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# Independent regulation of broadcasting: a review of international policies and experiences

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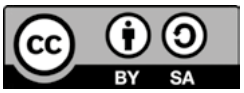



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Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of the United Nations

## An invitation to debate

More than three centuries ago, the thinker, poet and British politician John Milton published one of the most important and famous texts against censorship: Areopagitica. It was one of the catalysts for a major debate on the protection of freedom of expression and press.

Many centuries before him, the Greeks formed solid arguments on the importance of doxa (opinion) for democracy.

Discussions on the centrality of freedom of expression and access to information and knowledge for democracies, development, protection and promotion of other human rights are far from new.

However, there is no doubt that the advancement of new information and communication technologies, in particularly the growth of Internet, offers a unique and unprecedent dimension to these discussions.

As a result of this technological upsurge, we can observe impacts on the protection and promotion of human rights, on the consolidation of democracies, on fostering development, on decision-making processes, on public policies as well as on the everyday lives of citizens.

The advancement of knowledge societies is closely linked to the extensive discussions on the universal right to freedom of expression and access to information; in an increasingly connected world. Press freedom, media development, privacy, the role of ICTs in public policies, open governments, preservation of documentary heritage, media and information literacy are among the many issues that are on the table.

The UNESCO Office in Montevideo, seeking to enhance its role as laboratory of ideas, is now offering its stakeholders this Communication and Information Discussion Papers.

Written by leading experts from each field, the main objective is to provide inputs for decision makers and policy makers so they can take into account the different angles of the current issues on the international agenda, always having as a main line the international standards.

These papers do not intend to be the final word. Instead, they aim to contribute to an ever increasing, plural and well-informed debate on key issues of yesterday, today and tomorrow.

Happy reading!

# Foreword

# Regulation and freedom of expression

Among the many innovations contributed by the new sustainable development goals to the multilateral agenda for development, democratic consolidation and human rights promotion and protection, one is particularly relevant: a clear message that institutions are important, that the lack of good governance makes it especially difficult to achieve the desired development stages, as well as democracy and human rights guarantees.

Sustainable Development Goal 16 enshrines such concepts as the democratic rule of law, efficiency of institutions, accountability, access to public information, guarantees for fundamental freedoms, and political participation.

All these key concepts point to the same goal: the quality of the institutional design of regulatory agencies and the design, implementation, monitoring and evaluation mechanisms for the daily delivery of public policies in different areas, are crucial.

The same applies to the protection and promotion of freedom of expression and, more specifically, to the development and consolidation of free, independent, and pluralistic media systems.

Among the many pieces that are central to the mechanism advocated by international standards of freedom of speech and freedom of the press to achieve free, independent, and pluralistic media systems, the structure of the public agencies in charge of regulating the sector is undeniably important.

Comparative politics has shown that good laws without good regulating agencies are doomed to inhabit the world of good intentions. Therefore, here we consider that good governance equals good regulation.

How can this be achieved? The recipe is long and complex, although robustly tested (with both successes and failures) in different parts of the world. The secret lies in the independence of regulatory agencies.

Easier said than done. Building independent agencies is a less easy task, albeit not an impossible one.

This discussion paper, written by one of the most brilliant specialists in this topic, Eva Salomon, is a compass calibrated for sailors wishing to reach the port of good media regulation.

Enjoy your reading, debating, and regulating!

The editors

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## Executive Summary

This paper examines the role that broadcasting regulation has in relation to the right to freedom of expression, and the range of duties and powers that regulators typically have. A wide range of international bodies have agreed on the preference for such regulators to be independent, because this best protects freedom of expression. These international normative standards are described and from these, the legal and structural, and cultural and behavioural characteristics of independence are presented. Various global examples of how these characteristics are displayed are explained, as are the challenges and opportunities for independent broadcasting regulation. Finally, an account is given of how these characteristics, or indicators, have been assessed by researchers, with some specific recommendations for the Latin American region.

## Resumen ejecutivo

Este documento analiza el papel que juega la regulación de la radio y teledifusión en relación con la libertad de expresión, así como el abanico de responsabilidades y facultades que habitualmente poseen las agencias reguladoras. Una amplia variedad de organismos internacionales coinciden en que estas agencias deben ser independientes para asegurar una mejor protección de la libertad de expresión. El documento describe estas normas internacionales y, a partir de ellas, se presentan las características legales, estructurales, culturales y de comportamiento propias de la independencia. Luego, se exponen diversos ejemplos de todo el mundo sobre la forma en la que se presentan estas características, además de los desafíos y oportunidades de la regulación independiente de la radio y teledifusión. Finalmente, se da cuenta de la evaluación que los investigadores han realizado sobre estas características o indicadores, y se acompaña con algunas recomendaciones específicamente dirigidas a América Latina.

## Resumo executivo

O presente texto examina o papel desempenhado pela regulação de radiodifusão em relação ao direito à liberdade de expressão, e o conjunto de deveres e poderes que os reguladores tipicamente possuem. Uma ampla variedade de órgãos internacionais está de acordo a respeito da necessidade de que os reguladores sejam independentes, uma vez que isso é o que mais protege a liberdade de expressão. Esses padrões normativos internacionais são descritos e, a partir deles, as características da independência são apresentadas em termos legais e estruturais, e culturais e comportamentais. Diversos exemplos globais dessas características são explicados, juntamente com os desafios e oportunidades para a regulação independente de radiodifusão. Ao final, o texto apresenta um relato de como essas características – ou indicadores – têm sido avaliadas por pesquisadores da área e tece algumas recomendações específicas para a região da América Latina

# Independent regulation of broadcasting: a review of international policies and experiences

## 1. Introduction

The development of democracy requires the availability of a variety of sources of information and opinion so that citizens can make informed decisions, especially during elections. Throughout the world, television and radio are now the main sources of news and information. To enable proper debate for the proper operation of democracy, broadcasting service providers need to be free of political constraints so that they are able to provide viewers and listeners with a wide range of sources of news and information. It is accepted best practice that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry.

If decisions on who shall hold a broadcast licence are left as the preserve of government, there is unlikely to be – or to be seen to be – a fair, equitable range of service provision. Indeed, in those countries where the government (or a government-controlled regulator) issues licences, most broadcasters – unsurprisingly – tend overtly to support the government.

An independent authority (that is, one which has its powers and responsibilities set out in an instrument of public law and is empowered to manage its own resources, and whose members are appointed in an independent manner and protected by law against unwarranted dismissal) is better placed to act impartially in the public interest and to avoid undue influence from political or industry interests. This ability to operate impartially is vital to protect freedom of expression, which is necessary in a functioning democracy. Independence is also required for the proper operation of all of the major functions of broadcasting regulation, including licensing, applying content standards and positive content obligations, and ownership and competition regulation.

In 2006 the World Bank published its Handbook for Evaluating Infrastructure Regulatory Systems in which it says the following about independent regulation:

> *"The key characteristic of the independent regulator model is decision-making independence. This means that the regulator's decisions are made without the prior approval of any other government entity, and no entity other than a court or a pre-established appellate panel can overrule the regulator's decisions. The institutional building blocks for decision-making independence are:* ***organizational independence*** *(organizationally separate from existing ministries and departments),* ***financial independence*** *(an earmarked, secure, and adequate source of funding), and* ***management independence*** *(autonomy over internal administration and protection from dismissal without due cause).*
>
> *The principal motivation for trying to create an independent regulatory entity is to "depoliticize" tariff-setting and other regulatory decisions by insulating the regulatory entity from day-to-day political considerations. It is an attempt to move away from a closed and often unpredictable, old-style ministerial regulation."*[1]

Over the past 30 -40 years, independent regulatory authorities ("IRAs") have been created throughout the world, often to regulate financial sectors and utilities. For many, it has been considered a precondition of the successful liberalisation of markets – opening up competition following privatisation of public utilities – to introduce independent regulation. Indeed, a 2008 study for the World Bank on the electricity sector in Latin America[2] demonstrated that a high level of independence equated with improved performance in the regulated sector. Why should this be?

Lord Currie, the Chairman of the UK's Competition and Markets Authority (and former Chairman of OFCOM) has identified six key reasons why independent regulation makes sense:

- It is more likely to lead to focused, effective interventions as it is less susceptible to influence from lobbying;
- As IRAs operate within a limited legal framework, this facilitates greater transparency around the reasons for decisions which improves predictability and reduces regulatory uncertainty. In turn, this allows industry to better plan;
- IRAs can work to a longer-term timescale than governments, which are subject to the political pressures of an election timetable;

1. World Bank Handbook for Evaluating Infrastructure Regulatory Systems, p.50 http://elibrary.worldbank.org/doi/book/10.1596/978-0-8213-6579-3.
2. Regulatory Governance and Sector Performance: Methodology and Evaluation for Electricity Distribution in Latin America, Luis Andres, José Luis Guasch Sebastián Lopez Azumendi January 2008 http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4494

- IRAs can develop much greater sector and technical expertise;
- There are certain matters in which government should just not intervene. Currie specifically cites broadcasting content here: "The obvious example is content issues in the media. …Given the sensitivity of these issues, government has preferred this to be done independently and at a distance."; and finally
- Good governance requires a strong and robust appeals system. Not only is it more challenging to appeal decisions taken by government, but government itself prefers to avoid being tied up in legal challenges which could weaken its broader authority to the detriment of its overall effectiveness.

*"There is always the temptation for governments to want to influence specific outcomes. But politicians of all stripes need to bear in mind at all times the costs of so doing, and why the regime has evolved in the way that it has. While there may be political attractions for intervening in particular cases, the long term costs are potentially considerable and widespread, if not so obviously tangible. Political interventions often have undesired side effects, and most certainly damage the credibility of the regime, raising uncertainty for business and reducing the attractions of investing at home.."*[3]

The counterbalance to delegating authority from central government to an IRA is greater obligations of accountability and transparency. Without these, there is no credibility for 'independence', creating the worst of all worlds: without accountability and transparency, the IRA has power without the democratic mandate of a government and can make decisions which are not easily challenged by the courts. Therefore, the IRA must be subject to legal obligations on openness and disclosure as well as justification of its decisions.

From a review of literature and research, the following rationales for the establishment of IRAs can be identified:

1. Expertise

IRAs are closer to the regulated sector than government departments and can thus more easily gather relevant information. They generally offer a more attractive working environment for experts, who are thus more willing to work for IRAs than for traditional bureaucracies.

2. Flexibility and speed

IRAs' autonomy makes them more able to flexibly adjust regulations to changing conditions, without necessarily having to go through slow and cumbersome parliamentary processes.

3. Credibility and stability

IRAs are insulated from day-to-day political influence and electoral constraints, and can therefore have a longer time-horizon than politicians. This not only adds to their own credibility, but also that of governments as they are – at once removed – better able to deliver on governmental policy objectives (through the agency of the IRA).

4. Efficacy and efficiency

A number of research projects, for example the World Bank study mentioned above, have identified that sectors which are subject to independent regulation perform better than those that are regulated directly by the State.

5. Public participation and transparency

In return for their delegated powers, IRAs are by nature subject to accountability requirements. This means that their decision-making process is more open and transparent than that of ministerial departments, making them, in turn, less subject to sectoral lobbying as well as open to evaluation and assessment by civil society.

6. Blame shifting

IRAs enable politicians to avoid blame when regulatory failures occur or when unpopular decisions are taken.

7. Political uncertainty

As institutions are less easily changed than policies, IRAs are a means for politicians to fix policies so that they will endure beyond their term of office. When politicians set up a policy, they know that this may in future be changed if a different party wins the next election. To protect against this, policy may be insulated from politics by making it the preserve of an IRA. Although politicians currently in office lose some control, they can therefore prevent future governments from easily undoing their policy choices.[4]

So, if independent regulation is good for markets and good for governments, why have countries been slow in introducing it for the broadcasting sector?

3. From The Currie Lecture given by CMA chairman Lord David Currie to the Cass Business School in London on 21 May 2014 https://www.gov.uk/government/speeches/the-case-for-the-british-model-of-independent-regulation-30-years-on.

4. Se further Evaluating Independent Regulators, Dr. Fabrizio Gilardi, Université de Lausanne, Switzerland 2005 http://www.oecd.org/regreform/regulatory-policy/35028836.pdf p.101

There are two main reasons, which may, on the surface, appear contradictory. One is the fear of governments losing control over access to the airwaves, and the other is a fear of censorship by the State or State bodies.

Broadcasting is the most pervasive, powerful means of communication in the world. In many places with high levels of illiteracy or poverty, the only access to news and information is by word-of-mouth, or radio. Of the two, radio is certainly the more authoritative. In more developed parts of the world, television has replaced radio as the most trusted and main source of news. And as well as news, broadcasting provides education and entertainment; in Western societies like the UK, people spend an average of 27.5 hours a week watching television[5], and 21.4 hours listening to radio[6]. Whomever controls access to so much viewing and listening, and whomever controls the content of what is watched and heard, is in a prime position to influence the way in which viewers and listeners see the world and their attitudes towards their own and other's cultures.

Since the dawn of broadcasting governments have been well aware of its power and have sought to control its output. In many parts of the world the only source of television and radio – at least initially – has been the State. The State has determined what its citizens have access to, and has often used the power of broadcasting to underpin its own objectives to retain power. But over the years State control of broadcasting has been eroded: commercial operators, often large multi-nationals, have introduced broadcasting supported by advertising. Almost without exception, governments have tried to limit the numbers of new commercial operators through instigating systems of licensing. This licensing system has then been applied to restrict the content which new, non-State broadcasters can offer. However, with the proliferation of satellite and digital channels, it has become ever more difficult for State bodies to control access to broadcasting networks, or the content they carry.

There is a fear, particularly amongst citizens of relatively new democracies, that regulation will mean censorship. Indeed, most countries without democracy restrict access to news and information in order to maintain strict government control to prevent opposition views and opinions being heard. But increasingly, international opinion and pressure has reinforced the importance of broadcasting in supporting the development of democracy; without the free flow of news, information and opinion, citizens will not be adequately informed and so able to exercise their democratic rights. An informed citizenship can make informed choices at the ballot box.

There is no doubt that the effects of both the internet and satellite broadcasts from other countries have forced a pragmatic acceptance from otherwise totalitarian States to relax controls on their own, domestic broadcasting. But in addition, even democracies have realised that, given the particular power of broadcasting, it is reasonable to place certain restrictions on content as a means of protecting citizens – particularly children – from harmful material. Nonetheless, one of the principles of independent regulation of broadcasting is that the regulator may not interfere with content before broadcast: it is up to the broadcasters themselves to ensure that all content is lawful and complies with the normative standards which apply locally. This means neither the State nor the IRA interferes with any editorial decisions.

Certain parts of the world have overcome these concerns and embraced the concept of independent regulation of broadcasting, in particular Europe and the English-speaking world. This paper will look at the experience of independent regulation in the broadcasting field, its benefits and challenges, and why, in the view of many international bodies, it is the ideal form of governance for the broadcast media. Nonetheless, it is an ideal, and there are no doubt current as well as future challenges for the model. But it is doubtless the better model for promotion of freedom of expression; its characteristics can be identified and assessed and promoted for change in Latin America.

## 2. Remit and Duties of broadcasting regulators

### Freedom of Expression

The right to freedom of expression underpins all other rights, finding strong endorsement in both global and regional treaties on human rights. For example, Article 19(2) of the International Covenant on Civil and Political Rights ("ICCPR")[7] says,

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*

The media is a key means of exercising the right to freedom of expression from the perspective of both imparting and seeking/receiving information and ideas. Even though media is undoubtedly a

5. BARB figures for 2013

6. RAJAR Q2:2014.

7. See http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

key source of information for the vast majority of people on the planet, it has no special protection under international law. The general exceptions to this are laws, in most countries, on protection of journalists' sources, intellectual property, and rules on media regulation. All of these exceptions are aimed at protecting the right of the public to seek and receive information, rather than the right of the media to impart.

The right to freedom of expression is not, however, absolute: restrictions apply as set out in Article 19(3) of the ICCPR: "The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order or of public health or morals."

To assess whether a restriction is admissible, a three-part test has been developed. It must:

1. be provided by law. This can include a regulation, common law, or even a code of conduct issued by a regulator. The law must be accessible, clear, reasonably precise and publicly available;
2. have a legitimate aim. These are limited to the rights or reputations of others, national security and public order, public health or morals;
3. be necessary in a democratic society. Any restrictions must be necessary to protect the legitimate interest and they must be proportionate.[8]

The protection of viewers and listeners from harm has been recognised under international law as an interest of sufficient importance to warrant imposing special content restrictions on broadcasters. In most democracies, (independent) statutory regulators are given the power to set codes of conduct for broadcasters covering a wider range of issues, including protection of children, due accuracy in news and prohibitions on discriminatory programming, and to establish complaints systems for members of the public. In some countries, however, such codes are set and applied by the broadcasters themselves, either on a purely self-regulatory basis or through a system of co-regulation.

Protection of the freedom of expression, the rights of viewers and listeners, is manifested through the availability of a diverse and plural range of sources of information. This aspect of the right imposes certain positive obligations on States. These include creating an environment in which all three broadcasting sectors – public, commercial and community – may flourish and preventing undue concentration of ownership in the commercial broadcasting sector. They also include imposing positive content obligations on all broadcasters, for example in relation to national and independent productions and local content.

Finally, licensing is the key mechanism for regulating access to broadcasting. As a result, licensing processes must be fair and competitions must be judged against clear criteria set out in advance, which include promoting diversity in the airwaves.

A regulatory system for broadcasting which meets all of these conditions will not only pass muster under international law, it will also contribute to democracy, the rule of law and, indeed, national development. Putting in place such a regulatory system should, as a result, be a key objective for any democratic government.

### Content Regulation

Content regulation can be divided into two categories: Positive obligations which are placed on broadcasters and Negative content regulation where restrictions, which are compatible with freedom of expression, are placed on what can be broadcast.

#### Positive Content Obligations

In addition to regulation which prevent the broadcast of certain types of content, there is also regulation which requires certain content types to be broadcast.

##### *Domestic Production Quotas*

The imposition of obligations to provide content which is produced within the country (domestic programme production) is an important means to promote a sense of national identity, and also to provide impetus for the development of a national production industry. This is particularly important for countries which struggle to preserve their sense of unique national difference in the face of cheap foreign imported programming. National programming also serves a vital role in reinforcing a sense of nationhood in large, diverse countries such as Canada, Brazil, and the United States.

##### *Independent Producers*

Some countries require broadcasters to carry minimum quotas of programming prepared by inde-

8. For an exposition of these principles in relation to the Inter-American system, see IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. paras. 61-66. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf.

pendent producers who are not linked to any particular broadcasting enterprise. The idea behind this is to broaden access to the airwaves for different voices, as well as to promote access, by the audience, to a greater range of perspectives and creative talent (i.e. diversity). Mandating quotas for independent production can also help mitigate the negative impact of concentrated media ownership structures and can also stimulate the growth of a strong independent production sector.

Within the European Union, all television broadcasters, public and private, are required to reserve 10% of their schedule for independent producers[9].

### *Local versus National Services*

National services are generally expected to operate under more onerous public service obligations than local ones, especially as national services are likely to be able to generate greater revenues. However, where licences are issued on a local, rather than national basis, it is generally the case that those television and radio services are regulated to provide programming which is of particular interest and relevance to the area covered, for example local news, weather and information. Often there are also local language obligations on local services where many, or the majority, of local residents speak a language other than the main national one.

## Negative Content regulation

It is standard practice for broadcasting regulators to have responsibility for monitoring compliance with content standards. They may then have a duty to deal with breaches of the rules themselves, or alternatively, to bring a case in the courts.

The bare minimum content regulation seen globally covers the protection of children and the requirement for accurate information in news. In addition, it is common for the broadcasting regulator to have a duty to deal with hate speech and other potentially criminal content, and to adjudicate on requests for a right of reply. Many countries go further and expect broadcasters generally to uphold cultural norms and community standards, as mediated through the regulator.

### *Protection of Minors*

A key goal in programme content regulation is the protection of minors. This is the case throughout the world.[10] Although the legal age of majority may differ from country to country, virtually all regulators are concerned to protect the welfare of children and young people.

The intention is to seek to protect children from material which would, or could, damage them morally, psychologically or physically. What this means in practice is that 'adult' material cannot be broadcast when children are likely to be watching or listening, or has to be encrypted. But what is 'adult' material? This will vary from culture to culture. Types of material which are usually restricted in some way are violence, sexual portrayal and offensive language.

There are universal standards, including those flowing from the right to freedom of expression, in the context of protection of children. At the same time, there is no single interpretation of content standards which can be applied universally. More than any other area of broadcast regulation, content standards for protection of children (which often includes considerations of what may be referred to as 'taste and decency') must be set according to local values and norms, and applied by local people who can use their discretion to assess compliance according to the generally accepted standards in their society.

### *News*

It is fairly standard practice in regulation around the world to include a requirement for the broadcast media to strive to be accurate in their news and current affairs programming. This is vital if audiences are to trust broadcast news as a reliable source of information and receive the information they need to participate in the democratic debate, and to be an informed electorate. This is exemplified in the Council of Europe's Convention on Transfrontier Television, which states: "The broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinions."[11]

### *Protection against Crime and Disorder*

Most regulatory regimes include a provision that nothing in programmes may incite others to crime or disorder.[12] While this would seem to be a matter of common sense, it is in fact potentially very controversial. Great care must be taken in the definition and exercise of this rule to prevent the regulator operating as a political arm of government.

All States have laws which make it a criminal offence to commit treason, as well as a number of public order offences. In the most undemocratic regimes, these laws are cited by the broadcast-

9. See Art.5 AVMS Directive.

10. See Article 17 of the UN Convention on Rights of the Child, 1989.

11. See Article 7.3.CTTV

12. See, for example, section 319(2)(b) of the Communications Act 2003 of the United Kingdom

ing authorities to prevent the broadcast of material which is critical of the government or simply offering alternative political views. For example, the wording of the Malaysian law states, somewhat ambiguously:

> *"Content that causes annoyance, threatens harm or evil, encourages or incites crime, or leads to public disorder is considered menacing and is prohibited."*

### Protection against Racial or Ethnic Hatred

One of the most serious issues facing many regulatory authorities is 'hate' speech. To protect equality, a basic human right, it is standard to include in the regulatory regime a strongly worded rule prohibiting the broadcast of any material which may incite hatred on the grounds of race, ethnicity, tribal origin, religion, sex, or nationality.

### General moral and Ethical Norms

In addition to the core categories of content standards listed above, many countries apply rules to enforce generally accepted local moral and ethical standards. These often go well beyond protecting children, to protecting adults against content which is seen as inappropriate, offensive, or just in bad taste. As long as there is very widespread consensus about the level of restriction applied, this can work to the benefit of society. However, there is a thin line between 'protection' and suppression; social norms constantly shift and what may have been justifiably prohibited as inappropriate 20 years ago may now represent a severe restriction on freedom of expression. In addition, great care must be taken to ensure that the matters of 'taste' which might be proscribed do not stray into issues of political controversy and therefore act as a fetter on freedom of expression.

### Right of Reply

Where a programme contains allegations of wrongdoing or incompetence, or contains a damaging critique of an individual or organisation, those criticised should normally be given an appropriate and timely opportunity to respond to, or comment on, the arguments and evidence contained within that programme.

Within Europe, the right of reply is established in pan-European regulation.[13] Article 23 of the Audiovisual Media Services Directive states:

"Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interest, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers."

Article 14 of the American Convention on Human Rights[14] states:

> *"Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish."*

Unlike in Europe, the Inter-American Commission has concluded that the right of reply should only apply to statements of fact, and not to expressions of opinion.

To enable an effective right of reply, the regulator should have the power to consider whether any claims brought by aggrieved persons can be substantiated, and if so, to order the broadcaster to give an appropriate right of reply within a reasonable period of time and at a reasonable place within the broadcast schedule. Rather than give the aggrieved person the right to appear on-air him or herself, the regulator generally agrees a statement of correction to be broadcast.

### Advertising

There are generally consumer protection laws in place throughout the world banning misleading advertising. Additionally, for both public health reasons and to protect children, certain products are generally banned from being advertised, or subject to scheduling restrictions. It is not uncommon to find general rules applying similar content standards to broadcast advertisements that apply to programming.

13. See Article 8 of the European Convention on Transfrontier Television: "Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction.... In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities."

14. Available at: http://www.oas.org/juridico/english/treaties/b-32.html

*Elections*

The media play an extremely important role during elections in democratic countries, providing the main means by which the electorate receives information about the issues, positions and policies of the parties and candidates, and even the very meaning and role of elections in a democracy. At the same time, and by virtue of this very role, the media can potentially unbalance elections, promoting candidates who support policies that favour them, or who their owners support.

Another potential role of the broadcasting regulator is therefore with regard to election broadcasting. Most countries have specific rules setting out the number and nature of election advertisements and broadcasts, often specifying the amount of coverage each political party or candidate should receive. It is often the broadcasting regulator who is responsible for monitoring and applying these rules.

**Licensing**

Open, or free-to-air broadcasting uses radio spectrum frequencies allocated to each country under international agreements (overseen by the International Telecommunications Union ' ITU'). As such, they use a public resource and it is reasonable for the State to place reservations on the use of its resources. This they do by way of a licence.

A broadcast licence (or concession) is a legal document, which in effect sets out the contract between the regulator and the broadcaster. In many countries, broadcasting legislation places a primary legal responsibility on licensees to respect the terms of their licences. As a result, if a broadcaster does not perform according to the terms of the licence, the regulator may then take remedial action to address this.

Historically, licensing is a means of allocating spectrum between users, and this remains the case for terrestrial analogue and digital spectrum. Without a system of authorisation and structure, there is no order to spectrum use, which will lead to those with the strongest transmitters dominating the use of the airwaves. Licensing provides for a means of applying order to spectrum, protecting authorised spectrum users against abuse.

The spectrum plan for any particular country is a strategic plan, taking into account sometimes conflicting demands between spectrum users, for example, the military, broadcasters, and telecommunication companies. Although this is delegated to regulators in a few countries (for example, the UK), it is often retained as a central government activity. However, once the plan has been decided, the decision-making process regarding the allocation of frequencies within the framework of the Spectrum Plan is normally done by a bespoke regulator.

In some countries, spectrum allocation is conducted by a body separate from the one which regulates broadcasting; in others, a block of spectrum for broadcasting use is granted for the broadcasting regulator to allocate with broadcasting licenses, thereby combining the broadcast and spectrum licensing process in one.

There are as many different types of licences as there are broadcasting services. However, the broad categories of individual services for which licences are awarded are: analogue and digital, community, local, regional and national, and television and radio services. In addition, individual licences or permits are often issued for transmission of broadcast programming over cable and satellite systems. As a further layer of complexity, licences are normally awarded for platform providers, be they digital multiplexes, local or national cable operators, or satellite providers. Different licensing processes and award criteria will apply to these different categories of licences, depending on the extent to which spectrum – as a scarce resource – is used, as well as the level of competition for limited access.

There are two main methods of awarding licences: on demand or via tender. The latter may be conducted either on an auction basis or through a 'beauty parade'.

As the regulator acts as a gatekeeper through the duty to issue licenses, the extent to which the regulator is independent (of both political and industry influence) will directly affect freedom of expression: the less independent the regulator, the more subjective will be licensing decisions, which will have a direct effect on who has access to the airwaves and the nature of the content which is made available. This is the case regardless of the type of licensing undertaken: this author recently advised the Republic of Ukraine on changes to its broadcast legislation where proposals were made to replace the 'beauty parade' with an auction, in order to temper the influence of corruption on regulatory decisions. Broadcasters complained that this would be a more expensive process as they would still need to pay bribes in order for their bid to be considered, let alone paying the price for a successful bid.

When a licence is issued, it generally stipulates the type of content that the radio or television service must broadcast – for example, a pop music radio service, or a news and current affairs station. It is a standard duty of broadcasting regulators throughout the world to monitor compliance with the programme format set out in the licence.

**Other Duties**

Not all regulatory bodies are mandated to cover the entire range of possible duties, but other aspects of regulation which may or may not be within the remit of the broadcasting regulator include:

### Spectrum management

It is common for governments to retain Ministerial responsibility for broadcast frequency planning and allocation, within ITU and regional agreements, often within a single government department which manages all spectrum.

### Ownership

Compliance with ownership rules is usually the responsibility of the body with responsibility for licensing. A breach of the rules, if not remedied, can lead to a licence being revoked.

Concentration of ownership of broadcasters, along with vertically integrated media enterprises controlling parts of the broadcast and print media sectors, or a lack of diversity of ownership in the broadcast sector, can pose a number of problems from the perspective of freedom of expression. Most obvious is the risk of such concentrations undermining the goal of promoting diversity in the media, a key freedom of expression value. This can take many forms. Concentrated media houses may be tempted to syndicate programmes between members of the same ownership group, with a view to cost-cutting. This means that viewers and listeners are treated to the same fare on different stations. Syndication can be a particular problem where ownership extends to numerous local stations. In this case, syndication of news, for example, can result in less local news, which is relatively expensive to produce.

Concentration of ownership can also lead to a lack of diversity, or even uniform views on certain issues, being carried across the media group, particularly where owners impose editorial control over the group or where the group operates with a central news desk. This may be particularly problematical where it is linked to political parties. For example, where a dominant media owner supports a certain party or political leader, this can unbalance the electoral 'playing field'. It can also be problematical when a dominant media group takes a strong position on an issue of public debate which concerns that media group. This might even include attempts to put in place rules limiting concentration of media ownership.

It may be noted that competition in the media sector is different from competition in many commercial sectors, because the demand for variety is much greater in the media sector than in most commercial sectors. Two or three properly competitive players are enough in most markets to ensure fair market prices and choice. Far more players are desirable in the media sector, which deals in the marketplace of ideas, depending on financial viability. As a result, many countries have put in place special regimes governing concentration of media ownership in the public interest, over and above general rules prohibiting market monopolisation (or anti-trust measures) in order to protect plurality.

Considerations of plurality differ from competition concerns. Whereas competition regulation is focussed on market shares and potential abuses of dominant positions, plurality is a more subtle concept. As Tim Gardam has said, the values of plurality are those of "civic emancipation, intellectual and creative opportunity, equality of access to cultural engagement, a sense of connection to the otherness of others, virtues that are fundamental to a tolerant and humane life."[15] And to a functioning democracy.

These concerns fall into the overview of regulation in a number of areas. For example, media enterprises may be required to report, or even to obtain prior approval for, proposed media mergers to an oversight regulatory body. Media enterprises may also be required to meet special, more stringent, rules on transparency of ownership than are applied generally to corporations. Regulators may also be required to take into account the potential impact of granting a licence on concentration of media ownership when assessing licence applications.

Other ownership matters which often fall within the remit of the regulator are restrictions on cross-media and foreign ownership of broadcasting enterprises.

### Competition

Historically, it was fairly common for governments to retain certain powers in relation to anti-trust and market dominance issues, or at least to make them the preserve of a specialist competition regulator, rather than a dedicated broadcasting regulator. Increasingly, however, and with digital development, 'converged' regulation (for broadcasting and telecommunications) of competition issues is being undertaken by a dedicated regulatory authority, which may or may not have additional responsibilities for other broadcasting matters. The sectoral regulator is likely to have a more expert understanding of the broadcasting industry than a generally-focused competition body, and be in a position to take account of public interest plurality issues when considering competition cases.

### Intellectual Property Rights

Broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although, more often than not, countries leave disputes over defamation, copyright, trade-

15. See *The Price of Plurality: Choice, Diversity and Broadcasting Institutions in the Digital Age*, p.11. Available at: http://www.ofcom.org.uk/tv/psb_review/psbplurality.pdf.

marks, etc to the general application of law. Intellectual property matters can be very complex legally, and it is unlikely to be cost-effective for a broadcasting regulator to develop and retain the necessary in-house expertise to deal with disputes. This is particularly so in relation to allegations of defamation, which is a matter of criminal law in many countries.

However, it is reasonable for the broadcasting regulator to take account of court judgments against a licensee – be they over intellectual property disputes or serious contractual matters - when assessing whether the licensee should be considered for an extension or renewal of its license.

#### Powers

As well as the duties of regulatory authorities being varied, their powers are not uniform.

It is generally the case that sectoral regulators have a high level of technical expertise, which enables them to define technical standards and norms. Whereas economic regulators are therefore often given the power to make rules, in the case of broadcasting, this rule-making power is generally reserved to government, reflecting the particular social role that broadcasting plays. However, it is normal for the broadcasting regulator to be consulted on any new rules – and often, behind the scenes, will suggest drafting for submission to the parliamentary process.

Another power which is not universal in the broadcasting arena is the power of sanction. This is a quasi-judicial power and as such, must be applied in a way that respects the rules for due process, separating the investigative function from the department in charge of the sanction. In many countries, both investigation and sanction is conducted by the broadcasting regulatory authority. However, in some countries it is separated, with the determination of sanctions reserved for the court. Neither solution is ideal: if both are done in-house, there is the accusation that the regulator is both judge and jury (hence the need for internal separation of functions). If sanctions are applied by the judiciary, there is the danger that the court, not having the technical expertise of the regulator, will underplay the severity of the breach. On balance, a properly constructed internal system for applying sanctions – which is fully appealable to a court – generally results in a faster, more appropriate and consistent regime than one where sanctions are dealt with externally. What is clear is that it is inappropriate to delegate sanctions to a criminal court: not only is the process much longer and costly (for all participants), but the available fines are likely to be too low to be either an economic penalty or disincentive to others. As exemplified in Article 5 of European Union Directive 98/84/EC,[16] "sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity."

## 3. International Normative Standards

Although international law recognises the need for the regulation of broadcasting, there is persuasive support from a wide range of international bodies that this is only legitimate if applied by an independent regulator. There are no binding international legal instruments requiring independent regulation of broadcasting, although the closest to obligatory jurisprudence is the set of normative standards developed by the Council of Europe, which has formed the basis of guidance and good practice for every other international body.

#### Council of Europe

The Council of Europe is the Europe's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights ("ECHR"), a binding treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights in Strasbourg oversees the implementation of the Convention in the member states.

The Council of Europe's interest in broadcasting-related matters stems from Article 10 of the ECHR:

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

16. Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

17. European Convention on Human Rights, Rome 4 November 1950.

ceived in confidence, or for maintaining the authority and impartiality of the judiciary."[17]

As a consequence, as well as developing a substantial set of case law, the Council of Ministers regularly publishes Declarations and Recommendations on media issues, in the context of freedom of expression. Although not binding on member states, these statements are persuasive and are taken into consideration by the Strasbourg Court in legal proceedings. They represent the clearest set of international normative standards on media matters, and, when considering potential membership to the European Union, the European Commission now expects to see compliance with Council of Europe standards, particularly on broadcasting regulation.

The Council of Europe has had an interest in promoting independent regulation for broadcasting since 2000. The Council of Ministers' Recommendation on the subject that year urges member states to establish independent regulators for broadcasting:

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

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

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

Considering that for this purpose, specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law; "[18]

The key normative standards set by the Council of Europe and relating specifically to the characteristic of independence are as follows:

1. There should be a clear legislative framework setting out the means of accountability, the process for the appointment of members of the governing board, and the means of funding of the regulatory authority. Furthermore, the rules and procedures governing for the regulatory authority should clearly affirm and protect its independence and protect it from any political or economic interference.
2. There should be clear rules on conflicts of interest and incompatibilities to reinforce independence, and appointments to the governing body must be made in a democratic and transparent manner. Members of the Board may not receive any mandate or instructions from anyone or make statements or take actions which may prejudice their independence. The reasons to permit dismissal from office should be set out in law so that the threat of dismissal cannot be used to exert political pressure. These reasons should be limited to: conflicts of interest, incapacity, and conviction of a serious offence. The board should include experts within and related to broadcasting and its regulation.
3. Another key element to support independence is funding, and arrangements should be set out in the law in such a way to allow the regulatory authority to carry out its functions fully and independently, without government using its financial decision-making powers to exert influence.

In addition, the Council sets normative standards relating to broadcasting regulators' powers and responsibilities:

1. The law should set out clearly defined delegations to enable the regulatory authority to make regulations and guidelines relating to broadcasting and to adopt its own internal rules.
2. Regulatory authorities should be responsible for granting broadcasting licences in accordance with basic conditions and criteria set out in the law. The procedure for licensing should be applied in an open, transparent and impartial manner.
3. Broadcasting regulatory authorities should be involved in spectrum frequency planning for broadcasting services. Calls for tender should include all the relevant specificities, including what information and documentation should be submitted by candidates .
4. Regulatory authorities should monitor compliance with the law and the broadcasting licenses. But monitoring should always be after broadcast so that the regulator cannot

18. Recommendation Rec(2000)23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector 20 Dec 2000 https://wcd.coe.int/ViewDoc.jsp?Ref=Rec%282000%2923&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&Back ColorLogged=-FFAC75

exercise any control over programming prior to transmission.

5. Other duties and functions should include: the right to receive information from broadcasters, the power to consider complaints and publish their conclusions, and the power to impose proportionate sanctions – which must be open to legal review.

6. Regulatory authorities should be accountable to the public. The accuracy and transparency of their finances should be subject to external audit. All decisions should be published with full reasons given, and open to review by the court.

The full Recommendation and its Explanatory Memorandum are set out in the Annex.

On 26 March 2008, the Committee of Ministers of the Council of Europe adopted a new Declaration on the independence and functions of regulatory authorities for the broadcasting sector. The Preamble to the Declaration noted that, for a variety of reasons, the guidelines of Rec(2000)23 and its underlying principles "are not fully respected in law and/or in practice" in all member states. It therefore looked to promote a "culture of independence", which is "essential" for independent regulation of the broadcasting sector. It identified "transparency, accountability, clear separation of powers and due respect for the legal framework in force" as key elements of the "culture of independence" to be attained. The Declaration encourages the involvement of civil society and media actors in contributing to the "culture of independence" by "monitoring closely the independence of these authorities, bringing to the attention of the public good examples of independent broadcasting regulation as well as infringements on regulators' independence".

This introduction of the need for a 'culture of independence' to support structural and legal independence is an important addition to the understanding of what constitutes regulatory independence. As will be seen in the section on the Characteristics of Independence below, when assessing independence, both need to be present.

## European Union

The European Union's Directives take legal precedence in all 28 member states. They require member states to achieve a particular result without dictating the means of achieving that result. In the field of broadcasting, the 2010 Audiovisual Media Services Directive ("AVMSD")[19] is the pre-emptive legal authority.

The AVMSD suggests, but does not direct, member states to have independent regulators for broadcasting. Reference is made in Article 30 as follows:

> *"Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive… through their competent independent regulatory bodies."*

Additionally, recital 94 to the AVMSD refers to the fact that the Member States

> *"are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently".*

In March 2013 the Commission consulted on whether there should be greater legal clarity at EU level on the function, organisation, status, competences and resources of independent regulatory bodies within the context of the AVMSD. This followed on from two significant reports conducted for the Commission.

The High Level Group on Freedom and Media Pluralism recommended that,

> *"A network of national audio visual regulatory authorities should be created, on the model of the one created by the electronic communications framework. It would help in sharing common good practices and set quality standards. All regulators should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances."*[20]

The Committee on Civil Liberties, Justice and Home Affairs also issued a report which called, "on the National Regulatory Authorities to cooperate and coordinate at EU level on media matters, for instance by establishing a European Regula-

19. 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) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF.

20. p. 7 The Report of the High Level Group on Freedom and Media Pluralism chaired by Professor Vaira Vike-Freiberga with Professor Herta Däubler-Gmelin, Professor Luís Miguel Poiares Pessoa Maduro and Ben Hammersley, A Free and Pluralistic Media to sustain European Democracy, January 2013. http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf

tors' Association for audiovisual media services, to harmonise the status of the National Regulatory Authorities foreseen by Articles 29 and 30 AVMSD by ensuring they are independent, impartial and transparent, both in their decision-making processes and in the exercise of their powers, as well as in the monitoring process, and to provide them with appropriate sanctioning powers to ensure that their decisions are implemented;"[21]

After closing the consultation on Article 30 the Commission decided that rather than leap to legislate, it would seek to change behaviour by setting up a legally constituted high level European Regulators Group for national independent regulatory bodies in the field of audiovisual media services. This Group is set up primarily to advise and assist the Commission in its work to ensure a consistent implementation of AVMSD and to exchange experience and best practice between its membership. At the end of its inaugural meeting on 4 March 2014, Commission Vice-President Neelie Kroes

> *"closed the meeting by highlighting the importance of the audiovisual sector in Europe. She underlined the importance of having independent regulators and stressed their contribution in shaping the regulatory framework."*[22]

### Special Rapporteurs and Representatives

Globally, there are four special international officials with a mandate to protect freedom of expression, one of whom is strictly a" Representative" rather than a Special Rapporteur. The officials are: the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression,[23] the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression,[24] the African Commission on Human and Peoples' Rights (ACmHPR) Special Rapporteur on Freedom of Expression and Access to Information,[25] and the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media.[26] These special mandates adopt a Joint Declaration on a different freedom of expression issue every year.

#### UN

UN Special Rapporteur on Freedom of Opinion and Expression, Frank La Rue, has not made any individual statements on independent regulation per se. However, following his visit to Italy in November 2013, the Special Rapporteur said this about regulation:

> *"I believe that all activities of state institutions should be performed in representation of the citizens, seeking the common good. Therefore, all of the activities of state institutions should be public information and easily accessible to anyone for monitoring purposes, with exceptional limitations related to diplomatic communications, criminal investigations by the Court, the protection of children, and during the development of national security operations. In this context, it is particularly important that the activities of regulatory bodies be completely transparent. I would call upon the Parliament to establish a mechanism that would ensure transparency of the election processes of the board members of regulatory bodies. This should include publishing the selection criteria for the board members. In addition to this, the information on the qualifications, and professional experience of the applicants should be made easily accessible to the public, including through internet. The short-listed candidates for board members should be called to a public hearing in the Parliament and the final decision should be made through a public vote."*[27]

There is no doubt that in so saying, Mr La Rue was championing transparency and public involvement in the selection of members to a regulatory board, both of which would be strong indicators of independence.

#### OAS

The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission

21. Art. 37, Report on the EU Charter: Standard settings for media freedom across the EU, Committee on Civil Liberties, Justice and Home Affairs 25 March 2013 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0117+0+DOC+XML+V0//EN
22. Minutes available at https://ec.europa.eu/digital-agenda/en/news/inaugural-meeting-european-regulators-group-audiovisual-media-services-erga
23. This office was originally created by UN Commission on Human Rights Resolution 1993/45, 5 March 1993
24. Established in 1998
25. Established in December 2004
26. Established November 1997.
27. Preliminary observations and recommendations by the United Nations Special Rapporteur on the promotion and protection of freedom of opinion and expression: visit to Italy, 11-18 November 2013 http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14003&LangID=E.

on Human Rights published its Freedom of Expression Standards for Free and Inclusive Broadcasting at the end of December 2009.[28] One of the stated standards is that, "The enforcement and oversight authority [for broadcasting] must be independent and autonomous of political and economic power.", and cites the Council of Europe Council of Ministers Rec(2000)23.

It goes on to say,

> *"The broadcasting authority in charge of enforcement and oversight must be independent of both government influence and of the influence of private groups linked to public, private/commercial or community broadcasting. It must be a deliberative body that ensures plurality in its composition. It must be subject to clear, public and transparent procedures, as well as to the imperatives of due process and strict judicial review. Its decisions must be public, in accordance with existing legal norms, and adequately justified. Finally, the body must be accountable for and give public account of its activities. In regard to the enforcement authority, the Inter-American Commission has indicated that, "it is fundamental that the bodies with oversight or regulatory authority over the communications media be independent of the executive branch, be fully subject to due process and have strict judicial oversight."*[29]

The document proceeds to set out normative standards, to ensure independence and strengthen the regulatory authority's legitimacy. They are closely based on those set out in the Council of Europe Rec(2000)23:

1. The board members should be selected using clear criteria and through a transparent process with citizen participation and subject to strict rules on ineligibility, incompatibility and conflicts of interest;
2. Their tenure should be for set terms which do not coincide with election cycles;
3. Dismissal should only be for serious offences established by law. Mechanisms for dismissal must be transparent, and subject to appeal;
4. Staff who work for the regulatory authority must be subject only to the authority of the law and the Constitution;
5. The regulatory authority must have enforcement authority;
6. It must be autonomous functionally, administratively and financially;
7. Its budget must be guaranteed by law and sufficient for it to perform is mandate;
8. The regulatory authority must be required to be publicly accountable for its actions, for example before Parliament, the attorney general, the comptroller or even before a national human rights institution like the ombudsman's office; and
9. Its decisions must be subject to strict judicial review.

### ACmHPR

In Africa, the African Commission on Human and People's Rights issued a Declaration of Principles on Freedom of Expression in 2002[30]. Article 7 of the Declaration specifies that,

1. "Any public authority that exercises powers in the areas of broadcast or telecommunications regulation should be independent and adequately protected against interference, particularly of a political or economic nature.
2. The appointments process for members of a regulatory body should be open and transparent, involve the participation of civil society, and shall not be controlled by any particular political party.
3. Any public authority that exercises powers in the areas of broadcast or telecommunications should be formally accountable to the public through a multi-party body."

On the subject of licensing, the Declaration states that licensing should be done by an independent regulatory body using a fair and transparent licensing process.[31]

### OSCE Representative on Freedom of the Media

The Organisation for Security and Cooperation in Europe ("OSCE") has not in itself issued any nor-

28. Freedom of Expression Standards for Free and Inclusive Broadcasting, CIDH/RELE/INF. 3/09, 30 Dec. 2009 http://www.oas.org/en/iachr/expression/docs/publications/Broadcasting%20and%20freedom%20of%20expresion%20FINAL%20PORTADA.pdf
29. IACHR, Annual Report of the Office of the Special Rapporteur for Freedom of Expression 2008. OEA/Ser.L/V/II.134. Doc. 5. 25 February 2009. Chapter III. para. 82. Available at: http://www.cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf
30. Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002 http://www.achpr.org/sessions/32nd/resolutions/62/
31. Art. 5 ibid.

mative standards. However, in 1997 it established the Office and role of Representative on Freedom of the media noting,

> *"that freedom of expression is a fundamental and internationally recognized human right and a basic component of a democratic society and that free, independent and pluralistic media are essential to a free and open society and accountable systems of government."*[32]

One of the tasks undertaken by the Representative's Office is the review of proposed and actual media legislation, providing advice on how such legislation might better comply with international standards. The standards used are those of the Council of Europe, described above, and very much include those relating to independent regulation. For example in her November report to the Council of the OSCE, the Representative, Dunja Mijatovi said,

> *"Independent regulators play a key role in ensuring media pluralism and media freedom in any country. Therefore it is essential to safeguard and strengthen their independence. "*

### Joint Declarations

Together, the Special Rapporteurs have made a number of comments on the importance of regulatory independence in their annual Joint Statements:

In 2001: "Broadcast regulators and governing bodies should be so constituted as to protect them against political and commercial interference."[33]

In 2003: "All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party."

IN 2007: "Regulation of the media to promote diversity, including governance of public media, is legitimate only if it is undertaken by a body which is protected against political and other forms of unwarranted interference, in accordance with international human rights standards."[34]

In 2010: "…we are particularly concerned about: Direct government control over licensing or regulation of broadcasters, or oversight of these processes by a body which is not independent of government, either in law or in practice."[35]

### World Bank

The World Bank is an international financial institution under the auspices of the United Nations that provides loans to developing countries for capital programmes. As such, it takes an interest in the regulatory frameworks which apply in recipient countries, especially infrastructure regulators. Although the Bank has a particular interest in economic regulators, much of what it says is of relevance to broadcasting regulation.

When assessing how to evaluate regulatory effectiveness, the World Bank chose the independent regulatory model as the baseline for the evaluation of regulatory governance on the basis that it became the *de facto* governance model, at least on paper, in most of the 200 countries that had created new regulatory systems in the 10 years from 1996 to 2006. In their opinion, the model, when adopted in both law and practice, leads to better sector outcomes.

> *"This empirical evidence probably captures several advantages of the independent regulator model. When it is adopted in both law and practice, it tends to lead to decisions that are more focused on long-term policy goals than on short-term, political needs. In addition, errors in judgment are less likely to occur or to be repeated because of its emphasis on transparency. If mistakes are made, they probably will be corrected more quickly than in a closed regulatory system. Overall, these behavioural outcomes, which flow from the institutional and legal characteristics of the best-practice independent regulator model, seem to produce better sector outcomes."*[36]

The World Bank Handbook identifies what it refers to as three high level principles which apply for any regulatory system to be effective:

*Credibility*—Investors must have confidence that the regulatory system will honour its commitments;

*Legitimacy*—Consumers must be convinced that the regulatory system will protect them from the exercise of monopoly power. Both investors and

32. Report to the Permanent Council 28 November 2013 http://www.osce.org/pc/109182?download=true

33. Freedom of Expression Rapporteurs of the UN, OEA y OSCE, *Declaration on Challenges to Freedom of Expression in the New Century*, November 20, 2001

34. Freedom of Expression Rapporteurs of the UN, OAS, OSCE y CADHP, *Joint Declaration on Diversity in Broadcasting*, December 12, 2007.

35. http://www.osce.org/fom/99558?download=true

36. Handbook, p. 52

consumers must believe that the system will treat them fairly; and

*Transparency*—The regulatory system must operate transparently.

The Bank further identifies its "Ten Key Principles" for regulation in all categories:

1. Independence
2. Accountability
3. Transparency and Public Participation
4. Predictability
5. Clarity of Roles
6. Completeness and Clarity in Rules
7. Proportionality in Application
8. Requisite Powers
9. Appropriate Institutional Characteristics
10. Integrity of Conduct

Looking specifically at broadcasting, the World Bank publication on Broadcasting and Accountability, very clearly promotes independent regulation[37], with a Good Practice checklist which closely mirrors the standards set out in the Council of Europe's 2000 Recommendation:

**"Good Practice Checklist on Regulation and the Government Role**

- The regulation of broadcasting should be the responsibility of an independent regulatory body established on a statutory basis with powers and duties set out explicitly in law.
- The independence of the broadcast regulatory body should be adequately and explicitly protected from interference, particularly of a political or economic nature.
- Any independent body that exercises regulatory powers in broadcasting should have a principal duty to further the public interest and should have particular regard for the right to freedom of opinion and expression and the desirability of fostering a plurality and diversity of services.
- The appointment process for members of an independent broadcast regulator should be fair, open, transparent, and set out in law. It should be designed to ensure relevant expertise or experience and a diversity of interests and opinions representative of society as a whole.
- The appointments process should not be dominated by any particular political party or commercial interest and the members appointed should be required to serve in an individual capacity and to exercise their functions in the public interest at all times.
- In exercising its powers, the independent broadcast regulator should be required by law to operate openly and transparently and to facilitate public participation in their affairs, including through public consultation on their policies and procedures.
- All decisions of the independent broadcast regulator should be accompanied by written reasons.
- The independent broadcast regulator should be subject to judicial oversight and should be formally accountable to the public through a multiparty body such as the parliament or a parliamentary committee in which all major parties are represented.
- The independent broadcast regulator should be required by law to publish an annual report.
- The independent broadcast regulator should be ensured a reliable and recurrent income provided for in law and sufficient to carry out its activities effectively and without interference."

**UNESCO**

Together with the Commonwealth Broadcasting Association, UNESCO published its Guidelines for Broadcasting Regulation in 2004 (republished in 2007), which, inter alia, stressed the importance of independent regulators for the sector. It cites the Council of Europe as the authoritative body which, "believes that in order to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector. This will serve to guarantee the freedom of the media while at the same time ensuring a balance between that freedom and other legitimate rights and interests. Perhaps most importantly in order to preserve broadcasting as part of the democratic process, governments should aim to create independent regulators for broadcasting. Even in very small jurisdictions, where the only broadcaster is State funded and budgets are limited, regulation which is independent of the State is vital to preserve the right to freedom of speech."[38]

The Guidelines provide guidance on how to establish an independent regulatory authority, with international examples of how, for instance, ap-

37. See chapter 9 Broadcasting, Voice, and Accountability http://www.amarc.org/documents/books/Broadcasting_Voice_and_Accountability.pdf

38. Eve Salomon, Guidelines.

pointments are made to regulatory boards and how they are funded. The Guidelines provide a handbook of international best practice in broadcasting regulation which has been cited throughout the world, and includes 'tips' for regulators on how to avoid undue pressure on their independence from government and industry players.

In 2008, UNESCO's Intergovernmental Council of the International Programme for the Development of Communication adopted the *Media development indicators: a framework for assessing media development*. These set out in some detail the issues that should be considered when assessing the framework for media development. Indicator 1.6 focuses on the independence of the regulatory system for broadcasting, setting out a number of considerations for assessing the extent to which independence is guaranteed.

> *"The regulatory system exists to serve the public interest. Regulatory bodies should have autonomy and independence from political or commercial interference and their members should be chosen through a transparent and democratic process. Their powers and responsibilities should be set out in law, including explicit legal requirements to promote freedom of expression, diversity, impartiality and the free flow of information. The regulatory authority should have the necessary funding to fulfil this role. It should also be accountable to the public, normally via the legislature.[39]"*

### OECD

The Organisation for Economic Co-operation and Development ("OECD") is an international forum for governments to work together, sharing experience and setting standards to promote policies that will improve the economic and social well-being of people around the world. It has 34 member states, with Canada, Chile and the USA as members from the Americas.

*OECD Guiding Principles for Regulatory Quality and Performance* (2005) do not specifically refer to independent regulation, but in its description of how regulatory agencies should behave, recommends many of the qualities of independence:

> *"Ensure that regulations, regulatory institutions charged with implementation, and regulatory processes are transparent and non-discriminatory."*

Furthermore member states are recommended to:

> *"Establish regulatory arrangements that ensure that the public interest is not subordinated to those of regulated entities and stakeholders." And "Ensure that regulatory institutions are accountable and transparent, and include measures to promote integrity."[40]*

In 2012, and in the light of the global financial crisis, the Council of the OECD issued a recommendation on regulatory policy[41] with a view to strengthening regulatory frameworks to support the proper functioning of economies while meeting important social and environmental goals.

The principles in the recommendation include the following:

> *"7. Develop a consistent policy covering the role and functions of regulatory agencies in order to provide greater confidence that regulatory decisions are made on an objective, impartial and consistent basis, without conflict of interest, bias or improper influence."*

In the Explanatory Annex, this is expanded to say that independent regulatory agencies should be considered in circumstances where independence will maintain public confidence, both government and private entities are regulated under the same framework (and therefore competitive neutrality is required), and the regulatory agency's impartiality needs to be protected as its decisions will have significant economic impacts. Although there is no specific reference to broadcasting in this recommendation, it can be seen that these criteria will apply to the broadcasting sector, even in countries where there is no State or public television/radio competing with commercial broadcasters.

> *"8. Ensure the effectiveness of systems for the review of the legality and procedural fairness of regulations and of decisions made by bodies empowered to issue regulatory sanctions. Ensure that citizens and businesses have access to these systems of review at reasonable cost and receive decisions in a timely manner*

The Explanatory Annex says further that there must be a right of appeal on regulatory decisions, particularly on sanctions, to a body that is separate from the regulator. Furthermore, there should be the possibility of appealing to the court about the legality of any statutory provision on which the decisions of the regulator are based.

39. MDIs p.21

40. OECD Guiding Principles for Regulatory Quality and Performance, 2005 http://www.oecd.org/fr/reformereg/34976533.pdf.

41. Recommendation of the Council on Regulatory Policy and Governance http://www.oecd.org/gov/regulatory-policy/49990817.pdf

## 4. Characteristics of Independence

When setting up an IRA the first requirement is for the legal and structural framework to be conducive to independence; without a proper legal basis, the extent to which the regulator can be truly independent is limited. However, a legal base on its own is not sufficient if the behaviour of the regulator continues to be restricted or inhibited by outside interests – either political or industry pressures, and sometimes both. Therefore, both structural and *de facto* indicators need to be present in order to evidence independence.

### Legal and Structural

Having examined the normative standards that have been developed by a range of international bodies to apply to independent regulation, they can be summarised and applied to broadcasting regulation as follows:

#### Remit and Powers

Independent regulatory authorities should have their remit and jurisdiction, as well as their powers, set out in law. The remit should include a clear statement of the authority's regulatory and policy objectives, which should include an express reference to protecting freedom of expression (although this might separately be a constitutional right).

The regulatory authority's powers should include the power to adopt regulations and guidelines as well as the power for the authority to adopt its own internal rules.

#### The Board

To secure the independence of regulatory authorities, a number of conditions should be in place. The authority should be overseen by an independent board. There should be an appointments process for members of the board which is set out in a legal instrument, which is transparent and which promotes the appointment of members who are as independent of political or financial interests as possible. This means that the board does not have a majority of members representing a single interest or faction, and members should not receive a mandate or take instructions from any external person or body. Furthermore, and importantly, the chair should be – and be seen to be – independent.

In many societies it can be a major challenge to agree an appointment process which will deliver a regulatory authority consisting of independent individuals; there is no 'right' method. Each country must consider how best to appoint men and women who are representative of the broad spectrum of society, who are qualified to take the range of complex decisions incumbent upon a broadcasting regulator, and who have the strength of character to resist political and financial pressure

What should be avoided is an appointments process which is based on political favour, or left solely to Presidential or Ministerial discretion. There are many different models to choose from, all intended to ensure the creation of a politically balanced, independent board. Some examples are:

1. To ensure that each major political party is equally represented on the authority's board;
2. To allocate a number of places (typically 3) to each of the President, the Parliament, and Government;
3. For candidates to be selected by identified civil society groups (NGOs, trade unions, churches, the professions), with final decisions voted on in Parliament;
4. To publicly advertise for members, and applicants to be short-listed and selected an independent selection panel, for final approval by Parliament;
5. To apply strict qualifying criteria for applicants (e.g. business or legal experience, quotas based on ethnic minority, race or gender), with selection made by a representative group of senior politicians.

The dismissal of board members can also be used as a lever of political power, either as a threat or by actually removing members. To counteract this possibility, any power to dismiss board members should be limited to physical or legal incapacity, conflict of interest, failure to play an active role on the board or conviction of a serious criminal offence.

Good governance is important for any organisation. Either the primary legislation or the IRA's own internal regulations should set out clear Board procedures, which include the holding of meetings, the taking of minutes and what constitutes quorum.

#### Funding

It is important to look at how the regulator is funded as an indicator of both independence and its ability to do its job. In countries with an underdeveloped commercial broadcasting sector (or one which is struggling to make money), it is normal for the regulator to be funded mostly or entirely out of the State budget. This can be a recipe for political interference, as governmenst can 'punish' the regulator by not allocating sufficient funds to enable it to do its work. Conversely, a regulator which is funded entirely by industry fees and levies can be suspected of being subject to 'regulatory capture'. Neither solution would therefore seem to be ideal, although in practice, steps can be taken to reduce the risk of interference and influence from both State and industry sources of funding. In any case, what is important is to build in appropriate and effective methods of accountability for the regulator.

Another safeguard for independence is to provide for the regulator to set its own budget, regardless of the source of funds. Ideally, the budget should be based on a sensible business plan which has been the subject of consultation. It is normal practice for the regulator's budget to be subject to parliamentary approval, and it has been known for governments to seek to exercise indirect control over a regulator by not approving a budget. It is here that the existence of a mature civil society can act effectively against political attempts to interfere with the regulator.

### Accountability

It is vital that the regulatory authority is properly accountable: to the State, the public and the law. Its accounts should be independently audited and published. It should be required by law to present an annual report to parliament describing its activities over the year. This report should be made publicly available. Good practice suggests that thorough consultation should take place with the industry and all other interested stakeholders before introducing any significant new policy or major change. And there should be a means of appeal to the courts from any significant decision taken by the regulator in relation to licensing.

So, the structural and legal indicators for regulatory independence are:

1. A statutory basis for the regulator's remit and jurisdiction;
2. 'Independent' from government, that is: the agency has its own powers and responsibilities given under public law; it is organisationally separated from ministries; it is neither directly elected nor managed by elected officials;
3. Clarity of policy/regulatory objectives – in the founding statute or similar, to include a reference to protecting freedom of expression (either direct or through reference to a Constitutional right);
4. Powers set out in statute or other legal instrument including the power to adopt regulations and guidelines and the power to adopt internal rules;
5. Public accountability, at least through a requirement to publish an annual report;
6. Accountability to the courts through a right of appeal on any significant decisions taken with regard to licensing and the application of sanctions;
7. The process of appointment set out in a legal instrument. The process should be transparent and promote as much independence as possible;
8. Rules to guarantee that members may not receive any mandate or take any instructions from any person or body;
9. An independent Chair;
10. Narrow powers of dismissal which are set out in statute, limited to physical or legal incapacity, conflict of interest or serious criminal behaviour;
11. Clear board procedures, set out in published documents, to include the taking of minutes and the setting of a quorum;
12. Clear rules on conflicts of interest both for nominees and after appointment;
13. Clear funding mechanisms which limit the possibility of political interference and legal instruments which specify that that public authorities must not use their financial decision-making power to interfere with the independence of the regulatory authority; and
14. Ability for the regulatory authority to set its own budget, subject to approval by Parliament

### Culture

As recognised by the Committee of Ministers of the Council of Europe[42], a legal framework is not, in itself, enough. What is needed is a 'culture of independence' where the regulatory authority's right to act independently is respected – whether or not there is a legal framework in place demanding it.

So, how can a 'culture of independence' be supported? The CoE provides advice for its member states in their legislative capacity, for civil society and for the regulators themselves.

A number of legal criteria can assist the development of a culture of independence. The CoE cites of particular importance the need to extend incompatibility rules, for example by applying them to close family members. The CoE approves of instances where members of regulatory authorities are not permitted to work in the TV or radio business or engage in politics for several years after the expiry of their mandate. To prevent members from signing over their commercial interests in a media business to a family member, the law in some member states also requires that close relatives of members give up their commercial interests in the media. This requirement can also extend to relatives holding political office.

42. Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector March 2008 https://wcd.coe.int/ViewDoc.jsp?id=1266737&Site=CM

Another legal mechanism which assists the formation of a culture of independence is setting out clear processes and selection criteria for broadcast licensing. When this is unclear, or the law is frequently revised, it leaves the regulator open to accusations of subjectivity and coercion, if not corruption. The same requirement applies to the application of sanctions. Without clear statutory guidelines, regulators can be accused of applying sanctions arbitrarily or inconsistently, with the suspicion that they sanctions are politically motivated.

One of the key factors the CoE recognises as contributing to this 'culture of independence' is the active scrutiny of society at large, monitoring the ability of the regulatory authority to exercise independence with the support of public authorities and the media. The Council of Ministers, "Invites civil society and the media to contribute actively to the 'culture of independence', which is vital for the adequate regulation of broadcasting in the new technological environment, by monitoring closely the independence of these authorities, bringing to the attention of the public good examples of independent broadcasting regulation as well as infringements on regulators' independence.[43]"

The CoE reinforces the requirement for independent broadcasting regulatory authorities to be transparent and accountable as this will reinforce respect for the legal framework with a clear separation of powers between the regulator and government.

The Declaration, "Invites broadcasting regulatory authorities to:

- be conscious of their particular role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape;
- ensure the independent and transparent allocation of broadcasting licences and monitoring of broadcasters in the public interest;
- contribute to the entrenchment of a 'culture of independence' and, in this context, develop and respect guidelines that guarantee their own independence and that of their members;
- make a commitment to transparency, effectiveness and accountability; "These guidelines are ones that any regulatory authority that wishes to be independent can follow, regardless of the legal governance under which they are founded.

## 5. Examples of Good practice

### Legal base and remit

#### South Africa

In some countries the independence of the broadcast regulator is constitutionally prescribed. For example, the South African constitution states, in Section 192: "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

The Act which establishes the regulatory authority, the Independent Communications Authority of South Africa ("ICASA") , goes on to state: "The Authority is independent and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice. The Authority must function without any political or commercial interference."[44]

#### Chile

In Chile, Law No. 18,838 of the Home Office creates the National Television Council (CNTV), referred to in the Constitution as an autonomous body. I Its objectives are to ensure "the correct operation of television services", i.e. to ensure respect for the nation's moral and cultural values, the dignity of individuals, protection of the family, pluralism, democracy, peace, environmental protection and the spiritual and intellectual education of children and youths within such framework of values.[45]

#### UK

Ofcom, in the United Kingdom, was set up by the Office of Communications Act 2002,[46] while details of its remit and powers are contained in the Communications Act 2003.[47] Ofcom is the regulatory body for telecommunications, spectrum management and broadcasting. There is no official constitution in the UK, but the Act is clear in setting out Ofcom's duties with regard to broadcasting, namely to secure:

*"-the availability throughout the United Kingdom of a wide range of television and*

43 CoE Declaration 2008.

44. The Independent Communications Authority of South Africa Act No. 13 of 2000, available at: www.icasa.org.za.

45. Available at: http://www.leychile.cl/Navegar?idNorma=30214

46. Available at: http://www.opsi.gov.uk/acts/acts2002/ukpga_20020011_en_1

47. Available at: http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1.

*radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;*

*- the maintenance of a sufficient plurality of providers of different television and radio services; and*

*- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;*

*- the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both unfair treatment in programmes included in such services; and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services."*[48]

The Act is also very clear about Ofcom's powers, which include licensing, monitoring, dealing with complaints and issuing sanctions. Ofcom is given the power to develop and apply guidelines explaining the basic content standards set out in the Act, and to develop and publish its own internal procedures.

## Boards

### Netherlands

The size and composition of the board vary significantly from country to country. In the Netherlands, the independent Media Authority (*Commissariaat voor de Media*) has only three commissioners, although their independence is guaranteed by the Media Act of 1987. The commissioners are appointed by Royal Decree on the Recommendation of the Minister for Education, Culture, and Science. In contrast, in France, the CSA has a board of nine members. Three members are appointed by the president, three by the National Assembly, and the remainder appointed by the chairman of the Senate. They are confirmed by presidential decree, and the Chairman of the CSA is appointed by the president. A third of the members of the CSA are renewed every two years. The term of office for all members is six years, which can neither be revoked nor renewed.

### Benin

In Benin, the president of the *Haute Authorité de l'Audiovisuel et de la Communication* (HAAC) is appointed, after consultation with the president of the Parliament, by decree in the Council of Ministers. The other members of the HAAC board consist of three appointees of the head of state and three appointees of the Cabinet of the Parliament. Each set of appointments is to include a communicator, a lawyer, and a personality from civil society. In addition, it includes two professional journalists and one telecommunications technician appointed in a general assembly of their peers. The mandate of the nine members of the HAAC board is five years and may neither be revoked nor renewed.

### Canada

The Canadian Radio-television and Telecommunications Commission ("CRTC") is responsible for overseeing broadcasting licensing in Canada. It consists of not more than thirteen full-time members and not more than six part-time members, appointed by the prime minister. In practice, although not in law, this is a broad public process involving public consultations.

Members are appointed for five years and may be reappointed. There are strict conflict-of-interest rules for members, which exclude anyone who has interests in telecommunications or broadcasting from membership. The law does not set out prohibitions on politically active individuals from becoming members, but this is respected in practice.

### UK

In 1995, a new process of 'independent appointments' was put in place for all public appointments in the United Kingdom. Although the relevant Secretary of State formally appoints the non-executive members of Ofcom, appointments are made on the basis of recommendations reached through the standard public appointments procedure. This stipulates that all public appointments should be based on merit and subject to scrutiny by at least one accredited independent assessor. All the candidates put forward for ministerial selection must meet these criteria.[49]

### Mexico

In Mexico, the new Federal Telecommunications Institute, IFETEL, has responsibility for the allocation of broadcasting licences. It is set up under Article 6 of the constitution as independent from the executive and legislative branches. IFETEL will be headed by a body appointed through a process involving elements of civil society. Candidate selection will involve an open, competitive process that is subject to a technical evaluations

48. Sections 3(2)(c)-(f) of the Communications Act 2003.

49. See the website of the Office of the Commissioner for Public Appointments, at: http://www.publicappointmentscommissioner.org/.

committee, which, together with higher education institutions, will submit three to five candidates to the president, from which one will be proposed to the Senate for confirmation.

### Jamaica

The Jamaican Broadcasting Commission (JBC) was established by the Broadcasting and Radio Re-Diffusion Act. The Act provides for a novel way of securing the political independence of Commission members: between 5 and 9 members are to be appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition. Any serving politician, and anyone who sought election within the past 7 years (whether or not they were successful), is disqualified from appointment.

In Jamaica, a member may only be removed from office before the expiry of his or her term by a resolution approved by at least two-thirds of each House of Parliament. Existing Members of the Jamaican Broadcasting Commission include educationalists, policy experts and lawyers. They have the power to create advisory committees if additional expertise is required. The Act enables the JBC to set its own procedures, subject to setting a quorum of 3 members.

### Chile

In Chile, the law makes it clear that CNTC is to be an autonomous public authority that is functionally decentralised, with its own legal capacity and accountable to the President through the Ministry of General Secretary Government (Ministerio Secretaria General de Gobierno). Council members should be individuals with relevant personal and professional virtues, in the opinion of both the President and the Senate. Members sit for an 8-year term of office and are re-elected by halves every four years. The President appoints the 11 members with the agreement of the Senate. The chair is appointed by the President alone.

### South Africa

In South Africa, the governing legislation of ICASA sets out a clear procedure for appointment of members of its governing board:

The Council consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles, namely—

a. participation by the public in the nomination process;

b. transparency and openness; and

c. the publication of a shortlist of candidates for appointment[50]

Subsection 3 requires members to be committed to freedom of expression and other positive social values, to have relevant expertise and, collectively, to be representative of South Africa as a whole. Section 6, for its part, prohibits individuals with strong political connections, as well as those with vested interests in telecommunications or broadcasting, from becoming members.

### USA

The regulatory authority responsible for broadcasting (and telecommunications) in the United States is the Federal Communications Commission (FCC), an agency established under the Communications Act of 1934. As specified in the Communications Act, the Commission's mission is to

> *"make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."*

In the FCC, there are five commissioners, including a Chair, all of whom are appointed by the President and confirmed by the Senate. They serve for 5 years with no provision for dismissal. Up to three commissioners may be members of the same political party, thereby indicating that the FCC, although formally labelled an 'independent agency', is not 'independent' according to international standards.

Members of the FCC are, however, prevented by conflict of interest rules from holding any financial interest in any of the sectors they regulate. Clear rules on conflicts of interest for both candidates and appointees are vital to maintain independence. The rules should cover interests of close family members, as well as actual appointees. There are also clear prohibitions on any prospective or actual member of the FCC having any financial conflicts of interest, and this is one of the few reasons a member can be dismissed, together with bankruptcy, misbehaviour or incapacity.

## Funding

### UK

Ofcom sets its own budget based on an annual business plan which is published in draft and subject to full public consultation. It is largely funded through licence application and on-going licence

50. Section 5 of the Independent Communications Authority of South Africa Act, No. 13 of 2000.

51. See: http://www.ofcom.org.uk/files/2014/Tariff_Tables_2014_15.pdf/ for Ofcom's published budget and tariff table.

52. Schedule 1, Paragraph 8(1):7

fees from broadcasters, although it does receive a small grant from the government for activities not directly linked to licensees, such as the promotion of media literacy. By law, it must only seek to cover the costs of regulation and no more from licence fees. This results in a complex charging structure which links fees to actual costs. Any changes to the fee structure are consulted on and the fee structure is published.[51] The Communications Act 2002 states,

> *"It shall be the duty of Ofcom . . . so to conduct their affairs as to secure that their revenues become at the earliest possible date, and continue at all times after that to be, at least sufficient to enable them to meet their obligations and to carry out their functions."*[52]

### USA

Funded largely by regulatory fees with additional sums coming from the Treasury, the FCC publishes its accounts on a quarterly basis, and also produces a 5-year Strategic Plan and annual reports of its performance.[53] The annual budget is approved by the House Appropriations Committee.

### Chile

In Chile, CNTV's budget is set by the Budget Office, which is part of the Ministry of Finance. Although this could in theory be used as a means of exerting direct political control over the Council, in practice CNTV reports no problems in getting a reasonable financial allocation.

### Lithuania

The Radio and Television Commission of Lithuania (LRTK), established under the Mass Media Law of 1996, is financed from the funds of the commercial broadcasters. All broadcasters earning income from commercial broadcasting activities—with the exception of the public broadcaster, LRT—must pay the commission on a monthly basis: 0.8 percent of their incomes received from advertising, subscription fees, and other commercial activities related to broadcasting and/or retransmission. If broadcasters fail to pay for three months after a deadline specified in writing by the commission, such amounts are to be recovered in court. The LRTK is responsible for establishing its own budget within the funds thus made available.

## Accountability

### Jamaica

In Jamaica, the Commission is required to lay an annual report before Parliament setting out details of the performance of licensees, a summary of its decisions and any other matter of public interest.

### UK

Ofcom's accounts are audited by the public National Audit Office. Its Annual Report is laid before Parliament and published on the Ofcom website. A section of the website is devoted to accountability and it carries the annual plan, annual report and other documents containing key data and policies.[54]

In a published guide to their consultation processes, Ofcom states:

> *"Consultation is an essential part of regulatory accountability—the means by which those people and organizations affected by our decisions can judge what we do and why we do it."*[55]

The Communications Act of 2003 sets out a general requirement on Ofcom to have regard to,

> *"the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed".*[56]

In addition, the Act includes seventy-seven specific requirements on matters where consultation is required before a decision is taken. Ofcom consultation policy draws on current good practice in public administration set out in UK government guidelines.[57]

Perhaps surprisingly, one area of accountability which is weak in the United Kingdom is in relation to judicial oversight. Ofcom's broadcasting-related decisions are only subject to judicial review; there is no appeal of the substantive decision. If a court determines that Ofcom has not followed due process, has behaved irrationally, or has acted *ultra vires*, the court can refer the matter back to Ofcom for review. There is no power for the court to substitute Ofcom's decision with its own or review its actual decisions. To date, there have been no challenges questioning the legality in internation-

53. See: http://www.fcc.gov/encyclopedia/fcc-strategic-plan

54. See: http://www.ofcom.org.uk/about/annual-reports-and-plans/

55. Ofcom Consultation Guidelines, 2007 http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult

56. Section 3(a)

57. UK government consultation principles https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

al law of this limited right of appeal. However, to provide some sort of alternative, Ofcom has set up a range of internal appeal mechanisms to give dissatisfied stakeholders the opportunity to challenge regulatory decisions at least internally.

### Chile

Although the CNTV does not publish as much information as Ofcom, it does have an excellent website[58] and it seeks to be a regional leader in the development of broadcast regulatory policy. All major decisions, policy documents and 'think pieces' are published and there are regular consultations with the public and stakeholders.

### South Africa

In countries where access to information legislation is in force, the independent regulatory body should be subject to the same rules that apply to government departments and public bodies. ICASA, for example, is defined as a "public body" within the terms of the Promotion of Access to Information Act of 2000.

## 6. Challenges and opportunities

It is perhaps self-evident that the biggest challenge to the ability of a regulator to act independently is a government which opposes independence and either takes direct control of broadcasting-related matters, or interferes with the regulator's operations. However, the potential influence of the media itself must not be underestimated.

In countries where corruption is rife, there is always the potential for media players to corrupt officials of the regulatory authority in order to ensure decisions are made in their favour, particularly when it comes to granting licences. There are also places where the media has considerable influence and control over the political process, and here the media generally prefers regulation by government to regulation by an independent body which may be more difficult to manipulate. The power relationship is not always straightforward and obvious; in countries where the State largely funds commercial broadcasters (for example by purchasing the bulk of advertising), those broadcasters will support the State against third parties as they need to ensure they retain favour with their funders. A regulator trying to exercise independent thought and action in such circumstances will inevitably find it a struggle if faced with opposition from both the industry and the State.

Conversely, the Council of Europe has noted that almost all of the regulatory authorities amongst its member states

> *"which are not formally established as autonomous agencies but which are reported to work independently in practice seem to be found in longstanding democracies with relatively low levels of corruption, where the transparency of public bodies in general is ensured and where independent media and a vibrant civil society keep the regulatory authority's work under close scrutiny."*[59]

In other words, even where there is no strict legal independence, social and cultural factors can nonetheless result in *de facto* independence. This would suggest that, although formal factors are important, wider social factors which support a culture of independence are at least equally important to ensure that regulation is conducted free from influence of either the State or inidustry

### Digital convergence

Digital technologies have created the potential for important changes in the audiovisual environment, with the introduction of multi-channel television, and IPTV and online streaming. This has led to global concern about how current standards applied in broadcasting can be transferred to the digital world. The European Commission has recently consulted on the extent to which existing regulation needs to be adapted to make it as relevant and practicable as possible going forward[60].

In a recent speech on the future of regulation in the digital world,[61] the chief executive of the UK's converged regulatory body, Ofcom, identified three main reasons why regulation will still be needed:

> *"People typically want to be protected from illegal and harmful content, pretty much regardless of how it's delivered.*
>
> *People are entitled to have their privacy respected, both in broadcast content and online services.*
>
> *And Parliament has made very clear that there should always be a plurality and diversity of voices in the media."*

Nonetheless, he acknowledges the challenges around trying to adapt existing standards across all platforms and recognises that the future will require a mix of increased audience understand-

58. See: http://www.cntv.cl.

59. CoE Declaration 2008.

60. See Green Paper, Preparing for a Fully Converged Audiovisual World: Growth, Creation and Value https://ec.europa.eu/digital-agenda/node/51287#green-paper---preparing-for-a-fully-converged-audi.

61. Ed Richards, CEO Ofcom, 29 October 2013 http://media.ofcom.org.uk/speeches/2013/speech-on-broadcasting-regulation-in-a-converged-world/

ing (media literacy), self-regulatory initiatives and – for so long as broadcast television remains dominant – statutory regulation based on current models.

Discussing the challenges of adapting regulation to meet audience expectations across different types of platforms, Ed Richards says that nonetheless, the framework for successful regulation – be it statutory, self-regulation or co-regulation, must be one of independence:

> *"In the first instance, the regulator must have effective safeguards against undue influence based on:*
>
> - *Independent governance and decision making*
> - *Clear public accountability*
> - *Clear regulatory objectives and purposes*
> - *Clear and transparent processes*
>
> *Secondly, the regulator should be able to guarantee its independence and accountability through:*
>
> - *Independent funding and budget control*
> - *Accessibility*
> - *It must have - Genuine powers of investigation*
> - *Effective powers of enforcement and sanction"*

So, the role of the broadcasting regulator may remain relatively stable for some time yet, but the range of regulatory issues is certainly shifting as we see convergence between delivery platforms and increased convergence in ownership (in particular, as content producers also become platform owners) bringing a greater emphasis on the regulation of competition and access.

In a recent OECD roundtable event on competition in television broadcasting, Chile commented,

> *"..the development of multi-media conglomerates is a recent trend in the industry. The major concern for competition policy is the potential extension of market power already possessed in one kind of media (e.g., TV broadcasting) to another (e.g., radio broadcasting) through exclusionary practices such as tying, bundling, arbitrary discrimination, cross-subsidies, etc. At the same time it is well acknowledged that technological convergence can bring improvements in quality and content. However, if these improvements depend on multi-media conglomerates possessing market power in related markets, this structure may deter entry and expansion of smaller competitors operating in only one of these media platforms."*[62]

The issues around this are very current in Mexico,

> *"The problem is that the last concession for open TV was granted to TV Azteca in 1994 and no open TV concession has been tendered ever since."*[63]

The two dominant players, Televisa and TV Azteca, have ensured a lack of competition in the open TV markets. This,

> *"adversely affects consumers since they are deprived of a plural content offer. Independent TV producers are affected since they must be vertically integrated with Televisa and TV Azteca in order to reach a wider audience. However, vertically integrated producers might also be subject to pressures from either Televisa or TV Azteca given the limited options for producers. Finally, advertisers are forced to pay high prices for each TV advertisement in Televisa and TV Azteca. Studies estimate an advertising rate 40 percent higher for the Mexican market in comparison to competitive market conditions."*[64]

In May 2014, Mexico's new independent regulatory authority, the Federal Telecommunications Institute, announced it was to open a bidding process for two new free-to-air (open) services. More recently, Televisa has been declared as having a "preponderant" position and restrictions were placed on its expansion. At the same time, Carlos Slim's America Movil (the largest telecommunications provider in Mexico) has declared it will divest investments to reduce its own dominance, with a view to entering the Open TV market. The challenge for the new IFT will be to balance the desire to introduce new players into television with concerns about in so doing, merely extending the influence of America Movil across platforms.

With a shift in emphasis to the regulation of access and competition, the role of the broadcasting regulator will by necessity take on some of the characteristics of other infrastructure, or economic regulators. As will be recalled from the discussion above on normative standards, there is even greater international consensus on the value of independent regulation in such circumstances.

62. OECD 2013 http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf p.54
63. Ibid p.220
64. Ibid p222

**Support and co-operation**

Given both current and future challenges to broadcasting regulation, there are signs that regulators are finding ways to support each other through international cooperation.

The OECD says:

> *"Governments should co-operate with other countries to promote the development and diffusion of good practices and innovations in regulatory policy and governance." and, "Governments should contribute to international fora, including private or semi-private, which support greater International Regulatory Co-operation"*[65]

There are a number of these fora in the broadcasting world.

The first to be established was the European Platform for Regulatory Authorities ("EPRA") which now has 52 regulatory bodies as members as well as a number of standing observers including the European Commission, the CoE, and the Office of the Representative on Freedom of the Media of the OSCE.

The EPRA provides a forum:

- for informal discussion and exchange of views between regulatory authorities in the broadcasting field;
- for exchange of information about common issues of national and European broadcasting regulation;
- for discussion of practical solutions to legal problems regarding the interpretation and application of broadcasting regulation.[66]

The 2014 work programme features discussions on the independence of regulatory authorities**,** after EPRA members confirmed that they consider that independence is a key factor contributing to the efficient functioning of regulators and that lack of independence risks having a devastating effect on the freedom and pluralism of the media.[67]

Also in Europe, as stated above, the European Commission has recently established the ERGA, a high level group of the National Regulatory Authorities of EU Member States. The ERGA was set up as a non-legislative response to the consultation on Art 30 of the AVMSD, with the expectation that it will enhance members' capacity to strengthen independence as well as keeping the issue high on the policy agenda.

Involving Latin American countries and established in 2010, there is The Plataforma Iberoamericana de Reguladores de Televisión ( "PRAI"). PRAI is a network of audiovisual sector regulatory and advisory entities in Latin America and the Iberian Peninsula composed of representative organizations from Argentina, Brazil, Colombia, Costa Rica, Bolivia, Spain, Chile, Portugal, Uruguay, Morocco and Peru. The specific role of independence has not yet been discussed by the group, which is having its next meeting, in Colombia, on the subject, "*The new regulatory role of the state in the information society",* indicating that independence may be a challenge for the PRAI agenda[68].

The African Communication Regulation Authorities Network (ACRAN), was established in 1998 with the aim of developing and reinforcing co-operation between the communication regulatory authorities in Africa. It currently has 25 members from both Sub-Saharan and North Africa.[69]

The Network of French-speaking media regulatory authorities ("REFRAM"), established in 2007, is a forum for debate and exchange of information on issues of common interest and fosters training and cooperation between its members.This platform comprises 29 media regulatory authorities from 28 French-speaking African and European countries as well as Canada.[70]

There is also the Platform of Portuguese Speaking Audiovisual Regulatory Authorities ("PER"), which was set up in Lisbon in 2009 as a forum for discussion and cooperation and regular exchanges of information and research on issues related to media (including press) regulation. Its membership consists of the regulatory authorities from Portugal, Angola, Guinea-Bissau, Sao Tome and Principe, Angola, Cape Verde, Mozambique, Timor-Leste and Equatorial Guinea, some of which are government ministries.

Within Europe, there are a number of smaller groupings of regulatory authorities which share a geographic and cultural links: the Mediterranean Network of Media Regulatory Authorities, (established in 1997) with 29 members currently, the Central European Regulatory Forum (established 2009) with 6 members, the Black Sea Broadcast-

65. See OECD International Regulatory Co-operation Toolkit http://www.oecd.org/gov/regulatory-policy/irc-toolkit.htm
66. See more at: http://www.epra.org/articles/general-information-on-epra#sthash.zVubuSb0.dpuf
67. See more at: http://www.epra.org/news_items/independence-of-nras-epra-highlights-key-developments#sthash.wSc1anKN.dpuf
68. See: http://www.prensario.net/10032-Colombia-ANTV-organiza-reunion-iberoamericana-de-reguladores-de-TV.note.aspx
69. See more at: http://www.acran.org/index.jsp
70. See more at: http://www.refram.org/

ing Regulatory Authorities Forum, with representatives from 12 member states (2009), The Nordic Regulatory Cooperation which has been meeting since 1996, the Baltic Cooperation involving the regulatory authorities of Estonia, Latvia and Lithuania (2005) and Euregiolators - a forum of regulatory authorities supervising the media in the Netherlands, Belgium (Flemish, French and German language communities), Luxembourg and the German Länder bordering these countries.

Asia is the one part of the world where there is no formal platform for regulatory authorities, although the Singapore Media Development Agency did consider establishing one in 2010 (but subsequently did not pursue it). However, there is some regional co-operation linked with the ITU which has now held three annual Roundtables with regulators in Asia-Pacific.[71]

Although EPRA appears to be the only regulators' forum where independent regulation is a major issue of discussion and debate, there is certainly the opportunity for these other platforms to share experience and best practice as a means for mutual reinforcement and support.

## 7. Evaluation and assessment

For years, academics have been seeking to assess the efficacy of regulators[72]. The World Bank Handbook, which Berg describes as the "gold standard", sets out a general framework for assessing infrastructure regulators, but does not specifically refer to regulators of audiovisual services.

### UNESCO MDIs

The first attempt to codify the indicators relating to broadcasting regulatory authorities was in 2008 as part of the UNESCO Media Development Indicators.[73] The UNESCO MDIs look at the factors which must be present to enhance freedom of expression and identifies two fundamental conditions: channels of mass communications must be free and independent of established interests, and there must be widespread access to these media.

The first category of MDI Indicators which UNESCO has endorsed as "necessary to take full advantage of the democratic potential of the media and enhance their contribution to development" is, "a system of regulation conducive to freedom of expression, pluralism and diversity of the media: existence of a legal, policy and regulatory framework which protects and promotes freedom of expression and information, based on international best practice standards and developed in participation with civil society." UNESCO endorses independent regulation as meeting these standards and identifies the following key indicators for a regulatory system which is guaranteed as independent by law and respected in practice (that is, independent both by legal foundation and by cultural practice):

- *"licit legal guarantees of autonomy and independence from partisan or commercial interference;*
- *legal guarantees of the independence of the regulatory body;*
- *powers and responsibilities of the regulator clearly set out in law;*
- *members of the regulatory body chosen through a transparent and democratic process designed to minimise the risk of partisan or commercial interference (for instance, setting up rules on incompatibility and eligibility); and*
- *adequate and consistent funding for the regulator is guaranteed by law to safeguard its independence and/or protect it from coercive budgetary pressures"*

By way of verification, UNESCO suggests examining the law setting out the role, membership and funding of the regulatory authority as well as any provision in the constitution on the independence of the regulator. It also suggests looking at "Reports from credible agencies about the effective institutional autonomy of the regulatory body."

In addition to legal and cultural indicators of independence, UNESCO adds a requirement that the regulatory system actually works to ensure media pluralism and freedom of expression and information. Here, the indicators cover the regulatory authority's behaviour and powers: the regulator should be formally accountable to the public and should have, as part of its remit, responsibility to ensure that the broadcasting sector runs in a fair, pluralistic and efficient manner and has powers which promote fairness, freedom of expression, public service programming and accessibility. To verify this indicator, UNESCO suggests looking at relevant laws, reports from credible agencies about the regulator's effectiveness, and evidence of regulatory interventions.

71. See more: http://www.itu.int/ITU-D/asp/CMS/Events/2013/RR-ITP-2013/index.asp

72. For a review of the major studies before 2009, see Sanford V Berg, Characterizing the Efficiency and Effectiveness of Regulatory Institutions at: http://bear.warrington.ufl.edu/centers/PURC/DOCS/presentations/berg/P0309_Berg_Characterizing_the_Efficiency.pdf

73. See: http://unesdoc.unesco.org/images/0016/001631/163102e.pdf

**INDIREG**

In 2011 the European Commission commissioned a study examining the indicators of regulatory independence in the audiovisual sector and a means of measuring them. The INDIREG study looked at both formal and *de facto* criteria, but instead of seeking to measure independence *per se*, sought, through its Ranking Tool, to measure the risk of influence by external players.

The INDIREG Ranking Tool looks at the following criteria from both the legal structures and actual behaviours that are evident: the status and powers of the regulatory authority, its financial autonomy, the autonomy of its decisions makers (including how they are appointed), knowledge (including human resources and expertise) and transparency and accountability mechanisms. The Tool can be used as a self-assessment mechanism, following the extensive and detailed questionnaire provided.

Whilst a useful addition to the literature, there are some limitations to the Tool. First, it is based somewhat on a perfect ideal, but without a clear mandate for the basis of that ideal. As a result, it tends to objectify matters which are by nature subjective and qualified by cultural and political norms which are themselves outside the quantitative analysis of the Tool. Second, it is a static analysis which takes a snapshot at a given point in time, without being able to look at development. Third, it is not comparative; it cannot be used to assess 'how' independent one regulatory authority is compared to another. Its use is for self-assessment, by bodies that wish to look at how they can improve their own situation. As such, it can play a very useful role in supporting arguments for change, or for more resources. However, there remains an opportunity to develop a simpler means of assessing independence, taking into account the fact that, as identified by the CoE, that whilst formal, legal structures are an important adjunct to regulatory independence, actual culture and behaviour ("*de facto"* independence) is far more indicative of whether a regulatory authority makes and executes its decisions free from external influence.

## Recommendations

As has been demonstrated, there is overwhelming international endorsement for the concept of independent regulation of the broadcasting sector, yet Latin America arguably lags behind Europe, and even Africa, in its introduction.

Argentina's regulatory authority, the Autoridad Federal de Servicios de Comunicación Audiovisual, declares itself to be an autonomous, independent authority, but is generally not seen as independent, given the President's powers to appoint its members[74]

In Brazil, there is no independent regulatory authority with direct responsibility for broadcasting matters, although Anatel, the telecommunications regulator, is arguably *de jure* independent.

The Consejo Nacional de Televisión in Chile is the regions oldest, most established independent regulatory authority in the broadcasting field and the only one which is comparable to European counterparts.

In Peru, There is no independent media regulatory body, and under the 2004 Radio and Television Law, broadcast licensing is the responsibility of the Ministry of Transport and Communications.

Uruguay recently lost the chance to establish an independent Audiovisual Communications Council and instead gave responsibility to URSEC, whose members are directly appointed by the executive.[75]

In other countries, such as Columbia and Bolivia, the telecommunications regulatory agency – which may or may not count as 'independent', has some responsibility for the allocation of broadcast frequencies, but no other broadcasting-specific regulators exist.

So, in a region where theS generally retains a degree of at least indirect control over broadcast licensing – including issues such as competition, diversity and plurality, and where there are generally no content restrictions above and beyond those set out in the criminal legal code – applied by the Public Prosecutor/Attorney General's office - how can the notion of independent regulation be introduced?

A big cultural shift is required.

But first, it must be remembered that there is no perfect model of 'independence'; it will look different in every society as what will work in one culture will not necessarily apply in another. It must always be remembered that formal, *de jure* independence is not necessarily enough. Indeed, one comparative study of European regulatory authorities found that many regulators subject to the most rule-driven formal "independence" were actually the least independent in practice. In fact, it would seem that *de facto* independence is most apparent in countries where there is a very strong culture of journalistic professionalism, and the media are not themselves linked to political groups.[76]

Therefore, working in countries where the supporting factors for independent regulation are weak, much can still be done to encourage the development of as many of the elements which foster independence as possible. To this end, it would be useful to work towards an agreed list of indicators for good broadcasting regulation (which can be done without necessarily categorising the regulation as 'independent' of the State). A set of agreed indicators could then be applied on a country by country basis – both to analyse the existing condition and to assist in identifying new initiatives. Importantly, the indicators could be used as a discussion point with each set of the major stakeholder groups: the government, the broadcasters, civil society, and – where they exist already – the regulators.

### Governments

A large number of international bodies have already endorsed the principles of independent regulation for broadcasting, including the OAS and UN (through their Special Rapporteurs), UNESCO, the World Bank, and the OECD – all of whom have members in the region. Through these bodies, conferences and workshops could be arranged to discuss best practice and how the establishment of an IRA could be of benefit to the State.

### The Broadcasters

The region can be characterised as one where many broadcasters' interests are closely aligned to political ones, and there will be an understandable fear of introducing new regulation which could open up the airwaves to competition. Nonetheless, the introduction of new technology and growth of broadband penetration means that the floodgates are already opening. For broadcasters, the benefits of operating their businesses under a predictable, transparent regulatory framework should be preferable to one which is based on political caprice. There is substantial evidence to demonstrate that independent regulation is good for business, and this could be used to reassure nervous media companies. Another good route for involving broadcasters is to encourage them to set up their own self-regulatory mechanisms for content

74. See Article in NY Times Oct 10 2009 http://www.nytimes.com/2009/10/11/world/americas/11argentina.html?_r=0 and Freedom House 2013 Report on Freedom of the Press http://freedomhouse.org/report/freedom-press/2013/argentina#.U-_xM2OjK2o

75. See letter from Art 19, 14 March 2014 at: http://www.article19.org/resources.php/resource/37485/en/uruguay:-broadcasting-regulator-must-be-independent

76. Adriana Mutu, 2014

regulation as a defensive measure against potentially arbitrary application of the law by State authorities.

**Civil Society**

The CoE has made clear that a 'culture of independence' requires the active involvement, through encouragement and monitoring, of a wide range of social actors – including the press. Workshops and training for journalists could include as standard a piece on why independent regulation of audiovisual media is so important (as independent self-regulation is for the press). As already stated, the existence of professional journalism is, in itself, an indicator of a culture of independence.

**Regulatory Authorities**

In this author's experience of working with dozens of regulatory authorities around the world, no regulator wants to admit to lack of independence (even where there is little objective sign of it!). Yet, they benefit greatly from being able to share stories and experience with other regulators and are greatly encouraged by hearing examples of bravery. There is no doubt that the growth of international platforms of regulatory authorities is a way of sharing best practice and raising standards, and indeed the European Commission, by setting up ERGA, specifically intends such a platform to raise standards of independence.

In the region, the PRAI meets at least annually. It is recommended that the Office of the Special Rapporteur and UNESCO seek observer status at PRAI meetings and seek to influence the agenda to include the topic of independence. At EPRA meetings, the subject has been discussed in break-out workshops, with conclusions brought to the Plenary, and therefore included in the minutes. This provides a useful precedent for 'normalising' independence amongst the fledgling group of South American regulatory authorities.

Although it is right for the region to place initial emphasis on encouraging a culture of independence, formal requirements should not be forgotten. Here, it would be useful to draw up a model set of statutory provisions, bearing in mind that the particular method of appointing 'independent' members to the board of the regulatory authority will vary from country to country.

There is no doubt that in a region with few mature democracies, that is still struggling with the reality of autonomy and self-determination, the introduction of independent regulation of audiovisual services will not be simple. It must be linked to the dissemination of the understanding of the basis and importance of freedom of expression: that freedom of expression does *not* mean that broadcasters have the right to say whatever they want; it is *not* defined by what is good for the Government; that it *is* the citizen's right to receive information from a plurality of sources – and is best overseen by a body which is independent of both the broadcasters and the government.

# Annex

**COUNCIL OF EUROPE**
**COMMITTEE OF MINISTERS**

**RECOMMENDATION No. R (2000) 23 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE INDEPENDENCE AND FUNCTIONS OF REGULATORY AUTHORITIES FOR THE BROADCASTING SECTOR[1]**

*(Adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies)*

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

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

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

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

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

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

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

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

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

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

Recommends that the governments of member States:

a. establish, if they have not already done so, independent regulatory authorities for the broadcasting sector;

b. include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation;

c. bring these guidelines to the attention of the regulatory authorities for the broadcasting sector, public authorities and professional groups concerned, as well as to the general public, while ensuring the effective respect of the independence of the regulatory authorities with regard to any interference in their activities.

**Appendix to the Recommendation Rec (2000) 23**

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

**I. General legislative framework**

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

**II. Appointment, composition and functioning**

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
   - regulatory authorities are under the influence of political power;
   - members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
5. Furthermore, rules should guarantee that the members of these authorities:
   - are appointed in a democratic and transparent manner;
   - may not receive any mandate or take any instructions from any person or body;
   - do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.
6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.
8. Given the broadcasting sector's specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence.

**III. Financial independence**

9. Arrangements for the funding of regulatory authorities - another key element in their independence – should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.
10. Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Furthermore, recourse to the services or expertise of the national administration or third parties should not affect their independence.
11. Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.

## IV. Powers and competence

### Regulatory powers

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

### *Granting of licences*

13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.

14. The regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner. The decisions made by the regulatory authorities in this context should be subject to adequate publicity.

15. Regulatory authorities in the broadcasting sector should be involved in the process of planning the range of national frequencies allocated to broadcasting services. They should have the power to authorise broadcasters to provide programme services on frequencies allocated to broadcasting. This does not have a bearing on the allocation of frequencies to transmission network operators under telecommunications legislation.

16. Once a list of frequencies has been drawn up, a call for tenders should be made public in appropriate ways by regulatory authorities. Calls for tender should define a number of specifications, such as type of service, minimum duration of programmes, geographical coverage, type of funding, any licensing fees and, as far as necessary for those tenders, technical parameters to be met by the applicants. Given the general interest involved, member States may follow different procedures for allocating broadcasting frequencies to public service broadcasters.

17. Calls for tender should also specify the content of the licence application and the documents to be submitted by candidates. In particular, candidates should indicate their company's structure, owners and capital, and the content and duration of the programmes they are proposing.

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

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

19. Regulatory authorities should not exercise *a priori* control over programming and the monitoring of programmes should therefore always take place after the broadcasting of programmes.

20. Regulatory authorities should be given the right to request and receive information from broadcasters in so far as this is necessary for the performance of their tasks.

21. Regulatory authorities should have the power to consider complaints, within their field of competence, concerning the broadcasters' activity and to publish their conclusions regularly.

22. When a broadcaster fails to respect the law or the conditions specified in his licence, the regulatory authorities should have the power to impose sanctions, in accordance with the law.

23. A range of sanctions which have to be prescribed by law should be available, starting with a warning. Sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. All sanctions should also be open to review by the competent jurisdictions according to national law.

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

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

## V. Accountability

25. Regulatory authorities should be accountable to the public for their activities, and should, for example, publish regular or ad hoc reports relevant to their work or the exercise of their missions.

26. In order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised *a posteriori* only. The regulations on responsibility and supervision of the regulatory authorities should be clearly defined in the laws applying to them.

27. All decisions taken and regulations adopted by the regulatory authorities should be:

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

* * *

## Explanatory Memorandum

### Introduction

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

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

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

### Preamble

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

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

### Recommendation

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

It is also explicitly recommended that governments ensure effective respect of the regulatory authorities' independence, so as to protect them against any interference by political forces or economic interests. This provision was deemed particularly necessary since, in some cases, despite the existence of a proper

legal framework, and the fact that public authorities are committed to guaranteeing the independence of the broadcasting regulatory authorities, there is, in practice, interference in their activities.

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

## I. General legislative framework

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

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

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

## II. Appointment, composition and functioning

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

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

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

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

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

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

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

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

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

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

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

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

## III. Financial independence

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

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

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

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

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

### Powers and competence

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

#### Regulatory powers

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

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

These regulations may cover areas such as the granting of licences and broadcasters' compliance with their commitments and obligations. In particular, the power to regulate may include the authority to is-

sue, in co-operation with the professional circles concerned, binding rules on broadcasters' behaviour, in the form of recommendations or guidelines, on questions such as advertising and sponsorship, election campaign coverage and the protection of minors. As indicated in the preamble of the Recommendation, this regulatory power does not exclude the adoption of self-regulatory measures by broadcasters themselves.

It is recommended that, within the framework of the law, the regulatory authorities should have powers of regulation which enable them to respond flexibly and adequately to questions that may be unforeseen and are often complex, not all of which can be resolved, or even anticipated, by the legislative framework. In effect, it is considered that regulatory authorities are better placed to define the « rules of the game » in detail, since they have very good knowledge of the broadcasting sector. Furthermore, regulatory authorities should, within the framework of the law, have the power to adopt internal rules in order to define their organisation and decision-making in greater detail, in accordance with its administrative autonomy.

### *Granting of licences*

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

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

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

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

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

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

In order to minimise the possibility of arbitrary decision-making, the Recommendation provides that the regulations governing the granting of licences should be defined and applied in an open and transparent

manner. For the same reason, the conditions and criteria governing the granting and renewal of licences should be clearly defined in the law and/or by the regulatory authority, and regulatory authorities' decisions on the granting of licences should be published in all appropriate ways.

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

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

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

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

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

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

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

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

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

It is stipulated that sanctions should be proportionate and should not be decided upon until the broadcaster in question has been given an opportunity to be heard. In fact, it is the primary task of regulatory bodies not to "police" the broadcasting sector, but rather to ensure that it functions smoothly by establishing a climate of dialogue, openness and trust in dealings with broadcasters. Nonetheless, the

application of sanctions without prior warning may be justified in certain exceptional cases. For the sake of operators' legal certainty, such exceptional cases should be defined in law.

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

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

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

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

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

## V. Accountability

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

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

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

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

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This paper examines the role that broadcasting regulation has in relation to the right to freedom of expression, and the range of duties and powers that regulators typically have. A wide range of international bodies have agreed on the preference for such regulators to be independent, because this best protects freedom of expression. These international normative standards are described and from these, the legal and structural, and cultural and behavioural characteristics of independence are presented. Various global examples of how these characteristics are displayed are explained, as are the challenges and opportunities for independent broadcasting regulation. Finally, an account is given of how these characteristics, or indicators, have been assessed by researchers, with some specific recommendations for the Latin American region

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