



## Conclusions

Of fundamental importance is the independence of the regulatory body regardless of its form, converged or non-converged. Council of Europe *Recommendation 2000 (23) on the independence and functions of regulatory authorities for the broadcasting sector* (see below, page 108) outlines the basic prerequisites for independence: that regulatory bodies are given adequate powers to fulfil their missions (as prescribed by national law) in an effective, independent and transparent manner; that they are established with clear rules and procedures that should clearly affirm and protect their independence; these rules should address the definition of duties, powers and competences, transparency and accountability, procedures of appointments and funding.

The support provided by the Council of Europe, the European Union and the OSCE for their member states in ensuring the functioning of independent and effective regulatory bodies is essential and should continue.

Convergence of media should be considered as a challenge rather than a threat, and as a development that brings opportunities for both the media sector and the consumer, alongside complex challenges for governments, industry and regulators.

There is no consensus as to the potential superiority of a converged over a non-converged regulator with regard to addressing the challenges of technological and market convergence in the media sector.

Arguments in favour of converged regulation include: the one-shop-stop approach for industry that simplifies processes and reduces bureaucracy; assumptions of improved cost-benefit ratio; of efficiency and coherence of regulatory implementation; of a better approach to alignment with the Euro-

pean Union regulatory framework; avoidance of duplication of activities; a better ability to approach issues of market and content regulation, together, across different platforms.

Concerns regarding converged regulators include: the risk that such large organisations may be less transparent; the problems of bringing together different cultures of regulation; a potential conflict regarding objectives and aims between telecommunications and broadcasting; and between the aims and objectives of market and content regulation; the danger that broadcasting regulation is dominated within the structure as telecommunications regulators are generally much larger. Experiences of converged regulators stress these difficulties in harmonising approaches to regulation, the problems of managing large and complex organisations, and the fact that the regulation of content becomes less central compared to the regulation of access.

Industry representatives, in particular of commercial broadcasting, have expressed no preference as regards the structure of the regulatory authority but emphasise the importance of its independence (as outlined above), and of the need for the voice of the media industry to be heard in the process of regulation (development of regulation and right to review of decisions, etc.).

The European Commission also stresses that it has no preference for one structure over the other, that there is no requirement for this in European Union law, and that this remains the decision of the member states. It also emphasises the importance of the independence of regulatory bodies, and, in the case of a merger of regulators, the significance of independence before during and after such a merger. In addition, co-operation between regulatory authorities at the national, the regional and the European level is a vital factor in the implementation of regulation. Member states should not take advantage of convergence in order to put external pressure on the existing regulators.

The conference speakers have stressed the importance of carefully considering which models are best suited to the market, and to the political, economic and judicial situation of the country in question, and with reference to the accumulated experience of the incumbent regulators. This should involve comprehensive consultation with all stakeholders: the industry, the incumbent regulators, consumer groups, citizens etc., and preferably also look to best practice and relevant experience of other countries. Any decision must be carefully considered in the specific context of the country concerned, taking note of the pros and cons of converged regulators, and involving all stakeholders in the decision. The level of convergence reached in the market, and the general development of the market should be factors in this process, and indicators of whether or not, and when, it may be the appropriate time to converge.

Experiences related by the conference participants show that more contemplative, slow and consultative approaches lead to a more successful implementation of convergence solutions: when stakeholders are consulted, they are more co-operative with the resulting system; a solid and well thought out legislative framework can head off potential conflicts or problems of implementation in advance.

It is necessary to develop step-by-step planning and time frame for the convergence of regulatory authorities. A successful establishment and structuring of convergent authorities is best achieved by implementing the necessary legislative procedure and consultation processes over an appropriate time frame in order to achieve a functional institutional convergence. Duties, powers, competences, and rules of procedure should be set out in the law and in the statutes of the regulatory body in order to provide a clear outline of the functions of the body, and to prevent future conflicts.

It is important that the new body build on the experience and skills of the existing regulators, and on their collective past, in order to succeed in the future. It is necessary therefore to approach the exercise with considerable thoroughness and advanced preparation.

Conference participants have also shown that there are alternatives to the convergence of regulators. This involves co-operation, preferably outlined in the form of a memorandum of understanding (MOU), or an agreement establishing areas of consultation and co-operation between broadcasting, telecommunications and competition regulators. Co-operative examples were provided in relation to the federal systems of Belgium and Germany.

Efficient, transparent and consistent regulation is vital for the development of competitive, efficient markets that serve both consumer and citizen. The experience of telecommunications regulators can have a valuable input in the evaluation of markets with the goal of ensuring media pluralism, equality of access to platforms and non-discriminatory establishment of technical standards. Broadcasting regulation should also address essential issues of democratic, cultural and social roles and responsibilities of the media with regard to content, to pluralism of voices, protection of vulnerable members of society such as minors, and promoting a culture of tolerance by restricting incitement to hatred, concepts that may need implementation across new transmission platforms or with regard to new services.

All of these values and goals should constitute the basic premise of co-operation or convergence, depending on the model chosen. Strategies need to be developed in order to incorporate these different cultures and best achieve the

maximum benefit of sharing of ideas and expertise, whether through structured co-operation or convergence. This includes safeguards that ensure that the institutionally smaller broadcasting regulator has an equal voice if merged with the, generally, larger telecommunications regulator.

Strategic factors for successful convergence, outlined by representatives of converged regulators, included: the organisational structure i.e. the make-up, functioning and powers of boards and commissions; the organisational culture i.e. the way in which staff is integrated; relationship with industry and consumers including issues of transparency, consultation, and provision of information; and models of financing for example, via levies on the communications operators.

The example of multi-disciplinary teams addressing different issues was outlined as a way to integrate people from telecommunications and broadcasting backgrounds, and staff from various fields such as economics, law, engineering, and sociology.

Continuity and certainty are also important in relation to the validity of codes, laws, guidelines, and the continuation of initiatives and projects being carried out by the individual regulatory bodies during a merger process. The regulatory authority, whether converged or non-converged, can benefit from assessing and reviewing its performance, adjusting to new challenges and developments, and adapting its organisational structure when needed.

## Programme

*of the Conference: “Converging media – convergent regulators? The future of broadcasting regulatory authorities in South-Eastern Europe”*

### Monday, 1 October

- 8:30-09:00 Registration of participants
- 9:00-09:30 Opening addresses
- Mile Janakieski, Minister of Transport and Communications**
- Ambassador Giorgio Radicati, Head of OSCE Mission to Skopje**
- 9:30-10:30 Media convergence and its implications for media regulation
- Moderator:**  
**Sally Broughton, Head of Media Development/Mission Spokesperson, OSCE Mission to Skopje**
- Speakers:**  
**Johanna Fell, European Representative/Assistant to the President, Bayerische Landeszentrale für neue Medien (BLM), Germany**

- Ross Biggam, Director General, Association of Commercial Television in Europe**
- 10:30-11:00 Discussion
- 11:00-11:30 Coffee break
- 11:30-13:00 Panel discussion 1: European standards concerning the independence and functioning of broadcasting regulatory bodies
- Moderator:**  
**Dunja Mijatovic, Chairperson, European Platform of Regulatory Authorities; Director of Broadcasting, Communications Regulatory Agency, Bosnia and Herzegovina**
- Speakers:**  
**Ivan Nikoltchev, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe**
- Marisa Fernández Esteban, Administrator of the Audio-visual and Media policies unit, Directorate General for Information Society and Media, European Commission**
- Christian Möller, Programme Officer, Office of the OSCE Representative on Freedom of the Media**
- 13:00-14:30 Lunch
- 14:30-16:30 Panel discussion 2: When and how? The process and timing of convergence of regulators
- Moderator:**  
**Roland Bless, Director of the Office of the OSCE Representative on Freedom of Media**
- Speakers:**  
**Miha Kriselj, APEK, Slovenia**
- Patricia Galvin, Ofcom, United Kingdom**
- Jean-François Furnémont, Directeur, Conseil supérieur de l'audiovisuel, Belgium**
- 16:30-17:00 Summary of the discussions during the first day
- Rapporteur:**  
**Deirdre Kevin, Media Research Consultant**



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## Tuesday, 2 October

9:00-11:00 Panel discussion 3: Structure and functioning of converged regulators – best practices

**Moderator:**

**Ivan Nikoltchev, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs, Council of Europe**

**Speakers:**

**Lisa di Feliciantonio, AGCOM, Italy**

**Dunja Mijatovic, Director of Broadcasting, Communications Regulatory Agency, Bosnia and Herzegovina; Chairperson, European Platform of Regulatory Authorities**

**Patricia Galvin, Ofcom, United Kingdom**

11:00-11:30 Coffee break

11:30-13:00 Presentation of conclusions by the rapporteur and final discussion

**Rapporteur:**

**Deirdre Kevin, Media Research Consultant**



# Appendix

## **Recommendation Rec (2000) 23**

### **on the independence and functions of regulatory authorities for the broadcasting sector**

*adopted by the Committee of Ministers on 20 December 2000  
at the 735th meeting of the Ministers' Deputies*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Bearing in mind Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights;

Recalling the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication, making it possible to reflect the diversity of ideas and opinions, as set out in the Declaration on freedom of expression and information of 29 April 1982;

Highlighting the important role played by the broadcasting media in modern, democratic societies;

Emphasising that, to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector, in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests;

Considering that for this purpose, specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law;

Noting that the technical and economic developments, which lead to the expansion and the further complexity of the sector, will have an impact on the role of these authorities and may create a need for greater adaptability of regulation, over and above self-regulatory measures adopted by broadcasters themselves;

Recognising that according to their legal systems and democratic and cultural traditions, member states have established regulatory authorities in different ways, and that consequently there is diversity with regard to the means by which – and the extent to which – independence, effective powers and transparency are achieved;

Considering, in view of these developments, that it is important that member States should guarantee the regulatory authorities for the broadcasting sector genuine independence, in particular, through a set of rules covering all aspects of their work, and through measures enabling them to perform their functions effectively and efficiently,

Recommends that the governments of member states:

- a. establish, if they have not already done so, independent regulatory authorities for the broadcasting sector;
- b. 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, in accordance with the guidelines set out in the appendix to this recommendation;
- c. bring these guidelines to the attention of the regulatory authorities for the broadcasting sector, public authorities and professional groups concerned, as well as to the general public, while ensuring the effective respect of the independence of the regulatory authorities with regard to any interference in their activities.

## **Appendix to Recommendation Rec (2000) 23: Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector**

### **I. General legislative framework**

1. Member states should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
2. The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.

### **II. Appointment, composition and functioning**

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
  - regulatory authorities are under the influence of political power;
  - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
5. Furthermore, rules should guarantee that the members of these authorities:
  - are appointed in a democratic and transparent manner;
  - may not receive any mandate or take any instructions from any person or body;
  - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.

6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.
8. Given the broadcasting sector's specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

### **III. Financial independence**

9. Arrangements for the funding of regulatory authorities – another key element in their independence – 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.
10. Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Furthermore, recourse to the services or expertise of the national administration or third parties should not affect their independence.
11. Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on *ad-hoc* decision-making of public or private bodies.

### **IV. Powers and competence**

#### *Regulatory powers*

12. Subject to clearly defined delegation by the legislator, regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities. Within the framework of the law, they should also have the power to adopt internal rules.

### *Granting of licences*

13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.
14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.
15. Regulatory authorities in the broadcasting sector should be involved in the process of planning the range of national frequencies allocated to broadcasting services. They should have the power 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.
16. Once a list of frequencies has been drawn up, a call for tenders should be made public in appropriate ways by regulatory authorities. Calls for tender should define a number of specifications, such as type of service, minimum duration of programmes, geographical coverage, type of funding, any licensing fees and, as far as necessary for those tenders, technical parameters to be met by the applicants. Given the general interest involved, member states may follow different procedures for allocating broadcasting frequencies to public service broadcasters.
17. Calls for tender should also specify the content of the licence application and the documents to be submitted by candidates. In particular, candidates should indicate their company's structure, owners and capital, and the content and duration of the programmes they are proposing.

### *Monitoring broadcasters' compliance with their commitments and obligations*

18. Another essential function of regulatory authorities should be monitoring compliance with the conditions laid down in law and in the licences granted to broadcasters. They should, in particular, ensure that broadcasters who fall within their jurisdiction respect the basic principles laid down in the European Convention on Transfrontier Television, and in particular those defined in Article 7.



19. Regulatory authorities should not exercise a priori control over programming and the monitoring of programmes should therefore always take place after the broadcasting of programmes.
20. Regulatory authorities should be given the right to request and receive information from broadcasters in so far as this is necessary for the performance of their tasks.
21. Regulatory authorities should have the power to consider complaints, within their field of competence, concerning the broadcasters' activity and to publish their conclusions regularly.
22. When a broadcaster fails to respect the law or the conditions specified in his licence, the regulatory authorities should have the power to impose sanctions, in accordance with the law.
23. A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.

#### *Powers in relation to public service broadcasters*

24. Regulatory authorities may also be given the mission to carry out tasks often incumbent on specific supervisory bodies of public service broadcasting organisations, while at the same time respecting their editorial independence and their institutional autonomy.

## **V. Accountability**

25. Regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or *ad hoc* reports relevant to their work or the exercise of their missions.
26. In order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised *a posteriori* only. The regulations on responsibility and supervision of the regulatory authorities should be clearly defined in the laws applying to them.
27. All decisions taken and regulations adopted by the regulatory authorities should be:

- duly reasoned, in accordance with national law;
- open to review by the competent jurisdictions according to national law;
- made available to the public.

## **Explanatory memorandum to Recommendation Rec (2000) 23**

### **Introduction**

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.).

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.

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**

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.

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**

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.

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.

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.

### *1. General legislative framework*

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.

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.

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*

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.

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 dis-

missal. 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.

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*

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.

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.

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.

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.

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*

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*

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.

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.

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.

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*

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”.

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.

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.

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.

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.

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.

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.

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*

In order to give real effect to existing statutes and regulations and to the commitments that broadcasters make, the regulatory authorities must be empow-

ered to monitor their compliance in practice with the conditions laid down in the law and in the licences granted to them.

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.

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.

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.

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”.

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.

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.

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.

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*

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.

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.

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

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.

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.

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*.

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.