



Centre on Regulation in Europe
Improving network industries regulation

***Audiovisual media regulators:
Why are their independence and cooperation
crucial?***

Policy paper by

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- its scientific independence and impartiality;
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Introduction

The European Parliament and the Council of the European Union are currently examining a European Commission proposal amending, in view of changing market realities, the Directive of 2010 on the provision of audiovisual media services (AVMS Directive)¹. A draft report on the proposal has been prepared by MEPs Sabine Verheyen and Petra Kammerevert for the EP's Committee on Culture and Education (CULT Committee)².

One should be seriously concerned with the planned provisions of both the EC proposal and the CULT Committee draft report concerning the independence of audiovisual media regulators and their ability to cooperate.

Not new issues

Those issues are not new. They emerged during the review of the Directive in 2003-2007. In 2005, the proposal of the European Commission contained a provision according to which *"Members States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently"*³. The European Parliament supported such an evolution and even proposed several amendments to make further steps towards the independence of national regulatory authorities (NRAs)⁴. Its proposals were, however, rejected by the Council and the Directive which was finally adopted did not lead to the obligation for Member States to set up an independent supervisory body. Therefore, Member States still retain a large discretion to decide how they will ensure the compliance of the AVMS providers under their jurisdiction.

Regarding cooperation, the reviewed Directive of 2007 maintained the existence of a Contact Committee but -despite calls to do so- it did not reform it. This did not allow solving the (already problematic) lack of formal cooperation between NRAs as well as between those and the EC, since in practice many Member States do not allow NRAs to attend the Committee. Other Member States allow their NRA to attend alongside – and often under the control of their interventions by – a representative of the competent Ministry. In order to partly fill this gap the EC decided in February 2014 to create the European Regulators Group for Audiovisual Media Services (ERGA). Its tasks are *"to advise and assist the Commission"*, *"to provide for an exchange of experience and good practice"* and *"to cooperate and provide its members with the*

¹ Proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, (COM(2016)0287 – C8-0193/2016 –).

² European Parliament, Committee on Culture and Education, Rapporteurs: Sabine Verheyen, Petra Kammerevert, *Draft report on the proposal for a directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities*, 5.9.2016, M(2016)0287 – C8-0193/2016 – 2016/0151(COD)

³ Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC*, 13.12.2005, COM(2005) 646 final.

⁴ European Parliament, *Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, COM(2005)0646 – C6-0443/2005 – 2005/0260(COD), 23.11.2006.



*information necessary for the application of the Directive*⁵. Since then, ERGA has produced significant contributions to a better implementation of the Directive (e.g. reports on territorial jurisdiction, material jurisdiction, protection of minors and independence of NRAs, etc.)⁶

Strengthening the independence of audiovisual media regulators: a democratic urgency

Contrary to other regulated industries, the audiovisual media sector has both an economic and a cultural dimension. It is therefore unchallengeable that setting the objectives and the contents cultural policy is to remain the preserve of Member States executive and legislative branches. To put it bluntly, harmonisation of audiovisual policy is neither welcome nor doable. One should, however, make a clear distinction between, on the one hand, developing and setting a policy, and, on the other hand, regulating its implementation. In addition, one should not forget that the EU lawmaker's intervention in most networks and digital industries is motivated by an overarching aim, i.e. to achieve an internal market.

Therefore, as it is the case in those other industries, the audiovisual media policy and objectives must be implemented by strong, appropriately staffed and independent regulatory authorities for audiovisual media services. This has now become a necessary condition in our 21st century democracies for the latter to function properly. We can, unfortunately, still see today, not only outside of the EU, but also in a number of Member States too many cases of either capture or attempts to capture the media regulator on behalf not only of industry players, but also of governments and specific political interests.

Moreover, there has been a convergence of markets and regulations between the telecommunications and audiovisual media services industries. These are regulated in some countries by the same authority (e.g. in the United Kingdom, Italy and Spain) and, in the same or other Member States, accompanied by a merger between different sectors' NRA's (e.g. telecommunications, audiovisual media, energy, transport or postal services) to form multi-sector regulators (e.g. in Germany, Spain and the Netherlands). In these circumstances, there is no reason why an essential feature of the regulatory framework in such a closely related industry should be considered as inappropriate or incidental for audiovisual media services. It is therefore more than timely to make use of the current revision process to fill the gap between AVMS NRAs and other network industries' regulators in terms of independence.

The EC proposal contains several new provisions which go in this direction. A number of amendments (e.g. 84 to 87) of the draft report for the EP's CULT Committee appear to go in a different direction. Again, this is not a desirable option, in particular when the recent threats on independence of the NRA illustrate and confirm the urgent need to consolidate rather than weaken such independence.

⁵ Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C(2014) 462 final.

⁶ <https://ec.europa.eu/digital-agenda/en/audiovisual-regulators>



Enhancing NRA's cooperation to safeguard Europe's cultural sovereignty

The experience of, again, the telecommunications and the energy has now amply demonstrated that European bodies of regulators, such as BEREK and ACER, play a major role in ensuring both consistency and a level-playing field in more and more integrated markets.

The audiovisual media sector is now becoming increasingly integrated and cross-border, at a pace which calls for immediate progress in terms of cooperation. The AVMS Directive has successfully contributed to the development of an internal market, especially for non-linear services. According to a recent report of the European Audiovisual Observatory, 67% of VOD services are non-national services, and this ratio goes up to more than 70%, 80% and even more than 90% in some Member States.

In those circumstances, the risks of non-compliance by non-domestic players and the difficulties in enforcement by NRAs are going to increase. When so many services cross borders, there should be closer and stronger cooperation among NRA's and between them and the EC to make sure all these services comply with the objectives of the Directive. Due to its intrinsic nature, the Contact Committee cannot guarantee such compliance. Government departments do not enforce the regulatory framework: this is the NRAs' mission.

The EC proposal contains several provisions about ERGA which contribute to a better enforcement and also clearly defines the respective competences of ERGA, in charge of regulatory issues (e.g. establishment by virtue of the Directive, reinforcement of ERGA's role, delivery of opinions on jurisdiction issues and codes of conducts, etc.) and the Contact Committee, in charge of policy issues.

On the contrary, the amendments suggested in the draft report of the CULT Committee risk to blur this distinction, especially if the Contact Committee is in charge of revising opinions drafted by ERGA. Moreover, while at the national level, the decisions of NRAs are protected against a review by the executive, it would be quite odd to set up at the EU level a decision-making process which gives to representatives of Member States the power to review the opinions of independent regulatory bodies. The suggestion to appoint four MEPs at the Contact Committee adds to this oddness. Providing, as it is the case for telecommunications, that ERGA's opinions and decisions could be challenged by the European Commission would make much more sense and again be more consistent in converging markets.

It should also be noted that the only argument put forward in the draft report of the CULT Committee to oppose the full independency of regulators and the reinforcement of ERGA's competence is that the Directive *"should safeguard the prerogatives of Member States"*. It appears paradoxical to use a Directive (whose aim is to develop the internal market and thus cross-border distribution, circulation and consumption of services) to safeguard the prerogatives of the Members States.

In a global, converging environment where non EU-based mega-players tend more and more to impose their rules and conditions, providing ERGA, with the appropriate competences and autonomy, as it is already the case in other network industries, would be consistent with the principles of proportionality and subsidiarity underpinning the EU legislative framework. It would



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also – and this is not negligible - contribute to safeguard Europe's and its Member States' political and cultural sovereignty.