

*Independence of audiovisual media regulatory authorities and
cooperation between them:
time for the EU lawmaker to fill the gaps*

*Opinion on
the EC proposal for amending the AVMS Directive
and
the EP CULT Committee draft report*

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¹ This report develops the following policy paper recently published by [CERRE](#), the Centre on Regulation in Europe: Bruno Liebhaberg and Jean-François Furnémont, “Audiovisual media regulators: Why are their independence and cooperation crucial?”, CERRE, 29 September 2016, <http://www.cerre.eu/publications/audiovisual-media-regulators-why-are-their-independence-and-cooperation-crucial>

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About the report:

This report further develops the policy paper of CERRE², entitled “Audiovisual media regulators: Why are their independence and cooperation crucial?” published on 29th of September 2016³.

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1. What is at stake? Regulation as way to foster the internal market in network industries

There is today one common characteristic between the policies applied to network industries across the European Union (EU): the public interest objectives pursued are not implemented by traditional public departments acting under the control of the government but by sector-specific regulatory authorities. The main characteristic – if not the essence – of these national regulatory authorities (NRAs) is their independence. Several mechanisms are put in place at the national level in order to safeguard their independence from the government and all political interests, as well as from the industry they regulate⁵.

Additionally, since the adoption of the Single European Act in 1986, the EU has been very active in harmonising (or, when less ambitious due to national constraints, coordinating⁶) the regulatory framework applicable to these industries, with the aim to achieve an internal market for the services provided in these respective sectors. It is the case in the fields of telecommunications⁷, energy (electricity⁸ and gas⁹), transport¹⁰, post¹¹ and audiovisual media services (AVMS)¹².

⁵ For details about these mechanisms, see the two following studies conducted for the European Commission:

- Hans Bredow Institute for Media Research / Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven / Center for Media and Communication Studies (CMCS), Central European University / Cullen International / Perspective Associates (eds., 2011): [INDIREG](#). *Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study conducted on behalf of the European Commission. Final Report.* February 2011.
- Institute for European media Law / University of Luxembourg (eds., 2015): [RADAR](#). *Audiovisual 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.* December 2015.

Although both studies relate to the independence of audiovisual media regulators, most (if not all) of these indicators could also be applied to NRAs in other industries.

⁶ For details about this tension, see S. DE SOMER, “The political independence of national regulatory authorities: EU impulse versus national restraint”, in *Revue du droit des industries de réseau - Tijdschrift voor het recht van netwerkindustrieën*, 2015/2, pp. 192-207.

⁷ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337/37.

⁸ Directive 2009/72/EC of European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211/55.

⁹ Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, OJ L 211/94.

¹⁰ Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, OJ L 343/32.

Our opinion will focus on two distinctive features of this EU harmonisation or coordination process, which are the importance given to:

- independence of NRAs (since liberalisation of these industries does not appear achievable without independent regulation to supervise the process) and
- cooperation between them (since too broad discrepancies in the implementation of the EU regulatory framework inevitably harm the development of the internal market).

We will explain why independence of NRAs and cooperation between them is now necessary also in the AVMS sector, how such a move now benefits from a broad consensus among stakeholders and analysts and why it fully respects the principles of proportionality and subsidiarity which govern the use of EU competencies.

2. Where do we come from and where do we stand? Thirteen years of debates about independence of – and cooperation between – AVMS regulators

So far, the EU lawmaker has shown different levels of concern for these two features, depending on the industry concerned. If a “ranking” were to be set up between them, the first place would undoubtedly be given to the telecommunications sector, followed by energy, transport, post and, at the very end of this “independence ladder”, the audiovisual sector¹³.

Strangely enough, this means that although the market is going through an intense process of convergence between telecommunications and audiovisual media services and although NRAs themselves have converged in several Member States, the EU regulatory framework for telecommunications is the most advanced on these two issues (with the strongest requirements in terms of independence of NRA’s and the deepest cooperation between them via the

¹¹ Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 with regard to the full accomplishment of the internal market of Community postal services, OJ L53/2.

¹² 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 (codified version), OJ L 95/1.

¹³ For a cross-sector analysis of the different EU regulatory frameworks regarding the independence of NRAs, see J.-F. FURNEMONT & M. JANSSEN, “Independence of regulatory authorities in the network industries: when (and why) the European lawmaker does the splits”, in *Revue du droit des industries de réseau - Tijdschrift voor het recht van netwerkindustrieën*, 2016/2, pp. 160-167.

establishment a specific body at the EU level invested with decision powers)¹⁴ while the EU regulatory framework for AVMS is by far the less advanced (with so far no provisions about independence of NRAs and until recently no body through which formal cooperation between them could take place).

Yet, these issues are not new, and have been broadly discussed during the review process of both the Television Without Frontiers (TWF) Directive and the AVMS Directive.

2.1. *About independence of NRAs*

The debate about the independence of AVMS regulators emerged during the legislative process which started in 2003 and ended in 2007 with the transformation of the TWF Directive in the AVMS Directive.

The proposal of the European Commission contained an article 23d according to which: “1. *Members States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently. 2. National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive*¹⁵.”

The European Parliament supported such an evolution and even proposed several amendments to make further steps towards independence of NRAs, for example by adding the requirement for Member States who had not already done so to establish such authorities¹⁶. But all these proposals were 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 as such. According to article 2(1) of the AVMS Directive, “*Each Member State shall 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*”. Article 4(6) adds that “*Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive*”. Member States retain a large discretion to decide by which means they ensure that the AVMS providers under their jurisdiction comply. This is confirmed by the

¹⁴ Regulation (EC) n°1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, OJ L 337/1.

¹⁵ 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.

¹⁶ 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.

recital 94, according to which *“In accordance with the duties imposed on Member States by the Treaty on the Functioning of the European Union, they are responsible for the effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and, in particular, the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently”*. The only reference to NRAs is present in article 30, which deals with the issue of cooperation between Member States: *“Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies”*¹⁷.

Since then, the issue of independence of NRAs has been widely studied at the EU level, and a broad consensus has emerged on the importance of independence of AVMS regulators. The Commission has published the aforementioned INDIREG (2011) and RADAR (2015) studies. The issue has been addressed in 2013 by the High-Level Group on Media Freedom and Pluralism established in October 2011 by Vice-President Neelie Kroes, which recommended that *“all regulators should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances”*¹⁸. Also, the newly created European Regulators Group for Audiovisual Media Services (ERGA) has delivered significant contributions, including a report which calls on the Commission to revise the AVMS Directive in order to ensure the independence of AVMS regulators. Finally, as we will see in the next chapter, the European Parliament itself has made several recommendations in this regard, showing that it is clearly an idea whose time has come.

At a more informal level, it is also worth mentioning the work done by the European platform of regulatory authorities (EPRA), which has produced several background papers and contributions from experts in the framework of its 2014 work programme¹⁹.

2.2. About cooperation between NRAs

In terms of cooperation, the 2007 Directive maintained the existence of the Contact Committee created in the framework of 1997 review but (despite calls to do so) without reforming it. This

¹⁷ This seems to imply that Member States do not have the obligation to set up an NRA but that if they do so, then this NRA has indeed to be independent. This interpretation is supported by :

- A. SCHEUER & C. PALZER, “Cooperation between Member States regulatory bodies – commentary of article 23b”, in O. CASTENDYCK, E. DOMMERING and A. SCHEUER (eds.), *European Media Law*, Alphen aan den Rijn, Kluwer International, 2008;
- D. STEVENS, “Media regulatory authorities in the EU context: Comparing sector-specific notions and requirements of independence”, in W. SCHULZ, P. VALCKE and K. IRION (eds.), *The independence of the media and its regulatory agencies*, Bristol/Chicago, Intellect, 2013.

¹⁸ <https://ec.europa.eu/digital-single-market/en/high-level-group-media-freedom-and-pluralism>

¹⁹ See the public documentation of the [39th meeting in Budva](#) and the [40th meeting in Tbilisi](#).

lack of reforms did not allow solving the (however already problematic) issue of the absence of a formal forum of cooperation between NRAs as well as between NRAs and the Commission, since according to Directive the Contact Committee is “composed of representatives of the competent authorities of the Member States” and since in practice most Member States do not allow NRAs to attend the Committee (or allow them to attend alongside – and often under the control of their interventions by – a representative of the competent Ministry).

This issue has also been raised by the aforementioned High-Level Group on Media Freedom and Pluralism which recommended that “a network of national audiovisual regulatory authorities should be created, on the model of the one created by the electronic communications framework”, considering that “it would help in sharing common good practices and set quality standards”.

In order to partly fill this gap and considering that “it is crucial to facilitate a closer and more regular cooperation between the competent independent regulatory bodies of the Member States and the Commission”, the Commission decided in February 2014 to create ERGA, whose 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 information necessary for the application of the Directive”²⁰.

Since then, ERGA has produced significant contributions to a better implementation (and revision) of the Directive: reports on territorial jurisdiction, material jurisdiction, protection of minors and independence of NRAs²¹.

It has also contributed to raise awareness about the issue of independence of NRAs, especially in situations in which the independence of some of its members was challenged, for example in Poland²² and in Croatia²³.

²⁰ <https://ec.europa.eu/digital-single-market/en/news/commission-decision-establishing-european-regulators-group-audiovisual-media-services>

²¹ <https://ec.europa.eu/digital-single-market/en/news/statement-european-regulators-group-audiovisual-media-services-erga-necessity-independent-media>

²² <https://ec.europa.eu/digital-single-market/en/news/erga-statement-alarming-developments-independent-and-effective-functioning-media-regulators>

²³ <https://ec.europa.eu/digital-single-market/en/news/erga-statement-alarming-developments-independent-and-effective-functioning-media-regulators>

3. Where should we go? Time to fill the gaps of independence of – and cooperation between – NRAs

3.1. About independence of NRAs

Against this background, it appears timely for the EU lawmaker to make use of the current revision process to fill the gaps in terms of independence between AVMS regulators and NRAs of others network industries. The main arguments which justify such a move are the following:

- Regulatory frameworks of networks industries have the same goal. The intervention of the EU lawmaker in the different networks industries is motivated by an overarching aim (to achieve an internal market for the services provided in these respective sectors) and in order to reach this aim Member States use the same governance tools (all of them have set up NRAs). There is therefore no reason why these NRAs should be safeguarded from regulatory capture and similar threats in one of these industries and be left without protection against interferences in another one.
- Convergence. One essential feature of the telecommunications and AVMS industries is that they converge. Sometimes regulators also converge (for example in the United Kingdom, Italy, Spain, Slovenia...). As we have seen earlier, one of the main characteristics of the regulatory framework for telecommunications is that it provides the highest amount of rules and mechanisms meant to safeguard the independence of the NRA: legal independence, functional independence, structural independence, impartiality, transparency, governance requirements, adequate funding and human resources, adequate judicial review, transparent appointment and dismissal rules, periodical review by the Commission in which Member States have to cooperate ... There is no reason why what matters so much – and what is mandatory – in such a closely related industry should be considered as inappropriate or incidental for audiovisual media.
- Market efficiency. The independence intended through an adequate implementation of indicators such as those present in other regulatory frameworks is not a mean in itself but rather a means to an end, which is to make sure that public interest objectives are implemented fairly and efficiently, without regulatory capture by specific interests. More precisely, where independence is sought from politics, it is to make sure that service providers benefit from a regulatory environment which is consistent over time and provides the degree of predictability essential for investment. Where conflicts of interest with the industry are banned, it is to make sure that the market functions to the benefit of the consumer and not to the benefit of one or a few service providers exploiting their dominance position. The importance of such an end is already recognised in recital 8 of the AVMS Directive, according to which *“it is essential for the Member States to ensure the*

prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole". In its Resolution of 21 May 2013 on the EU Charter, the European Parliament has also stressed that "media freedom, pluralism and independent journalism are essential elements to the very exercise of media activity throughout the Union, and particularly in the single market" and that "therefore, any undue restrictions on media freedom, pluralism and the independence of journalism are also restrictions on the freedom of opinion and on economic freedom"²⁴.

- Democracy. Beyond market efficiency, the fundamental end of independence of NRAs is the reinforcement of our democratic system. The contribution of an independent regulation to the existence of independent media as well the importance of independent media for democratic societies has been highlighted and recognised by an abundance of statements. For example, in its Resolution of 21 May 2013 on the EU Charter, the European Parliament has stressed that *"freedom of expression in the public sphere has been shown to be formative of democracy and the rule of law itself, and coaxial to its existence and survival"* and that *"free and independent media and free exchange of information have a decisive role in the democratic transformations taking place in non-democratic regimes"*. At the Council of Europe level, in its Recommendation on the independence and functions of regulatory authorities for the broadcasting sector, the Committee of Ministers has also emphasised that *"to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector, in order to guarantee the freedom of the media whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests"* and considered that *"for this purpose, specially appointed independent regulatory authorities for the broadcasting sector, with expert knowledge in the area, have an important role to play within the framework of the law"*²⁵. These links between democracy, independent media and independent regulation have also been highlighted by several studies, the main ones being:
 - the MEDIADEM study²⁶, according to which one of the main lines of policy action with a view to support the development of free and independent media is

²⁴ [European Parliament resolution](#) of 21 May 2013 on the EU Charter: standard settings for media freedom across the EU.

²⁵ [Recommendation Rec\(2000\)23](#) of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector (Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers' Deputies).

²⁶ [MEDIADEM](#) has been a European research project on media policy-making processes in EU member states and candidate countries. Its purpose has been to identify which policy processes, tools and instruments can best support the development of free and independent media.

“introducing and maintaining a legally enabling environment” in which it is ensured that “regulatory bodies are independent and insulated from inappropriate state and industry influence”; the study also put forward the importance of institutions such as the European Union and the Council of Europe in strengthening the efforts deployed at the national level to realise media freedom and independence²⁷;

- the numerous contributions of the Centre for Media Freedom and Media Pluralism (CMPF)²⁸ and especially the one related to European Union competencies in respect of media pluralism and media freedom, which stressed that *“the AVMS Directive does not introduce any specific obligation for member states nor does it provide any guidelines on the structure, functioning or role of those national bodies or about the relationship between them. This lacuna appears particularly evident when we consider that the AVMS Directive regulates issues which are very sensitive, as they deal with audiovisual services and thus with media freedom and pluralism. It must be noted that the importance of independent bodies regulating the media sector is also growing in line with the legal issues raised by new technologies [...] It is clear that only independent authorities could be entrusted to decide cases where fundamental rights are at stake”*²⁹.
- Necessity and emergency. The recent and current threats on independence of the NRA in several Member States illustrate and confirm the urgent need to make a significant step in this direction. What is at stake is not only a matter of principles, but a practical question of survival of the NRA in some Member States. Already in 2008, in its Declaration on the independence and functions of regulatory authorities for the broadcasting sector, the Committee of Ministers of the Council of Europe was concerned *“that the guidelines of Recommendation Rec(2000)23 and the main principles underlining it are not fully respected in law and/or in practice in other Council of Europe member states due to a situation in which the legal framework on broadcasting regulation is unclear, contradictory or in conflict with the principles of Recommendation Rec(2000)23, the political and financial independence of regulatory authorities and its members is not properly ensured, licences are allocated and monitoring decisions are made without due regard to national legislation or Council of Europe standards, and broadcasting regulatory decisions are not made available to the public or are not open to review”*³⁰. In the same vein, one of the

²⁷ <http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/Policy-brief1.pdf>

²⁸ The [CMPF](#) is a research and training centre co-financed by the European Union. This initiative is a further step in the European Commission's on-going effort to improve the protection of media pluralism and media freedom in Europe and to establish what actions need to be taken at European or national levels to foster these objectives.

²⁹ E. BROGI & P.L. PARCU, “The Evolving Regulation of the Media in Europe as an Instrument for Freedom and Pluralism”, Centre for Media Pluralism and Media Freedom / RSC, 2014, p. 13.

³⁰ [Declaration](#) of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector (Adopted by the Committee of Ministers on 26 March 2008 at the 1022nd meeting of the Ministers' Deputies).

policy recommendations of the MEDIADEM study addressing the European Union and the Council of Europe was to “promote regulatory independence from political power. In many countries media regulation is still within the direct or indirect control of political power. The European institutions can monitor and police independence and respect of freedom of expression but they need new instruments to achieve this goal effectively. The shift towards formally independent regulatory agencies is a necessary yet not sufficient condition”³¹.

- Coherence. In its Resolution of 21 May 2013 on the EU Charter, the European Parliament itself has called:
 - “on the Member States and the EU to make sure that legally binding procedures and mechanisms are in place for the selection and appointment of public media heads, management boards, media councils and regulatory bodies that are transparent, are based on merit and indisputable experience and ensure professionalism, integrity and independence, as well as maximum consensus in terms of representing the entire political and social spectrum, legal certainty and continuity rather than political or partisan criteria that are based on a ‘spoil and reward’ system linked to election results or are subject to the will of those in power”;
 - “on the Member States to establish guarantees ensuring the independence of media councils and regulatory bodies from the political influence of the government, the parliamentary majority or any other group in society”;
 - “on the Commission to take measures to support the independence of the media and its regulatory agencies, from both the state (including at European level) and from powerful commercial interests”;
 - “on the Commission to include in the evaluation and revision of the AVMSD also provisions on transparency on media ownership, media concentration, conflict of interest rules to prevent undue influence on the media by political and economic forces, and independence of media supervisory bodies”.

The proposal of the Commission contains several provisions which show that these calls of the Parliament have been heard. It would therefore be hardly understandable for the Parliament to now change direction and contradict its former calls, especially considering all the evidence gathered by all the studies mentioned. Yet, such a contradiction appears in what is currently suggested in the draft report, especially in the following amendments which:

- replace the terms “regulatory authorities” by “regulatory bodies” (amendments 84 and 85);

³¹ F. CAFAGGI, F. CASAROSA, T. PROSSER, A. RENDA, R. CASTRO, “Policy recommendations for the European Union and the Council of Europe for media freedom and independence and a matrix of media regulation across the Mediadem countries”, MEDIADEM, September 2012, p. 12

- seem to imply that these bodies might not be necessary for the application of the directive (amendment 84);
- remove the requirement to make these bodies legally distinct from Government departments (amendment 84);
- limit their duties “monitoring the provisions of the Directive” (amendment 85);
- delete the protection of members of NRAs against abusive dismissal (amendment 86);
- delete the duty to actively participate in and contribute to ERGA (amendment 87).

3.2. *About cooperation between NRAs*

In the same spirit, the EU lawmaker should make use of the current revision process to formalise and structure the cooperation between NRAs as well as between them and the Commission. The main arguments in favour of such an evolution are the following:

- Efficiency. The experience of the telecommunications and the energy sectors has now amply demonstrated that European bodies of regulators, such as BEREC and ACER, play a major role in ensuring both consistency and a level-playing field in more and more integrated markets.
- Necessity and emergency. The audiovisual media sector is now becoming increasingly integrated and cross-border, at a pace which calls for immediate progress in terms of cooperation. Evidence shows that the Directive has successfully contributed to the development of an internal market, especially for non-linear services. It appears from a recent report of the European Audiovisual Observatory that 67% of VOD services are non-national services³². This ratio goes up to more than 70%, 80% and even more than 90% in some Member States. Such levels of cross-border services clearly shows the urgent need for enhanced cooperation between NRA's and between them and the Commission, otherwise the risks of non-compliance by non-domestic AVMS (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 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 duty of NRAs. We do not believe in (and therefore do not call for) a BEREC-like body for AVMS regulation, but it makes no

³² G. FONTAINE & A. SCHNEEBERGER, *Origin and availability of On-Demand services in the European Union*, European Audiovisual Observatory, Strasbourg, 2015, p. 12.

doubt that in such a developed internal market, a specific body of NRAs vested of the appropriate missions – and autonomy – is necessary.

- Consistency. In order to contribute to a better enforcement, the Directive should provide a clear division of powers between ERGA, in charge of regulatory advice, and the Contact Committee, in charge of policy advice.

The proposal of the Commission contains several provisions which go in this direction. 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.

It appears both from the amendments proposed in the draft report and from the hearing organised by the CULT Committee on the 26th of September that there might misunderstandings about the respective roles foreseen respectively for the Contact Committee and for ERGA. It might therefore be appropriate to use the ongoing legislative process to make clear that:

- ERGA will not become a decision-making body and will remain an advisory body; there is therefore no need to set up a system in which its draft opinions can be reviewed by the Contact Committee;
- ERGA will not be in charge of policy advice and will remain focused on regulatory advice; there is therefore no need to create a system in which the same topic is handled by ERGA and then by the Committee.

The regulation establishing BEREC might in this regard be a source of inspiration, if it is deemed necessary to draft more detailed provisions on the specific role of ERGA, its specific tasks and the way it will cooperate and interact with the Commission, the Council, the Parliament and the Contact Committee, without prejudice to the current prerogatives of these existing institutions (which indeed remain unaffected by the current proposal of the Commission).

3.3. About proportionality and subsidiarity

Beyond the arguments which are in favour of the progress in terms of independence of NRAs and cooperation between them, it appears necessary to conclude by an analysis of the arguments which are put forward against such evolutions.

However, this is a difficult exercise, since most of the amendments are currently not motivated. The only claim in the draft report of the CULT Committee is that the Directive “*should safeguard the prerogatives of Member States*”. This argument is not new, and appears related to the argument already presented by a couple of Member States during the review process of TWF which led to the adoption of the AVMS Directive, and according to which “*any issue related to regulatory authorities falls within the principle of subsidiarity*”.

These arguments seem to mean that there might be concerns about the respect of the principles of proportionality and/or subsidiarity which govern the use of Union competencies. However, in light of the following elements, these concerns appear unfounded.

3.3.1. The case law of the European Court of Human Rights (ECHR) imposes positive obligations in terms of regulation of audiovisual media services

As explained earlier, it is commonly admitted that independent regulation contributes to independence of the media, which is an essential feature of democracy. This might require in some cases the absence of public intervention and in other cases the need for such an intervention. Since the Handyside case in 1976 which stressed that “*freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man*”³³, the ECHR has provided an abundant case law which helps European countries to strike such a balance. In its recent Centro Europa case in 2012, the Court has recalled that “*the audio-visual media, such as radio and television, have a particularly important role in this respect. Because of their power to convey messages through sound and images, such media have a more immediate and powerful effect than print. The function of television and radio as familiar sources of entertainment in the intimacy of the listener’s or viewer’s home further reinforces their impact*”. Most importantly, it has added that “*in such a sensitive sector as the audio-visual media, in addition to its negative duty of non-interference the State has a **positive** obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism*”³⁴. Against this background, promoting and reinforcing independent regulation of audiovisual media can be considered as an appropriate and proportionate way to take care of this positive obligation, be it at the Union level or at the Member States level.

3.3.2. The EU Charter imposes the respect of media freedom and pluralism

According to article 11 of the Charter of Fundamental Rights of the European Union, “*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected*”. Again, as detailed earlier, the

³³ European Court of Human Rights, Case Handyside v. The United Kingdom, Application n°5493/72, 7 December 1976.

³⁴ European Court of Human Rights, Case Centro Europa 7 S.R.L. and Di Stefano v. Italy, Application n°38433/09, 7 June 2012.

contribution of independent regulation to media freedom and pluralism has been widely recognized. And, as noted by Fabio Barzanti, “the inclusion in the Charter of the principle of pluralism of the media can be surely taken as an indicator of its acknowledged relevance as a principle that results from the constitutional traditions common to the Member States; and, hence, of the necessity to observe it as a general principle of EU law, as it stems directly from freedom of expression”³⁵. Therefore, promoting and reinforcing independent regulation at the EU level can also be considered as an appropriate and proportionate way to contribute to the respect of freedom and pluralism of the media.

3.3.3. The Treaty on the Functioning of the EU (TFEU) and the case law of the European Court of Justice (ECJ) recognise that the EU level is the most appropriate to achieve the internal market

According to article 4 §2 of the TFEU, shared competence between the Union and the Member States applies in a series of principal areas, the first one being the internal market. It is doubtless that the AVMS Directive, even if it has a cultural dimension, is an internal market directive, as recognised by its following recitals:

- n°2: “certain measures are necessary to permit and ensure the transition from national markets to a common programme production and distribution market, and to guarantee conditions of fair competition”;
- n°10: “bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry”;
- n°11: “it is necessary, in order to avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services”;
- n°14: “the Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services”;
- n°33: “the country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market”;
- n°50: “it is necessary to make arrangements within a Union framework, in order to avoid potential legal uncertainty and market distortions and to reconcile the free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest”.

³⁵ F. BARZANTI, “Governing the European Audiovisual Space: what Modes of Governance can Facilitate a European Approach to Media Pluralism?”, Centre for Media Pluralism and Media Freedom / RSC, 2012, p. 11.

Considering the fundamental role NRAs play in compliance with and enforcement of the AVMS Directive, the fact their status and powers differ a lot between Member States and the application of the country-of-origin (which implies that in lack of compliance or enforcement in one Member State can – sometimes heavily – impact the market on another Member State), a minimum of harmonisation of their independence appears necessary, as it the case for other internal market directives. The example of network industries, including a closely related and converging one such as telecommunications, has already been given. It is with this goal of achieving the internal market in mind that the ECJ has recalled several times that an intervention at the EU level in favour of the internal market respects the principle of subsidiarity:

- *“The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community”³⁶,*
- *“With regard to the principle of subsidiarity, since the national provisions in question differ significantly from one Member State to another, they may constitute, as is noted in the fifth recital in the preamble to the PPE Directive, a barrier to trade with direct consequences for the creation and operation of the common market. The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature”³⁷.*

3.3.4. The cultural dimension of the audiovisual sector is already dealt with at the EU level, including by independent NRAs

If the AVMS Directive is mainly an internal market directive, it has also a cultural dimension and, according to article 6 of the TFEU culture is not a domain of shared competences but a domain in which the EU only has “competence to carry out actions to support, coordinate or supplement the actions of the Member States”. This dual aspect of the AVMS Directive is an argument which is sometimes put forward in favour a less harmonised regulatory framework in the audiovisual industry than in other network industries. Such an argument however contradicts the existing legislative framework:

³⁶ European Court of Justice, Judgment of the Court of 9 October 2001, Kingdom of the Netherlands v. European Parliament and Council of the European Union, Case C-377/98, §32.

³⁷ European Court of Justice, Judgment of the Court of 22 May 2003, Commission of the European Communities v. Federal Republic of Germany, Case C-103/01, §47.

- At the Treaty level, through the Protocol on public broadcasting³⁸. As highlighted by Fabio Barzanti, *“in dealing with such a public service task that has a strong political dimension, the Protocol indicates that the reason for paying this special account to PSB rests upon the consideration that ‘the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism’. Thus, in using the notion of media pluralism and stressing the important contribution that PSB offers to the maintenance of media pluralism itself, the Protocol recognises the latter (indirectly) as a crucial component in the functioning of the democratic process not only at Member State level, but also at the EU one”*³⁹.
- At the legislative level, through the Framework Directive⁴⁰. This Directive makes several explicit references to the role of NRAs in guaranteeing media pluralism and cultural diversity, for example in:
 - recital 5: *“the separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular in order to guarantee media pluralism, cultural diversity and consumer protection”*;
 - recital 31: *“interoperability of digital interactive television services and enhanced digital television equipment, at the level of the consumer, should be encouraged in order to ensure the free flow of information, media pluralism and cultural diversity”*;
 - article 8: *“national regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism”* (see also articles 9.4.d and 18.1).

It is therefore difficult to understand why the argument of safeguarding the specific cultural features of the Member States can lead to the highest level of EU harmonisation in terms of independence of NRAs for one directive (with no question whatsoever about subsidiarity) and a taboo in terms of independence of NRA for another directive (with an argument about subsidiary which thus appear as contingent).

³⁸ Protocol (n°29) on the system of public broadcasting in the Member States.

³⁹ F. BARZANTI, “Governing the European Audiovisual Space: what Modes of Governance can Facilitate a European Approach to Media Pluralism?”, Centre for Media Pluralism and Media Freedom / RSC, 2012, p. 10.

⁴⁰ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services, OJ L 337/37.

3.3.5. The case law of the ECJ recognizes that the existence of a particular regime at national level cannot impede legislation at the EU level

In a case related to the (lack of) independence of the data protection authority, Germany argued that the provisions of the Directive on independence of data protection authorities did not respect the principle of subsidiarity and proportionality enshrined in article 5 of the TEU and that *“it would be inconsistent with that requirement to oblige the Federal Republic of Germany to adopt a system which is foreign to its legal order and, thus, to give up an effective supervisory system established for almost 30 years and which has acted as a model for legislation on the protection of data, well beyond the national level”*. The ECJ rejected this argument and decided that the Directive *“does not go beyond what is necessary to achieve the objectives of the EC Treaty”*. The Court also stressed that *“the independence of the supervisory authorities, in so far as they must be free from any external influence liable to have an effect on their decisions, is an essential element in light of the objectives of Directive 95/46. That independence is necessary in all the Member States in order to create an equal level of protection of personal data and thereby to contribute to the free movement of data, which is necessary for the establishment and functioning of the internal market”*⁴¹.

Compared to the regulatory frameworks which have been adopted by the EU lawmaker in other network industries, and even more compared to the regulatory framework for data protection⁴², the proposals of Commission in terms of independence of – and cooperation between NRAs – in the audiovisual industry remain at one of the lowest levels of ambition. It is therefore difficult to understand how the two modest evolutions proposed by the Commission (the adoption of a few basic international standards in terms of independence of NRAs – which are promoted by the EU outside its borders and heavily suggested to candidate countries – and the existence of a forum of regulators without any decision powers and whose duties remain to advise and assist the Commission and exchange experiences) could be seriously considered as harming the principles of subsidiarity and proportionality.

3.3.6. The Amsterdam Protocol and the obligations of the Member States in terms of supervision of PSB are not affected

The Amsterdam Protocol recognises that *“the provisions of the Treaties shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting”*. In application of the Protocol, the Commission has adopted in 2001 and revised in 2009 a Communication on the application of State aid rules to public service broadcasting, which sets out the framework governing State funding of public service broadcasting. This Communication imposes that *“an appropriate authority or appointed body monitors its application in a transparent and effective manner”*. According to the Communication, *“in line with the Amsterdam Protocol, it is within*

⁴¹ European Court of Justice, Judgment of 9 March 2010, Commission v. Germany, Case C-518/07, §§ 47 to 56.

⁴² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281.

the competence of the Member State to choose the mechanism to ensure effective supervision of the fulfilment of the public service obligations, therefore enabling the Commission to carry out its tasks under Article 86(2). Such supervision would only seem effective if carried out by a body effectively independent from the management of the public service broadcaster, which has the powers and the necessary capacity and resources to carry out supervision regularly, and which leads to the imposition of appropriate remedies insofar it is necessary to ensure respect of the public service obligations”⁴³.

The proposal of the Commission does not affect this framework and is therefore without prejudice to the possibility for the Member States to determine the scope of the competences of their NRA. Different institutional designs for the supervision of the services which fall under the material jurisdiction of the AVMS Directive currently exist throughout EU, and can vary depending on:

- the public or private status of the service provider (for example in Germany where the medienanstalten are in charge of the supervision only of commercial service providers or in the United Kingdom where the supervision over the BCC is shared between Ofcom and the BBC Trust);
- the linear or non-linear aspect of the services delivered (for example in the United Kingdom where until recently supervision of non-linear services was exercised by a specific body – ATVOD – designated by Ofcom as a co-regulator or in Ireland where the competences of BAI are limited to linear services);
- the type of public policy objective (for example in Germany where the issues related to protection of minors are dealt with through a system of self-regulation regulated by the Kommission für Jugendmedienschutz or in the United Kingdom where the issues related to commercial communications are regulated by the Advertising Standards Authority under a contract with Ofcom).

In practice, these differences have not prevented the Member States to designate a regulatory authority to represent them in ERGA when it was created by the decision of the Commission of 3 February 2014.

As explained by Peggy Valcke, Dirk Voorhoof and Eva Lievens, the existence of NRAs which are not under the control of the government “does not exclude that, to a certain extent, some parts of broadcasting regulation may be exercised by governmental administrative authorities, while other issues may be dealt with by judicial authorities or courts, applying general legislation such as provisions of civil law, criminal law or commercial law. In some countries self- or co-regulatory bodies also oversee some aspects of the scope of media regulation, especially regarding journalism ethics, commercial communications in the media or public service broadcasting”. What matters is that “in any case, from

⁴³ Communication from the Commission on the application of State aid rules to public service broadcasting (2009/C 257/01), 27.10.2009, §§ 53-54.

the moment an independent media regulator or other authority interferes with the rights of a broadcaster or audiovisual media service provider, that body must guarantee 'structural' or 'objective' impartiality to comply with the fair trial requirement of article 6 of the ECHR"⁴⁴.

3.3.7. Global challenges need European answers

Finally, we would like to conclude by a more political than legal argument and recall that the European audiovisual media industry struggles in a global and converging environment where non EU-based mega-players tend more and more to impose their rules and conditions. Therefore, providing ERGA with the appropriate (but not necessarily the same) competences and autonomy as it is already the case in other network industries does not only appear consistent with the principles of proportionality and subsidiarity underpinning the EU legislative framework, but also as an initiative which can contribute to address the challenges of the industry at a more efficient level, to the benefit of a better implementation of both EU and Member States policies.

⁴⁴ P. VALCKE, D. VOORHOOF and E. LIEVENS, "Independent media regulators: Condition sine qua non for freedom of expression?", in W. SCHULZ, P. VALCKE and K. IRION (eds.), *The independence of the media and its regulatory agencies*, Bristol/Chicago, Intellect, 2013, p. 59.