



# The independence of media regulatory authorities in Europe

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**The independence of media regulatory authorities in Europe**

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# The independence of media regulatory authorities in Europe

Kristina Irion

with Giacomo Delinavelli, Mariana Francese Coutinho, Ronan Ó Fathaigh,  
Tarik Jusić, Beata Klimkiewicz, Carles Llorens, Krisztina Rozgonyi,  
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# Foreword

Despite Pablo Picasso's assertion that *to copy others is necessary, but to copy oneself is pathetic*, self-plagiarism is usually considered a minor sin, if any. Allow me then, dear reader, to quote here a paragraph from my foreword to our recent IRIS *Plus* on *The promotion of independent audiovisual production in Europe*:<sup>1</sup>

*In film, like in real life, we are not independent as such; we are or we become independent from something or somebody. Parents telling you what to do, an invading country or a bank which holds a mortgage on your house, you name it. The concept of independence means different things depending on the context.*

Just as these sentences apply to the independent production of films, they are equally applicable the relationship that media regulatory authorities maintain vis a vis the powers that be. In the matter at hand, the context is quite simple:

The regulation and supervision of the audiovisual sector, a fundamental pillar of the right to freedom of expression and information, must be placed in the hands of an institution that bows to no one, neither the government nor private third parties. Only then is it guaranteed that decisions affecting one of the most fundamental rights – indeed a cornerstone - of democracy are made without taking into consideration any spurious interests.

This is the theory. However, until recently no international instrument obliged a country to set up independent regulatory authorities in the media field. In principle, a country could decide not to have one, even if the exceptions (at least, at the European level) were rare. Moreover, every country has its own legal traditions and administrative practices, which makes for a varied picture of the role and powers of media regulatory authorities throughout Europe.

With the purpose of providing a harmonised framework for the activities of media regulatory authorities in the EU, the revised version of the Audiovisual Media Services Directive (AVMSD), which entered into force in the autumn of 2018, introduces an obligation for EU member states to designate one or more national regulatory authorities or bodies that are legally distinct from the government and functionally independent from their respective governments and from any other public or private body. It also outlines detailed rights and obligations for them.

This IRIS *Special* aims to bring clarity to the heterogeneous picture formed by the many different media regulatory authorities in Europe, and to advance understanding of the ways in which the revised AVMSD may have an impact on current legislation and practices.

Under the scientific coordination of our partner institution - the Institute for Information Law (IViR) of the University of Amsterdam - this publication includes country reports by Tarik Jusić (Bosnia and Herzegovina), Carles Llorens (Spain), Krisztina Rozgonyi

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<sup>1</sup> <https://rm.coe.int/iris-plus-2019-the-promotion-of-independent-audiovisual-production-in-/1680947bc8>.

(Hungary), Ronan Ó Fathaigh (Ireland), Giacomo Delinavelli (Italy), Gijs van Til (The Netherlands), Beata Klimkiewicz (Poland), Sara Svensson (Sweden) and Tanja Kerševan Smokvina (Slovenia). Furthermore, IViR's own research staff members Kristina Irion, Mariana Francese Coutinho and Gijs van Til provide analyses of the work of the Council of Europe in this field, and the evolution of independent supervisory authorities in the audiovisual media sector in European Union law, as well as a description of the INDIREG study and its methodology, together with an introduction and conclusions.

I would like to extend my warmest thanks to all of them.

Strasbourg, September 2019

**Maja Cappello**

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

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## Executive summary

This IRIS *Special* focuses on the independence of regulatory authorities and bodies in the broadcasting and audiovisual media sector in Europe. These entities have proliferated according to the different legal traditions of the respective countries they belong to. They do not, therefore, conform one, single model. Nonetheless, they reflect a common approach of sorts with regard to the institutional set-up of regulatory governance. The independence of these entities is particularly important because it contributes to the broader objective of media independence, which is in itself an essential component of democracy.

The creation, status and functioning of these regulatory authorities and bodies were shaped pursuant to the constitutional requirements and/or administrative practices of the countries that established them. As a result, each has distinct characteristics and levels of independence that differ according to where they are located. But when is an authority to be considered independent? The measurement of an entity's independence requires careful analysis of the legal texts setting it up, but also of the practices that are rooted in reality and reflect the sensitivities of the societies in question.

This IRIS *Special* aims to enlighten the reader on the definition of the independence of a regulatory authority or body, on the criteria used to assess its independence, and on the legal framework embodying this independence at the European level, as well as provide analysis of the status and functioning of regulatory authorities and bodies in a selection of nine European countries: Bosnia and Herzegovina, Spain, Hungary, Ireland, Italy, the Netherlands, Poland, Sweden, and Slovenia. This sample reflects the different levels of independence that can be found across Europe.

**Chapter 1** begins by discussing the concept of independent control, before giving an overview of the various elements considered in greater detail throughout the publication. This introductory chapter highlights the link between independent control of the audiovisual media sector and the fundamental freedoms of a democratic state.

**Chapter 2** presents the non-binding but nonetheless significant work carried out in this context by the Council of Europe. It describes the instruments that have promoted the requirement of independence, from the European Convention on Transfrontier Television (1989) to the relevant texts adopted by the Council of Europe over the last two decades: the Recommendation on the independence and functions of regulatory authorities (2000); the Declaration on the independence and functions of regulatory authorities (2008); and the Recommendation on media pluralism and transparency of media ownership (2018). With a view to promoting the standards of independence set out by these instruments, the Council of Europe supports the development of operational assistance and capacity building.



**Chapter 3** focuses on the evolution of European legislation concerning the independence of regulatory entities. In this respect, after having outlined the European Union's competences in the cultural field within the mandate of ensuring the proper functioning of the internal market, it addresses the rules introduced by the Audiovisual Media Services Directive (AVMSD). While the 2010 version of the AVMSD did not introduce an obligation for member states to guarantee the independence of regulatory authorities and bodies, this 'gap' was remedied with the introduction in the 2018 version of a revised Article 30. The revised version of the Article requires member states to designate regulatory entities and to guarantee their independence. The six detailed paragraphs of this Article outline the elements that must be implemented at the national level to meet the requirement of independence. As a result, the non-binding statement contained in the 2010 Directive has become a legal obligation under the revision of 2018. This normative shift is explained, *inter alia*, by results of the "Indicators for independence and efficient functioning of audiovisual media services regulatory bodies" study (known as INDIREG), designed to support enforcement of enforce the rules in the AVMSD. The study was conducted upon the request of the European Commission to measure the independence of regulatory authorities across Europe, and was published in 2011.

**Chapter 4** focuses on the INDIREG study, presenting the context of its development, its objectives, and the idea behind it, before going into the details of its methodology. In this respect, the INDIREG study allows for a detailed legal analysis of audiovisual media services regulatory bodies in EU member states, including potential or actual EU membership candidate countries, in EFTA countries and in four non-European countries. The methodology is based on five criteria: the status and powers of the authority; its financial autonomy; the autonomy of decision-makers; the adequate provision of professionally qualified human resources; and, ultimately, the accountability and transparency of the authority. Based on this spectrum of evidence, INDIREG measures the formal independence of the entity, and analyses the relative strength of the legal framework constituting a given agency. In doing so, INDIREG makes it possible to estimate the risks of influence from external actors. Finally, this chapter scrutinises the impact of INDIREG, as well as the synchronisation of its methodology with the revised Article 30.

In view of the future implementation (deadline 19 September 2020) by the member states of the revised Directive, this IRIS *Special* also provides an overview of the current state of independence of regulatory bodies in nine European countries. **Chapters 5 to 13** look at the requirements set out by Article 30 of the AVMSD and the standards promoted by the Council of Europe, as well as at criteria such as the functional and legal independence of the entity, its powers, the appointment procedures within the organisation and the possible appeal mechanisms. The analysis shows the level of disparity among the nine selected countries.

Finally, **Chapter 14** offers a comparative analysis of the standards promoted by the Council of Europe in its standard-setting instruments and Article 30 of the AVMSD. It then compares the main conclusions on the level of independence of the media regulators in the nine above-mentioned European countries, according to the relevant criteria - for each of which the current 'state of play' is subsequently summarised individually.



# 1. Introduction

**Kristina Irion & Gijs van Til, Institute for Information Law (IViR), University of Amsterdam**

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

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

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

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

<sup>4</sup> Jakubowicz (2013), p. ix.

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

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



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

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

## 1.1. The concept of independent regulation

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

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

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

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<sup>7</sup> Irion & Radu (2013), p. 17.

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

<sup>9</sup> Irion, and Radu (2013), p. 17.

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

<sup>11</sup> Schulz (2013), p. 9.



media in modern democratic societies is often highlighted<sup>12</sup> in support of independent media regulation. Additionally, the importance for democratic societies of the existence of a wide range of independent and autonomous means of communication in order to reflect the diversity of ideas and opinions is recalled.<sup>13</sup> European countries' express preference for this institutional form can certainly be attributed to the standard-setting by the Council of Europe.

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

This IRIS *Special* will connect European standards and practices of independent regulation in the audiovisual media sector with research outcomes to understand the arm's length relationship that is to be maintained with all players that can influence at least one of the resources eventually determining a regulator's independence. From this understanding, it is possible to discuss how to assess, rank or measure the independence of regulatory bodies. A significant effort in this context is the 2011 INDIREG study<sup>15</sup>, conducted on behalf of the European Commission, among others.

## 1.2. Overview of this IRIS *Special*

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

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

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

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., p. xviii.

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



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

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

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





## 2. The value of independent regulation of the audiovisual media sector – Council of Europe

**Mariana Francese Coutinho, Institute for Information Law (IViR), University of Amsterdam**

### 2.1. Introduction

This chapter provides an overview of the most relevant Council of Europe standards that call for independence of media regulatory authorities. Independence is an effective way to shield regulatory authorities from external interests, such as economic pressure, while also keeping competences like supervision and enforcement safe from political interference in order to ensure an impartial and fair handling of these matters. The independence of media regulatory authorities also works as a way to guarantee the fundamental right to freedom of expression and ensure media pluralism and media freedom – which are essential characteristics of freedom of expression according to the Council of Europe<sup>16</sup> – by removing the regulatory function from the state.<sup>17</sup>

This overview begins with relevant standard-setting instruments from the Council of Europe on the independence of media regulatory authorities, including the pertinent Recommendations and Declarations on media governance institutions, freedom of expression and media plurality. It then moves on to the European Convention on Transfrontier Television, the European Platform of Regulatory Authorities' activity and documents, and operational assistance and capacity-building initiatives supported by the Council of Europe.

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<sup>16</sup> Council of Europe, Media Regulatory Authorities, <https://www.coe.int/en/web/freedom-expression/media-regulatory-authorities>.

<sup>17</sup> See Irion & Radu (2013).



## 2.2. Recommendation of the Committee of Ministers (2000) on the independence and functions of regulatory authorities

The most relevant standard-setting text by the Council of Europe in relation to the independence of media regulatory authorities is Recommendation Rec(2000)23 of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 20 December 2000.<sup>18</sup>

According to the Recommendation's Explanatory Memorandum, it is up to each Member State to determine, in accordance with its own legal system, the level at which the Recommendation's principles should be implemented, and they should be applied by all entities in charge of broadcasting regulation (if there are more than one).<sup>19</sup> Furthermore, while the scope of the rules and procedures governing the regulatory authorities' activities 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.

This Recommendation is based on Article 10 of the European Convention on Human Rights (ECHR)<sup>20</sup> – which refers to freedom of expression and freedom of information – and highlights, in its preamble, the importance of broadcasting media in modern democratic societies and the importance, for democratic societies, of the existence of a wide range of independent and autonomous means of communication in order to reflect the diversity of ideas and opinions.<sup>21</sup> The Recommendation also emphasizes that, to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, adequate and proportionate regulation of that sector is essential so that freedom of the media may be assured and balanced with other legitimate rights and interests.

The Recommendation recognises the relevance of independent regulatory authorities for the broadcasting sector, and the impact that technical and economic developments have on the role of these authorities, including a potential need for “greater adaptability of regulation, over and above self-regulatory measures adopted by

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<sup>18</sup> Committee of Ministers, Recommendation Rec(2000)23 on the independence and functions of regulatory authorities for the broadcasting sector, 20 December 2000, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804e0322](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804e0322). Further documents by the Council of Europe pertaining to freedom of expression and the media can be found in: “Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers, (Nikoltchev S. & McGonagle T. (Eds.), European Audiovisual Observatory, Strasbourg 2011), <https://rm.coe.int/16807834c2>.

<sup>19</sup> Committee of Ministers, Explanatory Memorandum to Recommendation No. R(00)23, 20 December 2000, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804d1576](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804d1576).

<sup>20</sup> European Convention on Human Rights, Council of Europe, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>21</sup> Committee of Ministers, Recommendation Rec(2000)23, Preamble.



broadcasters themselves”.<sup>22</sup> The Recommendation also notes that member states have different regulatory authorities according to their legal systems and traditions, and that such authorities for the broadcasting sector should have genuine independence in order to perform their functions effectively and efficiently.

The Recommendation recommends that member states establish independent regulatory authorities for the broadcasting sector; adapt their legislation and policies to give the regulatory authorities for the broadcasting sector powers enabling them to fulfil their missions in an effective, independent and transparent manner, in accordance with a set of guidelines set out in the appendix of the Recommendation; and bring these guidelines to the attention of the regulatory authorities for the broadcasting sector, public authorities, professional groups concerned, and the general public, while ensuring respect of the independence of the regulatory authorities with regard to interferences in their activities.

The guidelines are divided into five sections: (i) general legislative framework;<sup>23</sup> (ii) appointment, composition and functioning;<sup>24</sup> (iii) financial independence;<sup>25</sup> (iv) powers and competence;<sup>26</sup> and (v) accountability<sup>27</sup>.

The first section defines that the establishment, functioning and independence of the regulatory authorities should be protected and affirmed by an appropriate legislative framework, and that member states should devise an appropriate legislative framework for this purpose.

The second section expresses that the rules governing regulatory authorities should be defined so as to protect them against interference by political forces or economic interests, and avoid that the authorities’ members exercise functions or hold interests in organisations which might lead to conflicts of interest. Members of the regulatory authorities should also: include experts in the authorities’ areas; be appointed in a democratic and transparent manner; not receive mandates or instructions from other people or bodies; and not undertake actions which may prejudice the independence of their functions or take advantage of them. Rules should also be put in place in order to avoid that the dismissal of members of the regulatory authorities may be used for political pressure.

Regarding financial independence, section (iii) of the guidelines provides that the arrangements for the funding of regulatory authorities should be specified and detailed in the law. Furthermore, they specify that: the independence of regulatory authorities should not be affected by public authorities’ financial decision-making power or recourse to third parties; and funding arrangements should take advantage of mechanisms independent of ad-hoc decision-making bodies, where appropriate.

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<sup>22</sup> Ibid.

<sup>23</sup> Committee of Ministers, Recommendation Rec(2000)23, 20 December 2000, Paras. 1-2.

<sup>24</sup> Ibid., Paras. 3-8.

<sup>25</sup> Ibid., Paras. 9-12.

<sup>26</sup> Ibid., Paras. 13-24.

<sup>27</sup> Ibid., Paras. 5-27.



Regarding powers and competence, section (iv) of the guidelines includes different sub-sections regarding:

- (a) the regulatory powers of regulatory authorities: they should have delegated powers to adopt regulations and guidelines concerning broadcasting activities, as well as internal rules;
- (b) the granting of licences, including the basic conditions governing the granting and renewal of broadcasting licences, which should be clearly defined by law; the regulations concerning the licensing procedure, which should be clear, precise and applied in an open, transparent and impartial manner; and the decisions about them, which should be public. Regulatory authorities should be involved in planning the range of national frequencies allocated to broadcasting sectors;
- (c) the monitoring of broadcasters' compliance with their commitments and obligations: regulatory authorities should monitor licensed broadcasters' compliance with the law, have the power to consider complaints concerning the broadcasters' activity, publish their conclusions and impose sanctions in accordance with the law; a range of proportionate sanctions should be available and prescribed by law, 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;
- (d) the powers in relation to public service broadcasters: regulatory authorities may also be given the mission to carry out tasks often incumbent on specific regulatory bodies of public service broadcasting organisations, while at the same time respecting their editorial independence and their institutional autonomy.

The last section of the guidelines, concerning accountability, makes clear that: regulatory authorities should publish regular or ad hoc reports relevant to their work; they should be supervised in respect of the lawfulness of their activities (*a posteriori* only), and the correctness and transparency of their financial activities; and all decisions taken and regulations adopted by the regulatory authorities should be duly reasoned and open to review by the competent jurisdictions according to national law, and made available to the public.

### **2.3. Declaration of the Committee of Ministers (2008) on the independence and functions of regulatory authorities**

The Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted by the Committee of Ministers on 26 March 2008<sup>28</sup>, builds on Recommendation Rec(2000)23 and two other instruments,

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<sup>28</sup> Committee of Ministers, Declaration on the independence and functions of regulatory authorities for the broadcasting sector, 26 March 2008, <https://rm.coe.int/09000016805d3c1e>.



namely: the Recommendation Rec(2003)9 on measures to promote the democratic and social contribution of digital broadcasting; and Declaration of 27 September 2006 on the guarantee of the independence of public service broadcasting in the member states.<sup>29</sup>

The 2008 Declaration highlights the importance of a wide range of independent and autonomous means of communication and refers to the European Commission of Human Rights' statement underscoring that a licensing system not respecting pluralism, tolerance and broadmindedness infringes Article 10 ECHR, and that an arbitrary or discriminatory rejection of a licence application is contrary to this Convention.<sup>30</sup>

The Declaration also reveals in its preamble a concern that, although the independence, transparency and accountability of regulatory authorities of the broadcasting sector are guaranteed by law and in practice, the basic principles and guidelines of Recommendation Rec(2000)23 are not fully respected in law and/or in practice in certain member states.

In view of this concern, the Declaration: (i) affirms that members of regulatory authorities should continue to be independent; (ii) supports the objectives of the independent functioning of broadcasting regulatory authorities in member states; (iii) calls on member states to implement Recommendation Rec(2000)23, provide means to ensure the independent functioning of broadcasting regulatory authorities and remove risks of political/economic interference, and disseminate the Declaration; (iv) invites broadcasting regulatory authorities to be conscious of their importance in creating a diverse and pluralist broadcasting landscape, ensure the independent and transparent allocation of licences and their monitoring, contribute to perpetuating a culture of independence and develop related guidelines, and make a commitment to transparency, effectiveness and accountability; and (v) invites civil society and the media to contribute actively to such a "culture of independence".

Furthermore, the Declaration re-affirms the 2000 Recommendation's guidelines. Its annex carries an overview of the legislative framework of member states and the legal and institutional solutions developed in particular countries regarding regulatory authorities in the broadcasting sector, as well as its practical implementation. This overview is structured so as to depict what was done by the member states in view of the 2000 Recommendation's guidelines.

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<sup>29</sup> Ibid., Preamble.

<sup>30</sup> Ibid.



## 2.4. Recommendation (2018) on media pluralism and transparency of media ownership

More recently, on 7 March 2018, the Committee of Ministers adopted Recommendation CM/Rec(2018)1[1] to member states on media pluralism and transparency of media ownership.<sup>31</sup>

A new concern for media pluralism is raised due to recent evolutions in the multimedia environment, online media and other Internet platforms. Although new opportunities for interaction have been created, the control of Internet intermediaries over online content has increased. Intermediaries are also key players in online advertising and marketing, which can greatly influence the agenda of public debate. Changes such as these and the new challenges they bring must be addressed by media regulation, to safeguard the democratic process, freedom of expression, quality journalism and diversity, and to foster media pluralism and informed decision-making in the face of increasing concentration.

In this overall context, the Committee of Ministers recommended that member states: (i) implement the Recommendation's guidelines, contained in its appendix; (ii) remain vigilant to assess and address threats to media freedom and pluralism through monitoring and by taking regulatory measures; (iii) take into account the relevant case law of the European Court of Human Rights (ECtHR) and the previous Recommendations and Declarations of the Committee of Ministers in relation to media pluralism and transparency of media ownership when implementing the guidelines; (iv) promote the Recommendation's goals at national and international levels, through dialogue and co-operation with all interested parties; and (v) review regularly the measures taken to implement the Recommendation to enhance their effectiveness.

The Recommendation also includes guidelines on media pluralism and transparency of media ownership, divided into five sections: (i) a favourable environment for freedom of expression and media freedom;<sup>32</sup> (ii) media pluralism and diversity of media content;<sup>33</sup> (iii) regulation of media ownership: ownership, control and concentration;<sup>34</sup> (iv) transparency of media ownership, organisation and financing;<sup>35</sup> and (v) media literacy and education.<sup>36</sup>

The section on regulation of media ownership encourages member states to develop and implement a comprehensive regulatory framework, taking into account factors such as media ownership, online media and online distribution channels. This

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<sup>31</sup> Committee of Ministers, Recommendation CM/Rec(2018)1[1] to member states on media pluralism and transparency of media ownership, 7 March 2018, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680790e13](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13).

<sup>32</sup> *Ibid.*, Appendix, Para. 1.

<sup>33</sup> *Ibid.*, Para. 2.

<sup>34</sup> *Ibid.*, Para. 3.

<sup>35</sup> *Ibid.*, Para. 4.

<sup>36</sup> *Ibid.*, Para. 5.



regulation's monitoring and enforcement should be conducted by an independent body, with financial and human resources that allow it to effectively perform its tasks.

## 2.5. European Convention on Transfrontier Television

An earlier effort to harmonise the European television landscape and guarantee freedom of expression was made in the shape of the European Convention on Transfrontier Television (ECTT)<sup>37</sup> which came into force on 1 May 1993 and was the first international treaty to create a legal framework for the free circulation of transfrontier television programmes in Europe.

It stipulates minimum common rules in fields such as programming, advertising, sponsorship and the protection of certain individual rights, as well as determining that transmitting states should ensure that television programme services comply with the Convention's provisions. In return, freedom of reception of programme services is guaranteed as well as the retransmission of programme services complying with the minimum rules of the Convention. The Convention applies to all transfrontier programmes regardless of the means of transmission used.

Recently, there has been some renewed interest in the ECTT despite the fact that the broadcasting and media framework in general has undergone intense changes since the time of its drafting and ratification. This may be attributed to factors such as the foreseen exit of the United Kingdom from the EU whose internal market regulation, like the AVMS Directive, would no longer be applicable to the United Kingdom, while the ECTT would still apply.<sup>38</sup>

## 2.6. Operational assistance and capacity-building supported by the Council of Europe

The Council of Europe has also taken measures to promote the standards relating to freedom of expression and independence of media regulatory authorities established by its Recommendations and Declarations. In the field of building capacity, the Council of Europe has, over the past decade, participated in numerous cooperation activities in member states and partner countries with a focus on strengthening media freedom and

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<sup>37</sup> European Convention on Transfrontier Television, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/132>.

<sup>38</sup> Woods L (2016) 'What would be the impact of Brexit on UK media regulation?', *London School of Economics and Political Science, Media Policy Project Blog*, 13 September 2016, <https://blogs.lse.ac.uk/mediapolicyproject/2016/09/13/what-would-be-the-impact-of-brexit-on-uk-media-regulation/>. See also Cabrera Blázquez F.J., Cappello M., Fontaine G., Talavera Milla J., Valais S. (2018), *Brexit: The impact on the audiovisual sector*, IRIS Plus, European Audiovisual Observatory, Strasbourg, Section 2.2.2., <https://rm.coe.int/brexit-the-impact-on-the-audiovisual-sector/16808f064f>.





supporting the independence and efficient functioning of media regulatory authorities. These activities have included: the Council of Europe project “Promoting Freedom of Expression and Information and Freedom of the Media in South-Eastern Europe”, which aimed to develop legal and institutional guarantees for freedom of expression, higher quality journalism and a pluralistic media landscape in South-Eastern Europe in line with Council of Europe standards;<sup>39</sup> and the Council of Europe and EU joint programme “Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe” (JUFREX) which sought to promote freedom of expression and freedom of the media in line with Council of Europe standards,<sup>40</sup> and to support the independence and effectiveness of media regulatory authorities.<sup>41</sup>

Among the operational assistance activities of the Council of Europe is the commissioning of experts to carry out independent assessments of draft laws in member states, often concerning the institutional design of the independent regulatory activity, and provide policy recommendations. In previous years, studies have been commissioned by the Council of Europe on the request of the Albanian Parliament,<sup>42</sup> and on the request of the Regulatory Authority for Electronic Media of Serbia within the framework of JUFREX,<sup>43</sup> for example.

Additionally, the Council of Europe was involved in: cooperation activities in Tunisia from 2015 to 2017<sup>44</sup>, where it supported the local authority for audiovisual communications; and in activities promoting freedom of expression, media independence and plurality in Morocco, from 2014 to 2017.<sup>45</sup> The Council of Europe also aims to develop cooperation between different regulatory authorities, and participates in meetings of regional platforms and networks of cooperation such as the European platform of regulatory authorities (EPRA), the Mediterranean network of media regulatory authorities (RIRM) and the Network of French-speaking media regulatory authorities (REFRAM).<sup>46</sup>

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<sup>39</sup> Council of Europe, “Promoting Freedom of Expression and Information and Freedom of the Media in South-Eastern Europe”, <https://www.coe.int/en/web/tirana/promoting-freedom-of-expression-and-information-and-freedom-of-the-media-in-south-eastern-europe>.

<sup>40</sup> Council of Europe, “Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX), Objectives”, <https://www.coe.int/en/web/belgrade/reinforcing-judicial-expertise-on-freedom-of-expression-and-the-media-in-south-east-europe-jufrex->.

<sup>41</sup> Ibid.

<sup>42</sup> Irion K., Ledger M., Svensson S. and Fejzulla E. (2014), “The Independence and Functioning of the Audiovisual Media Authority in Albania”, Study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Tirana, <https://www.indireg.eu/assets/files/Indireg-AMA-Report-Nov11.pdf>.

<sup>43</sup> Irion, K., Ledger M., Svensson S. and Rsumovic N. (2017), “The Independence and Functioning of the Regulatory Authority for Electronic Media in Serbia”, study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Belgrade, <https://www.ivir.nl/publicaties/download/REM-Report-IndiregMethodology-Nov17-FINAL-2.pdf>.

<sup>44</sup> Council of Europe, cooperation activities, completed projects, <https://www.coe.int/en/web/freedom-expression/completed-projects>.

<sup>45</sup> Ibid.

<sup>46</sup> Council of Europe, “Media Regulatory Authorities”, <https://www.coe.int/en/web/freedom-expression/media-regulatory-authorities>.





## 2.7. European Platform of Regulatory Authorities

The European Platform of Regulatory Authorities (EPRA) was set up in 1995 as a tool for increased cooperation between European regulatory authorities. It is currently the oldest and largest network of broadcasting regulators – with 53 regulatory authorities from 47 countries as members – and offers a space for the exchange of information, cases and best practices between broadcasting regulators in Europe.<sup>47</sup> EPRA’s vision, as formulated in the organisation’s current three-year strategy is “to promote freedom of expression as well as a culturally diverse, sustainable and pluralistic media environment through its support for independent, professional and effective regulation of the audiovisual media<sup>48</sup>”. Independence is a core value of EPRA as a non-political, impartial, self-financing and non-policy-making body.

The EPRA board members are not representatives of their respective authorities, but individuals elected through nomination, and perform their duties on a philanthropic basis. The EPRA Secretariat is exclusively financed by members and hosted by the European Audiovisual Observatory, to ensure stability and independence, and to make use of natural synergies with the host and minimise administrative burdens and costs. The EPRA has regular contacts with other regional networks of regulatory authorities in Europe, and its statutes expressly prohibit the adoption of common positions or declarations.<sup>49</sup> The EPRA also produces comparative working documents, presentations and information on media regulation, thereby retaining regulatory independence as a constant focus area of its work.

According to the EPRA, all European countries have now conferred the regulation of broadcasting on independent regulatory authorities. However, great differences can be found in the scope of their remit, powers and structure.<sup>50</sup> A report from 2007 tackles the independence of regulatory authorities in a comparative fashion. This report is based on a questionnaire answered by EPRA members designed to illustrate potential discrepancies between formal and actual independence, in which authorities described: the current state of legal safeguards to independence, as well as their organisational and financial independence; the perception of European instruments to preserve independence; and accountability and transparency mechanisms.

EPRA’s work programme for 2014 instituted a dedicated working group on the independence of national regulatory authorities in reaction to policy developments at EU level.<sup>51</sup> This activity led to a pan-European discussion on policy developments in relation

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<sup>47</sup> European Platform of Regulatory Authorities, “General information on EPRA”, <https://www.epra.org/articles/general-information-on-epra>.

<sup>48</sup> European Platform of Regulatory Authorities, “EPRA Statement of Strategy 2017-2019”, [https://cdn.epra.org/attachments/files/2924/original/Strategy%20Statement\\_adopted.pdf?1486391135](https://cdn.epra.org/attachments/files/2924/original/Strategy%20Statement_adopted.pdf?1486391135).

<sup>49</sup> Ibid.

<sup>50</sup> European Platform of Regulatory Authorities, “About Regulatory Authorities”, <https://www.epra.org/articles/about-regulatory-authorities>.

<sup>51</sup> European Platform of Regulatory Authorities, EPRA Annual Work Programme for 2014, 14 February 2014, [https://cdn.epra.org/attachments/files/2321/original/ANNUAL\\_WORK\\_%20PROGRAMME\\_2014\\_EN.pdf?1393239456](https://cdn.epra.org/attachments/files/2321/original/ANNUAL_WORK_%20PROGRAMME_2014_EN.pdf?1393239456).



to the independence of media regulatory authorities.<sup>52</sup> EPRA issued a survey report concerning the perceptions of independence by regulators and external players and an assembly of actual tools, practices and work processes that may strengthen independence and that are employed by regulators in their day-to-day work.<sup>53</sup>

More recent EPRA activity relates indirectly to independence with a look at the role of media regulatory authorities. EPRA's work programme for 2016 focused on "Compliance & enforcement in a changing media environment – How does it work in practice?"<sup>54</sup> with the aim of promoting independent, accountable and efficient regulation of the sector.

Another recent example is the comparative background document "Public service and public interest content in the digital age: The role of regulators"<sup>55</sup>, which identified challenges to public service media as pointed out by regulatory authorities, including quality of content, maintaining audience in the digital age, obtaining funding and financing, and ensuring political or financial independence.

## 2.8. Conclusion

This section provided a brief overview of the Council of Europe's standard-setting activities in the field of media governance. The most common organisational form in European countries is that of the independent regulatory authority, which is not part of the actual structure of governmental administration, and has an apparatus that does not serve any other body at its disposal. The Council of Europe has built a solid body of texts about the broadcasting sector; but it is still dealing with the emergence of new media technologies and their consequences, especially with regard to media pluralism and freedom of expression.

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<sup>52</sup> European Platform of Regulatory Authorities, "39<sup>th</sup> EPRA meeting. Independence of NRAs: Key Developments and Current Debates",

<https://cdn.epra.org/attachments/files/2436/original/Budva%20WG2%20summary.pdf?1405508378>.

<sup>53</sup> European Platform of Regulatory Authorities, 40<sup>th</sup> EPRA meeting, "Independence of NRAs: Tools and Best Practices",

[https://cdn.epra.org/attachments/files/2489/original/WG2\\_independence\\_background%20paper\\_final.pdf?1417453075](https://cdn.epra.org/attachments/files/2489/original/WG2_independence_background%20paper_final.pdf?1417453075).

<sup>54</sup> European Platform of Regulatory Authorities, 43<sup>rd</sup> and 44<sup>th</sup> EPRA meetings, Compliance and Enforcement Policies, Strategies and methods put to test",

<https://www.epra.org/attachments/barcelona-plenary-2-compliance-and-enforcement-policies-strategies-and-methods-put-to-test-background-paper>.

"Challenges of ensuring compliance and enforcement in a changing media ecosystem",

<https://www.epra.org/attachments/yerevan-plenary-ii-compliance-enforcement-policies-strategies-methods-of-nras-put-to-test-part-ii-keynote-jean-francois-furnemont>.

<sup>55</sup> Studer S. (2019), "Public service and public interest content in the digital age: the role of regulators.

Comparative Background document,

[https://cdn.epra.org/attachments/files/3463/original/EPRA\\_PSM\\_Plenary\\_2\\_questionnaire\\_analysis\\_final.pdf?1554198287](https://cdn.epra.org/attachments/files/3463/original/EPRA_PSM_Plenary_2_questionnaire_analysis_final.pdf?1554198287).



With respect to audiovisual media regulatory authorities and their independence, the Council of Europe has published extensive recommendations regarding their institutional design, and offers concrete and comprehensive guidelines on how to achieve independence and maintain its efficient functioning. The Council of Europe also demonstrates a concern with the implementation and effectiveness of legislation relating to independent regulatory authorities in European countries, as shown by the studies it has commissioned to assess the frameworks supporting independent regulatory authorities, and offer policy recommendations for improvement.

Independence has been highlighted as an essential characteristic of audiovisual media regulatory authorities in Europe for several years and in a series of Council of Europe documents. Nonetheless, regulatory authorities are not immune to political, economic or corporate pressures. Member states must remain vigilant and active in drafting and implementing measures to strengthen and improve the effectiveness of regulatory authorities' independence, in order to combat any attempts to undermine or tamper with the independence of audiovisual media regulators.





## 3. The evolution of independent regulatory authorities in the audiovisual media sector in European Union law

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### 3.1. Introduction

The motto “united in diversity” describes the complexity the EU has to deal with when it tries to coordinate and harmonise the regulatory framework of its member states’ audiovisual media sectors. EU primary law recognises pluralism as one of the essential characteristics of European society, as stated in Article 2 of the Treaty on EU (TEU) which also, in Article 3(3), states that the EU shall “respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced”. Pursuant to Article 167(4) of the Treaty on the Functioning of the EU (TFEU) “[t]he Union shall take cultural aspects into account in its action ..., in particular in order to respect and to promote the diversity of its cultures”.

The EU guarantees the fundamental right to freedom of expression and information, regardless of frontiers, pursuant to Article 11(1) of the Charter of Fundamental Rights of the EU (CFREU) and Article 10 ECHR in connection with Article 52(3) CFREU. On the basis of this fundamental right, freedom of the media has been recognised, with concomitant guarantees to media organisations and their operations. A fundamental right implies, moreover, a positive duty on the part of member states and, within its competences, on the part of the EU, to facilitate freedom of the media and due promotion of media pluralism. Article 11(2) CFREU specifically recognises media pluralism as an essential condition for a democratic society.

This chapter traces the most significant EU developments concerning member states’ independent regulatory authorities in the audiovisual media sector. In particular, the history of Article 30 of the AVMS Directive is central, having evolved from a declaratory provision to a full-fledged requirement to ensure the existence of independent regulatory authorities in the member states of the EU. Elements of this



development have been influenced by policy documents and recommendations at EU level directed at a more substantive protection of independent and functioning media regulatory authorities.

### 3.2. The European Union's cultural competence

With regards to cultural policy, the EU has strictly limited competences subsidiary to national cultural policy. Pursuant to Article 167(2) TFEU, the EU is limited to coordinative and supporting actions in the field of artistic and literary creation, notably in the audiovisual sector. EU actions in the pursuit of primarily cultural objectives through the approximation of laws and regulations in the member states are outright prohibited by Article 167(5) TFEU. The cultural dimension of public service media is underscored in the 1997 Protocol (No. 29) on the system of public broadcasting in the member states.<sup>56</sup> This Protocol guarantees member states' organisational autonomy in how they confer, define and organise the public service remit "in so far as such funding does not affect trading conditions and competition in the Union".<sup>57</sup>

The entry point for EU media policy was the notion that television and other media services, especially in the private sector, have an economic dimension inextricably linked to a cultural one. In 1974, the Court of Justice of the European Union (CJEU) in the *Sacchi* case recognised the economic nature of television services.<sup>58</sup> Buoyed by this ruling, the European Community at the time passed its first regulation of cross-border television services based on its internal market competences. The 1989 Television Without Frontiers Directive<sup>59</sup> (TVwFD) affirmed the free movement of European television programmes within the internal market together with a minimum set of harmonized requirements regulating certain aspects of the provision of television services.<sup>60</sup>

The coexistence of, on the one hand, the EU's regulation of economic aspects in the cross-border provision of traditional television and of today's audiovisual media services, and, on the other hand, the restraints placed on the EU with regard to member states' cultural competences has been, by and large, successful.<sup>61</sup> The AVMS Directive emphasises that "[a]udiovisual media services are to be considered as much cultural

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<sup>56</sup> Protocol (No. 29) on the system of public broadcasting in the member states, OJ C-326, 26/10/2012, p. 312.

<sup>57</sup> *Ibid.*

<sup>58</sup> Judgment of the Court of 30 April 1974, C 155-73, ECLI:EU:C:1974:40 (*Sacchi*), <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:61973CJ0155>.

<sup>59</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities.

<sup>60</sup> These are notably the prohibition of incitement to hatred, accessibility for people with disabilities, access to major events, promotion and distribution of European works, commercial communications, the protection of minors.

<sup>61</sup> Irion K., Valcke P. (2015), "Cultural diversity in the digital age: EU competences, policies and regulations for diverse audio-visual and online content" in: Psychogiopoulou E. (ed.), *Cultural Governance and the European Union*, 75-90, Palgrave Macmillan: Houndmills and New York.



services as they are economic services”.<sup>62</sup> Different to other sector-specific regulatory regimes of the EU, such as the electronic communications sector or personal data protection, the organisation of the media regulatory authorities remained, until recently, the sole responsibility of the member states. As we will see, this changed with the 2018 adoption of the revised AVMS Directive in light of evolving market realities.<sup>63</sup> Before turning to the 2018 Directive itself, however, the following sections are dedicated to the context and legislative developments that led to this revision.

### 3.3. The evolution of the requirement for independent regulatory authorities in EU audiovisual media law

The TVwF Directive was succeeded in 2010 by the AVMS Directive, which codifies the original TVwF Directive, as well as two subsequent amendments.<sup>64</sup> The 2010 Directive provides a significant point of departure with regard to the independence and effective functioning of regulatory bodies in the audiovisual media sector. Chapter XI of the 2010 AVMS Directive is titled “Cooperation between regulatory bodies of the Member States”, and in its only provision, Article 30, member states are required to:

*take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.*

From the text of Article 30 of the 2010 AVMS Directive and the corresponding recitals 94 and 95 of the preamble, a sensitive compromise can be observed between, on the one hand, the visions of the European Parliament and the Commission, insisting on stricter rules on institutional design, and the Council, on the other hand, with concerns about member states’ cultural sovereignty.<sup>65</sup> As a result, the provision can appear rather weak at first, but upon closer examination the provision clearly presupposes the existence of one

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<sup>62</sup> Recital 5 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

<sup>63</sup> Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>.

<sup>64</sup> Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, <https://eur-lex.europa.eu/legal-content/fr/ALL/?uri=CELEX%3A32007L0065>.

<sup>65</sup> Stevens D. (2013) “Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence, in Schultz W., Valcke P. & Irion K. (eds), *The Independence of the Media and Its Regulatory Agencies: Shedding new light on formal and actual independence against the national context* (pp. 83-110) (ECREA Book Series), Intellect: Bristol, UK, (hereafter: Stevens, 2014).



or several independent regulatory authorities in the member states charged with implementation of the AVMS Directive.

The 2010 version of the AVMS Directive did not signify a final destination for the legal framework with regard to the independence and effective functioning of regulatory bodies in the EU's audiovisual media sector. A significant regulatory shift has since taken place, with roots in several policy activities from the period between the two versions of the Directive, and which have proven to be highly influential regarding the requirements and demands of independent media regulation.

An initial such policy activity was the commissioning by the European Commission of the study that led to the 2011 INDIREG report and methodology.<sup>66</sup> The study formulated a scientifically-backed methodology to assess the formal and actual independence of media regulators, by providing an interdisciplinary and comparative perspective. The report and methodology have gained significant traction and have proven highly influential over the years. An in-depth discussion of the INDIREG methodology can be found in Chapter 4 of this Report.

Another policy activity was the institution of the High-Level Group on Media Freedom and Pluralism. Its final report, presented in 2013, contains an articulate recommendation on the topic of independent regulation of the audiovisual media sector.<sup>67</sup> The report maintains that “regulators should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances”.<sup>68</sup> The Commission then conducted a public consultation on the independence of the audiovisual regulatory bodies.<sup>69</sup>

Further to the EPRA documents introduced in the previous chapter, the more recent European Regulators Group for Audiovisual Media Services (ERGA) published its 2015 report on the independence of national regulatory authorities (NRA).<sup>70</sup> This Group was first established in March 2014, as an advisory body to the European Commission. The report addresses ways to strengthen the independence of the European audiovisual media services regulatory bodies. The report, therefore, in line with the outcomes of the INDIREG study, identifies certain requirements as “essential characteristics” of independent regulatory bodies, and explicitly refers to and seeks connection with the standard-setting by the Council of Europe (see Chapter 2 in this Report for more details).

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<sup>66</sup> INDIREG Study (2011).

<sup>67</sup> Final report of the High Level Group on Media Freedom and Pluralism “A free and pluralistic media to sustain European democracy”, January 2013, <https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf>.

<sup>68</sup> Ibid., Recommendation 6.

<sup>69</sup> European Commission, “Public consultation on the independence of the audiovisual regulatory bodies”, 2013, <https://ec.europa.eu/digital-single-market/en/public-consultation-independence-audiovisual-regulatory-bodies>.

<sup>70</sup> European Regulators Group for Audiovisual Media Services, “ERGA Report on the independence of NRAs”, ERGA (2015)11, 15 December 2015, [http://erga-online.eu/wp-content/uploads/2016/10/report\\_indep\\_nra\\_2015.pdf](http://erga-online.eu/wp-content/uploads/2016/10/report_indep_nra_2015.pdf).





### 3.4. Article 30 of the 2018 revised AVMS Directive

Changing market realities, as well as the policy activities described in the previous section, led to the realisation that a revision of the 2010 Directive was due. The official legislative process started with the legislative proposal amending the AVMS Directive of 25 May 2016 by the European Commission, introducing a clear obligation for member states to guarantee the independence of their media regulator.<sup>71</sup> Following this proposal, the European Parliament's Committee on Culture and Education (CULT) on 5 September 2016 released a draft report in which it suggested significantly watering down the text of Article 30. Initially, member states resisted, with recourse to their cultural competence, but eventually the resistance subsided, leading to the adoption of strong protection of independent regulatory bodies in the audiovisual media sector in EU law. After an intense debate and legislative process, a revised version of the AVMS Directive was eventually adopted and entered into force on 19 December 2018. Member states now have until 19 September 2020 to transpose the text.

The revised Directive, in Article 30, introduces a detailed provision for member states to designate one or more independent regulatory authorities, while at the same time specifying some of the requirements and substantive safeguards to guarantee this independence. Whereas the 2010 Article 30 consisted of a single paragraph, the 2018 version comprises six elaborate ones, relating to the different dimensions of independence.

The first paragraph of the revised Article 30 requires each member state to designate one or more independent national regulatory authorities. The last sentence of the paragraph leaves open the possibility for member states to have multiple sector-specific regulators, instead of integrated regulators responsible for the supervision of adjacent sectors as well. It is further stipulated that such regulators in the audiovisual media sector “shall be legally distinct and functionally independent of any other public or private body.”

The requirement of functional independence is a new and potentially significant element designed to complement the formal independence of national regulatory authorities codified in law. The preamble in recital 53 provides an indication of when the requisite degree of independence has been achieved. It reads: “... national regulatory authorities or bodies should be considered to have achieved the requisite degree of independence if those authorities or bodies, including those that are constituted as public authorities or bodies, are functionally and effectively independent of their respective governments and of any other public or private body.” In EU law, the formula “legally distinct and functionally independent,” which is used in other sector-specific regulations,

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<sup>71</sup> For a description of the legislative process, see: P. Valcke (2016), “AVMS Review and Media Regulator's Independence: The Dancing Procession of Echternach?”, *KU Leuven*, <https://www.law.kuleuven.be/citip/blog/avms-review-and-media-regulators-independence-the-dancing-procession-of-echternach/>.



such as those for energy and electronic communications,<sup>72</sup> has not yet been interpreted in the jurisprudence of the CJEU.

Article 30 then, in paragraph 2, requires that national regulatory authorities in the member states “exercise their powers impartially and transparently” in accordance with the objectives of the AVMS Directive, in particular media pluralism, cultural diversity, consumer protection, internal market and the promotion of fair competition. To that end, Article 30 paragraph 2 provides concretely that “national regulatory authorities shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law.” However, in order to hold national regulatory authorities accountable, Article 30 paragraph 2 stipulates that independence guarantees “shall not prevent supervision in accordance with national constitutional law”. The revised Article nonetheless means member states must remove from national legislation any formal possibility to instruct an authority or its decision-making organs.

Paragraph 3 of the revised Article 30 concerns the competences, powers and accountability of regulatory authorities. It provides that “member states shall ensure that the competences and powers of the national regulatory authorities or bodies, as well as the ways of making them accountable, are clearly defined in law.” While providing more detailed guidance compared to its predecessor, important questions in this context still remain unanswered, for example regarding what competences and powers should be conferred to a regulatory authority. Further, it remains to be seen when exactly such a provision is deemed to be clearly defined, and if only a definition in a formal law suffices.

The subsequent paragraph then sets out requirements on “adequate financial and human resources and enforcement powers” to be dedicated to the authorities so they may “carry out their functions effectively”. To back the financial independence of national regulatory authorities, member states must provide them “with their own annual budgets, which shall be made public.” With the publication obligation in the final sentence providing a significant check in this context, the main question regarding this paragraph revolves around when financial and human resources and enforcement power are deemed to be adequate.

Interesting is the explicit reference in paragraph 4 of Article 30 to ERGA, contributing to the aim of the original 2010 AVMS Directive to establish cooperation between regulators. According to paragraph 4, national regulatory authorities of the member states must be adequately resourced to contribute to the work of ERGA. In the revised AVMS Directive 2018, Article 30b provides the legal ground for ERGA, establishing it and denoting its composition and tasks – including to advise and assist the Commission, to cooperate and exchange information, and to give opinions when requested by the Commission. ERGA is thus granted procedural autonomy.

The fifth paragraph of Article 30 lays out requirements regarding the appointment and dismissal procedures involving the heads of national regulatory authorities and

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<sup>72</sup> European Regulators Group for Audiovisual Media Services, “ERGA Report on the independence of NRAs” (fn. 69), p. 9f.



bodies or the members of the collegiate body fulfilling that function. A key requirement is for member states to “lay down in their national law the conditions and the procedures for the appointment and dismissal” and “including the duration of the mandate.” Attendant procedures must meet requirements on transparency and non-discrimination, and guarantee the requisite degree of independence. While appointed decision-makers can be dismissed, the ground for dismissal is limited to a situation in which appointed decision-makers of the national regulatory authority can “no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level.” As a token of procedural legitimacy and transparency, any such dismissal decision “shall be duly justified, subject to prior notification and made available to the public”.

The final paragraph of Article 30 addresses the possibilities that member states have to guarantee effective appeal mechanisms at the national level against decisions made by the regulatory authority. Important for the powers of the national regulatory authority, their decision stands, pending the outcome of the appeal unless interim measures are granted in accordance with national law.

### 3.5. Conclusion

This section provided a brief overview of the most significant EU developments concerning member states’ independent regulatory authorities in the audiovisual media sector. It traced the history of Article 30 in the AVMS Directive from a declaratory provision to a full-fledged requirement to ensure the existence of independent regulatory authorities in the member states. Elements of this development have been influenced by policy documents and recommendations at EU level and involving the two pan-European networks of media regulatory authorities in Europe, EPRA and ERGA, geared towards a more substantive protection of independent and functioning media regulatory authorities.

As mentioned, member states now have until 19 September 2020 to transpose the text of the Directive into national laws. It remains to be seen how expansive the need for amendments is in each of the member states. For a selection of countries, this IRIS *Special*, from chapter 5, contains an overview of the extent to which the current set-up and practices of the national regulatory authority in the respective countries is up to par with the revised regulation, and outlines what legal adjustments might be required.





## 4. The INDIREG study and methodology

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### 4.1. Introduction

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

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

### 4.2. The INDIREG study

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

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

<sup>74</sup> Jakubowicz (2013) xi.

<sup>75</sup> *Ibid.*, xiv.



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

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

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

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

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

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<sup>76</sup> INDIREG Study (2011).

<sup>77</sup> Ibid., p. 9.

<sup>78</sup> Ibid., p. 19.

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

<sup>80</sup> INDIREG Study (2011), p. 47.

<sup>81</sup> INDIREG Study (2011), p. 46.



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

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

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

### 4.3. The INDIREG methodology

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

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

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<sup>82</sup> Schulz (2013). p. 8.

<sup>83</sup> INDIREG Study (2011), p. 45.

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

<sup>85</sup> Hanretty and Koop (2012).

<sup>86</sup> Irion and Ledger (2013), p. 143.



(1) status and powers; (2) financial autonomy; (3) autonomy of decision makers; (4) knowledge; and (5) accountability and transparency.<sup>87</sup> For each dimension, formal and actual independence are measured separately while retaining the complimentary relationship between the two sides. Due to the limitations of measuring a quality such as independence, rather than the intrinsic level of independence of regulators, this methodology measures the risk of influence by external players. The lesser the risk of external influence the better a particular agency's configuration performs in relation to a given indicator. Recognising that not every indicator holds the same relevance, the INDIREG methodology incorporates a weighted approach.<sup>88</sup> Indicators grouped in one dimension have been weighted on the basis of an indicator's relative impact in terms of external influence. The formula underlying the INDIREG methodology is embedded in a spread sheet<sup>89</sup> and automatically calculates the scores for each dimension, with separation into formal and actual spheres.

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

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

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<sup>87</sup> Ibid.

<sup>88</sup> INDIREG Study, p. 368.

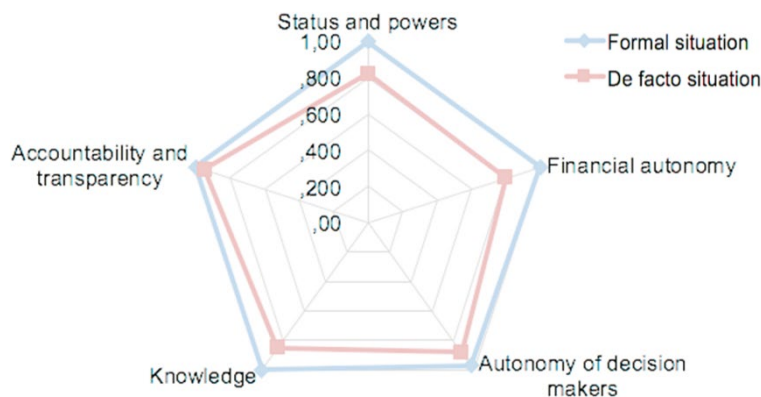
<sup>89</sup> The INDIREG methodology can be downloaded from [www.indireg.eu](http://www.indireg.eu).

<sup>90</sup> INDIREG Study, p. 368.





### Graphical representation of the INDIREG methodology



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

## 4.4. Impact of the INDIREG study and methodology

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

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

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

<sup>92</sup> *Ibid.*, p. 8.



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

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

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

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

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

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

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

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

<sup>97</sup> Unpublished.



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

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

## 4.6. Conclusion

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

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



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

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



## 5. BA – Bosnia and Herzegovina

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### 5.1. Introduction

The media system in Bosnia and Herzegovina is ethnically and territorially fragmented,<sup>98</sup> is politically polarised, and has a weak advertising market that is too small to support all private media outlets. The public service broadcasting (PSB) system of Bosnia and Herzegovina consists of three broadcasters, each with one TV and one radio channel with national coverage.<sup>99</sup> Additionally, there are 38 terrestrial TV channels, 52 TV channels that broadcast via other electronic communication networks and 142 radio channels in the country, as well as three non-profit radio stations. There are also 40 distributors of audiovisual media services (33 provide their services via cable, seven via IPTV platform).<sup>100</sup> Article 30 of the revised AVMS Directive primarily affects the national Law on Communications in Bosnia and Herzegovina.<sup>101</sup>

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<sup>98</sup> The country consists of state-level institutions and two administrative units (entities) - the predominantly Serb *Republika Srpska* (Republic of Srpska) and the Bosniak-Croat Federation of Bosnia and Herzegovina - with the entities granted a high degree of autonomy, each having its own legislative, executive and judicial branches of government. The Federation entity is further decentralised, consisting of 10 cantons - four with Bosniak majority, four with Croat majority, and two mixed - each with its own government and elected legislature. In addition, the District of Brčko is a separate self-governing administrative unit under the sovereignty of the state.

<sup>99</sup> The PSB consists of: *Radiotelevizija Bosne i Hercegovine* (Radio and Television of Bosnia and Herzegovina or BHRT) at the state level; *Radiotelevizija Federacije Bosne i Hercegovine* (Radio and Television of the Federation of Bosnia and Herzegovina or RTVFBiH) at the level of the administrative unit of the Federation of Bosnia and Herzegovina; and *Radio Televizija Republike Srpske* (Radio and Television of Republika Srpska or RTRS) at the level of the entity of Republika Srpska.

<sup>100</sup> Communications Regulatory Agency, public register of licence holders, <https://rak.ba/brdcst-license-holders>.

<sup>101</sup> 'Zakon o komunikacijama' (Law on Communications), the Official Gazette of Bosnia and Herzegovina, 31/03, 75/06, 32/10, 98/12, <https://docs.rak.ba/articles/da724391-4a61-429b-8859-14d77fbfbf43.pdf>; <https://docs.rak.ba/articles/106b2bd7-4d39-4b82-a956-21e55d869e11.pdf>; <https://docs.rak.ba/articles/8ed64927-655f-4461-8940-722ef312c3c7.pdf>; <https://docs.rak.ba/articles/a0c1b5e8-8d0b-4388-9a76-5a732dc564f0.pdf>.



## 5.2. Communications Regulatory Agency

The national media regulatory body in Bosnia and Herzegovina is the *Regulatorna agencije za komunikacije* (Communications Regulatory Agency - CRA),<sup>102</sup> established in 2001. It is an independent, converged decision-making body<sup>103</sup> responsible for the regulation of the broadcasting and telecommunications sectors, the allocation of frequencies to broadcasters, including public service broadcasting, and the management of the frequency spectrum.<sup>104</sup>

### 5.2.1. Legal distinctiveness and functional independence

The CRA is legally distinct from the government, established as “a functionally independent and a non-profit-making institution with the status of a legal person under the laws of Bosnia and Herzegovina”.<sup>105</sup> The powers and responsibilities of the CRA are stipulated by the Law on Communications.<sup>106</sup> The functional independence of the CRA is high, as the Law grants sufficient and stable sources of funding and broad powers and enforcement mechanisms for its unhindered operation. The CRA has both policy-setting and policy-implementing powers and a set of enforcement measures ranging from oral warnings to the revocation of a broadcasting licence (for more on powers and duties, see below). The agency is protected from political interference in its day-to-day decision-making since there is no formal possibility to instruct the agency in its exercise of powers or interfere with its decision-making in individual cases.<sup>107</sup> According to Article 37(g) of the Law on Communications, other duties can be assigned to the CRA by the Council of Ministers although the Law does not specify what those could be, and no instances of such delegation of new duties have so far occurred.<sup>108</sup>

As is the case with other similar state agencies, the Council of Ministers and the Parliamentary Assembly have indirect influence over the CRA through the appointment procedures for its key decision-making bodies – the Council of the CRA and the Director-General (for more details on appointment procedures, see below).

The Council of the CRA provides guidelines for the Agency in strategic issues, adopts codes of practice and rules for broadcasting and telecommunications, and serves as an appellate body for decisions by the Director-General.<sup>109</sup> The CRA is managed by the

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Article 36, Law on Communications.

<sup>106</sup> Articles 3(3), 3(4), 37, 46, Law on Communications.

<sup>107</sup> Article 36, Law on Communications.

<sup>108</sup> Email correspondence with Ms. Helena Mandić, Director of Broadcasting, Communications Regulatory Agency (April 2019).

<sup>109</sup> Article 39(1), Law on Communications.



Director-General,<sup>110</sup> who reports to the CRA Council. The organisational units of the CRA are the Cabinet of Director-General, five specialised sections and several other departments. Among the five sections, of particular relevance for audiovisual media is the Section of Broadcasting with its three divisions: first, the Division of Licenses, Digitalisation, and Coordination in Broadcasting; second, the Division of Programming, Complaints, and Legal Regulation in Broadcasting; and third, the Division of Audiovisual Services and International Cooperation in Broadcasting.<sup>111</sup>

## 5.2.2. Impartial and transparent exercise of powers

The Agency is characterised by a transparent exercise of powers, with full decisions published on the official website of the regulator alongside information on its activities, annual reports, financial information, and other types of documents and materials.

There is no evidence of partial decision-making or treatment of media organisations. However, the agency regularly faces criticism from the media outlets subject to its fines, and in particular from public broadcasters.<sup>112</sup> Although in principle such criticism of the Agency has not been valid, it may nevertheless be damaging for the public perception of the CRA.

## 5.2.3. Competences, powers and accountability

The competences and powers of the CRA are broad and clearly defined. The Agency is responsible for regulating broadcasting and public telecommunications networks and services, as well as managing the radio frequency spectrum.<sup>113</sup> Its core objectives regarding the broadcasting and telecommunications markets are the promotion of fair competition, the encouragement of investment and innovation, the protection of copyright and ensuring the efficient use of radio frequencies.<sup>114</sup> Its duties with regard to audiovisual media include, inter alia, introduction and enforcement of rules on broadcasting, licensing broadcasters and monitoring their compliance with license conditions, allocation and management of the frequency spectrum, and maintaining a technical licence fee system for broadcasting.<sup>115</sup>

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<sup>110</sup> Article 40, Law on Communications.

<sup>111</sup> Bosnia and Herzegovina, Communications Regulatory Agency, "Organizational structure", <https://rak.ba/organisational-structure>.

<sup>112</sup> See for example: RTRS (2018), "Programski savjet RTRS - RAK politički motivisan u kažnjavanju RTRS-a", (Program board of the RTRS – CRA politically motivated in punishing RTRS), <https://lat.rtrs.tv/vijesti/vijest.php?id=292590>.

<sup>113</sup> Article 3(3), Law on Communications.

<sup>114</sup> Article 3(4), Law on Communications.

<sup>115</sup> Article 37, Law on Communications.



The Agency is accountable to the parliament and the government of Bosnia and Herzegovina. It is subject to an audit review by the Supreme Audit Institution (SAI) as well as to a regular annual review by independent auditors.<sup>116</sup> Additionally, the Agency prepares an annual report of its activities and finances which is submitted to the Council of Ministers of Bosnia and Herzegovina.<sup>117</sup>

With respect to procedural legitimacy, the CRA is required, before adopting any rules, to publish a draft rule and allocate at least 14 days for public consultations.<sup>118</sup> Although it is not required by law to do so, the CRA publishes all of its decisions and associated explanations. Furthermore, all relevant information and documents are easily accessible on the website of the Agency, and additional information can be requested in accordance with the Freedom of Access to Information Act.<sup>119</sup>

#### 5.2.4. Adequate financial and human resources

The CRA's budget consists exclusively of revenues from licence fees. When grants are received for specific projects, they are accounted for separately, and are not part of the approved budget. The budget of the Agency has been stable over the last 10 years, rising from EUR 3.45 million in 2015<sup>120</sup> to EUR 3.83 million in 2018,<sup>121</sup> and the CRA has not requested any ad-hoc financial contributions from the state. The Agency enjoys sufficient autonomy when deciding how it will spend its budget. The budget for each fiscal year is first adopted by the CRA Council and then submitted by the Director General to the Council of Ministers for approval.<sup>122</sup> Until the final budget is approved by the Council of Ministers, the CRA operates according to the budget adopted by the CRA Council.

Even though the CRA is a self-financed body, its budget is part of the state budget of Bosnia and Herzegovina.<sup>123</sup> This means that the CRA has no direct control over its funds. Consequently, in cases where the state budget is not adopted on time, the funding for the CRA directly depends on decisions on temporary financing of state institutions.

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<sup>116</sup> Article 44(4), Law on Communications.

<sup>117</sup> Article 44(5), Law on Communications.

<sup>118</sup> Article 38, Law on Communications.

<sup>119</sup> Zakon o slobodi pristupa informacijama u Bosni i Hercegovini (Law on Freedom of Access to Information in Bosnia and Herzegovina), Official Gazette of Bosnia and Herzegovina, 28/00, [http://www.mpr.gov.ba/web\\_dokumenti/ZOSPI\\_-\\_B.pdf](http://www.mpr.gov.ba/web_dokumenti/ZOSPI_-_B.pdf).

<sup>120</sup> Zakon o proračunu institucija Bosne i Hercegovine i međunarodnih obveza Bosne i Hercegovine za 2016. godinu (Law on Budget of Institutions of Bosnia and Herzegovina and on international obligations of Bosnia and Herzegovina for 2016), Official Gazette of Bosnia and Herzegovina, 101/2015, December 30, 2015, <http://sllist.ba/glasnik/2015/broj101/Broj101.pdf>.

<sup>121</sup> Zakon o proračunu institucija Bosne i Hercegovine i međunarodnih obveza Bosne i Hercegovine za 2018. godinu (Law on Budget of Institutions of Bosnia and Herzegovina and on international obligations of Bosnia and Herzegovina for 2018), Official Gazette of Bosnia and Herzegovina, 8/2018, February 2, 2018, <http://sllist.ba/glasnik/2018/broj8/broj008.pdf>.

<sup>122</sup> Law on Communications, Article 44(1).

<sup>123</sup> Zakon o finansiranju institucija Bosne i Hercegovine (The Law on Financing of Institutions of Bosnia and Herzegovina), Official Gazette of Bosnia and Herzegovina 61/04, Art. 9(4).





The budget of the Agency for the current year (2019) has not been published on its website but is integrated into the overall budget of the state institutions of Bosnia and Herzegovina published by the Ministry of Finance and Treasury of Bosnia and Herzegovina in the form of the Law on Budget.<sup>124</sup> Detailed annual financial reports for previous years are regularly published on the CRA's website.

CRA's staff fall into the category of civil servants, in accordance with the Law on Civil Service in the Institutions of Bosnia and Herzegovina<sup>125</sup>. However, the Agency has the right to determine which positions fall under the scope of the Law on Civil Service<sup>126</sup>. The CRA has so far applied this exception to all of its staff members, meaning that it manages its human resources independently, i.e. outside of the procedures for hiring as defined by the Law on Civil Service. Nevertheless, the Agency cannot independently manage compensation schemes for its employees, since its salaries were defined by the Law on Salaries and Compensations in Institutions of Bosnia and Herzegovina in 2008.<sup>127</sup> Nevertheless, so far this has not had a major negative effect on its capability to recruit skilled staff.

## 5.2.5. Adequate enforcement powers

Overall, the CRA is respected as a regulator – there is a high level of compliance with the rules, decisions and sanctions it issues to broadcasters. This is a result of a broad set of enforcement measures available to the CRA and applicable proportionally to violations. These enforcement powers include: oral and written warnings; inspections; demands for cessation of activities; financial penalties not exceeding EUR 75 000 in the case of deliberate or negligent violation of laws, regulation, codes or licence provisions or not exceeding EUR 150 000 in the case of repeated violations; orders for temporary interruption of broadcasting, and, *ultima ratio*, the revocation of a licence.<sup>128</sup>

The CRA also has powers to undertake all necessary steps to stop the operation of a telecommunications or broadcasting network or service if it is operated without a licence,<sup>129</sup> and has monitoring and information collection powers necessary for the assessment of compliance with licensing conditions, rules and regulations.<sup>130</sup> The law

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<sup>124</sup> [https://www.mft.gov.ba/bos/index.php?option=com\\_content&view=article&id=144&Itemid=111](https://www.mft.gov.ba/bos/index.php?option=com_content&view=article&id=144&Itemid=111).

<sup>125</sup> Zakon o državnoj službi u institucijama Bosne Hercegovine (Law on Civil Service in the Institutions of Bosnia and Herzegovina), Official Gazette of Bosnia and Herzegovina 19/02, 35/03, 4/04, 17/04, 26/04, 37/04, 48/05, 2/06, 32/07, 43/09 and 8/10.

<sup>126</sup> Law on Communications, Article 43.

<sup>127</sup> Zakon o plaćama i naknadama u institucijama Bosne i Hercegovine (Law on Salaries and Compensations in Institutions of Bosnia and Herzegovina), Official Gazette of Bosnia and Herzegovina 50/08; 35/09; 75/09; 12/09; 32/12; 42/12; 50/12; 32/13; 87/13; 87/13; 75/15; 88/15; 16/16; 94/16; 72/17; 25/18, [http://www.mft.gov.ba/bos/images/stories/zakoni/2008/ZAKON\\_O\\_PLACAMA\\_BOSANSKI\\_50\\_08.pdf](http://www.mft.gov.ba/bos/images/stories/zakoni/2008/ZAKON_O_PLACAMA_BOSANSKI_50_08.pdf).

<sup>128</sup> Article 46, Law on Communications.

<sup>129</sup> Ibid.

<sup>130</sup> INDIREG (2011), p. 299.



enforcement agencies in Bosnia and Herzegovina are required to assist the Agency in the enforcement of its decisions if requested by the CRA.<sup>131</sup>

## 5.2.6. Appointment and dismissal procedures

So far, the appointment of the key decision-making bodies of the CRA - the Council of the Agency and the Director-General<sup>132</sup> - has been the most contentious issue impinging the requisite degree of independence.

The Council consists of seven members, appointed by the Parliamentary Assembly of Bosnia and Herzegovina for a period of four years, with a possibility of a single reappointment.<sup>133</sup> Candidates for the CRA Council are required to have experience in the telecommunications or broadcasting sectors, while “officials in legislative or executive functions at any level of government, or members of political party organs, shall not be named as candidates for the membership of the Council of the Agency.”<sup>134</sup>

Based on a proposal from the Council of Ministers, the Parliamentary Assembly of Bosnia and Herzegovina establishes an ad-hoc Commission mandated to implement the procedure for the appointment of the CRA Council. The ad-hoc Commission consists of an equal number of representatives from the government and non-governmental sectors, and is tasked with publishing a vacancy call for the Council members and submitting a list of the 14 best candidates to the Council of Ministers.<sup>135</sup> Within 30 days of receiving the list, the Council of Ministers proposes to the Parliamentary Assembly seven candidates from the list to be appointed as the members of the Council of the CRA.<sup>136</sup> The Parliamentary Assembly is then expected to formally appoint the members of the council within 30 days.<sup>137</sup> Nevertheless, if the Parliamentary Assembly rejects one or more of the nominated candidates, it provides reasons for the rejection and requires the Council of Ministers to submit a new proposal within 30 days.<sup>138</sup> If the Council of Ministers fails to respond to such a request, or if the Parliamentary Assembly rejects the second proposal by the Council of Ministers, the Parliamentary Assembly is required to immediately start a new public vacancy procedure for the appointment of the members of the CRA Council.<sup>139</sup>

The members of the Council can be dismissed before the end of their mandate by the Parliamentary Assembly of Bosnia and Herzegovina in the case of illness, conviction of a crime punishable by imprisonment, a conflict of interest, and a violation of the

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<sup>131</sup> Article 46, Law on Communications.

<sup>132</sup> Article 36, Law on Communications.

<sup>133</sup> Article 39(2), Law on Communications.

<sup>134</sup> Article 39(12), Law on Communications.

<sup>135</sup> Article 39(4), Law on Communications.

<sup>136</sup> Article 39(5), Law on Communications.

<sup>137</sup> Article 39(6), Law on Communications.

<sup>138</sup> Article 39(7), Law on Communications.

<sup>139</sup> Article 39(8), Law on Communications.



agency's Code of Ethics.<sup>140</sup> However, the Law on Communications does not specify the procedure for appointment of new members of the CRA Council in the case of removal of existing members before the end of the term of their mandate. In addition, the Law does not provide any stipulation regarding the possibility of the removal of the Council of the CRA as a whole.

There are a number of substantial problems with the appointment procedure for the CRA Council, which significantly undermine the level of transparency and efficiency of the procedure, exposing the CRA to undue influence from the Council of Ministers and the Parliamentary Assembly. In brief, the amended Law on Communications from 2012 creates substantial confusion with regard to roles and responsibilities of the Parliamentary Assembly and the Council of Ministers, as well as regarding the procedures, criteria and timeline for the appointment of the members of the Council of the CRA, effectively making the procedure non-transparent and highly inefficient and unpredictable. The Law provides for the possibility of an indefinite repetition of the procedure for the appointment of the CRA Council until political agreement is reached within and between the Parliament and the Council of Ministers.<sup>141</sup> It also provides for the possibility of an indefinite postponement of the start of the procedure of appointment of the members of the CRA Council upon the expiration of its mandate given the lack of a provision regarding the responsibilities and timeframe for starting the procedure.<sup>142</sup> The role of the ad-hoc commission – which is supposed to be crucial for implementing the appointment procedure – is rendered meaningless given the lack of criteria for its establishment<sup>143</sup> and operation,<sup>144</sup> or the extent of political influence on its decisions. Hence, the legal framework creates multiple loopholes for the exercise of undue political pressure in the process of the appointment of the CRA Council which can pose a significant threat to the normal functioning of the Council and of the Agency as a whole. As an illustration, at the moment of writing of this report, the current CRA Council has had the technical mandate for 15 months because the Council of Ministers and the

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<sup>140</sup> Article 42, Law on Communications.

<sup>141</sup> Law on Communications, Article 39(8).

<sup>142</sup> The Law (Article 39(4)) does not specify the nature of the relationship of the Parliamentary Assembly to the proposal by the Council of Ministers regarding the start of the appointment procedure – can the assembly reject the proposal of the Council of Ministers and what happens if it does so or if it fails to act upon the proposal? The Law also does not specify when the procedure for the appointment of the members of the CRA Council is to be started, i.e. when the Council of Ministers should send the proposal for the start of the procedure to the Parliamentary Assembly of Bosnia and Herzegovina – it only states that the first such procedure after the adoption of the amendment from 2012 must take place within 15 days of publication of the amendment in the Official Gazette of Bosnia and Herzegovina, but provides no direction as to when the procedure should be started with regard to any future rounds of appointments of the CRA Council.

<sup>143</sup> Article 39(4) of the Law on Communications does not specify the criteria for the appointment of the members of the ad-hoc commission. Unclear is: what is meant by “representatives from governmental and non-governmental” sectors; what competencies of such representatives should be; how and by whom they are to be nominated and selected; and how many members the ad-hoc commission should have.

<sup>144</sup> It is unclear how, and based on what criteria, the ad-hoc commission makes decision about the shortlisted candidates.



Parliamentary Assembly failed to initiate the appointment procedure in a timely manner with the official end of its mandate.<sup>145</sup>

The CRA is managed by a Director-General, nominated by the Council of the Agency based on the public vacancy announcement, and approved by the Council of Ministers within 30 days of its receipt of the nomination.<sup>146</sup> The Director-General, who has a term of four years renewable only once, reports to the Council of the Agency, and is responsible for decision-making and the management of the CRA. The Director-General can be nominated only from among candidates with experience in the telecommunications or broadcasting sectors. The Director-General can be dismissed by the Council of Ministers of Bosnia and Herzegovina only under exceptional circumstances, such as illness, conviction of a crime punishable by imprisonment, conflict of interest, resignation, failure to perform duties as described in law, and violation of the Agency's Code of Ethics.<sup>147</sup> However, the appointment of the Director-General has been heavily politicised. After the term of the previous Director-General ended in 2007, the Council of Ministers did not approve the appointment of the new Director-General selected according to the Law,<sup>148</sup> and so the incumbent Director-General retained a technical mandate until 2015, when the new Acting Director-General was appointed by the Council of the Agency and then formally approved in April 2016.

The Law on Communications provides incompatibility rules for key CRA staff in respect to other state and party functions, while financial relationships with stakeholders from the communications sectors are required to be declared only in the case of a conflict of interest. In the case of a conflict of interest, the Council members must abstain from the decision-making.<sup>149</sup> However, there are no rules that prevent Council members from being employed by regulated entities after their term in office. The Director-General and senior staff cannot have financial relationships with stakeholders.<sup>150</sup> The Law on Communications forbids the nomination of government officials or members of political party organs for the position of Director-General or as members of the Council of the CRA.<sup>151</sup> In the case of non-appointment of new members of the Council or of the Director-General, previous holders of the position continue their work with a technical mandate until the appointment procedure is completed.

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<sup>145</sup> See for example: Er. M. (2018). "Kompletnom Vijeću RAK-a istekao mandat, Federacija BiH blokirala izbor novih članova" (The mandate of all members of the CRA Council has expired), Klix.ba, <https://www.klix.ba/vijesti/bih/kompletnom-vijecu-rak-a-istekao-mandat-federacija-bih-blokirala-izbor-novih-clanova/180630010>.

<sup>146</sup> Article 40, Law on Communications.

<sup>147</sup> Article 42, Law on Communications.

<sup>148</sup> Article 36, Law on Communications.

<sup>149</sup> Article 39, Law on Communications.

<sup>150</sup> Ibid., Art. 39.

<sup>151</sup> Article 40, Law on Communications.



## 5.2.7. Appeal mechanisms

Appeals against decisions of the Director-General are directed to the Council, whose decisions are final and binding in an administrative procedure. A judicial review of the Council's decisions can be initiated before the State Court of Bosnia and Herzegovina. Pending the outcome of the appeal, the decision of the national regulatory authority stands.<sup>152</sup>

## 5.3. Conclusion

The current Law on Communications in Bosnia and Herzegovina, which applies to the CRA, is largely aligned with the criteria for regulatory independence as stipulated by Article 30 of the 2018 AVMS Directive. The most significant problem with the law pertains to the eventuality of an inconclusive - and potentially drawn-out ad infinitum - procedure for the appointment of the members of the Council of the Agency. The Law also does not provide guidance regarding the procedure for the appointment of individual Council members when an incumbent member is dismissed before expiration of his/her term due to illness, conflict of interest or misconduct.

In order for the Law on Communications in Bosnia and Herzegovina to be aligned with Article 30 of the 2018 AVMS Directive, it may well be necessary to further strengthen the safeguards of the CRA's legal and functional independence by revising Article 39, which stipulates the procedures for appointing the members of the Agency's Council, to ensure that the procedure is coherent, clear, transparent, efficient and does not allow undue political influence by the government or parliament. Further amendments may be necessary to align the Law with Article 30, for example with regard to paragraph 'g' of Article 37 – which provides for the possibility for the Council of Ministers to delegate new duties to the CRA. Such paragraph may have to be removed from the Law since it is sufficient that the Council of Ministers sets the overall sectoral policy for broadcasting and telecommunications<sup>153</sup>. Alternatively, the Law may also specify under which circumstances and according to which procedure the Council of Ministers may directly delegate new tasks and duties to the Agency.

In any event, notwithstanding the legal provisions in force to protect the independence of the CRA, the question of their application in practice and how to ensure the de facto independence of the Agency may arise, particularly in view of the politicised nature of the appointment of its main decision-making bodies. Such a situation may require continuous scrutiny by civil society and in particular by the EU institutions in the context of conditionality mechanisms related to Bosnia and Herzegovina's EU accession process, in order to ensure the functional independence of the CRA.

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<sup>152</sup> Article 47, Law on Communications.

<sup>153</sup> Law on Communications, Article 3.





## 6. ES – Spain

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### 6.1. Introduction

Key to understanding the Spanish media landscape are the triple administrative and market layers: national; regional (autonomous); and local. Spain is divided into 17 autonomous communities which have broad powers in many areas, including the media sectors. The regional media play a significant role in regions like Catalonia, Galicia and the Basque Country, with co-official languages and a strong regional culture. However, the main Spanish media market remains the national one. Its main characteristics are:

- a predominant broadcasting industry from a strategic and economic point of view, highly concentrated in two big operators (Atresmedia and Mediaset), and offering a great many free-to-air digital channels;
- traditional press groups (Prisa, Vocento, Unidad Editorial) that remain an important vehicle for the political agenda of Spain even if their circulation has been in strong decline over the last five years;
- a highly competitive radio landscape dominated by four big networks, owned by a private press group (SER), a TV group (OndaCero), a religious group (COPE) and the state media group (RNE);
- strong penetration of the pay-TV business by telecommunications operators (Movistar+, Vodafone);
- a decline in audience and budgets of the public service media (RTVE and regional and local broadcasters);
- significant audiences for new players in online press media (El Confidencial, El Diario.es) and SVOD and VOD operators like Netflix, HBO or Rakuten; and
- dispersed shareholding of the big media companies, with an increasing presence of financial companies, banks, and investment funds.

The main impact of the new revised AVMS Directive on the Spanish legislation as a whole will be on Act 7/2010 on Audiovisual Communication.<sup>154</sup> This Act has regulated public and commercial TV and radio broadcasting since 2010. It originally provided for the creation

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<sup>154</sup> Ley 7/2010 de 31 de marzo, General de la Comunicación Audiovisual (Act 7/2010 of 31 March on Audiovisual Communication), <https://www.boe.es/buscar/act.php?id=BOE-A-2010-5292>.



of an independent regulatory authority on broadcasting: the National Council for Audiovisual Media (*Consejo Estatal de Medios Audiovisuales* - CEMA). Ultimately, though, the council was not created because of a lack of political agreement between the main left and right Spanish parties in 2011. It was not until 2013 that a new law set up the National Markets and Competition Commission (*Comisión Nacional de los Mercados y de la Competencia* - CNMC), which has taken on a portion of the CEMA's competences. Therefore, regarding Article 30 of the revised AVMS Directive, the main piece of legislation that will be affected is Act 3/2013 of 4 June, which created the CNMC.<sup>155</sup>

## 6.2. The National Markets and Competition Commission

Until 2013, Spain was the only EU country without a nationwide independent regulatory authority for the audiovisual industry, even if there were two regional independent audiovisual authorities - in Catalonia since 2000 and in Andalusia since 2004 not analysed in this chapter because of space limitations. The right-oriented People's Party government decided to merge the existing independent regulatory bodies in the fields of telecommunications, energy and competition and created the National Markets and Competition Commission (*Comisión Nacional de los Mercados y de la Competencia* - CNMC) in 2013<sup>156</sup>. The CNMC is a "super-cross-sectorial-regulator", since it encompasses a number of different economic sectors and areas of interest: energy; telecommunications; competition; railways; post; airports; and audiovisual media.

The CNMC was granted some powers relating to audiovisual matters, especially with regard to content quotas, protection of minors and advertising limits, but none relating to licensing or media ownership concentration control, which remain in the hands of the government. The new independent cross-sectorial body was justified as a cost-cutting measure. The CNMC has two sites: Madrid, the CNMC headquarters, and Barcelona, which houses the telecommunications and audiovisual sector division.

The CNMC exercises its functions through two governing bodies: the Board and the Chairperson of the authority, who also chairs the Board. The Board is the collective decision-making body. The Board may meet in plenary session or in a chamber. To this end, it is organised into two chambers: one dedicated to competition issues (Competition Chamber) and the other to the supervision of regulated sectors (Regulatory Supervision Chamber). The plenary is made up of all members of the Board and is presided over by the Chairperson. In addition, the CNMC has four directorates (Competition; Energy; Telecommunications and the Audiovisual Industry; and Transport and the Postal Sector).

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<sup>155</sup> Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia (Act 3/2013 of 4 June 2013 creating the National Markets and Competition Commission), <https://www.boe.es/buscar/act.php?id=BOE-A-2013-5940>.

English non-official version: <https://www.cnmc.es/file/64267/download>.

<sup>156</sup> I. Fernández Alonso (2016), "Independent Audiovisual Regulators in Spain: A Unique Case in Europe." *International Journal of Communication* 2016-10, p. 18., <https://ijoc.org/index.php/ijoc/article/view/3845>.





The Board comprises 10 members: the President, the Vice-President and eight members. All members of the Council are appointed by the government by Royal Decree after they have appeared before the relevant committee of the Congress, which may veto the appointment of any member of the Board.

## 6.2.1. Legal distinctiveness and functional independence

In respect of its legal status, the CNMC takes the form of a public entity, with a legal personality of its own, and full ability to conduct itself publicly and privately, and it enjoys full autonomy in respect of the government and public administration. According to Article 2 of Act 3/2013 of 4 June, the CNMC has its own autonomy and independence, recognised by law, as follows:

*“The National Markets and Competition Commission has a separate legal personality and full public and private capacity. It acts, in the pursuit of its activities and for the achievement of its aims, with structural and functional autonomy and is fully independent of the government, of public authorities and of market actors. Moreover, it is subject to parliamentary and judicial oversight.”*

No formal instructions of any kind at any government level are allowed in the performance of its duties. Thus, Article 3 of Act 3/2013 of 4 June underlines the functional independence vis-à-vis public and private entities: “1. The National Markets and Competition Commission shall act, in the pursuit of its activities and for the achievement of its aims, independently of all business or commercial interests; 2. In the performance of the functions conferred on it by legislation, and notwithstanding cooperation with other bodies and the powers of managing general policies of the government exercised through its legislative capacity, neither the staff of nor members of the bodies of the National Markets and Competition Commission may seek or accept instructions from any public or private entity.”

Regarding its functional independence, the CNMC is regulated by Royal Decree 657/2013, 30 August, on the approval of the Statute of the National Commission on Markets and Competition.<sup>157</sup> It regulates the CNMC’s procedures, staff categories, contracts, arbitration functions and structure.

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<sup>157</sup> Real Decreto (RD) 657/2013, de 30 de agosto, por el que se aprueba el Estatuto Orgánico de la Comisión Nacional de los Mercados y la Competencia (Royal Decree 657/2013, 30 August, on the approval of the Organic Statute of National Commission on Markets and Competition), [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-9212](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-9212).  
English non-official version: [https://www.cnmc.es/sites/default/files/editor\\_contenidos/CNMC/RD%20657-2013%20de%2030%20de%20agosto%20Estatuto%20Organico%20CNMC%20eng\\_rev.pdf](https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/RD%20657-2013%20de%2030%20de%20agosto%20Estatuto%20Organico%20CNMC%20eng_rev.pdf).



## 6.2.2. Impartial and transparent exercise of powers

The 2013 Act provides a general statement regarding the CNMC's impartial and transparent exercise of its powers, which is later detailed in Article 37. The general statement explains that the transparency of the Commission's decisions is a factor strengthening its legitimacy and contributing to creating the necessary climate of trust in the institution among citizens.

In relation to audiovisual matters, there is no specific provision or reference regarding whether or not this power ought to be exercised in accordance with the objectives of the new AVMS directive, including the promotion of media pluralism, cultural and linguistic diversity, consumer protection, accessibility and non-discrimination. This is a point that could be included in any reform stemming from the new AVMS directive.

Analysis of the resolutions and decisions reveals no evidence of partial decision-making or treatment of media organisations. However, the two main broadcasting companies offering digital free-to-air channels, Atresmedia and Mediaset, have complained about what they regard as the CNMC's excessive control over, and penalties imposed on, them in comparison to new players, such as Netflix, HBO and YouTube, or small free-to-air operators.<sup>158</sup> The Commission has imposed penalties on public and private broadcasters alike, but the total amount of fines is bigger for the private broadcasters than for the nation-wide public media in Spain, which has no advertising, only sponsorship.

## 6.2.3. Competences, powers and accountability

The CNMC's main function in the audiovisual market is monitoring content; licensing and media ownership concentration control are in the hands of the government. According to Article 9 of Law 3/2013, the CNMC has the following competences in audiovisual matters:

- supervising national broadcasters in respect of the broadcasting quotas of European audiovisual works and investment in European audiovisual works (Art. 9.1);
- supervising fulfilment of obligations regarding the protection of minors and disabled people (art. 9.3);
- controlling audiovisual commercial communications, in respect of obligations, prohibitions and limitations (Art. 9.6);
- supervising compliance with the obligations and limitations imposed by the exclusive contracting of audiovisual content, the broadcasting of content included in the catalogue of events of general interest and the sale and purchase of exclusive rights to ordinary Spanish football competitions (Art. 9.7);

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<sup>158</sup> EFE, "Vasile acusa a la CNMC de una "opresión injustificada" sobre la televisión generalista", *Expansión*, 10 April 2019. <http://www.expansion.com/empresas/2019/04/10/5cae1367468aebd00c8b457f.html>.



- supervising fulfilment of the public service mission entrusted to providers of the public service of audiovisual communication at state level, as well as of the sufficiency of public resources allocated for that purpose (Art. 9.8);
- guaranteeing the freedom to receive, in Spain, audiovisual services whose holders are established in a member state of the EU (Art. 9.9);
- adopting measures to ensure compliance with Spanish legislation when the provider of a televised audiovisual communication service established in another EU member state directs its service entirely or primarily at Spain and has established itself in the other member state in question to circumvent stricter Spanish rules (Art. 9.10); and
- deciding on the non-advertising nature of public service advertisements or charitable advertisements, following an application by interested parties (Art. 9.11).

Regarding accountability, the CNMC is required by Article 37 to publish all of its reports, including its annual report, and its yearly and multi-year plans. The Commission must also publish the resolutions and decisions adopted by the Council and the organisation and functions of each of its bodies, as well as other minor and sectorial documents. The CNMC has been fulfilling this requirement since 2013 through its website. Moreover, in order to assure the CNMC's impartiality, the Commission itself has created a voluntary register of individuals or groups of interest, which has already around 500 entries. The meetings between them and Board members are published on the CNMC website with the date and the participants of the meetings<sup>159</sup>. However, there is no publication of the Board meetings' minutes or deliberations; only a document with Board meeting agreements is published on a regular basis.

#### 6.2.4. Adequate financial and human resources

According to Article 33 of Act 3/2013, the annual budget of CNMC comes out of the State National Budget. The Board of the Commission is in charge of approving the first draft of the annual budget which is then submitted to the Ministry of Economy and Competition. Article 34 provides that control over the budget is under the supervision of the *Intervención General de la Administración del Estado* (State Administration Audit Office), as well as the *Tribunal de Cuentas* (Court of Auditors). The Commission has some autonomy to decide on which tasks it spends its budget. The President of the CNMC can approve internal variations between the different budgetary items as long as they do not increase the overall budget. These variations, once authorised by the President of the Commission, must be notified to the Directorate-General of Budgets of the Ministry of Finance and Public Authorities. However, if these variations affect appropriations for staff expenditure

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<sup>159</sup> [https://www.cnmc.es/transparencia/reuniones-con-empresas?empresa=&field\\_asistente\\_value=&field\\_cargo\\_asistente\\_value=&edit-submit-transparencia-reuniones-con-empresas=Aplicar](https://www.cnmc.es/transparencia/reuniones-con-empresas?empresa=&field_asistente_value=&field_cargo_asistente_value=&edit-submit-transparencia-reuniones-con-empresas=Aplicar).



the power to authorise lies with the Minister of Finance and Public Authorities.<sup>160</sup> This budget limitation and control is important because the CNMC work is highly specialised and it is very difficult to retain talent if there is no authorisation to provide more incentives or remuneration.

Apart from this limit, the regulatory body can decide on its internal human resources, as the Board of the CNMC decides on the appointment of management staff. The CNMC permanent staff has numbered around 500 since 2015. The latest data available shows 489 staff at the end of 2017, 80 of them in the Telecommunications and Audiovisual Department<sup>161</sup>. However, as the CNMC is a super-regulator with many fields and competences, this number is by any standard low. The same applies to the CNMC's budget. The budget is public and has been stable over time – EUR 60 million for 2016 and around EUR 60 million for 2019 – not taking into account inflation. However, the CNMC Chairman says more resources are needed “to retain and attract talent” and notes that “the United Kingdom, for a regulator solely dedicated to Energy, has 300 more workers” than the CNMC.<sup>162</sup>

## 6.2.5. Adequate enforcement powers

The Spanish independent authority enjoys important powers of inspection pursuant to Article 27 of the 3/2013 Act. Tenured civil servants of the CNMC, duly authorised by the relevant director, have the status of an agent of the authority and may conduct as many inspections as required. They can check and copy the books, registers and other documents relating to the activity in question. They can ask any representative or member of staff at the company or association of companies for explanations on acts or documents related to the aim and purpose of the inspection and to record their answers. Companies can object to an inspection, then the CNMC can apply for the appropriate judicial authorisation from the judicial review courts, which issue a decision within a maximum period of 48 hours. Moreover, public authorities provide the necessary protection and assistance to the staff of the CNMC for the exercise of their inspection functions.

In the audiovisual media sector, the CNMC exercises its inspection and penalty powers according to the 7/2010 Act provisions. The Act distinguishes between three levels: very serious infringements; serious infringements; and minor infringements. Examples of very serious infringements are: the broadcasting of content that manifestly promotes hatred, contempt or discrimination on the grounds of birth, race, sex, religion, nationality, opinion or any other personal or social circumstances; broadcasting of commercial communications that violate human dignity or use images of women in a

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<sup>160</sup> Art. 43, RD 657/2013.

<sup>161</sup> CNMC Memoria 2017 (CNMC Activities Report 2017), p. 237, p. 262.

<sup>162</sup> Europa Press (2018) “La CNMC defiende que el Tribunal Supremo le ha dado la razón en el 88% de las sentencias”, <https://www.europapress.es/economia/macroeconomia-00338/noticia-cnmc-defiende-tribunal-supremo-le-dado-razon-88-sentencias-20180314212650.html>.



degrading or discriminatory manner; and failure to comply with more than 10% of the obligations to reserve an annual percentage of broadcasting time for European works and to pre-finance the production of European works. Examples of serious infringements are: failure to comply with the duty of full identification; failure to comply with the instructions and decisions of the audiovisual authority; and failure to comply with the time limit on advertising and teleshopping where this exceeds the permitted amount by 20%. Examples of minor infringements are: failure to comply with the duty to respond to a request for information from the competent authority; or an unjustifiable delay in a response required in accordance with this law.

Article 60 of the 7/2010 Act states that very serious infringements are to be penalised with a fine of between EUR 100 001 and EUR 1 000 000 and, in certain cases, with the revocation of the licence to offer audiovisual media services by means of terrestrial airwaves, thereby resulting in termination of the service. Serious infringements are to be penalised with a fine between EUR 50 001 and EUR 500 000. Finally, minor infringements are to be sanctioned with a fine of up to EUR 100 000 and a minimum of EUR 50 000.

## 6.2.6. Appointment and dismissal procedures

According to the 3/2013 Act<sup>163</sup>, the number of members of the Board is 10, and all of them are appointed by the government by decree, following nomination by the Minister of Economy and Competition. These 10 candidates must be known by their prestige and competence in the scope of work of the Commission. The Spanish Parliament, through a specific Congress of Deputies commission, interviews all of the candidates, who may be rejected by an absolute majority of the votes of the members of the Congress. However, the appointment process is strongly mediated by the interests of political parties, which seek to retain their quota of power in the independent super-regulator through political agreements to share the CNMC Board's seats.<sup>164</sup>

The Board's quorum is attained with the attendance of the President or his/her replacement, the Secretary, and at least five members of the Council.<sup>165</sup> There is a provision regarding the dismissal of a Board member with an expired term or as a consequence of a resignation accepted by the government, which allows him or her to continue in office until the appropriate Royal Decree of vacation of office is published in the Official State Gazette.

The legal causes for a dismissal are quite strict. They include: condemnation through a court sentence in respect of a criminal action; permanent disability; and a governmental decision in case of serious failure to fulfil the duties attached to the

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<sup>163</sup> Art. 13, Ley 13/2013.

<sup>164</sup> Monforte C. (2017), "El Gobierno ultima la renovación de la CNMC que ha pactado con PSOE y C's", *Cinco días*, 2017. [https://cincodias.elpais.com/cincodias/2017/05/31/companias/1496251362\\_486280.html](https://cincodias.elpais.com/cincodias/2017/05/31/companias/1496251362_486280.html).

<sup>165</sup> Art. 17.2, Ley 13/2013.



position or those concerning incompatibility rules, conflicts of interest and discretion obligations. The possibility of dismissing the Board as whole is not contemplated in the 3/2013 Act.

In order to prevent conflicts of interest, the President, Vice-President, Council members, managers and even employees, or their representatives, who have provided professional services at entities in a market or sector under the supervision of the CNMC, must notify the Council of any power or right, irrespective of its designation, regarding the retention or reinstatement of professional relations, indemnification or any advantages of a financial nature. In the case of Council members, that information must be made public.<sup>166</sup>

## 6.2.7. Appeal mechanisms

There are two different appeal mechanisms in the CNMC according to the level of the CNMC's decision or action. If a decision has been made by the bodies of the Commission other than the President and the Board, it can be challenged by way of an administrative appeal to the CNMC. If the decision or act has been effected by the President and the Board, either in the plenum or in one of the chambers, it can only be challenged before the judicial review courts<sup>167</sup>, in this case the *Audiencia Nacional* (National High Court) as a first appeal chamber and the *Tribunal Supremo* (National Supreme Court) as a second and final instance.

CNMC activity and penalties have increased in recent years. As a consequence, appeals against the penalties registered with the review courts are on the rise as well. Some have been overturned due to formal deficiencies, with a big echo in the Spanish economic press. According to the CNMC President, some economic sectors are interested in blurring the CNMC's sanctioning impact.<sup>168</sup> To counter public opinion, the CNMC itself has been obliged to note that the vast majority of the appeals rulings are in favour of the CNMC.<sup>169</sup>

## 6.3. Conclusion

The CNMC's future is not clear. Government and opposition discussions about CNMC reform and structures have occurred in the last two years. In 2018, there were proposals

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<sup>166</sup> Art. 24, Ley 13/2013.

<sup>167</sup> Article 37, Ley 13/2013.

<sup>168</sup> Europa Press (2018), "La CNMC defiende que el Tribunal Supremo le ha dado la razón en el 88% de las sentencias", <https://www.europapress.es/economia/macroeconomia-00338/noticia-cnmc-defiende-tribunal-supremo-le-dado-razon-88-sentencias-20180314212650.html>.

<sup>169</sup> CNMC (2018), "El Tribunal Supremo confirma de media el 83% de las resoluciones de la CNMC", <https://blog.cnmc.es/2018/05/24/el-tribunal-supremo-confirma-de-media-el-83-de-las-resoluciones-de-la-cnmc/>.



to divide up the CNMC and create two new authorities instead, one focused on competition and another dedicated to monitoring and supervising sectorial markets.<sup>170</sup> Shortly thereafter, a new Socialist government tried to promote a reform setting up a new authority with a three-tier sectorial structure: energy; telecommunications and audiovisual matters; and post and transport.<sup>171</sup>

It is evident that the national legislation needs to be updated in the light of the revised AVMS Directive, but how this will be done and how it will affect the CNMC depends on the majorities of the new parliament elected in April 2019. The audiovisual players have often requested a more specific sectorial regulator, which can better understand the audiovisual peculiarities. However, the CNMC as a super-regulator has had a strong impact on the content areas with the penalties it has exacted. It has been very difficult for broadcasters to exert influence over such a super-authority. Thus, independence from industry has been the norm, but a certain dependence on the government remains through the appointment procedure and budget control. The restrictions on budget and human resources make it difficult for the CNMC to cope with the regulatory tasks it has been entrusted with.

The implementation of Article 30 of the AVMS Directive may require some adjustments to Spanish regulation to strengthen the independence of the media regulatory authority: first, to ensure real autonomy in the distribution of the budget without the requirement of authorisation by government officials, especially regarding human resources; secondly, to review dismissal procedures, since Article 30 mandates a public justification, which is not currently foreseen in Spanish law. Finally, it is not clear whether the new Article 30 also implies changing the current appointment procedure, based on a direct decision by the government with a possible veto by Parliament if an absolute majority is reached. A direct appointment of the Board by the Legislator with a strong majority of 2/3 could represent a more representative and democratic approach.

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<sup>170</sup> Rodríguez A. (2018), “El ministro Escolano reactiva la división en dos de Competencia”, *La Vanguardia*, <https://www.lavanguardia.com/economia/20180405/442190460723/escolano-division-comision-nacional-mercados-competencia-cnmc.html>.

<sup>171</sup> Carcar S. (2018), “Giro en la CNMC: el Gobierno Sánchez prepara un supervisor con más poderes”, *La Información*, <https://www.lainformacion.com/espana/sanchez-prepara-cnmc-especializada-con-mas-poderes/6349856/>.







## 7. HU – Hungary

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### 7.1. Introduction

The Hungarian broadcast segment dominates the national media system, whereby linear television is the most popular way to consume audiovisual content.<sup>172</sup> News consumption online (including social media) and in local and regional press is widespread.<sup>173</sup> Since the economic crisis, the print press market has been in an on-going downturn and is gradually losing ground in the country. Public service media (PSM) offerings include general and thematic television and radio channels on various platforms. The national news agency is integrated with the PSM system. Plurality and diversity of content is severely limited by concentrated and politically tied ownership of media outlets.<sup>174</sup> Though television remains the most trusted source of information,<sup>175</sup> public trust in the media is generally low<sup>176</sup> and the vast majority of citizens think their media is not free from undue political influence.<sup>177</sup>

The implementation of the rules under the revised AVMS Directive within the Hungarian legal framework is likely to require the review of several laws. First, amendments must be made to Act CLXXXV of 2010 on Media Services and on the Mass Media (hereafter: Mttv.)<sup>178</sup> with special regards to Part Four which sets out the rules on

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<sup>172</sup> Nielsen Audience Measurement, “TV Piaci Körkép 2018 (Television Snapshot 2018)”, [http://www.nielsentam.tv/Uploads/Hungary/res\\_Snapshot\\_2018\\_hun.pdf](http://www.nielsentam.tv/Uploads/Hungary/res_Snapshot_2018_hun.pdf).

<sup>173</sup> European Journalism Centre, “Media Landscapes – Hungary, 2018”, <https://medialandscapes.org/country/hungary>.

<sup>174</sup> Media Pluralism Monitor (2016), “Monitoring Risks for Media Pluralism in the EU and Beyond Country report: Hungary”, [http://cadmus.eui.eu/bitstream/handle/1814/46799/Hungary\\_EN.pdf?sequence=1&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/46799/Hungary_EN.pdf?sequence=1&isAllowed=y).

<sup>175</sup> Media use in the European Union, Standard Eurobarometer 88 Report, Autumn 2017, p. 22, <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/82786>.

<sup>176</sup> Polyák G. (2014), „Context, Rules and Praxis of the New Hungarian Media Laws. How Does the Media Law Affect the Structure and Functioning of Publicity?”, in: Von Bogdandy A. & Sonnevend P. (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (pp. 125-150), Hart Publishing: Oxford, UK.

<sup>177</sup> Newman N., Fletcher R., Kalogeropoulos A., Levy D. & Kleis Nielsen R. (2017). „Reuters Institute Digital News Report 2017“ p. 74, [https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web\\_0.pdf](https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf).

<sup>178</sup> 2010. évi CLXXXV. törvény a médiaszolgáltatásokról és a tömegkommunikációról (Act CLXXXV of 2010 on Media Services and on the Mass Media), [http://hunmedialaw.org/dokumentum/153/Mttv\\_110803\\_EN\\_final.pdf](http://hunmedialaw.org/dokumentum/153/Mttv_110803_EN_final.pdf).



media regulation. Furthermore, the acts on the budget of the NRA<sup>179</sup> must be assessed. Also, a review of Mttv. vis-à-vis Act CL of 2016 on general public administration procedures<sup>180</sup> may be necessary, to ensure alignment with new rules on appeal procedures.

## 7.2. The National Media and Infocommunications Authority

The National Media and Infocommunications Authority (hereafter: NMHH, or the Authority) was established in 2010 amidst severe national<sup>181</sup> and international criticism.<sup>182</sup> The President, the Media Council and the Office of NMHH are the bodies of the regulator vested with independent jurisdictions.<sup>183</sup> The NMHH is a converged and integrated regulatory agency exercising regulatory and oversight functions. The headquarters of the NMHH are in Budapest (capital city); the agency operates at five locations within the city and at another five across Hungary (in Szeged, Pécs, Debrecen, Miskolc and Sopron). The strategic priorities of NMHH are: stimulating sustainable competition; innovation and investment; modernising media management; promoting the interests of subscribers and of users; and operational excellence.<sup>184</sup>

The regulator oversees Hungarian electronic communications, postal services and media services. It regulates all media platforms, including the print press, radio, television, and online media. The competencies of NMHH span spectrum management, licensing and tendering, registration of media service providers and of services, and monitoring and sanctioning. The National Film Office is also under the auspices of the NMHH.

### 7.2.1. Legal distinctiveness and functional independence

The Mttv. stipulates the legal distinctiveness of the regulator as an autonomous regulatory agency founded by the Hungarian Parliament and subordinated solely to the law.<sup>185</sup> The Articles of Association of NMHH<sup>186</sup> –i.e. the deed of foundation of NMHH,

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<sup>179</sup> Currently the 2018. évi LXXXI. törvény a Nemzeti Média- és Hírközlési Hatóság 2019. évi egységes költségvetéséről (Act LXXXI on the budget of the National Media and Telecommunication Authority).

<sup>180</sup> 2016. évi CL. törvény az általános közigazgatási rendtartásról (Act CL of 2016 on general public administration procedures).

<sup>181</sup> See “Timeline of events”, <https://cmds.ceu.edu/key-resources-new-media-laws-hungary>.

<sup>182</sup> See e.g. Barata J. & Salomon E. (2012), “Expertise by the Council of Europe experts”, <https://rm.coe.int/168048c26f>; Halmai & Scheppele (eds) (2012), “Amicus Briefs on the Hungarian Constitutionalism”, <https://sites.google.com/site/amicusbrieffhungary/>; Haraszti M. (former RFoM OSCE) (2012), “Hungary’s Media Law package”, <http://www.iwm.at/transit/transit-online/hungarys-media-law-package/>.

<sup>183</sup> Article 109 (3), Mttv.

<sup>184</sup> NMHH, “NMHH strategy 2018-2022”, 7 May 2018, p. 10, [http://english.nmhh.hu/document/195890/nmhh\\_strategy\\_2018\\_2022.pdf](http://english.nmhh.hu/document/195890/nmhh_strategy_2018_2022.pdf).

<sup>185</sup> Article 109 (1), Mttv.



issued by the president of the NMHH – further set forth the rules on separation from government and from the markets. Meanwhile, the NMHH carries certain governmental duties in electronic communications<sup>187</sup>, some of which (e.g. spectrum management) with relevance to the media as well. The law states that the NMHH while carrying out those duties may not be deprived of its competencies by the government.<sup>188</sup>

At present, the Media Council and its chairperson are not functionally separated from the PSM provider. Their respective regulatory powers are exerted through the Media Service Support and Asset Management Fund (hereafter: the Fund), the central body responsible for the functioning of the PSM. The Fund is directly involved in program production and acquisition, content distribution and for-profit activities.<sup>189</sup> The Media Council manages the Fund.<sup>190</sup> This function includes approval of its business plan and annual accounts, and setting the rules on the utilisation and management of the State property over which the Fund is entitled to exercise ownership.<sup>191</sup> The chairperson of the Media Council exercises all employers' rights over the Fund's executive director, including appointment, salary and benefits and dismissal.<sup>192</sup>

## 7.2.2. Impartial and transparent exercise of powers

Formal (de jure) safeguards of independence are provided by the law. The NMHH must exercise its powers and jurisdiction independently.<sup>193</sup> Furthermore, the Media Council and its members must act independently and cannot be instructed.<sup>194</sup> However, several significant de facto indicators suggest deficiencies in the independent functioning of the regulator.

According to a study, the Media Council's decision-making regarding market entry regulations and frequency tendering (linear radio services) has been found biased in the critical years after its establishment (2011-2013).<sup>195</sup> The calls for tenders and the evaluation of the applications were studied with a focus on their impact on media pluralism.<sup>196</sup> It was found that awards to successful applicants were often detrimental to plurality in the concerned markets.<sup>197</sup> Further research pointed to other flaws in de facto

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<sup>186</sup> See [http://english.nmhh.hu/article/184446/The\\_NMHHs\\_Articles\\_of\\_Association](http://english.nmhh.hu/article/184446/The_NMHHs_Articles_of_Association).

<sup>187</sup> Article 109 (2), Mttv.

<sup>188</sup> Article 109 (7), Mttv.

<sup>189</sup> Article 108 (1), (7) and (9), Mttv.

<sup>190</sup> Article 136 (6), Mttv.

<sup>191</sup> Article 136 (10), 107 (14), Mttv.

<sup>192</sup> Article 136 (11), Mttv.

<sup>193</sup> Article 109 (6), Mttv.

<sup>194</sup> Article 123 (2), Mttv.

<sup>195</sup> MerteK Media Monitor (2013) "Media Council redraws the radio market - Report on the frequency tendering by the Media Council", <http://www.mertek.eu/en/reports/media-council-redraws-the-radio-market-report-on-the-frequency-tendering-by-the-media>.

<sup>196</sup> MerteK Media Monitor (2014) "Gasping for Air - Soft Censorship in Hungarian Media 2014", *MerteK Booklets Vol. 2*, <http://www.mertek.eu/en/reports/gasping-for-air-soft-censorship-in-hungarian-media-2014>.

<sup>197</sup> Between 2010 and 2013, 31% of all successful frequency tenders were won by a mere four players.



independence in the area of media content standard-setting and its enforcement. Vague and unfounded application of the law exemplified non-compliance with rule of law requirements and insufficient protection of fundamental rights of citizens.<sup>198</sup> The authors, moreover, questioned the independence of the members of the Media Council because, between 2011 and 2013, all of the Media Council decisions regarding radio frequency tenders were rendered without debate or opposing votes.<sup>199</sup> A random sampling of all decisions enacted in 2019 demonstrated similar patterns.<sup>200</sup>

### 7.2.3. Competences, powers and accountability

The NMHH, its president and the Media Council, are provided with an exceptionally wide range of regulatory competences in terms of markets overseen and powers granted. The span includes audiovisual linear and on-demand media, public service media, print and online press, the national motion picture scheme, electronic communication and the postal sector. Corresponding to the audiovisual media sector, competences include issuance of decrees, comprehensive<sup>201</sup> market supervision and enforcement. Furthermore, the Media Council shares responsibilities with the Hungarian Competition Authority in merger control.<sup>202</sup>

Frequency tendering and licensing procedures are critical areas of regulatory intervention. In the field of radio licensing, which is arguably outside the scope of the AVMS Directive, the Media Council is responsible for conducting tendering and is provided with a wide range of discretion in the setting of internal rules of such procedures<sup>203</sup>. It may amend or withdraw calls for tenders<sup>204</sup> without the right of appeal. Additionally, the president of the NMHH is entitled to award licences to local or regional digital broadcasters for up to three years without a tender, in exceptional cases.<sup>205</sup>

The president of the NMHH is also entitled to issue decrees (similar to those at the ministerial level) on fees payable by service providers (frequency fees, fees charged for the reservation and use of identifiers, market supervision fees payable by electronic

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<sup>198</sup> Nagy K. & Lehóczki, Z. (2014), "A médiatartalomra vonatkozó előírások a Médiatechnikai Gyakorlatában 2011-2013" (Media content regulations in the practice of the Media Council 2011-2013), in: Polyák G. & Uszkiewicz E., szerk. *Foglyul ejtett média. Médiapolitikai írások* (pp. 105-148), Gondolat Kiadó: Budapest.

<sup>199</sup> *Ibid.*

<sup>200</sup> Out of 175 decisions adopted in 2019 there was none with any dissent or restraint on the part of any members of the Media Council. See NMHH Records of Meetings, 2019, [http://nmhh.hu/szakmai-erdekelttek/jogforras?HNDTYPE=SEARCH&name=doc&page=1&fld\\_sort=insdt](http://nmhh.hu/szakmai-erdekelttek/jogforras?HNDTYPE=SEARCH&name=doc&page=1&fld_sort=insdt).

<sup>201</sup> Sections 111, 132 and 184 of Mttv.

<sup>202</sup> Article 171, Mttv.

<sup>203</sup> Article 50, Mttv.

<sup>204</sup> Article 53, Mttv.

<sup>205</sup> 2007. évi LXXIV. törvény a műsorterjesztés és a digitális átállás szabályairól (Act of 2007 LXXIV on the Rules of Broadcasting and Digital Switchover), Article 43/M. and 43/N.



communication and postal service providers, administrative service fees) and set the terms and conditions of their respective payment.<sup>206</sup>

The NMHH and its president, as well as the Media Council, are subject to transparency requirements. The NMHH must publish its decisions, and the relevant court orders, on its website.<sup>207</sup> The Media Council must publish its sessions' meeting minutes and decisions adopted.<sup>208</sup> The president of the NMHH must publish draft decrees prior to her/his legislative action and consult relevant stakeholders.<sup>209</sup>

Public announcements must be made on frequency plans for media services and on draft tender notices, including a statement of reasons.<sup>210</sup> Public hearings must be held to consult draft media regulations or obtain experts' positions and opinions, on protective regulatory measures with regards to minors, on the list of designated events considered to be of major importance for society (with regards to exclusive broadcasting rights), and on recommendations in respect of product placement.<sup>211</sup>

The NMHH, the president and the Media Council meet formal requirements on transparency. Nonetheless, the spirit of transparency mechanisms involves the provision of in-depth justification for regulatory interventions, beyond the mere meeting of publishing obligations.<sup>212</sup> The Media Council has not offered qualified reasoning on strategic policy and regulatory objectives despite freedom of information (FOI) requests.<sup>213</sup> Furthermore, publication practices on judicial overview and financial transparency regularly fail to comply with FOI standards. Additionally, public hearing meeting minutes that would genuinely inform on stakeholders' positions have not been made available.<sup>214</sup>

The NMHH and the Media Council must take stock, on a yearly basis, before the Hungarian Parliament.<sup>215</sup> In the form of annual reports, the president of the NMHH must report on freedom of expression and of the media in Hungary, on trends in relevant markets including ownership structures, on the impact of regulation on media output, on the operations of the Media Council and on PSM media services.<sup>216</sup> The annual reports of NMHH are of a descriptive nature and do not indicate policy positions of the regulator. The Parliament must discuss the report and approve it. Upon approval, the NMHH must publish the report. Since the NMHH was established in 2010, all of its reports were approved by the Hungarian Parliament.

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<sup>206</sup> Article 134 (5) and 206, Mttv.

<sup>207</sup> Article 162 (2), Mttv.

<sup>208</sup> See <http://english.nmhh.hu/media-council/sessions>.

<sup>209</sup> See NMHH Stakeholder Consultation, see e.g. Public Consultation on spectrum auctions, [http://nmhh.hu/cikk/202646/Rendelettervezet\\_a\\_frekvenciahasznalati\\_jogosultsag\\_megszerzeset\\_szolgalo\\_arv\\_eres\\_es\\_palyazat\\_szabalyaitol\\_szolo\\_42011\\_X6\\_NMHH\\_rendelet\\_modositasarol](http://nmhh.hu/cikk/202646/Rendelettervezet_a_frekvenciahasznalati_jogosultsag_megszerzeset_szolgalo_arv_eres_es_palyazat_szabalyaitol_szolo_42011_X6_NMHH_rendelet_modositasarol).

<sup>210</sup> Article 49 (5) and 50 (1), Mttv., further see [http://english.nmhh.hu/tart/report/148/Media\\_service\\_tenders](http://english.nmhh.hu/tart/report/148/Media_service_tenders).

<sup>211</sup> Article 157 and 158; 10 (6) and 11 (3); 16 (2); and 31 (4), Mttv.

<sup>212</sup> Article 183 (1) i and j, Mttv.; the law requires the Media Council to prepare and make available media and spectrum policies and positions.

<sup>213</sup> See FOI requests at <https://kimitud.atlatszo.hu/body/mediatanacs>.

<sup>214</sup> Ibid. 39. NMHH Stakeholder Consultation.

<sup>215</sup> Article 109 (4) and 119, Mttv.

<sup>216</sup> See <http://nmhh.hu/kozerdeku-adatok/tevekenyseg-mukodes/orszaggyulesi-beszamolok>.



## 7.2.4. Adequate financial and human resources

The Hungarian regulator is one of the few in the region of Central and Eastern Europe<sup>217</sup> that relies largely on own financial revenues<sup>218</sup> (91% self-funded, 9% from state budget funds) stemming mostly from its electronic communication activities. The consolidated budget must be approved by the Parliament. The NMHH and the Media Council must manage their respective budgets independently, including allocation of funds for activities. Annual reserve funds (max. 25%) may not be drawn on for other purposes. Furthermore, the president has the authority to restructure approved resources while the Media Council's authorisation is necessary for re-allocations affecting its own budget.<sup>219</sup> This includes a discretionary right to the reallocate funds to financing PSM, and to further instruct on the use of those funds.<sup>220</sup>

The annual budget of the NMHH was set at ca. EUR 108 million for 2019.<sup>221</sup> The financial stability of the NMHH has been guaranteed in the years since its establishment in 2010, with similar budget figures, which are relatively high compared to those of other regulatory authorities with comparable tasks in Hungary.<sup>222</sup>

The NMHH operates with a staff of approximately 650 professionals<sup>223</sup> organised into several units reporting to the president directly or to the executive director.<sup>224</sup> The overall size of staff is relatively extensive compared to other regulators in Hungary with similar competencies<sup>225</sup>, and to other best practice regulators overseeing significantly bigger markets.<sup>226</sup> How many staff work on audiovisual media and broadcasting is not obvious due to a lack of public data.

The human resources policy is independently formed by NMHH,<sup>227</sup> while general rules are applicable to the executive director, to deputy directors, and to the employees.<sup>228</sup> The president of the NMHH is assigned with the sole authority to define functions of jobs, scope of human resources<sup>229</sup> and remuneration policy including non-wage benefits.<sup>230</sup> This

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<sup>217</sup> Adriana M. (2018), "The Institutional Design of Audiovisual Media Regulators: Evidence from Central and Eastern Europe", *Yearbook of the Institute of East-Central Europe*, (16)5, pp. 105-122.

<sup>218</sup> Article 134 (1), Mttv.

<sup>219</sup> Article 134 (2), Mttv.

<sup>220</sup> Article 134 (5), Mttv.

<sup>221</sup> Ibid, 7.

<sup>222</sup> E.g. the annual budget of the Competition Authority was set approx. 16 times lower (EUR 6 890 041) for 2018.

<sup>223</sup> See NMHH, <http://english.nmhh.hu/the-nmhh>.

<sup>224</sup> See NMHH organogram, [http://english.nmhh.hu/document/194539/NMHH\\_Organogram.pdf](http://english.nmhh.hu/document/194539/NMHH_Organogram.pdf).

<sup>225</sup> The Competition Authority is staffed with 125 employees (2018).

<sup>226</sup> Ofcom (the UK regulator) was staffed with 868 full-time employees in 2018:

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0012/115230/annual-report-1718-accessible.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0012/115230/annual-report-1718-accessible.pdf).

<sup>227</sup> Article 110/A. (1), Mttv.

<sup>228</sup> 2011. évi CXCV. törvény a közszolgálati tisztviselőkről (Act 2011 CXCV on Public Service Officials).

<sup>229</sup> Article 110/A. (3), Mttv.

<sup>230</sup> Article 110/A. (4), Mttv.



extensive power over professional staff is not balanced with accountability requirements.<sup>231</sup>

## 7.2.5. Adequate enforcement powers

In the context of audiovisual media services, the NMHH and its organs possess an exceptionally extensive scope of enforcement powers. They extend from general inspections through specific market analyses procedures to strong sanctioning.

The NMHH is in a position to ensure media diversity while interfering with market concentration matters. A key regulatory power lies here with available measures for the prevention of media market concentration and for identifying audiovisual media service providers with Significant Powers of Influence (SPI).<sup>232</sup> Once the NMHH identifies a media service provider as holding SPI, it has unique authorisation to set specific obligations and rules severely restricting market presence and activities.<sup>233</sup> The obligations on SPI media service providers (including the obligation to broadcast daily news programs and original language cinematographic works) can take the form of a public contract entered into with the Media Council.<sup>234</sup> Additionally, shared responsibilities of the Media Council with the Hungarian Competition Authority in merger control cases further extend the scope of regulatory intervention in this area.<sup>235</sup>

The NMHH and the law compel media service providers to disclose information upon request.<sup>236</sup> Media service providers have to register detailed data (and changes therein) with regards to linear, on-demand media services and press products.<sup>237</sup> Meanwhile, the Office of the NMHH is entitled to enforce such data provision requirements by setting fines in the event of breaches.<sup>238</sup>

Overall, the sanctioning powers of the NMHH are extensive and significant. In cases of non-compliance with administrative actions, there is an option to issue administrative fines to a media service provider, including sanctioning its executive officer.<sup>239</sup> Moreover, in cases of infringements of media regulation the Media Council and the Office of the NMHH can impose the following sanctions, even cumulatively:

- issue a warning, order the discontinuation of unlawful conduct and refraining from any further infringement in the future, or prohibit unlawful conduct;<sup>240</sup>

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<sup>231</sup> According to Article 110/A. (7), Mttv. there is no requirement on disclosing information concerning human resources management.

<sup>232</sup> Articles 70, Mttv.

<sup>233</sup> Articles 68, Mttv.

<sup>234</sup> Articles 70 (10), Mttv.

<sup>235</sup> Article 171, Mttv.

<sup>236</sup> Article 41, Mttv.

<sup>237</sup> Article 42, 45 and 46, Mttv.

<sup>238</sup> Article 41 (10), 45 (8) and 46b(8a) and 185 (2), 187 (3), Mttv.

<sup>239</sup> Article 175 (8), 70 (3), Mttv., up to fifty thousand and three million forints.

<sup>240</sup> Article 186 (1) and 186 (2) Mttv.





- impose significant fines upon the executive officer, an SPI media service provider, other media providers, press publishers (including online), broadcasters (up to five million forints), and intermediary service providers;<sup>241</sup>
- suspend the provision of media services;<sup>242</sup> and
- de-register media service providers or terminate the public contract concluded, in which case the distribution of the media service is also suspended.<sup>243</sup>

The financial sanctions are enforceable within administrative procedures.<sup>244</sup> However, in the case of non-compliance with sanctioning resolutions, suspension of service (including making online press unavailable) is foreseen.<sup>245</sup> An independent study found the scope of the sanctioning powers of the regulator unprecedented compared with other European countries' practices.<sup>246</sup>

## 7.2.6. Appointment and dismissal procedures

The President of the Republic appoints the president of the NMHH for a term of nine years on a recommendation by the Prime Minister. Following termination of the mandate, the president may not be appointed for a second term.<sup>247</sup> The president must appoint the vice-presidents, the executive director of the Office of the NMHH, and the deputy directors, and can remove them from office without the requirement of justification<sup>248</sup>. The powers of the president are not balanced with institutional checks.

The Hungarian Parliament elects the chairperson and the four members of the Media Council for a term of nine years, whereby the President of the NMHH is the automatic nominee to the chairperson of the Media Council.<sup>249</sup> The mandate of the President is terminated if the President is not elected as chairperson of the Media Council.<sup>250</sup> The terms of the mandate of the President and of the chairperson are identical and the two roles are strictly bound to each other.<sup>251</sup> In the event of a one-party majority within the Parliament (the case in Hungary since 2010), the chairperson and all members can be nominated and elected in a partisan manner (a matter of de facto independence).<sup>252</sup>

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<sup>241</sup> Article 187 (1) and (3).

<sup>242</sup> Article 187 (3) d, Mttv.

<sup>243</sup> Articles 187 (3) e, 189 (1), Mttv.

<sup>244</sup> Article 187 (8), Mttv.

<sup>245</sup> Article 189 (2), (3) and (4).

<sup>246</sup> Centre for Media and Communication Studies (CMCS), "Hungarian Media Laws in Europe: An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms", March 2012, <https://cmds.ceu.edu/article/2014-03-09/hungarian-media-laws-europe-assessment>.

<sup>247</sup> Article 111/A. (1) and (3), Mttv.

<sup>248</sup> Article 112; 115 (1); 117 (1) ; 113 (4) and (6); 115 (7); and 117 (4), Mttv.

<sup>249</sup> Article 124 and 125, Mttv.

<sup>250</sup> Article 113 (1e), Mttv.

<sup>251</sup> Article 113 (1e); 125 (7) Mttv.

<sup>252</sup> The President of the Republic was also elected by majority of parliamentary votes.





There are several rules on conflict of interest with regards to the President and vice-presidents of the NMHH, the executive director and the deputy directors of the Office of the NMHH. These rules are to prevent *inter alia*: the holding of office in the government or local municipalities, with the PSM; membership in the European and national Parliament, or acting as mayor; affiliation with political parties; or exercising any function or possessing any interest in an enterprise or other organisation in the media or related sector.

These rules are also applicable to the members of the Media Council.<sup>253</sup> The President and the vice presidents of the NMHH and the members of the Media Council are also subject to revolving-door restrictions for one year following termination of their mandate.<sup>254</sup> In cases where conflicts of interest are not resolved within 30 days of occurrence or of appointment, the president of the NMHH<sup>255</sup>, the chairperson and the members of the Media Council<sup>256</sup> must be dismissed on an individual basis. There are no rules in place addressing failure of the Media Council to attain a quorum.

## 7.2.7. Appeal mechanisms

The decisions of the NMHH (the Office thereof) and of the Media Council can be appealed according to general rules on public administration procedures<sup>257</sup> with the exceptions set out by the Mttv.<sup>258</sup>

The resolutions of the Media Council may not be appealed but judicial review is provided at the court of jurisdiction for administrative actions with no suspensory effect on the appealed decision (unless the court renders a suspension).<sup>259</sup> Review procedures fall under the exclusive competence of the Budapest Court of Public Administration and Labour (Fővárosi Közigazgatási és Munkaügyi Bíróság), which may also overturn the resolution appealed.<sup>260</sup>

Meanwhile, the decisions of the Office of the NMHH can be appealed at the Media Council with a suspensory effect.<sup>261</sup> A resolution of the Media Council adopted in the second instance can be further challenged at the court with no suspensory effect on the reviewed resolution (unless the court renders a suspension).<sup>262</sup>

There are specific rules applicable *inter alia* to judicial review of the decisions of the Media Council during tendering procedures on the rejection of registration of

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<sup>253</sup> Article 127, Mttv.

<sup>254</sup> Article 113 (8) and 129 (9), Mttv.

<sup>255</sup> Article 113 (2), Mttv.

<sup>256</sup> Article 129 (2), Mttv.

<sup>257</sup> *Ibid.* 9.

<sup>258</sup> Article 144 (1) and 166, Mttv.

<sup>259</sup> Article 163 (1) and (3), Mttv.

<sup>260</sup> Article 164 (2), (3), Mttv.

<sup>261</sup> Article 165 (1), Mttv.

<sup>262</sup> Article 165 (3) and (4), Mttv.



bidders,<sup>263</sup> and to resolutions identifying SPI media service providers and setting obligations accordingly.<sup>264</sup> Furthermore, judicial review of sanctioning resolutions leading up to suspension of dissemination of media services (including online and print press) can be sought at the specified court (see above).<sup>265</sup> In these procedures, neither does the review request have a suspensory effect nor does the court have jurisdiction to order such a suspension, and the resolution is executable with immediate effect.<sup>266</sup> The ruling of the court may not be appealed either.

### 7.3. Conclusion

Implementation of Article 30 of the 2018 AVMS Directive requires both de jure and de facto independence of regulators. The independence paradox was showcased earlier in the Hungarian experience, with the regulator considered formally compliant with EU requirements while manifesting serious anomalies in its operations.<sup>267</sup> Such weakness of formal guarantees of independence in countries where actual independence has been subject to the greatest challenges was further pointed out.<sup>268</sup> Therefore, it is to be expected that the enforcement of the new rules of the AVMS Directive will be under the highest scrutiny at the European level.

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<sup>263</sup> Article 58 (2), Mttv., rendering courts for non-contentious proceedings.

<sup>264</sup> Article 70 (9), Mttv., rendering courts for priority proceedings.

<sup>265</sup> Article 189 (1-4), Mttv.

<sup>266</sup> Article 189 (8), Mttv.

<sup>267</sup> Polyák G. and Rozgonyi K. (2015), "Monitoring media regulators' independence – Evidence-based indicators, Hungarian experience", *International Journal of Digital Television*, (6)3, pp. 257–273, doi: 10.1386/jdtv.6.3.257\_1.

<sup>268</sup> Mutu A. (2018), "The regulatory independence of audiovisual media regulators: A cross-national comparative analysis", *European Journal of Communication*, 33(6), pp.619–638, <https://doi.org/10.1177/0267323118790153>.



## 8. IE – Ireland

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### 8.1. Introduction

In the latest research on the Irish media landscape, the broadcast media market has been described as mature and competitive, and characterised by a relatively small population sharing a language with much larger markets (UK and US).<sup>269</sup> The public service broadcaster RTÉ is the main TV broadcaster, operating four national channels (RTÉ One, RTÉ2, RTÉ News Now and RTÉjr), followed by the national commercial broadcaster Virgin Media Ireland, operating Virgin One, Virgin Two, and Virgin Three. There is also the public service broadcaster TG4, providing an Irish-language channel. There are four pay TV operators, led by Sky and Virgin, and nearly two-thirds of Irish TV households pay a monthly subscription for TV.<sup>270</sup> Around a third of Irish households subscribe to monthly subscription Video on Demand services such as Netflix.<sup>271</sup> There are currently 34 commercial radio stations and 22 community stations in Ireland. RTÉ is the leading radio broadcaster, with four national stations (RTÉ Radio 1, RTÉ 2FM, Raidió na Gaeltachta, and RTÉ lyric fm). Communicorp operates the two national commercial radio stations (Today FM and Newstalk). The leading Irish newspaper is the *Irish Independent*, while TheJournal.ie is the most popular news website, followed by RTÉ online (rte.ie), and the *Irish Independent* online (independent.ie).<sup>272</sup> Two international non-governmental

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<sup>269</sup> Mediatique, “A report on market structure, dynamics and developments in Irish media” (Broadcasting Authority of Ireland, 2017), p. 2, [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2018/04/180410-Mediatique-Report.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/180410-Mediatique-Report.pdf). See also Robert Kenny and Robin Foster, “Ownership and control of media businesses in Ireland, 2015-17” in Broadcasting Authority of Ireland, *Report on Ownership and Control of Media Businesses in Ireland 2015-2017*, Annex 1, 30 January 2019, <https://www.dccae.gov.ie/en-ie/communications/publications/Pages/BAI-Report-on-Ownership-and-Control-of-Media-Businesses-2015-2017.aspx>; and RTÉ, “The Media Landscape in Ireland: An Overview” (RTÉ, 2017), <https://static.rasset.ie/documents/about/2017/10/the-media-landscape-in-ireland.pdf>.

<sup>270</sup> Mediatique, “A report on market structure, dynamics and developments in Irish media” (Broadcasting Authority of Ireland, 2017), p. 2, [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2018/04/180410-Mediatique-Report.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/180410-Mediatique-Report.pdf).

<sup>271</sup> Mediatique, “A report on market structure, dynamics and developments in Irish media” (Broadcasting Authority of Ireland, 2017), p. 2, [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2018/04/180410-Mediatique-Report.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/04/180410-Mediatique-Report.pdf).

<sup>272</sup> Culloty E., Cunningham K., Suiter J. and McNamara J. (2018), *Reuters Institute Digital News Report 2018 (Ireland)* (Dublin City University & Broadcasting Authority of Ireland), p. 8,



organisations, Reporters Without Borders and Freedom House, rank Ireland in the top 20 of their global media freedom indices, but also note the “highly concentrated nature of media ownership in Ireland continues to pose a major threat to press freedom”.<sup>273</sup>

The main legislation on broadcasting and on-demand audiovisual media comprises the Broadcasting Act 2009,<sup>274</sup> the European Communities (Audiovisual Media Services) Regulations 2010,<sup>275</sup> and the European Communities (Audiovisual Media Services) (Amendment) Regulations 2012.<sup>276</sup> In early March 2019, the Irish government launched a public consultation on the implementation of the revised 2018 AVMS Directive, and indicated primary legislation will be required for its implementation.<sup>277</sup>

## 8.2. Broadcasting Authority of Ireland

The national regulatory authority for audiovisual media services in Ireland is the Broadcasting Authority of Ireland (BAI), which was established in 2009, and replaced the previous Broadcasting Commission of Ireland and the Broadcasting Complaints Commission. The BAI sits in Dublin, and consists of an Authority, a Contract Awards Committee, and a Compliance Committee. The functions of the BAI include licensing radio and television services, reviewing performance and public funding of public service broadcasters, awarding funding under the Broadcasting Funding Scheme, and ensuring compliance of broadcasters with broadcasting codes and rules.<sup>278</sup> The BAI has a limited role in relation to on-demand audiovisual media services. Under the European Communities (Audiovisual Media Services) Regulations 2010,<sup>279</sup> the BAI is required to develop, in co-operation with providers of on-demand audiovisual media services, the

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[https://fujomedia.eu/wp-content/uploads/2018/06/DNR\\_Final\\_Web-3.pdf](https://fujomedia.eu/wp-content/uploads/2018/06/DNR_Final_Web-3.pdf).

<sup>273</sup> See Reporters Without Borders, “Ireland”, <https://rsf.org/en/Ireland>; Freedom House, “Freedom of the Press 2017” (2017), p. 27, [https://freedomhouse.org/sites/default/files/FOTP\\_2017\\_booklet\\_FINAL\\_April28.pdf](https://freedomhouse.org/sites/default/files/FOTP_2017_booklet_FINAL_April28.pdf); and Freedom House, “Ireland”, <https://freedomhouse.org/report/freedom-press/2016/ireland>. See also, Roddy Flynn, “Monitoring Media Pluralism in Europe - Country Report: Ireland” (Centre for Media Pluralism and Media Freedom, 2018),

[http://cadmus.eui.eu/bitstream/handle/1814/61144/2018\\_Ireland.pdf?sequence=3&isAllowed=y](http://cadmus.eui.eu/bitstream/handle/1814/61144/2018_Ireland.pdf?sequence=3&isAllowed=y).

<sup>274</sup> Broadcasting Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/html>.

<sup>275</sup> European Communities (Audiovisual Media Services) Regulations 2010, S.I. No. 258/2010,

<http://www.irishstatutebook.ie/eli/2010/si/258/made/en/print>.

<sup>276</sup> European Communities (Audiovisual Media Services) (Amendment) Regulations 2012, S.I. No. 247/2012,

<http://www.irishstatutebook.ie/eli/2012/si/247/made/en/print>.

<sup>277</sup> Department of Communications, Climate Action & Environment, Public Consultation on the Regulation of Harmful Content on Online Platforms and the Implementation of the Revised Audiovisual Media Services Directive - Explanatory Note, 1 March 2019, p. 2,

<https://www.dccae.gov.ie/en->

<ie/communications/consultations/Documents/86/consultations/Consultation%20Explanatory%20Note.pdf>.

<sup>278</sup> Broadcasting Act 2009, section 26. See Broadcasting Authority of Ireland, ‘About Us’,

<https://www.bai.ie/en/about-us/>.

<sup>279</sup> See European Communities (Audiovisual Media Services) Regulations 2010, S.I. No. 258/2010,

<http://www.irishstatutebook.ie/eli/2010/si/258/made/en/print>.



Code of Conduct on On-Demand Audiovisual Media Services.<sup>280</sup> The current Code provides that complaints over certain violations of the Code may be made to the self-regulatory Advertising Standards Authority for Ireland (ASAI),<sup>281</sup> and requires on-demand audiovisual media service providers to put in place complaint-handling procedures. The BAI accepts appeals against resolutions of complaints with regard to certain breaches of the Code.<sup>282</sup>

## 8.2.1. Legal distinctiveness and functional independence

The Broadcasting Act 2009 contains a number of provisions seeking to ensure the BAI is legally distinct from government, and functionally independent of government and any other body. First, section 7 establishes the BAI as a distinct statutory "body corporate", with its own power to sue, acquire, hold and dispose of land and other property, and with its own seal.<sup>283</sup> Second, section 31 sets out the BAI's statutory powers, including that the BAI has "all the powers necessary, incidental or conducive to [its] functions".<sup>284</sup> In a stand-alone provision, section 24 provides that, "[s]ubject to this Act, the Authority and each statutory committee shall be independent in the performance of their functions".<sup>285</sup> Further, each member of the Authority and the Committees is under a statutory obligation to "represent the public interest in respect of broadcasting matters".<sup>286</sup>

## 8.2.2. Impartial and transparent exercise of powers

In relation to ensuring that the BAI exercises its powers impartially and transparently, a number of rules and measures are relevant. First, section 22 of the Broadcasting Act 2009 contains rules on any conflicts of interest for BAI staff, and under section 23, the BAI is required to adopt a code of conduct on interests and ethical behaviour for staff. As such, the BAI has adopted its Code of Business Conduct to ensure that "all persons having dealings with the BAI are dealt with on a fair and equitable basis",<sup>287</sup> and also sets out the BAI's Anti-Bribery Policy.<sup>288</sup> BAI staff is also subject to legislation on ethics,<sup>289</sup> anti-

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<sup>280</sup> Code of Conduct On-Demand Audiovisual Media Services, <http://www.bai.ie/en/download/128548>.

<sup>281</sup> Advertising Standards Authority for Ireland, <https://www.asai.ie>.

<sup>282</sup> Code of Conduct On-Demand Audiovisual Media Services, Part 3, section 7, <http://www.bai.ie/en/download/128548>.

<sup>283</sup> Broadcasting Act 2009, section 7(1).

<sup>284</sup> Broadcasting Act 2009, section 31.

<sup>285</sup> Broadcasting Act 2009, section 24.

<sup>286</sup> Broadcasting Act 2009, section 9(2).

<sup>287</sup> BAI, Code of Business Conduct, 2018, [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2013/11/2018\\_CodeBusinessConduct\\_vFinal\\_SH.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2013/11/2018_CodeBusinessConduct_vFinal_SH.pdf).

<sup>288</sup> BAI, Code of Business Conduct, 2018, p. 11, [https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2013/11/2018\\_CodeBusinessConduct\\_vFinal\\_SH.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2013/11/2018_CodeBusinessConduct_vFinal_SH.pdf).

<sup>289</sup> Ethics in Public Office Act 1995, <http://www.irishstatutebook.ie/eli/1995/act/22/enacted/en/html>; and Standards in Public Office Act 2001, <http://www.irishstatutebook.ie/eli/2001/act/31/enacted/en/html>.



corruption,<sup>290</sup> lobbying,<sup>291</sup> and whistle-blowers.<sup>292</sup> The BAI has a Policy on Whistleblowing,<sup>293</sup> and publishes a Protected Disclosure Annual Report detailing any whistle-blower disclosures.<sup>294</sup> The Standards in Public Office Commission also maintains a searchable online register of lobbying activities, detailing any registered lobbying of public officials, including the BAI's Designated Public Official.<sup>295</sup> Section 30 also provides that the Minister for Communications "shall not issue a communication in respect of the performance of the functions of the Authority, in respect of individual undertakings or persons", or "in respect of the performance of the functions of the Contract Awards Committee or the Compliance Committee".

In terms of transparency, the BAI publishes agendas and minutes of meetings, decisions on the award of licences, decisions on complaints, annual reports, financial accounts, corporate policy and reports, and purchase reports.<sup>296</sup> The BAI is also subject to the Freedom of Information Act 2014, and required to have a Publication Scheme, in order to make as much information as possible available to the public.<sup>297</sup> The BAI also publishes a log of FOI requests it receives, the information sought and decisions made by the BAI.<sup>298</sup>

### 8.2.3. Competences, powers and accountability

The competences and powers of the BAI are specifically enumerated in various provisions of the Broadcasting Act 2009, including: section 25 setting out the BAI's objectives; sections 26-27 setting out the functions of the BAI and its committees; section 31 setting out the BAI's powers; and section 32 setting out the duties of the BAI and its committees.<sup>299</sup> Further, the BAI's competences in relation to broadcast licensing are set out in Part 6 of the Broadcasting Act 2009, where, for example, the Authority, on the recommendation of the Contract Awards Committee, enters into "television programme service contracts" for the provision of television programme services; and in relation to the Broadcasting Fund in Part 10. The BAI also has a role in media merges, and its

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<sup>290</sup> Criminal Justice (Corruption Offences) Act 2018, section 17(9), <http://www.irishstatutebook.ie/eli/2018/act/9/enacted/en/>.

<sup>291</sup> Regulation of Lobbying Act 2015, <http://www.irishstatutebook.ie/eli/2015/act/5/enacted/en/html>.

<sup>292</sup> Protected Disclosures Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/14/enacted/en/html>.

<sup>293</sup> Broadcasting Authority of Ireland, "BAI Policy on Whistle-blowing", <http://www.bai.ie/en/download/129356/>.

<sup>294</sup> Broadcasting Authority of Ireland, "Protected Disclosure Annual Report", 26 June 2018, <http://www.bai.ie/en/download/132984>.

<sup>295</sup> Standards in Public Office Commission, "Register of Lobbying", <https://www.lobbying.ie>.

<sup>296</sup> See Broadcasting Act 2009, sections 38 and 45. The BAI also publishes documents in the Irish language (*Gaeilge*), and is subject to the Official Languages Act 2003: it is required to provide certain services in the Irish language. See <http://www.irishstatutebook.ie/eli/2003/act/32/enacted/en/html>.

<sup>297</sup> Freedom of Information Act 2014, <http://www.irishstatutebook.ie/eli/2014/act/30/enacted/en/html>. See Ronan Ó Fathaigh, "New Freedom of Information Law", IRIS 2015/25, <https://merlin.obs.coe.int/iris/2015/1/article25.en.html>.

<sup>298</sup> Broadcasting Authority of Ireland, "FOI Disclosure Log", <https://www.bai.ie/en/foi-disclosure-log>.

<sup>299</sup> See Broadcasting Act 2009, <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.



competences in relation to media mergers are set out in Part 4 of the Competition and Consumer Protection Act 2014.<sup>300</sup>

In terms of accountability, there are a number of relevant provisions in the Broadcasting Act 2009 and the FOI Act 2014. Under section 45 of the Broadcasting Act, the Compliance Committee must publish its decisions, and the reasons. Under section 38, the BAI is required to submit annual reports to the Minister, and the Minister must lay each annual report before parliament, making it available to be read. The BAI also has an archive of all annual reports on its website.<sup>301</sup> Further, under the FOI Act, the BAI is required to publish minutes of meetings, and the BAI has an archive of all minutes on its website.<sup>302</sup>

There are also various requirements under the Broadcasting Act for the BAI to undertake public consultations, such as under section 44, where the BAI is required to publish a draft of broadcasting codes and rules, and must have regard to any submission made. The BAI is also required, with the consent of the Minister for Communications and the Minister for Finance, to publish three-year estimates of income and expenditure.<sup>303</sup> The BAI's annual reports contain the BAI's annual financial statements, and include Comptroller and Auditor General (the public audit body) reports on financial audits of the BAI, which is required under section 37 of the Broadcasting Act.<sup>304</sup> These reports are also publicly accessible on the BAI's website.<sup>305</sup>

## 8.2.4. Adequate financial and human resources

The BAI's main source of income is a levy imposed on broadcasters under section 33 of the Broadcasting Act 2009, and the basis for calculating this levy is detailed in the Broadcasting Act 2009 (Section 33) Levy Order 2010.<sup>306</sup> The BAI publishes a Levy Calculation Table, setting out the BAI's estimated cost for year. The BAI also publishes its actual costs for the year, which were EUR 44 million in 2017.<sup>307</sup>

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<sup>300</sup> Competition and Consumer Protection Act 2014, Part 4, <http://www.irishstatutebook.ie/eli/2014/act/29/enacted/en/print.html>. See Ronan Ó Fathaigh, 'New Law on Media Mergers', IRIS 2015-2/23, <https://merlin.obs.coe.int/iris/2015/2/article23.en.html>.

<sup>301</sup> Broadcasting Authority of Ireland, "Publications", <https://www.bai.ie/en/news-and-information/publications>.

<sup>302</sup> Broadcasting Authority of Ireland, "Publications", <https://www.bai.ie/en/news-and-information/publications>.

<sup>303</sup> Broadcasting Act 2009, 37(7), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.

<sup>304</sup> Broadcasting Act 2009, 37, <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>. See also Office of the Comptroller and Auditor General, <https://www.audit.gov.ie/en/about-us/the-comptroller-and-auditor-general>.

<sup>305</sup> See, e.g., BAI, "Annual Report 2017", 22 November 2018, p. 85 (Report of the Comptroller and Auditor General), <http://www.bai.ie/en/download/133414>.

<sup>306</sup> Broadcasting Act 2009 (section 33) Levy Order 2010, S.I. No. 7/2010, <http://www.irishstatutebook.ie/eli/2010/si/7/made/en/print>.

<sup>307</sup> BAI, Levy Calculation Table, <http://www.bai.ie/en/download/133359>.





On the question of whether the BAI's budget has been sufficiently stable over time, in its latest annual report, it stated that "[t]here is no material uncertainty regarding the Broadcasting Authority of Ireland's ability to meet its liabilities as they fall due."<sup>308</sup> Further, on whether the BAI requested ad-hoc financial contributions from the state, in its annual report, the BAI reported that, "[i]n 2016, pursuant to section 35 of the Broadcasting Act 2009, the Authority obtained sanction for a loan facility of EUR 1 million with the National Treasury Management Agency, in order to allow the Authority to manage its cash-flow requirements arising as a result of differences in the timing of receipt of levy income", with ... " EUR 500,000 drawn down in December 2017 [and] ... repaid to the National Treasury Management Agency in January 2018".<sup>309</sup>

Section 13 of the Broadcasting Act 2009 concerns staffing of the BAI. It provides that the BAI "shall, as well as appointing the chief executive, appoint such and so many other persons to be members of the staff of the Authority as the Authority from time to time thinks proper, subject to the prior consent of the Minister [for Communications] and the Minister for Finance."<sup>310</sup> In its latest annual report, the BAI disclosed that it had 35 full-time staff.<sup>311</sup> It should be noted that the BAI's Chief Executive stated in the annual report that "[i]t would be remiss of me not to mention the on-going resource challenges where the BAI continues to operate with less staff than our predecessor the BCI, which had many less responsibilities."<sup>312</sup> Similarly, in its 2016 annual report, the BAI stated that "[s]taffing and resourcing for the BAI continues to be a challenge ... the BAI notes that its staff numbers remain low in the context of its additional statutory responsibilities following the introduction of the Broadcasting Act 2009."<sup>313</sup> The previous Broadcasting Commission of Ireland had 42 staff in 2008,<sup>314</sup> while the Competition and Consumer Protection Commission currently has 90 staff;<sup>315</sup> and the Data Protection Commission has 135 staff.<sup>316</sup>

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<sup>308</sup> BAI, "Annual Report 2017", November 2018, p. 71, <http://www.bai.ie/en/download/133414>.

<sup>309</sup> BAI, "Annual Report 2017", 22 November 2018, p. 78, <http://www.bai.ie/en/download/133414>.

<sup>310</sup> Broadcasting Act 2009, section 15(1), <http://www.irishstatutebook.ie/eli/2010/si/7/made/en/print>. See also, Laura Slattery, "Broadcasting Authority calls for additional resources" *The Irish Times*, 26 September 2016, <https://www.irishtimes.com/business/media-and-marketing/broadcasting-authority-calls-for-additional-resources-1.2804857>.

<sup>311</sup> BAI, "Annual Report 2017", 22 November 2018, p. 48, <http://www.bai.ie/en/download/133414>.

<sup>312</sup> BAI, "Annual Report 2017", 22 November 2018, p. 7, <http://www.bai.ie/en/download/133414>.

<sup>313</sup> BAI, "Annual Report 2016", p. 48, 14 November 2017, <http://www.bai.ie/en/download/132450/>.

<sup>314</sup> BAI, "Annual Report and Accounts 2008", 30 September 2009, p. 8, <http://www.bai.ie/en/download/129188/>.

<sup>315</sup> Competition and Consumer Protection Commission, "Annual Report 2017", 30 August 2018, p. 38, <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2018/08/Annual-Report-2017-1.pdf>.

<sup>316</sup> Data Protection Commission, "Annual Report 25 May 2017 - 31 December 2018", 28 February 2019, p. 7, <https://www.dataprotection.ie/sites/default/files/uploads/2019-03/DPC%20Annual%20Report%2025%20May%20-%2031%20December%202018.pdf>.





## 8.2.5. Adequate enforcement powers

Part 5 of the Broadcasting Act 2009 sets out the enforcement powers of the BAI, which include, in exceptional circumstances, termination or suspension of a broadcaster's broadcasting contract, or the imposition of financial sanctions. The BAI may also issue Compliance Notices and Warning Notices, and under section 50 and 53, the Compliance Committee may initiate a statutory investigation where there is apparent non-compliance by a broadcaster. On the recommendation of the Compliance Committee that there has been a serious or repeated failure of a broadcaster to comply with certain Broadcasting Act provisions, the Authority may apply to the High Court for a determination that there has been such a breach, and indicate the sanction (unless the broadcaster requests that the Authority deal with the matter). In 2012, the BAI issued a EUR 200 000 fine on RTÉ over a programme that included wrongful allegations against a priest.<sup>317</sup> The BAI also publishes a Compliance and Enforcement Policy, which sets out the BAI's approach to dealing with compliance and enforcement.<sup>318</sup>

## 8.2.6. Appointment and dismissal procedures

Section 8 of the Broadcasting Act 2009 sets out the detailed rules for appointment of the BAI's Authority, Contract Awards and Compliance Committees. The Authority must be comprised of nine members. Five members are appointed by the government on the nomination of the Minister for Communications, and four members are appointed by the government on the nomination of the same Minister, but having regard to the advice of a parliamentary committee. Under section 11, the government, on the nomination of the Minister, appoints the chairperson of the Authority, Contract Awards Committee and Compliance Committee.<sup>319</sup> Section 9 provides that a person "shall not be appointed" unless they have experience of, or shown capacity in, specific areas which are listed. The Minister is also under an obligation to provide a statement to the parliamentary committee indicating the relevant experience and expertise of nominated BAI members.<sup>320</sup>

Section 10 of the Broadcasting Act 2009 contains the rules on the removal of members of the Authority or committees. It sets out when a member shall cease to be a member, and in what circumstances a member may be removed by the government, and "only if, resolutions are passed by each House of the Oireachtas (Parliament) calling for his or her removal". Section 10 also has provisions on filling "the casual vacancy" arising from a member ceasing to be a member, or when removed. In relation to safeguards for

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<sup>317</sup> See Damien McCallig, "Public Service Broadcaster Sanctioned", IRIS 2012-7/27, <http://merlin.obs.coe.int/iris/2012/7/article27.en.html>.

<sup>318</sup> BAI, Compliance and Enforcement Policy, November 2014, <http://www.bai.ie/en/download/128465>.

<sup>319</sup> See, e.g., Department of Communications, Climate Action and Environment, "Minister White nominates BAI Chair and Board Members", 2 December 2014, <https://www.dccae.gov.ie/en-ie/news-and-media/press-releases/Pages/Minister-White-nominates-BAI-Chair-and-Board-Members.aspx>.

<sup>320</sup> Broadcasting Act 2009, section 8(2)(b), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.



situations where members have yet to be appointed, section 13(10) provides that "[t]he Authority or a statutory committee may act notwithstanding one or more vacancies among its members".

## 8.2.7. Appeal mechanisms

The Broadcasting Act 2009 contains a number of provisions providing for appeal mechanisms to the High Court. These include, under section 51, where a decision to terminate or suspend a broadcasting contract by the BAI may be appealed by the holder of the contract to the High Court;<sup>321</sup> and, under section 55, where a broadcaster may appeal to the High Court against a statement of findings for a serious or repeated failure by a broadcaster to comply with certain provisions of the Act, or a financial sanction imposed against the broadcaster under the Act, which stand during an appeal.<sup>322</sup>

## 8.3. Conclusion

A recent expert report on media pluralism examined the "Independence and effectiveness of the Media Authority", and found that "this indicator achieved a low risk level (15%)".<sup>323</sup> Flynn commented that "[a]lthough there is a high level of political involvement in appointing the main media authority – the Broadcasting Authority of Ireland – it operates within clearly defined legal structures, and consistently acts in a manner which is both transparent and which appears to be independent from political and/or commercial interference".<sup>324</sup>

The Broadcasting Act 2009 can be viewed as broadly in line with Article 30 of the 2018 AVMS Directive; however, two short points may be made. First, presently the government appoints half of the BAI members per its own choice, whereas a procedure involving the Public Appointments Service may add to the BAI's independence (in addition to having separate Contract Awards and Compliance Committees). For instance, under the Data Protection Act 2018, members of the Data Protection Commission are appointed by government "on the recommendation of the Public Appointments Service" (a statutory body for civil service recruitment), following an "open selection competition held by the Service for that purpose".<sup>325</sup> Second, it should be noted that the BAI has continued to flag staffing and resourcing issues in its annual reports, which does raise a question under the Article 30 requirement of "adequate financial and human resources". Finally, given the

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<sup>321</sup> Broadcasting Act 2009, section 51(4), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.

<sup>322</sup> Broadcasting Act 2009, section 55(5), <http://www.irishstatutebook.ie/eli/2009/act/18/enacted/en/print>.

<sup>323</sup> Roderick Flynn, "Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2017 in the European Union, FYROM, Serbia & Turkey - Country Report", Ireland (Centre for Media Pluralism and Media Freedom, 2018), p. 8, <http://cadmus.eui.eu/handle/1814/61144>.

<sup>324</sup> Ibid.

<sup>325</sup> Data Protection Act 2018, section 15, <http://www.irishstatutebook.ie/eli/2018/act/7/enacted/en/print>.



current limited role of the BAI in relation to on-demand audiovisual media services, and in particular in relation to enforcement powers, its powers may not be adequate to implement and supervise the requirements of the AVMS Directive regarding this group of services.





## 9. IT – Italy

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### 9.1. Introduction

The Italian audiovisual market is populated by a plurality of private operators as well as by the public service media organisation *Radiotelevisione Italiana* (RAI). Although the advent of digital television, i.e. the transition from analogue to digital signal transmission, has opened the market to a variety of independent and local TV operators, the largest four media groups (RAI, Mediaset, Sky Italia, La7) together account for 77,3% of viewers,<sup>326</sup> and the biggest three alone generate 45% of the revenues of the companies operating in the so-called ‘integrated system of communication’ (SIC).<sup>327</sup>

The pillar of the Italian legal framework concerning the audiovisual media sector is Law No. 177/2005, “*Testo unico della radiotelevisione*”.<sup>328</sup> This law establishes both general principles and detailed norms regarding both the public service and the private market. The law was amended in 2010 to include the current process of “convergence” between electronic communication and electronic publishing.<sup>329</sup>

### 9.2. Authority for Media and Communication

Established in 1997 by Law No. 249,<sup>330</sup> the Authority for Media and Communication (AGCOM) is the Italian independent regulatory authority for media and communications. Based in Naples, with a secondary operative location in Rome, AGCOM's institutional aim is to guarantee media pluralism, the competitiveness of the telecommunication market

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<sup>326</sup> Auditel, “annual report 2018”,

[https://www.auditel.it/wp-content/uploads/2018/12/sintesi\\_annuale\\_2018.pdf](https://www.auditel.it/wp-content/uploads/2018/12/sintesi_annuale_2018.pdf).

<sup>327</sup> AGCOM, “Relazione Annuale sull’attività svolte e i programmi di lavoro, 2018 (Annual report 2018), <https://www.agcom.it/documents/10179/11258925/Relazione+annuale+2018/24dc1cc0-27a7-4ddd-9db2-cf3fc03f91d2>).

<sup>328</sup> Law No. 177/2005, “Testo unico della radiotelevisione” (Consolidated Text of Radio and Television).

<sup>329</sup> Legislative decree, No. 44/2010.

<sup>330</sup> Legge 31 Luglio 1997, No. 249 “Istituzione dell’Autorità per le garanzie nelle comunicazioni e norme sui sistemi delle telecomunicazioni e radiotelevisivo”.



and the protection of consumers.<sup>331</sup> AGCOM is a converged regulator which performs regulatory and supervisory functions in the telecommunications, audiovisual media, publishing and, more recently, postal sectors. The bodies of the Authority are: the President, the Committee on Infrastructure and Networks, the Committee on Services and Products, and the Council. The Committees and the Council are collegial bodies. The Committees are composed of the President and two Commissioners, respectively. The Committee on Services and Products is responsible, among other things, for supervising compliance with the rules on the protection of minors, linguistic minorities and the right to reply in the audiovisual media sector. The Committee on Infrastructure and Networks is tasked with supervision and legislative implementation in the electronic communication sector. The Council, which is composed of the President and the four Commissioners of both Committees, is primarily charged with guaranteeing the pluralism of the audiovisual media sector.

At the local level, monitoring of broadcasters is carried out by regional authorities, i.e. Communications Regional Committees (Co.re.com),<sup>332</sup> which are functionally dependent on AGCOM and carry out their activity pursuant to the framework agreement signed in Rome on 21 November 2017.<sup>333</sup>

### 9.2.1. Legal distinctiveness and functional independence

AGCOM is a public entity formally independent from the government, since its organisational, financial and accounting autonomy are guaranteed by the primary law.<sup>334</sup> However, independent regulatory authorities are not explicitly mentioned in the Italian constitution, which, on the contrary, establishes the principle of unity of the political and administrative direction of the government, which the constitution attributes to the President of the Council of Ministers,<sup>335</sup> as well as the principle of ministerial responsibility of the public administration.<sup>336</sup>

Nevertheless, legal doctrine has sustained the concept that independent authorities gain (part of) their legitimacy in consideration of the high technical complexity

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<sup>331</sup> Law No. 177/2005, “Testo unico della radiotelevisione”, Article 10.

<sup>332</sup> Law No. 249/1997, Article 1(13).

<sup>333</sup> “Accordo quadro concernente l’esercizio delle funzioni delegate ai Comitati regionali per le comunicazioni tra AGCOM e la Conferenza delle Regioni e delle Province autonome e la Conferenza dei Presidenti delle assemblee legislative delle regioni e delle province autonome”, 2017.

<sup>334</sup> Specifically, Law No. 249/1997, Article 1(1) states: “The Authority is established, [...] which operates in full autonomy and with independence of judgment and evaluation.” Previously, Law No. 481/1995, which established the Authority for the regulation of public utility services, set the fundamental principles concerning the independence and autonomy of these authorities and conferred on them a series of general functions correlated by specific powers, including those of a sanctioning nature. The same legal architecture was then adopted for AGCOM.

<sup>335</sup> Italian Constitution, Article 95(1).

<sup>336</sup> Italian Constitution, Article 95(2).



of the sectors they must supervise and the corresponding high-level expertise they provide, to the benefit of both the government and the entities under supervision.<sup>337</sup>

## 9.2.2. Impartial and transparent exercise of powers

AGCOM is part of the public administration of the State, thus subject to the principles of impartiality and good functioning.<sup>338</sup> Moreover, as stated in Article 1 of Law No. 249/1997, AGCOM must “operate in full autonomy and with independence of judgment and evaluation”.

Moreover, pursuant to the law and as detailed in its own regulation, AGCOM strives for a high level of transparency.<sup>339</sup> AGCOM pursues this objective in order to protect the rights of citizens, promote the participation of those concerned in administrative proceedings and encourage widespread forms of control over the functioning of the Authority and the use of resources.<sup>340</sup> In practical terms, AGCOM’s website is effectively a huge source of fresh information and documentation.

AGCOM’s impartial and transparent exercise of powers may not appear to be conditioned also in more politically sensitive contexts. For instance, it has been said that the public broadcasting service has been a notorious “bone of contention” among the different political parties, which have strived to influence RAI’s internal pluralism according to the political cycle.<sup>341</sup> The strict scrutiny of RAI performed by AGCOM may demonstrate its commitment to impartiality and to guaranteeing the internal pluralism of the public service media and the rule of the law.<sup>342</sup>

## 9.2.3. Competences, powers and accountability

AGCOM’s advisory, supervisory and regulatory powers are prescribed in detail by the law and distinctly attributed to the two Committees and to the Council.<sup>343</sup> Nevertheless, the

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<sup>337</sup> Cassese S., “Funzionamento e organizzazione delle authorities: esperienze a confronto”, conference report, Forum p.a. 2004, Roma, 10 maggio 2004; Irion K., Radu R., “Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory”, in Schulz W., Valcke P., and Irion K. (eds), *The independence of the media and its regulatory agencies* (ECREA 2014).

<sup>338</sup> Article 97(2), Italian Constitution.

<sup>339</sup> Resolution No. 148/17/CONS, “Regolamento sugli obblighi di pubblicità, trasparenza e diffusione di informazioni dell’Autorità per le garanzie nelle comunicazioni ai sensi del decreto legislativo”, 14 marzo 2013, n. 33 e s.m.i.

<sup>340</sup> Supra, Article 1.

<sup>341</sup> Carlassare L., “A proposito di principi costituzionali e regole democratiche: il caso Rai”, in *Quaderni costituzionali, Rivista italiana di diritto costituzionale* 1/2002, pp. 69-70, doi: 10.1439/4916.

<sup>342</sup> AGCOM, Resolution No. 42/19/CONS.

<sup>343</sup> Law No. 249/1997, Article 6, letters a), b), c).



law grants AGCOM the autonomy to redistribute these competences among its bodies through internal regulation.<sup>344</sup>

The Council, among other things, advises the government regarding the need for regulation on technological innovations, promotes research and studies about technological developments and media and communication, cooperates with the Competition and Market Authority (AGCM) to ensure consumer protection and market competition, supervises publication of surveys, and advises the government on the service agreement for the public broadcasting service - monitoring the latter's implementation.<sup>345</sup>

The Committee on Services and Products, in the field of audiovisual media, primarily oversees and regulates advertising and telemarketing and the protection of minors in the light of the relevant self-regulatory code,<sup>346</sup> ensures the right of rectification, and monitors radio and television broadcasts, with the power to sanction infringements.

The Committee on Infrastructure and Networks is mainly charged with implementation and supervision of electronic communications and is therefore outside the scope of this analysis.

AGCOM is exclusively accountable to Parliament, to which it provides a very detailed annual report.<sup>347</sup> AGCOM submits its annual report to the President of the Council of Ministers for referral to the Parliament. The report contains, *inter alia*, data and information relating to the areas of competence, in particular as regards technological development, resources, potential and actual dissemination, the ratings and readings recorded, the plurality of opinions in the information system, and cross-holdings between radio, television, the daily press, the periodical press and other media. However, this annual report cannot be considered tantamount to proper parliamentary scrutiny of AGCOM's activity, especially considering that the documents presented are not subjected to parliamentary debate.<sup>348</sup>

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<sup>344</sup> Law No. 249/1997, Article 7. Specifically, see: Resolution No. 223/12/CONS "Regolamento concernente l'organizzazione e il funzionamento di AGCOM". Moreover, for a recent case of redistribution of competences from the Committee on Services and Products to the Council, see: AGCOM Resolution No. 315/12/Cons.

<sup>345</sup> AGCOM supervises public broadcast service (RAI) compliance with the guidelines issued by the Parliamentary Committee on the general direction and supervision of radio and television broadcasting pursuant to Articles 1 and 4 of Law No. 103 of 14 April 1975.

<sup>346</sup> Code of self-regulation for TV and minors, approved on 29 November 2002, then implemented in the Consolidated Text of Radio and Television, Article 34.

<sup>347</sup> AGCOM, "Relazione Annuale sull'attività svolte e i programmi di lavoro, 2018 (Annual report 2018), <https://www.agcom.it/documents/10179/11258925/Relazione+annuale+2018/24dc1cc0-27a7-4ddd-9db2-cf3fc03f91d2>).

<sup>348</sup> Video of the Annual Report presentation is available here <http://www.agcom.it/relazione-annuale-al-parlamento-2018>.





## 9.2.4. Financial and human resources

AGCOM does not receive any form of public funding. The Authority's funding system is based on levies applied on those entities active in the sectors over which AGCOM exercises its institutional competence (i.e. electronic communications, media services and postal services). In 2019, the Authority expects to receive levies of around EUR 75 million. Most of the levies come from electronic communications and media services operators (84.6%), postal operators contribute about 12% and sports competition organisers a marginal 0.6%.<sup>349</sup><sup>350</sup> Expenditures planned for 2019 are about EUR 82 million, primarily to cover the costs of staff and instrumental goods and services. Personnel expenditure accounts for 70.2% of total expenditure. Any deficit will be covered with an expected surplus from the previous year.

In accordance with the principle of organisational autonomy, AGCOM defines with its own regulations the legal and economic treatment of personnel, on the basis of the criteria established by the collective labour agreement in force for the Italian Antitrust Authority (AGCM).<sup>351</sup> The staff employed by AGCOM are set to not exceed 419 units, divided into four professional qualifications: managers; officials; operatives; executives. As of 31 March 2018, the personnel employed by AGCOM is 361.<sup>352</sup>

## 9.2.5. Enforcement powers

AGCOM has a general competence to impose sanctions for failure to comply with statutory requirements concerning programming, advertising, and audiovisual content. For instance, AGCOM (the Council) monitors whether the concessionaire of the public broadcasting service complies with the guidelines issued by the Parliamentary Committee on Broadcasting services. In the event of non-compliance, AGCOM can request that the public broadcaster initiate disciplinary proceedings against the managers responsible; AGCOM intervenes on violations of the code of self-regulation on protection of minors.<sup>353</sup>

Furthermore, AGCOM monitors the competitiveness of the market. In this regard, the law mandates that organisations operating in the 'integrated communication system' notify AGCOM of operations that may restrict the market above certain thresholds.<sup>354</sup> In

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<sup>349</sup> Other sources of financing include refunds, interest income and various recoveries, which represent 2% of total revenue.

<sup>350</sup> Resolution No. 603/18/CONS, <https://www.agcom.it/bilancio-preventivo-e-consuntivo1>.

<sup>351</sup> Pursuant to Law No. 481/1995, Article 2(28).

<sup>352</sup> AGCOM, Annual report 2018, pp. 143-150.

<sup>353</sup> See: "Code of self-regulation TV & minors", and following legislative interventions.

<sup>354</sup> Law No. 177/2005, Article 43.



2018, 14 proceedings were started but in none did the authority determine any risk of excessive concentration.<sup>355</sup>

AGCOM is also tasked with monitoring conflicts of interest of government members: undertakings in the ‘integrated system of communications’ and relating to a holder of governmental offices must not constitute conduct that provides “privileged support” to the latter.<sup>356</sup> However, no such proceedings have been initiated.

## 9.2.6. Appointment and dismissal procedures

The president of AGCOM is appointed by the President of the Council of Ministers, upon receipt of the opinion of the relevant Committees of the Chamber of Deputies and Senate. The members of AGCOM’s two Committees are elected by the Senate and by the Chamber of Deputies (two members each).<sup>357</sup> All the members are appointed for a period of seven years, and their mandates cannot be renewed.<sup>358</sup>

The personal and professional requirements for the President and the Commissioners must be read in the light of the functional independence of the various bodies of the authority. AGCOM’s decision-makers are called upon to operate “in full autonomy and with independence of judgment and evaluation”;<sup>359</sup> the authority must be composed of people who, because of their personal history, appear capable of withstanding external conditioning and pressure. In any event, they must not have any ties to companies subject to their supervisory activity, nor any other conflict of interest.<sup>360</sup> Moreover, upon exhaustion of their term in office, AGCOM members are subject to a cooling-off period of four years; after the termination of their appointment, they cannot have business relations with companies operating in their field of expertise.<sup>361</sup> The infringement of this provision is punishable with financial sanctions, both against the former commissioner and against the company involved.<sup>362</sup> However, no such case has occurred so far.

It is worth noting that a recent legislative reform of public spending review has halved the total number of the members of the AGCOM Commissioners from four to two per committee.<sup>363</sup>

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<sup>355</sup> Among these proceedings, it is worth underscoring the Vivendi case, in which the simultaneous possession by the French company of Telecom Italia’s and Mediaset’s shares was assessed to be in compliance with the law, see Resolution No. 338/18/CONS.

<sup>356</sup> Law No. 215/2004, Article 7(1).

<sup>357</sup> Law No. 249/1997, Article 1.

<sup>358</sup> Law No. 481/1995, Article 2(8).

<sup>359</sup> Law No. 249/1997, Article 1.

<sup>360</sup> See note 22.

<sup>361</sup> Law No. 481/1995, Article 2(9).

<sup>362</sup> Ibid.

<sup>363</sup> Decree Law No. 201/2011, Article 23, letter a).



## 9.2.7. Appeal mechanisms

As any other act of the public administration affecting citizens' private sphere of interests, AGCOM's resolutions can be appealed, within 60 days, to the Regional Administrative Court of Latium and in the last instance to the Council of State (i.e. external appeal procedure).<sup>364</sup> AGCOM's decisions stand throughout the appeal.

Given the strong technical character of the acts of the regulatory authorities, there has been discussion about the extent to which judges can assess their merits.<sup>365</sup> In compliance with Article 6 of the ECHR, the merit of the measures with a punitive character must be subjected to full judicial scrutiny of the administrative courts, whereas acts that do not present a punitive character must be subjected only to formal scrutiny.<sup>366</sup>

## 9.3. Conclusion

The latest economic measures adopted by the Italian government, including the complete cut of public funding transferred to AGCOM and the halving of the board members, exemplify the impact of changing the constituting legislation for AGCOM. This brief chapter on AGCOM shows that certain legal amendments may be required to formally strengthen the principle of independence, as envisaged in the revised Article 30(1) of the AVMS Directive.

Beyond EU law, in consideration of the reduced space for opposition political parties to appoint any of the new commissioners for the new seven-year cycle, a different, perhaps more inclusive, appointment procedure could be considered. For instance, parliament may be required by law to have an open call among high level experts for candidates to the new AGCOM board, to promote diversity, political independence and expertise, which could fuel trust and underpin the legitimacy of the authority itself.

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<sup>364</sup> Legislative decree No. 104/2010 (Codice del processo amministrativo), Article 119, letter b), Article 134 letter c).

<sup>365</sup> Consiglio di Stato (Ufficio Studi, massimario e formazione), "Autorità indipendenti e sindacato giurisdizionale", 2017, [www.giustizia-amministrativa.it](http://www.giustizia-amministrativa.it).

<sup>366</sup> Ibid.





## 10. NL – The Netherlands

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### 10.1. Introduction

The Netherlands has a widely diversified, but concentrated, media landscape with overall high levels of trust in the media by the public.<sup>367</sup> The landscape is characterised by strong public service broadcasting at the national, regional and local level, both in the form of TV and radio channels. Airtime at the national level is shared by a large number of member-based broadcasting associations and several other non-profit organisations without members, which are granted broadcasting licences either because they are deemed representative of a particular segment of the population or on the basis of a specific programme remit.<sup>368</sup> In addition, there is a large variety of commercial media service providers and on-demand media service providers.

The main laws in the Netherlands regulating the audiovisual media sector and implementing the areas covered by the AVMS Directive are the Dutch Media Act 2008 (Mediawet 2008)<sup>369</sup> and the Media Decree 2008 (Mediabesluit 2008)<sup>370</sup>, the latter an elaboration of the Media Act. The laws are phrased in a technology-neutral and platform-independent manner and are applicable to both public and commercial media service providers.<sup>371</sup>

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<sup>367</sup> Commissariaat voor de Media, “Mediamonitor 2018”, part of the Reuters Institute’s Digital news report, <http://www.digitalnewsreport.org/>.

<sup>368</sup> Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/Perspective Associates (eds, 2011): INDIREG. Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study conducted on behalf of the European Commission. Final Report. February 2011, p. 141.

<sup>369</sup> Mediawet 2008 (Media Act 2008), <http://wetten.overheid.nl/BWBR0025028/2017-02-01>.

<sup>370</sup> Mediabesluit 2008 (Media Decree 2008), <http://wetten.overheid.nl/BWBR0025036/2018-01-01>.

<sup>371</sup> Betzel M (2011), “Finetuning classification criteria for on-demand audiovisual media services: The Dutch approach”, in: Nikoltchev S. (ed.), *IRIS Special: The Regulation of On-demand Audiovisual Services: Chaos or Coherence?*, European Audiovisual Observatory: Strasbourg, FR, <https://rm.coe.int/1680783c21>.



## 10.2. Dutch Media Authority

The media regulatory authority in the Netherlands is the Commissariaat voor de Media (Dutch Media Authority, hereafter also: CvdM, or Authority), established in 1988. The Authority holds office in Hilversum, a city that is also home to a number of Dutch broadcasters and media companies, and is the headquarters of the national public broadcasting system. The CvdM supervises compliance with the Dutch Media Act 2008 and the Act on the fixed book price (*Wet op de vaste boekenprijs*). In the area of media regulation, the CvdM covers both audiovisual content and distribution aspects of audiovisual content, rendering the authority's competence partially converged in nature. Transmission and spectrum aspects of audiovisual content as well as general electronic communications matters, however, are not among the sectors covered by the authority.

Oversight by the CvdM concerns the national public service media (national, regional and local), commercial media service providers, short-term broadcasters and commercial on-demand media service providers. It currently supervises the three national public broadcasting (PSB) TV channels, several regional PSB TV channels, approximately 300 local PSB TV channels, almost 250 commercial licensed TV programs (including around 10 main national private channels, many satellite channels, and text TV services), providers of VOD services, radio channels (both PSB and private service providers), and secondary PSB activities, such as the publishing of TV guides.<sup>372</sup>

Responsibility for the areas covered by the AVMS Directive is not solely in the hands of the CvdM. In the field of television advertising and teleshopping, responsibility is shared with a self-regulatory initiative on advertising by the Stichting Nederlandse Reclame Code (Advertising Code Foundation) and the *Reclame Code Commissie* (Advertising Code Commission). The protection of minors also comes in the form of co-regulation through the *Nederlands Instituut voor Classificatie van Audiovisuele Media* (Netherlands Institute for the Classification of Audiovisual Media or NICAM).

### 10.2.1. Legal distinctiveness and functional independence

The CvdM is an independent administrative authority. It is established by statute under the Dutch Media Act 2008 as a public entity with legal personality.<sup>373</sup> As an independent administrative authority, the CvdM is furthermore governed by the Framework Act for Independent Administrative Authorities,<sup>374</sup> which applies to all independent administrative authorities in the Netherlands, as well as by the General Administrative Law Act (*Algemene Wet Bestuursrecht*).

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<sup>372</sup> Numbers according to the CvdM, <https://www.cvdm.nl/english/>.

<sup>373</sup> Article 7.1, Dutch Media Act 2008.

<sup>374</sup> Article 7.2, Dutch Media Act 2008, referring to the *Wet van 2 november 2006, houdende regels betreffende zelfstandige bestuursorganen* (Framework Act for Independent Administrative Authorities).



The independence of the CvdM is governed mainly by the Framework Act for Independent Administrative Authorities, and by the Media Act, which appoints the CvdM as the authority responsible for the supervision of media service providers' respect for, and compliance with, the Dutch Media Act and the Media Decree. As an independent administrative authority, the CvdM has public authority and is not hierarchically subordinate to a minister. The Media Act, however, also somewhat limits the scope of the CvdM's tasks by assigning certain areas of competence by law to the Minister responsible for media policies rather than to the CvdM.<sup>375</sup>

The highest decision-making organ of the CvdM is the Board of Commissioners, which consists of a chair accompanied by either two or four other commissioners.<sup>376</sup> The current, three-headed Board has been in place since September 2013. The Board decides by majority vote.<sup>377</sup> In practice, however, decision-making usually happens by consensus. The decision-making process by the Board is further laid down in Board regulations, which the Board is legally required to draw up.<sup>378</sup> Moreover, Article 7.5(2) of the Media Act states that the delegation of decision-making power to one of the Commissioners is allowed only with the consent of all of the other Commissioners. In any event, the aforementioned regulation on the decision-making process stipulates that for a decision to be legally valid, it has to be taken in a meeting attended by at least two Commissioners.

There is no formal possibility for anyone to give instructions to the CvdM or the Board of Commissioners. After announcement, decisions taken by the CvdM, however, must be sent to the Minister as soon as possible.<sup>379</sup> The Minister has the power to annul or suspend decisions of the CvdM within eight weeks after receipt of a copy of the decision. The Minister has very seldom used this power.<sup>380</sup> A decision to suspend or annul must be published in the *Staatscourant* (government Gazette). The Framework Act for Independent Administrative Authorities also provides the Minister with the power to undertake necessary measures if an administrative body seriously neglects its duties.<sup>381</sup> In such a situation, the Authority must first be given the opportunity to carry out its tasks properly, and the Minister must inform both houses of parliament immediately of the steps taken.

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<sup>375</sup> For example, with regard to the annual budget of public service media providers, Article 7.11 (1a), Dutch Media Act 2008 in conjunction with Article 2.149, Dutch Media Act 2008.

<sup>376</sup> Article 7.3 (1), Dutch Media Act 2008.

<sup>377</sup> Article 7.5 (1), Dutch Media Act 2008.

<sup>378</sup> Article 7.5 (3), Dutch Media Act 2008; *Regeling besluitvorming en werkwijze College Commissariaat voor de Media 2002* (Regulation on the decision-making process and working method of the Board of the CvdM), <https://www.cvdM.nl/wp-content/uploads/2018/06/Regeling-besluitvorming-en-werkwijze-College-Commissariaat-voor-de-Media.pdf>.

<sup>379</sup> Article 7.9 (1), Dutch Media Act 2008.

<sup>380</sup> This power has so far been used only twice by the Minister, the last time in 2004.

<sup>381</sup> Article 23, Framework Act for Independent Administrative Authorities.

## 10.2.2. Impartial and transparent exercise of powers

The CvdM highlights transparency as one of its basic principles.<sup>382</sup> As is pointed out in this section, as well as in the following section, such transparency is in part established by statutory obligations to publish decisions and by statutory annual reporting obligations.

As pointed out earlier, the Board is legally required to lay down its decision-making process and its way of working in a Board regulation. This regulation provides information on the procedure and set-up of the meetings of the Board. While the agenda and minutes of these meetings are not published, the regulation provides that the Board, as part of an active disclosure policy, publishes all decisions regarding the Authority's policy. Moreover, the CvdM can be requested to disclose information under the government Information Act (Wet openbaarheid van bestuur).<sup>383</sup> There is no provision allowing people to attend meetings as observers.

Article 7.20(1) of the Media Act obligates the CvdM to annually inform the Minister of its intended enforcement policy for the next year. A copy of the letter setting out this policy is also published on the website of the Authority.

Until now there has never been evidence of partiality in the decision-making by the Dutch Media Authority. The Media Act explicitly states that the Authority is not allowed to exercise any prior supervision of media content.<sup>384</sup>

## 10.2.3. Competences, powers and accountability

The CvdM is appointed as the authority responsible for supervising media service providers' respect for and compliance with the Media Act and the Media Decree.<sup>385</sup> As set out earlier in this chapter, the Dutch Media Authority is responsible for audiovisual content and distribution matters. As such, it grants licenses to broadcasters, registers VOD services and systematically monitors compliance with the rules on programme quota, advertising, sponsoring, product placement and other commercial communication, as well as the protection of minors.

Further, the CvdM has a statutory obligation to research concentrations and economic conditions in the national and international media markets and to examine their consequences for the plurality and independence of information provision.<sup>386</sup> It is mandatory for the CvdM to annually report on this research to the Minister, and to make the research findings publicly available.

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<sup>382</sup> Commissariaat voor de Media, "Annual report 2017", p.8, <https://www.cvdM.nl/wp-content/uploads/2018/07/Jaarverslag-Commissariaat-voor-de-Media-2017.pdf>.

<sup>383</sup> Wet openbaarheid van bestuur (government Information Act), <https://wetten.overheid.nl/BWBR0005252/2018-07-28>.

<sup>384</sup> Article 7.20 (1), Dutch Media Act 2008.

<sup>385</sup> Article 7.11 (1), Dutch Media Act 2008.

<sup>386</sup> Article 7.21, Dutch Media Act 2008.





To carry out its tasks, the CvdM is granted general policy-implementing powers as well as third-party decision-making powers. The Authority does not have general policy-setting powers. So it may carry out its monitoring tasks, the CvdM is furthermore granted regulation, monitoring, and information-gathering powers, not only under the General Administrative Law Act,<sup>387</sup> but also explicitly in the Media Act.<sup>388</sup>

It is obligatory for the CvdM to publish any general policy-implementing decision in the *Staatscourant* (government Gazette).<sup>389</sup> All decisions in specific cases are also published on the website of the CvdM,<sup>390</sup> even though this is not a legal requirement. Such decisions have to be properly motivated on the basis of the General Administrative Law Act. There is a statutory obligation for the CvdM to submit annual reports to the Minister.<sup>391</sup> The annual reports are also published on the website of the CvdM.<sup>392</sup> Further, the Authority is obliged to submit to the Minister an annual budget and an annual account, both of which are subject to auditing by a private audit firm.<sup>393</sup> Lastly, the CvdM can be requested by anyone to disclose information and documents under the government Information Act (*Wet Openbaarheid Bestuur*).<sup>394</sup>

#### 10.2.4. Adequate financial and human resources

Around three-quarters of the Authority's funding comes from the Ministry of Education, Culture and Science after approval by the Minister on the basis of a budget proposal from the CvdM.<sup>395</sup> In 2017, funding from the Ministry amounted to approximately EUR 5.3 million, a decrease compared to the year before (approximately EUR 5.5 million), but an increase compared to 2015 (approximately EUR 4.8 million). The remaining quarter of the Authority's budget comes from supervision fees paid by commercial media institutions. In various annual reports, the Authority has identified that there is a high risk of having insufficient funding for the execution of its tasks.<sup>396</sup>

In 2017, the staff count of the CvdM was an approximate 50 full-time equivalents.<sup>397</sup> Staff members are appointed by decision of the Board of Commissioners.<sup>398</sup> The CvdM, in several of its annual reports, has signalled the risk of the Authority not

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<sup>387</sup> Article 5.20, General Administrative Law Act.

<sup>388</sup> Articles 7.18 & 7.19, Dutch Media Act 2008.

<sup>389</sup> Article 7.10, Dutch Media Act 2008.

<sup>390</sup> Decisions, <https://www.cvdm.nl/besluiten/>.

<sup>391</sup> Article 18, Dutch Framework Act for Independent Administrative Authorities.

<sup>392</sup> Annual reports, <https://www.cvdm.nl/over-het-commissariaat-voor-de-media/jaarverslagen/>.

<sup>393</sup> Articles 25 & 34, Dutch Framework Act for Independent Administrative Authorities.

<sup>394</sup> *Wet openbaarheid van bestuur* (government Information Act), <https://wetten.overheid.nl/BWBR0005252/2018-07-28>.

<sup>395</sup> Article 7.6, Dutch Media Act 2008.

<sup>396</sup> E.g. Commissariaat voor de Media, "Annual report 2017", p.38-39; Commissariaat voor de Media, "Annual report 2016", pp. 50-51.

<sup>397</sup> E.g. Commissariaat voor de Media, "Annual report 2017", p.51.

<sup>398</sup> Article 7. 11(2), Dutch Media Act 2008.



being able to attract and retain sufficiently skilled personal needed to fulfil its duties.<sup>399</sup> Among other things, this could be attributed to the Authority not being sufficiently competitive in the labour market. Several actions, including the hiring of temporary staff, are being taken to mitigate this risk.

### 10.2.5. Adequate enforcement powers

The Media Act confers several formal instruments of enforcement to the CvdM. The Authority can in certain cases impose administrative fines of up to EUR 225,000 per violation, and issue cease and desist orders.<sup>400</sup> Further, the CvdM can reclaim or reduce financial public media budget contributions. In situations of mismanagement, the CvdM can give instructions, possibly accompanied by certain concrete measures, to national and regional public service media.<sup>401</sup> Such instructions may require the replacement of members of the management or regulatory board. Lastly, the CvdM is allowed to reduce or withdraw broadcasting airtime for public service media or, in the case of a commercial media service provider, revoke a licence.<sup>402</sup>

### 10.2.6. Appointment and dismissal procedures

The board members of the CvdM are appointed by the Minister of Education, Culture and Science for a period of five years.<sup>403</sup> A reappointment for one consecutive period is permitted. A legislative change in the appointment procedure is currently pending.<sup>404</sup> Under this change, the CvdM will gain the responsibility to submit new commissioners for nomination, a procedure to be subsequently subject only to a marginal test by the Minister. In general, the proposal aims for a more prominent role of the CvdM in the appointment procedure.

The Minister of Education, Culture and Science is also responsible for the dismissal of a board member.<sup>405</sup> The grounds for dismissal, as listed in the Dutch Framework Act for Independent Administrative Authorities, are: incapacity or incompetence as regards the position, or other compelling reasons relating to the person concerned. The decision-making body cannot be dismissed as a whole. There were no early dismissals during the last five years. The appointment as well as dismissal decisions are made available to the public.

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<sup>399</sup> E.g. Commissariaat voor de Media, “Annual Report 2017”, pp.38-39.

<sup>400</sup> Article 7.12, Dutch Media Act 2008.

<sup>401</sup> Article 7.16a, Dutch Media Act 2008.

<sup>402</sup> Article 7.14 and Article 3.4, Dutch Media Act 2008.

<sup>403</sup> Article 7.3 (2), Dutch Media Act 2008 and Article 12 (1), Dutch Framework Act for Independent Administrative Authorities.

<sup>404</sup> Legislative proposal W8177 K-2 of 26 September 2018, amending the Dutch Media Act 2008.

<sup>405</sup> Article 12 (1), Dutch Framework Act for Independent Administrative Authorities.



Several rules are in place to prevent conflicts of interest on the part of the commissioners. A provision in the general statutory rules governing all independent administrative authorities states that a member of an administrative body may not hold any ancillary positions that are undesirable with a view to the proper fulfilment of his duties, or in maintaining independence or confidence in such independence.<sup>406</sup> Any intention by a member to accept an ancillary position must be reported to the Minister and must, upon acceptance by the member, be made public. In addition to the general rule, the Dutch Media Act 2008 explicitly states that a membership of the board cannot be combined with (a) membership of both Houses of Parliament, a provincial administration or a municipality, (b) an employment in a ministry, agency, institution or company falling under the responsibility of a minister, and (c) membership of an organ or an employment relationship with the Dutch public broadcaster, a public media institution, a commercial institution or a media publisher of a newspaper.<sup>407</sup> There are no rules in place to guard against conflicts of interest after term of office.

### 10.2.7. Appeal mechanisms

The appeal procedures relating to decisions taken by the CvdM are mainly governed by the General Administrative Law Act. Under this Act, a party whose interests are likely to be affected by the decision must first appeal to the board of the CvdM, before going to court. A decision by an administrative court can subsequently be appealed to the Council of State. Appealed decisions stand pending the court's decision.

## 10.3. Conclusion

Overall, tenets of the independence of the Dutch Media Authority are ingrained both in the legal framework governing the Authority and in the organisation itself. The proposed legislative change in the appointment procedure of board members may even further enhance the independence of the Authority. However, the power vested in the Minister to suspend or annul decisions by the Authority may prove problematic in relation to the demands Article 30 of the revised AVMS Directive makes with regard to functional independence.

The Authority generally operates in a transparent way, partly due to statutory obligations to publish decisions, and to statutory annual reporting obligations. The Authority currently appears sufficiently equipped both in terms of financial and human resources, and in enforcement powers. As the Authority has identified a high risk of being both underfunded and understaffed, it remains however to be seen whether the current practice qualifies as adequate in light of Article 30 of the revised Directive.

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<sup>406</sup> Article 13, Dutch Framework Act for Independent Administrative Authorities.

<sup>407</sup> Article 7.4, Dutch Media Act 2008.





## 11. PL – Poland

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### 11.1. Introduction

Relatively stable economic conditions and steady growth are supporting dynamic development of various media services in Poland, including online media. The Polish media environment is composed of strong and concentrated TV networks (including both private and public) which dominate news provision<sup>408</sup>, declining but still influential newspaper groups, and growing web portals.

The broadcasting sector in Poland is regulated by the 1992 Broadcasting Act<sup>409</sup>, applying to radio and TV broadcasters as well as to providers of audiovisual media services. The regulatory authority responsible for supervising and monitoring the operations of the broadcasters and providers of audiovisual media services is the Krajowa Rada Radiofonii i Telewizji (National Broadcasting Council, KRRiT), set up in 1993.<sup>410</sup> In addition, the 2016 Act on the National Media Council<sup>411</sup> established the Rada Mediów Narodowych (National Media Council, RMN). RMN took over part of KRRiT's mandate concerning public service broadcasters (PSM), mainly supervising and appointing boards of the National Media (the term refers to PSM – including Polish Television and Polish Radio, as well as the Polish Press Agency)<sup>412</sup>. The main rationale for setting a separate regulatory body for PSM as stated in the Explanatory Memorandum of the Draft Law on the National Media was a conflict of functions performed by the KRRiT.<sup>413</sup> Finally, the

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<sup>408</sup> See e.g. Indicator (2015), "Różnorodność treści informacyjnych w Polsce z perspektywy użytkownika"(News diversity from a user's perspective in Poland), 30 December 2012, <http://www.krrit.gov.pl/krrit/aktualnosci/news.2185.pluralizm-polskich-mediow-z-perspektywy-odbiorcow.html>.

<sup>409</sup> Ustawa o Radiofonii i Telewizji (The 1992 Broadcasting Act), adopted on 29 December 1992, as amended, Official Journal 1993, No 7, item 34, <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19930070034>, Unofficial translation [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/angielska/Documents/Regulations/broadcasting\\_act\\_2802\\_2013.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/angielska/Documents/Regulations/broadcasting_act_2802_2013.pdf).

<sup>410</sup> National Broadcasting Council, <http://www.krrit.gov.pl/en/homepage>.

<sup>411</sup> Ustawa o Radzie Mediów Narodowych (Act on the National Media Council), adopted on 22 June 2016, Official Journal 29 June 2016, item 929, <http://dziennikustaw.gov.pl/du/2016/929/1>.

<sup>412</sup> National Media Council, [http://sejm.gov.pl/Sejm8.nsf/page.xsp/rmn\\_sklad](http://sejm.gov.pl/Sejm8.nsf/page.xsp/rmn_sklad).

<sup>413</sup> In the view of lawmakers, KRRiT - as a broadcasting market regulator – is expected to ensure impartial treatment of all market players, including private and public service media. The fact that KRRiT has performed



Urząd Komunikacji Elektronicznej (Office for Electronic Communication - UKE), created in 2005, serves as a regulatory and supervisory authority responsible for telecommunications, postal services, frequency management and monitoring telecom, postal and Internet service providers' markets.<sup>414</sup>

The implementation of the revised AVMS Directive, and Article 30 in particular, will most probably affect the 1992 Broadcasting Act.

## 11.2. National Broadcasting Council and National Media Council

The National Broadcasting Council (KRRiT) was established in 1993 in Warsaw on the basis of the 1992 Broadcasting Act. An establishment of a new regulatory body for the media at that time was part of a more complex revamping of the post-Communist media environment and its regulatory structure. The KRRiT was designed according to the French model of Conseil supérieur de l'audiovisuel (French national audiovisual regulator CSA) to reflect institutional components of representative democracy, manifesting in the appointment procedure shared between the Sejm (the Lower House of the Polish Parliament), the Senate and the President. Since its establishment, KRRiT's competencies have encompassed granting and revoking broadcasting licences, participating in broadcasting policy formation, supervising the compliance of broadcasters and nominating members of the PSM boards, and others.<sup>415</sup>

The National Media Council (RMN) was set up in 2016 in Warsaw on the basis of the 2016 Act on the National Media Council, amending the 1992 Broadcasting Act. The Act was initially prepared as an integral part of a larger package (called a Big Media Law) consisting of three draft bills regarding the public service media (Draft Act on the National Media; Draft Act on Audiovisual Contribution; and Draft Act – Provisions Introducing Act on the National Media and Act on Audiovisual Contribution) aimed at transformation of PSM's remit, funding and governance.<sup>416</sup> The law package has sparked a contentious public debate and criticism from international organisations.<sup>417</sup> As a

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controlling roles with regard to PSM (e.g. through appointment procedures) entails a possibility of distorting this impartiality. See: Projekt Ustawy o mediach narodowych (Draft Law on the National Media), submitted on 20 April 2016, Document No. 442. Justification for the Draft Law, p. 2, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/rada-europy\\_bezp.-dziennikarzy/projekt-ustawy-o-mediach-narodowych.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/rada-europy_bezp.-dziennikarzy/projekt-ustawy-o-mediach-narodowych.pdf).

<sup>414</sup> Office for Electronic Communications, <https://www.uke.gov.pl/en/about-us/>.

<sup>415</sup> From the beginning of 2016, the last of these competencies was exercised by the Minister of the Treasury, and since June 2016 it has been exercised by the National Media Council.

<sup>416</sup> See: Projekt Ustawy o mediach narodowych (Draft Law on the National Media), submitted on 20 April 2016, Document No. 442, [http://www.krrit.gov.pl/Data/Files/\\_public/Portals/0/komunikaty/rada-europy\\_bezp.-dziennikarzy/projekt-ustawy-o-mediach-narodowych.pdf](http://www.krrit.gov.pl/Data/Files/_public/Portals/0/komunikaty/rada-europy_bezp.-dziennikarzy/projekt-ustawy-o-mediach-narodowych.pdf).

<sup>417</sup> See e.g. Council of Europe (2016), "Opinion of Council of Europe experts on the three draft Acts regarding Polish public service media", DGI 13: Strasbourg, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168065e7a4>.



consequence, the Polish government abandoned enforcement of the three acts on the national media and passed instead the Act on the National Media Council.

### 11.2.1. Legal distinctiveness and functional independence

The KRRiT's legal distinctiveness from the government is described by the 1992 Broadcasting Act and the Polish Constitution enacted in 1997.<sup>418</sup> In the Constitution, the National Broadcasting Council is recognised as one of the organs of state control and protection of rights. The Constitution defines tasks and competences of the KRRiT in general terms in Article 213 (1):

*“The National Council of Radio Broadcasting and Television shall safeguard the freedom of speech, the right to information as well as safeguard the public interest regarding radio broadcasting and television”.*

The KRRiT is equipped with its own powers, which are not delegated from government institutions. This is reflected in Article 213(2) of the Constitution, which states that the KRRiT “.....shall issue regulations and, in individual cases, adopt resolutions.” In addition, Article 5 of the 1992 Broadcasting Act refers to the role of the KRRiT as the state authority competent to deal with the broadcasting sector:

*“The National Broadcasting Council (...) shall hereby be established and shall constitute the state authority competent in matters of radio and television broadcasting.”*

Independence is not recognized as a value to be explicitly guaranteed by constitutional or media law provisions. Yet, operational rules on eligibility and incompatibility exist that support some level of the regulator's functional independence. First, these include a mode of nomination of KRRiT members by Parliament and the President (both elected in the general election), potentially creating a balance of powers.<sup>419</sup> Second, the constitutional provisions prevent members of political parties from being nominated to the KRRiT, and the 1992 Broadcasting Act prohibits members of the KRRiT from also holding an interest or shares, or also having any other involvement, in a media company providing services or producing content, as well as from simultaneously holding any other gainful employment.<sup>420</sup>

Despite these safeguards, the issue of weak independence, in particular from political pressure, has long been on the political and public agenda in Poland. According to the Eurobarometer Special Report on “Media Pluralism and Democracy” (2016), Poland's public perception measure demonstrates a low level of public trust (28%) in the

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<sup>418</sup> Konstytucja RP (The 1997 Constitution of the Republic of Poland), adopted on 2 April 1997, Official Journal 1997, No 78, item 483, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

<sup>419</sup> Article 214.1. of the Constitution; Article 7.1 of the 1992 Broadcasting Act.

<sup>420</sup> Article 214.2 of the Constitution; Article 8.4.



media regulatory authority's independence.<sup>421</sup> A majority of respondents in Poland (58%) stated that the KRRiT is not, in their opinion, free and independent from political, governmental and commercial pressures; 14% said they did not know.<sup>422</sup> The comparative results place Poland in the group of four countries with the lowest trust in the independence of key regulatory institutions of the media sector in the EU.

As regards legal decision-making power, the KRRiT is entitled to issue regulations and adopt resolutions by a two-thirds majority of votes of the total number of its members.<sup>423</sup> The Chairman of the Council is elected by the KRRiT from among its members.<sup>424</sup> The Chairman directs the KRRiT's work, represents the Council and performs the tasks specified in the Act, such as requiring media service providers to submit necessary documentation and information.<sup>425</sup>

The National Media Council (RMN) is legally distinguished by the 2016 Act on the National Media Council, which defines the Council's tasks, powers and forms of organisation. A main competence of the RMN encompasses appointing and dismissing members of governing bodies of PSM and the Polish Press Agency (Article 2). Although Article 9(1) states that members of the Council must be independent and guided by the public interest when performing their functions, functional independence of the body is not sufficiently ensured. Appointment procedures not only reflect influence of political parties, but also allow active politicians, party members and MPs to be appointed to the RMN.

## 11.2.2. Impartial and transparent exercise of powers

The KRRiT has functioned in Poland for 25 years. During this period, many of the everyday routine regulatory practices carried out by the Office have not been directly affected by possible political orientations of the KRRiT members. In some cases, however, political pressure has resulted in politically motivated decisions, mostly regarding sanctioning and licence-granting practices. For example, in December 2017, the KRRiT imposed a fine amounting to 1.47 million Polish Zloty (approximately EUR 344,000) on TVN24 (a commercial news TV channel) for "biased coverage" of protests in the Polish Parliament in December 2016. According to the report commissioned by the KRRiT, a part of the TVN24 programming was inflammatory and dangerously escalated the conflict between the government and opposition. After a wave of criticism both regarding the report and the fine, the decision was ultimately revoked by the KRRiT Chairman.<sup>426</sup>

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<sup>421</sup> Eurobarometer (2016), "Media Pluralism and Democracy", Special Eurobarometer 452 Report, <https://ec.europa.eu/digital-single-market/en/news/media-pluralism-and-democracy-special-eurobarometer-452>.

<sup>422</sup> Ibid.

<sup>423</sup> Article 9 of the 1992 Broadcasting Act.

<sup>424</sup> Article 7(2b) of the 1992 Broadcasting Act.

<sup>425</sup> Article 10 of the 1992 Broadcasting Act.

<sup>426</sup> Trzaska I. (ed.) (2018), „Gigantyczna kara dla TVN. KRRiT cofa decyzję z grudnia” (The gigantic fine for TVN: KRRiT revokes its decision from December), *Money.pl*,





### 11.2.3. Competences, powers and accountability

The KRRiT's tasks and competences are clearly defined under Article 6(3) of the 1992 Broadcasting Act. These include: setting the directions of state policy in respect of broadcasting, issuing opinions on draft legislative acts and international agreements concerning broadcasting, supervising the activities of broadcasters, developing the conditions to be met by broadcasters in their activities, making decisions concerning broadcasting licences, and others.<sup>427</sup>

As regards accountability, the KRRiT provides broad information about its activities via its website.<sup>428</sup> This information is segmented according to the area of concern (e.g. activities of licence-holder broadcasters, PSM performance, audience complaints, EU and international relations, and other areas). Also, information on legal issues and regulations is clearly displayed, together with public consultations concerning particular problems. One area that could perhaps benefit from greater transparency is full and easy access to information about media organisations and providers, including data on ownership and revenues.

Each year, the KRRiT has an obligation to submit to the Sejm, Senate and President an annual report on its activities during the preceding year, as well as information concerning key issues in radio and television broadcasting.<sup>429</sup> The KRRiT must also present the report and information to the Prime Minister.<sup>430</sup> The Sejm, the Senate and the President can accept or reject the KRRiT's annual report. In the event of rejection of the report by both the Sejm and the Senate, the term of office of KRRiT's members expires, but only if this is approved also by the President.<sup>431</sup> In June 2010, for the first time since the KRRiT's establishment, the KRRiT's annual report was rejected by the Sejm, Senate and the President. As a result, the term of office of the KRRiT's members expired before its legally set limit. In other cases, the KRRiT's annual report was rejected by the Sejm and Senate, for example in 2016, 2011, 2009 and 2008.<sup>432</sup> Although such cases don't occur frequently, they demonstrate that the KRRiT's accountability process is closely linked to political approval.

The RNM tasks and competencies are described in a relatively general manner under Article 2 of the 2016 Act on the National Media Council, stating that the Council has the power to appoint and dismiss members of governing bodies of PSM and the Polish Press Agency. According to Article 13, RNM has an obligation to submit written information on its operations in the past year to the Sejm, the Senate, the President, the Prime Minister, the KRRiT and the general public. These bodies may submit their remarks to the RNM and the RNM is obliged to provide a response. The Act does not, however,

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<https://www.money.pl/gospodarka/wiadomosci/artykul/kara-tvn-krrit,132,0,2396036.html>.

<sup>427</sup> Article 6(3), the 1992 Broadcasting Act.

<sup>428</sup> At [www.krrit.gov.pl](http://www.krrit.gov.pl).

<sup>429</sup> Article 12(1), the 1992 Broadcasting Act.

<sup>430</sup> Article 12 (2), the 1992 Broadcasting Act.

<sup>431</sup> Article 12 (4) and 12 (5), the 1992 Broadcasting Act.

<sup>432</sup> See information on Sejm and Senate voting, <http://www.krrit.gov.pl/krrit/sprawozdania/informacja-dot-uchwal/>.



specify procedures or actions in cases in which the Council's response is found to be insufficient or not well-grounded.

#### 11.2.4. Adequate financial and human resources

In general, the KRRiT's financial and human resources appear to be adequate.<sup>433</sup> Article 11(3) of the 1992 Broadcasting Act states that "costs of operations of the National Council and its Office shall be borne by the state budget". The annual budget of the KRRiT is defined by the Budgetary Act, and made public *post factum* in the annual report.<sup>434</sup> Financial accountability of the KRRiT is controlled by the national audit office (Najwyższa Izba Kontroli – NIK – Supreme Chamber of Control). The results of this control in the last few years show that NIK positively evaluated KRRiT budgets.<sup>435</sup> The KRRiT's budget and financial accountability has not raised major public discussions and media attention.

#### 11.2.5. Adequate enforcement powers

The enforcement and sanctioning powers of the KRRiT are defined in the 1992 Broadcasting Act, mainly through three areas of possible action: warning/formal objections;<sup>436</sup> penalty payments/ fines;<sup>437</sup> and suspension/revocation of a licence.<sup>438</sup>

Article 10 of the 1992 Broadcasting Act generally describes the role of the KRRiT's Chairman, including the power to require appropriate information from broadcasters and call an end to practices infringing on the provisions of the Act. The sanctioning powers also involve consideration of personal responsibility on the part of broadcasters.<sup>439</sup> The strictest form of sanctions includes revoking the broadcasting licence, as foreseen by Article 38.

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<sup>433</sup> The KRRiT annual reports do not disclose the exact number of staff, but there is information on salaries which comprise around 60% of the total budget. See: <http://www.krrit.gov.pl/krrit/sprawozdania/>.

<sup>434</sup> Ustawa budżetowa (The 2019 Budgetary Act) of 16 January 2019, Official Journal 2019, item 198, <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000198>.

<sup>435</sup> See e.g. NIK (2018), „Informacja o wynikach kontroli wykonania budżetu państwa”, w 2017 r. w części 09 – KRRiT (Information about audit regarding the state budget in 2017, part 09 – KRRiT), KNO.430.006.2018, Nr ewid. 134/2018/P/18/001/KNO, <https://www.nik.gov.pl/plik/id.17028.pdf>.

<sup>436</sup> Article 10 (2), 10 (3) and 10(4) of the 1992 Broadcasting Act.

<sup>437</sup> Articles 53, 54 and 55 of the 1992 Broadcasting Act.

<sup>438</sup> Article 38(2), 38(3) and 38(4) of the 1992 Broadcasting Act.

<sup>439</sup> Article 54(1) of the 1992 Broadcasting Act. The Article refers explicitly to "a person who directs the media service provider's activity".



## 11.2.6. Appointment and dismissal procedures

The constitutional provisions protect a representative composition of the National Broadcasting Council and aim to prevent active party membership of the KRRiT members.<sup>440</sup> At the same time, the Constitution does not sharply define the number of KRRiT members nor the length of their terms. This has been used in the past by politicians both to change the number of KRRiT members and the KRRiT's composition. For example, in 2005, the Act on transformations and modifications to the division of tasks and powers of state bodies competent for communications and broadcasting reduced nine KRRiT members to five.<sup>441</sup> In June 2010, the term of office of the KRRiT's members expired before its legally set limit due to the rejection of the KRRiT's annual report as described above.

Article 7(1) of the 1992 Broadcasting Act states that the main competence expected from candidates for National Broadcasting Council membership is “a distinguished record of knowledge and experience concerning media”. In the course of the KRRiT's history, however, its members have included a large number of active politicians or political activists who briefly suspended their political activities but returned back to active politics after the end of their membership term.<sup>442</sup>

The members (5) of the National Media Council are appointed by the Sejm (3) and President (2), who chooses the members from proposals of opposition parties represented in the Sejm. Such an appointment procedure ensures that a majority of the Council's members are most likely nominated by governing political parties, while candidates of the opposition will always constitute a minority. Although the conflict-of-interest rules do not allow members of the government, self-government, chancellery of the President and the KRRiT to have membership in the RMN, they don't exclude active politicians, party members or MPs from acting as Council members.<sup>443</sup>

## 11.2.7. Appeal mechanisms

The appeal procedure against decisions of the media authority is defined in Article 56 of the 1992 Broadcasting Act. The sanctioning decisions issued under Article 10 paragraph 4 and Articles 53 and 54 may be appealed against to the Voivodship Court (regional Court).

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<sup>440</sup> Article 214, The 1997 Constitution.

<sup>441</sup> Ustawa o przekształceniach i zmianach w podziale zadań i kompetencji organów państwowych właściwych w sprawach łączności, radiofonii i telewizji (Act on transformations and modifications to the division of tasks and powers of state bodies competent for communications and broadcasting), adopted on 29 December 2005, Official Journal 2005, No 267, item 2258.

<sup>442</sup> Please see information on KRRiT's membership, <http://www.krrit.gov.pl/krrit/informacje-o-krrit/historia-krrit/>.

<sup>443</sup> Article 5(2), the 2016 Act on the National Media. Three (a majority) of current RMN members are members of the governing Law and Justice Party, as well as MPs.



The appeal mechanisms appear relatively effective, although the time taken to deal with issues is usually very long.<sup>444</sup>

### 11.3. Conclusion

Both functional and de facto independence play an important role in securing the effectiveness and impartiality of the media regulatory authorities in light of the 2018 AVMS Directive and Council of Europe standard-setting instruments. In the case of Poland, perhaps one of the weakest elements of de facto independence can be found in the implementation of the appointment procedures.

On the one hand, constitutional provisions and the regulatory framework appear to be in line with the Directive and the recommendations of the Council of Europe as far as KRRiT is concerned. On the other hand, the way in which the rules are used and implemented in practice reveals the risk of political influence on regulatory practice. Likewise, the KRRiT's accountability appears to be closely linked to political approval, especially in relation to a majority political party represented in Parliament.

Thus, both the implementation of the appointment procedures and accountability could reflect, to a greater extent, the public component, for example through the involvement of social, educational and other organisations representing various segments of society. In addition, appeal mechanisms require more effective and timely action by the courts. As regards transparency, which is closely linked to accountability, one possible action could be the provision of full and easy access to information about media organisations and providers, including data on ownership, revenues, financing (also through public advertising), market shares, connections to other media companies, etc. Finally, in the long term, greater legal certainty would probably give the KRRiT more stability in terms of tasks and competences so it can effectively implement the 2018 AVMS Directive and the standards set by the Council of Europe.

The governance of PSM and the role of the RMN in this regard appear to be more of an issue. Not only has the establishment of RMN weakened the KRRiT's competences in PSM, but there are also no adequate safeguards for the functional independence of the RMN, in particular from political parties and the government.

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<sup>444</sup> For example, the decision of the Appeal Court in Warsaw in the case *Sygn. akt VI ACa 867/10* regarding the sanction imposed on a broadcaster by the Chairman of the National Broadcasting Council took almost three years. Appeal Court (2011) Judgement *Sygn. akt VI ACa 867/10*, (*Wyrok w sprawie Sygn. akt VI ACa 867/10*), [http://orzeczenia.ms.gov.pl/content/\\$N/15450000003003\\_VI\\_ACa\\_000867\\_2010\\_Uz\\_2011-08-11\\_001](http://orzeczenia.ms.gov.pl/content/$N/15450000003003_VI_ACa_000867_2010_Uz_2011-08-11_001).



## 12. SE – Sweden

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### 12.1. Introduction

Sweden has an extensive and diverse media landscape consisting of a combination of ‘old’ and ‘new’ technology. Especially the production and consumption of print media (newspapers) has traditionally been very high. Public service radio and TV are offered by Sweden’s Television (Sveriges Television AB) and Sweden’s Radio (Sveriges Radio AB)<sup>445</sup>, both financed through a public special tax, which in 2019 replaces an earlier licence-fee-based system. Swedish Radio is broadcast on four analogue channels, one of which is regionally produced and distributed through 25 local channels, and Swedish Television has five channels. Both Sweden’s Television and Sweden’s Radio have web-based on-demand services based on the broadcasted material but with some additional exclusive material. Licences for private radio broadcasting were redistributed in 2017 (with broadcasting starting in 2018), when private actors could compete for three national and 35 regional licences. At the same time, there were licences for 50 national and three local digital TV broadcasters. There is also an extensive satellite broadcasting system combined with VOD and SVOD offerings. The latter has increased rapidly. In 2017, 56% of households had access to at least one SVOD service, with Netflix as the market leader.<sup>446</sup> The most likely legislative piece to be affected by the revised Article 30 of the AVMS Directive is the Act on Radio and TV (Radio och tv-lagen). On 28 June 2018, the government appointed a committee to provide an analysis and recommendations with regard to what type of changes, if any, will be needed. The committee is due to provide its conclusions no later than 17 August 2019.<sup>447</sup>

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<sup>445</sup> There is also a separate public service company producing educational material for schools, distributed online and in cooperation with Swedish Television and Swedish Radio.

<sup>446</sup> Myndigheten för press, radio och tv. 2018. *Medieutveckling 2018: Medieekonomi*. Published October 2018, p. 17-19,

<https://www.mprt.se/Documents/Publikationer/Medieutveckling/Medieekonomi/Medieekonomi%202018.pdf>.

<sup>447</sup> Kommittédirektiv 2018:55 (Government Decree 2018:55),

<https://www.regeringen.se/49f284/contentassets/f85f3a36d95046b792f03d5c2a1260be/genomforande-av-andringar-i-av-direktivet-dir.-201855.pdf>.



## 12.2. The Swedish Press and Broadcasting Authority

The Swedish Press and Broadcasting Authority (in Swedish: Myndigheten för press, radio och tv, hereafter also: the Authority)<sup>448</sup> was set up in 2010 as a successor to two previous bodies, the Swedish Radio and TV Authority, and the Swedish Broadcasting Commission (hereafter also: the Commission). It retains a dual structure; the Swedish Broadcasting Commission functions as an independent decision-making body within the Authority with relation to programme content whereas the Authority is responsible for licensing, registration, maintenance of databases and other issues.<sup>449</sup> It is a converged regulator, with its seat in Sweden's capital Stockholm.<sup>450</sup>

### 12.2.1. Legal distinctiveness and functional independence

The Swedish public administration is traditionally characterized by dualism, in which the executive (the government and its ministries) keeps an arm's length distance from implementing agencies. The practice is deeply rooted in Swedish administrative culture and can be traced back to the 17<sup>th</sup> century. It means that Ministries are not allowed to interfere with, or give an opinion on, decisions related to specific cases taken by an authority, but instead rules and controls agencies through the legal framework, annual regulatory instructions and the appointments of heads and/or boards.<sup>451</sup> The Swedish Press and Broadcasting Authority must be understood within this tradition. It is an authority (myndighet) as defined by Regeringsformen (The Instruments of Government), one of the four Fundamental Laws that together form the Swedish constitution. Thus, the Swedish Press and Broadcasting Authority is an implementing authority (Regeringsformen, chapter 2, paragraph 2) enjoying a similar type of independence to that of other authorities. The Swedish Broadcasting Commission unit has additional constitutional protection through the Fundamental Law on Freedom of Expression (Yttrandefrihetsgrundlagen, chapter 3, article 7 and chapter 7, article 5).

The government appoints the head of the Swedish Press and Broadcasting Authority (the Director General). The government also appoints four persons to an advisory council, chaired by the Director-General. The role of the council is to obtain insight into the activities of the Authorities and to give advice based on knowledge and experience. It does not make any decisions. The Broadcasting Commission, as an

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<sup>448</sup> In addition to referenced documents, information for the analysis was provided by representatives of the authority: Helena Söderman, Head of Legal Services, Peter Schierbeck, Head of Administration, and Charlotte Ingvar-Nilsson, Director-General. The interview was carried out via phone, on 22 February 2019.

<sup>449</sup> The Authority also contains a Media Support Commission, which distributes financial support for print and other news media and hence is not dealt with in this analysis.

<sup>450</sup> Radio and TV content is also in the sphere of competence of the Chancellor of Justice (Justitiekanslern) who can take action against severe violence or pornographic content that has been broadcast during daytime. In practice, few cases are handled by the Chancellor.

<sup>451</sup> Bengtsson H. & Melke A. (2014), *Vår offentliga förvaltning. Samverkan i välfärdspolitiken* (Our public administration: collaboration in welfare policy), Gleerups: Malmö, Sweden, p. 74.



independent unit within the Authority, consists of seven regular members, including the chair, and in addition four substitutes, who are all appointed by the government. The body has no independent administration, but is serviced by the Authority. The Authority is accountable to the government in terms of ensuring that the Commission has sufficient resources for its activities and that its activities are conducted in line with legal requirements and are accounted for.<sup>452</sup> The Authority is also responsible for receiving and communicating decisions of the Commission, and its civil servants handle and prepare the cases, although decisions are solely to be made by the Commission.

In sum, the Authority is not a body that is clearly distinct from the government; its authority is not different in structure from that of other implementing authorities and the government has appointing power over key positions. Technically, the government could withdraw the appointment of the Director-General at any time without reason, although this has never happened. However, functional independence is a different matter. Even though the Authority must follow the annual government instruction letter (and other regulations), this does not extend to the Commission, and the de facto independence is high, due to the historically stable and constitutionally protected tradition of arm's-length governance.

## 12.2.2. Impartial and transparent exercise of powers

The Swedish Press and Broadcasting Authority provides extensive information about its activities through its website, annual reports and other types of material. The website is clearly designed to be easy to navigate for different user groups, for instance through highly profiled headings on “how to file a complaint” and “how to broadcast”. The annual report is structured according to the Authority’s tasks and activities and also contains financial information. The government has a formal possibility, indeed an obligation, to instruct the Authority<sup>453</sup> and these annual instruction letters are also available on the website (a typical instruction letter is five to six pages and easy to read also for a layperson).

Some decisions regarding content complaints, especially those that refer to the public service broadcaster’s obligation to be impartial, receive much attention and lead to public discussions. But there is no evidence of partial decision-making or treatment of media organisations.

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<sup>452</sup> Förordning 2015:302 (Decree 2015:302), paragraph 22.

<sup>453</sup> Sveriges Regering (the Government of Sweden), <https://www.regeringen.se/sa-styrs-sverige/myndigheter-och-bolag-med-statligt-agande/>.





### 12.2.3. Competences, powers and accountability

The Swedish Press and Broadcasting Authority has competence in the areas of audio and radio broadcasting, and TV broadcasting, as well as VOD and searchable text-TV. It grants licences for broadcasting through analogue and digital radio channels<sup>454</sup> and digital TV channels<sup>455</sup>, and requires registration for some activities such as VOD.<sup>456</sup> It regulates product placement, sponsoring and advertisements in TV broadcasting<sup>457</sup>, and advertisement and sponsoring in radio broadcasting.<sup>458</sup> It also has competences with regard to print media, such as providing financial support for certain types of print newspapers and other news media.

The Authority applies a range of methods to enable assessment of its accountability to the government, stakeholders and citizens. All decisions by the Broadcasting Commission are available and searchable on the website. About 10% of the decisions constitute potential precedent cases and are therefore considered extra-important. These decisions are discussed and made by the entire Commission (instead of only the Chair) and are communicated via a press release and possibly more extensive coverage on the website in which reasoning is elaborated on. The Authority's decisions on other matters, most importantly licences, are also public and searchable. The archive currently consists of 13 000 cases. In addition, any citizen has the right to request relevant documentation in accordance with Sweden's wide-ranging and old freedom of information law. The latter means that all public document categories that are not explicitly described as secret by law are public.

Consultation is another method that is applied, but in different ways. Depending on the subject area this may take place through invitations to deliberative events ("hearings") or in written form. An example of an area that required extensive consultations before and after regulatory decisions were made was accessibility of programs for persons with disabilities.

There appears to be sufficient legal certainty with regards to the competences and powers of the Authority, since there have been no publicly known instances of dispute around this in recent years. There are processes in Sweden whereby agencies may suggest changes in competences and powers, or the legal description thereof, to enable their work. The Authority has only rarely requested any such changes, but two examples of requests responded to with legal changes were demands that providers of on-demand TV should also be required to store and archive their materials to allow monitoring of rule compliance, and the establishment of clarity about the fact that the Commission also has searchable text-TV within its competence,<sup>459</sup> and that appropriate accountability procedures are in place even if not specified by law.

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<sup>454</sup> Radio-och TV-lag 2010:696 (Act on Radio and TV 2010:696), chapter 10.

<sup>455</sup> Chapter 4, Act on Radio and TV (2010:696).

<sup>456</sup> Chapter 2 and Chapter 11, Act on Radio and TV (2010:696).

<sup>457</sup> Chapters 6, 7 and 8, Act on Radio and TV (2010:696).

<sup>458</sup> Chapter 15, Act on Radio and TV (2010:696).

<sup>459</sup> Interview 22 February 2019.





## 12.2.4. Adequate financial and human resources

The Swedish Press and Broadcasting Authority had an annual budget of around EUR 3.7 million (SEK 37 million) in 2018<sup>460</sup> and 35 staff, not including the members of the Broadcasting Commission<sup>461</sup> who receive honoraria for the hours spent on the Commission but are not on the general payroll. The bulk of the funds come from the state budget, which is spent and accounted for in accordance with rules and recommendations in place for all state authorities (e.g. Government decree 2000:606 and instructions from the Swedish National Financial Management Authority<sup>462</sup>). The Authority is obliged to retain a portion of the fees it generates, such as fees to apply for a licence, and use it to cover the costs associated with licensing or other types of operation. According to the Authority, there is no specific advantage to this model of financing and it may even cause more administrative work in some cases. The budget has been relatively stable over time.<sup>463</sup>

The financial and human resources have in general been adequate and sufficient for the Authority. However, the Authority notes that the number of cases has increased, both for licensing and programme content, which in 2017 caused the average time required to deal with a case to increase from 42 to 51 days. The goal was to reduce the time to below 40 days<sup>464</sup>, but efforts to streamline procedures in 2018 led only to the handling time staying at the same level, since the number of cases increased further.<sup>465</sup>

## 12.2.5. Adequate enforcement powers

The Act on Radio and TV specifies a range of enforcement powers, and the cases to which they apply. If a broadcaster has damaged someone's integrity or private life, or is non-factual or racist, the sanction is that the decision of the Broadcasting Commission should be public and publicised in a prominent space/time window by the broadcasting company. The same procedure applies to the requirement on public service to be "impartial", which is one of the most common grounds for complaints. The Authority says<sup>466</sup> it often receives questions and comments from the general public suggesting this power is "too soft", but in the experience of the Authority the actors on the market (the broadcasting companies,

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<sup>460</sup> Myndigheten för press, radio och tv, "Annual report 2018", <https://www.mprt.se/Documents/Styrdokument/Arsredovisning-2018-web.pdf>, p. 37.

<sup>461</sup> The same is valid for the Print Media Support Commission, which is not dealt with in this report due to the focus on audiovisual media.

<sup>462</sup> Myndigheten för press, radio och tv, "Annual report 2017", [https://www.mprt.se/Documents/Styrdokument/Radio\\_tv\\_AR\\_2017-Signerad.pdf](https://www.mprt.se/Documents/Styrdokument/Radio_tv_AR_2017-Signerad.pdf), p. 40.

<sup>463</sup> The budget has increased in recent years. In 2011, it was 24 million SEK (2.4 million EUR), Myndigheten för press, radio och tv, "Annual report 2011", <https://www.mprt.se/Documents/Styrdokument/Årsredovisning%202011.pdf>.

<sup>464</sup> Annual report 2017, p 3.

<sup>465</sup> Annual report 2018, p 3.

<sup>466</sup> Interview February 22, 2019.



including the public service companies) try hard to avoid being subjected to this form of sanction and take it very seriously.

Violations against rules can be sanctioned with either a special fee or a fine. For instance, violation of rules regarding advertisements and sponsorship can lead to a special fee of between SEK 5 000 and 5 million (approx. EUR 500 to EUR 0.5 million).<sup>467</sup> Violations of for instance the accessibility requirement or the provision of information to the Authority lead to a fine<sup>468</sup>, the size of which is not specifically regulated for this area (special legislation for fines applies). Failure to pay these fees and fines may result in further penalty fees. The fee is set by the Authority, but the case is then handed over to the Administrative Court of Stockholm county, which enforces the fee (it goes to the state). The fee is collected by the Authority on the State's behalf. There is a possibility for the Administrative Court not to follow the Broadcasting Commission's decision, but for instance in 2017, 13 cases were decided. In 12 of these, the Commission's decisions were followed entirely, and in the 13<sup>th</sup> case partly.<sup>469</sup> The experience of the Authority is that the procedure through the Administrative Court enhances the legitimacy of the decisions, since those affected perceive it as an additional judicial review and guarantee of due process.

## 12.2.6. Appointment and dismissal procedures

The appointment and dismissal procedures for the Authority and the Broadcasting Commission do not differ from the appointment procedures for other state bodies. The government appoints the head of the regulatory body (the Director-General) and the members of the collegiate body of the Broadcasting Commission. The decision is taken on the basis of merit. There is one rule regarding competence, which is that the Chair (and the substitute member serving as Vice-Chair) and the Vice-Chair of the Broadcasting Commission should have competence as a judge. There is no similar rule for the Head of the Authority, but in practice all recent heads have had a legal background. In addition, the government seeks to choose among as broad a field of candidates as possible and strive for even gender distribution and an increase in diversity. Before the creation of the current structure of the Authority (in 2010), it was not uncommon to have members of parliament on the Broadcasting Commission, but this practice has stopped although there is no rule against it. The appointment period is six years for the Director-General and three years for the Broadcasting Commission members. There is a staggered schedule so competence is not lost in bulk. Both the head and the members of the Broadcasting Commission can be dismissed, but this has not happened in practice. The employees of the Authority are bound to follow the same rules regarding prevention of conflict of

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<sup>467</sup> Chapter 17, paragraph 5, Act on Radio and TV (2010:696).

<sup>468</sup> Chapter 17, paragraph 11, Act on Radio and TV (2010:696).

<sup>469</sup> Annual report for 2017, page 24.



interest as other employees in state authorities. They also need to adhere to a set of constitutionally specified values.<sup>470</sup>

There are no specific rules to prevent conflicts of interest, nor any specific safeguards in place in the event the Commission does not have a quorum because new members have yet to be appointed. In fact, in practice most routine decisions are taken by the Chair alone, which is in accordance with legal provisions.<sup>471</sup>

In general, the appointment and dismissal procedures appear little regulated, but it should be noted that there is high support across political parties for retention of this merit-based government-led system. The only party that in recent times has suggested a change is the far-right Swedish Democrats, representatives of which have advocated for a system in which parliament would appoint the members of the Broadcasting Commission. According to spokespersons of other parties, this could lead to a politicisation of the Commission's work.<sup>472</sup>

### 12.2.7. Appeal mechanisms

Licensing decisions and decisions about access taken by the Authority can be appealed to the public administrative court system. The decision of the authority stands pending the outcome of the appeal.<sup>473</sup> The number of appeals is relatively low. In 2018, only about 30 of 3 500 decisions were appealed<sup>474</sup>, and of the many re-licensing cases of all private radio channels in 2018 (about 50) only two to three were appealed.<sup>475</sup> Decisions taken by the Commission can be appealed, unless the sanction is that the decision be published by the broadcaster.

## 12.3. Conclusion

The Swedish system appears to be working well, and there are no significant risks to the independence of the authority in practice not covered by the new codification. The committee currently working to establish whether the national legislation needs to be updated in the light of the revised AVMS directive is required to provide suggestions by August 2019. These suggestions will be further analysed by the government and possibly turned into legal suggestions to be reviewed by stakeholders (remissförfarande) and decided on by parliament.

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<sup>470</sup> Regeringsformen (The Instrument of Government), chapter 1, paragraph 2.

<sup>471</sup> Chapter 16, paragraph 14, Act on Radio and TV (2010:696).

<sup>472</sup> A. Horne, "SD-politiker vill ge riksdagen mer makt över Granskningsnämnden" (Swedish Democrat Politician wants to give parliament more power over the Broadcasting Commission), *SVT Nyheter*, 19 October 2018, <https://www.svt.se/kultur/granskningsnamnden>.

<sup>473</sup> Chapter 20, paragraph 1, Act on Radio and TV (2010:696).

<sup>474</sup> Interview 22 February 2019.

<sup>475</sup> Interview 22 February 2019.



The overview of the Swedish system provided here cannot foretell what the committee will recommend in the area of independent regulatory activity and oversight. However, it can safely be concluded that the Swedish system rests more on widespread and engrained norms in society, and traditional and to some extent formalised independence of authorities in general, than on independence set down in law.

A strict reading of Article 30 of the AVMS Directive may well result in some legislation and practices, particularly with regard to the regulation (or non-regulation) of appointment and dismissal procedures.



## 13. SI – Slovenia

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### 13.1. Introduction

Slovenia faces typical challenges of a small-sized media market in which the quantity of media outlets does not translate to a high level of diversity and good choice of quality content. The advertising budget aimed at media has been seemingly on the rise over the last years, but its net worth is impossible to calculate due to business arrangements often based on under-the-table arrangements and unknown discounts. The breakdown of the gross advertising budget indicates significant differences in comparison with global trends. With a share of more than 80%, television advertising still dominates the Slovenian media market and the lion's share of these funds (again more than 80%) goes to the leading media company PRO PLUS<sup>477</sup>, owned by Central European Media Enterprises (CME), an AT&T-Warner Media media and entertainment company, which operates television channels also in the Czech Republic, Slovakia, Bulgaria and Romania.

Despite its withdrawal from media ownership in the 1990s, the state still has an important role in the media, for example as the 100% owner of the Slovenian Press Agency (STA) and through the market-correction scheme based on public subsidies. In terms of the Hallin & Mancini (2004) classification<sup>478</sup>, Slovenia has often been considered a polarised pluralist model of media and politics for its high parallelism of media and politics.<sup>479</sup>

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<sup>476</sup> Editor's note: This article was written by Ms. Kerševan Smokvina before she took office in March 2019 as Slovenia's Secretary of State for the Media and Creative Sector.

<sup>477</sup> Setinšek I. (2018) "Več kot pozitivna oglaševalska bera v letu 2017," in: *Marketing Magazin*, 29 March 2018, <http://www.marketingmagazin.si/novice/mmarketing/15228/vec-kot-pozitivna-oglasevalska-bera-v-letu-2017>.

<sup>478</sup> Hallin D. C. & Mancini P. (2004), *Comparing Media Systems. Three Models of Media and Politics*. Cambridge University Press: Cambridge.

<sup>479</sup> Jakubowicz K. (2008). "Finding the right place on the Map: Prospects for Public Service Broadcasting in Post-Communist Countries," in: Jakubowicz K. & Sükösd M. (eds) *Finding the Right Place on the Map. Central and Eastern European Media Change in a Global Perspective*, pp. 101–124, Intellect Books: Bristol, UK & Chicago, US; Bašić-Hrvatinić S. & Brankica P. (2008). *You Call this a Media Market? The Role of the State in the Media Sector in Slovenia*, Peace Institute: Ljubljana; Pfetsch B., Maurer P., Mayerhöffer E., Moring T. & Schwab Cammarano S. (2014), "Context of the Media-Politics Relationship: Country Selection and Grouping", in: Pfetsch B. (ed), *Political Communication Cultures in Western Europe: Attitudes of Political Actors and Journalists in Nine Countries*, pp. 48–49, Palgrave Macmillan: London.



The out-dated Media Act of 2001<sup>480</sup>, which was last thoroughly amended in 2006, has been subject to several unsuccessful revision attempts to date, together with efforts to adopt a national strategy on media which also have not acquired the needed public and political consent. The audiovisual media services are governed by a separate law, the Audiovisual Media Services Act (ZAvMS), a fairly faithful copy of the former AVMS Directive (2007), which was adopted in 2011 and slightly corrected in 2015.<sup>481</sup> In addition to this law, the transposition of the new AVMS Directive (2018) will likely affect the Electronic Communications Act (ZEKom-1, adopted in 2012 and last revised in 2017), which will be in any case replaced by a new law (ZEKom-2) due to the recently adopted European Electronic Communications Code.<sup>482</sup>

## 13.2. Agency for Communication Networks and Services

The Slovenian Agency for Communication Networks and Services (AKOS) was established as a converged authority in 2001, as a result of merging the then Office of Telecommunications and Broadcasting Council. It operates in Ljubljana, with a small dislocated unit in the eastern part of Slovenia, responsible for radio spectrum monitoring in that area.

From the initial scope of activities covering telecommunications and broadcasting, the remit of the regulatory authority eventually extended to include postal and railway services. The mandate, organisation and powers of AKOS, now responsible for electronic communications, electronic media, and postal and railway service markets, are defined by ZEKom-1, which already contains high safeguards of independence. This can be attributed to the EU legislation requiring independent regulation of areas other than audiovisual services (e.g. the former telecom package, railway package, and Postal Services Directive). Article 30 of the revised AVMS Directive will therefore most probably result in slight amendments of the provisions governing AKOS in the new ZEKom-2.

The bodies of AKOS are the Agency Council and the Agency Director. The Council's most influential role in the work of the regulator is its mandate with regard to the adoption of the AKOS work program with a financial plan and the AKOS annual report, as well as in the initiation of the dismissal of the Agency Director. The Members of the Council may inspect the AKOS business accounts and may suggest improvements in the operation of AKOS to its Director, as well as flag any irregularities to the Director and external competent authorities.

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<sup>480</sup> Zakon o medijih (Official Gazette of the Republic of Slovenia, No. 110/06 – official consolidated text, 36/08 – ZPOmK-1, 77/10 – ZSFCJA, 90/10 – odl. US, 87/11 – ZAvMS, 47/12, 47/15 – ZZSDT, 22/16 & 39/16) (Media Act).

<sup>481</sup> Zakon o avdiovizualnih medijskih storitvah (Official Gazette of the Republic of Slovenia, No. 87/11 & 84/15) (Audiovisual Media Services Act).

<sup>482</sup> Zakon o elektronskih komunikacijah (Official Gazette of the Republic of Slovenia, No. 109/12, 110/13, 40/14 – ZIN-B, 54/14 – odl. US, 81/15 & 40/17) (Electronic Communications Act).



The Agency Director: represents AKOS; manages its operations and organises its work; adopts the AKOS' statute (upon the consent of the Agency Council); manages procedures and gives authorisations to manage procedures; issues individual acts and adopts general acts and recommendations relating to the AKOS competencies; and is liable for any damage caused by negligent or unlawful conduct, under the general rules of liability for damages.

### 13.2.1. Legal distinctiveness and functional independence

As a public agency, a corporate body governed by the Public Agencies Act (2002, last amended in 2011)<sup>483</sup>, AKOS is legally distinct from the government. In Slovenian law the public agencies are established in the following cases: if it is assumed that they would guarantee a more efficient and rational performance of tasks; if the administrative tasks can be entirely or for the most part financed by administrative or user fees; and where permanent and immediate political supervision over the performance of tasks is not necessary or appropriate due to the nature of the tasks.

AKOS' functional independence of the Slovenian government is high; its powers range from general policy-implementing powers to information-collecting powers, markets monitoring and services supervision, enforcement powers, as well as dispute and complaints handling. AKOS is the sole regulatory authority for issues covered by the AVMS Directive, but shares some tasks with the Electronic Communications Council (SEK) and the Broadcasting Council (SRDF), which are independent expert bodies with competencies in the field of electronic communications and electronic media. AKOS is legally obliged to provide them administrative and financial support.

Nevertheless, neither AKOS nor its main decision-making organ, the AKOS Director, are bound by instruction of these two councils or any other body in the performance of their duties as regards the audiovisual media services. The role of SEK and SRDF is giving opinions, recommendations and suggestions addressing issues in the field of electronic communications and in broadcasting, respectively.

As in the case of other public agencies, the government has an indirect financial and organisational influence over AKOS, as it appoints both the members of the AKOS Council and its Director, as well as approves AKOS annual plans, statutes and reports. Another area of indirect influence is the supervision of the legality of the Agency's work, carried out by the ministries responsible for areas within the scope of the AKOS remit. ZEKom-1 clearly states, however, that this supervision does not give grounds to interfere with the content of general or specific legal acts issued by AKOS in relation to the exercise of its powers under the laws in the fields of its operation.

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<sup>483</sup> Zakon o javnih agencijah (Official Gazette of the Republic of Slovenia, No. 52/02, 51/04-EZ-A, 33/11-ZEKom-C) (Public Agencies Act).



The government bodies (e.g. various ministries) are not entirely absent from the procedures conducted by the Agency, however their role is not to provide direct instructions to the regulator, but mainly opinions, proposals, programme orientations, or rarely, consents (e.g. in the case of the public tender for radio broadcasting frequencies, where the ministry responsible for culture, gives consent to tender conditions and criteria for selection of the best application).

The functional independence of AKOS is further guaranteed by the fact that no one apart from the court can overturn the regulator's decisions. The court responsible for judicial review of AKOS' decisions is the Administrative Court.

### 13.2.2. Impartial and transparent exercise of powers

Transparency is an important highlight of the AKOS regulation principles as stipulated by ZEKom-1, which is the main legal act governing the organisation and functioning of the converged regulator. Transparency is enshrined in various sections of the law. Among others, transparency provisions refer to obligatory publishing of documents, access to public information, relations with media, and public consultations.

The objectives of the law governing AKOS correspond to the ones promoted by the new AVMS Directive, that is media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

There is no evidence of partial decision-making or different treatment of audiovisual media services providers by AKOS.

### 13.2.3. Competences, powers and accountability

The scope of regulatory activities AKOS is responsible for is broad and varied. As regards electronic communications and electronic media, it includes market regulation, spectrum management and numbering, dispute resolution, licensing and authorisation, supervision of compliance with AVMS and media law, as well as granting special statuses to broadcasters that provide content in the public interest. The competencies and powers of AKOS related to audiovisual media services are elaborated in detail in ZAvMS and ZEKom-1. Together with laws regulating administrative procedure, inspection procedure and misdemeanour procedure they guarantee sufficient legal certainty for the subjects of regulation.

AKOS is obliged to carry out public consultations when amending general acts and policies. Relevant stakeholders in the broadest sense and the general public are invited to participate in the consultations. AKOS takes into account all responses and views that are adequately reasoned. The consultation period is 30 days. The regulator publishes how the received comments will affect the content and process of adoption of the document





concerned: which proposals will be taken into account and to what extent, as well as which not and why.

The regulator's decisions have to be carefully motivated. If not, the Administrative Court sends it back for completion. Every year, the Agency has to prepare an annual report and submit it to the government for approval. Once the annual report is approved, the government informs the National Assembly about it. The annual report consists of a report on the work done and a financial report. AKOS may be subjected to auditing of the Court of Audit, responsible for supervising legality, purposefulness, efficiency and effectiveness of the use of the Agency's resources.

Supervision of the legality of the regulator's work is carried out by the ministries responsible for the individual work areas in which the agency operates. This control does not entail the possibility of interfering with the content of general or specific legal acts issued by AKOS with regard to the exercise of its powers granted by different laws.

#### 13.2.4. Adequate financial and human resources

AKOS has been exclusively funded by industry fees with a fairly stable annual income of around EUR 5 million over recent years. The regulator has sufficient autonomy to decide on which tasks it spends its budget. The height of the fees, paid by subjects of regulation, are determined based on the estimated costs related to execution of the approved annual plan of work. The tariffs are determined by general acts of the Agency, which go through public consultation and have to be approved by the government. A detailed breakdown of costs and revenues is provided by both the annual programme and the financial plan, as well as an annual report with a business report of AKOS. AKOS' annual financial plan has to be approved by the government.

The salaries of employees of the Agency are subject to the regulations governing the wage system in the public sector and therefore mostly don't match the salaries in the industries AKOS regulates. AKOS can decide on its internal human resources; in the agency of around 90 employees, those directly dealing with media services represent around one tenth of AKOS' human resources. The rather small number of people responsible for media-related issues does not correspond to the increased volume of work and new regulatory challenges.

#### 13.2.5. Adequate enforcement powers

When it comes to enforcement of regulatory decisions related to audiovisual media services, AKOS has at its disposal a varied range of enforcement powers: from a warning to penalty fines. No important enforcement powers are missing. The fines for misdemeanours related to audiovisual media services range up to EUR 60 000 for service providers and up to EUR 500 in total for providers' responsible persons.



Due to modest staffing levels in the media department, AKOS' ability to contribute to the work of ERGA is limited. It is difficult to assess how the provision of Article 30 of the new AVMS Directive, requiring adequate financial and human resources for regulators, as well as enforcement powers, allowing them to carry out their functions effectively and to contribute to the work of ERGA, will be translated into Slovenian legislation and regulatory practice. In theory, it provides an opportunity for the role and resources of the media department to be strengthened, as was the case with the provisions referring to The Body of European Regulators for Electronic Communications (BEREC) and the related responsibilities of AKOS can serve as an example.

### 13.2.6. Appointment and dismissal procedures

The Agency Director is appointed by the government at the proposal of the Minister responsible for public administration, and based on a public tender published on the AKOS website and on the Ministry's website, as well as in the daily press and in the Official Gazette of the Republic of Slovenia. The public competition is managed by a competition commission appointed by the Officials' Council, which is a body responsible for selection procedures related to the nomination of Directors-General, Secretaries-General, heads of bodies in the composition of ministries, heads of government departments and heads of administration units. If the Director passes away or is dismissed, or if his or her term of office has expired and a new Director has not been appointed yet, the government appoints an Acting Director, without a public competition, to serve until the appointment of the Director but for no longer than six months. Early dismissal of the Director is possible: if she or he so requests; if she or he no longer meets the conditions for appointment; if she or he permanently loses the capacity to work ; or if the Court of Audit of the Republic of Slovenia issues a call for her or his dismissal. The government must dismiss the director at its own initiative or at the proposal of the Agency Council if the reasons referred to above arise. The Director must be informed of the reasons for his or her early dismissal and must be given the opportunity to respond to them. The government must dismiss the director by administrative decision, the reasoning for which must be explained. Judicial protection in the form of an administrative dispute may be claimed, whereby the competent court must decide on the matter as a priority. The government must make information on the dismissal of the Director public.

The Agency Council Members are recruited via a public call and appointed by the government. Members of the Council cannot be dismissed as a whole. Grounds for early dismissal of individual members are the following: if she or he so requests; no longer meets the conditions for the appointment laid down by law; permanently loses the working capacity to hold office; if the position of incompatibility referred to in law arises (e.g. if she or he becomes a member of a political party organ, public official, member of management boards of entities within the area of AKOS competencies etc.); or if she or he does not perform his duties for more than six months. Judicial protection in the form of an administrative dispute may be claimed. There are detailed rules preventing conflict of interest for both the Council Members and the AKOS Director.

### 13.2.7. Appeal mechanisms

The regulator's decisions are final and immediately enforceable. Any party in the AKOS proceedings can lodge an appeal to the Administrative Court, but the AKOS decisions stand unless interim measures such as injunctions are granted. The Administrative Court has the power to cancel a decision and send it back to the regulator for a new decision. In some cases, defined by the Administrative Dispute Act (2006, last revision in 2017)<sup>484</sup>, the Court can replace the regulator's decision.

## 13.3. Conclusion

The current national law in Slovenia, applying to the national regulatory authority responsible for media, is largely aligned with the new codification of regulatory independence as envisaged by Article 30 of the 2018 AVMS Directive. The announced revision of the law governing electronic communications (and AKOS) will need to preserve the current safeguards of legal and functional independence of the national regulatory authority and only add a few details such as those requiring adequate resources for participating in the work of ERGA.

A problem that may occur de facto rather than de jure level is related to the in a manner weak position of the AKOS department responsible for media within the converged authority responsible for a broad array of areas. Judging by the attention given to media issues in the Agency's annual reports, as well as by employment practices in recent years (indicating a significant increase in the number of staff in telecommunications departments, while media department sizes are maintained), the media focus of AKOS has often been marginalised in terms of the priority given to projects related to media in comparison to projects related to telecommunications.

Regardless of the level of quality of the national law, recent examples of practices related to the granting of spectrum rights, pointing to possible regulatory capture (which has not yet been fully explored since investigations are still underway), would appear to indicate a further need to raise awareness about the mission and restrictions associated with regulation.

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<sup>484</sup> Administrative Dispute Act (Official Gazette of the Republic of Slovenia, No. 105/06, 107/09 – odl. US, 62/10, 98/11 – odl. US, 109/12 & 10/17 – ZPP-E).





## 14. Conclusions

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### 14.1. Introduction

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

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

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



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

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

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

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

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

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



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

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

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

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



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

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

## **14.3. Country experiences compared**

### **14.3.1. Legal distinctiveness and functional independence**

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





### 14.3.2. Impartial and transparent exercise of powers

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

### 14.3.3. Competences, powers and accountability

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

### 14.3.4. Adequate financial and human resources

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



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

### 14.3.5. Adequate enforcement powers

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

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

### 14.3.6. Appointment and dismissal procedures

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



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

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

### 14.3.7. Appeal mechanisms

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

## 14.4. Outlook

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



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

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

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

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

<sup>487</sup> Jakubowicz (2013), p. xxii.



## 15. Annex: Abbreviations

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





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