



# AVMS-RADAR

## AudioVisual Media Services- Regulatory Authorities' InDpendence And Efficiency Rview

Update on recent changes and developments  
in Member States and Candidate Countries  
that are relevant for the analysis of  
independence and efficient functioning of  
audiovisual media services regulatory bodies  
(SMART 2013/0083)

### FINAL REPORT

A study prepared for the European Commission  
DG Communications Networks, Content & Technology  
by:



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# **AVMS-RADAR**

## **Audio Visual Media Services- Regulatory Authorities' InDependence And Efficiency Review**

**Update on recent changes and developments  
in Member States and Candidate Countries  
that are relevant for the analysis of  
independence and efficient functioning  
of audiovisual media services regulatory bodies**

**– Final report –**



## ABSTRACT

(en)

The study AVMS-RADAR (AudioVisual Media Services-Regulatory Authorities' InDependence And Efficiency Review) has been jointly conducted by the Institute of European Media Law (EMR) and the University of Luxembourg on behalf of the European Commission (SMART 2013/0083). With a particular view on criteria affecting authorities' independence, the study aims to provide an updated analysis of the institutional, legal and regulatory framework governing the regulatory bodies competent for audiovisual media services in EU Member States and candidate countries to the EU. It also comprises the analysis of the implementation of said framework in practice and its effectiveness.

The report comprises information resulting from desk research, country reports drafted by correspondents of the EMR's Media Network and responses by regulatory authorities and interested stakeholders. They result in a comprehensive analysis that identifies differences and common traces of the different national legal systems governing regulatory authorities. Besides the description of the legal framework at EU level and a criteria-based, comparative analysis of the rules in place for national regulatory authorities, the report is supplemented by a 1700+-page annex which gives a country-by-country perspective in table form (based on the country overview tables from the study "INDIREG" conducted in 2010 on behalf of the European Commission) and the extensive answers to the questionnaires used.

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(de)

Die AVMS-RADAR-Studie (AudioVisual Media Services-Regulatory Authorities' InDependence And Efficiency Review) wurde gemeinsam vom Institut für Europäisches Medienrecht (EMR) und der Universität Luxemburg im Auftrag der Europäischen Kommission erstellt (SMART 2013/0083). Auf der Basis einer speziellen Betrachtung der Kriterien, die die behördliche Unabhängigkeit beeinflussen, zielt die Studie darauf ab, eine aktualisierte Analyse der institutionellen, gesetzlichen und aufsichtsrechtlichen Rahmenbedingungen zur Verfügung zu stellen, die die Kompetenzen der Aufsichtsbehörden audiovisueller Mediendienste in den EU-Mitgliedstaaten und den Beitrittskandidaten der EU regeln. Ferner umfasst sie die Analyse der Umsetzung dieses Rahmens in der Praxis und seiner Effizienz.

Der Bericht umfasst Informationen aus Sekundärerhebungen, durch Korrespondenten des EMR-Mediennetzwerkes erstellte Länderberichte und Antworten von Aufsichtsbehörden und interessierten Kreisen, die eine umfassende Analyse ergeben, welche Unterschiede und Übereinstimmungen der verschiedenen nationalen rechtlichen Rahmenbedingungen aufzeigt. Neben der Schilderung des auf EU-Ebene geltenden rechtlichen Rahmens und einer kriterienbasierten Vergleichsanalyse der für

die nationalen Aufsichtsbehörden geltenden Regelungen wird der Bericht durch einen über 1700 Seiten umfassenden Annex, der eine nach Ländern gegliederte Übersicht in Tabellenform gibt (welche auf den Ländertabellen der 2010 von der Europäische Kommission in Auftrag gegebenen „INDIREG“-Studie basiert) und die ausführlichen Antworten zu den verwendeten Fragebögen ergänzt.

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(fr)

L'étude AVMS-RADAR (**A**udio**V**isual **M**edia **S**ervices-**R**egulatory **A**uthorities' **I**n**D**e**p**endence **A**nd **E**fficiency **R**eview).a été menée conjointement par l'Institut du droit européen des médias (EMR) et l'Université du Luxembourg pour le compte de la Commission européenne (SMART 2013/0083). Axée en particulier sur les facteurs ayant un impact sur l'indépendance des autorités, l'étude met à jour l'analyse du cadre institutionnel, juridique et réglementaire régissant les organismes de régulation compétents pour les services de médias audiovisuels dans les Etats membres de l'UE et les pays candidats à l'adhésion. Elle comporte également une analyse de la mise en œuvre pratique et de l'efficacité de ce cadre.

Le rapport regroupe des informations issues de recherches documentaires, des rapports nationaux rédigés par les correspondants du Media Network de l'EMR et des réponses fournies par les régulateurs et les parties prenantes. Il en ressort une analyse approfondie qui révèle les disparités et les points communs entre les différents cadres juridiques nationaux régissant les autorités de régulation. Outre le descriptif du cadre juridique au niveau européen et une analyse comparative méthodique des dispositifs en place régissant les autorités nationales de régulation, le rapport comporte une annexe de plus de 1700 pages qui fournit un panorama de la situation pays par pays sous forme de tableau (basé sur les tableaux récapitulatifs des pays de l'étude « INDIREG » menée en 2010 pour le compte de la Commission européenne), ainsi que les réponses détaillées aux questionnaires utilisés.

## EXECUTIVE SUMMARY<sup>1</sup>

1. This final report of the study “Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and efficient functioning of audiovisual media services regulatory bodies” (SMART 2013/0083) has been prepared jointly by the Institute of European Media Law (EMR) and the University of Luxembourg (hereinafter: the consortium) on behalf of the European Commission, following the consortium’s successful bid to the Commission’s invitation to negotiate of 28 July 2014. The acronym of the study is **AVMS-RADAR** (AudioVisual Media Services-Regulatory Authorities’ InDpendence And Efficiency Review).
2. The main **objective** is to update the findings of a previous study, commissioned by the European Commission in 2009, entitled “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive” (SMART 2009/0001, hereinafter: INDIREG study). The study therefore aims to provide updates of the detailed description and analysis of the institutional, legal and regulatory framework governing the regulatory bodies competent for audiovisual media services in EU Member States and candidate countries to the EU (Objective 1) and the analysis of the implementation of said framework in practice and its effectiveness (Objective 2).
3. The consortium pursued an integrated **approach** to both objectives since the legal paradigms and their practical implementation are interlinked and both can have a significant impact on the real degree of independence of a regulatory body. In this vein, similar tasks foreseen under Objectives 1 and 2 have been linked, resulting in a single set of issues to be investigated, comprising both objectives. The analysis covers both the competent regulatory bodies overseeing the activities of public service audiovisual media services providers as well as those for commercial audiovisual media services providers. Regulatory bodies are included in the scope of the study regardless of their structure and actual legal status, for example whether it is an internal oversight Board within a public service broadcaster or a co-regulatory body.
4. The chosen **methodology** included an intensive desk research phase aimed at gathering information about the different legislative, regulatory and institutional frameworks present at the international, supranational and national levels with regard to the scope and activities of the audiovisual media services regulatory bodies in the countries to be covered by the study. In parallel, the existing data on the specific national situations were extensively complemented and updated by

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<sup>1</sup> The final study report exclusively contains the English version of the executive summary. For the other two mandatory language versions (German and French) see the separately submitted document.

country reports produced by correspondents of the EMR's Media Network in response to a questionnaire developed by the consortium. Appropriate consideration of both regulatory authorities' and stakeholders' viewpoints was secured by including in the overall analysis an evaluation of their feedback to another questionnaire and online survey which were designed specifically for these two groups by the consortium. Following the thorough evaluation of the country reports and with due consideration of the further material, a comprehensive comparative analysis was conducted with a view to identifying differences and common traces of the different national legal frameworks.

5. The **structure** of the final report is composed of two parts. The first part includes a description of the legal framework currently in force at EU level including an overview of relevant texts from the Council of Europe. In the second part, an updated description of the legal, institutional and regulatory framework in place in EU Member States and candidate countries and its efficient implementation in practice is given. A list of the experts that have contributed to the study with country reports is included in Annex 1 of this report. Annex 2 contains the questionnaire sent to these experts. Screenshots of the online-survey are included in Annex 3 of this report. In order to complement the issue-based description of the final report, Annex 4 contains the country overview tables from the former INDIREG study for each monitored country, but in the version as they have been updated by the national experts. In order to make the numerous changes visible, the track changes mode has been used. Finally, Annex 5 contains the answers of the national experts to the questionnaire drafted by the EMR.
6. It emerges from the comparative analysis that all regulatory authorities are separate legal entities whose **independence is explicitly or implicitly recognized** by the national legal framework with the exception of one authority that constitutes a governmental organisation. While the regulatory framework has remained stable in most countries investigated in the study, in a few countries new regulatory bodies have been established. Staffing and budget are heavily dependent on national conditions and thus show great variety across all countries. It seems as if problems concerning staffing and financial resources are more likely to occur or become evident in case of "small" regulatory authorities in countries which have limited resources to fund them.
7. Both the **financial and human resources** of the regulatory bodies responsible for audiovisual media services need to be acquired from external sources. With regard to the highest decision-making organ within the regulatory body (the Board), this situation requires careful selection of its members so as to ensure that all relevant views are represented in it in a balanced way. The size of regulatory bodies' Boards spans from three to 13, except for a few countries where in certain cases an individual person acts as the highest decision-making body and a few other countries which have significantly higher numbers. While the sizes of Boards have remained unaltered in a majority of countries, when changes occurred they typically came about as a consequence of extensive reforms of the entire regulatory body.

8. A **balanced representation of stakeholder views** within the Board is also dependent on the socio-economic backgrounds of its members. In most countries, Boards are legally required to be composed of members acting for diverse social, economic and political groups. In nearly two thirds of the countries experts in fields related to (audiovisual) media are represented in the Board. In a few others, members do not explicitly represent certain groups, but are actually nominated and/or appointed by these.
9. Of equal importance for the proper fulfilment of the Board's functions is the **professional qualification and expertise** of its members. However, while in most countries requirements in this regard exist, they are missing completely in a considerable number of countries. Where legal requirements are in place, they vary substantially. In some countries, only some education, but no work experience is required, whereas others only require a certain degree of professional experience.
10. Existing **rules to prevent conflicts of interest** at all stages of Board membership are a strong indicator for the independence of Board members, as they can ensure that undue influence on the decisions of the Board is reduced to a minimum. While specific conflict of interest rules preventing candidates from being appointed in case of existing incompatibilities are widespread, they are missing in seven countries. In the majority of countries, specific incompatibility rules also apply at senior staff level. As far as they exist, the rules mostly cover a wide range of potential conflicts of interest, from incompatibilities with Government, political parties and sometimes the legislature as well as the regulated branches. The laws of more than half of the countries prohibit Board members from holding any other position during their membership in the Board, and they also provide for a cooling-off period after the Board member's term of office in order to prevent members from abusing their position regarding decisions taken in favour of a potential future employer.
11. In procedural terms, the **rules governing the appointment and dismissal** of Board members (including the chairperson) and their practical implementation call for a closer look as they may have an impact on the independence with which a Board member conducts his or her functions. Candidates for the Board are, in most countries, selected through a two-stage procedure, featuring separate nomination and (subsequent) appointment stages. Often, however, this procedure does not apply to the chairperson. On the other hand, in some countries, the chairperson is elected directly from among the Board members. As far as a two-stage model is applied, it is mostly a legislative or executive organ of the State (Parliament, Head of State or (a part of) the Government) that is responsible for the actual appointment. State bodies or individual Members of Parliament are also usually in charge of the nominations. In the majority of countries, the Government is involved either at the nomination or at the appointment stage of the procedure.
12. Board members are, in most countries, appointed for a **term** of between four and six years. Shorter terms of one or two years are foreseen in very few cases for

chairpersons. Noteworthy are long terms of seven and nine years in a few countries. Particularly where these terms have only been extended in the past years, this might point to a potential democratic deficit. In the overwhelming majority of countries, laws to protect Board members against arbitrary dismissal are effective. In these countries, a Board member can only be dismissed for one of the reasons specified in law, which mostly include health conditions, cases of serious misconduct, violations of conflict of interest rules, a request by the Court of Auditors or by the Board member him or herself. Changes in this area have remained minimal in the past years and mostly did not touch upon substantial issues. In practice, dismissals ahead of schedule have been limited to a handful of cases in the past five years.

13. Since the regulatory body cannot produce its own resources, its **financial independence** is determined by the way in which the regulatory body can enforce the funding entity's financing obligation. Generally spoken, in all countries, the regulatory body is involved, at some stage, in the decision-making process about the financial needs. In the great majority of countries, regulatory bodies are to a large part or exclusively financed by the State. In some countries, a mainly fee-based funding model applies, whereby fees are collected either from the broadcaster (licence and authorisation fees) or from the end-user (broadcasting fee) or from both. In more than two thirds of the countries, the final decision concerning the regulatory body's annual budget lies with the Parliament. In seven countries, the regulatory body itself decides on its budget. In three countries, the Government or the competent Ministry takes the ultimate decision over the regulatory body's budget. In the years after the INDIREG study, there have only been very few changes in this regard, most of which brought about a more prominent role of the Parliament in the decision-making process.
14. The **range of powers** granted to regulatory authorities is indicative of their independence. The more comprehensive their powers are, the more they can assert themselves within the national context (e.g. vis-à-vis the Government or the industry). While less than half of the regulatory authorities examined in this study have been given policy *setting* powers, all bodies are entrusted with policy *implementing* powers. The power to take decisions, which are binding on third parties, is attributed to all regulatory authorities and pertains to the core of their powers. Changes with regards to the existence of regulatory powers have occurred in a handful of countries where regulatory bodies have gained such powers. To this end, their independence was strengthened.
15. In order to effectively enforce the law, regulatory authorities are equipped with different **monitoring powers**. With the exception of two regulatory authorities, all other regulators have been empowered to conduct systematic monitoring. Similarly, all regulatory authorities but one have been granted ad-hoc monitoring powers, and all regulatory authorities are authorized to collect information from third parties. Complaints may be initiated by the general public in many countries.

16. Apart from monitoring powers by which regulatory authorities oversee compliance with national media laws, the **power to impose sanctions** constitutes another indicator of the independence of regulators. Typically, national laws prescribe a graduated sanctioning scheme comprising a number of sanctions of different intensity. While almost all regulatory authorities may impose warnings and fines, considerably less regulatory authorities are endowed with the power to order publication of their decisions in media outlets of the concerned providers. Furthermore, the power to suspend a service or revoke a license has been attributed to all but a few regulators and is mostly regarded as a sanction of last resort, but not all regulatory authorities have the power to impose penalty payments in case of non-compliance with their decisions. It follows from the analysis that all regulatory authorities seem to have adequate sanctioning powers to be able to enforce the law.
17. The position of a regulator within the national regulatory arena may also be indicative of its independence. At national level, **collaboration with other regulators** operating in different fields is indispensable in implementing the Government's policies consistently. Thus, all regulatory bodies cooperate with other bodies regulating the media or different aspects of the market for audiovisual media services. Cross-sector cooperation (with consumer or competition agencies) is equally common. In most countries, such collaboration is voluntary and designed in rather loose fashion. Cooperation between regulators at European or international level has increased in the last years. Bilateral or multi-lateral cooperation exists between neighbouring countries or countries sharing the same language, history or culture. More institutionalized forms of cooperation such as EPRA and ERGA have been established at European level and are actively supported by the regulatory authorities.
18. There have been very few changes regarding the **bodies to which regulatory authorities are formally accountable**. Overall, there has been a small increase in the amount of regulators that are accountable towards the Parliament, a specific ministry, the Government or the Head of Government. Whereas there has been a small increase in the amount of regulators being obliged to undergo an audit by a public audit office, there has been no change regarding the periodicity of such an obligation. In the same vein, there has almost been no change in the reporting obligations of the regulatory authorities towards statutory organs (e.g. Parliament or Government). While a few more obligations have been introduced for regulatory authorities to conduct public consultations, there have been almost no changes in the question of who needs to be consulted and the period of consultation. Further, no changes could be detected regarding the publication obligations of regulatory authorities.
19. Concerning **judicial review** of the decisions of regulatory authorities that might have an impact on regulators' independence, it can be noted that little has changed. Similarly, there have been no changes at all regarding the appeal bodies and the status of complaining persons or companies. While the possibility of the appeal body to suspend the regulator's decision has been newly introduced in two

countries, it has been abolished in one country, and limited in another. In two countries, appeal bodies are newly empowered to replace the regulator's decision with their own, whereas in one country the appeal bodies of the second and third stage of the appeal procedure have lost this power.

20. As an **overall observation**, it is noteworthy that there have been only a few major changes in the national landscapes governing regulatory authorities. Where these occurred they were indeed significant such as for example the establishment of new bodies in some of the monitored countries. In many cases there have been a series of smaller amendments, for example the extension of regulatory powers, prolongation of terms of office for chairpersons and Board members, increase of consultation obligations, or changes in judicial review procedures. However, the study supports the conclusion that in general regulatory authorities in the audiovisual sector are both independent to a sufficient degree and function efficiently.



## 1. INTRODUCTION

The present document is the final report for the study “Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and efficient functioning of audiovisual media services regulatory bodies” (SMART 2013/0083), which the Institute of European Media Law (EMR) and the University of Luxembourg’s Research Unit in Law (hereinafter: the consortium) jointly conducted on behalf of the European Commission, following their successful bid to the Commission’s invitation to negotiate of 28 July 2014. The title of this study is **AVMS-RADAR (AudioVisual Media Services-Regulatory Authorities’ InDpendence And Efficiency Review)**.

### 1.1. Objectives of the study

The study’s main objective is to update the findings of a previous study, commissioned by the European Commission in 2009, entitled “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive” (SMART 2009/0001, hereinafter: INDIREG study).<sup>2</sup> It therefore aims to provide updates of

- the detailed description and analysis of the institutional, legal and regulatory framework governing the regulatory bodies competent for audiovisual media services in EU Member States and candidate countries to the EU (Objective 1);
- the analysis of the implementation of said framework in practice and its effectiveness (Objective 2).

In contrast to the INDIREG study, the territorial scope of the present study has been limited to the EU Member States and candidate countries to the EU as at the end of July 2014 (Albania, the Former Yugoslav Republic of Macedonia, Iceland, Montenegro, Serbia and Turkey) totalling 34 countries.

Since the legal landscapes and their practical implementation are interlinked and both can have a significant impact on the real degree of independence of a regulatory body, the consortium is pursuing an integrated approach to both objectives. In order to ensure efficient working procedures, similar tasks foreseen under objectives 1 and 2 have been linked, resulting in a single set of issues to be investigated, comprising both

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<sup>2</sup> „Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive“, the study including its annexes is available at [www.indireg.eu](http://www.indireg.eu); after the study several members of the consortium were also involved in the preparation of a book dealing with the topic of Independence: *Schulz/Valcke/Irion*, The independence of the media and its regulatory agencies, Bristol/Chicago 2013.

objectives. In particular, the comparative analysis is based on country reports, prepared by country experts, covering both aspects. These country reports include both an update of the original issue tables prepared in the context of the INDIREG study, as well as answers to an additional new wide-ranging questionnaire summarizing the legal situation and its implementation in the 34 countries.

The analysis covers both the competent regulatory bodies overseeing the activities of public service audiovisual media services providers and those competent in view of commercial audiovisual media services providers. Regulatory bodies have been included in the scope of the study regardless of their structure and actual legal status, e.g., as an internal oversight board within a public service broadcaster or a co-regulatory body. However, purely self-regulatory bodies have only been considered where this has been deemed appropriate due to their prominent role in the regulatory setting.

## **1.2. Methodology of the study and structure of the report**

The report is divided mainly into two parts. The first part includes a brief description of the legal framework currently in force at EU level (see chapter 2). In the second part, an updated description of the legal, institutional and regulatory framework in place in EU Member States and candidate countries and its efficient implementation in practice is given (see chapter 3).

The consortium pursued an integrated approach since the legal paradigms and their practical implementation are interlinked and both can have a significant impact on the real degree of independence of a regulatory body. In doing so, a number of criteria were identified that contribute to a regulatory authority's independence and efficiency of its work (detailed presentation of the criteria at the beginning of section 3). These are grouped by three main areas which determine the structure of this section of the report: independence, effective functioning and accountability. For each of these areas a number of relevant questions were developed that were used as basis to collect information about the situation in the 34 countries covered by this study.

A major share of the data used for the comparative analysis has been obtained from country experts carefully selected from the EMR's Europe-wide network of contacts (EMR media network). A list of the experts that have contributed to the study is included in Annex 1 of this report. The country reporters were asked to revise the tables from the INDIREG study which give bullet point-style answers to a wide range of topics, mainly collecting factual information. In addition, they were asked to complete a detailed set of questions covering all relevant aspects for the study (Annex 2 contains the blank questionnaire as it was sent to the experts). The completed questionnaires and updated tables are found in the additional annexes joined to this report (see below).

In addition to the country reports the results of the study reflect answers received from an adapted version of the questionnaire that the regulatory authorities received via the

European Regulators Group for Audiovisual Media Services. (ERGA) for which the European Commission acts as secretariat. Although not all authorities answered, the vast majority did or supplied the requested information in other form to the consortium so that there was an additional source used to verify the findings of the study.

The final study report also includes the insight gained from an online stakeholder survey, which was carried out between July and August 2015. The survey, which was conducted using the online tool *LimeSurvey*<sup>3</sup> was answered by about 15 stakeholders which had been informed in multiple ways about the possibility of participating in the survey. Screenshots of the survey are included in Annex 3 of this report and a summary of responses is to be found in section 3.4. Chapter 3 is completed by a schematic overview in table form that shows the main trends of changes that occurred since the INDIREG study using traffic light-style indications.

In order to complement the issue-based description in Chapter 3 of this report, Annex 4 contains the (former) INDIREG tables for each analyzed country in the form they have been updated by the national experts. In order to make the changes visible that occurred since the last study or differences in the perception of certain information, the annex displays the questionnaires using the track changes mode. The annex is very large and covers about 1,300 pages, which is why it is joined separately to this report. Finally, Annex 5 contains the answers of the national experts to the questionnaire developed by the current consortium (see Annex 3) sorted by country. Again, this annex is very extensive and covers about 400 pages, which is why it can also be found as a separate document. In addition to the summarized findings of chapter 3 of the study, these two annexes allow an in-depth study of the situation in each of the 34 countries by taking a closer look at the questionnaire answers and accompanying tables. For a comparative evaluation of the situation in the analysed countries, the findings of the report itself in chapter 3 and the conclusions in chapter 4 are the suggested reading.

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<sup>3</sup> See <http://avms-radar.limequery.com/index.php/264918/lang-en>

### 1.3. List of regulatory bodies and abbreviations

The following list is intended to give an overview on the relevant regulatory bodies active in the areas covered by this report. At the same time, it provides for the abbreviations used in the subsequent comparative analysis.<sup>4</sup>

#### Albania

**AMA** Autoriteti i Mediave Audiovizive  
Audiovisual Media Authority

#### Austria

**KommAustria** Kommunikationsbehörde Austria  
Austrian Communication Authority

#### Belgium

**MRat (de)** Medienrat der Deutschsprachigen Gemeinschaft Belgiens  
Medienrat of the German speaking Community of Belgium

**CSA (fr)** Conseil supérieur de l'audiovisuel  
High Audiovisual Council

**VRM (fl)** Vlaamse Regulator voor de Media  
Flemish Regulatory Authority for the Media

#### Bulgaria

**CEM** СЪВЕТ ЗА ЕЛЕКТРОННИ МЕДИИ  
Council for Electronic Media

#### Croatia

**AEM** Agencija za elektronicke medije  
Agency for Electronic Media of the Republic of Croatia

#### Cyprus

**CRTA** Αρχή Ραδιοτηλεόρασης Κύπρου  
Cyprus Radio-Television Authority

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<sup>4</sup> To the extent that other abbreviations for organisations or bodies are used in this report they are explained when they are first mentioned.

CzechRepublic

**RRTV** Rada pro rozhlasové a televizní vysílání  
Council for Radio and TV Broadcasting

Denmark

**RTB** Radio og tv-nævnet  
Radio and Television Board

Estonia

**TSA** Tehnilise Järevalve Amet  
Technical Surveillance Authority

Finland

**FICORA** Viestintävirasto  
The Finnish Communications Regulatory Authority

France

**CSA** Conseil Supérieur de l'Audiovisuel  
High Audiovisual Council

Germany

**brema** Bremische Landesmedienanstalt  
State Media Authority Bremen

**BLM** Bayerische Landeszentrale für neue Medien  
State Media Authority Bavaria

**LFK** Landesanstalt für Kommunikation Baden Württemberg  
State Media Authority Baden-Württemberg

**LfM** Landenstalt für Medien Nordrhein-Westfalen  
State Media Authority North Rhine-Westphalia

**LMK** Landeszentrale für Medien und Kommunikation Rheinland-Pfalz  
State Media Authority Rhineland Palatinate

**LMS** Landesmedienanstalt Saarland  
State Media Authority Saarland

**LPR Hessen** Hessische Landesanstalt für privaten Rundfunk und neue Medien  
State Media Authority Hesse

**mabb** Medienanstalt Berlin-Brandenburg  
State Media Authority Berlin-Brandenburg

**MA HSH** Medienanstalt Hamburg/Schleswig-Holstein  
State Media Authority Hamburg/Schleswig-Holstein

**MMV** Medienanstalt Mecklenburg-Vorpommern  
State Media Authority Mecklenburg-Western-Pomerania

**MSA** Medienanstalt Sachsen-Anhalt  
State Media Authority Saxony-Anhalt

**NLM** Niedersächsische Landesmedienanstalt  
State Media Authority Lower Saxony

**SLM** Sächsische Landesanstalt für privaten Rundfunk und neue Medien  
State Media Authority Saxony

**TLM** Thüringer Landesmedienanstalt  
State Media Authority Thuringia

#### Greece

**NCRTV** Εθνικό Συμβούλιο Ραδιοτηλεόρασης  
National Council for Radio and Television

#### Hungary

**NMHH** Agencija za elektronicke medije  
Agency for Electronic Media of the Republic of Croatia

#### Iceland

**IMC** Fjölmiðlanefnd  
Icelandic Media Commission

#### Ireland

**BAI** Údarás Craolacháin na hÉireann  
Broadcasting Authority of Ireland

Italy

**AGCOM** Autorità per le garanzie nelle comunicazioni  
Communications authority

Latvia

**NEPLP** Nacionālā elektronisko plašsaziņas līdzekļu padome  
National Electronic Media Council

Lithuania

**RTCL** Lietuvos radijo ir televizijos komisija  
Radio and Television Commission of Lithuania

Luxembourg

**ALIA** Autorité Luxembourgeoise Indépendante de l'Audiovisuel  
Independent Audiovisual Authority of Luxembourg

Macedonia

**AVMU** Агенција за аудио и аудиовизуелни медиумски услуги  
Agency for Audio and Audiovisual Services

Malta

**MBA** Malta Broadcasting Authority

Montenegro

**AEM** Agencija za elektronske medije  
Agency for Electronic Media of Montenegro

Netherlands

**CvdM** Commissariaat voor de Media  
Dutch Media Authority

Poland

**KRRiT** Krajowa Rada Radiofonii i Telewizji  
National Broadcasting Council

Portugal

**ERC** Entidade Reguladora para a Comunicação Social  
Regulatory Authority for the Media

Romania

**NAC** Consiliul National al Audiovizualului  
National Audiovisual Council

Serbia

**REM** Регулаторно тело за електронске медије  
Regulatorno telo za elektronske medije  
Regulatory Authority of Electronic Media

Spain

**CNMC** Comisión Nacional de los Mercados y la Competencia  
National Authority for Markets and Competition

**CAC** Consell de l'Audiovisual de Catalunya  
Audiovisual Council of Catalonia

**CAA** Consejo Audiovisual de Andalucía  
Audiovisual Council of Andalusia

Sweden

**SBA** Myndigheten för radio och tv  
Swedish Broadcasting Authority

Slovakia

**CBR** Rada pre vysielanie a retransmisiu  
Council for Broadcasting and Retransmission of the Slovak Republic



Slovenia

**AKOS**      Agencija za komunikacijska omrežja in storitve Republike Slovenija  
Agency for Communication Networks and Services of the Republic of  
Slovenia

Turkey

**RTÜK**      Radyo ve Televizyon Üst Kurulu  
Turkish Radio and Television Supreme Council

United Kingdom

**OFCOM**      Office of Communications

## **2. LEGAL FRAMEWORK AT THE EUROPEAN LEVEL**

In this chapter a brief overview will be given of the relevant legal framework at European level that regards the regulatory bodies entrusted with monitoring audiovisual media services. Focus is put on rules or positions that were stated in view of such regulatory bodies' independence. Whilst the main source of relevant texts are from within the EU framework an additional view will be taken on other relevant actors.

### **2.1. Requirements concerning implementation of the relevant EU law in form of the AVMSD**

This section provides an overview of the relevant legal framework at EU level concerning the implementation of the Audiovisual Media Services Directive (Directive 2010/13/EU, hereinafter: AVMSD)<sup>5</sup>.

The Directive itself requires Member States to ensure, among others, compliance of media service providers with the relevant provisions of national law: Art. 2 AVMSD, establishing the home-state-control (better known as the country-of-origin-) principle, states in its para. 1 that Member States must;

“ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State”;

Additionally, Art. 4(6) AVMSD sets a focus on the obligation of the Member States to ensure, “within the framework of their legislation” and by “appropriate means”, that media service providers effectively comply with the provisions of the Directive.

The AVMS Directive deliberately does not prescribe by which means it must be secured that there is compliance. Provided that the respective rules are in accordance with Union law, Member States may enact more detailed or stricter rules in the fields coordinated by the Directive (Art. 4(1) AVMSD). The openness about how the implementation takes place also concerns the structures with which it is ensured (what this means for the design of the regulatory authorities is discussed below under 2.2.1.).

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<sup>5</sup> 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, OJ of 15.4.2010, L 95, p. 1. See also Corrigendum, OJ of 6.10.2010, L 263, p. 15. The AVMS-Directive is the codified version of the Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC and Directive 2007/65/EC.

This first obligation that Member States have to fulfil relates to the “implementation” of the Directive’s provisions into their national legal order. Implementation, applying a narrow meaning, primarily refers to the *transposition* of the Directive’s rules into the national system of law. The transposition period ended on 19 December 2009.<sup>6</sup>

In order to ensure effective compliance, Member States are, secondly, under an obligation to provide for a correct *application* of the transposed rules. This entails *monitoring* of the media service providers’ actual pursuit of their activities as falling under the scope of the Directive. The Member States enjoy some leeway in respect of how this is secured (“appropriate means”). In particular, as long as such systems prove effective, a random-based monitoring of television broadcasts or of the provision of on-demand audiovisual media services may be sufficient. In general, the same applies to a monitoring system based on complaints by the viewers or competitors, for instance.

All Member States’ branches of power are obliged to ensure that a Directive is properly implemented in national law, entailing the legislature, the administration and the judiciary. However, in respect of broadcasting, there is a long-standing tradition in almost all Member States to have specialised media authorities in place which are responsible, as the case may be, for licensing and monitoring the providers of (television) broadcasting or other (audiovisual) media services. In this respect, the Commission has in the past placed some emphasis on a sufficient level of *staffing and funding* of regulatory authorities in the media field.<sup>7</sup>

As regards the application of the relevant provisions as well as sanctioning of infringements, the actual text of the Directive using “appropriate means” reflects an earlier discussion about this issue. When the original Television without Frontiers-Directive was revised for the first time (by Directive 97/36/EC), the need for prescribing more in detail what kind of measures should be used by Member State’s competent authorities in order to avoid or, where violations had previously occurred, prevent future infringements of the Directive’s provisions in the way they had been implemented in national law.<sup>8</sup> Where a EU Directive does not specifically provide any sanction for an infringement of the substantive provisions or refers for that purpose to

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<sup>6</sup> The national implementing measures as they were communicated to the European Commission can be found under <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32007L0065&qid=1441368589096>. An unofficial English translation of all Member States laws transposing the AVMSD including synopses can be found at the AVMSD project of the University of Luxembourg at [www.medialaw.lu](http://www.medialaw.lu) ([http://wwwen.uni.lu/recherche/fdef/droit\\_des\\_medias/audiovisual\\_media\\_services\\_directive/national\\_execution\\_measures](http://wwwen.uni.lu/recherche/fdef/droit_des_medias/audiovisual_media_services_directive/national_execution_measures)).

<sup>7</sup> “Furthermore, the Commission notes that Member States have devoted adequate resources to apply national legislation implementing the Directive effectively. Independent regulatory authorities have been established and budgets for technical resources as well as staff have been considerably increased where they were insufficient.” Fourth Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 89/552/EEC “Television without Frontiers”, COM (2002) 778 final, point 2.

<sup>8</sup> *Scheuer/Ader*, Comments on Art. 3 TWFD, in: *Castendyk/Dommering/Scheuer* (ed.), *European Media Law*, Alphen a/d Rhijn 2008, paras 6 et seq., 54 et seq.

national laws, regulations and administrative provisions, the Member States have to take all measures necessary to guarantee the application and effectiveness of Union law. For that purpose, while the choice of sanctions remains within their discretion, they must ensure in particular that infringements of EU law lead to consequences under conditions – both in procedural and substantive aspects –, which are *analogous* to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the sanction *effective, proportionate and having a deterrent effect*.<sup>9</sup> With regard to employment law for instance, the Court has held that where a Member State chooses to penalise a breach of the prohibition on discrimination by the award of compensation, that compensation must be adequate in relation to the damage occurred and have a deterrent effect.<sup>10</sup>

Where recourse to co-regulation is being made, it follows from the AVMS Directive, but also from primary European Union law, that the Member States remain responsible for the achievement of the results of the Directive. Therefore, independent regulatory bodies must be vested with instruments to oversee the actual performance of the self-regulatory component of the co-regulatory system, and be able to intervene where necessary. This is to be derived particularly from Art. 4(7) AVMSD: the regime has to provide for effective enforcement.<sup>11</sup> As the study on co-regulation measures in the media sector<sup>12</sup> has shown, co-regulatory regimes ‘often’ provide for a sanctioning system,<sup>13</sup> in other words, not all of the investigated regimes do. Other parameters for effectiveness of co-regulatory models include in particular incentives for participation, transparency, safeguarding of process objectives, openness to all relevant stakeholders, broad acceptance by stakeholders and society (necessitating complaints mechanisms and awareness campaigns), effective means of enforcement of the co-regulatory rules, as well as a regular evaluation of the system together with ‘patience’. Also a ‘legal back-stop’ is necessary; this is referred to by Recital 44 as a Member State’s possibility to intervene should the objectives of the co-regulatory regime not be met.<sup>14</sup>

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<sup>9</sup> CJEU, Case 68/88, judgement of 21 September 1989, *Commission v. Greece*, para 23 et seq., ECLI:EU:C:1989:339; Case C-7/90, judgement of 2 October 1991, *Paul Vandevenne*, para. 11, ECLI:EU:C:1991:363; Case C-382/92, judgement of 8 June 1994, *Commission v. United Kingdom*, para. 55, ECLI:EU:C:1994:233; Case C-383/92, judgement of 8 June 1994, *Commission v. United Kingdom*, para. 40, ECLI:EU:C:1994:234; Commission, COM (2001) 330 final, pp. 1 et seq.; Hans-Bredow-Institut/Institut für Europäisches Medienrecht, Study on Co-Regulation Measures in the Media Sector, 2006, pp. 160 et seq.; available at [http://ec.europa.eu/archives/information\\_society/avpolicy/docs/library/studies/coregul/final\\_rep\\_en.pdf](http://ec.europa.eu/archives/information_society/avpolicy/docs/library/studies/coregul/final_rep_en.pdf).

<sup>10</sup> CJEU, Case 14/83, judgement of 10 April 1984, *von Colson and Kamann*, para. 23 et seq., ECLI:EU:C:1984:153.

<sup>11</sup> Cf. also Recital 44 Directive 2010/13/EU.

<sup>12</sup> Hans-Bredow-Institut/Institut für Europäisches Medienrecht (EMR), *op.cit* (fn. 8).

<sup>13</sup> *Kleist/Scheuer*, “Neue Regelungen für audiovisuelle Mediendienste – Vorschriften zu Werbung und Jugendschutz und ihre Anwendung in den Mitgliedstaaten”, [2006] MMR 206.

<sup>14</sup> *Scheuer/Ader*, Comments on Art. 3 AVMSD, in: *Castendyk/Dommering/Scheuer* (ed.), European Media Law, *op. cit.*, p. 863.

## 2.2. Specific rules in the AVMSD governing the independence and efficient functioning of regulatory bodies

### 2.2.1. Independence of competent regulatory bodies (Art. 30 AVMSD)

The establishment of independent regulatory bodies in the audiovisual sector is not explicitly prescribed in the AVMS Directive. However, Art. 30 provides for cooperation rules among Member States and between Member States and the Commission, “notably through their competent independent regulatory bodies” and thereby mentions in the passing *independent regulatory bodies* seemingly expecting their existence already. It is controversial what this wording implies not least due to the evolution of the provision in the drafting stage where a clear controversy about the content of such a provision occurred between Commission and Parliament on the one side and the Member States’ view in the Council on the other, which ultimately led to this compromise.<sup>15</sup> It may seem that the provision obliges Member States to introduce some specific form of authority which has a certain status, but it could also be seen in conjunction with the above mentioned provisions as leaving it to the Member States how to organise (including the bodies) the Directive’s implementation and this provision only indicating that these (assumed pre-existing) bodies are active, they should be involved in the cooperation.

Article 30 is accompanied by a Recital 94 which is much more detailed as far as the regulatory authorities are concerned.<sup>16</sup> When applying a strict interpretation, Recital 94 AVMSD, which states that the freedom is left to the Member States to choose “*the form* of their competent independent regulatory bodies” (emphasis added), it could be understood that Member States may decide on the concrete design of the body, but not on the question whether to establish such body at all.<sup>17</sup> Under these preconditions, one would have to draw the conclusion that there is an obligation to establish independent regulatory bodies. However, this interpretation is too far-reaching as the substantive provision clearly does not go as far as the Recital does which merely contributes to the interpretation but is itself not binding. This holds especially true as the original draft for the provision which would indeed have supported such an interpretation was quashed in favour of the current wording (see also *infra*). Therefore, another opinion claims the text does not provide a decision in favour of a duty to establish independent

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<sup>15</sup> On this development cf. *Kleist/Scheuer*, “Neue Regelungen für audiovisuelle Mediendienste – Vorschriften zu Werbung und Jugendschutz und ihre Anwendung in den Mitgliedstaaten”, [2006] MMR 206 et seq.; *Stevens*, Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence, in: *Schulz/Valcke/Irion* (ed.), The independence of the media and its regulatory agencies, Bristol/Chicago 2013, p. 83, 87 et seq.

<sup>16</sup> On the distinctions cf. again *Stevens*, Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence, in: *Schulz/Valcke/Irion* (ed.), The independence of the media and its regulatory agencies, Bristol/Chicago 2013, p. 83, 87 et seq.

<sup>17</sup> Cf. on this possible position (if the provision is narrowly analysed by the wording of the Recital) the general discussion at *Scheuer/Palzer*, Comments on Art. 23b AVMSD, in: *Castendyk/Dommering/Scheuer* (ed.), European Media Law, p. 996.

regulatory bodies, but would only see an independent regulatory body as optimum.<sup>18</sup> According to Art. 30 AVMSD, the effective information exchange required by this provision can “notably” be ensured “through their competent independent regulatory bodies”. If one follows this view, under the AVMS Directive Member States may still choose whether (and how) to establish an independent regulatory body at all. However, where such bodies exist, they would have to be independent.<sup>19</sup>

Another question which is not clearly answered by the Directive, is what the term “independent” means.<sup>20</sup> According to the initial proposal introduced by the Commission, Art. 23b (1) AVMSD would have imposed on Member States the obligation to “guarantee the independence of national regulatory bodies and ensure that they exercise their powers impartially and transparently”. Recital 47 of the draft Amending Directive 2007/65/EC stated that independence in this sense should entail independence from both national governments and audiovisual media service providers. Some Member States, however, claimed that these rules were an inappropriate interference with their national legislative competence. Therefore, and strikingly, the original draft of the provision requiring the setting up of independent regulators was dropped together with the formulation of the Recital due to doubts based on competency and subsidiarity.<sup>21</sup> That draft Recital and the original draft of the provision have thus not been transferred to the final version of the Directive as adopted. Hence, a clear legal definition of what, in the context of the AVMS Directive, is meant by “independent”, is not available.<sup>22</sup>

The current version of Recital 94 AVMSD has, however, retained the idea of Recital 47 of the draft Amending Directive inasmuch as independence can, at least, be seen as

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<sup>18</sup> *Ibid.*; *Jakubowicz*, Keynote speech, EPRA meeting May 2007, available at [http://epa3-production.s3.amazonaws.com/attachments/files/1380/original/EPRA\\_keynote\\_KJ.pdf?1323685662](http://epa3-production.s3.amazonaws.com/attachments/files/1380/original/EPRA_keynote_KJ.pdf?1323685662), p. 1 *et seq.*; *Mastroianni*, IRIS Special 2/2009, p. 120.

<sup>19</sup> *Scheuer/Palzer*, Comments on Art. 23b AVMSD, in: *Castendyk/Dommering/Scheuer* (ed.), *European Media Law*, p. 996; this view is supported more recently by *Stevens*, Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 83, 89 *et seq.*, 104.

<sup>20</sup> On the general difficulty of defining the concept of “independence” in the current context *Schulz*, Approaches to independence, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 3 *et seq.* In the same volume it is discussed in a further contribution in contrast to what influence independence should be understood, cf. *Dreyer*, Locating a regulator in the governance structure: A theoretical framework for the operationalization of independence, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 111, 115-119.

<sup>21</sup> Cf. briefly on this *Dörr*, Die Kommunikationsfreiheiten im Recht der Europäischen Union, in: *Dörr/Kreile/Cole* (ed.), *Handbuch Medienrecht – Recht der elektronischen Massenmedien*, Frankfurt a.M. 2011, no. B 101.

<sup>22</sup> And even with the original wording would not have been available immediately, but could have been derived from other secondary law in which specific independence requirements are foreseen, cf. on this e.g. *Stevens*, Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 83, 92 *et seq.*, and would have ultimately been open for interpretation by the Court of Justice of the European Union.

a factor to ensure that the national regulatory bodies' tasks are carried out impartially and transparently and that they contribute to the promotion of media pluralism:

“[Member States] are free to choose the appropriate instruments according to their legal traditions and established structures, and notably 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*. More specifically, the instruments chosen by Member States should *contribute to the promotion of media pluralism*.” (emphasis added)

In addition to the wording of the Directive one can turn to non-EU-documents which further discuss independence in an attempt to define it for regulatory bodies in the audiovisual media sector. The Council of Europe Recommendation Rec(2000)23 (see *infra*, at 2.4.1. for more details) mentions in point 5, second indent, of the appendix, that members of the regulatory bodies “may not receive any mandate or take any instructions from any person or body”. Interference by public and private bodies should also be prohibited with regard to the funding (see points 10 and 11 of the appendix) and to the supervision of the regulatory bodies' activities, which should be limited to a legal oversight (see point 26 of the appendix). These descriptions are attempts at shaping the content of “independence” with more easily discoverable features than just an overarching concept. In this regard, it is also worth mentioning the public consultation of the Commission held from March to June 2013 and directed towards collecting views on the issue of independence of national regulatory bodies.<sup>23</sup>

### 2.2.2. Cooperation (Art. 30 AVMSD)

Art. 30 AVMSD establishes a specific duty on Member States to cooperate with each other and with the European Commission. This cooperation shall consist primarily in the provision of information in relation to the AVMSD. When it comes to the information of the Commission, such duty on Member States can already be derived from primary EU law as well, since the Commission is entitled to request all information necessary for executing the tasks attributed to them. When referring particularly to Articles 2, 3 and 4 AVMSD, the duty to inform as laid down in Art. 30 AVMSD aims at achieving a high level of mutual cooperation in such fields that show significant importance in relation to Member States' effective implementation of the Directive, foremost having regard to cases in which the key principles of the Directive – home-state-control/country-of-origin-principle and freedom of reception and retransmission – are at stake. This is highlighted by Recital 95. Both in this Recital as well as in Art. 30 AVMSD it is suggested that the information exchange from the Member States' side could be “notably [achieved] through their competent independent regulatory bodies”, which puts the regulatory bodies in the focus of the provision.

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<sup>23</sup> The contributions to the consultation are available at <http://ec.europa.eu/digital-agenda/en/news/public-consultation-independence-audiovisual-regulatory-bodies-read-contributions>.

As regards cooperation, Art. 29 AVMSD is worth mentioning in addition. Therein, provision is made for the setting-up and the related tasks of the Contact Committee to be composed, on the part of the Member States, of representatives of their competent bodies. In this context, it becomes clear that Art. 29 AVMSD reflects on the outcome of the TWFD review: in its work programme for the revision of the TWFD, the Commission stated that the Contact Committee would play a key role in the application of the Directive by the Member States and would further constitute an ideal forum for the exchange of views and information between the Commission and the Member States and among the Member States. Therefore, the Commission decided to involve the Contact Committee closely in the implementation of the work programme. It should be noted, however, that in addition to this existing structure, in February 2014 the Commission established the European Regulators Group for Audiovisual Media Services (ERGA), comprising high-level representatives of the national audiovisual media services regulatory authorities. ERGA has been tasked with advising the Commission on the implementation of the AVMS Directive and shall complement the work of the Contact Committee (see also *infra* 2.4.3.).

### **2.3. Implementation of the AVMS Directive in non-EU Member States**

Before joining the EU, countries are under the obligation to bring their national laws in line with the EU *acquis*, including – in the audiovisual field – the AVMS Directive. Promoting the alignment with European standards on media legislation and the AVMS Directive is one of the initiatives of the European Commission’s pre-accession strategy. The alignment of legislation and practices with European standards on media in accordance with fundamental democratic principles is an element of the so-called “Copenhagen criteria”, and is crucial for the promotion of cultural diversity and the AVMS Directive.

The current pre-accession countries have already made substantial efforts to meet European standards on media, and the process of reform is ongoing. Information on their progress towards meeting the membership requirements in the audiovisual field is provided in the EU’s annual progress reports for the candidate and potential candidate countries.<sup>24</sup> Candidate countries and Iceland are included in the study and therefore observations concerning the situation of the regulatory authorities there are to be found in chapter 3 of this report.

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<sup>24</sup> The current status of the negotiations including progress reports is available at [http://ec.europa.eu/enlargement/countries/check-current-status/index\\_en.htm](http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm).



## **2.4. Other European sources concerning the independence and effectiveness of audiovisual media services regulatory bodies**

### *2.4.1. Council of Europe*

On 6 and 7 March 2014, the Council of Europe held a Regional Conference in Tirana, Albania, to start a process of defining key indicators for the independence of media regulatory bodies.<sup>25</sup> The conference underlined the role of the CoE in setting standards and in assessing and assisting implementation processes in the field of media. As a result of the event, it was mentioned that the aim of Governments, Parliaments and civil societies should be to establish and strengthen independent and efficient media regulatory agencies.

On 4 June 2014, in the framework of the Project “Promoting freedom of expression and information and freedom of the media in South-East Europe (SEE)” the Council of Europe organized a Regional Meeting in Becici-Budva, Montenegro.<sup>26</sup> On the basis of the Tirana Conference and with the representatives of the regulatory bodies from Albania, Bosnia and Herzegovina, Macedonia, Montenegro, Serbia and Kosovo, the CoE continued the work on the definition of specific indicators for establishing and monitoring the transparency, responsibility and operational efficiency of media regulatory bodies.

As a part of the conference, the Agency for Communication Networks and Services of the Republic of Slovenia (AKOS) published a report examining the independence of the audiovisual regulators from the perspective of a converged authority.<sup>27</sup> The report presented the positive and negative effects of a converged regulatory authority and came to the final conclusion that an existing legal framework is essential, but without a “culture of independence”, not even the best legal solutions will have the desired effect of independence of the audiovisual regulators.

#### **2.4.1.1. European Convention on Transfrontier Television**

Independent of these more recent developments, which are partly directed at specific situations of regulatory authorities in some countries, the Council of Europe has

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<sup>25</sup> See Council of Europe, Tirana/Albania: Regional Conference: “Indicators for Independence of Media Regulatory Bodies” – Conclusions, available at <http://epra3-production.s3.amazonaws.com/attachments/files/2337/original/6-7%20March%20Conclusions%20indicators%20Regulators%20independence%20.pdf?1396963062>

<sup>26</sup> See Council of Europe, Becici-Budva/Montenegro: Regional Meeting: “Defining specific indicators for establishing and monitoring the transparency, responsibility and operational efficiency of media regulatory bodies”, available at <http://epra3-production.s3.amazonaws.com/attachments/files/2435/original/CoE%20Regional%20Meeting%20Conclusions%20Final%20Version%20.pdf?1404155893>

<sup>27</sup> See *Kersevan Smokvina*, Becici-Budva/Montenegro: Independence of the audiovisual regulators: the perspective of a converged authority, available at [http://epra3-production.s3.amazonaws.com/attachments/files/2434/original/SI\\_CoE\\_independence\\_%20IRA\\_Budva\\_0614.pdf?1403185733](http://epra3-production.s3.amazonaws.com/attachments/files/2434/original/SI_CoE_independence_%20IRA_Budva_0614.pdf?1403185733)

contributed to the discussion about independence and functioning of regulatory authorities in the broadcasting or audiovisual media services sector since a long time now. This is not surprising, as one of the core treaties of the CoE is the European Convention on Transfrontier Television (ETS No. 132) of 5<sup>th</sup> May 1989<sup>28</sup> which was developed in parallel to the original Television without Frontiers-Directive.

The convention itself does not deal with implementing structures in the ratification states as it concerns mainly substantive provisions about goals and joint values in broadcasting policies as well as some fundamental rules which reflect the Directive's provisions. Article 6 of the Convention about supply of information by broadcasters does mention competent authorities (licensing authorities) and this can typically be the regulatory authorities in charge of monitoring audiovisual media services. Such authorities can be the same as the ones communicated by the Member States (if it is not a competent ministry) according to Art. 19 (2) CTT which are in charge for contributing to supporting each other in applying the convention. Both provisions do not, however, indicate any specific information about what type of authority (and even whether it has to be the regulatory authority) this should be.

Because of the relevance of regulatory authorities in connection with the aims pursued by the CTT and the human rights impact – especially concerning Art. 10 ECHR – which is a core activity of the CoE, the Council has contributed with important texts by its different bodies.

#### 2.4.1.2. Recommendation Rec(2000)23

Recommendation Rec(2000)23 of the Committee of Ministers to the Member States on the independence and functions of regulatory authorities for the broadcasting sector<sup>29</sup> sets out that with regard to the regulation in the broadcasting sector

- independent regulatory authorities should be established (item a),
- regulatory authorities should be vested with powers required to fulfil their missions in an *effective, independent and transparent manner* and in accordance with the guidelines set out in the appendix (item b).

The guidelines include detailed recommendations on all three aspects referred to in item b): the effective functioning of the regulatory authorities, their independence as well as their transparency. It should be noted, that recommendations adopted by the Committee of Ministers under Art. 15 lit. b of the Statue of the Council of Europe address the governments of the CoE member states, but being recommendations only encourage these to act in that sense without having legally binding force. However, the

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<sup>28</sup> The consolidated version reflecting the amendments by the Protocol (ETS No. 171) is available at <http://conventions.coe.int/Treaty/EN/treaties/Html/132.htm>.

<sup>29</sup> The Recommendation Rec(2000)23 of the Committee of Ministers to the Member States on the independence and functions of regulatory authorities for the broadcasting sector is available at [http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%282000%29023&expmem\\_EN.asp](http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%282000%29023&expmem_EN.asp)

European Court of Human Rights (ECtHR) draws on these recommendations when interpreting the ECHR.<sup>30</sup>

#### 2.4.1.3. Declaration of 26 March 2008

In its more recent Declaration on the independence and functions of regulatory authorities for the broadcasting sector<sup>31</sup>, the Committee of Ministers of the Council of Europe refers to the above-mentioned Recommendation and again stresses the importance to provide for adequate and proportionate regulation of the broadcasting sector, in order to guarantee the freedom of the media. In this vein, the Committee of Ministers affirms that

“the ‘culture of independence’ should be preserved and, where they are in place, independent broadcasting regulatory authorities in member states need to be effective, transparent and accountable.”

In particular, the Declaration calls on Member States to

“provide the legal, political, financial, technical and other means necessary to ensure the independent functioning of broadcasting regulatory authorities, so as to remove risks of political or economic interference.”

The Committee of Ministers also addresses national regulatory authorities and invites them to

“be conscious of their particular role in a democratic society and their importance in creating a diverse and pluralist broadcasting landscape [and to] 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.”

Declarations of the Committee of Ministers evidently also have no binding force, but reflect important conclusions of Member States’ representatives in this organ.

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<sup>30</sup> On the role of the ECtHR in deriving key elements concerning independence of authorities mainly from Art. 10 ECHR cf. *Valcke/Voorhoof/Lievens*, Independent media regulators: Condition sine qua non for freedom of expression?, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 55, 66 et seq.

<sup>31</sup> The Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector, adopted on 26 March 2008, is available at <https://wcd.coe.int/ViewDoc.jsp?id=1266737&Site=CM>

#### 2.4.2. *European Platform of Regulatory Authorities (EPRA)*

The European Platform of Regulatory Authorities (EPRA) gathers 52 national regulatory bodies in Europe.<sup>32</sup> It provides an open platform for discussions and particularly exchange of information on a wide variety of relevant topics to regulators.

Some EPRA members (Austria, Bosnia and Herzegovina, Estonia, Greece, Ireland, Israel, Italia, Latvia, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey) issued a common Statement on 9 May 2003<sup>33</sup> emphasising the importance of the independence of broadcasting regulators, particularly with regard to the dismissal of members, which should only be possible in cases of incompatibility, incapacity or on the grounds of an offence, subject to a final court sentence.

Recently, the topic of independence and the structure of (converging) regulators has been in the focus of attention of the organization. EPRA *inter alia* devoted important parts of its two meetings in 2014 to independent regulatory bodies. For this purpose, EPRA announced, in its annual work programme for the year 2014,<sup>34</sup> on the one hand to analyse the responses to the consultation of the European Commission on the independence of national regulatory bodies. On the other hand, the association intended to look at tools and best practices to strengthen independence and try to explore whether the definition of independence is changing.

An analysis of the above-mentioned consultation took place at EPRA's 39<sup>th</sup> meeting from 4 to 6 June 2014 in Budva, Montenegro. EPRA analyzed the responses of the national regulatory bodies to the Commission's consultation on independent media regulation and the freedom and pluralism of the media, which was held in spring 2013.<sup>35</sup>

As a basis for this meeting, a report explained that there is still a need to assess the concept of independence from the point of view of recent developments and initiatives.<sup>36</sup> According to the report, the existing provisions and especially those

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<sup>32</sup> The European Commission and the Council of Europe participate in the work of EPRA as standing observers, and so does the European Audiovisual Observatory.

<sup>33</sup> EPRA, Statement on the independence of broadcasting regulators with the list of signatories, 17th EPRA meeting: Naples, Italy, 8-9 May 2003, available at [http://epra3-production.s3.amazonaws.com/attachments/files/1355/original/Statement\\_amended\\_signed\\_en.pdf?1418057900](http://epra3-production.s3.amazonaws.com/attachments/files/1355/original/Statement_amended_signed_en.pdf?1418057900)

<sup>34</sup> See EPRA Annual Work Programme for 2014, available at [http://epra3-production.s3.amazonaws.com/attachments/files/2321/original/ANNUAL\\_WORK\\_%20PROGRA\\_MME\\_2014\\_EN.pdf?1393239456](http://epra3-production.s3.amazonaws.com/attachments/files/2321/original/ANNUAL_WORK_%20PROGRA_MME_2014_EN.pdf?1393239456).

<sup>35</sup> See EPRA Annual Work Programme for 2014, available at [http://epra3-production.s3.amazonaws.com/attachments/files/2321/original/ANNUAL\\_WORK\\_%20PROGRA\\_MME\\_2014\\_EN.pdf?1393239456](http://epra3-production.s3.amazonaws.com/attachments/files/2321/original/ANNUAL_WORK_%20PROGRA_MME_2014_EN.pdf?1393239456).

<sup>36</sup> See *Culahovic*, Budva/Montenegro: Introduction, Objectives and Structure of the Working Group, available at [http://epra3-production.s3.amazonaws.com/attachments/files/2391/original/WG\\_IndependenceNRA\\_intro.pdf?1401177725](http://epra3-production.s3.amazonaws.com/attachments/files/2391/original/WG_IndependenceNRA_intro.pdf?1401177725).

contained in the AVMS Directive (particularly Art. 30) do not offer adequate safeguards for the establishment of an independent regulatory agency.

According to the EPRA report, the responses have confirmed that the independence of national regulatory bodies is a very important aspect for the efficient functioning of regulatory agencies and that – with regard to the existing connection between the media and the regulatory bodies – a lack of independence can have a significant effect on freedom and pluralism of the media.<sup>37</sup> EPRA also made assessments on the influence of the independence of national regulatory bodies on the exercise of regulatory tasks.<sup>38</sup> It pointed out that the indicators defined by the INDIREG study of February 2011 are a good tool for measuring independence.<sup>39</sup> Finally, the objectives and the content of the initiatives of the Council of Europe concerning the independence of regulators were mentioned and discussed.

The discussion about tools and best practices to strengthen independence and on the potential changes to the definition of independence took place at the 40th meeting in Tbilisi, Georgia, from 8 to 10 October 2014.<sup>40</sup> The session also aimed at exploring key prerequisites and essential work processes to ensure independence, the impact of effectiveness and transparency on independence and the role of industry, civil society, European and international institutions in ensuring independence from political pressure. The meeting featured a presentation and panel discussion on methods of measurement of *de facto* independence and an overview of the findings of the INDIREG stakeholder survey with regard to positive correlations between transparency and accountability on the one hand and an impartial regulation on the other.

Already at prior meetings, EPRA had dealt with questions referring to the independence and efficiency of national regulatory bodies. For example, the 33<sup>rd</sup> meeting was directed towards the analysis and discussion of some key factors for independence of regulatory bodies as a precondition for their effective functioning in the light of the then running INDIREG study.<sup>41</sup> In addition, this meeting included a presentation of commercial broadcasters that took the view that political pressure on

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<sup>37</sup> See *Culahovic*, Budva/Montenegro: Summary of the WG, available at <http://epra3-production.s3.amazonaws.com/attachments/files/2436/original/Budva%20WG2%20summary.pdf?1405508378>

<sup>38</sup> See *Culahovic*, Budva/Montenegro: Background document – Analysis of NRAs Responses to the Commission’s Consultation (Final public version of 15 July), available at [http://epra3-production.s3.amazonaws.com/attachments/files/2392/original/WGIndependenceNRA\\_paper\\_revised\\_final.pdf?1405507179](http://epra3-production.s3.amazonaws.com/attachments/files/2392/original/WGIndependenceNRA_paper_revised_final.pdf?1405507179)

<sup>39</sup> See *Culahovic*, Budva/Montenegro: Summary of the WG, available at <http://epra3-production.s3.amazonaws.com/attachments/files/2436/original/Budva%20WG2%20summary.pdf?1405508378>

<sup>40</sup> See the meeting documents at <http://www.epra.org/meetings/tbilisi-40th-epra-meeting>.

<sup>41</sup> See *Culahovic*, Ohrid/Macedonia: Effective functioning of Regulatory Authorities: Focus on issues of Independence and Governance of Regulatory Authorities as a follow-up to the INDIREG study – Introduction & Objectives of the Session, available at [http://epra3-production.s3.amazonaws.com/attachments/files/1814/original/Plenary2\\_Introduction\\_Objectives\\_final.pdf?1328692934](http://epra3-production.s3.amazonaws.com/attachments/files/1814/original/Plenary2_Introduction_Objectives_final.pdf?1328692934).

broadcasters is constantly growing and multiplying.<sup>42</sup> Therefore, a truly independent national regulatory body could function as an essential ally to the broadcasters.

At the 34<sup>th</sup> Meeting, EPRA took a detailed look at the way national regulatory bodies are practically ensuring and controlling compliance with relevant legal provisions.<sup>43</sup> In this vein, the meeting looked at the monitoring of on-demand audiovisual media services and discussed the specific challenges that these new media services can cause for the tasks and the duties of national regulatory bodies. EPRA also analyzed the cooperation between national regulatory bodies in Europe in the field of monitoring.

These texts provide helpful background information and they contribute to the discussion about regulatory authorities' independence and how this affects efficiency from an "insider view" of the concerned regulators.

### 2.4.3. *European Regulators Group for Audiovisual Media Services (ERGA)*

On 3 February 2014, the *European Regulators Group for Audiovisual Media Services* (ERGA) was established by a decision of the European Commission in view of Art. 30 AVMSD and the cooperation requirement set forth in that provision. ERGA consists of the heads of the independent regulatory agencies in the field of audiovisual media services, whilst the European Commission provides the secretariat.

In both its work programmes for 2014 and 2015, ERGA defined the topic of the independence of audiovisual regulatory bodies as one of two main subjects for the year 2014.<sup>44</sup>

Therefore, ERGA established a subgroup that carries out an in-depth analysis on the term of independence applied to audiovisual regulatory bodies.<sup>45</sup> With regard to a different understanding of the term of independence in the various countries, the ERGA subgroup shall consult the work already done on this area by EPRA, academics, the Council of the EU, the European Commission, the Council of Europe and others, in order to create common conclusions on this subject.

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<sup>42</sup> See ACT, Ohrid/Macedonia: Industry's perspective: private broadcasters' viewpoint on the independence of regulators, available at [http://epra3-production.s3.amazonaws.com/attachments/files/139/original/plenary2ACT\\_rossbiggam.pdf?1323685223](http://epra3-production.s3.amazonaws.com/attachments/files/139/original/plenary2ACT_rossbiggam.pdf?1323685223).

<sup>43</sup> See *Machet*, Brussels/Belgium: Efficient Functioning of Regulators: Approaches to Monitoring – Background document, available at [http://epra3-production.s3.amazonaws.com/attachments/files/1875/original/session2\\_Monitoring\\_final.pdf?1328690464](http://epra3-production.s3.amazonaws.com/attachments/files/1875/original/session2_Monitoring_final.pdf?1328690464).

<sup>44</sup> See ERGA Work Programme for 2014, available at <https://ec.europa.eu/digital-agenda/en/news/erga-work-programme-2014>.

<sup>45</sup> The outcome of the first subgroup meeting is summarised in the minutes of the 2<sup>nd</sup> ERGA Meeting of 21 October 2014, ERGA (2014) 14, available at: [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=7968](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=7968). More recently, an (internal) survey was conducted by ERGA between its members concerning independence factors of regulatory authorities.

The subgroup also adopted a statement setting out the need for principles and approaches regarding independence of regulatory agencies shared by all EU member states.<sup>46</sup>

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<sup>46</sup> ERGA statement on the independence of NRAs in the audiovisual sector, ERGA (2014)03, [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=7310](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=7310).

### 3. ISSUE-BASED ANALYSIS OF LEGAL, INSTITUTIONAL AND REGULATORY FRAMEWORK IN EU MEMBER STATES AND CANDIDATE COUNTRIES AND ITS IMPLEMENTATION AND EFFECTIVENESS IN PRACTICE

In order to measure independence of a regulatory authority (*de iure* as well as *de facto*), a set of criteria have been established by the consortium on the basis of an evaluation of European requirements, previous studies in this area<sup>47</sup> as well as observations by the consortium. They were refined based on the information received by correspondents in their country reports.

These criteria can be grouped according to three main areas which determine the structure of this section of the report: independence (section 3.1.), effective functioning (section 3.2.) and accountability (section 3.3.). For each of the self-explanatory criteria the information from the different sources this study is based upon – mainly the country reports – were joined. Although a complete overview of all countries is given for each of the criteria, changes compared to the situation in 2009/10 or important observations in specific countries are highlighted in the analysis.

While some general remarks (section 3.1.1.) commence with an analysis of the legal status of regulatory authorities and by discussing where independence is defined by law as a value, the detailed evaluation of governance rules (section 3.1.2.) is intended to assert the potential of external influence on regulatory authorities via appointment procedures for Board chairpersons and members and corresponding rules preventing conflicts of interest. As the decision on a regulatory authorities' financial means also influences its independence, the study assesses the kinds and sources of funding, the funding bodies and the involvement of different parties in establishing the budget (section 3.1.3.).

As the objective of the study is not only to present the legal framework pertaining to independence, but also the question of efficiency of the regulatory authorities' functioning, in the section on effective functioning an assessment of the range of instruments available to the regulatory authorities in order to effectively fulfill their mandate is undertaken. Typically these instruments cover regulatory, monitoring and sanctioning powers (section 3.2.1.). A further indicator of independence in this regard is the degree of international cooperation between regulatory authorities in order to avoid that bodies act in an isolated way and to better understand the international dimension of the authorities' work (section 3.2.2.).

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<sup>47</sup> See inter alia *Irion/Ledger*, Measuring independence: Approaches, limitations, and a new ranking tool, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, Bristol/Chicago 2013, p. 139 et seq; Mutu, *The Independence of National Media Regulators across Europe: A Comparative Perspective*, available at <http://reggov2014.ibei.org/bcn-14-papers/58-200.pdf>; *Gibbons*, „Club government“ and independence in media regulation, in: *Price/Verhulst/Morgan* (ed.), *Routledge Handbook of Media Law*, Abingdon 2013, p. 47 et seq. with a strong focus on the situation in the UK; Puppis//Maggetti/Gilardi/Biela/Papadopoulos, *The Political Communication of Independent Regulatory Agencies*, in *Swiss Political Science Review*, Volume 20, 2014, pages 388 et. seq.



A final set of criteria affecting an authority's independence is to be found in the obligations an authority has towards other bodies and the public. Formal accountability (section 3.3.1.) is understood as describing reporting obligations towards statutory organs, while transparency requirements (section 3.3.2.) are intended to inform the public about the activities of the regulatory authority. Finally, the analysis of judicial review processes (3.3.3.) takes a look at the position of an authority and its decisions in the national judicial system in order to evaluate the extent of the legal effect its decisions have.

### 3.1. Independence

#### 3.1.1. General Remarks

##### 3.1.1.1. Legal status<sup>48</sup>

Except for Estonia, separate regulatory authorities are established in all countries covered by this study.<sup>49</sup> These take different forms and are named in a variety of ways depending on national legal orders but they all are the same inasmuch that they constitute distinct entities.

In Estonia, the regulator takes the form of an executive authority which is attached to the Ministry of Economic Affairs and Communications. Under the INDIREG study, regulatory powers rested with the Estonian Ministry of Culture, (more precisely the Department of media and copyright and neighbouring rights) which transferred them in 2008. The *Tehnilise Järelevalve Amet* (TJA) is a governmental authority which operates within the ministry, exercising powers of state supervision and enforcement.<sup>50</sup> The authority comprises three departments, one of which being the Communications and Media services Department responsible for overseeing the market for linear and non-linear audiovisual media services.<sup>51</sup> The re-structuring in Estonia has shifted the task of implementing the AVMSD from one governmental authority under the umbrella of one ministry to another ministry. This is particularly striking as reorganisations undertaken since the publication of the INDIREG study in other countries have led to a clearer separation of structures of the regulatory body on the

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<sup>48</sup> This section also addresses structural changes to existing and the establishment of new regulatory bodies in some countries. In subsequent sections, these changes are not separately referred to unless they have also led to an (additional) substantial change with regard to the matter analysed in that specific section, although obviously a new body typically means a change in most areas discussed in this report.

<sup>49</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>50</sup> See Art. 70 (1) Government of the Republic Act, available in English at <https://www.riigiteataja.ee/en/eli/517112014001/consolide>.

In its annual report of 2014, the Estonian Technical Regulatory Authority considers itself as an "integral state agency", p. 6. The annual report 2014 is available in English at [http://www.tja.ee/public/documents/TJA/Aastaraamatud/TJA\\_aastaraamat\\_A4\\_ENG\\_online.pdf](http://www.tja.ee/public/documents/TJA/Aastaraamatud/TJA_aastaraamat_A4_ENG_online.pdf).

<sup>51</sup> See the annual report 2014 of the Estonian Technical Regulatory Authority, p. 48.

one hand and the relevant national Ministry on the other hand. While the Estonian Ministry appears not to be empowered to instruct the TJA, it is noteworthy that the regulator remains closely linked to a government body also under the new structure. It lacks an independent legal status<sup>52</sup> and is moreover integrated in the structures of the ministry. Although there are no signs that this set-up has been abused to date by the government to influence the decisions of the TJA, a certain risk that this might happen in the future is inherent in the current structures. This situation therefore may give rise to certain concerns about the independence of the Estonian regulator, if there would be a different governmental approach to the issue in future.

In Sweden a new legislation was passed, too, concerning the regulatory authority. In mid-2010 the Swedish *Myndigheten för radio och tv* was installed to replace the Radio and Television Authority as well as the Swedish Broadcasting Commission. The new Swedish Broadcasting Authority appears to have maintained ties to the Swedish Ministry of Culture but the Ministry cannot intervene in the way the Authority applies the law, which includes the way it handles individual cases.

Another significant development occurred in Luxembourg where an independent regulatory body, the *Autorité luxembourgeoise indépendante de l'audiovisuel* (ALIA) was created in mid-2013 by a major revision of the law. This new authority replaces the *Conseil National de Programmes* (CNP), an independent advisory body and the previous regulatory functions of the *Service de Médias et Communications* (SMC), a department of the Ministry responsible for the media. The SMC continues to exist as a governmental service, but all regulatory functions are now solely vested in ALIA.

In addition, several changes have been effectuated in a number of other countries, which explicitly or implicitly impact on the position of the regulatory authority within the national legal framework. In Albania and France, new laws were passed in 2013, which underline the independent status of the Albanian *Autoriteti i mediave audiovizive* (AMA) and the *Conseil Supérieur de l'Audiovisuel* (CSA)<sup>53</sup>, respectively. Furthermore, constitutional changes to the jurisdiction of the Austrian administrative courts in 2010 have had implications for the review of decisions taken by *KommAustria*. With this reorganization the review is now no more done internally at the authority but is carried out by the *Bundesverwaltungsgericht* (Federal Administrative Court). In Estonia, Spain (at federal level), Hungary and Slovenia, converged regulatory bodies have been established since the conclusion of the INDIREG study. These amendments to national legislation were accompanied with changes in the regulatory framework.

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<sup>52</sup> Art. 2 of the law establishing the TJA makes clear that in performing its duties, the TJA represents the state. See the statute of the TJA *Tehnilise Järelevalve Ameti põhimäärus* of 2007, available at <https://www.riigiteataja.ee/akt/102072014002>.

<sup>53</sup> For further reading on the French law of November 2013 see *Franceschini*, Les Points Clés de La Loi Du 15 Novembre 2013 'Relative À L'indépendance de L'audiovisuel Public, *Revue Lamy de Droit de l'Immatériel* 2014, p. 38-40; *Kamina*, *JurisClasseur Propriété Littéraire et Artistique* 2014, *Cadre Administratif, Communication Audiovisuelle*, II., para. 35.

### 3.1.1.2. Independence as a value

The independence of regulatory authorities is reinforced where it is recognized by the national legal framework. In all countries except for Estonia, independence is enshrined, either explicitly or implicitly, in the national legal order.<sup>54</sup> In an overwhelming majority of States, independence is expressly referred to in national laws. Similarly, national judiciaries (typically supreme courts) may have carved out and ensured the independence of regulatory bodies according to national constitutions as for example in Germany and Poland.

Where independence is not recognized in legislation, it may find expression in executive measures. In Denmark, for instance, an internal order of the *Radio- og TV-Nævnet* (RTB) refers to its independence. In Finland, by contrast, independence is only recognized implicitly.

Recent developments in certain countries have led to more explicit forms of recognition of authorities' independence. As mentioned above, in Albania and France the national laws were changed in 2013 to include an express reference to the independence of the regulatory authorities. In Albania, in particular, such direct wording is crucial to assert the independence of the AMA which is struggling with the Communist legacy including impartiality of courts, excessive length of procedures and corruption. What is more, a new regulatory body, the ALIA was created in Luxembourg in 2013. Not only does the name of the regulatory body reflect considerations of independence, the legal provisions, which were inserted into the national media law also contain several explicit references to its independence.<sup>55</sup>

### 3.1.2. Governance rules

#### 3.1.2.1. Composition and appointment of the highest decision-making organ

An important indicator for the independence of a regulatory body from external influence is the set of rules governing the appointment of members of the highest decision-making organ within the body. It is this organ (hereinafter “the Board”), which has the greatest influence on the actual implementation of the regulatory body's policy and on the fulfilment of its tasks in practice. Recognising that complete independence from any third-party influence cannot reasonably be expected to be

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<sup>54</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>55</sup> Art. 35 (1) Loi du 27 juillet 1991 sur les médias électroniques, Mém. A – 47, 30.07.1991, p. 972 as amended by Loi du 27 août 2013 portant création de l'établissement public « Autorité luxembourgeoise indépendante de l'audiovisuel », Mém. A – 163, 09.09.2013, p. 3114.

achieved as the regulatory body is unable to produce its own resources to a sufficient extent, it is of crucial importance that the Board members can ensure independence e.g. by representing all stakeholders in a balanced way, so that no party alone has a decisive say.

In this vein, a closer look needs to be taken into both the procedure that has to be followed when appointing the members of the Board and the substantial criteria candidates have to fulfil to be eligible for membership (qualification, professional expertise, absence of conflicts of interests etc.).

#### 3.1.2.1.1. Number of Board members

The influence any single member has on the implementation of the Board's powers depends significantly on its total number of members: the smaller this number, the greater the influence of a single Board member on the decisions taken by the Board. However, if the Board actually consists of a single representative (e.g. a Director), independence of this person cannot be guaranteed by balancing external influences within the organ. Instead, it needs to be ensured by other means that influence exerted by third parties on this person is reduced to a minimum.

The number of Board members in the countries covered by this study ranges between one and 77. An individual acts as the highest decision-making body in Estonia (as far as the competences of the Director-General of the Technical Surveillance Authority are concerned), Finland, Slovenia<sup>56</sup> and – depending on the issue to be dealt with – in some set-ups of the Austrian *KommAustria*. The other end of size of Boards is the *ZDF-Fernsehrat* (Television Council of the *Zweites Deutsches Fernsehen*, a nationwide public television broadcaster), which is one of the regulatory bodies' Boards in Germany, which features 77 members.<sup>57</sup> Because of this very wide range, the calculation of an average number of Board Members would not allow to derive any useful information. However, it can be noted that in most countries apart from the ones mentioned above, the number of Board Members is between three<sup>58</sup> and 13<sup>59</sup>. In

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<sup>56</sup> The renaming of the Agency for Post and Electronic Communication (APEK) to “Agency for communication networks and services of the Republic of Slovenia” (AKOS) has not led to any difference in this regard.

<sup>57</sup> It should be noted, however, that the *ZDF-Fernsehrat* is currently undergoing a reform, which will result in the reduction of its members to 60. This reform has been agreed upon by the Prime Ministers of the German *Länder* (and is intended to enter into force on Jan. 1<sup>st</sup>, 2016) following a judgment by the German Federal Constitutional Court which declared the current composition unconstitutional; cf. *Bundesverfassungsgericht*, Judgment of 25 March 2014, case no. 1 BvF 1/11 and 1 BvF 4/11, ECLI:DE:BVerfG:2014:fs20140325.1bvff000111. See also Docquir/Müller/Gusy, Does the complexity of institutional structures in federal states influence the independence of AVM regulatory authorities? A review of the cases of Germany and Belgium, in: *Schulz/Valcke/Irion* (ed.), *The independence of the media and its regulatory agencies*, op. cit., p. 249, 267.

<sup>58</sup> Belgium, Flemish-speaking Community: VRM management board; Belgium, German-speaking Community: MRat-ADV board (The MRat-*Bureau* which shall assist the MRat, shall be equipped, according to a Government decree, with three staff members. In practice, however, only two staff

Germany, the number of Board members (except for the *ZDF-Fernsehrat*) varies, depending on the regulatory body, between five<sup>60</sup> and 74<sup>61</sup>.

While in some countries, the number of members of the Board has been reduced, compared to the situation as examined by the INDIREG study<sup>62</sup>, it has been increased in others<sup>63</sup>. In more than half of the analysed countries, however, the number has remained the same. Where the number of Board members has changed, several underlying reasons can be observed. In Latvia, where the number was reduced, as well as in Iceland, where the number was increased, new regulatory bodies have been introduced with new compositions of the highest decision-making organs. In Spain, the number of Board members of the newly established market surveillance authority, the *Comisión Nacional de los Mercados y la Competencia* (CNMC), has been extended from nine to ten, in comparison to the previous authority, the *Consejo Estatal de Medios Audiovisuales* (CEMA).

#### 3.1.2.1.2. Socio-economic background of Board members

Concerning the composition of the Board, the requirements that members have to fulfil vary to a high degree. Most Boards are composed of members representing different socio-economic groups, ranging from Government and Parliament, civil society and industry (particularly the sectors regulated by the regulatory body) to academics, professionals and other renowned experts in the fields of regulation.

In the majority of countries, at least some members of the Board need to be experts. However, at least 15 countries have not explicitly laid down such a requirement in the law. Civil society needs to be represented only in a few countries, including Belgium (French Community (at least 1) and German-speaking Community (5)), Germany

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have been assigned (part-time) with this task yet. They are financed by the Ministry of the German-speaking Community and are located within the Ministry's premises.); Netherlands: CvdM Board.

<sup>59</sup> The Czech RRTV board consists of 13 members. Overall, the number of board members lies in the range between three and 13 members in the following countries: Albania, Austria (some *KommAustria* configurations), Belgium (Flemish-speaking Community; French Community: CSA *Bureau* and CAC board; German-speaking Community: MRat-REG board (for the MRat-*Bureau* see comment in fn. 57), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, France, Germany (some *Länder*), Greece, Croatia, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Latvia, Montenegro, Macedonia, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovakia, Turkey, UK (*Ofcom*, ATVOD, BBC Trust).

<sup>60</sup> Executive Board of the LfK, the regulator for commercial media in Baden-Württemberg, and Media Council of the SLM, the regulator for commercial media in Saxony.

<sup>61</sup> Broadcasting Council of the *Südwestrundfunk* (SWR), the main public broadcaster for Baden-Württemberg and Rhineland-Palatinate.

<sup>62</sup> Bulgaria, Germany (3 regional regulatory bodies), Spain (CAC), France, Italy, Lithuania, Macedonia, Sweden. It should be underlined, however, that in the case of Sweden, the new regulatory body has been created by merging the Swedish Broadcasting Commission, the Board of which featured 11 members, and the Swedish Radio and TV Authority, which had no board but was led by the Director-General as an individual.

<sup>63</sup> Albania, Belgium (German-speaking Community), Germany (three regulatory bodies), Sweden (if compared to the former Swedish Radio and TV Authority's Director-General; cf. previous footnote).

(some *Länder*)<sup>64</sup>, Denmark (1), Iceland (1, nominated by academia), Lithuania (15, compared to 6, as at the time of the INDIREG study), Montenegro (2) and Slovakia. In Albania, civil society groups (as well as some professional associations) may propose Board candidates upon invitation by the Parliamentary commission competent for nominating Board members, but these candidates do not officially represent that particular group. Industry representatives are usually not allowed to be members of the Board. However, in Ireland and Spain, no specific rules exist in this regard. In Belgium (French and German-speaking Communities) and Montenegro, at least one of the regulatory body's decision-making bodies is partly made up of industry representatives. The United Kingdom's *Authority for Television On Demand* (ATVOD), in line with its then self-regulatory role, previously exclusively featured representatives of the industry sector to be regulated, but has recently been transformed into an independent co-regulatory body, with only four out of its nine members representing the industry. The remaining five members are independent and do not have to represent any particular segment of society.<sup>65</sup>

The laws in some countries do not provide for certain socio-economic groups to be represented on the Board, but instead require members to be nominated and/or appointed by these groups.<sup>66</sup>

Political powers, such as the Heads of State or Government, other Government representatives or Members of Parliament, are represented on the Board in a number of countries. For example Members of Parliament are in some cases appointed as a Board member. In other countries, they have an active role to play in the appointment procedure. Sometimes, membership comes with an explicit requirement to act independently.<sup>67</sup> In Belgium (French Community), two representatives of Government and administration attend the meetings of the CAV Board (without voting rights), while not being formal members.

Compared to the INDIREG study, the composition of the Boards, in terms of the members' role and background, has only slightly changed in a number of countries.<sup>68</sup> In some cases, the change in the composition resulted from the change in size, as is the case in Bulgaria, Germany (some *Länder*) and Denmark, where the ratios of different groups represented on the Board could not be kept exactly the same. In other cases, the

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<sup>64</sup> Interestingly, almost 80% of the members (equalling 59 out of 74) of the SWR's Broadcasting Council need to be civil society representatives.

<sup>65</sup> See also <http://www.atvod.co.uk/about-ATVOD>

<sup>66</sup> Albania (cf. the explanation in this regard in the previous paragraph), Bulgaria, France, Iceland, Poland.

<sup>67</sup> See also the analysis of conflict of interest rules in section 3.1.2.1.4.

<sup>68</sup> Albania, Belgium (German-speaking Community), Bulgaria, Cyprus, Germany (some *Länder*), Iceland, Lithuania, Montenegro, Republic of Serbia, Slovakia.

changes have led to a reduction of civil society representatives on the Board<sup>69</sup>, sometimes in parallel to an increase of political representatives<sup>70</sup>.

Overall, no general pattern in the above-mentioned changes is recognisable.

### 3.1.2.1.3. Qualification and experience of Board members

For the proper completion of its tasks, the Board needs to dispose of members with an adequate level of educational qualification and professional experience. Legal requirements in this regard can also give an indication of the regulatory body's independence, as they provide objective criteria meant to lead to a configuration of the Board that is best equipped for the fulfilment of its functions, thereby limiting the influence of other, informal appointment criteria which might have a negative impact on the body's independence, such as personal relations of a candidate with an appointing body or individual.

Interestingly, a considerable number of countries lack rules defining either the required qualification<sup>71</sup> of Board members or their required work experience<sup>72</sup>. In twelve countries, for at least some regulatory bodies there are no rules in place regulating any of the two aspects.<sup>73</sup> In practice, persons holding the positions frequently have the qualification necessary to fulfil the position's requirements or experience needed also in countries where legal requirements in this regard are not in place.<sup>74</sup>

As far as such requirements are laid down in the law, they vary largely. While in some countries, qualification is defined as formal education and experience in specific areas pertaining to the Board's scope of work<sup>75</sup>, others require a law degree or a

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<sup>69</sup> Belgium (German-speaking Community), Germany (some *Länder*), Lithuania. It has to be noted, however, that in other German *Länder*, the number of civil society representatives has been increased.

<sup>70</sup> Partially Belgium (German-speaking Community), Germany (Broadcasting Council of the *Norddeutscher Rundfunk*, NDR), Lithuania.

<sup>71</sup> Albania, Belgium (German-speaking Community: MRat-REG, Bureau and Instruction Service; Flemish Community: VRM Management Board; French Community: CSA Bureau, CAC), Czech Republic, Germany (some *Landesmedienanstalten* and all public service broadcaster's Broadcasting Councils), Denmark, Estonia, France (chairperson only), Ireland, Luxembourg, Malta, Netherlands, Portugal (only general requirements), Romania, Slovakia, UK.

<sup>72</sup> Belgium (German-speaking Community: MRat-ADV, *Bureau* and Instruction Service; French Community: CSA Bureau, CAV), Czech Republic, Germany (almost all public service and commercial broadcasters' regulatory bodies), Estonia, Spain (CNMC, CAA), France, Iceland, Lithuania, Luxembourg, Latvia, Malta, Netherlands, Portugal (only general requirements), Romania, Slovakia, UK.

<sup>73</sup> Belgium (German-speaking Community: MRat-Bureau and Instruction Service; French Community: CSA Bureau); Czech Republic, Germany (some), Estonia, France, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, UK.

<sup>74</sup> This has explicitly been confirmed for countries such as Germany, France, Luxembourg or Netherlands.

<sup>75</sup> Albania, Belgium (Flemish Community), Cyprus, Spain (CNMC, CAA), France (Board), Greece, Croatia, Hungary, Iceland (Board), Montenegro, Poland, Serbia, Slovenia.

qualification of judgeship<sup>76</sup>. In other countries, requirements are less specific and are, for instance, limited to a university degree of any kind or even to a lower level, namely some form of higher education<sup>77</sup>. Some laws only ask for informal knowledge or skills, which are sometimes difficult to distinguish from professional experience requirements, described with words such as “high prestige”, “good reputation”, “eminent person of public life”, “high professional and moral level” or “outstanding public record”<sup>78</sup>.

The overwhelming majority of countries where a professional record is essential, require specific experience which is either closely related to the (audiovisual) media sector or in another way relevant to the work of the Board, such as experience in law, economics, finance or administration.<sup>79</sup> Only in few countries, requirements in this regard remain vague or of a general nature.<sup>80</sup>

In some cases, persons holding these positions are required to have either certain qualification criteria or relevant work experience but not both.<sup>81</sup>

In the years after the completion of the INDIREG study, some countries have intensified the requirements, as regards qualification<sup>82</sup> and professional experience<sup>83</sup>. In Turkey, on the other hand, work experience standards have been lowered: while before, apart from ten years’ experience in public and private organisations, Board members and the chairperson had to have specific experience in any of the areas of journalism, publishing, communication and technology, culture, religion, education or law, this requirement has now been abolished.

#### 3.1.2.1.4 Rules to prevent conflicts of interest

An important indicator for the independence of the regulatory body is the existence of clear rules designed to avoid conflicts of interest of decision-makers within the body and, if they occur, to mitigate their effects as far as possible.

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<sup>76</sup> Austria, Belgium (German-speaking Community: 1 member of the MRat-Bureau; Flemish Community: chairperson and 2 members of the VRM General Chamber), Germany (chairpersons of some commercial broadcasters’ regulatory bodies), Sweden (chairperson), Iceland (chairperson).

<sup>77</sup> Bulgaria, Finland, Lithuania, Latvia, Montenegro (Director), Macedonia, Turkey.

<sup>78</sup> Bulgaria, Cyprus, Spain (CNMC, CAC, CAA), Greece, Croatia, Lithuania, Montenegro, Serbia, Sweden.

<sup>79</sup> Albania, Austria, Belgium (German-speaking Community: MRat-REG; Flemish Community; French Community: CAC), Bulgaria, Cyprus, Germany (some), Denmark, Spain (CAC), Finland, Greece, Hungary, Ireland, Italy, Lithuania, Latvia. Montenegro (Board and chairperson), Macedonia, Poland, Serbia, Sweden, Slovenia.

<sup>80</sup> Germany (as far as professional experience is required at all), Estonia (Director-General), Montenegro (Director), Turkey.

<sup>81</sup> Alternative requirements in this respect are laid down in the laws of Cyprus, France (Board) and Hungary.

<sup>82</sup> Spain (CNMC, as opposed to CEMA). France (Board), Hungary, Iceland (Board), Lithuania, Latvia, Macedonia.

<sup>83</sup> Lithuania, Latvia.



In some cases, a decision-maker may have private interests in a certain decision. Conflicts arise when these private interests contravene the interests, which the regulatory body has to preserve when carrying out its tasks. If these conflicts are not resolved in favour of the latter, they can influence decisions of the regulatory body in an undue way, thereby calling the independence of this body into question.

Conflicts of interest can be avoided during the appointment procedure by setting rules concerning the eligibility of candidates, particularly of those who have ties with other organisations involved in or affected by the conduct of the regulatory body's tasks. They can also be mitigated where they occur in the course of the body's work by ensuring that a decision-maker affected by a conflict of interest cannot unduly influence a decision. Conflicts of interest that may occur after a decision-maker's term of office, for instance, when that person takes up another post in an organisation involved in or affected by the conduct of the regulatory body's tasks, can be reduced by establishing a "cooling-off period" during which a former board member is not allowed to be affiliated with such an organisation.

#### *3.1.2.1.4.1. Conflicts of interest before appointment*

Rules to prevent conflicts of interest even before a Board member is appointed are widespread. In fact, the large majority of the countries analysed provides for such rules in some form. No rules in this regard exist, however, in Austria, Bulgaria, Germany (for the position of chairperson in some *Länder*), Denmark, Iceland, Romania and UK (as far as self-regulatory bodies are concerned). There may be various reasons for this lack of relevant provisions. For one, although specific rules preventing conflicts of interest may not exist in a certain country, general rules on competency and appropriate behaviour may apply.<sup>84</sup> Also, lax or non-existing rules on conflicts of interest during the appointment procedure may be compensated by strict provisions on conflicts of interest during a Board member's term of office.<sup>85</sup> Finally, self-regulatory bodies are, by definition, composed of representatives of the branches to be regulated, which implies that the interests of the regulated parties may be introduced in the decision-making process. While codes of conduct may mitigate some of these effects to the necessary degree, it needs to be recognised that the representation of private interests is inherent to this regulatory model and cannot reasonably be expected to be fully avoided.

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<sup>84</sup> This is the case, for example, in Iceland and the UK.

<sup>85</sup> For instance, although in Romania there are no rules preventing conflicts of interest during the appointment, the national law provides for a comprehensive prohibition to hold any other public or private office in parallel to the Board membership, except from didactical ones, provided these do not give rise to a conflict of interest. If a Board member does hold such conflicting position at the time of being appointed, he or she may still be appointed, but has to give up the respective position within three months.

In some countries, conflict of interest rules only apply to the Board's chairperson and its members, but not to senior staff of the regulatory body.<sup>86</sup>

Where rules to prevent conflicts of interest exist, they mostly cover all areas of potential incompatibility, i.e. conflicts with Government, Parliament and political parties as well as industry (namely the branches to be regulated). In some countries, however, not all of these areas are covered.

For instance, no rules against conflict of interest with Government exist in Germany (for some *Länder* as well as for the ZDF<sup>87</sup>), Spain (as far as the new CNMC is concerned), Poland, Romania, Slovenia, Turkey and UK<sup>88</sup>. In some countries, rules do not apply at the time of appointment, but a board member must give up his or her conflicting activity, once appointed.<sup>89</sup>

As regards conflicts with Parliament and political parties, Belgium (all Communities), Estonia, Spain (as far as CNMC is concerned), France, Germany (most *Länder*), Netherlands, Portugal, Romania, Slovenia and Turkey lack any specific rule. No rules in respect of political parties, but a prohibition for Members of Parliament to be a member of the regulatory body's Board are in place Ireland, Luxembourg, Malta and the UK (as far as Ofcom is concerned). Provisions that only take effect after appointment include a provision in Cyprus allowing for the removal of a board member who, while in office, takes up a position in a political party, as well as a legal obligation in Lithuania to suspend any membership of and active participation in a political party.

Only a small number of countries, including Belgium (for some regulatory bodies, i.e. the management board of the Flemish VRM and the advisory boards, in the French and German-speaking communities, CAV and MRat-ADV), Germany (only as regards the RBB's and RB's board members), Estonia, Spain, France and Serbia have no rules dealing with possible conflicts of interest with industry.<sup>90</sup>

On the other hand, Lithuanian law provides for a very strict rule, barring from membership in the LRTK board also persons who have held a management position or

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<sup>86</sup> No specific rules for senior staff exist, for example, in Estonia, France, Hungary, Italy, Lithuania, The Netherlands, Poland, Slovakia, Slovenia, Spain, Sweden, Croatia and Turkey.

<sup>87</sup> According to the reasoning of the Federal Constitutional Court, recently confirmed in a ruling on the composition of the ZDF TV Council, the rules implemented have to safeguard that the authority/the board in total is not unduly influenced by Government representation, *Bundesverfassungsgericht*, Judgment of 25 March 2014, case no. 1 BvF 1/11 and 1 BvF 4/11, ECLI:DE:BVerfG:2014:fs20140325.1bvf000111.

<sup>88</sup> For the *Ofcom*, only the general rules, which can be found in the Communications Act 2003 and the Bribery Act 2010, apply.

<sup>89</sup> France, Italy. According to Italian legislation, a direct transition from a government position to the AGCOM board is permitted, but the two positions may not be held simultaneously. Some countries require candidates having a conflict of interest to resolve this conflict within a certain period of time after he or she has been appointed a Board member.

<sup>90</sup> However, France and Serbia provide for an obligation to give up conflicting activities in the industry sector upon appointment.

have an interest in organisations active in sectors covered by LRTK for up to one year preceding the appointment as board member.

The majority of countries analysed also have rules which prohibit Board members to hold other public or private offices during their term of office in the board.<sup>91</sup> However, some of these allow research and teaching activities as well as creative work.<sup>92</sup> In Sweden, while no explicit prohibition exists to take up other accessory positions, all such positions and other sources of income must be declared and must be approved by the government.

#### 3.1.2.1.4.2. Conflicts of interest during term of office

With the exception of Denmark, Luxembourg and Iceland, all countries analysed provide for specific conflict of interest rules for members of the Board during their term of office.<sup>93</sup> In Luxembourg, general incompatibility rules apply. In Iceland, the Broadcasting Act includes rules on confidentiality, in addition to general conflict of interest rules laid down in the Administrative Procedure Act.

In some of the countries with conflict of interest rules for active Board members, these rules are the same as those applying to the appointment phase. In others, different or additional rules apply during the Board members' term of office.

Most countries feature rules to prevent conflicts of interest with their Governments during term of office. Provisions in this respect do not exist in Poland, Slovenia, Turkey and, in Germany, for the *Fernsehrat* (Television Council) of the ZDF. It should be noted, however, that a judgment of the German *Bundesverfassungsgericht* (Federal Constitutional Court) of 2014 ruled unconstitutional certain provisions of the ZDF Interstate Treaty, which concern the composition and scope of tasks of the ZDF TV Council.<sup>94</sup> In this ruling, the Court also criticised the lack of incompatibility rules in the Treaty and requested the *Länder* as competent legislators to remedy this situation by 30 June 2015. An amendment to the Treaty, which has been signed by all *Länder* Heads of Government on 18 June 2015, is envisaged to come into force on 1 January 2016.<sup>95</sup>

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<sup>91</sup> Albania (for the chairperson), Belgium (all communities; no such rule, however, exists for the German-speaking community's MRat-Bureau and Instructions Service), Cyprus (emanating from a general incompatibilities clause in the Constitution), Denmark, Estonia, Spain, Finland, France, Greece, Croatia, Hungary, Italy, Lithuania, Poland, Portugal, Serbia, Slovakia and Turkey.

<sup>92</sup> Hungary, Poland, Portugal, Romania, Slovakia.

<sup>93</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Germany, Estonia, Spain, Finland, France, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Latvia, Montenegro, Macedonia, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey and UK.

<sup>94</sup> *Bundesverfassungsgericht*, Judgment of 25 March 2014, case no. 1 BvF 1/11 and 1 BvF 4/11, ECLI:DE:BVerfG:2014:fs20140325.1bvff000111.

<sup>95</sup> 17th Interstate Treaty Amending Interstate Treaties on Broadcasting Law; available at: [https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/17\\_\\_RaeStV.pdf](https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/17__RaeStV.pdf). The amendment aims to eliminate the shortcomings of the current Treaty, as set out by the Court. It includes a new

Nine countries lack specific provisions regulating incompatibilities of the membership in the Board with functions in political parties.<sup>96</sup> In some of these, however, conflict of interest rules barring Members of Parliament from membership in the Board are in place, e.g. in Ireland, Malta and the Netherlands. The above-mentioned provisions for Board members of the Lithuanian LRTK and of the Cypriot Radio-Television Authority to abstain from any active membership in political parties after their appointment<sup>97</sup> remain in force throughout the whole term of office.

In nearly all countries, rules to prevent conflicts of interest with actors of the regulated sector are in place. For the Flemish VRM, however, these are limited to a prohibition for Board members to take part in decisions in which they have a direct or indirect interest. No rules exist in this regard for most German public service broadcasters (except for WDR, RBB and ZDF).

In Montenegro, a member discovering that he or she has a conflict of interest regarding a particular subject has a duty to inform the Board of this fact. As a consequence, he or she will be excluded from the further consideration of that subject by the Board. If a decision on that subject has already been taken by the time the conflict of interest becomes known, the decision must be reconsidered and may be annulled, if it was taken with the participation of the Board member concerned.

#### 3.1.2.1.4.3. *Conflicts of interest after end of Board membership*

The laws of a considerable number of countries also provide for a cooling-off period after the Board member's term of office in order to prevent members from considering to take decisions in favour of a potential future employer while still in their position of the regulatory authority.<sup>98</sup> The period foreseen ranges between six months (UK) and four years (Italy).

Soft (implicit) rules in this regard can be derived from the laws in Iceland, which provide for a confidentiality rule that remains applicable after the member's term of office has ended, and in Slovenia, where a cooling-off period may be regulated contractually.

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rule providing that members of the TV Council may, among others, not be members of the European Parliament, the European Commission or any Parliament or Government at federal or *Länder* level in Germany; see Art. 1 Nr. 15 of the 17th Interstate Treaty Amending Interstate Treaties on Broadcasting Law (§ 19a (3) ZDF Interstate Treaty).

<sup>96</sup> Belgium (Flemish community, German-speaking community as far as the *Medienrat's Bureau and Instructions Service* are concerned), Estonia, France, Germany, Ireland (conflict of interest rules only cover Members of Parliament), Malta (conflict of interest rules only cover Members of Parliament), Netherlands, Portugal, Slovenia.

<sup>97</sup> Cf. the previous section on „Conflicts of interest before appointment“.

<sup>98</sup> Albania, Bulgaria, Spain, France, Greece, Croatia, Hungary, Italy, Latvia, Montenegro, Macedonia, Malta, Portugal, Serbia and UK (for *Ofcom*).

### 3.1.2.1.5 Procedural issues

In procedural terms, the rules governing the appointment, term of office and dismissal of Board members (including the chairperson) and their practical implementation call for a closer look as they may have an impact on the independence with which a Board member conducts his or her functions.

#### 3.1.2.1.5.1. Appointment

In the majority of countries, a two-stage procedure applies, featuring a separate nomination stage preceding the actual appointment.<sup>99</sup> Some countries, however, apply a uniform appointment procedure, not further subdivided into different stages.<sup>100</sup> In other countries, the structure of the appointment procedure depends on the body or organ to be appointed. In these countries, while the appointment of the board follows a two-stage procedure, the chairperson of the board is frequently appointed directly, with no previous nomination phase.<sup>101</sup> In Estonia, the members of the Communications and Media Department of the new Technical Surveillance Authority (TSA) are directly appointed by the Director-General of the body, whereas the Director-General him/herself is appointed by the relevant minister upon a recommendation by the chancellor of the ministry. In Lithuania, the chairperson and three members of the LRTK board are nominated jointly by the Education and Culture Committee of the Parliament and the Information Society Committee of the Communications ministry and, in a second step, appointed by Parliament. The other board members are directly appointed by the relevant bodies or organisations.

Since 2010, there has only been little change with regard to these rules. Aside from the establishment of entire new regulatory bodies – which, however, in most cases has not led to any substantial changes, as far as the aspect analysed here is concerned –, the appointment procedure has been restructured fundamentally only in Lithuania. Compared to the situation analysed in the INDIREG study, the actual act of appointment of the LRTK chair is now also preceded by a nomination stage, in the same way in which this was already true for the three board members to be appointed by Parliament. The countries where the establishment of a new regulatory body has also led to a modification in the appointment procedure's subdivision into different stages are Estonia and Slovenia. Before the reform, both the chairperson as well as individual board members of the former Estonian Public Broadcasting Council (the ambit of which was limited to public service broadcasting) were appointed following a two-stage procedure. In Slovenia, while the new AKOS Director is – comparable to

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<sup>99</sup> Albania, Austria, Germany (for some regulatory bodies), Spain, France, Greece, Croatia, Hungary, Ireland, Italy, Luxembourg, Malta, Romania, Slovenia and UK.

<sup>100</sup> Belgium (all Communities), Cyprus, Denmark, Finland, Germany (for some regulatory bodies), The Netherlands, Poland, Sweden.

<sup>101</sup> This is the case in Bulgaria, Czech Republic, Iceland, Latvia, Montenegro, Macedonia, Portugal, Serbia, Slovakia and Turkey. Usually, candidates are elected by board members from among themselves, with the exception of Iceland, where the chairperson is appointed by the competent minister.

the Director of the previously competent *Agencije za pošto in elektronske komunikacije* (APEK) – still appointed following a public competition, the successful candidate is now first nominated by the AKOS Council for appointment by the Government.

In countries where the appointment procedure is divided into two stages, a very diverse range of models can be found as regards the bodies competent for each of the stages. While in most cases, the chairs and members of the board are appointed by either the Parliament,<sup>102</sup> the Head of State<sup>103</sup> or (a member of) the Government,<sup>104</sup> the bodies involved in the nomination stage vary widely.

Where the Head of State is the appointing body, candidates are nominated by either Parliament<sup>105</sup> or (members/the head of the) Government<sup>106</sup>, or jointly by both<sup>107</sup>.

Candidates appointed by Parliament are in most countries nominated by one or more parliamentary committee(s) or by political groups in the Parliament.<sup>108</sup> Sometimes, the parliamentary committee only issues a public call for nomination of candidates by certain stakeholder groups, such as academia, professional associations or representatives and social and religious communities and, as the case may be, prepares a shortlist of suitable candidates.<sup>109</sup> In some of these cases, the parliamentary committee or individual Members of Parliament are also authorised to nominate candidates besides the stakeholder groups.<sup>110</sup>

No parliamentary activity seems to be involved at the nomination stage in Bulgaria, where stakeholders can directly nominate their candidates which may then be selected

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<sup>102</sup> E.g. in Albania, Bulgaria (for three of the five board members), Czech Republic, Croatia, Latvia, Montenegro, Macedonia, Portugal, Romania, Serbia, Turkey.

<sup>103</sup> E.g. in Austria, Bulgaria (for two of the five board members), France, Italy, Luxembourg and Malta.

<sup>104</sup> E.g. in Spain, Ireland (except for four of the eight members of the BAI's Contract Awards and of the Compliance Committees, respectively, who are appointed directly by the BAI Main Board) and Slovenia. In Spain, however, the (central or regional, as the case may be) Government has no decisive power, i.e. the appointment of the nominated candidates is merely a formal act.

<sup>105</sup> This is the case in France and Italy (for the AGCOM commissions' members).

<sup>106</sup> This is the case in Luxembourg (nomination by Government) and Malta (nomination by the Prime Minister, together with the leader of the opposition)

<sup>107</sup> As is the case in Austria and Italy (for the AGCOM President who is nominated by the competent parliamentary committees, following the designation by the Prime Minister on the advice of the competent minister).

<sup>108</sup> This is the case in Albania (for the nomination of the chairperson), Czech Republic, Latvia, Portugal and Turkey. In Greece, candidates are nominated by the President of Parliament and appointed by the Parliament's Conference of Presidents. On the lengthy negotiations in Greece see *Psychogiopoulou/Casarosa/Kandyla*, The independence of media regulatory authorities and the impact of the socio-political context: A comparative analysis of Greece and Italy, in: *Schulz/Valcke/Irion*, The independence of the media and its regulatory agencies, (op. cit.), p. 213, 220 et seq., 224 et seq., 236 et seq.

<sup>109</sup> This applies to the nomination of candidates for the board in Albania and Montenegro.

<sup>110</sup> E.g. in Macedonia and Serbia.

and appointed by either the Parliament (for three of the five board members) or the President (for two of the five board members).

In Croatia, candidates are nominated by the Government, whereas in Romania, the Government, both houses of Parliament and the President are called upon to make proposals for board member candidates, who are then heard by specialised standing commissions in both houses of Parliament. The standing commissions present a joint notification to the Parliament who then appoints members finally by majority vote.

In countries where the Government decides about the appointment of chairs and members of the Board, candidates are nominated either by the Board itself,<sup>111</sup> the Parliament<sup>112</sup> or the competent minister following an advice of a parliamentary committee.<sup>113</sup>

A small number of countries have established other procedures for the nomination and appointment of candidates. In Estonia, for example, both the Director-General and the Board members of the TSA are nominated by the chancellor of the competent ministry and appointed by the competent minister. Also in Iceland, the Board is appointed by the competent minister; candidates are nominated by the Supreme Court (2), academia (1) and the Journalists' Association (1).

No definitive pattern can be recognised in the case of Germany: while some Board members of the *Länder's* regulatory bodies competent for commercial broadcasters are elected by the State Parliaments, others are directly appointed by socially relevant groups, the latter of which is also the default case for the public service broadcasters' regulatory bodies. In most cases, the chairperson of a regulatory body of one of the *Länder* competent for commercial broadcasters as well as the chairperson of a public service broadcaster (*Intendant*) is elected by the Board itself.

In Hungary, the new regulator's Board consists of four members plus the chairperson. Board members are nominated and elected by an ad-hoc parliamentary committee where all parliamentary factions are represented according to their voting power in Parliament. They are elected by unanimous vote or, if unattainable, by a two-thirds majority vote. The President of the NMHH is automatically nominated as candidate for the chairperson of the Board. The chairperson is then elected by the parliamentary committee pursuant to the same procedure as applicable to Board members. The (single) candidate for NMHH President, in turn, is nominated by the Prime Minister, after considering the recommendations made by different stakeholder groups and bodies, and is appointed by the President of the Republic. The NMHH President's mandate automatically extends if Parliament fails to elect a new President and until such election has taken place.

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<sup>111</sup> As is the case in Spain (for the chairpersons of the CAC and the CAA who are nominated by the other members of the board) and Slovenia.

<sup>112</sup> As is the case in Spain (for the chairperson and board members of the CNMC).

<sup>113</sup> As is the case in Ireland.

The Lithuanian regulatory body's Board is composed of two members that are appointed by the President of the Republic, three members appointed by Parliament, five appointed by professional associations and one by the Bishops' Conference. The three candidates that are to be appointed by Parliament are nominated jointly by the competent parliamentary committee and a committee under the competent ministry. The chairperson and deputy chairperson of the Board are appointed from among the Board members by the Parliament upon joint recommendation by the competent parliamentary committee and a committee under the competent ministry.

In the UK, a real nomination stage is only foreseen in the case of the ASA chairperson who is nominated by the ASA Council's Nominations Committee. In all other cases (i.e. Ofcom, ATVOD, BBC Trust and ASA Council members), the candidates appointed are selected by a competition, following a public tender.

Overall, changes in the appointment procedure have been moderate in the countries analysed. Most significant changes have been caused by the establishment of new regulatory bodies, as is the case in Albania, Estonia, Spain, Hungary, Iceland, Luxembourg, Latvia, Sweden and Slovenia. In Lithuania, some modifications have resulted from the reduced size of the LRTK's Board.

#### 3.1.2.1.5.2. *Term of office*

Most Board members are appointed for a limited period of time, in a similar manner as democratically elected State bodies. Only in Finland, members are appointed for life and remain, in principle, on duty until they resign or retire. In the UK (for Ofcom<sup>114</sup> and ATVOD), no term is stated by law. In Macedonia, the law does not state whether the chairperson shall serve the full term of office of the Board (i.e. seven years). The concrete terms of limited mandates vary remarkably among the analysed countries.

The period in office usually ranges from between four to six years.<sup>115</sup> Shorter periods are foreseen in a small number of countries.<sup>116</sup> Longer periods are rare.<sup>117</sup> Most

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<sup>114</sup> However, terms in practice usually end after three or four years for Board members, five years for chairpersons.

<sup>115</sup> Four-year terms in Belgium (German-speaking Community: all bodies; French Community: CAC, CAV), Denmark, Greece, Iceland, Lithuania: from 2015, Montenegro (Director).

Five-year terms in Albania, Belgium (Flemish Community: all bodies; French Community: CSA Bureau), Estonia, Spain (CAA), Croatia, Ireland, Luxembourg, Latvia, Montenegro (Board and chairperson), Netherlands, Portugal, Serbia, Slovenia.

Six-year terms in Austria, Bulgaria (Board), Cyprus, Czech Republic, Spain (CNMC, CAC), France, Poland, Romania, Slovakia (chairperson; Board: 6 years or less), Turkey (Board).

In Germany, periods for Board members vary between four and six years, for chairpersons between five and nine years.

<sup>116</sup> Bulgaria (1 year for the chairperson), Lithuania (2 years for the chairperson, until 2014), Turkey (2 years for the chairperson), Sweden (3 years), UK (3 years, ASA). In Malta, while terms may, according to the law, last up to 5 years, they generally end after two to three years.

<sup>117</sup> Italy (7 years), Macedonia (7 years), Hungary (9 years). In Germany, the chairperson (*Intendant*) of the *Hessischer Rundfunk* (public broadcaster in the State of Hesse) is elected for five to nine



changes that have been made in this regard since the completion of the INDIREG study have remained within the four- to six-year range.<sup>118</sup> Otherwise, tenure extensions have been introduced from six to seven years in Macedonia and from four to nine years in Hungary. In Lithuania, Board members and the chairperson will be appointed for four years from 2015. Before, the Board members' term was aligned to that of the appointing body, whereas the chairperson served for a period of two years.

Apart from the length of the mandate, also its relation to the election cycles of State bodies can give an indication about the independence of the Board (including its chairperson) from the bodies in charge of appointing and ultimately overseeing its activity. In almost half of the countries analysed, the Board's period of office does not correspond to the election cycles.<sup>119</sup> In the remaining cases, a staggered term of office is either explicitly not foreseen or not regulated at all.<sup>120</sup> Changes in this area remain very limited and have only affected three countries, where previously foreseen staggered terms have been abolished (Romania), are no longer regulated explicitly (Macedonia) or now result newly from an extended term of office (Hungary).

Particularly where mandates have a moderate length, renewals of Board membership or chairmanship can be a way to improve continuity in the work of the Board. While a one-time renewal is possible in twelve countries<sup>121</sup>, the term may be renewed twice in Bulgaria<sup>122</sup> and Ireland. In many countries, however, there is no limit as to the number of possible renewals.<sup>123</sup> In Germany, rules vary among the *Länder*: Board members and chairpersons may at least be re-appointed once; in some cases, the number of renewals is not limited.

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years; the chairperson of the *Landesmedienanstalt Saarland* (LMS, media authority for the State of Saarland) is appointed for 7 years.

<sup>118</sup> This includes Belgium (German-speaking Community), which switched from a 5- to a 4-year term; Latvia, which switched from 4 to 5 years; Montenegro, which switched from 5 to 4 years (Director), and Serbia, which switched from 6 to 5 years.

<sup>119</sup> Bulgaria, Cyprus, Czech Republic, Spain (CNMC, CAC: partial renewal every 2 to 3 years), Croatia, Hungary, Latvia, Montenegro (Board and chairperson), Malta, Poland, Portugal, Sweden, Slovakia (partial renewal), Turkey (Board; partial renewal), Italy, UK (Ofcom).

<sup>120</sup> Albania, Austria, Belgium (German-speaking Community; Flemish Community: VRM Management Board's term explicitly has to coincide with the election cycle; French Community), Germany, Denmark, Estonia, Spain (CAA, although in practice, the 5-year term does not coincide with the 4-year election cycle), Finland, France, Greece, Ireland, Iceland, Lithuania, Luxembourg, Montenegro (Director), Macedonia, Netherlands, Romania, Serbia, Slovenia, Turkey (chairperson), UK (ATVOD).

<sup>121</sup> Albania, Cyprus (chairperson), Czech Republic (Board), Spain (CAA), Greece, Lithuania, Latvia, Montenegro, Netherlands, Serbia, Slovakia, UK (ASA; Ofcom; the Code of Practice of the Commissioner for Public Appointments recommends a maximum of two terms).

<sup>122</sup> For the Board. However, renewals may not be granted consecutively.

<sup>123</sup> Austria, Belgium (German-speaking Community: MRat-REG, ADV; Flemish Community; French Community), Bulgaria (chairperson), Cyprus (Board), Czech Republic (chairperson), Denmark, Estonia, Finland, Croatia, Iceland, Lithuania (deputy chairperson), Luxembourg, Macedonia (Director and deputy Director), Malta, Romania, Sweden, Slovenia, Turkey, UK (ATVOD).

In some countries, no renewal is possible. This is the case particularly where longer terms of office apply<sup>124</sup>, but is not limited to these cases.<sup>125</sup>

#### 3.1.2.1.5.3. Dismissal

Another indicator of independence from external influence is the regime according to which Board members can be dismissed. The less specific these rules are and the less they are related to an individual misconduct or another failure of the member to carry out his or her tasks properly, the greater is the risk that members might be dismissed on an arbitrary basis.

In only a few countries, no specific rules exist to protect Board members against arbitrary dismissal.<sup>126</sup> On the other hand, laws in a few other countries do not permit the dismissal of Board members on any grounds during their term of office.<sup>127</sup> However, in these cases, the term provides for situations, such as a conviction for a criminal offence or a violation of conflict of interest rules, in which an individual Board member's term is legally deemed to be terminated.

The reasons for a dismissal are usually enumerated in the law and typically include health conditions, conviction for a criminal offence, violations of conflict of interest rules, another serious misconduct or breach of law or factual failure or legal incapacity of the member to fulfil his or her duties. In Slovenia, a request to dismiss the AKOS Director can also be issued by the Court of Auditors.

The body entitled to dismiss a Board member varies widely among the countries analysed. Sometimes, it is the body that has appointed the member.<sup>128</sup> In other cases, however, the decision lies with the Parliament<sup>129</sup>, the Government<sup>130</sup> or an individual

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<sup>124</sup> Spain (CNMC, CAC: 6 years), Hungary (9 years), Macedonia (Board and chairperson: 7 years (although the law does not state whether the chairperson has to serve the full 7 years as a chairperson); no limits as to the times of renewals are foreseen, however, for the Director and his/her deputy who also serve 7-year terms), Poland and Italy.

<sup>125</sup> No renewal is possible also in Belgium (German-speaking Community), where the MRat-ADV and REG Presidents' term of office lasts only 4 years, and in Portugal, where a 5-year term applies.

<sup>126</sup> These include Belgium (Flemish Community, for the VRM Management Board), Denmark, Estonia, Luxembourg, Sweden and Iceland. In some German *Länder*, no information is available in this respect.

<sup>127</sup> Greece, Macedonia (chairperson), Turkey.

<sup>128</sup> Germany (some *Länder*), Lithuania (individual Board members only upon request by the Board), Czech Republic, Montenegro,

<sup>129</sup> Albania, Belgium (French Community: CAC, CAV, after proposition from Government), Germany (some *Länder*), Spain (CAC), Croatia (upon proposal by Government), Latvia, Montenegro (individual Board member: upon decision by appointing body or Board; entire Board: Parliament alone), Macedonia (Board), Portugal, Romania, Serbia, Slovakia (Board: upon proposal by chairperson).

<sup>130</sup> Belgium (German-speaking Community; Flemish Community: if a member of the Chambers (General Chamber or Chamber Impartiality and Minors) is to be dismissed due to a misconduct, the decision cannot be taken without a respective proposition from the competent VRM committee; French Community: VRM Bureau), Cyprus, Spain (CNMC), Finland (only Director-General), Luxembourg (chairperson), Sweden, Slovenia.

minister<sup>131</sup>. Some countries entitle the regulatory body itself to decide about the dismissal of Board members, either through the Board as a whole (regarding the dismissal of individual Board members)<sup>132</sup>, the Board's chairperson (regarding Board members)<sup>133</sup> or another organ within the regulatory body<sup>134</sup>.

While the specific provisions for dismissal in some countries only apply to the dismissal of individual Board members<sup>135</sup>, the rules in other countries also provide for a possibility to dismiss the entire Board<sup>136</sup>.

The only significant changes that occurred since the completion of the INDIREG study were in Lithuania and Estonia. While in Lithuania the chairperson could be dismissed by a two-thirds vote of the Board, dismissal is now only possible by the appointing body. Also, the entire Board may now be dismissed, if the annual report was rejected by the Parliament and the appointing bodies refuse to allow the majority of Board members to continue their activities. In Estonia, the TSA Director-General may now be dismissed by the competent Minister, whereas before this was the competence of the Parliament and the regulatory body itself.

In the past five years, dismissals before the expiration of the Board's term of office occurred in only four cases. In 2014, an individual Board member of the Danish RTB was dismissed at his own request and replaced by a new member, who was appointed by the Minister of Culture. The chairperson of the Albanian AMA was suspended in the same year due to a lawsuit filed against her by commercial operators. After that a new chair was elected. In July of the same year, a new Macedonian law on audio and audiovisual media services, establishing a new regulatory body (the Agency for Audio and Audiovisual Media Services), was adopted. Following this, the members of the Agency's predecessor, the Broadcasting Council, were dismissed in order to allow for the transition to the new structure.

The entire board of the Polish KRRiT had to step down in 2010, after the Board's term of office automatically expired as a legal consequence of the rejection of its 2009 annual report by the two Houses of Parliament, the *Sejm* and the Senate, which was confirmed by the President.

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<sup>131</sup> Ireland (upon resolution by Parliament), Estonia (TSA Director-General), Netherlands, UK (Ofcom). In Malta, the decision can be taken jointly by the President and the Prime Minister.

<sup>132</sup> Austria, Belgium (German-speaking Community: MRat-ADV), Germany (some *Länder*; in the case of public service broadcaster, sometimes jointly with the Administrative Council), Spain (CAA), France, Hungary.

<sup>133</sup> Estonia (regarding Board members) and Hungary (regarding Board members, as far as not the Board as a whole is competent).

<sup>134</sup> Bulgaria, Czech Republic, Germany (some *Länder*).

<sup>135</sup> Austria, Belgium (all Communities), Bulgaria, Cyprus, Germany (some *Länder*), Estonia, Spain, Croatia, Hungary, Ireland, Italy, Latvia, Macedonia, Netherlands, Romania, Serbia, Slovakia, UK. In Finland and Slovakia, the tasks of the regulatory body are carried out by an individual.

<sup>136</sup> Czech Republic, Malta, Poland, Portugal, Lithuania, Montenegro, Macedonia (implicitly), Turkey (implicitly). In Albania, Germany (some *Länder*), Denmark, Greece, Iceland, Luxembourg and Sweden, the situation is unclear.

In Bulgaria, an interesting legal development deserves attention. A member of the Bulgarian CEM had been dismissed in 2008, after his affiliation with the former State Security Services was found to be in breach of CEM membership requirements. In 2013, however, the Bulgarian Constitutional Court declared this legal incompatibility rule unconstitutional and inconsistent with international treaties.

In a few other cases, the Board or some of its members were not re-appointed for another term<sup>137</sup>, were not allowed to stay in office after the end of term until a new Board was appointed.<sup>138</sup> Some others resigned or retired.<sup>139</sup>

### 3.1.2.2. Staffing and budget of regulatory authorities

A further indicator of independence of regulatory authorities is the staff and resources they have at their disposal. As a rule of thumb, it could be said that the more staff a regulatory body employs, the less difficult it is to “capture” individual staff members and thereby directly influence the regulators’ activities. By the same token, sufficient financial capacities are required for the regulatory authorities to fulfil their tasks independently.

#### 3.1.2.2.1. Staffing

The number of staff of regulatory bodies covers a broad range and is difficult to specify exactly. It is first and foremost dependent on national circumstances and conditions. The staff count may also be imprecise (in view of staff responsible for audiovisual media services) where the remit of regulatory authorities (above all, converged regulators) covers tasks beyond the regulation of audiovisual media services. Nonetheless, a general overview can be sketched from the up-dated data set.

In a majority of national laws, the number of staff is not foreseen specifically.<sup>140</sup> In more than ten countries, the number of staff is outlined in the laws.<sup>141</sup> In Slovakia and

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<sup>137</sup> Belgium (Flemish Community): no re-appointment of General Chamber’s chair in 2013; Belgium (French Community): non-prolongation of CSA’s President and one Bureau member for another term for personal reasons in 2012; Hungary: establishment of a new regulatory body in 2010.

<sup>138</sup> Belgium (German-speaking Community): MRat-REG President was dismissed after end of second term and thus was not allowed to stay in office until a new MRat-REG was appointed,

<sup>139</sup> Spain: voluntary resignation of CAC chair in 2012 to facilitate renewal of the whole Board; retirement of a CAC Board member in 2013; Italy: voluntary resignation of chair for „serious personal reasons“ in 2013; Serbia: resignation of chair, who, nevertheless, remained a Board member, in 2014; Ireland: resignation of Board member, supposedly for political reasons, in 2014; Portugal: resignation of an ERC Board member in 2010 due to personal disagreement with political situation.

<sup>140</sup> Albania, Bulgaria, Cyprus, Czech Republic, Germany (*Landesmedienanstalten*), Estonia, Spain (CNMC and CAC), Finland, France, Croatia, Hungary, Ireland, Latvia, Macedonia, the Netherlands, Portugal, Serbia, Sweden, Slovakia, Turkey, United Kingdom

<sup>141</sup> Belgium (all Communities), Spain (CAA), Greece, Iceland, Lithuania, Luxembourg, Montenegro, Malta, Poland, Romania, Slovenia.

Italy, it seems to have been outlined in the measures issued by the respective regulatory authorities but not in the legislation.

Current staff counts are extremely diverse ranging from two in Iceland (*Fjölmiðlanefnd*) to 790 in the United Kingdom (OFCOM). Yet, it is clear that due to the converged nature of OFCOM not all of its staff is actually involved in the regulation of audiovisual media services and for some staff members it might even be difficult to determine. Similarly, while the Finish regulatory body *Viestintävirasto* (FICORA) has more than 240 employees, staff responsible for matters affecting audiovisual media services is estimated at only 3 to 4. The converged Spanish regulatory authority at national level, the CNMC (500 of whom approximately 160 deal with audiovisual media services), the converged Italian AGCOM (372) and the Turkish RTÜK (421) also show high numbers of staff. Apart from Poland (136) and Romania (130), all other regulators are staffed with less than one hundred. Several regulatory bodies have between 20 and 30 employees.<sup>142</sup> Rarely, regulatory bodies have a staff of less than 10.<sup>143</sup>

In a majority of countries, the number of staff is considered appropriate to respond to the complexities of tasks undertaken by the regulatory authorities.<sup>144</sup> Nonetheless, the level of staff is considered problematic in case of several regulatory authorities with a comparatively small staff.<sup>145</sup>

Importantly, some regulatory authorities may be under more pressure in the future due to cutbacks and austerity programmes of States following the economic crisis.<sup>146</sup> This may hold especially true where financing of the regulatory authority is fully sourced from State budget. Small regulatory bodies like the *Radio- og TV-Nævnet* in Denmark

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<sup>142</sup> Belgium (DE: 27, FL: 20, F: 26), Cyprus (26), several *Landesmedienanstalten* in Germany (LFK: 25, brema: 21, HSH: 21, LPR: 23, mmv: 20, NLM: 28, SLM: 25, MSA: 22,75, TLM: 30), several Broadcasting Councils of German public service broadcasters (rbb: 29, RB: 25), Lithuania (29), Montenegro (21), Malta (28), Sweden (25), Slovakia (30).

<sup>143</sup> Austria (5), Iceland (2), Luxembourg (4 excluding 5 board members).

<sup>144</sup> Austria, Belgium (Flemish- and French- speaking Communities), Denmark, Estonia, Spain, Finland, France, Germany, Italy, Lithuania, Luxembourg, Montenegro, Malta, the Netherlands, Poland, Portugal, Sweden, Slovakia, Turkey, United Kingdom.

<sup>145</sup> German-speaking Community of Belgium, Cyprus, Czech Republic, Greece, Croatia, Ireland, Iceland and Romania. In contrast to the assessment by the consortium's national correspondents, the regulators of Cyprus and Croatia, found that they were staffed appropriately to fulfil their missions. *Psychogiopoulou/Casarosa/Kandyla* also consider the level of staff of the Greek regulator as very limited, see The independence of media regulatory authorities and the impact of the socio-political context: A comparative analysis of Greece and Italy, in: *Schulz/Valcke/Irion*, The independence of the media and its regulatory agencies, (op. cit.), p. 213, 224.

In addition, several regulators (CSA of the French-speaking Community of Belgium, the Medienrat of the German-speaking Community of Belgium, the *Rada pro rozhlasové a televizní vysílání* of the Czech Republic) indicated in their responses to the consortium's questionnaire that they lacked personnel.

<sup>146</sup> This emerges from the responses of the correspondents in the French-speaking Community of Belgium, Spain and the Netherlands (this is also confirmed by the responses received directly from the Dutch regulatory authority, the *Commissariaat voor de Media*) to the questionnaires.

or the ATVOD in the United Kingdom have resolved capacity problems by acquiring external expertise.<sup>147</sup> Such reliance on experts is, however, only possible if backed by sufficient funding.

In addition, concerns have been expressed that several regulatory bodies appear to be under-staffed especially after the expansion of their mandate to regulate on-demand audiovisual media services.<sup>148</sup> Similarly, the lack of adequately trained or experienced staff is considered a problem in some countries.<sup>149</sup>

In two other countries, more serious issues regarding staffing appear to have surfaced. In Albania, significant changes in the structure of the personnel occurred during the past five years resulting in over 20 dismissals. The substitution of staff may indeed affect the stability and continuity of an authority. Since the precise reasons of the changes are not known, it is, however, difficult to draw concrete conclusions. Similar politically motivated dismissals have been noticed in Macedonia but the current level of staff seems to be appropriate.

Although the law provides for three members of staff, the *Medienrat* of the German-speaking Community of Belgium currently only employs two persons working part time (at 50 and 25 percent respectively). Above all, these are paid by the Ministry of the German-speaking Community and appear to work for both, the Ministry and the *Medienrat*. In addition, the organ responsible for handling complaints has not yet been set up according to the law. Similarly, in Denmark, the RTB is supported by the secretariat of the Danish Agency for Culture, Center for Libraries and Media, an agency under the aegis of the Danish Ministry of Culture. The markets for audiovisual media services in the German-speaking Community of Belgium as well as in Denmark are rather small but the close ties between the Ministry and the regulatory authority in terms of staff could have adverse effects on the regulators' independence and efficient functioning.

With regards to the technical facilities, a great majority of regulatory bodies is well equipped.<sup>150</sup> In Albania and Greece, technical equipment seems to be insufficient, especially in Albania where it is out-dated and does not comply with current technical standards. This may impede the effective enforcement of the law and may put a strain on the regulators.

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<sup>147</sup> On the use of research by regulatory authorities see Smokvina, *Research & Regulators: Towards an evidence-based approach*, 41<sup>st</sup> EPRA meeting of 14-15 May in Berne, available at <http://www.epra.org/attachments/berne-wg3-research-regulators-final-output-document>. This paper stresses that due to budgetary cuts, regulators have less money to commission external experts so that more frequently research is carried out internally (see p. 6).

<sup>148</sup> Czech Republic, Greece, Croatia, Ireland (due to economic crisis, vacancies have not been filled in recent years), Iceland, Latvia, Romania.

<sup>149</sup> Bulgaria, Cyprus, Estonia, Greece, Serbia, Slovenia.

<sup>150</sup> Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Spain, Finland, France, Germany, Italy, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

### 3.1.2.2.2. Budget

In addition to staff, it is crucial that regulatory authorities have sufficient funding to cover their activities. In most countries, the budget is not foreseen specifically in the national legislation while some laws do provide for the annual budget of the regulators.<sup>151</sup>

Similar to the discrepancies in staffing, there exist huge budgetary differences in the countries investigated in this study. The regulatory bodies of roughly ten countries have less than € 1 million at their disposal on a yearly basis.<sup>152</sup> This marks a sharp contrast to the regulatory bodies in Turkey (€ 90 million in 2014-2015), the United Kingdom (OFCOM: € 160 million in 2014-2015), Spain (CNMC: € 53 million in 2014), France (€ 35 million in 2013) and several German regional regulators such as the BLM (€ 28 million in 2014) and the LFK (10 million in 2014),

Due to the economic crisis and general austerity policies, some regulatory authorities have suffered cut backs in recent years.<sup>153</sup> Serious reductions of resources are problematic and may in the future negatively impact the independence of regulators. Still, on an overall level, regulatory authorities appear to be adequately or well-financed. Importantly, the Hungarian NMHH which had an annual budget of € 25.8 million in 2014 seems to be over-financed in view of having accumulated large budgetary reserves.

Furthermore, of relevance is also the situation in Latvia: the Latvian *Nacionālā elektronisko plašsaziņas līdzekļu padome* (NEPLP) published an announcement in 2014 in which it informed the public that it had requested an additional budget of more than € 100.000 for 2015 in order to effectively fulfill its missions. It stated that without the increase in funding, it would only be able to monitor one percent of all

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<sup>151</sup> The annual budget is not foreseen in the laws of Albania, Belgium (all Communities), Bulgaria, Czech Republic, Germany (public service broadcasting), Denmark, Estonia, Hungary, Ireland, Italy (where parts of the budget are nonetheless stipulated by law), Lithuania, Luxembourg, Latvia, Montenegro, Macedonia, the Netherlands, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

The annual budget is foreseen in the laws of Austria, Cyprus, France, Finland, Greece, Germany (*Landesmedienanstalten*), Spain, Finland, France, Greece, Croatia, Iceland, Malta, Poland.

<sup>152</sup> Albania (€ 800,000 in 2014), German-speaking Community of Belgium (€ 14,000 in 2014), Bulgaria (€ 614,000 in 2014), Finland (€ 789,000 in 2014 for audiovisual media services), Iceland (€ 190,000 in 2015), Lithuania (€ 724,000 in 2014), Luxembourg (€ 724,000 in 2015), Latvia (€ 475,500 in 2015), Montenegro (€ 921,600 in 2013), United Kingdom (Authority for Television On-Demand: € 705,000 in 2013).

<sup>153</sup> In their responses to the consortium's questionnaire, the two Belgian regulators (the *Vlaamse Regulator voor de Media* of the Flemish-speaking Community and the *Conseil Supérieur de l'Audiovisuel* of the French-speaking Community), the Cypriot *Αρχή Ραδιοτηλεόρασης Κύπρου*, the Czech *Rada pro rozhlasové a televizní vysílání*, the Dutch *Commissariaat voor de Media* and the Greek *Ethniko Symvoulío Radiotileorasis* the Spanish *Comisión Nacional de los Mercados y la Competencia*, and the Italian *Autorità per le Garanzie nelle Comunicazioni* explicitly acknowledge a reduction of their budgets as a direct consequence of the economic crisis. The Finish *Viestintävirasto* states that its budget might have to be reduced in the future due to the general economic recession.

broadcasters under its jurisdiction. In spite of NEPLP's apparent lack of resources, the Latvian Parliament did not raise the budget for 2015.

In sum, there is great disparity in the number of staff and the amount of annual budget of regulatory authorities. These have to be set in relation to the respective size of the national market for audiovisual media services and the number of providers operating in this sector. It appears that the level of staffing and financial resources is generally appropriate in view of the tasks carried out by regulatory authorities.

### *3.1.3. Funding*

The second criteria for the evaluation of the independence of the regulatory body concerns its funding. To examine whether the body is financially independent, a closer look at the kinds and sources of funding, the funding body and the involvement of different parties in setting the budget are necessary.

#### *3.1.3.1. Sources of funding*

As has been mentioned before, the regulatory bodies are typically not capable of generating their own resources. They rely, therefore, on external resources which are granted to them or which they are allowed to levy on a legal basis. In general, it can be said that the lesser the extent to which the granting body has a margin in deciding about its obligation to finance the body, the higher the degree of independence of the regulatory body is.

In this regard, a direct State funding which is not fixed in advance, at least if this is the only or predominant source, appears to be the least favourable option. However, in the vast majority of countries, an (at least partially) State-financed model is applied.<sup>154</sup> In many cases, all<sup>155</sup> or nearly all<sup>156</sup> financial resources of the regulatory body originate from the State budget. Only in few countries, regulatory bodies do not rely on funds from the State budget for their operations.<sup>157</sup> A small proportion of the regulatory body's total budget is made up of State funds in Italy (4.8%) and the UK (concerning OFCOM, 2%). Regulatory bodies in some countries are net-budgeted by the State, i.e.

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<sup>154</sup> Albania, Belgium (all Communities, of which the French and German-speaking rely on state financing to 100%), Bulgaria, Czech Republic, Denmark, Estonia, Spain Finland, France, Greece, Hungary, Iceland, Italy, Luxembourg, Latvia, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey and UK.

<sup>155</sup> Belgium (French and German-speaking Communities), Bulgaria, Czech Republic, Denmark, Estonia, France, Greece, Luxembourg, Slovakia, Spain (CAA).

<sup>156</sup> Latvia, Spain (CAC).

<sup>157</sup> Austria, Cyprus, Germany, Croatia, Ireland (state financing allowed under exceptional circumstances), Macedonia, Slovenia and UK (only for the self-regulatory bodies ASA and ATVOD).



they only get their deficit funded from the State budget, whereas any surplus generated is transferred to the State budget.<sup>158</sup>

Changes regarding this source of income that have occurred after the INDIREG study are limited to Cyprus (where State funding has ceased a few years after the establishment of the CRTA) and Lithuania (which switched from a fee-based to a predominantly State-budgeted model). In Macedonia, a first-time payment from the national budget in 2009 appears to have remained the only case when State funds were used to finance the regulatory body's work; they are not foreseen as a regular source of income of the body renamed Agency for Audio and Audio-visual Media Services.

As far as end-user licence fees are collected by the regulatory bodies, they may, in many cases, not be used directly by them, but must be transferred to the State budget, from where they then receive back part of the resources.<sup>159</sup> Direct funding from end-user licence fees is only foreseen in seven countries.<sup>160</sup>

Similarly, spectrum fees also contribute (directly or indirectly) to the regulatory bodies' budget in only seven countries.<sup>161</sup> Nearly no changes have occurred here in the past years.

In contrast, licence and authorisation fees paid by broadcasters make for the regulatory bodies' budget in a considerable number of countries.<sup>162</sup> In Ireland, 100% of the budget is gained from an industry levy imposed on providers on a cost-recovery basis. On the other hand, broadcasters' fees (collected exclusively from satellite providers) only amount to 2.4% of the budget in Italy. Since the publication of the INDIREG report, more countries have turned to a (partly) broadcaster-financed model.<sup>163</sup> In Luxembourg, a draft regulation introducing a provider tax from 2015 has recently been adopted.<sup>164</sup>

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<sup>158</sup> This is the case in Albania, Finland, Poland and Serbia.

<sup>159</sup> This is the case, for example, in Finland, Lithuania, Latvia and Poland.

<sup>160</sup> Albania, Austria, Belgium (Flemish Community, where end-user licence fees amount to 63% of the regulatory body's total budget), Germany (for the *Landesmedienanstalten* which draw between 59 and 99% of their funds from licence fees; regulatory bodies for the public service broadcasters obtain their share of the fees indirectly from the broadcasters themselves), Macedonia, Sweden (24% of the total budget) and UK (for the BBC Trust which gains less than 0.31% of the total fee revenues for the BBC).

<sup>161</sup> Albania, Belgium (Flemish Community, 42%), Spain (CAC only), Finland (30%), Hungary, Slovenia (54%) and UK (for *Ofcom*, which obtains a 57% grant-in-aid from the central government).

<sup>162</sup> Albania, Bulgaria, Cyprus, Spain (CAC only), Hungary, Ireland, Italy, Montenegro, Malta, Portugal, Serbia, Sweden, Slovenia, Turkey and UK (for *Ofcom*).

<sup>163</sup> Bulgaria, Montenegro, Sweden (as an additional source of income aside from state budget and end-user broadcasting licence fees) and Turkey.

<sup>164</sup> Règlement grand-ducal du 2 février 2015 fixant le montant et les modalités de paiement des taxes à percevoir par l'Autorité luxembourgeoise indépendante de l'audiovisuel en matière de surveillance des services de médias audiovisuels et sonores, Mém. A- N° 21, 10.02.2015, p. 238.

Revenues from fines imposed on regulated parties are a funding source in more than one third of countries, even though they usually only contribute a minor part to the overall budget of the regulatory body. Often, administrative fees, market surveillance or supervision fees or levies and providers' revenues are also foreseen as a source of financing.<sup>165</sup> Other sources include savings, the use of reserves and own property and interest rates.

Overall, changes to the funding schemes remained marginal. Only in a few countries, more significant changes were made. This includes Bulgaria, where end-user licence fees partly used to fund the regulatory body's work are now collected, and Lithuania, where funding has switched from a fee-based to a mainly State-funded model. In Cyprus and Macedonia, State funding has ceased.

### 3.1.3.2. Procedural rules concerning the establishment of the budget

In the same way that the mix of funding sources has an impact on the degree of financial independence, the process of drafting and adopting the regulatory body's annual budget is significant, too. Particularly in countries where the regulatory body is mainly financed by the State, its independence may additionally be affected negatively, if the same State body competent for granting the money is also the one having a decisive say on the adoption of the budget. On the other hand, it should be noted that a decision taken by democratically elected State organs can provide the budget with the highest democratic legitimation possible.

Most of the countries analysed have vested their Parliaments with the power to take the final decision on the regulatory body's annual budget.<sup>166</sup> In Croatia, the overall annual budget has been fixed by an Act of Parliament to a certain share of market players' annual revenues.<sup>167</sup>

In some countries, the regulatory body itself has the last say on the annual budget.<sup>168</sup> It needs to be noted, however, that while in these countries, the regulatory body can

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<sup>165</sup> This is the case, for instance, in Albania, Austria, Cyprus, Germany, Finland, Croatia, Hungary, Italy, Latvia, Macedonia, Netherlands, Portugal and Turkey. In Italy, the system is currently under review following a CJEU judgment declaring the previous model partly invalid (see CJEU, Judgment of 18 July 2013, case no. C-228/12 – Vodafone Omnitel et al., ECLI:EU:C:2013:495)

<sup>166</sup> Albania, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain (CAC/CAA: regional Parliaments), Finland, France, Croatia, Hungary, Iceland, Lithuania, Luxembourg, Latvia, Malta, Montenegro, Poland, Portugal (jointly with regulatory body, only as far as the State's share in the regulatory body's budget is concerned), Romania, Serbia, Sweden, Slovakia, Turkey (as far as the State's share in the regulatory body's is concerned).

<sup>167</sup> The budget is set to 0.5% of the total annual gross revenues gained by market players from the provision of relevant media services in the previous year; cf. Art. 66(7) *Zakon o elektroničkim medijima* (Law on Electronic Media) of 11 December 2009, Official Gazette 153/09, 84/11, 94/13, 136/13; a consolidated version of the law is available at: <http://www.zakon.hr/z/196/Zakon-o-elektroni%C4%8Dkim-medijima>

<sup>168</sup> Austria (legal caps apply; cf. § 35(1) *KommAustria* Act), Germany, Ireland, Italy (adjusted by Ministry of Economy, if necessary, Macedonia, Portugal (jointly with Parliament), UK (Ofcom; however, a spending cap set by HM Treasury has to be observed).

ultimately decide over how the money is spent, in some of these, it has no decisive influence on the amount of financial means at its disposal. In Germany and Macedonia, for instance, the total budget depends, to a great extent, on the revenues gained from the end-user broadcasting contribution and broadcasting licence fees, respectively, which, in turn, depend on other external factors, such as the number of households/service providers liable to pay the contribution or fee, as well as their level (which is fixed by the legislator). Also in Italy, the budget relies, to a considerable degree, on annual contributions paid by operators, and the Ministry of Economy is entitled to adjust the budget drafted by AGCOM, if necessary. In the UK, Her Majesty's Treasury sets spending caps valid for three-year periods. The Portuguese regulator, ANACOM, can adopt the budget only jointly with Parliament.

In a few countries, it is the competent ministry – often the Ministry of Finance – or the Government as a whole that decides on the regulatory body's annual budget.<sup>169</sup>

Even though the regulator may not be in the position of taking the final decision over its annual budget, it is involved in the process in all countries analysed, mostly in the drafting phase. As regards the other bodies involved in the budget-making process, a wide variety of models can be observed: sometimes, apart from the regulator, only the executive branch (either a single minister or the Government as a whole) participates in the budget-making<sup>170</sup>, sometimes only the legislator<sup>171</sup>. In most countries, however, both Government and Parliament are involved.<sup>172</sup> No direct involvement of any other body than the regulator is foreseen in Austria (although market players have to be consulted) and Germany.

Changes in the budget-making process have remained marginal. New laws in Albania and Lithuania now assign the decisive role to the Parliament, whereas before it was the regulator (LRTK in Lithuania) or the Government (Albania) who had the final say. In Iceland, the regulator is now formally involved in the budget-drafting process. The Montenegrin Ministry of Finance now has an advisory role, as it is asked for opinion (which may also include adjustment proposals), before the draft budget is forwarded to the Parliament for final decision.

It remains vastly unclear to what extent third parties have a *de-facto* influence on the drawing up of the budget. Some external factors on which the total budget amount might depend when the financial means come, at least in part, from fees and other levies, have already been mentioned above. Other influences are difficult to spot.

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<sup>169</sup> Greece, Netherlands, Slovenia. For the role of the Italian and UK government in the budget-making process, see the previous paragraph.

<sup>170</sup> Greece, Netherlands, Slovenia. For the role of the Italian and UK government in the budget-making process, see the penultimate paragraph. In Greece, the President of the Parliament receives a copy of the budget plan.

<sup>171</sup> Croatia, Hungary, Ireland, Lithuania, Macedonia (Parliament can only review and demand a new budget within 60 days), Turkey.

<sup>172</sup> Albania, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Iceland, Luxembourg, Latvia, Malta, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia. In Serbia, however, the Government is only involved if State funds are needed.

Although *de-facto* third party influence has been confirmed only in a minority of country reports<sup>173</sup>, it appears unlikely that in the other countries such influence can be completely ruled out. Even where no such influence could be found today, this may only mean that no such case has become known to the author or the public at large so far. On the other hand, in some countries, only a rough assessment as to the intensity or the parties that appeared the most likely or most widely known to influence budgetary decisions was given. More details were only provided in one case: in Ireland, the BAI was forced to revise its industry levy order as a consequence of the financial crisis and increasing market pressure.

### **3.1. Effective functioning**

#### *3.1.1. Adequate powers*

The range of powers accorded to regulatory authorities can be seen as another indicator of the latter's independence. More precisely, regulatory bodies need to be equipped with a minimum of powers (i.e. adequate powers) to ensure their independence as well as the effective exercise of their activities. In this report it is generally distinguished between regulatory, monitoring and sanctioning powers. Regulatory powers mean the power to act in certain fields of regulation and take binding decisions against third parties. Monitoring powers denote the power to exercise an appropriate level of oversight with a view to checking compliance with the law. In order to guarantee effective enforcement of the law and take action against providers whose services are not in conformity with legal requirements, sanctioning powers are given to regulatory authorities. In addition, the existence of complaints-handling procedures is examined.

##### 3.1.1.1. Regulatory powers

Different types of regulatory powers can be distinguished. These are policy setting and policy implementing powers as well as specific decision-making powers. The latter are taken with regards to third parties (individually or collectively) and are binding on them. These regulatory powers can be limited by the powers of other bodies to overturn the regulators' decisions and to give instructions.

###### 3.1.1.1.1. General policy setting powers

In 15 countries, regulatory authorities possess policy setting powers.<sup>174</sup> More precisely, ten regulatory bodies of EU Member States and five regulatory authorities of candidate countries are equipped with "the power to decide on the general orientation of the rules

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<sup>173</sup> Belgium (all Communities, to a "limited" degree), France (to a high degree), Hungary (influence from political parties), Ireland, Italy, Poland and Sweden (to a low degree).

<sup>174</sup> Albania, Estonia, Spain, Croatia, Hungary, Ireland, Latvia, Luxembourg, Montenegro, Macedonia, Romania, Serbia, Slovenia, Turkey, the United Kingdom. By contrast, national regulators in Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain (regional regulators CAC and CAA) Finland, France, Germany, Greece, Iceland, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal, Sweden, Slovakia are not equipped with policy setting powers.

to be followed (for instance the power to decide on the amount of quotas)”.<sup>175</sup> In most of these countries, the policy setting power of regulatory authorities entails the administration of the licensing procedure and the management of the frequencies and other network capacities.<sup>176</sup> In Spain (CNMC), Hungary (NMHH), Slovenia (AKOS) and the UK (OFCOM), where converged regulators have been established, such policy setting powers are common due to the regulators’ activities in both sectors, audiovisual media services and telecommunications.

In several countries, policy-setting powers are associated with regulator’s involvement in the legislation making process and the drawing up of the national strategy.<sup>177</sup> It is, however, questionable to what extent the latter can be considered policy-setting as it is contingent on the freedom of the regulator and the respective national context. Where the regulatory body simply specifies the policy goals set by the national government, this should be considered policy-implementing powers. Where the regulatory body, however, is free to develop more clearly objectives and formulate concrete proposals in its annual strategy, this is considered to be policy setting powers.

Moreover, policy-setting powers are typically limited to certain fields of regulation. In Ireland, for instance, the Broadcasting Authority of Ireland is entitled, among others, to draw up advertising codes and regulate the right of reply. In Latvia, the NEPLP, among others, determines the remit of public service broadcasters and in Turkey, the RTÜK sets out the broadcasting standards including the rules on commercial communications and age labelling.

In contrast to the INDIREG study, the regulatory bodies of four additional countries have been endowed with policy setting powers. In Estonia<sup>178</sup> and Luxembourg, where the national regulatory frameworks have been substantially altered, the regulators have gained the power to set policy objectives. Similarly, in Spain and Hungary, where institutional reforms have also been effectuated in 2013 and 2010 respectively, regulator’s remits have been broadened to include policy-setting powers.

In a great majority of countries where the regulatory authorities have policy-setting powers, these are also used in practice. Yet, the Spanish CNMC does not seem to have employed this power yet which may be explained by the fact that it was only established in June 2013.

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<sup>175</sup> INDIREG Study, table 9 and Final report p. 216.

<sup>176</sup> Estonia, Spain, Hungary, Ireland, Luxembourg, Montenegro, Serbia, the United Kingdom. In Serbia, the regulator’s involvement in the licensing process is considered policy implementing power.

<sup>177</sup> Albania, Croatia, Latvia, Macedonia, Romania, Turkey.

<sup>178</sup> Previously, the Estonian Ministry of Culture, which was considered as a regulatory body by the INDIREG study, exercised policy setting powers.

#### 3.1.1.1.2. General policy implementing powers

In all countries, national regulatory bodies are entrusted with policy-implementing powers implying the power to apply and enforce the obligations set out in national laws (e.g. monitor the rules concerning audiovisual commercial communication and interpret provisions in individual cases).<sup>179</sup>

In comparison to the INDIREG study, changes have occurred in only a few countries. The powers of the Czech RRTV have been refined by the amendment of the Czech Radio and Broadcasting Act of 2010 expanding RRTV's competences in the field of media literacy. RRTV has henceforth been competent to publish opinions and draft proposals contributing to the media policy of the Czech government in particular with a view to enhancing media literacy. In addition, the modification of the Czech law included a clarification that RRTV is competent to issue opinions in all matters covered by its mandate. The possibility to set forth its activities in opinions and thereby give guidance to providers constitutes an important means to implement the country's media law policy.

Furthermore, policy-implementing powers have been transferred to the TJA of Estonia which inherited this function from the Ministry of Culture in 2008. The TJA operates as an administrative authority under the umbrella of the Estonian Ministry of Economic Affairs and Communications. The new Luxembourgish regulatory authority ALIA was also endowed with policy implementing powers when it was created in August 2013. This constitutes a significant change from the previous design of the regulatory scheme and can be considered a positive development concerning the independence and effective functioning in this country.

Although all regulatory authorities are formally entrusted with policy-implementing powers, some do not appear to have actually used them. To date, the Danish and Luxembourgish regulators do not seem to have exercised policy-implementing powers. Similarly, in the Czech Republic, Spain, Germany (with regards to public service broadcasters) and Croatia, it is unclear whether regulators have made use of such powers.

#### 3.1.1.1.3. Binding decisions on third parties

The power to take decisions, which are binding on third parties<sup>180</sup> such as service providers, is attributed to all national regulatory bodies.<sup>181</sup> This entails the power to

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<sup>179</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Lithuania, Latvia, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>180</sup> The power to take binding decisions on third parties was defined by the INDIREG study as the "power to take in a specific case a decision binding on specific operators". See INDIREG study, table 9 and Final report p. 218.

<sup>181</sup> Third-party binding decision-making powers are held by the national regulators of Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland,

take decisions relating, for instance, to specific aspects of licensing but excludes sanctioning decisions which are analysed separately.

Compared to the INDIREG study, the regulatory bodies of Iceland (where the Media Act was amended in 2011) and Luxembourg (where a new regulator was set up) have gained the power to take binding decisions on third parties. While the Slovenian Ministry of Culture was previously authorized to take decisions vis-à-vis third parties, today, the Slovenian AKOS enforces such decisions. In Estonia, this power is no longer exercised by the Ministry of Culture but has been shifted to the TJA of Estonia. To this end, these regulatory bodies can take decisions more independently, which allows them to effectively monitor compliance with and take steps to enforce the law.

Since the INDIREG study, only the Czech, Danish and Spanish (neither the federal CNMC nor the regional regulators CAC and CAA) regulators have not employed the power to take decisions (other than sanctioning decisions), which are binding on third parties. All other regulatory authorities have taken specific decisions affecting market operators.

#### 3.1.1.1.4. Limitations of the regulatory powers

In the following we will focus on the limitations of the regulatory powers. Such limitations arise from the power of other bodies to overturn the decisions of the regulatory authorities and to give them instructions. However, the power of courts to overturn the regulators' decisions is not subject of the analysis in this section but will be examined further below in the chapter on judicial review.

The regulatory powers of 21 regulators are not limited. No other body has the power to overturn their decisions or to give instructions.<sup>182</sup> For the regulator of Luxembourg there has been a change, since the Minister for Communication and Media used to be able to give instructions, but is not able to do so any longer. In this regard, for AKOS in Slovenia there has been the same change, as the Ministry of Culture used to have the power to give instructions, but does not have that power any longer.

The regulatory powers of four regulators are limited by the power of other bodies to overturn their decisions as well as by the power of other bodies to give instructions: all Communities in Belgium, and the regulator from Denmark. The regulatory power of CvDM of the Netherlands is only limited by the power of other bodies to overturn its decisions, but no other body has the possibility to give instructions to the regulator. The decisions of the regulator from the Flemish-speaking Community of Belgium, from Denmark and the Netherlands can be overturned by a Ministry, while the

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France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Lithuania, Latvia, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>182</sup> Austria, Croatia, Czech Republic, Germany, Denmark, Spain (CNMC, CAC, CAA), Greece, Hungary, Lithuania, Luxembourg, Latvia, Montenegro, Macedonia, Poland, Portugal, Serbia, Slovakia, Slovenia, Turkey.

decisions of the French-speaking Community and the German-speaking Community of Belgium can be overturned by the Government. Limitations to that power to overturn the decisions of the regulator exist only in the German-speaking and French-speaking Community of Belgium and in Denmark.

The regulatory powers of twelve regulators are only limited by the power of other bodies to give instruction, but no other body has the power to overturn their decisions.<sup>183</sup> The regulatory powers of the NAC in Romania have been limited, since the Parliament is now able to reject the annual activity report.

Seven regulatory authorities get instructions by a ministry.<sup>184</sup> The Minister for Communication and the Media can no longer give instructions to the regulator in Luxembourg, and the Ministry of Culture can give no instructions to AKOS from Slovenia anymore. Six regulators can be subjected to instructions from the Government.<sup>185</sup> Three regulators receive instructions from the Parliament,<sup>186</sup> while the Cypriot Parliament can no longer give instructions to the Radio and Televisions Authority. There is no limitation of the power to give instructions for the Government of the Flemish-speaking Community in Belgium, the Ministry in Ireland, and the Parliament in Romania.

Overall there have only been few changes regarding the limitations of the regulatory powers of the regulatory authorities. The power to give instructions to the regulatory authority has been introduced in Romania, but abolished in Luxembourg and Slovenia.

#### 3.1.1.2. Monitoring powers

It is essential for national regulatory bodies to have at their disposal the power to monitor service providers established in the country. Thereby, regulators can effectively ensure that providers abide by the law and can take corrective action if this is not the case. Different types of monitoring can generally be distinguished such as systematic and *ad hoc* monitoring. Both of these types are initiated by the regulator. Complaints-based monitoring on the other hand depends on the active involvement of the public. In addition, the power to request information from providers is crucial for the clarification of contentious issues.

The scope of monitoring powers is also taken into account. National regulatory authorities may possess extensive monitoring powers for all sectors covered by their remit. Alternatively, such powers may be constrained to certain areas such as the promotion of European works (e.g. in form of quotas), the protection of minors or audiovisual commercial communications.

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<sup>183</sup> Bulgaria, Cyprus, Finland, France, Iceland, Ireland, Italy, Luxembourg, Malta, Romania, Sweden, United Kingdom.

<sup>184</sup> Cyprus, Denmark, Finland, Iceland, Ireland, Sweden, United Kingdom.

<sup>185</sup> Albania, Belgium (all Communities), Sweden, United Kingdom.

<sup>186</sup> Italy, Malta, Romania.



#### 3.1.1.2.1. Systematic monitoring

Systematic monitoring entails the continuous supervision of providers operating on the national market (under the jurisdiction of that State) on the basis of a set of criteria or pre-determined methodology.<sup>187</sup> In contrast to other types of monitoring, systematic monitoring is the most intensive, laborious and time-consuming from the perspective of regulators. It allows for a detailed oversight of service providers and the rapid detection of irregularities or infringements of the law.

Except for the Belgian regulator of the German-speaking Community, the Icelandic and Swedish regulators, all other national regulatory bodies conduct systematic monitoring.<sup>188</sup> Interestingly, the Albanian AMA seems to monitor in a systematic manner only those providers established in the capital city whereas operators located elsewhere in the country are monitored by means of spot checks and other ad hoc methods. Such differentiation seems at first glance to constitute unequal treatment but may be justified by national particularities (e.g. the large number of major providers established in the area of the capital city).

Importantly, in some countries, the scope of systematic monitoring activities is restricted to certain areas. The Austrian regulator carries out monitoring only with respect to the rules on promotion of European works and those concerning audiovisual commercial communication. The Spanish regional regulatory body CAA concentrates its monitoring activities on the rules regarding minors. In Serbia and Turkey, the national legal orders do not provide for legal obligations promoting the production and distribution of European works. As a result, the monitoring activities in these countries merely encompass the fields of audiovisual commercial communication as well as protection of minors. What is more, the Serbian regulatory body only resorts to systematic monitoring techniques during election periods.

Interestingly, where co- or self- regulatory models have been established, monitoring activities are shared between different regulatory authorities. In the Netherlands, the *Commissariaat voor de Media* supervises advertising standards and the norms promoting European works, while *NICAM* is responsible for overseeing provider's compliance with the provisions protecting minors in audiovisual media services. By the same token, the British co-regulators, the *Advertising Standards Authority* (ASA) and the *ATVOD*, monitor the advertising market and the application of the rules to on-demand service providers respectively.

In comparison to the *INDIREG* study, new powers for systematic monitoring have been attributed to the regulatory authorities of Estonia (as previously held by the

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<sup>187</sup> *INDIREG* study, Final report, p. 218.

<sup>188</sup> Albania, Austria, Belgium (Flemish- and French-speaking Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain (federal and regional regulatory bodies), Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Latvia, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, Turkey, United Kingdom.

Ministry of Culture), Luxembourg (where a new regulator has been founded), Romania and Slovenia.

Although the regulatory authorities are formally empowered to carry out systematic monitoring, such does not seem to take place in Denmark. Whereas the INDIREG study indicated that the Croatian AEM did not employ the tool to monitor systematically, this appears to have changed and AEM undertakes such monitoring.

#### 3.1.1.2.2. Ad-hoc monitoring

Apart from systematic monitoring, less structured or ad-hoc monitoring techniques such as random spot checks are used by national regulatory bodies to gather data and evaluate providers' compliance with the law. Ad-hoc monitoring allows for unannounced screening/checking of services and the threat/possibility of such spot checks incites providers to keep in line with legal obligations on a continuous basis. As systematic techniques of monitoring are not all-encompassing, ad-hoc monitoring is an important technique, which ideally supplements the former.

All regulatory authorities except for the Spanish regulators (at regional level) are granted *ad hoc* monitoring powers.<sup>189</sup> This method of supervision was newly introduced in Albania (where the law was significantly amended in 2013 extending the regulator's monitoring functions), Estonia (where a transferral of regulatory power has taken place in 2013) and Iceland (where a new regulatory body was established in 2011) compared to the time of the INDIREG study. Ad-hoc monitoring is actually performed in all countries except for Cyprus where the regulatory body only rarely seems to employ this tool and instead appears to rely more heavily on complaints brought about by the public.

As with systematic monitoring, *ad hoc* monitoring is limited to certain sectors in some countries. The Cypriot *Αρχή Ραδιοτηλεόρασης Κύπρου* as well as the Austrian *KommAustria* exercise this power only with regards to the rules on audiovisual commercial communication and the protection of minors.<sup>190</sup> Similarly, in Serbia and Turkey where no legal obligations exist to promote European works, the scope of *ad hoc* monitoring powers consequently does not cover this area. Moreover, co- or self-regulatory bodies such as *NICAM* in the Netherlands or the *ASA* and *ATVOD* in the United Kingdom may exclusively or jointly (with the national regulator) perform this function.

With regards to both ad-hoc and systematic monitoring, several observations are noteworthy. In Slovenia, for instance, AKOS reverts to ad-hoc monitoring methods

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<sup>189</sup> Ad-hoc monitoring powers are granted to the national regulatory authorities in Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Lithuania, Latvia, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>190</sup> In Austria, the power to do ad-hoc monitoring in the areas of commercial communication and protection of minors is further limited with respect to public service broadcasting.

when particular problems arise. This allows for more flexible oversight. Moreover, a small group of regulators uses external services and data compilation agencies in the process of monitoring.<sup>191</sup> The “outsourcing” of data gathering may be useful where the regulator’s resources (in terms of personnel) are limited. Yet, such services may also turn out to be relatively costly in the long run. In France and Italy, regional committees are charged with the monitoring of regional or local service providers, thereby exonerating the national regulators to a certain extent. Interestingly, in Italy, Serbia and Slovakia, the regulatory bodies seem to be equipped with the necessary facilities to record all programmes themselves. The Turkish RTÜK is even entitled to set up a recording system in the studio of a broadcaster.

Moreover, some regulatory authorities seem to prioritize certain instruments of monitoring or apply different ones in different situations. The Bulgarian CEM appears to supervise more actively during election periods and otherwise resorts to more indiscriminate monitoring techniques. Furthermore, the Hungarian NMHH specifies the services, which will be systematically monitored in its annual work plan. In France, the CSA appears to monitor broadcasting and radio services on a more continuous basis in comparison with non-linear provision of content. The Italian AGCOM monitors services more intensively following complaints by the public.

In many countries, the legal provisions outlining regulators’ monitoring powers are complemented by provisions requiring providers to keep records and archive programmes for certain time periods.<sup>192</sup> If cases arise or are otherwise brought to the attention of regulators, the latter may enquire about such recordings as part of their information collection powers.

#### 3.1.1.2.3. Information collection powers

Apart from monitoring techniques, regulatory authorities have other powers at their disposal, which permit them to effectively act on and react to individual cases. Hence, the power to collect information from service providers, whereby certain points may be clarified, constitutes an important tool for regulators.

The regulatory bodies of all countries are endowed with information collection powers.<sup>193</sup> These commonly cover all areas and are exceptionally restricted to certain

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<sup>191</sup> Albania, Czech Republic, Spain (federal and regional regulatory bodies), Croatia and Italy.

<sup>192</sup> This aspect was not explicitly covered by the scope of this study. The national correspondents of Austria and the French-speaking Community of Belgium referred to it in their responses to the questionnaire, but it needs to be pointed out that the above mentioned list therefore is expected to be incomplete.

<sup>193</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain (CNMC), Estonia, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

sectors in Serbia and Turkey where national laws do not stipulate quota requirements and thus no corresponding information collection powers.<sup>194</sup>

In Slovenia, the Ministry of Culture has preserved information collection powers with respect to the enforcement of the quota rules, exercising this power in parallel with AKOS. More precisely, it is the Ministry which reports to the European Commission, decides on exemptions from the quota requirements, and may request operators to provide additional documentation.

#### 3.1.1.2.4. Monitoring only after complaints

Another form of monitoring involves the general public including viewers or users of audiovisual media services, competing service providers or other stakeholders. Due to the plethora of services and the vast amounts of content made available, regulatory bodies are dependent on collaboration with the audience and market. Hence, a great majority of regulators relies on public complaints and has made available special complaint forms on their websites facilitating the handling of complaints.<sup>195</sup> In Lithuania, where the law does not provide for a legal basis, the regulator nonetheless relies on this instrument. This reflects the significance of complaints-based monitoring.

In a few countries, regulatory bodies become active only after a complaint has been filed. This is, for instance, the case in Austria (with regards to the enforcement of the rules concerning audiovisual commercial communication and the protection of minors in public service broadcasting), in Germany (in relation to public service broadcasting), in the Netherlands (with respect to NICAM in the area of protection of minors) and the United Kingdom (regarding public service broadcasting).

Moreover, complaints-based monitoring is increasingly being used by some national regulatory bodies. In several countries<sup>196</sup>, this type appears to be the predominant mode of monitoring the market, while the *Medienrat* of the German-speaking Community relies entirely on complaints lacking an appropriate level of staff as well as any facilities to scrutinize services by itself. In brief, the large majority of national regulatory authorities is equipped with broad monitoring powers. Regulators either conduct systematic or *ad hoc* monitoring or more commonly use both techniques simultaneously. In addition, problematic or controversial issues are brought to the attention of regulators by the public through well-established systems of complaints. They are also endowed with information collection powers.

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<sup>194</sup> In Germany, the Broadcasting Councils of public service broadcasters do not have information collection powers regarding the set of rules promoting European works.

<sup>195</sup> A precise number of countries cannot be given as the wording of table 10 of the INDIREG study was phrased in a manner which lent itself to misunderstandings asking for “monitoring *only* after complaints”. Some correspondents seemed to ignore the adjective “only” while others indicated that the regulatory body generally performs monitoring upon complaints.

<sup>196</sup> French-speaking Community of Belgium, Cyprus, Denmark, Greece and Sweden.

### 3.1.1.3. Sanctioning powers

In order to effectively enforce legal requirements, national laws provide for a range of sanctions. These may be imposed by national regulators which have a margin of discretion regarding the choice of sanction. When determining the type of sanction, factors such as the nature of the infringement, its seriousness and providers' previous conduct may be taken into account. Typically, national laws outline a graduated sanctioning scheme encompassing among others warnings, fines, orders requiring the publication of decisions in a media outlet of the infringing provider and suspension or revocation of licenses. In addition, the law may envisage penalty payments in case of non-compliance with a sanctioning decision. A staggered system of sanctions enhances flexibility and allows national regulators to appropriately react to violations of the law. It may also incentivize providers' respect of legal obligations and stimulate (or at least not impede) a relationship of trust between operators and regulators provided that it is applied uniformly and coherently. It is necessary that the imposition of sanctions follows clear and transparent guidelines and is accompanied by procedural safeguards protecting providers' rights to defence including the possibility to ask for judicial review of the sanctioning decision.<sup>197</sup>

#### 3.1.1.3.1. Warning

The least intrusive sanction constitutes a warning, which determines that a provider has breached the law. It represents a "formal objection" by the regulatory authority and demands that the provider ends the infringement.<sup>198</sup> As the first of a series of sanctions, a warning implies the imposition of heavier sanctions if the provider does not rectify its conduct and bring it into line with the law.

This type of sanction is available to all national regulatory authorities.<sup>199</sup> In comparison to the INDIREG study, since the creation of a new regulator in Luxembourg in 2013, this power is firmly vested in the ALIA.<sup>200</sup> Similarly, changes in the regulatory framework of Estonia have led to the transferral of sanctioning powers from the Ministry of Culture to the TJA.

In general, regulatory bodies are endowed with sanctioning powers in all fields of regulation. Yet, sanctioning powers may be constrained to certain areas. This is the case in Greece, Iceland, Romania, Sweden and Turkey where the regulators are not

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<sup>197</sup> See also the analysis of complaints handling procedure (3.1.1.4), transparency requirements (3.3.2.) and judicial review (3.3.3.) in this report.

<sup>198</sup> INDIREG study, Final report, p. 220.

<sup>199</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>200</sup> Previously, sanctioning powers were mainly attributed to the SMC, a government service unit attached to the Ministry responsible for the media). The SMC ensured the implementation of the government's audiovisual policy. In this respect, the SMC also monitored compliance with advertising standards. To this end, the SMC was vested with a range of different types of sanctions.

empowered to sanction providers for non-observance of the rules promoting European works including the setting of quotas. The Spanish regional body, the CAA has sanctioning powers only for the provisions protecting minors.

Warnings are frequently used in practice by all regulatory bodies except in the German-speaking Community of Belgium where investigations by the *Medienrat* have never led to the imposition of sanctions so far. Furthermore, no information is available with regards to the Estonian TJA and the Spanish CAA.

#### 3.1.1.3.2. Fines

Another type of sanction constitutes the imposition of fines in form of lump sums. This power is granted to all regulatory bodies with the exception of Denmark and Montenegro.<sup>201</sup> The Finish FICORA and the Swedish *Myndigheten för radio och tv* are entitled to impose penalty payments as well as conditional fines. Conditional fines are enforceable if the provider does not bring the infringement to an end within a reasonable period set by the regulators. Importantly, the regulatory authorities of Luxembourg, Macedonia and Slovenia have been strengthened by awarding them the power to fine service providers. In practice, almost all regulatory authorities have made use of the power to fine service providers during the past five years.<sup>202</sup>

In a number of countries, the imposition of fines is restricted to certain pre-determined areas of regulation. The regulatory bodies of Austria, Estonia, Greece, Iceland, Serbia and Turkey are competent to impose fines only for breaches of the provisions concerning commercial communication and protection of minors. Moreover, the mandate of the Spanish regional CAA solely covers the imposition of fines for violations of provisions relating to minors. In a similar vein, ATVOD and the ASA, the two British co-regulatory bodies active in certain fields, are not mandated to impose fines themselves but may refer a case for consideration of fines to OFCOM. In addition, several national laws provide for different amounts of fines for different areas.<sup>203</sup>

Furthermore, fines may also be differentiated by the type of provider. The Hungarian law enumerates different media outlets<sup>204</sup> taking into account their position on the

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<sup>201</sup> The power to impose fines is granted to the regulatory bodies of Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Estonia, Spain, France, Finland, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>202</sup> The Medienrat of the German-speaking Community of Belgium, the Estonian TJA as well as the Serbian RBEM do not seem to use the power to impose fines. Similarly, the Luxembourg ALIA which was only established in mid-2013 has not yet fined service providers. By contrast, the Broadcasting Authority of Ireland has employed this power in a case of 2009 and the Croatian AEM as well as the Macedonian AVMU have also relied on this power during the previous years.

<sup>203</sup> Bulgaria, Czech Republic, Spain, Greece, Italy, Lithuania, Macedonia, Portugal, Serbia, Slovakia.

<sup>204</sup> The Hungarian law explicitly refers to linear and non-linear audiovisual media service providers with significant market power, other broadcasters, providers of nation-wide newspapers, weekly

national market and market power. Similarly, the Polish, Slovenian and Slovak legislation refer to broadcasting<sup>205</sup> and on-demand services. Legislation in Estonia, Montenegro and Serbia differentiates between natural or legal persons outlining different lump sums. The structure of businesses operating on the market for audiovisual media services is also acknowledged by the Slovenian law which entitles the AKOS to impose fines not only on the provider of a service but also on the natural person who has editorial responsibility for the contested programme.

In general, national laws specify the amount of fines by stipulating a range or indicating a maximum sum of money. In a few countries fines are calculated as a percentage of providers' annual turnover or other reference amounts.<sup>206</sup> In several countries, different amounts are due depending on the area of law violated. Moreover, the amounts which can be levied/collected by national regulators have been modified in some countries mostly resulting in potentially higher fines.<sup>207</sup> By the same token, the method for calculating fines has been altered in a few countries in comparison to the findings of the INDIREG study.<sup>208</sup>

#### 3.1.1.3.3. Publication of decisions in the media

The range of sanctions available to national authorities extends to the power to order service providers to publish decisions in their media outlet(s). At first glance, this sanction seems less costly for service providers when compared to the payment of fines. Nonetheless, it may be intrusive on the provider's editorial decisions depending on the conditions outlined by the regulator for the announcement. To inform an audience (of potentially millions of viewers) about an infringement committed by the provider may have considerable adverse effects, for instance, on the provider's reputation. Thus, this power is an important "supplementary" sanction at the disposal of regulatory bodies.

Other than warnings and fines, which are outlined in all national laws with very few exceptions, the sanction to order publication of decisions in the media is not provided by quite as many countries. Still, a great majority of regulatory authorities are

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print media outlets like newspapers and magazines, providers of online press products and intermediary service providers.

<sup>205</sup> Legislation in Slovakia also refers to IPTV as a category of broadcasting.

<sup>206</sup> In the French-speaking Community of Belgium, fines are between € 250.00 and three percent of providers' annual turnover. Similarly, in France, the regulatory body may impose a fine of maximum three percent of providers' annual turnover. In Poland, the law differentiates between different lump sums for different kinds of providers. Broadcasters may be fined up to 50 percent of the annual frequency fee or a fine of up to ten percent of the revenues generated by the broadcaster in the preceding fiscal year. On-demand service providers may have to pay an amount of up to 20 times the average monthly remuneration typical for the sector. In Turkey, fines are calculated on the basis of the revenue generated from commercial communication during the preceding month and may amount between one and three percent but may not be less than 10000 Turkish lira.

<sup>207</sup> Albania, Bulgaria, Cyprus, Spain, Hungary, Latvia, Poland, Slovakia, Turkey.

<sup>208</sup> Montenegro, Poland and Turkey.

empowered to demand publication of their decisions.<sup>209</sup> However, this power is not given to the regulators in Albania<sup>210</sup>, Estonia, the regional regulatory body CAA in Spain, Croatia, Lithuania, Macedonia, the Netherlands, Poland and Slovenia. In comparison to the INDIREG study, this type of sanction is now available to the regulatory bodies in Iceland and Luxembourg but no longer granted to the regulator in Macedonia.

In countries where this sanction is set forth in national laws, it may be limited to certain regulatory areas. Hence, in Austria, it only applies to the regulation of European works (“quotas”) and audiovisual commercial communication.<sup>211</sup> In Germany, Greece, Iceland and Serbia, this power is prescribed for the rules on audiovisual commercial communication and the protection of minors while it is only envisaged for the enforcement of the rules on protection of minors in Italy, Sweden and Slovakia.

The power to order announcements has not been exercised in a number of countries during the past five years.<sup>212</sup> This fact may underline the “complementary” character of this type of sanction which seems to be used less often in practice in contrast to warnings and fines.

#### 3.1.1.3.4. Suspension/revocation of license

The most severe sanction (apart from, e.g. imposing the maximum fine prescribed by law) constitute the suspension of a programme or service or even the revocation of the license. The latter solely applies in the context of broadcasting for which commonly a license is required. The former is applicable for both linear and non-linear services. More in particular, providers of on-demand audiovisual media services may have to temporarily suspend the transmission of individual programmes or the entire service or may even be barred from exercising the activity. To this end, this type of sanction is the most serious as it extensively intrudes into providers’ freedoms to conduct business. Thus, this sanction is usually “reserved” for grave and repeated violations of the law and is typically considered as the *ultima ratio*, the last resort.

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<sup>209</sup> Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain (CNMC at federal level and CAC at regional level), Finland, France, Germany, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Luxembourg, Montenegro, Malta, Portugal, Romania, Serbia, Sweden, Slovakia, Turkey, United Kingdom. According to several country correspondents, publication of decisions may be ordered in Cyprus, Germany, Greece, Italy and Montenegro whereas the regulatory bodies in their responses to the questionnaire of the consortium are mute on this sanctioning tool.

<sup>210</sup> The Albanian AMA nonetheless appears to have certain powers in this field. More precisely, the complaints council (which has not yet been established at the time of the drafting of this report) may require service providers to publish its conclusions under certain conditions. Similar powers are given to the complaints council in relation to the right of reply.

<sup>211</sup> With respect to public service media in Austria, the power to order publication of decisions in the media is limited to the areas of audiovisual commercial communication and protection of minors.

<sup>212</sup> Albania, German-speaking Community of Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Germany, Iceland (no information available), Latvia, Luxembourg, Serbia (there were cases mentioned in the INDIREG study), Turkey.



The power to suspend a service or revoke a license is attributed to all regulatory bodies except for one of the regional regulators in Spain (CAA), the Finish FICORA, the Macedonian AVMU and the Swedish *Myndigheten för radio och tv*.<sup>213</sup> The Broadcasting Councils of the German public service broadcasters also do not have the means to suspend or withdraw licenses as the number of programmes for the public service broadcasters are assigned by the broadcasting law (*Rundfunkstaatsvertrag*) in the context of the definition of their remit. The powers of the regulators of Luxembourg and Romania have been expanded to include this power in their current mandate compared to the situation at the time of the INDIREG study.

An important limitation to this power is the fact that regulators of a number of countries are only permitted to exercise this function in specific areas. In Austria, the power to suspend or revoke licenses is limited to violations of the rules concerning audiovisual commercial communication. In the Czech Republic and Slovakia, it is constrained to the provisions regarding minors and in Romania to the rules promoting European works. Moreover, in Germany, Greece, Iceland, Serbia and Turkey, this power is not prescribed for sanctioning infringements of the quota rules whereas in the Netherlands, it is not applicable to the rules protecting minors.

Importantly, other requirements may have to be respected when regulatory authorities decide to suspend or revoke licenses. The exercise of this power by the Luxembourgish ALIA is contingent on the involvement of the Minister responsible for the media. Similarly, the decision to suspend or bar a service is subject to a court order for instance in Cyprus and Sweden. The inclusion of these instances (be it the executive or the judiciary) in the procedure including an independent review of the decisions, enhances the accountability of regulatory authorities and guarantees due process rights of stakeholders.

Within the previous five years, the power to suspend or revoke a service or license has not been used by a great number of regulatory bodies such as in Austria, German-speaking Community of Belgium, Bulgaria, Cyprus, Estonia, Spain, Hungary, Ireland, Iceland, Luxembourg, Malta, the Netherlands and Poland. This underlines the nature of this sanction to which regulators in view of the proportionality principle only turn if all other measures have been exhausted.

#### 3.1.1.3.5. Penalty payments in case of non-compliance

In case of a provider's disregard for the decisions taken by regulatory authorities, the law may provide for penalty payments. These may typically be imposed if the infringement persists and the provider has not taken steps to rectify the situation and

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<sup>213</sup> The power to suspend a service or revoke a license is attributed to the regulators of Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain (CNMC at federal level and CAC at regional level), France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg (here a recommendation to the competent Minister who formally makes the decision), Montenegro, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, Turkey, United Kingdom.

bring its conduct in line with the decision taken by regulatory bodies. The requirements for the imposition of penalty payments depend on the national legal orders.

The power to impose penalty payments is not granted to the regulatory bodies in Albania, Austria, the German-speaking Community of Belgium, the Czech Republic, Denmark, Spain<sup>214</sup>, Italy, Latvia and Serbia.<sup>215</sup> By contrast, it was newly introduced to regulators in Estonia, Iceland, Lithuania, Luxembourg and the Netherlands in comparison to the findings of the INDIREG study.

Where regulatory authorities have this power at their disposal, it may nonetheless be area-specific. In Estonia, it is constrained to the rules on promotion of European works, while in Sweden and Turkey it is applicable to the field of audiovisual commercial communication. Moreover, in Germany, Greece and Iceland, regulatory bodies are not empowered to impose penalty payments for violations of the quota rules. Furthermore, penalty payments in Macedonia and Sweden have to be approved by courts.

In practice, more than half of the regulatory authorities with this power do not actually employ it in practice.<sup>216</sup>

Other types of sanctions may be stipulated by national laws. In Hungary, for instance, providers may be temporarily excluded from tender procedures. In several countries, regulatory bodies may impose sanctions on the individual persons, above all, the person bearing editorial responsibility for a particular programme.<sup>217</sup> In Iceland and Turkey, this may encompass prison sentences: In Iceland, up to six months; and, in Turkey, between one and two years. Imprisonment is a harsh instrument for which appropriate procedural safeguards must be stipulated in the national legal orders.

Succinctly, the regulatory authorities examined in this study are generally equipped with a variety of instruments to sanction providers' non-observance of legal obligations. In countries where the regulatory framework has been modified recently (e.g. Estonia, Iceland, Luxembourg or Slovenia), the sanctioning powers of the new regulatory bodies appear stronger compared to the situation before. Similarly, minor changes for instance in the amount of the fines prescribed by law have mostly led to an expansion of the powers of regulatory bodies. Even if individual regulatory authorities formally lack certain types of powers (the Swedish regulator, for example is not

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<sup>214</sup> While the CNMC is equipped with this power, the two regional regulators, the CAA and the CAC cannot sanction non-compliance with their decisions by imposing penalty payments.

<sup>215</sup> The regulatory authorities of the Flemish and French-speaking Communities of Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, Slovakia, Turkey, United Kingdom have the power to impose penalty payments.

<sup>216</sup> The power to impose penalty payments is not used in the Flemish and French-speaking Communities of Belgium, Estonia, Spain (CNMC), Finland, France, Croatia, Ireland, Iceland, Italy, Lithuania, Luxembourg, Montenegro, Malta, Slovenia.

<sup>217</sup> Iceland, Lithuania, Macedonia, Turkey.

entitled to suspend/revoke a license), it does not automatically follow that the rules applicable to audiovisual media services in these countries are not effectively enforced.

In practice, the most frequently used sanctions are warnings and fines while regulators appear to be careful in the application of more intrusive sanctions (being mindful of their negative effect on service providers) like the suspension or revocation of a license or the imposition of penalty payments. This also underscores the graduated character of the sanctions. The application according to a graduated scheme appears to have led to certain irregularities in Hungary. The Media Council of the NMHH seems to strictly rely on the principle of graduated response regardless of the seriousness of the breach committed. It has disregarded service providers' "records" under the previous law (which was amended in 2010) even in cases where the relevant (violated) provision remained unchanged. Hence, providers who have committed serious breaches for the first time after the amendment entered into force (but repeatedly if one considers the time before, too) were nonetheless sanctioned mildly. This has led to concerns of fairness. The Czech RRTV is equally required to apply the sanctions in a strict graduated manner. This emerges from the case law of the Czech courts, which held that the sanction must always relate to the same kind or type of case. In practice, the Czech RRTV can only impose heavier fines (other than warnings) when the same infringement takes place again. This strict interpretation of the law seems to unduly restrict the regulators' sanctioning powers. It follows from the Hungarian and Czech examples that the criteria according to which national regulatory bodies apply the sanctions may also be indicative of their independence and effective functioning.

#### 3.1.1.4. Complaints handling procedures

In every country, there are procedures for handling complaints by viewers.<sup>218</sup> In Lithuania, where pursuant to the INDIREG study no such procedures existed, they have now been outlined and are valid for all public institutions. In most countries, procedures are outlined in sector-specific legislation while in a small group, they are derived from general administrative law.<sup>219</sup> In Cyprus, Denmark, Greece, Montenegro, Macedonia and Malta, procedures are set out by internal regulations drawn up by the regulatory bodies. Procedures are less formalized in Finland where complaints may be sent by email or post to FICORA.

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<sup>218</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>219</sup> Lithuania, Latvia, the Netherlands and Slovenia. In more detail, in Latvia, the law regulating audiovisual media sets forth a general provision and the NEPLP has also issued internal regulations specifying complaints-handling procedures.

### 3.1.2. Cooperation between regulatory authorities

#### 3.1.2.1. Cooperation between regulatory authorities at national level

At their respective national levels, regulatory agencies do not operate in a vacuum but instead pertain to a complex system of regulatory bodies (including co- and self-regulators) operating at different layers and in different sectors. The position of the regulatory authority within the national regulatory arena is a factor, which can be taken into account when determining its independence. Collaboration with other national regulators may be crucial to implement government's policies in a coherent manner. Yet, the independence of a regulatory authority may be at risk where other bodies can give instructions, thereby actively influencing policy decisions and activities.

All national regulatory bodies cooperate with other authorities at national level.<sup>220</sup> This encompasses cooperation with other bodies regulating other aspects of the market for audiovisual media such as the press, advertising, film classification, telecommunications, data protection, or copyright. Cooperation may also take place across sectors and include national authorities operating on a horizontal level like competition authorities or consumer authorities (including agencies representing specific consumers such as children or those suffering from disabilities). Several regulatory bodies also regularly cooperate with the national ministry competent for the media (e.g. Ministry of Culture).<sup>221</sup>

In most countries, cooperation is voluntary and designed in rather loose form through exchange of information, expertise and experience, the organization of common events, working groups or meetings.

More sophisticated or regular forms of cooperation typically exist between regulatory authorities for audiovisual media services and those competent to regulate infrastructure.<sup>222</sup> The close collaboration between these authorities is essential to guarantee optimal use of the spectrum and a transparent and fair process of allocating national licenses. In addition, regulatory authorities of federal states (e.g. Belgium, Spain or Germany) commonly rely on periodical meetings to align policy objectives and discuss "cross-state" or "cross-regional" issues. In the United Kingdom where the ATVOD and the ASA have been designated as co-regulatory authorities, close cooperation exists with OFCOM which has retained backstop powers (e.g. certain types of sanctions can only be imposed by OFCOM such as fines) and regularly reviews the co-regulatory arrangements.

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<sup>220</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>221</sup> Albania, Estonia, Spain (CNMC at federal level), Lithuania, Luxembourg, Poland, Romania, Slovenia, Slovakia.

<sup>222</sup> In case of converged regulators, this kind of cooperation may take place between the different units or departments but is nonetheless essential.

Although many different mechanisms of cooperation have been designed at national level, regulatory authorities generally do not receive any instructions from other bodies. Yet, in Cyprus, the Minister of the Interior may give instructions of a general nature to the APXH in connection with the exercise of its competencies if this is necessary to defend the general interest. This provision, which derives from the Constitution, is applicable to all public law bodies in Cyprus. Nonetheless, the vague formulation of the provision is worrisome as it gives the Minister of the Interior considerable leeway to interfere with the regulator's powers and prerogatives.

Moreover, the authority regulating technical aspects of the infrastructure (the Post and Telecom Administration) of Iceland seems to be able to influence the decisions of the *Fjölmiðlanefnd*. To a lesser extent, the Slovenian Ministry of Culture is involved in the classification of providers granting them special status, which entails the transmission of programmes in the public interest. In the United Kingdom, OFCOM may instruct the co-regulatory bodies ATVOD and ASA, the latter of which may also be instructed by the Office of Fair Trading.

### 3.1.2.2. Cooperation between regulatory authorities at European and international level

Apart from cooperation at national level, the rapid transformation of a globalized market for audiovisual media services necessitates cross-country collaboration. All regulatory authorities are involved in different supra-national forums or groups and have more or less regular contact with European institutions including the European Commission or the Council of Europe.<sup>223</sup> In addition, bilateral cooperation or multilateral types of cooperation are becoming more frequent.

Interestingly, several regional forms of cooperation have been constructed to discuss or solve cross-border issues and exchange best practices and coordinate, to a certain extent, media policies. The Central European Regulatory Forum (CERF) was set up in 2009 by the regulatory authorities of the Czech Republic, Hungary, Poland, Romania, Serbia, Slovenia and Slovakia.<sup>224</sup> CERF members meet once a year. Similarly, the Spanish (regional regulators CAC and CAA) and Portuguese regulatory authorities occasionally hold the Iberian Conference, the Nordic countries like Finland, Iceland and Sweden keep up ad hoc forms of collaboration and Romania, Serbia and Turkey assemble in the Forum of Black Sea Broadcasting Regulators (BRAf).

Smaller groups of countries have set up tripartite meetings which take place, for instance between the German-speaking regulators of Austria, Germany and

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<sup>223</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Spain, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, the Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom.

<sup>224</sup> For more information see <http://cerfportal.org/>.

Switzerland, the Baltic states Estonia, Latvia and Lithuania or between the regulators of France, Germany and the United Kingdom.

Beyond the borders of Europe, the *Réseau Francophone des Régulateurs des Médias* (REFRAM) was established in 2007 between 29 French-speaking regulatory bodies from three Continents including Albania, French-speaking Community of Belgium, Bulgaria, France, Luxembourg and Romania.

More institutionalized forms of cooperation have been established at European level in the form of the *European Platform of Regulatory Authorities* (EPRA) to which all regulatory authorities investigated in this study belong and the *European Regulators Group for Audiovisual Media Services* (ERGA) encompassing the regulators of all EU Member States. ERGA, which was created in 2014, facilitates cooperation between its members and has become an important forum of discussion and exchange of best practices.<sup>225</sup> Moreover, regulators whose mandate covers telecommunications aspects are members of *Body of European Regulators for Electronic Communications* (BEREC), the counterpart to ERGA for electronic communications networks and services.

In brief, regulatory authorities act in different regulatory contexts. They have established and maintain good relations and contacts with other regulatory authorities at national, European and international levels. Such cooperation, especially enhanced forms thereof may put pressure on individual regulatory bodies but do not seem to have an effect on the independence of the regulatory bodies.

### **3.3. Accountability**

Accountability is the regulators' responsibility for its own actions and decisions. Being subject to potential consequences for actions taken, can limit the regulators' autonomy of decision-making. Therefore, accountability can be seen as a criterion for the regulatory authority's dependence, rather than its independence. However, to round up the picture of the independence of regulatory authorities it is necessary to take a look not only at criteria of independence – as done above – but as well at such aspects of dependence, not last as these may also contribute to effectiveness in the overall picture.

For the analysis of accountability, a subdivision into three significant criteria is useful: The formal accountability, transparency regarding the work of regulators and the judicial review of the regulators' decisions affecting providers.

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<sup>225</sup> See Commission Decision of 03.02.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final.

### 3.3.1. Formal Accountability

To start with, the formal accountability of regulators will be analysed to identify who regulatory authorities are accountable to and by which means they have to give account (e.g. submitting reports, hold public information events, etc.), as well as concerning what issue they are obliged to give account about.

#### 3.3.1.1. Bodies regulators are accountable to

In general, it can be noted that all regulators are accountable to another body, only the *Radio- og TV-Nævnet of Denmark* is solely accountable to the public. This situation has not changed in the last five years. While many other regulators are also accountable to the public, all of them are accountable to either the Parliament, the Government as a whole, the Head of the Government or one specific Ministry. AKOS, the Slovenian regulatory authority is also accountable to the Broadcasting Council and the Electronic Communications Council, and it should be noted that the Cyprus Radio and Television Authority is not accountable to the Supreme Court anymore. ASA and ATVOD from the UK are accountable to the regulator Ofcom.

Apart from the RTB of Denmark, seventeen other regulators are accountable to the public at large.<sup>226</sup> The accountability to the public at large has been abolished by Estonia and newly introduced in Austria and Luxembourg. Therefore, in an overall perspective there has been little change regarding the media regulatory authority's accountability to the public.

The majority of regulators are accountable to their Parliament<sup>227</sup>, only nine regulators are not accountable to the Parliament.<sup>228</sup> It should be mentioned that the regulators of Netherlands and Denmark are only indirectly accountable to their Parliament since they have to report to their Minister for Education, Culture and Science respectively their Minister for Transport, Innovation and Technology and these Ministers have to send the regulator's annual report to the Parliament. The accountability to the Parliament has not changed significantly in the past five years. Only AKOS from Sweden and the Technical Surveillance Authority from Estonia are no longer accountable to their Parliament, while for the *Regulatory Body for Electronic and Media from the Republic of Serbia* (RBEM) such an accountability has been introduced.

Accountable to the Government as a whole are eleven regulatory authorities<sup>229</sup>, while the regulatory authorities from Austria, Poland and Germany are accountable

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<sup>226</sup> Austria, Belgium (all Communities), Bulgaria, Germany, Denmark, Ireland, Luxembourg, Montenegro, Macedonia, Malta, Netherlands, Portugal, Serbia, Slovenia, Slovakia, United Kingdom.

<sup>227</sup> Albania, Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Spain, France, Greece; Croatia, Hungary, Ireland, Italy, Lithuania, Montenegro, Macedonia, Malta, Poland, Portugal, Romania. Serbia, Slovakia, Turkey, United Kingdom.

<sup>228</sup> Denmark, Estonia, Finland, Iceland, Luxembourg, Latvia, Netherlands, Sweden, Slovenia.

<sup>229</sup> Belgium (all Communities), Cyprus, Spain (CAC), Finland, France, Sweden, Slovenia, Estonia, Serbia.

specifically to the Head of Government. In view of the *Technical Surveillance Authority* from Estonia, and the Serbian RBEM, an accountability to the Government has been introduced. In no case such accountability to the Government has been abolished since the completion of the INDIREG study.

Fifteen regulatory authorities are accountable to a specific Ministry<sup>230</sup>, for four of them this accountability has been introduced anew<sup>231</sup>, and no country has abolished the accountability to a Ministry. In some cases, the regulators are accountable to the minister responsible for press, media and culture.<sup>232</sup> In other cases, the regulators are accountable to the Ministry for communication<sup>233</sup>, and in again other cases the regulators are accountable to the Ministry for finance, economy or competition.<sup>234</sup> Only in Slovakia, the regulator is accountable to three Ministries in parallel (the Ministry for finance, the Ministry for culture and the Ministry for education). There has been no change in the actual Ministries the regulators are accountable to.

Altogether there has been little change regarding the bodies regulatory authorities are formally accountable to. There has been a small increase in the amount of regulators, which are accountable towards Parliament, a specific ministry, the Government or the Head of Government. Overall, for only three regulators new accountabilities towards other bodies have been introduced, for two regulators accountabilities towards other bodies have been abolished and for one regulator its accountabilities have been replaced. While for the CNMC of Spain and the Media Commission of Iceland a new accountability has been introduced only to a Ministry, for the Serbian regulator new accountabilities have been introduced not only to a Ministry but also to the Parliament and the Government. For the Estonian Public Broadcasting Council new accountabilities towards a Ministry and the government have been introduced while the accountability towards the Parliament has been abolished. For the Cyprus Radio and Television Authority the accountability towards the Supreme Court has been abolished, and for the Swedish Broadcasting Council the accountability towards the Parliament has been abolished.

Therefore, today four more regulators are accountable in one form or another in comparison to the INDIREG study.

Furthermore, most regulatory authorities have to undergo audits. Some regulatory authorities undergo an audit by a private audit firm, while others undergo public audits.

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<sup>230</sup> Belgium (all Communities), Finland, Greece, Ireland, Luxembourg, Montenegro, Netherlands, Slovakia, United Kingdom.

<sup>231</sup> Spain (CNMC), Iceland, Serbia, Estonia.

<sup>232</sup> Flemish-speaking Community of Belgium, Greece, Luxembourg, Netherlands, Iceland, Serbia.

<sup>233</sup> Finland, Ireland, Estonia.

<sup>234</sup> Montenegro, United Kingdom, Spain (CNMC),



### 3.3.1.2. Accountability means

Accountability in the way it is understood here, roughly entails the publication of documents, the submission of reports and the obligation to undergo audits.

Most regulators which are accountable to the public have the obligation to publish their reports and decisions, documents and information on the regulatory framework. In the following (in the context of the analysis of the transparency of regulators) a closer look will be taken at these publication obligations. However, some regulators are not (only) obliged to publish documents, but they also have to organise public information events like discussions, symposiums, meetings and hearings.<sup>235</sup>

Accountability to the Parliament, to the Government as a whole, to the Head of the Government or a specific ministry, means that most regulatory authorities must submit reports to the respective body. Besides the reporting obligations, the accountability to those bodies can additionally mean that the regulator is under a general supervision<sup>236</sup>, under a budgetary supervision<sup>237</sup> or both<sup>238</sup>. The budgetary supervision in Iceland and the Republic of Serbia has been newly introduced. In some cases, Parliament has the right to submit questions to the regulator.<sup>239</sup> This right has been newly introduced in Hungary and Malta, but has been abolished in Spain. In other cases, the Parliament has the right to request information.<sup>240</sup> In Finland, the Ministry sets the regulatory authority's yearly general goals in the form of a contract. Overall, in four countries new obligations have been introduced<sup>241</sup>, while the accountability of the CNMC in Spain has been diminished.

Half of the regulators undergo an audit by a public audit office,<sup>242</sup> while four regulators undergo a private audit,<sup>243</sup> and twelve regulators undergo an audit by a public audit office as well as a private audit.<sup>244</sup> Only the three Belgian regulatory authorities do not undergo an audit, but are under budget supervision by the public audit office. For four regulators the obligation for an audit by a public audit office has been introduced,<sup>245</sup> and the Slovenian regulator undergoes a private audit instead of a public audit now. Most regulators have to undergo the audit annually,<sup>246</sup> while two

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<sup>235</sup> Bulgaria, Belgium (Flemish-speaking Community) (newly introduced), Macedonia, Portugal.

<sup>236</sup> Belgium (German-speaking Community) (by the Government).

<sup>237</sup> Belgium (Flemish-speaking Community), Iceland, Serbia.

<sup>238</sup> Belgium (French-speaking Community).

<sup>239</sup> Hungary, Malta, Turkey.

<sup>240</sup> Austria (by the Federal Chancellor), Serbia (newly introduced).

<sup>241</sup> Hungary, Iceland, Malta, Serbia.

<sup>242</sup> Albania, Austria (KommAustria), German-speaking Community of Belgium, Bulgaria, Cyprus, Germany, Denmark, Spain (CNMC, CAC, CAA), France, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Latvia, Poland, Romania, Sweden, Turkey, United Kingdom (*Ofcom*).

<sup>243</sup> Austria (RTR-GmbH), Estonia, Montenegro, United Kingdom (*ASA*).

<sup>244</sup> French-speaking Community of Belgium, Flemish-speaking Community of Belgium, Czech Republic, Finland, Lithuania, Luxembourg, Malta, Netherlands, Macedonia, Portugal, Serbia, Slovenia.

<sup>245</sup> Albania, Austria (RTR-GmbH), Luxembourg, Lithuania.

<sup>246</sup> Austria (RTR-GmbH), Bulgaria, Cyprus, Czech Republic, Germany, Denmark, Estonia, Spain (CAC, CAA), Finland, Croatia, Iceland, Lithuania, Luxembourg, Montenegro, Macedonia (private

regulators undergo an audit twice a year,<sup>247</sup> and the regulatory authority of Greece undergoes an audit for each expenditure. In some cases the audit takes place ad-hoc. (Albania, Hungary, Macedonia (public audit), Romania, Slovakia). It should be mentioned that the regulatory authority of Hungary used to undergo an audit annually. The regulator of the Flemish speaking community of Belgium has to undergo an audit after request of a ministry or the government and the regulator in France has to undergo an audit after request of the Court of Auditors. Two other regulators have to undergo audits continuous.<sup>248</sup> There has been no change regarding the periodicity of the obligation to undergo audits in the last five years. Overall little has changed in this area, but there is a small increase in the amount of regulators being obliged to undergo an audit by a public audit office.

### 3.3.1.3. Reporting obligation

All but five<sup>249</sup> regulatory authorities are obliged to report about their activities and/or their budget to the Parliament or parts of the Government on a regular basis. Most reports have to be submitted to Parliaments<sup>250</sup>, six regulators have to report to the Government as a whole<sup>251</sup>, and the regulators of Austria and Poland have to report to the Heads of their Governments. Of the six regulators, which have to report to the Government as a whole, five have to submit their report to the Parliament as well.<sup>252</sup> *KommAustria* has to submit its report not only to the Federal Chancellor, but also to the Minister for Transport, Innovation and Technology. Eight regulatory authorities have to submit a report to a specific ministry.<sup>253</sup> Three out of these eight regulators have to submit their report to the Parliament as well.<sup>254</sup> Only AKOS of Slovenia has abolished the obligation to submit a report to the Parliament and the ministry, and the Council for broadcasting and retransmission of Slovakia has introduced reporting obligations to a third ministry (the ministry of culture). Otherwise there have been no changes as regards the bodies regulators have to submit their reports to.

It is also worth noting that the Danish regulator produces an activity report annually, but only for internal use, since RTB is not accountable to another body.

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audit), Malta, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Turkey, United Kingdom (ASA).

<sup>247</sup> Netherlands, United Kingdom (*Ofcom*).

<sup>248</sup> Belgium (Germany), French-speaking Community of Belgium.

<sup>249</sup> Cyprus, Germany, Denmark, Iceland, Luxembourg.

<sup>250</sup> Albania, Belgium (all Communities), Bulgaria, Croatia, Czech Republic, Estonia, Spain (CNMC, CAC, CAA), France, Greece, Hungary, Italy, Lithuania, Montenegro, Macedonia, Malta, Poland, Portugal, Romania, Serbia, Slovakia, Turkey, United Kingdom.

<sup>251</sup> Belgium (all Communities), France, Slovenia, Spain (CAC).

<sup>252</sup> Belgium (all Communities), France, Spain (CAC).

<sup>253</sup> Austria, Flemish-speaking Community of Belgium, FL, Greece, Ireland, Netherlands, Slovakia, Sweden.

<sup>254</sup> Flemish-speaking Community of Belgium, Greece, Slovakia.

Almost all reports have to be submitted annually<sup>255</sup>, only the regulators of Bulgaria and Finland have to submit a report twice a year. In addition to its annual reports the ERC of Portugal has to submit information to the Parliament once a month and the regulator of Romania has to submit an additional report on the Parliaments request. There has been no change in the periodicity of the reporting obligation in the last five years.

The subjects that have to be covered by the reports are mainly the regulators' activities and financial aspects. In some cases, the reports cover only the regulators' activities<sup>256</sup>, while in other cases the report has to cover the regulators' activities and financial aspects in addition.<sup>257</sup> Only the reports of Ofcom in the UK and of the Swedish Broadcasting Council are limited to merely financial aspects. For the regulatory authority of the German-speaking community of Belgium the reporting obligations have been extended to include a financial budget report. For the Council for broadcasting and retransmission in Slovakia new reporting obligations have been introduced together with the new bodies the regulator has to report to. The reporting obligations now include a list of major events together with an according assessment (to be reported to the Ministry for Culture). For the NMHH of Hungary new reporting obligations have been introduced as well, e.g. the report shall provide information on the economic situation and on changes in the financial conditions of media services. Furthermore, the report shall provide information on the monitoring of the conduct of organisations and persons engaged in electronic communications activities for compliance with the relevant legislation.

More than half of the regulators have to include statistical data about their own performance in the report.<sup>258</sup> The regulatory authorities of Poland and Portugal always include such statistical data into their reports, while not being legally obligated to do so. The Serbian RBEM and the LRTK of Lithuania, have a newly introduced obligation to include statistical data in the reports. Therefore, there have been only few changes regarding the subjects that have to be covered by the reports.

In 13 countries the report needs to be approved<sup>259</sup>, but only in four countries a report has actually been disapproved.<sup>260</sup> It should be mentioned, however, that the Albanian report – which was disapproved – has not been formally rejected. In the Czech Republic, Poland, and Romania the rejection of the report is linked to consequences: After repeated disapproval by the Parliament of the Czech Republic, the whole

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<sup>255</sup> Austria, Belgium (all Communities), Czech Republic, Estonia, Spain, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Macedonia, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Slovakia, Turkey, United Kingdom (OFCOM, ATVOD).

<sup>256</sup> Austria, Czech Republic, Estonia, Spain (CNMC, CAC, CAA), France, Hungary, Ireland, Netherlands, Romania.

<sup>257</sup> Albania, Belgium (all Communities), Bulgaria, CR, France, Italy, Montenegro, Macedonia, Malta, Poland, Portugal, Serbia, Slovakia, Slovenia, Lithuania.

<sup>258</sup> Albania, Flemish-speaking Community of Belgium, French-speaking Community of Belgium, Bulgaria, Czech Republic, Finland, Croatia, Hungary, Ireland, Italy, Lithuania, Macedonia, Netherlands, Romania, Slovenia, Slovakia, Sweden, Turkey, United Kingdom.

<sup>259</sup> Albania, Croatia, Czech Republic, Croatia, Hungary, Lithuania, Montenegro, Malta, Netherlands, Poland, Romania, Sweden, Slovenia.

<sup>260</sup> Albania, Czech Republic, Montenegro, Slovenia.

broadcasting council is dismissed, and in Poland the regulators term of office expires immediately. This actually happened in Poland in 2010 for the first time. In Romania a new law regulates that the dismissal of the annual activity report triggers – *ipso iure* – the dismissal of the President of the Council. The only other change in this area occurred in the Former Yugoslav Republic of Macedonia, where the Parliament can no longer obligate the regulator to submit a new report.

Next to those general activity and financial reports, the LRTK of Lithuania has to submit an analytical survey on the implementation of Lithuania's audiovisual policy, the development of audiovisual services, and statistical data on the providers of audiovisual media services. In addition to its general report, the CNMC in Spain has to submit a balance about the fulfilment of its objectives every three years. This is a new obligation for the CNMC.

Overall, there has again been hardly any change in the reporting obligations of the regulatory authorities in the past five years. For AKOS in Slovenia the reporting obligations to the Ministry and the Parliament were abolished, but the reporting obligation to the Government as a whole kept. On the other hand, the Council for Broadcasting and retransmission in Slovakia has newly introduced additional reporting obligations towards two new bodies: the ministry of culture and the European Commission. Further, reporting obligations have been introduced for the regulator in the German-speaking community of Belgium as well. And two more regulators have to include statistical data about their own performances into their reports. For the first time, a report was dismissed in Poland with the consequence of the expiration of the term of office for the Polish regulatory authority. On the other hand, the Macedonian regulator can no longer be obliged to submit a new report by the Parliament.

### 3.3.2. *Transparency*

The extent of a regulatory authority's transparency regarding its work can be determined by several factors: the general publication obligations of a regulatory authority, the rules regarding the decision making process as well as the existence of complaints handling procedures. As already seen above, complaints handling procedures are foreseen for all regulators. Therefore, in the following focus is put on obligations to publish documents, e.g. reports, minutes of meetings and especially decisions, and on the details of the internal decision-making processes.

#### 3.3.2.1. Decision-making process

For the analysis of the transparency of the decision-making process it is important to determine whether the law provides for specific transparency obligations regarding the decision-making process, whether obligations for the regulatory authorities exist to attach a reasoning to their decisions and if obligations exist to include an impact assessment in the process.

In most countries, specific laws are in place regulating at least some aspects of transparency during the decision-making process.<sup>261</sup> Only general publication obligations apply in Belgium (German-speaking and Flemish Communities), Cyprus and Finland. No specific transparency provisions exist in some German *Länder*, Denmark, Finland, Spain (CAC and CAA) and Serbia. Information on the existence of transparency rules is missing in Albania, Germany (for some *Länder*, including almost all regulatory bodies overseeing public service broadcasters) and Spain (CNMC). As far as more details on the content of existing transparency rules or practices are available, they usually include the publication of decisions<sup>262</sup>, although in some countries not all decisions are published<sup>263</sup> or decisions are not published in full<sup>264</sup>. In various countries, meetings are open to the public by default<sup>265</sup> or may be held in public on request.<sup>266</sup> Concerning obligations to publish agendas and minutes of meetings this aspect will be in Section 3.3.2.3. Overall, a trend towards more openness of decision-making processes can be observed. Most changes in the past years extended transparency requirements.<sup>267</sup> On the other hand, Macedonia seems to have suffered a backlash regarding transparency, with the public now generally being excluded from the meetings and decisions often being taken in camera. Tendencies in this respect had already become apparent from factual developments as was explained in the INDIREG study.<sup>268</sup>

The vast majority of all analysed regulators have to motivate all of their decisions.<sup>269</sup> The regulatory authorities of Slovakia and Montenegro have a limited obligation concerning the reasoning as it applies only for some decisions. Six regulatory authorities are under no (explicit) obligation to motivate their decisions.<sup>270</sup> The obligation to motivate all decisions has been newly introduced for CNMC of Spain, and it has been expanded from the obligation to motivate only certain decisions to all

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<sup>261</sup> Austria, Belgium (French Community), Bulgaria, Cyprus, Czech Republic, Estonia, Finland, Greece, Croatia, Hungary, Ireland, Iceland, Italy, Lithuania, Luxembourg, Latvia, Montenegro, Macedonia, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia, Slovakia, Turkey, UK.

<sup>262</sup> E.g. in Austria, Czech Republic, Iceland, Italy, Lithuania, Latvia, Malta, Macedonia, Romania, Sweden, Slovenia, Slovakia.

<sup>263</sup> In Luxembourg, for instance, only decisions issuing sanctions, dismissing complaints and ordering additional investigations need to be published. Also in Germany and in Turkey, only some decisions are published.

<sup>264</sup> Such is the case in Poland, where press releases are published informing about decisions taken.

<sup>265</sup> E.g. in Lithuania, Romania, Montenegro, Slovakia.

<sup>266</sup> E.g. in Malta. In Latvia, the process is not designed to be open, but in practice, many decisions are taken in the presence of interested parties.

<sup>267</sup> E.g. in the Czech Republic, Iceland, Luxembourg, Poland, Slovakia.

<sup>268</sup> „Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive“, the study including its annexes is available at [www.indireg.eu](http://www.indireg.eu)

<sup>269</sup> Austria, Belgium (all Communities), Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Croatia, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Spain (CNMC, CAC, CAA), Sweden, United Kingdom (OFCOM, ASA, ATVOD), Serbia.

<sup>270</sup> Albania, Estonia, Luxembourg, Macedonia, Turkey, Iceland.

decisions for the regulators of Poland and Serbia. On the other hand, the obligation of the regulator to give reasons for its decisions has been abolished in Albania. There have been only few changes regarding the obligation to motivate decisions; overall the obligation to motivate all decisions has slightly increased.

Most regulators are not required to include a public impact assessment into their decision making process, neither *ex ante* nor *ex post*.<sup>271</sup> Seven regulators have to include an *ex ante* impact assessment<sup>272</sup> and only the regulator of Ireland has to include an *ex post* public impact assessment. For the Council for Broadcasting and Retransmission of Slovakia the obligation is only foreseen as part of the license awarding procedure, but for no other types of decisions. For the LRTK in Lithuania the obligation to include a public impact assessment in the decision-making process is restricted to decisions establishing legal norms. This restriction has been newly introduced. Otherwise there have been no changes in this obligation to include a public impact assessment for any regulatory authority.

### 3.3.2.2. Public and external advice

The rules regarding the implementation of public consultations and the possibility to ask for expert (external) advice are important indicators for the evaluation of the transparency of a regulators work. Therefore, the procedures for the implementation of public consultations and the obtaining of external advice shall be analysed.

Most regulators are *de facto* requesting external advice<sup>273</sup>, typically on a regular basis. Only the regulators in Albania and Montenegro are taking external advice *ad hoc* rather than on a regular basis. The regulatory authorities from Cyprus and Iceland have started taking external advice.

Only seventeen out of the 31 regulators, which are taking external advice have a specific budget foreseen for that.<sup>274</sup> However, it needs to be mentioned that for the LRTK of Lithuania a specific budget is not foreseen every year; the last time a specific budget for external advice was foreseen was in 2013. Not for every country there is information available on the actual amount of the specific budget. For example in

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<sup>271</sup> Albania, Austria, German-speaking Community of Belgium, French-speaking Community of Belgium, Flemish-speaking Community of Belgium, Bulgaria, , Cyprus, Czech Republic, Denmark, Estonia, Spain (CNMC and CAA), Finland, France, Croatia, Greece, Iceland, Latvia, Luxembourg, Montenegro, Macedonia, Malta, Netherlands, Poland, Portugal, Romania, Serbia, Sweden, Slovenia, Turkey, United Kingdom (ASA).

<sup>272</sup> Germany, Spain (CAC), Italy, Lithuania, Slovakia, United Kingdom (OFCOM and ATVOD).

<sup>273</sup> Albania, Austria, French-speaking Community of Belgium, Flemish-speaking Community of Belgium, Cyprus, Czech Republic, Germany, Denmark, Spain (CNMC, CAC, CAA), Finland, France, Croatia, Hungary, Ireland, Iceland, Italy, Luxembourg, Latvia, Lithuania, Montenegro, Malta, Netherlands, Poland, Portugal, Serbia, Sweden, Slovenia, United Kingdom (OFCOM, ASA, ATVOD).

<sup>274</sup> Austria, Cyprus, Spain (CAC, CAA), Finland, France, Greece, Croatia, Italy, Lithuania, Malta, Netherlands, Poland, Serbia, Slovenia, United Kingdom (ASA, ATVOD).

Austria the budget for external advice is a maximum of 10% of the sectoral expenditure of RTR GmbH's broadcasting division. Where there is information available, it shows that the amounts vary widely for the different regulators and for different years as well. The amounts lay between EUR 5,000 for the CAC in Spain for the year 2011 and EUR 763,000 for the CAA in Spain for the year 2012. At the lower end of this scale there is LRTK of Lithuania as well with EUR 5,800 for the year 2012 and EUR 5,500 for the year 2013. Four regulators had budgets of about EUR 100,000 or less<sup>275</sup>, and four regulators had budgets well over EUR 100,000 for this purpose<sup>276</sup>. In some cases, budgets also vary widely between different years, i.e. the Cyprus Radio and Television Authority's budget for external advice varied since 2012 between EUR 30,000 and EUR 86,000. Where there is no specific budget foreseen, the budget depends in some cases on the needs of the regulator and/or can be determined by the authority itself.<sup>277</sup> Only for the AEM from Croatia a specific budget for external advice has been newly introduced. Otherwise there have been no changes.

With the exception of the regulatory authorities of Turkey and Luxembourg all regulators have to respect public tender procedures when obtaining expert advice on regulatory matters. It should be noted that RTB of Denmark does not have to follow public tender procedures when obtaining advice for legal matters, and seven regulators have to follow the public tender procedures only in case of exceeding a certain financial threshold.<sup>278</sup> This rule does generally apply in Luxembourg as well, but due to the limitations on budgets for individual service agreements, the threshold cannot be exceeded in case of expertise requests and therefore, no public tender procedures have to be followed. RTÜK of Turkey is not subject to the provisions of the State Tender Law. The regulators CAC and CAA of Spain require the agreement of their Board to obtain external advice. Other requirements for the obtaining of expert advice are not foreseen in any country. The approval of the budget by the Prime Minister of Malta is no longer required.

Most regulators are under a general obligation to consult with the industry stakeholders and the general public.<sup>279</sup> However, it should be mentioned that the Estonian regulator has never actually consulted with stakeholders or the general public, and that the Council for Broadcasting and Retransmission of Slovakia is only under the obligation to cooperate with self-regulatory bodies. Five regulators consult with industry stakeholders and the general public while not being obligated to do so by law.<sup>280</sup> The situation is similar regarding the regulatory authorities' obligation to hold public consultations before they make decisions.

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<sup>275</sup> Cyprus (between EUR 30,000 - EUR 86,000), Greece (EUR 54,000), Poland (EUR 102,000), Slovenia (between EUR 30,000 - EUR 40,000).

<sup>276</sup> Finland (EUR 150,000), Netherlands (250,000), Spain (CAC with EUR 150,000 for 2012 and CAA with EUR 763,000 for 2013 and EUR 763,000 for 2012).

<sup>277</sup> Belgium (all Communities), Germany, Malta, Sweden.

<sup>278</sup> Germany, Spain (CNMC, CAC, CAA), Finland, Poland, Portugal.

<sup>279</sup> Albania, Austria, Belgium (all Communities), Cyprus, Estonia, Finland, France, Croatia, Hungary, Ireland, Italy, Latvia, Montenegro, Macedonia, Portugal, Romania, Serbia, Slovenia, Slovakia.

<sup>280</sup> Bulgaria, Denmark, Malta, Netherlands, Poland.

Most regulatory authorities have to implement public consultations prior to certain decisions. Only KommAustria is required to hold public consultations prior to all of its decisions, while fifteen regulatory authorities are not required to hold any public consultations at all.<sup>281</sup> The obligation for public consultations in Serbia was introduced only in 2014.

Which decisions require prior public consultations vary widely for the different regulatory authorities. Just to name the most common, a change of the regulatory framework, especially by introducing new legal norms, requires a prior consultation in the case of eleven regulators<sup>282</sup>, and has been newly introduced for the Albanian and the Lithuanian Regulator. Decisions imposing obligations on network operators require a prior public consultation for seven regulatory authorities<sup>283</sup>, and market definition rules require a public consultation in the case of four regulators<sup>284</sup>. The strategy or work plan requires a public consultation by the Broadcasting Authority of Ireland, the *Agency for Audio and Audiovisual Services* from Macedonia, and the National Electronic Media Council of Latvia. For the latter, this obligation has been newly introduced. New obligations to hold prior public consultations have also been introduced for the regulatory authority of Serbia regarding general acts which are directly related to Media Service Providers and for the regulatory authority of Hungary regarding minority protection and product placement as well as the list of major events. New consultation obligations have been introduced in Turkey as well.

Besides the 13 regulators, which are not required to hold public consultations, six other regulators are not bound by specific legal requirements on who must be consulted in a public consultation.<sup>285</sup> Seven regulatory authorities are obliged to consult with the general public<sup>286</sup>, and nine regulators have to do so with respective stakeholders.<sup>287</sup> The Agency for Electronic Media of Montenegro is not legally bound to consult with the respective stakeholders, yet the authority in practice does it. The same situation can be found in Germany and Italy. CNMC of Spain is no longer required to consult with stakeholders. Other requirements on who must be consulted can only be found in Austria, Slovakia and Turkey. The regulatory authority *KommAustria* has to consult with the Federal competition Authorities as well, and – regarding questions of journalism – with the Advisory Board. The *Council for Broadcasting and Retransmission of Slovakia* must consult with the *Regulatory Authority for Electronic Communications and Postal Services* regarding decision on frequency utilisation, and with several Ministries regarding the list of major events and

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<sup>281</sup> Bulgaria, Cyprus, Czech Republic, Estonia, Spain (CNMC, CAA), Croatia, Iceland, Italy, Luxembourg, Malta, Netherlands, Poland, Slovenia, Sweden.

<sup>282</sup> Albania, Denmark, Spain, (CAC), Ireland, Lithuania, Montenegro, Macedonia, Portugal, Romania, Slovenia, United Kingdom (OFCOM).

<sup>283</sup> Belgium (all Communities), Finland, Greece, Luxembourg, Portugal.

<sup>284</sup> Austria, Belgium (all Communities).

<sup>285</sup> Germany, France, Hungary, Italy, Montenegro, Macedonia, Malta, Romania, Serbia.

<sup>286</sup> Austria, Belgium (all Communities), Ireland, Lithuania, Latvia.

<sup>287</sup> Albania, Denmark, Spain (CAC), Finland, Greece, Portugal, Slovenia, Turkey, United Kingdom (OFCOM).



decisions on television broadcasts of foreign origin. Next to consulting with broadcasters, RTÜK of Turkey has to discuss with academics and occupational organizations as well.

The consultation period is regulated differently in comparison of the regulators. While for some regulators there is no requirement foreseen to hold public consultations for a predefined period of time<sup>288</sup>, other regulators are required by law to hold the consultations for a certain time period which usually ranges from one to three months.<sup>289</sup> In some cases the consultation period varies depending on the subject of the consultation.<sup>290</sup>

While a few more obligations have been introduced to hold public consultations, there have been hardly any changes concerning the question on who must be consulted or the length of the consultation periods.

The obligation to hold public consultations does not reflect whether public consultations were actually held. Six regulators which are generally required to hold public consultations have not done so in the last five years<sup>291</sup>, while three regulators which are not obliged to hold public consultations have nonetheless done so: CEM from Bulgaria held two public consultations in the year 2011, the *Broadcasting Authority of Malta* held one each in 2013 and 2015 and two in 2014; and KRRiT in Poland even undertook 21 public consultations in the last five years and therefore, more public consultations than most regulators. Only CvdM of the Netherlands (approx. 40) and *Ofcom* in the UK (24) have held more public consultations in that time period. The AVMU in Macedonia and AGCOM in Italy held 21 public consultations, too, followed by KommAustria with ten consultations, the AEM in Montenegro and ATVOD in the UK with eight, AKOS of Slovenia with seven, and the CSA of France with six consultations. All other regulatory authorities conducted between one and four public consultations.<sup>292</sup>

It is worth noting that two stakeholders participating in the online-survey – one from Albania and one from the Flemish-speaking Community of Belgium – indicated that no public consultations were held in Albania, respectively the Flemish-speaking Community of Belgium in the previous years, while AMA of Albania has held four public consultations and VRM of the Flemish-speaking Community of Belgium has held one public consultation.

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<sup>288</sup> German-speaking Community of Belgium, Finland, France, Greece, Hungary, Ireland, Latvia.

<sup>289</sup> Albania, Austria, Belgium (all Communities), Spain (CAC), Lithuania, Portugal, Slovenia, Macedonia, Romania, Serbia, United Kingdom (OFCOM).

<sup>290</sup> Austria, Denmark, Hungary, Italy, Slovakia, Turkey.

<sup>291</sup> Spain (CAC), Finland, Greece, Hungary, Slovakia, Turkey.

<sup>292</sup> Albania (4), German-speaking Community of Belgium (2), French-speaking Community of Belgium (1), Flemish-speaking Community of Belgium (1), Lithuania (2), Latvia (1), Romania (3), Serbia (1), UK (ASA 1)).

### 3.3.2.3. Publication obligations

The most important indicator for the transparency of the work of regulatory authorities is the obligation to publish documents. All regulators are under such an obligation in some way or other. However, which documents have to be published varies widely in the countries analysed. The most common publication obligations concerns the decisions of the regulatory authorities, the responses to public consultations, the activity reports, which regulators are obliged to submit to their Parliament or parts of their Government (as discussed above), and the minutes and agendas of the regulator's meetings. Besides these widespread obligations a variety of other publication obligations exist in most countries.

Half of the regulatory authorities have to publish all of their decisions.<sup>293</sup> The obligation to publish all decisions has been newly introduced for the regulators of Macedonia and Slovakia, whilst it was not abolished anywhere. Ten regulators have to publish only certain decisions<sup>294</sup>, such as e.g. decisions regarding the awarding and revocation of licences<sup>295</sup>, sanctioning decisions<sup>296</sup>, or decisions of principle importance.<sup>297</sup> Ten regulators do not have to publish decisions at all.<sup>298</sup> But nine out of these ten regulatory authorities publish decisions anyway, without being legally obliged to do so.<sup>299</sup> For the regulators of Albania, Luxembourg, Slovakia, and Montenegro new obligations regarding the publication of decisions have been introduced.

The obligation to publish the responses to public consultations exists for 18 of the analysed regulatory authorities.<sup>300</sup> Most of these regulators have to publish the full responses and have to prepare summaries, which they have to publish as well. Only four of the regulatory authorities do not have to prepare summaries of the responses<sup>301</sup>, while the regulators of Croatia, Finland, Germany and Turkey only have to publish summaries. RTÜK of Turkey publishes summaries of the responses to public consultations without being legally bound to do so. In Romania, the obligation to publish summaries of the responses of public consultations has been abolished,

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<sup>293</sup> Austria, Flemish-speaking Community of Belgium, French-speaking Community of Belgium, Bulgaria, Croatia, Finland, France, Greece, Hungary, Italy, Lithuania, Malta, Portugal, Romania, Serbia, Slovakia, Spain (CNMC), United Kingdom (ATVOD), Macedonia, Montenegro.

<sup>294</sup> Albania, German-speaking Community of Belgium, Denmark, United Kingdom (*Ofcom*), Ireland, Estonia, Luxembourg, Latvia, Spain (CAC and CAA).

<sup>295</sup> Estonia, Latvia, Romania.

<sup>296</sup> Estonia, Spain (CAC, CAA), Luxembourg, Romania.

<sup>297</sup> Denmark, United Kingdom (OFCOM).

<sup>298</sup> Cyprus, Czech Republic, Germany, Iceland, Netherlands, Poland, Sweden, Slovenia, Turkey, United Kingdom (ASA).

<sup>299</sup> Cyprus, Czech Republic, Iceland, Latvia, Netherlands, Poland, Slovenia, Turkey, United Kingdom (ASA).

<sup>300</sup> Albania, Austria, Belgium (all Communities), Germany, Denmark, Finland, France, Croatia, Hungary, Italy, Macedonia, Portugal, Slovakia, Slovenia, Sweden, United Kingdom.

<sup>301</sup> Austria, Flemish-speaking Community of Belgium, Sweden, Slovenia.

whereas in Hungary the obligation to publish the full responses has been introduced. Otherwise there have been no changes.

More than half of all regulators have to publish their activity reports.<sup>302</sup> The CRTA from Cyprus, KRRiT from Poland as well as the regulatory authorities from the UK publish their reports as well, but they are not legally obliged to do so. The obligation to publish their reports is new for the regulators of Austria and Bulgaria. The obligation has not been abolished for any regulatory authority.

In the majority of countries, regulatory bodies do not have to publish agendas or minutes of their meetings.<sup>303</sup> The laws in 13 countries, however, provide for an obligation to publish either agendas<sup>304</sup> or minutes<sup>305</sup> or both<sup>306</sup>. In Greece, a press conference is held after the meeting; in Latvia, the meeting is followed by the publication of a press release. This situation has not substantially changed over the past years. In Serbia, new provisions foreseeing the publication of minutes and agendas have been introduced. In Estonia, minutes and agendas were previously published by the Ministry of Culture and the former Estonian Public Broadcasting Council, whereas the new TSA does not publish these documents anymore.

Aside from the obligations to publish decisions, consultation responses, activity reports, and minutes/agendas many other publication obligations exist in most countries. Just to name a few, the regulators of Luxembourg, Ireland and the Netherlands publish their financial accounts, an obligation which has been newly introduced in Luxembourg. For the Bulgarian regulator the obligation to publish a monthly newsletter has been newly introduced. The regulators of the German-speaking community of Belgium, the AEM in Montenegro, KRRiT from Poland, and AKOS from Slovenia have to publish information on the regulatory framework. The Cyprus Radio and Television Authority publishes the plan of radio frequencies, while this obligation has been abolished in Albania. Overall, just as there have been only few changes to the accountability to the public at large, only few publication obligations have been introduced newly and fewer even have been abolished.

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<sup>302</sup> Austria, Belgium (all Communities), Bulgaria, , Czech Republic, Germany, Denmark, Estonia, Spain (CNMC), France, Latvia, Lithuania, Montenegro, Malta, Netherlands, Serbia, Sweden, Slovenia, Slovakia, Croatia.

<sup>303</sup> Belgium (all Communities), Cyprus, Denmark, Estonia, Finland, France, Germany (all media authorities and most regulators overseeing public service broadcasters), Ireland, Iceland, Italy (however, minutes are available upon request, as far as deliberations on complaints are concerned), Luxembourg, Montenegro (however, these documents are available on request), Malta, Poland, Portugal, Sweden, Turkey,

<sup>304</sup> Greece, Lithuania (minutes are available upon request), Latvia

<sup>305</sup> Czech Republic.

<sup>306</sup> Bulgaria, Croatia, Spain (CAA, CAC; however, only 5 years after the decision was taken), Hungary, Macedonia, Romania, Serbia, Slovakia, UK (all regulatory bodies).

More than half of the regulators are covered by the media in their country on a regular basis.<sup>307</sup> However, only in 14 countries the public seems to be aware of the regulatory authority and its activities.<sup>308</sup>

### 3.3.3. *Judicial Review*

In this section, the details of the appeal procedure are examined. It will be clarified, whether the regulatory authority's decisions can be appealed either by internal or external appeal mechanisms and how many stages of appeal are foreseen against the decisions of the regulators. A closer look at the appeal bodies and the eligible applicants will follow. Furthermore, the examination of the accepted grounds for appeal, as well as the appeal body's power to replace the original decisions with its own decision completes the analysis of judicial review.

#### 3.3.3.1. Internal and External Appeal Procedures

Decisions taken by regulatory authorities can be appealed in all countries either by internal or external appeal procedures, with the only exception of Estonia. Against the decisions of the regulatory authority in Estonia no specific appeal procedures are foreseen. The decisions of all other authorities can be appealed with an external appeal procedure, and in some cases with an internal procedure in addition.

Internal appeal procedures against the decisions of the regulators exist in 16 cases<sup>309</sup>, in nine cases these internal appeal procedures have to be pursued before being eligible for an external appeal.<sup>310</sup> Therefore, in all other cases internal appeal procedures are either non-existent or optional for the applicant and therefore a direct external recourse is possible. The regulatory authority CNMC of Spain has newly introduced its internal appeal procedure, including the obligation to follow such internal proceedings, as well as NMHH of Hungary. The regulator AKOS from Slovenia has abolished its internal appeal procedure.

With the exception of the two-stage internal appeal procedure against decisions of the Macedonian regulator, all internal appeal procedures have only one stage. The internal appeal procedure in Albania has changed from a two-stage procedure to a one-stage

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<sup>307</sup> Albania, Belgium (all Communities), Bulgaria, Czech Republic, Denmark, Finland, France, Ireland, Iceland, Lithuania, Luxembourg, Latvia, Macedonia, Malta, Netherlands, Poland, Romania, Sweden, Slovenia, Slovakia, Turkey.

<sup>308</sup> Albania, Belgium (Flemish-speaking Community), Belgium (French-speaking Community), Bulgaria, Denmark, Finland, Ireland, Iceland, Latvia, Netherlands, Poland, Romania, Slovenia, Slovakia.

<sup>309</sup> Albania, Belgium (all Communities), Germany, Spain (CNMC), Greece, Hungary (but only regarding decisions of the "office"), Ireland, Montenegro, Netherlands, Poland, Portugal, Serbia, Sweden, United Kingdom (OFCOM).

<sup>310</sup> Albania, Flemish-speaking Community of Belgium, Germany, Spain (CNMC), Hungary, Montenegro, Netherlands, Sweden, Serbia.

procedure. Apart from that there have been no changes in the internal appeal procedures against the decisions of regulatory authorities.

The external appeal procedures have between one and three stages in all countries. One stage of appeal is foreseen against the decisions of fifteen regulators<sup>311</sup>, two stages against the decisions of sixteen regulators<sup>312</sup> and three stages against the decisions of nine regulators<sup>313</sup>. The only exception is the appeal procedure in Spain, which has five stages, and it should be mentioned that a second stage of appeal is possible in Serbia in extraordinary cases. In Lithuania, a second stage of appeal has been introduced. Apart from these cases no further changes occurred.

### 3.3.3.2. Appeal bodies and status of complainants

The appeal body for the external appeal is in almost all cases a court. However, against the decisions of ASA and ATVOD a complaint can be lodged with the regulatory authority OFCOM. If there are several stages of appeal, the appeal bodies are multiple instances of the courts. Only the decisions of OFCOM in the United Kingdom can be reviewed by the Competitions Appeal Tribunal for competition matters and decisions relating to the provision of electronic communications services and networks. The Competition Appeal Tribunal is a specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy whose function is to hear and decide cases involving competition or economic regulatory issues.

In all cases concerned or interested parties can appeal the decision. In the French-speaking Community of Belgium as well as in Greece a Government representative has the power to lodge an appeal as well.

### 3.3.3.3. Reasons for Appeal

The accepted reasons for appeal are errors of law as well as errors of fact and therefore a full re-examination of the regulator's decision takes place in almost all countries. However, in Italy the full re-examination of the AGCOM's decisions is limited to cases falling under the electronic communication package and in cases where compensation is requested. In all other cases only errors of law are accepted grounds for appeal. In the Netherlands a full re-examination only takes place when the regulator has no margin for appreciation. Otherwise only errors of law are accepted grounds for appeal. It should be mentioned as well, that in Macedonia the accepted grounds for appeal are being determined on a case-by-case basis by the Administrative Court. The accepted grounds for appeal have been extended from errors of fact to a full

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<sup>311</sup> Belgium (all Communities), Spain (CAC, CAA), France, Croatia, Iceland, Ireland, Portugal, Serbia, Sweden, United Kingdom (OFCOM, ASA, ATVOD).

<sup>312</sup> Bulgaria, Cyprus, Denmark, Finland, Greece, Hungary, Iceland, Italy, Lithuania, Luxembourg, Montenegro, Macedonia, Malta, Netherlands, Slovakia, Slovenia.

<sup>313</sup> Albania, Austria, Czech Republic, Germany, Latvia, Poland, Romania, Turkey.

re-examination in Latvia. Otherwise there have been no changes regarding the accepted grounds for appeal.

#### 3.3.3.4. Pending Appeal

The decisions of five regulatory authorities stand pending appeal<sup>314</sup>, while the decisions of seven regulators do not stand pending appeal.<sup>315</sup> The decisions of 22 regulatory authorities generally stand pending appeal, unless the appeal body suspends the decision.<sup>316</sup> However, the appeal body in Austria has no longer the possibility to suspend the regulators decision, while for the appeal body of Spain such a possibility has been newly introduced with regard to the regulatory authority CNMC, as well as for the *Swedish Broadcasting Authority*.

In the cases of the NEPLP in Latvia, the CBR of Slovakia, and the in CRTA in Cyprus, the answers whether the decisions stand pending appeal depend on the type of decision. Decisions on the result of tenders stand pending appeal in Latvia, and decisions on the suspension of broadcasting of programmes or part of programmes stand pending appeal in Slovakia. On the other hand, decisions on administrative violations are not potential decisions for an appeal in Latvia, and decisions imposing fines and revoking licences do not qualify for appeal in Slovakia. The decisions of the Cyprus Radio and Television Authority used to stand appeal only in case the appeal body did not suspend its decisions. However, the possibility to suspend the regulators decisions has been limited to the Supreme Court for cases of injunctions and interim decisions. Otherwise all decisions of the Cyprus' regulator stand pending appeal.

#### 3.3.3.5. The power to overturn decisions

In some cases the appeal body has the power to replace the original decision of the regulatory authority with its own decision. In the other cases, the appeal body only has the power to either accept the original decision or cancel it and send the case back to the regulator for a new decision.

With regard to the internal appeal procedures, half of the appeal bodies have the power to replace the regulator's decision with their own<sup>317</sup>, while the other appeal bodies can either accept the decision or send it back to the regulator. With regard to the external appeal procedures, the situation is more diverse. The decisions of 12 regulators can be replaced with decisions of the appeal body<sup>318</sup>, while the decisions of 15 regulatory

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<sup>314</sup> Austria, Czech Republic, Denmark, Ireland, Latvia, Slovakia, United Kingdom (OFCOM).

<sup>315</sup> Spain (CAC, CAA), France, Croatia, Macedonia, Serbia, Slovenia.

<sup>316</sup> Albania, Belgium (all Communities), Bulgaria, Germany, Spain (CNMC), Finland, Greece, Hungary, Italy, Lithuania, Luxembourg, Montenegro, Malta, Netherlands, Poland, Portugal, Romania, Sweden, Slovenia (APEK), Turkey.

<sup>317</sup> Albania, Belgium (all Communities), Germany, Greece, Portugal, United Kingdom (OFCOM).

<sup>318</sup> Croatia, Hungary, Italy, Malta, Netherlands, Poland, Serbia, Sweden, Slovenia, Slovakia, UK (ASA, ATVOD).

authorities cannot be replaced with the decisions of the appeal body.<sup>319</sup> The power to replace the regulator's decision with their own has been newly introduced for the appeal bodies in Hungary, Slovakia and Serbia. Otherwise there have been no changes.

The appeal bodies of the CRTA in Cyprus and of the NEPLP in Latvia have the power to lower or increase the fines imposed by the regulators. Otherwise they cannot replace the regulators' decisions with their own. The decisions of the French CSA can only be replaced by the Supreme Administrative Court in some specific cases, i.e. in cases of conflict between channels and operators and in case of decisions regarding sanctions. The appeal body of the Macedonian AVMU can replace the original decisions with its own or remit the decision back to the regulator for a new decision, if it determines errors of law. However, if it determines errors of fact it has to cancel the decision and remit it back to the regulatory authority for a new decision. In this case the Court cannot replace the regulators decision with its own. The appeal body of the Portuguese regulator can generally replace the regulator's decisions with its own, however, the substitution is not possible in certain cases, i.e. in tendering procedures for the award of television licences.

In Albania, Austria, and Lithuania the power to replace the regulators decision with their own differs for the different appeal bodies in the different stages of appeal. The appeal bodies of the first and second stage of the appeal process in Austria and Latvia have the power to replace the regulator's decision with their own, while the appeal bodies of the third stage of appeal do not have that power. In the case of Latvia, the appeal body of the fourth stage does not have that power either. In Albania on the other hand, the appeal body of the first stage does not have the power to replace the regulator's decision with its own, while the appeal body of the second and third stage do not have that power any longer.

### **3.4. Stakeholder survey**

Apart from feedback provided by country correspondents and national regulators, the views of stakeholders were sought to broaden the input to this study and verify findings. Being the primary subjects of regulation, directly or indirectly affected by any changes in the regulatory scheme, the perspective of stakeholders constitutes an important source contributing to a more comprehensive analysis. Yet, the responses by stakeholders are not representative of the views of the industry as a whole and no general conclusions can be drawn from them. They should therefore be regarded as selective statements, which may serve to reinforce individual aspects examined in this study.

Stakeholders were invited to participate in an online survey consisting of 15 questions including a comment section for additional remarks.<sup>320</sup> The first four questions

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<sup>319</sup> Belgium (all Communities), Bulgaria, Czech Republic, Germany, Spain (CNMC, CAC, CAA), Finland, Greece, Luxembourg, Romania, United Kingdom (OFCOM), Turkey.

requested general information about the stakeholder, its name, core business, country of origin and relevant geographic market. It was also possible to contribute to the survey anonymously. The second set of questions related to the regulatory authority's remit, its agenda-setting powers, its funding and staffing as well as its composition. Two further questions referred to the regulatory body's sanctioning powers and the existence of efficient complaints handling procedures. The next two questions related to the aspect of transparency inquiring about consultations and the publication of internal documents. Finally, stakeholders were asked to consider the level of independence of the national regulator in an overall view and indicate any significant aspects or particularities of the national context.

In total, 14 responses by various stakeholders across Europe were received. Of these, a great majority of stakeholders operate in the broadcasting business while one of these is also active in the distribution of on-demand services. In addition, one representative primarily offers on-demand audiovisual media services while the core activity of another participant is teleshopping focussing on the market for commercial communications. Most stakeholders operate at national level in different countries, one even at European level (hereinafter European stakeholder).

In more detail, public service broadcasters of the Flemish-speaking Community of Belgium, France, Finland, Germany, Ireland, Slovenia and Sweden and commercial broadcasters located in Germany and Slovenia participated in the survey. Three further stakeholders established in Albania, Hungary and Italy did not specify the nature of the broadcasting service but indicated broadcasting as their principal business. The European stakeholder, albeit established in Belgium answered the questionnaire with regards to the German broadcasting market.

With respect to the substantive questions, stakeholders confirmed that in most countries, the remit of regulatory bodies had expanded.<sup>321</sup> In several countries, the scope of tasks carried out by regulatory authorities was regarded to have remained stable<sup>322</sup> or was characterized as decreasing by one stakeholder.<sup>323</sup> A reduction in the regulatory remit may be explained by the activity undertaken by the stakeholder focussing on a specific segment of the market for audiovisual media services (e.g. advertising). A general trend towards an extension of regulators' remits seems to be supported by a majority of contributions.

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<sup>320</sup> The 15 questions are included in Annex 3.

<sup>321</sup> An increase in the remit of regulatory authorities was noted by stakeholders established in Albania, the Flemish-speaking Community of Belgium, Finland, France, Hungary, Italy, Sweden and Slovenia.

<sup>322</sup> Stakeholders located in the Czech Republic, Germany and Ireland noted that the regulatory remit remained unchanged throughout the past years. The response by the stakeholder in the Czech Republic indicated nonetheless that the Czech regulator had gained more competences.

<sup>323</sup> The European stakeholder posited that the remit of the regulator of the German broadcasting market had decreased.



Similarly, most stakeholders consent that the regulatory bodies are able to determine their own agendas.<sup>324</sup> The capacity to determine policy objectives and the ability to take regulatory measures to foster these may be more prevalent in certain areas of regulation than in others as highlighted by a stakeholder established in Germany. The Italian stakeholder agreed that the regulator generally determined its agenda but underlined that from time to time, it was strongly influenced by political and economic actors. This stakeholder also pointed to the excessive number of objectives formulated by the regulator in its agenda and remarked that the market interventions by the regulator were too numerous causing a serious backlog of current activities (underlined, for instance, by numerous pending public consultations). Importantly, the stakeholder established in the Czech Republic posited that the regulatory body could not determine its own agenda, being strongly pressured by the industry.

Furthermore, a majority of stakeholders opined that the regulatory authorities were adequately funded and relied on staff with an adequate level of expertise.<sup>325</sup> Importantly, the Albanian stakeholder considered the financial resources of the regulatory authority to be inadequate. In addition, two stakeholders located in Hungary and Italy raised concerns that the regulatory authorities were over-financed due to, among others, excessive industry levies. Moreover, in Albania, the Czech Republic, Ireland, Italy and Slovenia, the level of expertise was criticized as inadequate. Responses by the Slovenian stakeholders differed with respect to the training of regulator's personnel. While one considered the level of expertise adequate, the other disagreed.

When regarding the highest decision-making body of regulatory authorities, a group of stakeholders confirmed its independence whereas many stakeholders answered in the negative. The Albanian, Czech, Hungarian, Italian, Slovenian and European<sup>326</sup> stakeholders claimed that the highest decision-making body lacked independence. The Czech stakeholder highlighted that the Board consisted of members of the political parties represented in Parliament. Importantly, the responses from Hungary pointed out that the highest decision-making body was exclusively composed of delegates of the party in power. Consequently, power was concentrated in this body, which lacked neutrality and impartiality according to the stakeholder. Similarly, it was possible to identify the party affiliations of members of the highest decision-making body in Italy. Apart from the political influence on the Board, the stakeholder stressed that some

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<sup>324</sup> Stakeholders from Albania, Flemish-speaking Community of Belgium, the European stakeholder, France, Germany, Hungary, Italy, Ireland, Sweden and Slovenia. From the responses of the Finish stakeholder, it can be deduced that the regulator can generally determine its agenda.

<sup>325</sup> Stakeholders of Belgium, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Sweden and Slovenia consider the level of funding of regulatory authorities to be adequate. The stakeholder located in the Flemish-speaking Community of Belgium did not specify an answer. The expertise and knowledge of staff is considered appropriate in the Flemish-speaking Community of Belgium, Belgium, Finland, France, Germany, Hungary, Sweden and Slovenia. The Finish stakeholder emphasized the complexities of regulating the market for audiovisual media services and noted that the regulator lacked adequate expertise for some areas of regulation.

<sup>326</sup> The stakeholder operating on European level expressly referred to the regulatory authority on the German TV market.

members were affiliated with media companies, which were directly linked to the main Italian political parties.

All stakeholders except for the Albanian and Swedish respondents confirm that the regulatory authorities have employed their sanctioning powers during the previous five years. Warnings and fines appear to be the sanctions most frequently used by regulators. The Czech stakeholder showed concern about the coherent application of fines and pointed out that many sanctioning decisions by the regulator were quashed by courts. The Hungarian stakeholder underlined the large margin of discretion of the authority when imposing fines. This stakeholder also criticized that the payment of the fine was not suspended until approved of by the courts so that service providers were required to immediately pay the lump sums ordered by the regulator. Furthermore, complaints handling procedures were considered efficient by a majority of stakeholders whereas the Albanian, Czech and Italian representatives regarded such procedures as inefficient. In this respect, the Italian stakeholder referred to the large margin of discretion enjoyed by the regulatory authority.

Another issue enquired by the survey was the transparency of the activities exercised by regulatory authorities. Firstly, several stakeholders indicated that they were aware of public consultations initiated by regulatory authorities while no such consultations appear to have been held in previous years in Albania, the Flemish-speaking Community of Belgium, the Czech Republic, Germany and Hungary. Secondly, most stakeholders took the view that the activities of regulatory authorities such as their decisions, annual reports or guidelines were transparent. By contrast, from the responses of the Albanian, European<sup>327</sup>, Czech, Hungarian and Italian stakeholders, it emerges that the activities of regulatory bodies were not considered transparent.

On an overall level, a majority of stakeholders agreed that the regulatory bodies were sufficiently independent to accomplish their tasks. The two Slovenian responses diverged on this point. While one stakeholder confirmed overall independence of the regulator, the other posited that it lacked independence. Importantly, the stakeholders located in Albania, the Czech Republic, Hungary and Italy considered that the regulatory authorities were not independent.

Briefly, participating stakeholders generally seem to positively evaluate regulatory authorities' independence. In the view of the stakeholders, agenda-setting, as well as sanctioning powers, are established in the mandate of regulatory bodies which regularly use such competences. On an overall level, regulatory authorities appear to be funded and staffed in a way which ensures their efficient functioning. However, some stakeholders underpinned the lack of independence of the highest decisions-making body, which appears to be a principal reason for the lack of independence of the entire regulatory authority. Stakeholders established in Albania, the Czech Republic, Hungary and Italy seem to be especially concerned about interferences primarily stemming from the political sphere.

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<sup>327</sup> The European stakeholder expressly linked its responses to the German TV market.

These observations might point to difficulties in the application of the rules in practice or by defining the composition of important bodies. However, the findings cannot be confirmed in a systematic manner based on a representative view of all concerned stakeholders nor as a consequence of the underlying legal norms (as has been shown above).

### 3.5. Schematic overview on extent of changes

This schematic overview in table form shows the main trends of changes that occurred since the INDIREG study using traffic light-style indications

	AL	AT	BE-DE	BE-FL	BE-FR	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR	HU	IE	
<b>Governance rules</b>	Red	Green	Green			Red	Yellow		Yellow		Red	Yellow		Green			Red		
<b>Funding</b>	Red	Green		Green		Red	Yellow	Green										Green	
<b>Adequate powers</b>	Yellow		Yellow			Green	Green	Green			Yellow	Green					Green	Yellow	
<b>Cooperation</b>	Green	Green	Green	Green	Green	Green	Green	Green	Green	Green	Yellow	Green	Green	Green	Green	Green	Green	Green	Green
<b>Formal accountability</b>		Green	Green				Green				Red	Green						Green	
<b>Transparency</b>			Green	Green	Green		Yellow				Yellow	Yellow					Green		Green
<b>Judicial Review</b>	Green	Green					Green				Yellow							Yellow	

**Legend**



No changes



Minor changes



Significant changes



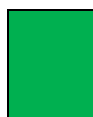
Fundamental overhaul

	IS	IT	LT	LU	LV	ME	MK	MT	NL	PL	PT	RO	RS	SE	SI	SK	TR	UK
<b>Governance rules</b>	Significant changes	Minor changes	Fundamental overhaul	Significant changes	Significant changes	Significant changes	Fundamental overhaul	No changes	No changes	Minor changes	No changes	Minor changes	No changes	Minor changes	Fundamental overhaul	Minor changes	Minor changes	No changes
<b>Funding</b>	Minor changes	No changes	Fundamental overhaul	Fundamental overhaul	No changes	Significant changes	Significant changes	No changes	No changes	Significant changes	No changes	Minor changes	Minor changes	Minor changes	No changes	No changes	No changes	Minor changes
<b>Adequate powers</b>	Significant changes	No changes	Significant changes	Fundamental overhaul	Minor changes	Minor changes	Significant changes	Minor changes	Minor changes	Minor changes	Minor changes	Significant changes	Minor changes	Minor changes	Significant changes	Minor changes	Minor changes	Minor changes
<b>Cooperation</b>	Significant changes	Minor changes	Minor changes	Significant changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes
<b>Formal accountability</b>	No changes	No changes	Minor changes	Minor changes	No changes	No changes	Minor changes	No changes	No changes	No changes	No changes	Significant changes	Significant changes	Minor changes	Minor changes	Minor changes	No changes	No changes
<b>Transparency</b>	Minor changes	No changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes	No changes	Minor changes	No changes	No changes	Significant changes	Minor changes	Minor changes	Minor changes	Minor changes	Minor changes
<b>Judicial Review</b>	No changes	No changes	No changes	No changes	Minor changes	No changes	No changes	No changes	No changes	No changes	No changes	No changes	Minor changes	No changes	Minor changes	Minor changes	No changes	No changes

**Legend**



No changes



Minor changes



Significant changes



Fundamental overhaul

## 4. CONCLUSIONS

The following concluding remarks summarize the findings of this report along the three main groups of indicators and the set of criteria as outlined in chapter 3.

### 4.1. Independence

#### 4.1.1. *Legal status and resources*

The regulatory framework has remained stable in most countries investigated in the study. In a number of countries, such as Spain, Estonia, Luxembourg, Sweden and Slovenia, new regulatory bodies have been established, which has obviously an impact for a large number of areas analysed in this report. The comparative analysis shows that all regulatory authorities are separate legal entities whose independence is explicitly or implicitly recognized by the national legal framework. There is one notable exception and that is the Estonian TJA. This body is a governmental authority, which operates within the Ministry, exercising powers of state supervision and enforcement. The TJA is competent to regulate audiovisual media services as well as telecommunications aspects. Although no direct influence by the Ministry on the activities of the TJA appears to be legally admissible or to have been exerted in practice so far, the legal provisions concerning the organisation of the authority still constitute a close and direct link to the government structure of Estonia. As mentioned in the context of the legal status of regulatory bodies, such a closeness may give rise to doubts about the regulator's independence.<sup>328</sup>

What contributes to regulator's independence is their adequate equipment with sufficient resources, above all, staffing and budget. Both parameters are heavily dependent on national conditions and thus show great variety across all countries. Apart from a large group of regulatory bodies which appear appropriately staffed and financed, country reporters have noted that regulators in the German-speaking Community of Belgium, the Czech Republic, Greece, Croatia, Ireland, Iceland, Latvia and Romania could be regarded as under-staffed in view of the breadth of their mandate while the Latvian regulatory authority seems to operate on a very tight budget. It seems as if problems concerning staffing and financial resources are more likely to occur or become evident in case of smaller regulatory authorities in countries which have limited resources to fund them. Moreover, the trend towards downsizing administration, i.e. consolidating different aspects of regulation within one (converged) body thereby considerably expanding regulators' mandates, if continued, will further put a strain on smaller regulators. Similarly, where funding comes from

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<sup>328</sup> To the extent that the TJA as converged regulator is also in charge of regulating electronic communications – which is not the topic of this report –, the independence requirement derives from Art. 3 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ of 24.4.2002, L 108, p. 33 as amended by Directive 2009/140/EC, OJ of 18.12.2009, L 337, p. 37 and Regulation 544/2009 OJ of 18.6.2009, L 167, p. 12.

State budgets, ongoing austerity schemes will put pressure on the structure of regulatory bodies as designed today.

#### 4.1.2. Governance rules

Complete independence of the regulatory body from any external influence will, if at all it is seen as one, remain an ideal which is very difficult to achieve as long as the body is unable to produce to a sufficient extent its own resources. Both the financial and human resources of the regulatory bodies responsible for audiovisual media services need to be acquired from external sources. With regard to the highest decision-making organ within the regulatory body (the Board), this situation requires careful selection of its members so as to ensure that all relevant views are represented in it in a balanced way.

From a mathematical point of view, this balance can better be achieved through a Board comprising a high number of members, as different societal nuances can be better mapped in the Board's decision-making process. In this respect, it is specifically the Broadcasting Councils of the German public service broadcasters (with their number of members varying between 25 and 77) that allow for a wide representation of different social groups and interests. On the other hand, depending on its scope of competence, it can become a cumbersome task to organise the daily work of a body of that size, which might render this model suitable only for internal self-regulatory mechanisms within public service broadcasting providers that have additional smaller, purely internal bodies overseeing the exercise of everyday executive functions, as is the case in the German public service broadcasters' Administrative Councils.

The size of regulatory bodies' Boards in almost all countries but Germany spans from three to 13, except for a few countries where either an individual person acts as the highest decision-making body, or a body with significantly more members exists (which is true for the advisory organs of the regulators in the German-speaking and French Communities of Belgium and for the UK's co-regulatory body for television on-demand services, ATVOD). While the sizes of Boards have remained unaltered in a majority of countries, the changes that occurred in the others typically came about as a consequence of extensive reforms of the entire regulatory body.

A balanced representation of stakeholder views within the Board is also dependent on the socio-economic backgrounds of its members. In most countries, Boards are legally required to be composed of members acting for diverse social, economic and political groups. In nearly two thirds of the countries experts in fields related to (audiovisual) media are represented in the Board. In a few others, members do not explicitly represent certain groups, but are actually nominated and/or appointed by these. Since the INDIREG study, changes in the composition of Boards have occurred in about a third of countries analysed, but were mostly only minor and sometimes resulted from a change in the overall size of the Board. Noteworthy are reductions in the number of civil society representatives along with an increase of the number of political representatives which could be observed in Belgium (German-speaking community), Germany (for the *Norddeutscher Rundfunk*) and Lithuania. They do not, however, seem to represent a general trend aiming at gaining more political influence in Board decisions.

Of equal importance for the proper fulfilment of the Board's functions is the professional qualification and expertise of its members. However, while in most countries requirements in this regard exist, they are missing completely in a considerable number. Where legal requirements are in place, they vary substantially. In some countries, only some education, but no work experience is required, whereas others only require a certain degree of professional experience. Likewise, the levels and relevance of education and professional experience for the work as a Board member differ, although it can be noted that in the majority of countries requiring either of these qualifications, they need to have been acquired within the (audiovisual) media sector or at least in fields of relevance to the substantial work of the Board. While in general changes regarding this area have remained marginal compared to the INDIREG study, requirements have been raised or made more specific in a limited number of countries, but also reduced in one other country (Turkey).

Existing rules to prevent conflicts of interest at all stages of Board membership are a strong indicator for the independence of Board members, as they can ensure that undue influence on the decisions of the Board is reduced to a minimum.

While specific conflict of interest rules preventing candidates from being appointed in case of existing incompatibilities are widespread, they are missing in seven countries. In some of the latter, however, general incompatibility rules also applying to the appointment phase are in place, or the lack of rules is compensated by strong rules on conflicts of interest applicable during the members' term of office. In the majority of countries, specific incompatibility rules also apply at senior staff level. As far as they exist, the rules mostly cover a wide range of potential conflicts of interest, from incompatibilities with Government, political parties and sometimes the legislator as well as the regulated branches. The laws of more than half of the countries prohibit Board members to hold any other position during their membership in the Board (sometimes with an exception for research, teaching activities and/or creative work).

In all countries except for Denmark, specific or at least general incompatibility rules are in place to mitigate conflicts of interest during a Board member's term of office. Mostly, these rules again cover all potential incompatibility situations.

The laws of almost half of the countries also provide for a cooling-off period after the Board member's term of office in order to prevent members from considering to take decisions in favour of a potential future employer while still in their position of the regulatory authority. The periods foreseen range between six months and four years.

In procedural terms, the rules governing the appointment and dismissal of Board members (including the chairperson) and their practical implementation called for a closer look as they may have an impact on the independence with which a Board member conducts his or her functions.

Candidates for the Board are, in most countries, selected through a two-stage procedure, featuring separate nomination and appointment stages. Often, however, this procedure does not apply to the chairperson. On the other hand, in some countries, the chairperson is elected directly from among the Board members.



As far as a two-stage model is applied, it is mostly a legislative or executive organ of the State (Parliament, Head of State or (a part of) the Government) that is responsible for the actual appointment. State bodies or individual Members of Parliament are also usually in charge of the nominations. In the majority of countries, the Government is involved either at the nomination or at the appointment stage of the procedure. In the process, however, a considerable minority of predominantly Eastern European countries (Member States and candidate countries) only involves the legislative power and, in some instances, at the nomination stage, other groups, such as academia, jurisdiction, civil society or professional associations. In many German *Länder* as well as in Lithuania, the majority of the Board members are directly appointed by stakeholders, without any State interference. This does not include those Board members explicitly representing the executive or legislative power of the State. In some other countries, the appointment is based on a previous public call for candidates.

Substantial changes specific to the appointment procedure have, all in all, remained limited to two countries (Estonia, Slovenia). Other changes have resulted from reforms of the entire regulatory system, such as e.g. in Luxembourg.

The appointment procedure applying to Board members in Hungary gives rise to serious concerns about the independency of the NMHH: in practice, a two-thirds majority of the governing party (coalition) in Parliament implies that the same can elect all members of the Board. The NMHH's President, who is nominated directly by the Prime Minister and formally appointed by the President of the Republic, becomes automatically nominated as the Board's chairperson. Since he or she was originally nominated as a candidate for the NMHH President by the Prime Minister, the governing coalition in the Parliamentary election committee is again able to elect a candidate from its own political camp.

Board members are, in most countries, appointed for a term of between four and six years. Shorter terms of one or two years are in very few cases foreseen for chairpersons. A three-year term applies to Board members in Sweden and the UK (in the latter concerning the Advertising Standards Authority). Noteworthy are long terms of seven years in Italy and Macedonia and even nine years in Hungary. Also in two German regulatory bodies (the LMS and the *Hessischer Rundfunk*), chairpersons serve seven and (up to) nine years terms, respectively. Some Boards have no fixed term, and members might stay on the Board until they resign or retire. This is the case in Finland, Macedonia (for the chairperson) and UK (for Ofcom and ATVOD, although terms in practice usually end after three to five years). Long terms – particularly where they have only been extended in the past years (Hungary: previously four years) – might point to a potential democratic deficit, but might also mean a longer phase for the Board to carry out its work independently from external influence by appointing bodies. Other terms have only changed moderately within the four to six years range. The terms of the Board and of the democratic election cycles have different lengths in about half of the countries, giving regulatory bodies greater independence from changes in the political balance of powers. In almost as many countries, the term of office of a Board member can be renewed once or twice. It should be noted that in countries where long terms of office are foreseen, these terms usually (except for the two German bodies mentioned above) cannot be renewed. However, seen together

with the problematic design of the appointment procedure, the extraordinarily long term of office of the Hungarian Board implies a high risk that the composition of the Board, which only inadequately reflects the real political and social situation of the country, can be preserved over a long period of time.

In the overwhelming majority of countries, laws to protect Board members against arbitrary dismissal are effective. In these countries, a Board member can only be dismissed for one of the reasons specified in law, which mostly include health conditions, cases of serious misconduct, violations of conflict of interest rules, a request by the Court of Auditors or by the Board member him/herself. The body competent to dismiss Board members is frequently the Government. However, in a number of cases, it is the Board itself, its chairperson or another organ of the regulatory body that is entitled to dismiss a member. In other countries, this power is conceded to the Parliament, to socially relevant groups or the body that originally appointed the member. In some countries, not only individual Board members, but also the entire body can be dismissed, e.g. when the annual report is rejected by the body to which the regulatory body is accountable. Changes in this area have remained minimal in the past years and mostly did not touch upon substantial issues. In practice, dismissals ahead of schedule have been limited to a handful of cases in the past five years. Individual Board members were dismissed due to an incompatibility or at own request. In one case, dismissal of the entire Board resulted from the establishment of a new regulatory body, in another as an (automatic) legal consequence of the rejection of the annual report by the competent body (Parliament).

#### *4.1.3. Funding*

##### *4.1.3.1. Funding sources*

Since the regulatory body cannot produce its own resources, its financial independence is determined by the way in which the regulatory body can enforce the funding entity's financing obligation. In the great majority of countries, however, regulatory bodies are mainly or exclusively financed by the State. In some countries, a mainly fee-based funding model applies, whereby fees are collected either from the broadcaster (licence and authorisation fees) or from the end-user (broadcasting fee) or from both. While initial or interim state funding of a small number of regulatory bodies has ceased after the INDIREG study, one country, Lithuania, switched from a fee-based to a predominantly state-budgeted model with the aim of making the LRTK's financing regime more transparent, following an advice by the National Audit Office. On the other hand, regulatory bodies in four countries now rely more than before on fees as a funding source. Where fines contribute to the regulatory body's budget (roughly one third of the countries) and details about their share in the overall budget are available, this share was found to be small.

##### *4.1.3.2. Budget-making process*

In more than two thirds of the countries, the final decision over the regulatory body's annual budget lies with the Parliament. This is of some concern, where the regulatory

body draws its financial means mainly from the State budget. In these countries, the regulatory body cannot be considered to be financially independent from the State, as the party funding the regulatory body also has the last and decisive say over its funding needs. In seven countries, the regulatory body itself decides on its budget, only limited in some instances by external factors, such as the uncertainty about the real revenues that can be gained from funding sources, such as broadcasting fees (Germany), or spending caps that may be imposed by the Government (Italy, UK) or are laid down in law (Austria). In three countries, the Government or the competent Ministry takes the ultimate decision over the regulatory body's budget. In all countries, the regulatory body is involved, at some stage, in the decision-making process about the financial needs. In the years after the INDIREG study, there have only been very few changes in this regard, most of which brought about a more prominent role of the Parliament in the decision-making process.

## **4.2. Effective functioning**

### *4.2.1. Adequate powers*

#### 4.2.1.1. Regulatory powers

The range of powers granted to regulatory authorities is indicative of their independence. The more comprehensive their powers are, the more they can assert themselves within the national context (e.g. vis-à-vis the Government or the industry). While less than half of the regulatory authorities examined in this study have been given policy setting powers, all bodies are entrusted with policy implementing powers. This finding is not surprising when considering that regulatory authorities are designed precisely for implementing the media policies of their respective Governments. Less frequently so, they are granted more extensive policy setting powers whereby the regulator can act with more freedom and design policy goals itself. These may, nonetheless be constrained to certain areas of regulation. In a similar vein, the power to take decisions which are binding on third parties is attributed to all regulatory authorities and pertains to the core of their powers. Changes with regards to the existence of regulatory powers have occurred in a handful of countries where regulatory bodies have gained such powers. To this end, their independence was strengthened.

#### 4.2.1.2. Monitoring powers

In order to effectively enforce the law, regulatory authorities are equipped with different monitoring powers. With the exception of the Icelandic and Swedish regulatory authorities, all other regulators have been empowered to conduct systematic monitoring. Similarly, all regulatory authorities except for the Spanish regulators (at federal and regional levels) have been granted ad-hoc monitoring powers. Moreover, several regulatory bodies such as in Albania, Estonia, Iceland, Luxembourg, Romania, Slovenia have been attributed either power since the INDIREG study. By the same

token, all regulatory authorities are authorized to collect information from third parties. In a minority of countries, either type of power is restricted to certain areas. In addition, complaints may be initiated by the general public in many countries. Regulators seem to revert to complaints-based supervision more frequently. Although all regulatory authorities employ a mix of monitoring powers in practice, concerns have been reported that under-staffed regulators minimize own monitoring activities and exclusively rely on complaints by the public.

#### 4.2.1.3. Sanctioning powers

Apart from monitoring powers by which regulatory authorities oversee compliance with national media laws, the power to impose sanctions constitutes another indicator of the independence of regulators. Typically, national laws prescribe a graduated sanctioning scheme comprising a number of sanctions of different intensity. The least intrusive sanction constitutes a warning which can be issued now by all regulatory authorities. Changes in so far as the regulator has been granted the power to warn providers, have only been made in very few countries such as Luxembourg and Estonia. Similarly, the power to impose fines is granted to all regulatory bodies with the exception of several Nordic countries such as Denmark, Finland and Sweden. The mandate of only a few regulators was extended to include this power. The precise conditions for imposing fines including the amount which may be levied, differ considerably from country to country.

While almost all regulatory authorities may impose warnings and fines, considerably less are endowed with the power to order publication of their decisions in media outlets of the concerned providers. The newly created regulators of Iceland and Luxembourg have been equipped with this particular power.

Furthermore, the power to suspend a service or revoke a license has been attributed to all but a few regulators and is mostly regarded as a sanction of last resort. This explains that a great number of regulators does not seem to have used this type of sanction recently. In Romania, the regulator has been newly endowed with this power. Similar to the power to suspend or revoke a license, not all regulatory authorities have the power to impose penalty payments in case of non-compliance with their decisions. Yet, this power was newly introduced in Estonia, Iceland, Lithuania, Luxembourg and the Netherlands. In general, sanctioning powers are restricted to certain areas of regulation in some countries but generally cover the whole range of competences of regulators. It follows from the analysis that all regulatory authorities seem to have adequate sanctioning powers to be able to enforce the law. It is noteworthy that the Danish and Swedish regulators appear less well equipped (lacking the power to impose fines in case of the former or suspend/revoke a license in case of the latter) but seem to make effective use of the existing sanctions. In countries where the regulatory framework has been modified more substantially like in Estonia, Iceland, Luxembourg and Slovenia, the sanctioning powers of regulators have been strengthened.

#### 4.2.1.4. Complaints handling procedures

Complaints handling procedures exist in all countries including Lithuania where they have been laid down in the law recently. These are set out either in sector-specific legislation or executive acts or stem from general administrative law and are thus valid for all public institutions. Finland seems to be the only exception with less formalized rules.

#### 4.2.2. *Cooperation between regulatory authorities*

##### 4.2.2.1. Cooperation between regulatory authorities at national level

The position of a regulator within the national regulatory arena may also be indicative of its independence. At national level, collaboration with other regulators operating in different fields is indispensable to guarantee coherent policy outcomes. Thus, all regulatory bodies cooperate with other bodies regulating the media or different aspects of the market for audiovisual media services. Cross-sector cooperation (with consumer or competition agencies) is equally common. In most countries, such collaboration is voluntary and designed in rather loose fashion. More structured forms of cooperation exist in many countries with regards to the interaction with the regulator governing the telecommunications sector as aspects of infrastructure are essential for both. Close cooperation also takes place between the regulators of federal states (e.g. Belgium, Germany and Spain) and an Industry Forum has been established by the Authority for Television On-Demand (ATVOD) in the UK. Such cooperation is generally necessary and needed to facilitate exchange of viewpoints and formulation of common positions.

##### 4.2.2.2. Cooperation between regulatory authorities at European and international level

Cooperation between regulators at European or international level has increased in the last years. The market for audiovisual media services has become global necessitating some kind of collaboration. Bilateral or multi-lateral cooperation exists between neighbouring countries or countries sharing the same language, history or culture. More institutionalized forms of cooperation like EPRA and ERGA have been established at European level and are actively supported by the regulatory authorities. They facilitate mutual understanding of regulatory issues and constitute a mechanism to resolve disputes. Yet, they may also be used as mechanisms to put political pressure on regulators pertaining to a minority but the effect on their independence appears minimal.

### **4.3. Accountability**

#### 4.3.1. *Formal Accountability*

There have been only few changes regarding the existence and form of accountability of regulators. However, a small increase in accountability obligations can be detected. The requirements set forth for regulators regarding formal accountability and transparency have increased, while such an increase cannot be detected regarding the

rules of judicial review of regulators' decisions. Concerning formal accountability, it can be noted that in a great majority of countries, regulators remain free from influence of other national executive organs in their decision-making. Yet, in very few countries (e.g. Cyprus, Finland, Iceland, and Slovenia), the regulators seem to have to follow instructions by other bodies including the Government, albeit in limited cases.

There have been very few changes regarding the bodies to which regulatory authorities are formally accountable to, regarding their obligations towards these bodies to undergo audits and to submit reports. Overall, only three regulators are newly accountable towards other bodies (Ireland, Serbia, Spain) and for two regulators accountability obligations towards other bodies have been abolished (Cyprus, Sweden). In one country (Estonia), accountability of the regulator has been shifted from Parliament to a Ministry and the Government.

The obligation to undergo a public audit has been newly introduced for four regulators (Albania, Austria, Luxembourg, Lithuania) and changed from a public to a private audit for AKOS of Slovenia. However, there has been no change regarding the periodicity of the obligation to undergo audits in the last five years.

There has been almost no change in the obligations of the regulatory authorities to submit activity reports to other bodies in the past five years: For AKOS in Slovenia, such reporting obligations to the Ministry and the Parliament have been replaced by reporting obligations to the Government as a whole, since they are still in force. The Council for Broadcasting and retransmission in Slovakia is now obliged to report towards the Ministry of Culture. Further obligations to submit reports have been introduced for the regulator in the German-speaking community of Belgium as well. Two more regulators than at the time of the INDIREG study have to include statistical data about their own performances into their reports now.

Remarkably, for the first time a report has been rejected in Poland with the consequence of the expiration of the term of office for the Polish regulator; and the Macedonian regulator can no longer be obliged by the Parliament to submit a new report in case it detects irregularities regarding the financial plan.

#### *4.3.2. Transparency*

Although only few changes have occurred regarding the transparency of the regulators work, those that did occur, point to more transparency. There have been few changes in the rules regarding the transparency of the decision-making process, the rules regarding the possibility to seek public and external advice, and the publication obligations of regulatory authorities.

Regarding the decision-making process – with the exception of Macedonia, where meetings are now closed to the public and decisions are frequently taken in camera – several countries (e.g. the Czech Republic, Iceland, Luxembourg, Poland, Slovakia) have strengthened their transparency provisions. The LRTK in Lithuania is now obliged to carry out public impact assessments before establishing legal norms. With

this exception and in addition to the cases where whole new regulators have been introduced, there have been no changes concerning the decision-making process.

While a few more obligations have been introduced for regulatory authorities to conduct public consultations, there have been almost no changes in the question who needs to be consulted and how long the consultation needs to last. Regarding the publication obligations it can be noted that in five countries new obligations have been introduced (Austria, Bulgaria, Luxembourg, Montenegro, Slovakia), while in two countries obligations have been replaced (Albania, Estonia).

#### *4.3.3. Judicial Review*

The rules regarding the internal and external appeal procedures against decisions of regulatory authorities, have changed only little in the last five years with overall no impact on the regulators' independence. While in Spain a new internal appeal procedure for the CNMC was introduced, such a procedure was abolished for AKOS in Slovenia. Albania has reduced its internal appeal procedure from a two stage procedure to a one stage procedure, while in Lithuania a second stage of appeal has been introduced in the external appeal procedure.

Regarding the appeal bodies and the status of complaining persons or companies there have been no changes at all. As far as the grounds for appeal are concerned, there has been a change only in Latvia. Now, only errors of fact are accepted grounds for appeal, and a full re-examination of the decision is no longer possible. The possibility of the appeal body to suspend the regulator's decision has been abolished in Austria and limited in Cyprus; while that possibility has been newly introduced in Spain and in Sweden. With the exception of the newly introduced power of the appeal bodies in Slovakia and Serbia to replace the regulator's decision with their own and the loss of that power for the appeal bodies of the second and third stage of the appeal procedure in Albania, there have been no further changes in this regard.

#### **4.4. Overall Conclusion**

As an overall observation, it is noteworthy that there have been only a few major changes in the national landscapes governing regulatory authorities. Where these occurred, they were indeed significant such as the establishment of new bodies in a number of the monitored countries (such as Spain, Estonia, Luxembourg, Sweden and Slovenia).

In many cases there have been a series of smaller amendments, for example the extension of regulatory powers (e.g. Czech Republic, Estonia, Luxembourg, Hungary, Spain), prolongation of terms of office for chairpersons and Board members (e.g. Macedonia, Hungary), increase of consultation obligations (e.g. Hungary, Latvia, Serbia, Turkey), or changes in judicial review procedures (e.g. Albania, Hungary, Lithuania, Slovenia, Spain).

The study supports the conclusion that in general regulatory authorities in the audiovisual sector are both independent to a sufficient degree and function efficiently.



## ANNEXES

### **Annex 1: List of experts**

The following is a list of experts that have been entrusted with the drafting of country reports, based on the questionnaire, as shown under annex 2. Please note that the country reports on Germany and Luxembourg have been covered by in-house experts of the consortium's members.

1. AL (*Albania*)

**Ilda Londo**

Albanian Media Institute, Tirana, Albania

2. AT (*Republic of Austria*)

Prof. Dr. **Michael Holoubek** and Mag. **Hannah Grafl**, LL.M.

Institute for Austrian and European Public Law, University of Economics and Business, Vienna, Austria

3. BE (*Kingdom of Belgium*)

*Flemish Community:*

**Dr. David Stevens**

Neerijse, Belgium

*French Community:*

**Robert Queck** and **Elise Defreyne**

Centre de Recherche Informatique, Droit et Société, University of Namur, Belgium

*German-speaking Community:*

**Dr. Olivier Hermanns**

Ministry of the German-speaking Community, Eupen, Belgium

4. BG (*Republic of Bulgaria*)

**Evgeniya Scherer**

Attorney at Law and Lecturer, Bulgaria/Germany

5. CY (*Republic of Cyprus*)

**Christophoros Christophorou**

Council of Europe Expert in Media and Elections, Cyprus

6. CZ (*Czech Republic*)

**Dr. Milan Smid**

Department of Media Studies, Charles University, Prague, Czech Republic

**Dr. Vladimír Kroupa**

Attorney at Law, Prague, Czech Republic

7. DE (*Federal Republic of Germany*)  
**Peter Matzneller**, LL.M. Eur.,  
Institute of European Media Law, Saarbrücken/Brussels  
  
**Sebastian Schweda**  
Institute of European Media Law, Saarbrücken/Brussels
8. DK (*Kingdom of Denmark*)  
**Per Jauert**  
Associate Professor, Department of Aesthetics and Communication – Media  
Science, Aarhus University, Denmark
9. EE (*Republic of Estonia*)  
**Pirkko-Liis Harkmaa**, LL.M.  
Attorney at Law for Telecommunication and Media Law, LAWIN Tallinn office,  
Estonia
10. ES (*Kingdom of Spain*)  
**Juan Rodriguez-Pardo**  
Professor, Comunicación Audiovisual y Publicidad, Universidad de Extremadura,  
Plasencia, Spain
11. FI (*Republic of Finland*)  
**Päivi Korpisaari**  
Doctor of Laws, Professor for Communications Law, Faculty of Law, University  
of Helsinki, Finland
12. FR (*French Republic*)  
**Pascal Kamina**  
Prof. Univ., Dr. iur., LL.M., Ph.D., Attorney at Law, University of Franche-  
Comté, Besançon, France
13. GR (*Hellenic Republic*)  
**Petros Iosifidis**  
Professor, Media & Communication Policy, City University London, United  
Kingdom
14. HR (*Republic of Croatia*)  
**Zrinjka Peruško**, Ph.D.  
Professor, Communications and Media Studies, University of Zagreb, Faculty of  
Political Science, Croatia
15. HU (*Republic of Hungary*)  
**Dr. Gábor Polyák**  
Institute for Information, Telecommunications and Media Law, Westfälische  
Wilhelms University of Münster, Germany

16. IE (*Ireland*):  
**Marie McGonagle**  
B.A., LL.B., LL.M., Faculty of Law, National University of Ireland, Galway,  
Ireland
17. IS (*Iceland*):  
**Hörður Helgi Helgason**  
University of Iceland, Iceland
18. IT (*Italian Republic*):  
**Dr. Roberto Mastroianni**  
Professor of European Union Law, University of Naples, Italy
- Dr. Amedeo Arena**  
Assistant Professor of European Union Law, University of Naples, Italy
19. LT (*Republic of Lithuania*):  
**Ingrida Kruopškaitė**  
Directorate of Information Society and Action against Crime, DGI – Human  
Rights and Rule of Law, Council of Europe
20. LU (*Grand Duchy of Luxembourg*)  
**Dr. Mark D. Cole**  
Professor, Media and Telecommunication Law, University of Luxembourg
- Jenny Metzdorf, LL.M.**  
PhD Student, Media and Telecommunication Law, University of Luxembourg
21. LV (*Republic of Latvia*):  
**Ieva Andersone**  
Attorney at Law, Sorainen, Riga, Latvia
22. ME (*Montenegro*)  
**Daniela Brkic**  
Lawyer, Krug – Communications & Media, Podgorica, Montenegro
23. MK (*Former Yugoslav Republic of Macedonia*)  
**Borche Manevski**  
Independent Media Consultant, Skopje, Republic of Macedonia
24. MT (*Republic of Malta*):  
**Dr. Joseph Borg**  
Lecturer, Media & Communications, University of Malta, Faculty of Media &  
Knowledge Sciences, Malta

25. NL (*Kingdom of the Netherlands*):  
**Dr. Lucky Belder**  
Assistant Professor, Faculty of Law, Economics and Governance, Utrecht University, The Netherlands
26. PL (*Republic of Poland*):  
**Prof. Dr. Krzysztof Wojciechowski**  
Lawyer, Lecturer at University of Warsaw, Poland
27. PT (*Portuguese Republic*):  
**Joaquim Fidalgo**  
Assistant Professor Communication and Society Research Centre, University Minho, Braga, Portugal
28. RO (*Romania*):  
**Eugen Cojocariu**  
Radio Romania International, Bukarest, Romania
29. RS (*Republic of Serbia*):  
**Slobodan Kremenjak**  
Lawyer, Živković Samardžić Law Office, Belgrade, Republic of Serbia
30. SE (*Kingdom of Sweden*):  
**Pam Storr, LL.M., and Christine Kirchberger**  
Lecturers in Law and Information Technology, Swedish Law and Informatics Research Institute, Faculty of Law, Stockholm University, Sweden
31. SI (*Republic of Slovenia*):  
**Brankica Petkovic**  
Researcher, Head of the Center for Media Policy, Peace Institute, Ljubljana, Slovenia
32. SK (*Slovak Republic*):  
**Andrej Školka**  
Ph.D., Faculty of Mass Media Communication, University of SS. Cyril and Methodius, Trnava, Slovakia
33. TR (*Turkey*):  
**Dr. Zeynep Oya Usal Kanzler**  
Assistant Professor of law at Koc University, Istanbul, Turkey
34. UK (*United Kingdom*):  
**Lorna Woods**  
Professor, Deputy Director of Research, Director of the LL.M. in Internet Law, University of Essex, United Kingdom

## Annex 2: Questionnaire

Annex 2 contains the blank questionnaire as it was sent to the national correspondents. The completed versions with country-specific information are joined in Annex 5.

### SMART 2013/0083 – Reporting phase

#### Instructions for country reporters

Dear country reporter,

Thank you very much for your participation in the study “Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and efficient functioning of audiovisual media services regulatory bodies”, the follow-up to the **INDIREG study of 2011** conducted by the Hans Bredow Institute in conjunction with the Interdisciplinary Centre for Law and ICT, the Centre for Media and Communications Studies, Cullen International and Perspective Associates. Since the study was commissioned and published, many changes have occurred in a number of Member States.

For this reason, the present study seeks to look into the institutional, legal and regulatory frameworks establishing national regulatory bodies in charge of the implementation of the rules set out in Directive 2010/13/EU, the Audiovisual Media Services Directive (AVMS Directive), focussing on the changes which have occurred in the past four years. It examines, among others, the legislative changes and alterations to the structure and composition, funding and regulatory practice of national regulatory bodies. Your answers to this questionnaire should reflect the state of affairs as at the **end of 2014**.

This questionnaire is composed of two parts. The study takes the answers of the respective country reports of the INDIREG study of 2011 as its basis. In the first part (i.e. section I – Comments on INDIREG country table of 2011), you are therefore kindly asked to **review the existing country table** for your country of expertise. Please indicate below when the responses are no longer valid or accurate and **describe in detail the modifications** which have been realized in the meantime (e.g. adoption of new laws, amendments to existing laws, etc...). The country tables are available on the INDIREG website: (<http://www.indireg.eu/?p=8>; see section “Country Tables and Country Questionnaire”).

In addition to the review of the existing INDIREG country table, you are requested to respond to the **list of ten questions** outlined in the second part of the questionnaire (i.e. section II – Additional questions). While questions 1-7 have a clear link to the INDIREG country tables, questions 8-10 go beyond this setting and inquire about the practical application of the AVMS Directive by national regulators.

Please provide additional information and references where necessary and clearly state the sources of your findings. **If there is no information available on certain aspects, please indicate so and, ideally, also give an explanation for the lack of information.**

## **Questionnaire (incl. review of INDIREG country table)**

### **I. Comments on INDIREG country table of 2011**

Please comment on the respective tables of the former INDIREG study where necessary.

**Tables 1-5: Comments on general information**

**Tables 6-9: Comments on institutional framework**

**Tables 9-14: Comments on powers of regulatory bodies**

**Tables 15-24: Comments on internal organization and staffing**

**Tables 25-27: Comments on financial resources**

**Tables 28-35: Comments on checks and balances**

**Tables 36-39: Comments on procedural legitimacy**

**Tables 40-41: Comments on cooperation**

### **II. Additional questions**

#### **1. Type of Regulation**

What type of regulatory model has been adopted in your country (state regulation, co- or self-regulation)? What is the scope of competence of the individual regulator(s), i.e. is there one converged regulatory body competent for all (audiovisual) media (and possibly even for the underlying infrastructure) or is competence split between separate entities, depending on whether a public service broadcaster or a private broadcaster, a television broadcaster or a provider of another audiovisual media service is concerned?

What is the hierarchical structure internal to the regulator? If applicable: can you give reasons or refer to public debates why a co- or self-regulatory model has been established in your country?

[Consider tables 1-4]

## **2. Financing**

How is the regulator financed? Does the state contribute (partly or exclusively) to its funding? If yes, are there conditions to receive state funding? Have there been any cut-backs in view of the economic crisis? If so, please specify. Who manages the funds available to the regulator? Is the funding scheme regulated by legislation? Please specify the legal basis.

[Consider tables 25-27]

## **3. Incompatibility Rules**

Do conflict of interest rules exist either in the legislation, in executive measures (e.g. guidelines) or in any other documents (e.g. codes of ethics)? If so, do they include the prohibition to be remunerated by a service provider or the prohibition to hold a public/political office? Please also indicate and, where possible, explain where information is unavailable.

[Consider tables 20-22]

## **4. Staffing and Resources**

How is the regulator equipped in terms of staff, technical and financial resources? In your opinion, is the level of personnel appropriate to the complexity of tasks and to the number of services regulated? If not, please explain. What kinds of technical facilities exist?

[Consider tables 5]

## **5. Monitoring**

Does the regulator conduct monitoring of the services itself or does it entirely rely on complaints by the public? How does the regulator conduct its monitoring (by spot checks or more indiscriminate monitoring techniques)?

[Consider table 12]

## **6. Sanctions**

What kinds of sanctions have been imposed in practice for which infringements? Which rules of the AVMS Directive have been violated most frequently? What is the “track record”? Do fines flow, directly or indirectly, to the state budget? Please give references (to the extent to which information is available). Please indicate explicitly and, where possible, explain when information is lacking or not accessible.

[Consider tables 11, 13, 25]

## **7. Transparency and Awareness**

a. Is the regulator obliged to make its decisions, recommendations, annual reports or similar documents summarizing its activities available to the public? If not, does the

regulator publish such documents on its own initiative? Which form does publication take (e.g. publication in the official journal, on the website of the regulator etc.)? What information is included in the annual report?

b. Is the public aware of the activities of the regulator? Are the activities of the regulator commonly covered by the media (e.g. television, radio, the printed press)?

Please indicate and, where possible, explain where information is unavailable.

[Consider table 29]

## **8. Agenda Setting and Enforcement**

a. Can the regulator set its own agenda? Can it determine long-term objectives? If not, who determines the policies and goals of the regulator? What issues of the regulation of audiovisual media services have been prioritized by the regulator since the transposition of the AVMS Directive (e.g. interpretation of terms, protection of minors, promotion of European works)?

b. Can the regulator issue interpretative guidance on the application of rules contained in the AVMS Directive? Is this guidance binding on service providers? What guidance has been provided for which aspect of the regulation of audiovisual media services (please include the reference)?

Please indicate and, where possible, explain where information is unavailable.

## **9. Consultations**

Is the regulator obliged to consult industry stakeholders and the general public? Are these consultations institutionalized (e.g. Industry Forum)? If not, does the regulator nonetheless regularly seek the views of the industry and the public? Please give examples of previous consultations. Are the responses by stakeholders made public (e.g. on the website of the regulator)?

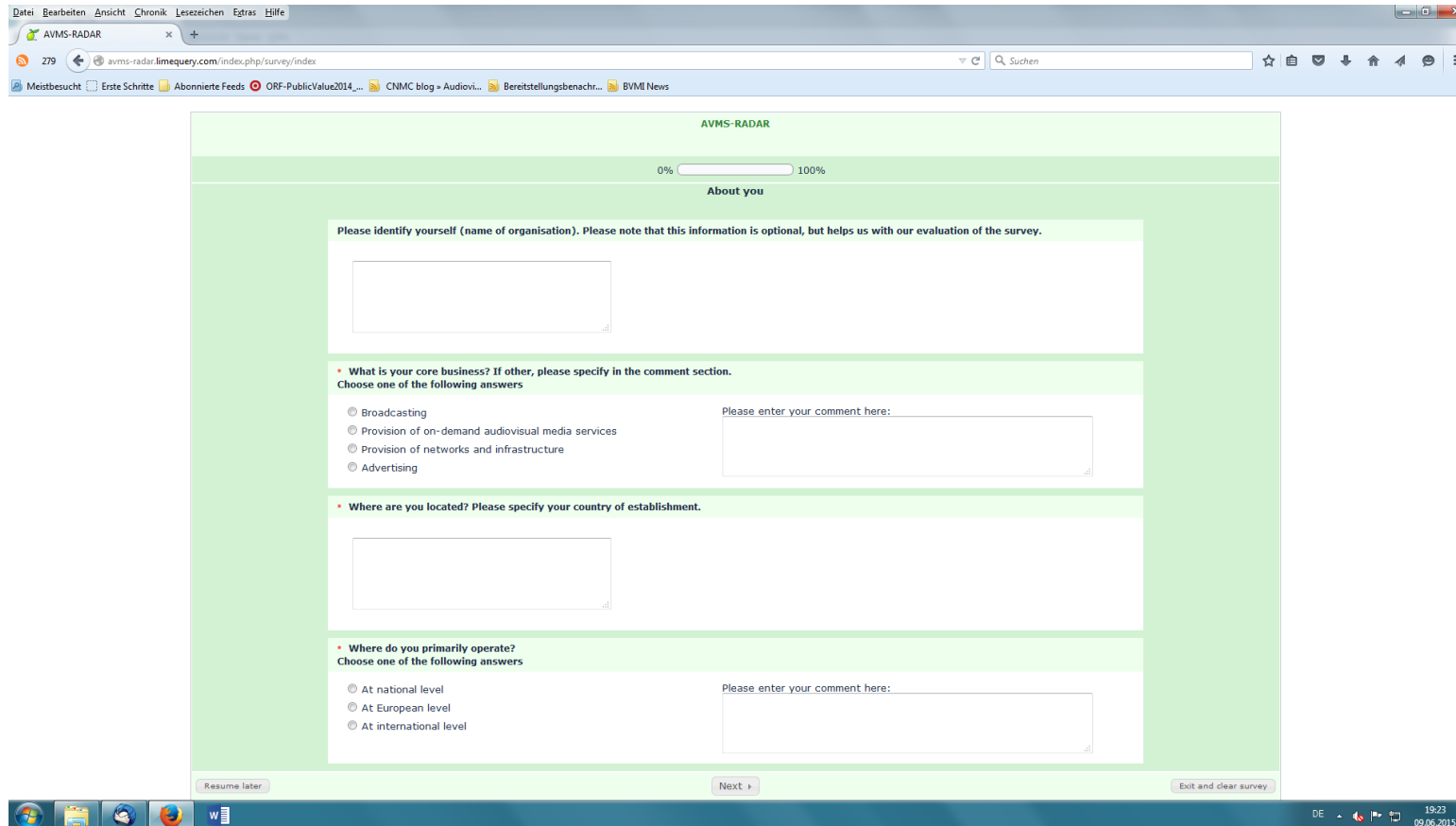
## **10. General Remarks**

Are there any other aspects or particularities which you consider significant in the context of the analysis of the regulator's independence and its enforcement of the AVMS Directive in your country?

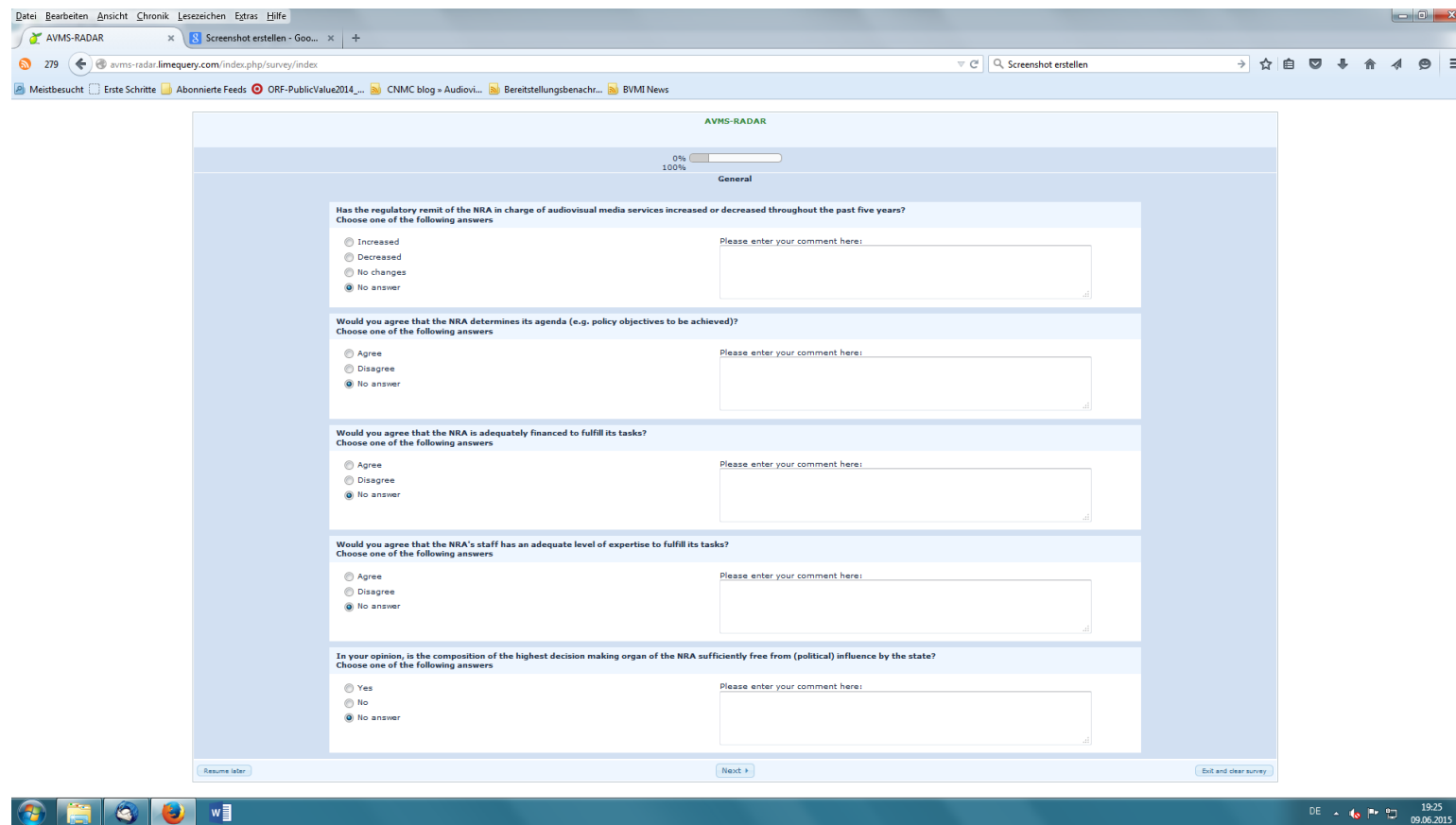


### Annex 3: Stakeholder survey

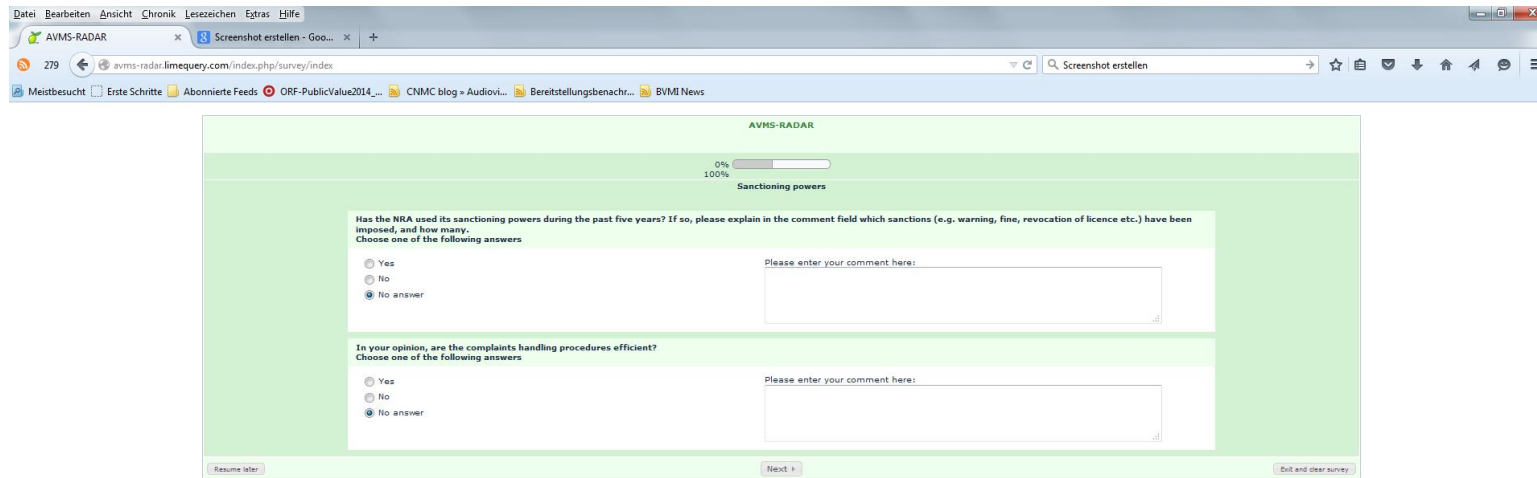
The following are screenshots taken from the online stakeholder survey that cover each of the sections that persons accessing the questionnaire were asked to respond to.



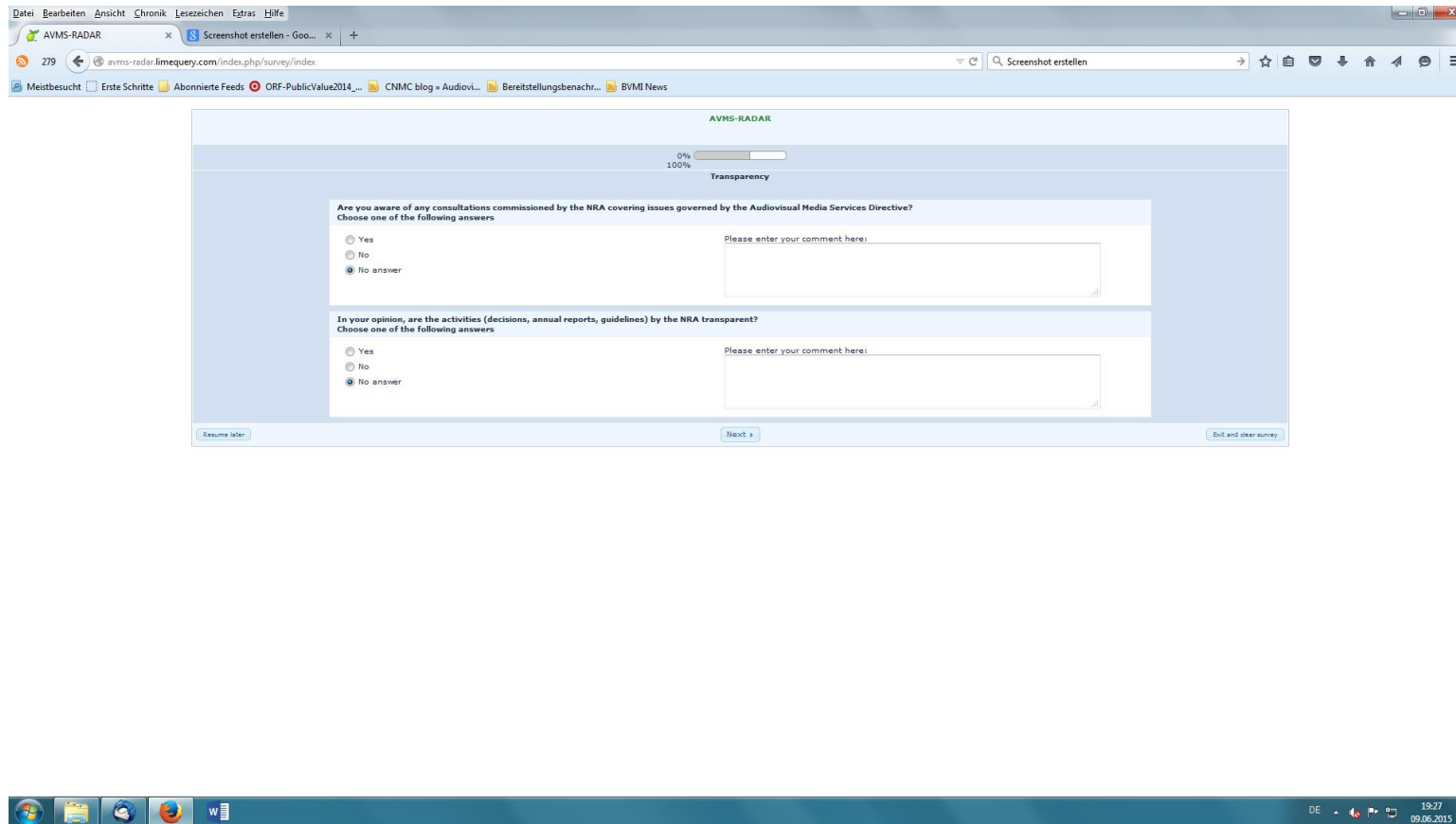
Screenshot 1. Data related to the survey respondent.



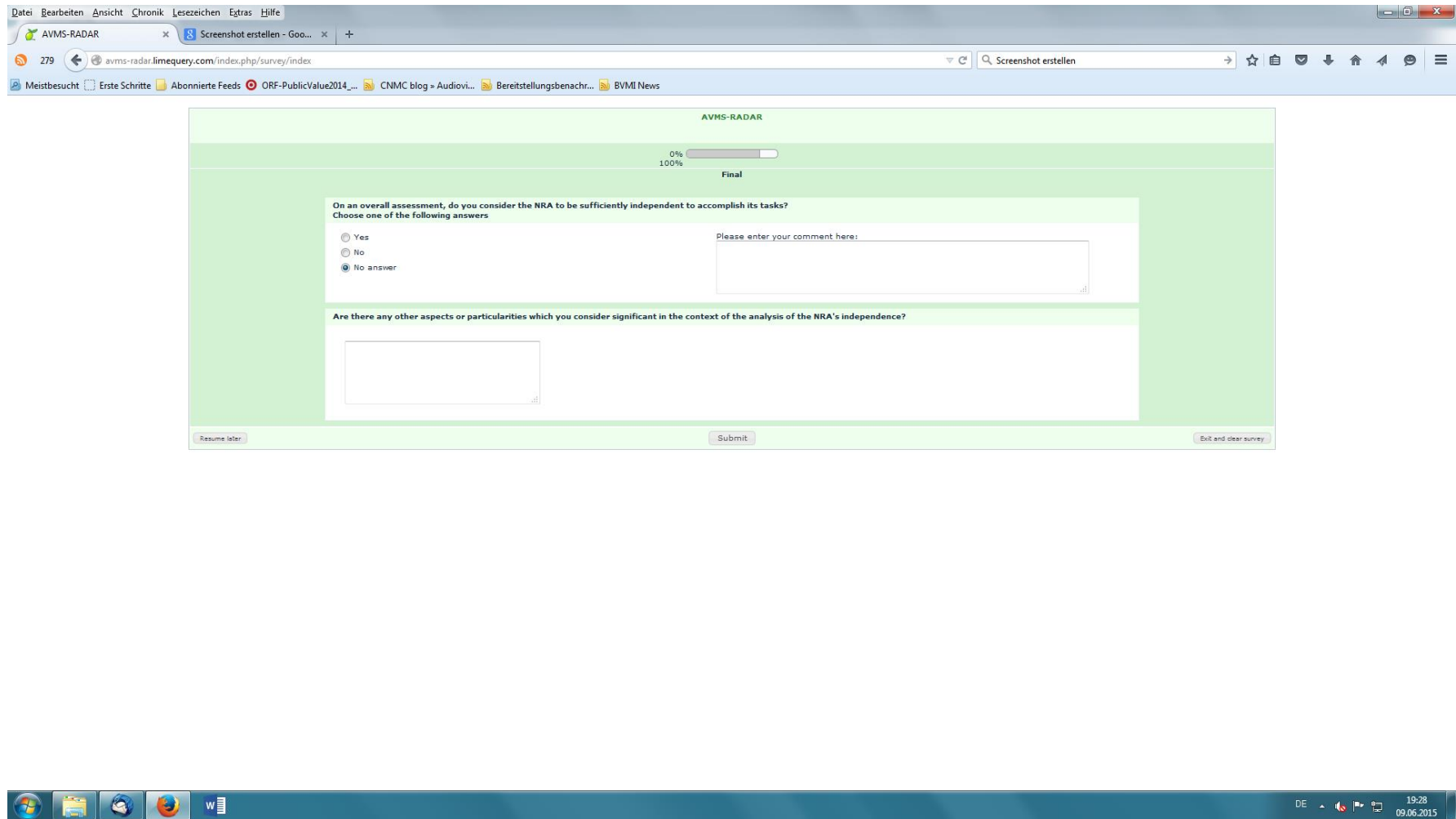
Screenshot 2. Data related to the regulatory remit, agenda-setting, financing, staffing and composition of the highest decision-making organ of the national regulatory authority.



*Screenshot 3. Data related to sanctioning powers and complaints handling procedures.*



Screenshot 4. Data related to consultation practice and transparency.



Screenshot 5. General assessment of independence and additional remarks.

#### **Annex 4: Updated INDIREG tables**

Due to its length (approx. 1,300 pages) this annex is joined to the report as a separate document.

## **Annex 5: Answers of correspondents to questionnaire**

Due to its length (approx. 400 pages) this annex is joined to the report as a separate document.

European Commission

**AVMS-RADAR**

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