



Media Regulators in Europe:



A Cross-Country Comparative Analysis.



Helena Sousa, Wolfgang Trützschler,
Joaquim Fidalgo and Mariana Lameiras (eds.)



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Introduction

HELENA SOUSA, WOLFGANG TRÜTZSCHLER, JOAQUIM FIDALGO & MARIANA LAMEIRAS
Editors

Empirical evidence¹ demonstrates that states around the world are gradually setting up or reconfiguring existing media regulators. The nature and performance of these bodies vary profoundly from country to country and the consequences of their action (and inaction) cannot be understood outside the specific national and regional contexts of these societies

This publication “Media Regulators in Europe: A Cross-country Comparative Analysis” aims at gathering and analyzing information about media regulators in a particular part of the world: Western Europe. Although there is quite a lot of data available (mostly online and in different languages), we’re attempting to organize a coherent and hopefully useful document for regulators, politicians, academics and citizens concerned with the symbolic environment. Media regulators are supposed to improve the overall quality of the media and some certainly play a relevant role. They are expected to raise media standards and therefore to contribute to the expansion of public and private media social responsibilities. But do they? And, if so, how and why?

This e-book results from the common intellectual interests of the EuroMedia Research Group² and the collective research project “Media Regulation in Portugal: The ERC’s Case” (PTDC/CCI-COM/104634/2008)³, based at the Communication and Society Research Center (CSRC), University of Minho. One of the project’s objectives is to understand the Portuguese national media regulator in context. Therefore, we have invited members of the EuroMedia Research Group and the Project’s consultants⁴ to participate in this collaborative project that brings together the contributions from thirteen countries: Austria, Finland, France, Germany, Greece, Ireland, Italy, Poland, Portugal, Spain, Switzerland, The Netherlands, and the United Kingdom.

Together we have developed a model to compare media regulatory bodies across Europe. We met in Ghent (19-20 November 2011) and in Helsinki (28-29 April 2012) to discuss a model that could contribute to a more coherent, contextual and holistic gathering of information about state/national media regulatory bodies in different countries. So, basically, this book is an attempt to implement the model we have developed so far. Each chapter corresponds to a specific country and the authors have tried to respond to the questions put forward in the nine dimensions of the model. As expected, not all were relevant in every case and the model faced particular difficulties in countries such as Germany or Spain, where the regional character of the political system has complexified the regulatory system.

We are now presenting the model as it was presented to the authors and answered in the following chapters.

¹ Information available online at http://www.lasics.uminho.pt/mediareg/?page_id=425&lang=en. Accessed 30.03.2013.

² Information available online at <http://www.euromediagroup.org/>. Accessed 30.03.2013.

³ Information available online at <http://www.lasics.uminho.pt/mediareg/?lang=en>. Accessed 30.03.2013.

⁴ Information available online at http://www.lasics.uminho.pt/mediareg/?page_id=163&lang=en. Accessed 30.03.2013.

1. Dimension

Legal framework

What is the designation (original language and English translation) and legal definition of the state media regulatory body (or bodies?)

What are the legal documents (laws, rules, protocols, others) framing the media regulatory entity(ies)?

Does the law clarify the nature of the state media regulatory in terms of its independence regarding the government of the day? Is it formally an 'independent' entity/authority or, for example, an administrative agency of the government?

Are there formal links with self-regulatory and co-regulatory media structures?

2. Dimension

Functions

What media/mew media sectors does it cover? Please specify if and how the internet is mentioned.

If the regulatory entity is a convergent body (media + telecoms, etc), when did it acquire the present-day format?

What are the functions the media regulatory entity(ies) is (are) expected to perform according to the law?

Does media content regulation cover advertising?

Is media education/digital literacy included in the explicit (or implicit) functions?

What are the functions the media regulatory entity is expected to perform according to other social actors? (This is particularly relevant if there are social debates about absence of regulation on some sectors/areas).

Is there a functional distinction between state, self and co-regulatory mechanisms?

3. Dimension

Legitimizing / underlying values

What are the values that justify media state regulation? Where can this 'normative theory' be found? (e.g. law, agreements, protocols, political discourses, others?)

Is it identifiable a hierarchy of values? (e.g: freedom of speech/press, independence, pluralism/diversity, protection of fundamental human rights, quality, empowerment, others).

The values defended by state media regulatory structures are similar to those safeguarded by self-regulation and co-regulation?

4. Dimension

Performance

What are the tasks that the regulatory entity(ies) actually perform in its/their daily activity? (This is particularly relevant to mention discrepancies between legal duties and actual performance).

In daily activity, the state regulatory body(ies) complement and/or clash with the activities of self-regulation and co-regulation entities?

When citizens, media companies or other actors disagree with media regulatory decisions/performance, are there appeal mechanisms? Can courts overturn a particular decision taken by the media regulatory body?

5. Dimension**Enforcement mechanisms / accountability**

What are the legal mechanisms to ensure compliance with the media regulatory body(ies)' decisions?

Are these legal enforcement mechanisms used and how?

How relevant are non-binding guidelines and regulatory doctrines?

Whom is/are the media regulatory entity(ies) accountable to?

Are the media regulatory body board members subject to any incompatibility regime to safeguard their independence or to protect other values considered relevant?

6. Dimension**Institutional organization / composition**

Board	Staff	Media sector	Civil Society
What is the number and composition of the governing body? What are the main functions of this board	What is the overall number of the regulatory body staff? How is it organized? What are the functions?	Are the media represented? By whom? What role is it supposed to perform?	Is civil society represented? By whom? What role is it supposed to perform?
How long are the mandates? Is there possibility of mandate renewal?	What is based on precarious or stable labour?	How long are the mandates? Is there possibility of mandate renewal?	How long are the mandates? Is there a possibility of mandate renewal?
Are members appointed, elected or selected by any other means?	What is the recruitment policy?	What is the selection mechanism?	What is the selection mechanism?

7. Dimension**Funding**

How is/are the media regulatory body(ies) funded? What is the proportion of revenues (state budget, licenses, fees, fines, etc.). What are the expenses/revenues (totals) per year?

Is there any yearly financial report? Is it public?

8. Dimension**Regulation in context**

General brief description of the national media system where the media regulatory body is inscribed (level of market concentration, PSB (yes or no), n° of TV channels, n° radio stations, delivery systems, internet penetration, etc.)

General comment on your own perception regarding the relevance of the media regulatory body(ies) in the national media system. Is/Are it/they significant?

9. Dimension**Ignored dimensions**

Please let us know whether this model is missing critical dimensions to the examination of the media regulatory body (or bodies) in your country. If this is the case, identify and explain the relevance of the aspects which are not covered in this model.

Mostly written by experienced academics with the research assistance of younger colleagues, these country reports show a notorious variety of experiences that can be appreciated in the following next thirteen chapters.

In the Austrian report, Manuela Grünangerl, Josef Trappel & Corinna Wenzel give us a general overview on the Austrian Communications Authority (KommAustria) and reinforce the importance of the media regulatory body in the national scenario. On the other hand, Anna-Laura Markkanen & Hannu Nieminen present a different scenario regarding state media regulation in Finland. In fact, around 245 full-time employees integrate the body's structure, which immediately leads us to the differences between the size and scope of regulatory bodies in different countries. Moreover, it appears to be a fluent relationship between FICORA and the Ministry of Transport and Communications, to whom it is directly subordinate to, and also a collaborative stance towards integrate decisions.

Specific geographical characteristics are probably more evident in the German and Spanish cases due to the highly intricate structure of media regulatory bodies in each of these countries. Federalism and the distinction between commercial and public broadcasting, regulated by different bodies, are the reasons appointed by Indira Dupuis and Barbara Thomass for the difficulty in applying the cross-country comparative model to the German case. In Spain, Laura Bergés Saura and Núria Reguero Jiménez show that many bodies are involved in several fields of the media sector, such as market competition, content or telecommunications, and also a cumulative regionalization in these areas, which leaves media regulation disperse in different areas of activity and diverse central and regional structures.

Most of the analysed countries show that the usual legal form chosen for the regulatory bodies is of "independent administrative entities", as is the case of the Portuguese ERC, the Italian AGCOM or the Greek National Council for Radio and Television. Nevertheless, there are cases in which the option is for the constitution of agencies, such as FICORA (in Finland), which also as the peculiarity of having a director as main decision-maker and not a collegial body, as we commonly identify in other regulatory structures.

The Greek report, written by Stylianos Papathanassopoulos and Achilleas Karadimitriou, describes a National Council for Radio and Television (NCRTV) similar to the Portuguese ERC since both are enshrined in national legal frameworks as independent administrative authorities/entities. Nevertheless, researchers point out the peculiar funding scheme of NCRTV, which is solely derived from state budget (as well as Poland, for example), against the general option for mixed solutions, usually combining public funding with fees applied to media companies. On the contrary, the Irish regulator is funded by means of a levy imposed on broadcasters, as Marie McGonagle and Annabel Brody state in their report about The Broadcasting Authority of Ireland (BAI). This is probably the most detailed report in self-regulation and co-regulation issues, as authors dedicate several pages to these regulatory mechanisms nonetheless also showing that functions and roles are clearly distinguished between them, without registering cases of overlapping activities but emphasizing a certain sense of complementarity.

Divina Frau-Meigs and Sophie Jehel proceed with an historical review on the French tradition of state media regulation and clarify the role of the *Conseil Supérieur de l'Audiovisuel* (CSA) mentioning that it practically acts as a buffer-agency, with members from the state, the profession

and, to a much lesser extent, from civil society. This sensitive question is worth our attention as we perceive not only civil society, but also the media, as crucial elements in the process of media regulation. Therefore, this explains the addition of a straight question on this matter in the developed model with the purpose of understanding which ways (if any) do European countries adopt to include these actors in state media regulatory bodies' structures.

The Polish country report is very clear on the importance of politicization as a dimension of analysis of state media regulatory bodies. In a couple of paragraphs, Stanislaw Jedrzejewski stresses that there are persistent problems in Poland regarding the discrepancy between the intended broadcasting policy and current practice, also stating that the National Broadcasting Council's composition has been suffering from politicization in both ways: the nomination process and the members' affiliation to political parties.

Werner A. Meier and Martina Leonarz present the Swiss OFCOM as a regulatory body without decision-making powers, very close to the governmental sphere due to its allocation as a supervisory and administrative agency of the Department for the Environment, Transport, Energy and Communications (DETEC) and the Swiss Federal Communications Commission (ComCom).

Independence is, as several contributors systematically show, a recurrent subject for those studying media regulation and, in particular, media regulatory bodies' framework and performance. Once again, the question is raised by Leen d'Haenens, Quint Kik and Andra Leurdijk, authors of the Dutch country report. They present us three regulatory bodies with responsibilities in the media sector: the Netherlands Media Authority (*Commissariaat voor de Media - CvdM*), the Independent Post and Telecommunications Authority of the Netherlands (*Onafhankelijke Post en Telecommunicatie Autoriteit - OPTA*), and the Radiocommunications Agency (*Agentschap Telecom - AT*). In this case, independence is described by researchers as 'formal' because, in fact, bodies perform their activity based on the premise of acting as extensions of the Dutch government. The Media Authority, for example, has independence from the government by the guarantee that the Minister has no right to interfere with research goals or complaining processes. However, its decisions can be overruled. This does not apply to the Independent Post and Telecommunications Authority of the Netherlands, as there is the slight difference of non-interference with individual cases but a ministerial involvement in members' nomination and budget approval.

Convergence is another relevant topic which makes Italy a stimulating case, as described by Maria Stella Righettini, Giorgia Nesti, and Claudia Padovani in the Italian report.

The analysis of each country report raises several questions that need clarification and deeper reflection. The Portuguese case, for instance, introduces a premise related to the importance of the media regulatory body in the national legal framework. Actually, the Portuguese state media regulatory entity is enshrined in the Constitution of the Republic, which is unusual. The Portuguese report, written by Helena Sousa and Mariana Lameiras, it is emphasized the role of the ERC in press regulation, which is not usually verified in other countries, as the most common option is to place it under the supervision of another different body (as it happens in Ireland, with the Press Council). Moreover, it is also mentioned that legal mechanisms to ensure compliance with the ERC's decisions are not proportional to competences it is supposed to perform.

Last but not least, Alessandro D'Arma describes in detail the regulatory body of the United Kingdom, the Office of Communications (Ofcom), giving an overview on its duties according to

legal prescriptions as well as its enforcement mechanisms, having dealt with over twenty thousand complaints in the biennium 2011/2012.

We are therefore proposing a journey through present-day media regulatory bodies in thirteen different national contexts. We believe that the model we have collectively constructed can operate as a map that can help us reading the empirical realities.

Austria

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1. LEGAL FRAMEWORK

The media regulatory body in Austria is the Austrian Communications Authority (*KommAustria = Kommunikationsbehörde Austria*) which is responsible for regulatory issues concerning all audio (visual) media services. It is made up of five members who are appointed for a period of six years by the Austrian president subsequent to their nomination by the federal government. The KommAustria is a panel authority¹, whose independent organizational structure was enabled by an amendment to the Federal Constitution Act of 2010 (BVG 2010: Art. 20 Par. 2 Nr. 5a). Since that time the regulatory authority is independent and no longer bound by instructions from the Federal Chancellery or any other authority. This change was constitutionally controversial, as it constitutes an exception from the traditional dependence of public authorities on the legislator (the so-called *Legalitätsprinzip* see tBVG 2010: Art. 18). This amendment enabled the establishment of independent authorities only by simple majority and without a constitutional basis. Nevertheless, as the RTR GmbH is an agency of the authority when it comes to media affairs, it is not independent of Government. The self-contained tasks of the RTR GmbH are still subject to governmental directives. Prior to the subsequent amendment of the KommAustria Act in 2010 the regulatory body was a monocratic administrative authority subordinated to the Federal Chancellery. It was established by the KommAustria Act (KOG) in 2001. Thus, it followed the introduction of nationwide private television in Austria which occurred in the same year under the legal authority of the Private Television Act (PrF-G 2003 = *Privatfernsehgesetz*). The predecessor of KommAustria was the Private Broadcasting Authority (*Privatrundfunkbehörde*) that was responsible for the distribution of regional private radio licenses following the implementation of the Regional

¹ The legal term panel authority (*Kollegialbehörde*) refers to the fact that all members of the authority have equal rights and that in general decisions are taken jointly (e.g. by majority vote).

Radio Act (RR-G = *Regionalradiogesetz*, later then replaced by the Private Radio Act, PrR-G 2010 = *Privatradiogesetz*) in 1993. This regulatory authority was set up as an independent panel authority with the powers of a court. However, due to the lack of a legal framework for the establishment of an independent regulatory body its organizational structure was declared unconstitutional in 2000, the authority was dissolved and later on replaced by the KommAustria (see VfGH 2000: 1075 on the dissolution of Sec. 13 RR-G). Thus, the conflicts about the legal status of the first Regional Radio Act (RR-G) from 1993 not only delayed the establishment of a private broadcasting sector in Austria but also had an impact on the organizational structure of the KommAustria in the first years of its existence. The main objectives of media regulation in the beginning of the dual broadcasting system in Austria was clearly defined by law (KOG 2001: Sec. 2 Par. 2): to facilitate the market entry of new (private) broadcasters in order to foster diversity of opinions and to increase the quality of broadcasting. Furthermore, the elaboration of plans for the technical and economic development of the dual broadcasting market and an optimization of the allocation and distribution of the broadcasting frequency range were also mentioned. The convergent structure of the regulatory framework can also be seen in the tasks of the regulatory bodies that were obliged to provide expert knowledge on the convergence of the audio(visual) media sector and the telecommunications sector (by continuously publishing the so-called Reports on Digitalization = *Digitalisierungsberichte*). The KommAustria's objectives do not explicitly mention media education or digital literacy as a main goal of the regulatory body's work. However, the development of digital strategies and the safe-guarding of compliance with European standards for the protection of children and consumers are mentioned by law (KOG 2011: Sec. 2 Par. 3 Nr. 4).

The amendments from 2010 can be seen as an application of European legal provisions designed to strengthen the independence of the regulatory authority (Fuchs 2011: 50). Moreover, it led to an expansion of the duties of the KommAustria and a harmonization of responsibilities among the regulatory authorities in the Austrian media sector (see also dimension 2).

The KommAustria as a convergent regulatory authority responsible for all electronic audio(visual) media services is primarily in charge of licensing and supervision of (private and public) broadcasting companies. In addition, the administration of state funds for the media sector and the control of the recently established rules for transparency of media co-operations² from public entities (KOG 2011: Sec. 1, Par. 1 – 3). It is supported on an operational level by the RTR GmbH (*Rundfunk- und Telekomregulierungs GmbH* = Broadcasting and Telecommunications Regulation-Company) that is in charge of providing administrative support to the regulatory responsibilities and the implementation of KommAustria's duties such as the distribution of media grants. The RTR GmbH was also established by the

² The implementation of the Federal Constitutional Act on the Transparency of Media Co-operations and Media Funding (BVG MedKF-T 2011 = Bundesverfassungsgesetz über die Transparenz von Medienkooperationen sowie von Werbeaufträgen und Förderungen an Medieninhaber eines periodischen Mediums) and the Federal Law on Transparency of Media Co-operations and -funding (MedKF-TG 2011 = Medienkooperations- und -förderungs-Transparenzgesetz) followed a long-time controversy and public debate on the practices of some public entities (e.g. political parties, ministries or public companies such as the Austrian Railways) to place advertisements in and finance favorable news coverage of leading Austrian news media. The new legal provisions determine that such indirect ways of public funding of media institutions has to be transparent and therefore published regularly.

KommAustria Act in 2001 providing the same administrative support to the Telecom Control Commission (TKK = *Telekom-Kontroll-Kommission*) and the Post Control Commission (PCK = *Post-Control-Kommission*), both of them panel authorities with judicial powers.

The KommAustria Act of 2001 defined another regulatory entity in the broadcasting sector – the Federal Communications Senate (BKS = *Bundeskommunikationssenat*). It was originally in charge of the legal supervision of the public broadcaster ORF and its subsidiaries, a task that was transferred to the KommAustria by the amendment of the KommAustria Act of 2010 as a way of harmonization of responsibilities of the regulatory bodies. The Federal Communications Senate, which is located within the Federal Chancellery, is the appeals authority concerning decisions of KommAustria. The duties of the Federal Communications Senate are defined in the KommAustria Act (KOG 2011, Sec. 36 – 38). It is made up of five members; at least three of whom have to be judges. The BKS is thus an independent panel authority with powers of a court. Appeals of decisions made by the Federal Communications Senate must be made as complaints to the Austrian Constitutional Court (*Verfassungsgerichtshof*) and the Austrian Administrative Court (*Verwaltungsgerichtshof*).

The main legal basis of media regulation in Austria is the KommAustria Act mentioned above. It was originally passed in 2001 and its latest version dates back to 2012 (and includes all amendments made prior to 2011). The most important amendment made was undoubtedly the amendment of 1st October 2010 expanding the functions of KommAustria and codifying its independent status. The independence of the regulatory authority is also stated in the Rules of Procedure of KommAustria (cf. KommAustria 2012d: Sec. 4 and KOG 2011: Sec. 6), that regulate the different responsibilities of the members and the three senates of KommAustria. Due to the variety of tasks carried out by the regulatory authority several other laws contribute to the regulatory framework in Austria. Aside from the constitutional foundation of broadcasting in Austria³, several laws concerning the operation of public and private media services have been established: the ORF Act (ORF-G 2012 = ORF-Gesetz), the Private Radio Act (PrR-G 2010 = *Privatradiogesetz*), the Law for Audiovisual Media Services (AMD-G 2012 = *Audiovisuelle Mediendienste-Gesetz*, formerly known as the Private Television Act, PrF-G 2003 = *Privatfernsehgesetz*) are relevant as they confirm the supervisory authority of KommAustria. The following laws are implemented by KommAustria by means of its duties concerning media grants, licensing and control: the Television Exclusive Rights Act (FERG 2010 = *Fernsehexklusivrechtgesetz*), the Press Subsidies Act (PresseFG 2010 = *Presseförderungsgesetz*), the Telecommunications Act (TKG 2003 = *Telekommunikationsgesetz*), the Journalism Subsidies Act⁴ (PubFG 2012 = *Publizistikförderungsgesetz*), the Access Control Act (ZuK-G 2010 = *Zugangskontrollgesetz*), the Federal Law on Transparency of Media Co-operations and -funding (MedKF-TG 2011

³ The constitutional basis for broadcasting in Austria is on the one hand determined by Article 10 of the European Human Rights Convention and the Article 20 of the Federal Constitution Act (BVG [1930] 2010) mentioned above. On the other hand there is also a Federal Constitutional Act Ensuring the Independence of Broadcasting (BVG-Rundfunk 1974) and the recently established Federal Constitutional Act on Transparency of Media Co-operations and Media Funding (BVG MedKF-T 2011 = *Bundesverfassungsgesetz über die Transparenz von Medienkooperationen sowie von Werbeaufträgen und Förderungen an Medieninhaber eines periodischen Mediums*). See also dimension 3 for further details.

⁴ The Press Subsidies Act regulates the public grants given to daily print media while the Journalism Subsidies Act concerns public funding of periodical print media that are not published with daily frequency.

= *Medienkooperations- und -förderungs-Transparenzgesetz*) the Cooperation of Consumer Protection Authorities Act (VBKG 2012 = *Verbraucherbehörden-Kooperationsgesetz*) and the License Fee Act (RGG 2012 = *Rundfunkgebührengesetz*).

2. FUNCTIONS

KommAustria has been right from the start a convergent regulatory body responsible for all electronic media in the broadcasting sector (radio and television broadcasters). Since the substitution of the Private Television Act by the Audiovisual Media Service Act in 2008 other audiovisual media services (including online-based ones such as on-demand services, multiplex platforms for digital terrestrial broadcasting, providers of additional services, program aggregators and communication networks and services that disseminate broadcasting content) are also included. The continuous extension of the duties of KommAustria making it the supervisory body of private and public broadcasters and subsequent to the implementation of the Media Transparency Law it is also the body responsible for regulatory issues concerning advertising. Nevertheless, other media organizations that are not covered by the above mentioned laws are not subject to the regulation or supervision by KommAustria (e.g. internet service providers or print media). Thus, KommAustria fulfills a wide range of functions as a regulatory and supervisory authority. All of these are defined in the KommAustria Act (KOG 2011: Sec. 2, see also Sec. 17 concerning the duties of the RTR GmbH and Sec. 36 concerning the duties of the BKS).

In the first instance KommAustria fulfills duties on a technical and infrastructural level as the licensing authority in the broadcasting sector. It is also in charge of establishing and maintaining frequency allocation and licensing procedures according to the Private Radio Act and the Audiovisual Media Service Act. It also guarantees the use of the transmission infrastructure for broadcasting that is owned by the public broadcaster ORF and therefore provides access to broadcasting infrastructure by private broadcasting companies according to the ORF Act (2010: Sec. 8). The regulatory body is also in charge of the approval of the installation of technical infrastructure necessary for the transmission of broadcasting, and the administration and allocation of frequencies according to the Telecommunications Act (2003). Moreover, KommAustria fosters the implementation and further development of digital broadcasting in Austria.

In addition, KommAustria carries out various functions by being the supervisory authority in the broadcasting sector. It is the supervisory authority for all private broadcasters and audiovisual media service providers as well as the public broadcaster ORF and its subsidiaries. KommAustria has a monitoring function when it comes to the public broadcaster ORF, in particular concerning provisions of advertising and sponsorship (ORF-G, Part 3) as well as content (especially Sec. 9 concerning the format of programs of the ORF and Sec. 18 concerning the content of Teletext and online services). Furthermore, it is responsible for monitoring advertising practices of private broadcasters (according to Sec. 19 – 20 PrR-G 2010 and Sec. 31 – 38 and Sec. 41 – 45 AMD-G 2012). This monitoring role is achieved by collecting and providing analyses of programs containing commercial communication

(advertising) of all broadcasters and media service providers at least once a month. For the ORF this also applies to online content. In case of alleged violation of advertising constraints the KommAustria functions as the regulator.

As a result of this, KommAustria can also be characterized as an administrative penal authority. In addition to the control responsibilities mentioned above, KommAustria is the administrative penal authority that launches investigations and imposes fines in cases of infringements of the regulations of the Television Exclusive Rights Act (FERG 2010 = *Fernsehexklusivrechtgesetz*) and the Access Control Act (ZuK-G 2010 = *Zugangskontrollgesetz*). Since the implementation of the Law on Media Transparency (MedKF-TG 2011) that came into force on 1st July 2012 KommAustria has taken on another regulatory function. The Law on Media Transparency regulates in particular the advertising practices of public bodies. It obliges all public legal entities under the control of the Austrian Audit Court (Rechnungshof) to disclose their advertising activities and media co-operations (MedKF-TG 2011: Sec. 2). KommAustria has the duty to publish these disclosures quarterly on its website. Furthermore, KommAustria has to report on inaccurate and incomplete disclosures in its annual report. They can then also be subject to a fine (MedKF-TG 2011: Sec. 5).

Finally, in its role as a regulatory authority KommAustria administers and distributes media funding in accordance with to the PresseFG (2010), the PubFG (2012) and the KommAustria Act (KOG 2011: Part 3). The main part of the funding by KommAustria is on an operational and administrative level handled by the RTR GmbH. Hence, the RTR GmbH under the responsibility of the managing director of the Media Division, administrates and operates the following funds: the Digitization Fund (Digitalisierungsfond, according to KOG 2011: Sec. 21), the Television Fund (Fernsehfonds Austria, according to KOG 2011: Sec. 26), the Non-Commercial Broadcasting Fund (Fonds zur Förderung des nicht-kommerziellen Rundfunks, according to KOG 2011: Sec. 29), the Private Broadcasting Fund (Fonds zur Förderung des privaten Rundfunks, according to KOG 2011: Sec. 30), the Press Subsidies and the Journalism Subsidies Funds (specified in KOG 2011: Sec. 33). Since 2009 the KommAustria Act (2012: Sec. 33) also implemented two funds for self-regulatory organizations, one for the self-regulation of commercial communication the other for self-regulation of the press. Those funds were supposed to support the reimplementation of the Austrian Press Council (Österreichischer Presserat) that was inactive between 2001 and 2010 as well as the further development of a self-monitoring body in the field of advertising. Inm the period 2009 to 2011 this fund was given to the Austrian Advertising Council (Österreichischer Werberat) (RTR GmbH 2012a: 90). Apart from this there are no formal links between the regulatory authority and the self-regulatory organizations in Austria. The Press Council is rather relevant for the print sector and there is no self-regulatory organization for the broadcasting sector. In fact, the self-regulatory organizations in Austria have an advisory function rather than a control function; no legal consequences follow from complaints to these self-regulatory organizations. The Austrian Press Council as well as the Austrian Advertising Council set up guidelines in form of ethical codes for their sector (cf. Der österreichische Selbstbeschränkungskodex elaborated by the Austrian Advertising Council 2009 and Ehrenkodex für die österreichische Presse 1999 published by the Austrian

Press Council). However, in particular the Press Council has been facing problems of legitimation, as leading print media organizations withdrew their support after decisions of the Press Council. In 2001, a controversy on the decision against the leading newspaper Kronen Zeitung led to the withdrawal of the support by the Austrian Publisher's Association and in consequence to the dissolution of the Press Council (Gottwald/Kaltenbrunner/Karmasin 2006: 9). The Press Council remained inactive until 2011. After its reestablishment the newspaper with the biggest reach – Kronen Zeitung – and the two freesheets with the biggest reach – Heute and Österreich – refused to become members of the Press Council. In 2012 this controversy reached another peak when the free daily Österreich announced its intention to sue the Press Council for its investigations concerning their news coverage stating that the Press Council could not be responsible for non-members (cf. Mark 2012; Austrian Press Council 2012).

In order to fulfill its mandate and to make the work of the regulatory authority transparent, the KommAustria Act (KOG 2011: Sec. 20) implemented a Competence Centre within the RTR GmbH. Concerning the media sector this Competence Centre fulfills duties that include the publication of decisions and consultations of the regulatory body itself and relevant research findings in the field of the media. As a result, the Competence Centre provides analyses of the Austrian media market, either on its own or by commissioning research in particular concerning the allocation of frequencies, the implementation of digital broadcasting, the regulation of advertising, market structures, the protection of children, the access to ICTs and other technological innovations. These findings are also regularly presented and discussed in conferences and events organized by the Competence Centre of the RTR GmbH. Thus, the authority not only regulates, monitors and controls the Austrian media market, but also provides a platform for a public discourse and debate of relevant current issues in the field.

3. LEGITIMIZING/UNDERLYING VALUES

There is a clear hierarchy in the Austrian legal system regarding media policy. As in most other member states of the Council of Europe, human Rights as enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) enjoy the highest possible status and are equal to the rights enshrined in the Austrian Constitution. Within this Convention, art. 10 is fundamental for audiovisual media policy and the general set-up of Austrian media law.

At the next level, the Austrian Constitution refers in several articles to media and media policy and requires among other rules specific regulation of broadcasting, as mentioned above. There are no constitutional rules for print and other media (e.g. internet). The Federal Constitutional Act Ensuring the Independence of Broadcasting (BVG-Rundfunk 1974 = Bundesverfassungsgesetz über die Sicherung der Unabhängigkeit des Rundfunks) stipulates that a specific law needs to be enacted that rules upon the organization of broadcasting, respecting the fundamental values and rights of objectivity, non-partisanship, diversity of opinions and the independence of persons managing broadcasting.

All these provisions are represented in the guiding broadcasting laws, one for the public service broadcaster (ORF-G 2012 = Bundesgesetz über den Österreichischen Rundfunk) and two for the private operators (AMD-G 2012= Audiovisuelles Mediendienst-Gesetz/PrR-G 2012 = Privatradiogesetz). Both laws explicitly refer to the text and the values of the Federal Constitution.

It can therefore be concluded that in Austria the values enshrined in the Human Rights Convention, together with those of the Federal Constitution can be considered as fundamental for media politics. They are not subject to day-to-day controversies over media politics but generally accepted as cornerstones of the Austrian media landscape.

4. PERFORMANCE

The regulatory authority is mainly concerned with complaints by competitors in the field of broadcasting. Austrian broadcasters seem to observe the performance of one another in great detail which leads to frequent complaints concerning, for example, non-compliance with the rules on advertising or the rules on broadcasting content. The Austrian legislation with regard to broadcasting content is not very clear and many terms require interpretation (for example, Sec. 4 of the ORF Act requires the ORF to broadcast ambitious contents on equal terms within its entire program offer). For this reason, complaints are frequent and the ORF's private competitors seek legal and court assistance in their interpretation of what kind of rule violations the ORF commits in content terms.

In 2011, most of KommAustria's decisions were approved by the BKS (RTR GmbH 2012a: 35), which functions as a court of appeal on decisions made by the authority. Six complaints were lodged against the ORF relating to violations of program guidelines, especially ones concerning partiality, a lack of objectivity and insufficient independence of journalists. In addition, the public broadcaster ORF was found guilty twice for the non-compliance of advertising rules (RTR GmbH 2012a: 49). Moreover, four complaints against private broadcasters were submitted on the grounds of an infringement of program guidelines. Three of these four, however, were rejected (RTR GmbH 2012a: 50). Five private broadcasters were found guilty as they did not notify changes in their ownership structures (RTR GmbH 2012a: 36). In addition, three decisions concerning violations of advertising rules by private broadcasters were dealt with. On one occasion, the authority conducted infringement procedures when a radio broadcaster had gone on air without a license (RTR 2012a: 51). In total, 14 proceedings were conducted; only four of them ended with convictions. In five cases, only warnings were issued. The rest of them have not yet been closed (mid 2012).

In 2012, the ORF had to accept several restrictive decisions made by the authority. KommAustria decided in January 2012 that the ORF is no longer allowed to use Social Networking sites (KommAustria 2012a). This decision was approved by the BKS (Fidler 2012). However, the ORF decided to refer the matter to the Supreme Court and is still running SNS accounts for some of its formats. Moreover, the ORF intends to extend the online platform *tvthek.orf.at* to cable distribution but this was declared to be illegal (KommAustria 2012b).

In general, there are constantly mutual observations between the ORF and private broadcasters when it comes to possible violations of advertising rules that lead to complaints. One privately organized cable broadcaster was found guilty in criminal law in April, for violation of the separation of advertising content from program content (KommAustria 2012c). In general, many decisions concern the violation of advertising rules; complaints in these instances are often initiated by private media organizations. There are only few complaints by individuals. In most cases the work of the regulatory authority is rather restricted to declaratory judgments rather than the imposition of warnings and fines. In 2011, five decisions were taken to the Constitutional Court (RTR 2012a).

Conflicts between the regulatory authority and self-regulatory bodies do not happen frequently. The Austrian advertising Council deals mainly with ethical standards of advertising and the Austrian Press Council is closer to observing the press, rather than broadcasting. Moreover, the Press Council was only re-established in 2011 so there has been little room over the last decade for clashes between the legal and the self-regulatory body.

5. ENFORCEMENT MECHANISMS/ACCOUNTABILITY

Different rules, legal mechanisms and competences of the KommAustria were established when it came to sanctions against private and public broadcasters in case of violation of regulatory provisions. In general, the authority is obliged to take action in the appeals process as a result of complaints, when requested to do so by the state or the provinces and districts or ex officio initiated by the authority itself. The result of this procedure can be the making of declaratory judgment, but in some cases it may result in the removal of the license or the removal of programs and formats. There is also the possibility of imposing a penalty (KOG 2011: Sec. 39 Par. 1). If the authority detects an illegal situation, the broadcaster is obliged to eliminate it.

When it comes to the examination of advertising rules, the authority is obliged to consult associations of self-regulation and consider their decisions and rules (KOG 2011: Sec. 39 Par. 4). These associations have to be widely accepted by the public and must guarantee transparency⁵.

Apart from, these general rules, specific sanctions for the public broadcaster ORF have been established and implemented by the ORF Act. In its function as a monitoring body of the advertising and program guidelines of the ORF and its subsidiaries (ORF-G 2012: Sec. 35 Par. 1-2), KommAustria becomes active in different ways. It can start an appeals procedure by either following a complaint by people affected by programs or formats, or by acting on a request by administrative units or by acting on its own as in cases in which it suspects non-compliance (ORF-G 2012: Sec. 36 Par. 1). KommAustria is thus able to suspend decisions by the ORF board (Stiftungsrat) or the General Director and can dissolve the boards of the public broadcaster in cases of non-compliance (ORF-G 2012: Sec. 37 Par 1 – 2). It can also decide that the ORF has to publish the KommAustria's decision (Par. 4). Fines for the ORF can

⁵ In fact, there is only a small number of self-regulatory bodies in Austria, most of them in the Press and the Advertising Council.

result from violations of program guidelines, for not establishing the quality safeguarding-system prescribed in law (ORF-G 2012: Sec. 4a), for neglecting its duty to submit a report, for neglecting an ex ante-examination of programs and formats (Auftragsvorprüfung) as well as using the ORF finances to fund its commercial activities using income from the license fees (ORF-G 2012: Sec. 38 Par. 1 Nr. 1 – 10). In case the authority detects an illegal use of license fees by the ORF it can start proceedings enabling it to confiscate money from the ORF (Abschöpfungsverfahren, see Sec. 38a and b).

For private broadcasters and audiovisual media service providers, the authority has powers slightly different from those concerning the ORF. Nevertheless, the regulatory authority can also force media organizations to eliminate illegal situations (PrR-G 2010: Sec. 25 Par. 3). Thus, media organizations can be forced to publish the regulatory body's decision (PrR-G 2010: Sec. 26 Par. 2 and AMD-G 2012: Sec. 62 Par. 3). Fines for private broadcasters are smaller than those for the public broadcaster (PrR-G 2010 Sec. 27 Par. 1). The reasons for sanctions are either violations of advertising rules or of program guidelines or a significant change of the program structures that results in a violation of the requirements of the license (PrR-G 2010: Sec. 27 Par. 2). In the case of repeated infringements, the license can be withdrawn (PrR-G 2010: Sec. 27 Par. 5 and AMD-G 2012: Sec. 63 Par. 1). For private television companies and new media service providers, the authority is able to suspend the distribution of a service for a period of up to six months (AMD-G 2012: Sec. 56 Par. 1), if the organization repeatedly offends human dignity or human Rights. Moreover, complainants can appeal to higher courts (Verfassungsgerichtshof, Verwaltungsgerichtshof) if they do not agree with the decision of the BKS. In general, guidelines and regulatory principles concerning the regulatory authority are all binding; the relevance of non-binding rules and procedures is small.

As has already been mentioned, since the amendment of the KommAustria Act in 2010, the regulatory authority is formally independent of political decision makers, namely the Federal Chancellor (i.e. the Prime Minister). Hence, it is impossible for political decision makers or representatives of Government to enforce any directives (BVG 2010: Art. 20 Par. 2 Nr. 5a). Nevertheless, the Federal Chancellor has the right to be informed about and to gather insight into the activities of the regulatory authority (KOG 2011: Sec. 15 Par. 1).

When it comes to ex ante-program evaluation by the ORF, the authority has to consult the Public Value Council of the RTR GmbH, which has to make a statement on it. The same applies if the ORF wants to significantly change a channel's profile or establish a new one. Likewise, the Press Subsidies Commission has the right to give such a statement and a report if press subsidies are distributed (PresseFG 2010: Sec. 4). Funding and investment of KommAustria is monitored by the Austrian Audit Council (Rechnungshof), which is a control board of the Austrian Parliament (KOG 2011: Sec. 15 Par. 2). Decisions and reports of the authority have to be published regularly (KOG 2011: Sec. 19 Par. 1 – 2). As a result, the authority has to consult several other authorities and organizations in order to be able to make a decision, which establishes several checks and balances. This contributes to the authority's accountability.

6. INSTITUTIONAL ORGANIZATION AND COMPOSITION

The regulatory authority KommAustria consists of five members, who are appointed by the Federal Chancellor subsequent to a governmental proposal (in accordance with Parliament) for a period of six years (KOG 2011: Sec. 3). The members must have a judicial qualification and professional experience of at least five years. The renewal of mandates is possible. There is a chairman, a vice-chairman and three other members. As mentioned before, the members are independent of government directives (KOG 2011: Sec. 6 Par. 1). Members of the government or the Parliament, Secretaries of State, members of political parties, members of the ORF or its subsidiaries and members of interest groups are not allowed to form part of KommAustria (KOG 2011: Sec. 4). The chairman is responsible for external representation of the authority. Decisions within KommAustria have to be made unanimously. Daily operations are conducted either in plenary sessions, senates or by individual members (KOG 2011: Sec. 8). Plenary meetings include all members and deal with the establishment of internal rules and rules of procedure as well as the dismissal of members. Senates consist of three members (KOG 2011: Sec. 10). Individual duties and responsibilities can be delegated to individual members (KOG 2011: Sec. 11), according to their competences. These competences are codified in the rules of procedure. Allocation of duties and rules of procedure have to be published regularly (KOG 2011: Sec. 12). License procedures, complaints management and control mechanisms remain a duty of the senates (KOG 2011: Sec. 13 Par. 3). Staff members are employed as contract staff according to civil law, contract partner is the Federal State (KOG 2011: Sec. 14 Par. 1). This means that there are only few civil servants left who enjoy a greater degree of independence and more privileges (such as permanent positions and high wages). This fits in with the overall trend in Austrian labor law.

The subordinate administrative body, the RTR GmbH is divided into two divisions – the Media Division (Fachbereich Medien) and the Telecommunications and Postal Service Division (Fachbereich Telekommunikation und Post) – that operate separately and that are headed by two managing directors (KOG 2011: Part 2 Par. 16 – 20). The managing director of the Media Division is appointed by the Federal Chancellor, the managing director of the Telecommunications and Postal Service Division by the Federal Minister of Transport, Innovation and Technology.

In their divisions, they have the authority to conduct operations in their own right, while all other tasks are performed together. The RTR GmbH has to establish a Competence Center, which operates under the responsibility of the two managers. The internal control board of the RTR GmbH is the supervisory board (Aufsichtsrat), which meets regularly. Its members are appointed by the Federal Chancellor and the Minister of Transport, Innovation and Technology. By the end of 2011 the RTR GmbH employed 104.5 Full-Time-Equivalents (RTR 2012a: 186). The number of staff members in the RTR GmbH has increased slightly (by 6.5 Full-Time-Equivalents compared to the employed staff a year ago). This was made possible by legal amendments and an increase in tasks and budget (RTR 2012a: 186f). In addition, the duties concerning the funds for private and non-commercial broadcasters were extended, which also required more staff. In total, 56.1 % of the staff belong to the Telecommunications and Postal Service Division, while the Media Division only employs

25.4 % of all staff members. The remaining 18.5 % of the staff members is responsible for service agendas concerning both divisions (RTR GmbH 2012a: 187). KommAustria consists of legal experts only, while media and telecommunications experts are placed within the RTR GmbH. The staff therefore is provided with economic and also technological know-how.

The Public Value Council is part of the RTR GmbH. It is responsible for advice and consultation concerning the ex-ante program evaluation of the ORF. It decides whether a new format contributes to fulfilling the public remit of the ORF as well as to the societal, cultural and political needs. Furthermore, it examines which effects the format is likely to have on the wider market. The council consists of five members, which have to be experts in communication science or communication professionals. They are appointed by the government for a five years period (RTR GmbH 2012d; ORF-G 2012: Sec. 6c).

Thus, there are no rules for the representation of the media sector in the boards. Civil society is overall neglected, as well. There are no consultation procedures, only with interested third parties in the case of the ex-ante program evaluation of the ORF and its market effects (ORF-G 2012: Sec. 6a Par. 2). They have the right to give a statement within a six weeks-period.

7. FUNDING

KommAustria and the RTR GmbH are obliged to work efficiently (KOG 2011: Sec. 35). The authority has to notify the Government of its budget and expected expenses (KOG 2011: Sec. 35 Par. 1). Thus, the legal funding rules are consistent and constant; there are no regular negotiations about them. KommAustria and the Media Division of the RTR GmbH have three different sources of revenue. First, they are funded by financial contributions by the broadcasters and audiovisual media service providers⁶ (KOG 2011: Sec. 24 Par. 1; Sec. 35 Par. 2; Sec. 34 Par. 2). The contributions of the media organizations are calculated according to their market share of revenues. Public service license fees are excluded from the ORF's revenues. The contributions of the providers serve to fund regulatory operations and are limited in total. Secondly, the authority receives financial support from the federal government (KOG 2011: Sec. 22 Par. 9, Sec. 26 Par. 3, Sec. 31 Par. 5, Sec. 34 Par. 1, Sec. 34a Par. 1, Sec. 35 Par. 1). The state supports duties which are in the public interest (RTR GmbH 2012a: 194). Thirdly, the license fee provides a small amount for the duties in line with the Signature Law (SigG Sec. 13 Par. 4). The financial resources necessary for the administration costs of the several funds are drawn from the funds themselves. Nevertheless, the expenditures of the RTR GmbH's divisions are capped; for the Media Division the expenditures are limited to € 4 million per year; for the Telecommunications and Postal Service Division the annual limit is € 8 million (limits for 2011, annual adjustment to the Austrian consumer price index cf. KOG 2011 Sec. 34 Par 1 and Sec. 35 Par 1). In fact, the expenditures of the Media Division in 2011 amounted to 3,860,000 EUR, the expenditures for the Telecommunications and Postal

⁶ The Telecommunications and Postal Service Division is financed by the contributions of infrastructure and postal service providers in a similar manner.

Service Division to 7,278,000 EUR. Thus the total budget of the RTR in 2011 amounted to 11,872,000 EUR (see also Table 1). A major part of the expenditure was used for personnel costs: 8,181,073 EUR for the RTR GmbH in total; 2,011,096 EUR of this for the personnel costs are associated with media regulation (RTR GmbH 2012a: 190).

Table 1: Approved Budget of the RTR in 2011

Budget 2011	Revenues in EUR
Media Division	3,860,000 EUR
Telecommunications and Postal Service Division	7,278,000 EUR
Total Budget	11,872,000 EUR

A maximum of 70 % of the budget has to be delivered by the financial contributions of the media or telecommunications companies. However, at least 30 % of the budget originates from the Federal Budget (Holoubek/Kassai/Traimer 2010: 171). In the beginning of its operations the regulatory authority was exclusively financed by contributions from the media and telecommunication companies (according to TKG 1997 and KOG 2001: Sec. 10). These provisions have been declared unconstitutional though (VfGH 2004) as the operation of the regulatory authority is in the public interest and therefore cannot only be financed by the industry itself. This was in particular acknowledged for the duties of KommAustria concerning media regulation. The mixed-financing model was implemented by an amendment of the KOG in 2005. In fact, the RTR GmbH estimated expenditures of 3,860,000 EUR for the year 2011. 31% of that was covered by the Federal Budget according to law (KOG 2011: Sec. 35 Par. 2), the remaining 69 % had to be made up by the contributions of the media industry (RTR GmbH 2012c). In 2012, due to the extension of the duties concerning media regulation the estimated expenditures were higher; 4,968,000 EUR were estimated by the RTR GmbH (2012d). In total, 30 % will be covered by the Federal Budget and 54 % through private industry contributions. The remaining 16 % will be covered by the public broadcaster ORF (ORF-Prüfungskommissionsgebühr) (see also Table 2).

Table 2: Estimated expenditure and distribution of financial resources by the RTR GmbH in 2011 and 2012 (RTR GmbH 2012c and 2012d)

Expenditures/resources	2011		2012	
	Total	Percentage	Total	Percentage
Federal Budget	1,211,550 EUR	31 %	1,551,000 EUR	30 %
Industry Contribution	2,649,000 EUR	69 %	2,686,337 EUR	54 %
ORF Contribution	-*	-*	770,663 EUR	16 %
Total estimated expenditures	3,860,000 EUR		4,968,000 EUR	

* The ORF's contribution in the year 2011 is included in the industry's contribution. No data was available.

8. REGULATION IN CONTEXT

The Austrian media market is a small market challenged by some particularities: Firstly, high concentration ratios can be found in all media sectors, and are essentially a result of reactive media policy promoting the establishment of media conglomerates for decades. Secondly, the importance of foreign media companies (mainly from the big neighbor Germany) cannot be neglected. Thirdly, the implementation of private broadcasting occurred considerably late in Austria (in 1993 with the implementation of the Regional Radio Act and in 2001 with the establishment of the Private Television Act⁷).

A substantial level of concentration can be seen in particular in the print media sector. Austria's leading newspaper – *Kronen Zeitung* – is still outstanding in terms of reach and political significance. In 2011 the average daily reach of *Kronen Zeitung* was 38.2 % reaching 2,724 million Austrians every day, followed by *Kleine Zeitung* (mainly dominant in the south-eastern regions of the country) with 11.3 % and the two free dailies *Heute* (13.1 %) and *Österreich* (10.3 %), focusing more on the eastern part of the country (Media-Analyse 2012). In fact, the newspaper and magazine market is dominated by just three private media companies (*Styria Media Group*, *Verlagsgruppe News*, *Mediaprint*). Over the last decades these companies extended their businesses to other media sectors (mainly radio and television but also online) and they are highly interlinked with one another or in particular with German media conglomerates (e.g. *Bertelsman Group*). The second biggest Austrian media company, *Styria Media Group*, is for instance mainly active in the print sector, both on a national and a regional level (being e.g. the owner of the daily newspapers *Kleine Zeitung*, *Wirtschaftsblatt*, *Die Presse*). It is also active in the broadcasting sector as the owner of two radio stations (*Antenne Kärnten*, *Antenne Steiermark*) and as a co-owner of *Sat1 Österreich* in the television market. Even though media mergers have to be notified to the Competition Authority (*Bundswettbewerbsbehörde*) if companies exceed revenue limits lower than in other sectors formal rejections of such mergers are exceedingly rare in Austria (Grünangerl/Trappel 2011: 87).

The internet penetration rate has been constantly on the increase over the last couple of years reaching 80 % in 2011. In addition, the number of households receiving television via computer (TV-card) has been rising as well, reaching 17 % in 2011 (ORF-Medienforschung 2012b). The online media sector is dominated by news media from either the print sector or the ORF extending their businesses to the online sector.

The Austrian radio market is, however, dominated by the channels of the public broadcaster ORF, which runs three national radio channels (Ö1, Ö3 and FM4). The only nationwide private radio license was granted to *Kronehit* that is owned by *Kronen Zeitung* and *Kurier*. Thus, the Austrian radio market is dominated by regional channels. The ORF runs nine regional radio channels (Ö2), one in every Austrian province. Furthermore, a wide range of local and regional private radio stations is available in Austria. In 2010, 83 private regional radio stations were available in Austria, 15 of them were non-commercial radio stations (Statistik Austria 2011). The ORF-channels combine a daily reach of 70.4 % in the radio

⁷ As satellite and cable penetration has been quite substantial in Austria, the public broadcaster ORF was facing competition from (mainly German) foreign private channels as far back as 2001.

market reaching 5,026 million people every day. All Austrian private radio channels in total reach 26.2 % of the population. Therefore, radio is the medium with the highest reach in Austria (Media-Analyse 2012).

In 2011, 98 % of all Austrian households were equipped with a television set; in more than 40 % of all households more than one television set was available. The distribution is dominated by satellite (55 %) and cable (39 %). Digital distribution is constantly increasing and is strongest among satellite households (53 %) in 2011 but also considerable within cable networks (15 %). Only 5 % of the television households have digital-terrestrial television only. Analog terrestrial distribution was turned off in 2010. Therefore the television digitalization rate is 72 %. On average the Austrian population can receive 94 channels, 69 of them in the German language. Satellite households can receive on average 136 channels (96 in the German language) (ORF-Medienforschung 2012a). However, the number of Austrian national channels is smaller: the ORF operates two generalist channels (ORF1 and ORF2). In addition, two format channels were launched by the ORF in 2012: ORF III (for cultural and information programs) and ORF Sport + (for sports programs)⁸. There are three private television channels on a national level (ATV, Puls 4, Servus TV) a fourth one was launched in 2012 (SIXX Austria) replacing the former cable channel Austria 9. On a regional level many private channels have been established in the last number of years a considerable number of them not broadcasting full-time or being established as local program windows (RTR GmbH 2012e). Furthermore, three non-commercial television channels are available in Austria. Nevertheless, the public broadcaster ORF still dominates the television market, which is rather nationally orientated: even though in decline, the market share of the two generalist ORF channels was 36.4 % in 2011. The four Austrian national private television channels (ATV, Puls 4, Servus TV, Austria 9) only had a combined market share of 7.6 %. The importance of the big neighbor Germany sharing the same language can be seen in particular in the television market: the biggest private television channels from Germany (Pro 7, Sat 1, Kabel 1, RTL, RTL II, VOX) are the main competitors of the ORF representing a combined market share of 27.7 %; most of them providing Austria-specific program windows.

Media concentration concerning ownership structures is also paramount in the television sector: Two national Austrian channels (Puls 4, SIXX) are owned by the SevenOne Media Austria, a subsidiary of the German Pro7Sat1 Media Group. The German and Austrian television channels that belong to Pro7Sat1 Media Group together had a market share of 17,4 % (AGTT 2012).

9. IGNORED DIMENSIONS

It should be noted that the regulatory body in Austria is much more an administrative agent rather than a rule setting authority, as is the case in other European countries. Media policy rules are defined within the political space (Government, Parliament) and not within

⁸ ORF Sport + already existed since 2006 and shared its frequency with TW1, a tourism and weather channel also run by the ORF.

the regulatory body – who has an equal say in the process of law-making as any other public or private entity concerned. Therefore, its legal status but also its status in practice is less exposed to the political debate and to political pressures than the regulatory bodies elsewhere. As a result, media policy in Austria does not enjoy any additional legal independence, despite its importance for policy making in general.

A concluding remark: Media policy in general is not exclusively a matter of regulatory bodies. It is rather a matter of bargaining, negotiations, and powerplay between media actors – both public and private companies and the political elites. In the Austrian case, legal decisions and their implementation and administration are prepared and sanctioned well before the formal political process enacts rules. Therefore, the media policy picture is incomplete if only the performance of the regulatory bodies is observed. Public, private and commercial interests are well defined and defended outside the realm of regulatory bodies.

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1. LEGAL FRAMEWORK

1.1 DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY

The state media regulatory authority in Finland is the Finnish Communications Regulatory Authority (FICORA, the Finnish name is Viestintävirasto). FICORA is a supervisory and administrative agency that is subordinate to the Ministry of Transport and Communications. The Act on Communications Administration¹ names FICORA as the actor responsible for communications administration in the administrative branch of the Ministry of Transport and Communications. FICORA's tasks are also decreed in the Act on Communications Administration. The contents of the Act will be covered more in the following dimension. Other laws that regulate FICORA are the Communications Market Act², the Act on Radio Frequencies and Telecommunications Equipment³, the Act on Television and Radio Operations⁴, the Act on the Protection of Privacy in Electronic Communications⁵, the Act on the State Television and Radio Fund⁶, and the Postal Act⁷.

¹ Act on Communications Administration <http://www.finlex.fi/fi/laki/ajantasa/2001/20010625> , unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2001/en20010625.pdf>

² Communications Market Act <http://www.finlex.fi/fi/laki/ajantasa/2003/20030393>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2003/en20030393.pdf>

³ Act on Radio Frequencies and Telecommunications Equipment <http://www.finlex.fi/fi/laki/ajantasa/2001/20011015> , unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2001/en20011015.pdf>

⁴ *Act on Television and Radio Operations* <http://www.finlex.fi/fi/laki/ajantasa/1998/19980744>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/1998/en19980744.pdf>

⁵ *Act on the Protection of Privacy in Electronic Communications* <http://www.finlex.fi/fi/laki/ajantasa/2004/20040516>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2004/en20040516.pdf>

⁶ *Act on the State Television and Radio Fund* <http://www.finlex.fi/fi/laki/ajantasa/1998/19980745>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/1998/en19980745.pdf>

⁷ *Postal Act* <http://www.finlex.fi/fi/laki/ajantasa/2011/20110415>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2011/en20110415.pdf>

In Finland, several institutions possess competencies in the field of telecommunications sector regulation. Apart from FICORA, both the Ministry for Transport and Communications as well as the Finnish Competition Authority are involved in the regulation of the telecommunications sector. The Ministry of Transport and Communications and FICORA work in cooperation with general competition and consumer authorities wherever necessary. The Consumer Agency⁸ and the Consumer Ombudsman⁹ monitor the Consumer Protection Act¹⁰ and other acts enacted to protect consumers. The Finnish Competition Authority's¹¹ mission is to monitor compliance with the Act on Competition Restrictions¹² and the EU competition rules and to promote efficient competition.

1.2 EXAMPLES OF LINKS WITH SELF-REGULATORY AND CO-REGULATORY MEDIA STRUCTURES

In Finland, the regulation of advertising can be seen as an example of co-regulation. The regulation of advertising is relatively complex and is subject to different laws, authority guidance and self-regulation. Laws regulating advertising include the Act on Television and Radio Operations, the Consumer Protection Act, the Tobacco Act, the Alcohol Act and the Securities Market Act.

The main self-regulatory institution for advertising is The Council of Ethics in Advertising¹³. The Council issues statements on whether or not an advertisement or advertising practice is ethically acceptable and mainly deals with requests from consumers and with issues of public significance. The Council cannot deny advertising, but the weight of its statements is quite heavy. It bases its statements on the basic rules of the International Chamber of Commerce. The guidelines emphasize the marketers' responsibilities to the society. With its interpretations, the Council has created principles concerning fair marketing that are similar to laws and international guidelines. (Neuvonen 2008.)

FICORA also has a role in the advertising regulation processes. Its task is to ensure that program operators comply with provisions stated in the Act on Television and Radio Operations in terms of advertising, sponsorship and teleshopping. The Consumer Ombudsman¹⁴ is responsible for monitoring the provisions on the ethical principles of advertising and the protection of minors. FICORA has given guidelines on the basis of surveys and discussions with operators. The guidelines explain how FICORA interprets the law with regard to advertising provisions.¹⁵

⁸ The Consumer Agency (Finnish: Kuluttajavirasto) <http://www.kuluttajavirasto.fi/en-GB/>

⁹ The Consumer Ombudsman's supervisory tasks <http://www.kuluttajavirasto.fi/en-GB/consumer-agency/tasks-and-courses-of-action/consumer-law/consumer-ombudsman-supervisory-tasks/>

¹⁰ Consumer Protection Act <http://www.finlex.fi/fi/laki/ajantasa/1978/19780038> , unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/1978/en19780038.pdf>

¹¹ The Finnish Competition Authority (Finnish: Kilpailuvirasto) <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?>

¹² Act on Competition Restrictions <http://www.finlex.fi/fi/laki/ajantasa/1992/19920480>

¹³ The Council of Ethics in Advertisement http://www.keskuskauppamari.fi/site_eng/Services/Expert-Services/Statements-on-Ethical-Advertising

¹⁴ The Consumer Ombudsman <http://www.kuluttajavirasto.fi/en-GB/>

¹⁵ Directions to advertising regulation http://www.ficora.fi/attachments/suomimq/5xNJ3ju8L/Mainonnan_kestoa_ja_sijoitte-lua_koskeva_ohje.pdf

The self-regulatory body and the state authorities complement each other in many ways. One problem in the prevailing system is the lack of cooperation between these supervisory parties. It can be stated that the self-regulatory system does not seem to provide for a real alternative to legislation by the Finnish State because the activities by the consumer protection authorities are so extensive. (Pakarinen & Tala 2008.)

Another example of co-regulation in Finland is the self-regulation agreement signed by Finnish television channels, the public service YLE and the commercial MTV3 and Nelonen, in 2004¹⁶. The agreement classifies television content as a safeguard for children. The TV channels also agreed to transmit material potentially harmful to children at times when children are not expected to watch television. The self-regulation agreement forms a basis for interpreting the 19 § of the Act on Radio and Television operations. FICORA also takes the self-regulation agreement into account in its decisions.¹⁷

A third example of co-operation between the state regulatory authority and the self-regulatory entity is pointed out in the Strategy for FICORA 2009-2015¹⁸. FICORA mentions gathering information on consumers' media literacy and perceptions of media related issues as one of its tasks. FICORA states that this research data is also utilized in supporting self-regulation in the media.

2. FUNCTIONS

2.1 FICORA'S TASKS

FICORA's responsibilities cover all media sectors except the press regulation. The press is regulated by the Act on the Exercise of Freedom of Expression in Mass Media¹⁹. FICORA is not responsible for regulating journalistic content. FICORA's tasks include:

- technical regulation of communication networks to ensure its functioning and security,
- supervision and regulation of telecommunication markets to ensure competition,
- allocation and control of radio frequencies to provide sufficient frequencies within Finland,
- data security and privacy protection in electronic communications, and
- broadcasting regulation by monitoring the content and its compliance with law.²⁰

In addition, FICORA also controls postal operations, collects television fees, co-ordinates standardization of telecommunications and postal services and allocates internet

¹⁶ See page 317: <https://jyx.jyu.fi/dspace/bitstream/handle/123456789/25620/URN%3ANBN%3Afi%3Aju-201011223111.pdf?sequence=1>

¹⁷ See for example FICORA's decision of Nelonen breaking the article 19 of the Act on Radio and Television operations: http://www.ficora.fi/attachments/suomimq/5uM4wCvhY/Paatos_Sanoma_Televisio_Oy_lain_rikkomisesta_Greyn_Anatomia.pdf

¹⁸ See page 6 of the Strategy for the Finnish Communications Regulatory Authority 2009-2015: http://www.ficora.fi/attachments/englantiav/strategy/5jyWB7NAG/DOHA_n561005_v1_Viestintaviraston_strategia_2009-2015_in_English.pdf

¹⁹ Act on the Exercise of Freedom of Expression in Mass Media <http://www.finlex.fi/fi/laki/ajantasa/2003/20030460>, unofficial English translation <http://www.finlex.fi/en/laki/kaannokset/2003/en20030460.pdf>

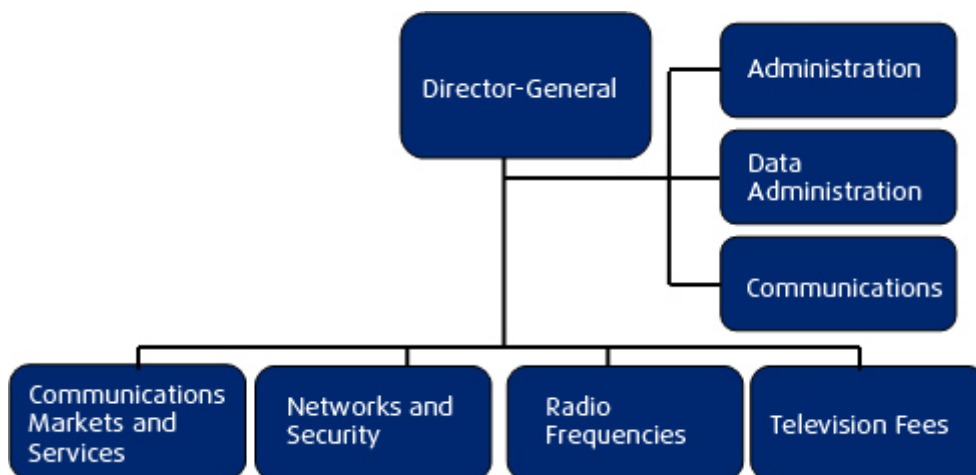
²⁰ FICORA's web page <http://www.ficora.fi/en/index/viestintavirasto/esittely.html>

domain names.²¹ FICORA has little independent decision-making power, apart from the specific supervisory responsibilities entrusted to it in the media legislation.

FICORA's tasks and responsibilities are decreed in the Act on Communications Administration. According to the act, FICORA shall carry out the duties provided by the Communications Market Act, Radio Act, Act on Postal Services, Act on Television and Radio Operations, Act on State Television and Radio Fund, Act on the Protection of Privacy and Data Security in Telecommunications, Act on Electronic Signatures, and Domain Name Act. FICORA shall also carry out the duties that lie with it according to other provisions, or regulations of the Ministry of Transport and Communications.²²

FICORA used to have a small number of tasks concerning media education, but all those tasks were transferred to the Finnish Centre for Media Education and Audiovisual Programmes²³, which was established at the beginning of the year 2012. The tasks of the authority are stated in the Act on the Finnish Centre for Media Education and Audiovisual Programmes²⁴.

FICORA's organization is divided into seven profit areas illustrated by the figure below.²⁵ The organizational structure will be further discussed in the 6th dimension.



According to its web page, FICORA participates actively on a large scale in areas of European and international co-operation. The most important partners include the International Telecommunications Union (ITU), the Communications Committee (COCOM) and the Radio Spectrum Committee (RSC) of the European Union (COCOM), and the European Regulators Group for Electronic Communications (BEREC).²⁶

²¹ FICORA's web page <http://www.ficora.fi/en/index/viestintavirasto/esittely.html>

²² Act on Communications Administration <http://www.finlex.fi/en/laki/kaannokset/2001/en20010625.pdf>

²³ Finnish Centre for Media Education and Audiovisual Programmes, www.meku.fi

²⁴ Act on the Finnish Centre for Media Education and Audiovisual Programmes <http://www.finlex.fi/en/laki/kaannokset/2011/en20110711.pdf>

²⁵ FICORA's web page, <http://www.ficora.fi/en/index/viestintavirasto/esittely/organisaatio.html>

²⁶ <http://www.ficora.fi/index/viestintavirasto/esittely/kansainvalinenyhteisty.html>

2.2 MONITORING INTERNET CONTENT

The monitoring of harmful Internet content is undertaken by the different, mostly self-regulatory bodies: the Ethical Committee for Premium Rate Services²⁷, the Council for Mass Media in Finland²⁸, the Council on Ethics in Advertising²⁹, the Consumer Agency³⁰, and the Consumer Ombudsman³¹.

A central question about the regulation in the Internet has been about child welfare. A couple of years ago there was some unawareness of the roles of the Ministry of Transport and Communications and FICORA in this matter. The cases that attain most notice are often so serious that they employ the police rather than the communications regulatory entities. (Kosonen 2011.)

2.3 SHORT HISTORY OF FICORA

FICORA's predecessor, The Telecommunications Administration Centre (TAC)³², was established in 1988 to fill the need to separate business operations and administrative functions in the telecommunications sector. The TAC was formed of four different existing entities: the Radio Inspection Office in the Radio Division in the General Directorate of Posts and Telecommunications of Finland³³ and the TV License Centre³⁴, which had been a special unit in the Posts and Telecommunications³⁵, the Tele Inspection Division³⁶ in the Ministry of Transport and Communications, and the TV License Inspection Division³⁷ in the Finnish Broadcasting Company Yle. The authority's name was changed from Telecommunications Administration Centre to Finnish Communications Regulatory Authority in 2001 and as issues related to communications and information society grew more important and the old name no longer corresponded to the authority's duties and continuously expanding field of activity.³⁸

2.4 FUNCTIONAL DISTINCTIONS BETWEEN STATE, SELF AND CO-REGULATORY MECHANISMS

The functional distinction between FICORA and the self-regulatory mechanisms are clear for the most part. The main self-regulatory institutions are the Guidelines for

²⁷ The Ethical Committee for Premium Rate Services (Finnish: Maksullisten puhelinpalveluiden eettinen lautakunta) The Ethical Committee for Premium Rate Services

²⁸ The Council for Mass Media in Finland (Finnish: Julkisen sanan neuvosto) <http://www.jsn.fi/en/>

²⁹ The Council on Ethics in Advertising (Finnish: Mainonnan eettinen neuvosto) http://www.keskuskauppakamari.fi/site_eng/Services/Expert-Services/Statements-on-Ethical-Advertising

³⁰ The Consumer Agency (Finnish: Kuluttajavirasto) <http://www.kuluttajavirasto.fi/en-GB/>

³¹ The Consumer Ombudsman (Finnish: Kuluttaja-asiamies) <http://www.kuluttajavirasto.fi/en-GB/>

³² Finnish: Telehallintokeskus

³³ Finnish: Radio-osaston radiotarkastustoimisto

³⁴ Finnish: Televisiolupakeskus

³⁵ Finnish: Posti- ja telehallitus

³⁶ Finnish: Liikenneministeriön teletarkastustoimisto

³⁷ Finnish: Yleisradion televisiolupatarkastus

³⁸ Presentation of FICORA, history <http://www.ficora.fi/en/index/viestintavirasto/esittely/historia.html>

Journalists³⁹ and the Council for Mass Media⁴⁰. The aim of the Guidelines for Journalists is to support the responsible use of freedom of speech in mass communications. The guidelines are drafted for the purpose of self-regulation. The Council for Mass Media is a separate self-regulating committee that interprets good professional practice and handles complaints from members of the public on breaches of journalism ethics. The functions of FICORA and these self-regulatory institutions do not collide. By definition, FICORA does not have the mandate to participate in the journalistic press or broadcasting regulation.

There is some overlap in the activities of different authorities. For example, both FICORA and the Finnish Competition Authority (FCA)⁴¹ carry out tasks that aim at creating and maintaining efficient competition in the communications markets. The authorities have signed a cooperation agreement⁴² to improve their co-operation. Another example of overlapping functions concerns regulating advertising. In some cases, FICORA is pursuing the same goals as the National Supervisory Authority for Welfare and Health (Valvira)⁴³, as both monitor advertising in the media.

3. LEGITIMIZING / UNDERLYING VALUES

The basic values are stated in the Constitution of Finland⁴⁴, which builds the basis for all legislation. The basic rights and liberties stated in the Constitution include for example equality, right to life, personal liberty and integrity, right to privacy and freedom of expression.

Taking notice of the ethical values of media regulation in Finland falls more to the field of self-regulation than to FICORA's responsibilities. For example, the task of the Council for Mass Media is to cultivate responsible freedom in regard to the mass media as well as provide support for good journalistic practice.⁴⁵

The societal influence aims of the administrative branch of the Ministry of Transport and Communications are to offer versatile and reasonably priced services of high quality, to strengthen the citizens' freedom of speech and privacy protection, and maintain the diversity of communications.⁴⁶

FICORA states good service culture, expertise and development as their central values.⁴⁷ As for the Ministry of Transport and Communications, the main values are fairness, courage and cooperation.⁴⁸

³⁹ The Guidelines for Journalists http://www.jsn.fi/en/journalists_instructions/

⁴⁰ The Council for Mass Media <http://www.jsn.fi/en/>

⁴¹ Finnish: Kilpailuvirasto, www.kilpailuvirasto.fi

⁴² <http://www.ficora.fi/attachments/suomiry/1156442812964/yhteistyomuistio.pdf>

⁴³ Finnish: Sosiaali- ja terveystieteiden lupa- ja valvontavirasto, <http://www.valvira.fi/en/>

⁴⁴ Constitution <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>

⁴⁵ Council for Mass Media <http://www.jsn.fi/en/>

⁴⁶ The Financial agreement between the Ministry of Transport and Communication and FICORA for the year 2011 http://www.lvm.fi/c/document_library/get_file?folderId=1551286&name=DLFE-11854.pdf

⁴⁷ Values of FICORA <http://www.ficora.fi/en/index/viestintavirasto/esittely/missiovisiojaarvot.html>

⁴⁸ Values of the Ministry of Transport and Communication http://www.lvm.fi/web/en/mission_vision_and_values

4. PERFORMANCE

In general, FICORA is able to actually perform the duties decreed in the law. The official stand of the Ministry of Transport and Communications is that it does not give FICORA tasks if it does not give resources as well. In the ideal situation, FICORA only receives tasks that it is able to perform. However, in practice there have been some discrepancies in terms of television content monitoring. The Ministry has noticed that, in this case, some financial resources have been insufficient. (Ristola 2011.)

From the point of view of the Ministry, FICORA's daily operations according to the law are clear, but there are some areas where the authority wishes for more specific directions, such as some concrete questions related to locations of postal services. On the other hand, in the economic supervision of telecommunications and postal companies the authority needs no further directions. (Normo, 2011.)

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

From the Ministry's point of view, the division on responsibilities between the Ministry of Transport and Communications and FICORA is clear, at least in theory: the Ministry makes the enactments and handles general communications politics and FICORA oversees the realization of certain laws. Even though FICORA is accountable to the Ministry of Transport and Communication, the ministry has no right to interfere in decisions independently made by FICORA. (Kosonen 2011.) In Finland, only courts can overturn FICORA's decisions.

FICORA monitors media outlets' compliance with the terms and conditions of their broadcasting licenses and the regulations in the Act on Radio and Television Operations, but the final power to grant, amend or revoke a broadcasting license lies with the license authority, which in most cases in Finland is the Government (prepared by the Ministry of Transport and Communications).

FICORA's powers to sanction media outlets are defined in Chapter 6 of the Act on Television and Radio Operations. Similar supervision and sanctioning procedures regarding telecommunications operators are defined in Chapter 12 of the Communications Market Act. FICORA may impose sanctions for broadcasters that act in violation of the provisions of chapters 3 and 4 in the Act on Television and Radio Operations. These chapters include regulations on the proportion of European works and programs by independent producers, programs that may be detrimental to the development of children, use of exclusive rights, and certain restrictions on advertising and sponsoring. Sanctions include a reminder, a conditional fine, or if a broadcaster fails to rectify its actions in a set period, a penalty fine. In case of fines, the penalty is determined by the Market Court⁴⁹ on the proposal of FICORA⁵⁰. The Administrative Judicial Procedure Act⁵¹ applies to the handling and investigation of

⁴⁹ <http://www.oikeus.fi/markkinaoikeus/15578.htm>, see the Act on Certain Proceedings before the Market Court, <http://www.finlex.fi/en/laki/kaannokset/2001/en20011528.pdf>

⁵⁰ Section 36a, Act on Television and Radio Operations

⁵¹ <http://www.finlex.fi/fi/laki/kaannokset/1996/en19960586.pdf>

all sanctions. Disputes about individual decisions by FICORA have been considered in the administrative courts, but its sanctioning powers as such have not been challenged in any notable court cases.

As a supervisory authority of several media related regulations, including the Act on Television and Radio Operations, FICORA can issue a reminder to a broadcaster or other telecommunications operator and obligate it to correct its error or neglect. The decision may be enforced by a conditional fine as provided for in the Act on Conditional Fine. If the broadcaster fails to rectify its actions within a set period, it may be ordered to pay a penalty fine. The penalty is determined by the Market Court on the proposal of the supervisory authority. The primary enforcement mechanism is a reminder. Other sanctions have been rarely imposed.

One example of FICORA's sanctioning powers is the case of five radio stations breaking the Act on Television and Radio Operations. The radio stations had broken the law by transmitting almost identical programs even though the license terms require the transmissions to be independent programs. One of the radio stations in question had already received a reminder and a conditional fine earlier and as it had not corrected its error, the conditional fine became a penalty fine and a new higher conditional fine was imposed. The other stations were given reminders and they announced the authority to have commenced actions to rectify their actions.⁵²

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

FICORA is a governmental agency under the Ministry of Transport and Communications and it has circa 245 full-time employees⁵³. It is led by a Director-General and its organization is divided into seven profit areas and the additional units of International Affairs and Development that function directly under the Director-General. The areas are Communications Markets and Services, Networks and Security, Radio Frequencies and Television Fees, Development and Support, Information Technology, and Communications.⁵⁴ There are some advantages that can be connected to FICORA's solution to have a Director-General and no official collegial-body-structure: speedy and non-bureaucratic decisions, a high level of accountability for each regulatory decision, efficiency in terms of a low demand of resources and predictability in terms of decision-making consistency.⁵⁵

All open job positions at FICORA are published on FICORA's web page and the Heli recruitment page, which is a service for finding jobs at the state.⁵⁶ The post of the Director-General is terminable, a Director-General is appointed for a five years term.

⁵² www.ficora.fi/index/viestintavirasto/lehistotiedotteet/2011/P_24.html

⁵³ Annual report 2009, <http://www.ficora.fi/2009/economy-and-resources.html>

⁵⁴ See FICORA web site, <http://www.ficora.fi/en/index/viestintavirasto/esittely/organisaatio.html>

⁵⁵ Publications of the Ministry of Transport and Communications: http://www.lvm.fi/c/document_library/get_file?folderId=180955&name=DLFE-4906.pdf&title=02/2003

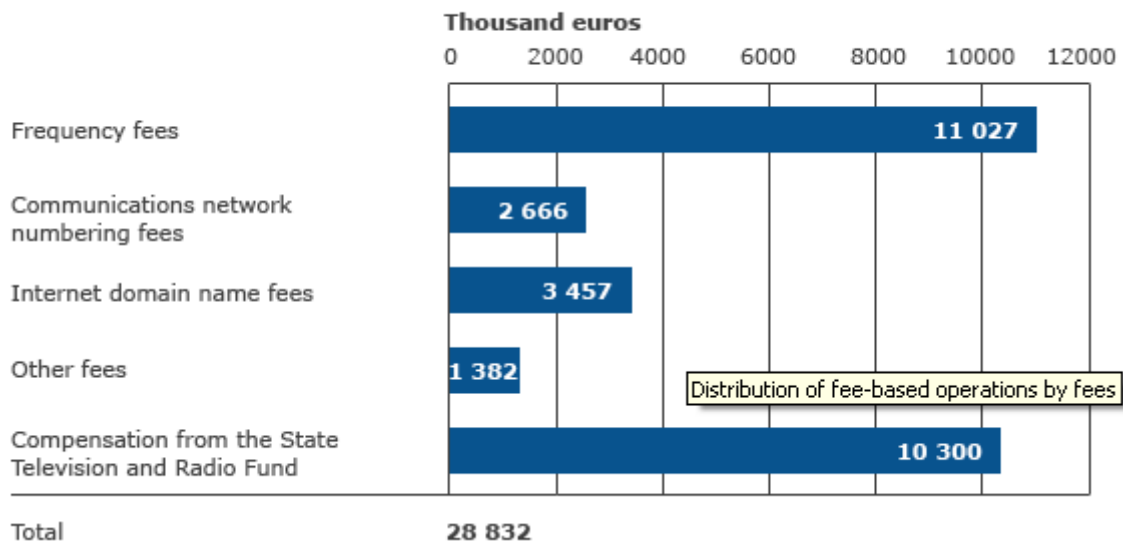
⁵⁶ About recruitment, see FICORA's web page <http://www.ficora.fi/index/viestintavirasto/avoimettyopaikat.html>

7. FUNDING

In the government budget, FICORA is an authority with a net budgeted income. In the 2010 budget, the forecast of income from operations subject to a fee was 29,1 million euros and the actual income was 28,9 million euros.⁵⁷

FICORA covers most of the costs of its operations with the fees it collects. A remarkable part of the revenue comes from radio transmitter license fees, telecommunications network numbering fees, postal operation supervision fees, internet domain name fees, and spectrum fees. The television fees and license fees for carrying on television operations are passed on to the State Television Radio Fund. The graph below demonstrates the distribution of fee-based operations by fees in 2010.⁵⁸

Distribution of fee-based operations by fees



According to the Ministry of Transport and Communications, the costs of FICORA's actions are about 35,4 million euros. The costs are mostly covered by fees collected from clients to the tune of 27,6 million euros. In the state budget for 2011, FICORA is to have 7,8 million euro as net allowance.⁵⁹

The financial resource basis of FICORA is relatively broad and diverse. This could grant FICORA a certain level of independence, especially from the government. In addition, if one source of revenue loses financing capacity, the loss can be compensated by raising revenue from other sources.⁶⁰

FICORA's annual reports are available in Finnish, English and Swedish at FICORA's

⁵⁷ FICORA's Annual Report 2010, <http://www.ficora.fi/2010/economy-and-resources.html>

⁵⁸ FICORA's Annual Report 2010, <http://www.ficora.fi/2010/economy-and-resources.html>

⁵⁹ Financial agreement between the Ministry of Transport and Communication and FICORA for the year 2011 http://www.lvm.fi/c/document_library/get_file?folderId=1551286&name=DLFE-11854.pdf

⁶⁰ Publications of the Ministry of Transport and Communications: http://www.lvm.fi/c/document_library/get_file?folderId=180955&name=DLFE-4906.pdf&title=02/2003

web page.⁶¹ Documents concerning planning and follow-up related to management by results and performance are available in Finnish. Yearly financial reports are public, as are the Ministry of Transport and Communication's comments about the financial and annual reports. FICORA also publishes the performance targets drawn up to FICORA by the Ministry of Transport and Communications.⁶²

8. REGULATION IN CONTEXT

The Finnish media system is a relatively concentrated one and the size of the media market is quite small. The main national news media have a high reach amongst Finnish citizens. The media system is characterized by a strong literary culture and the number of newspapers and readership figures are one of the highest in the world. Journalistic culture in Finland is characterized by a strong professional ethos and an established self-regulatory system. (Karppinen *et al.* 2011.)

Finland has a national public service broadcasting company, Yle.⁶³ It operates four national television channels and six radio channels. The company is 99,9% state-owned and its operations are mainly financed by a television fee.

All print media represent two thirds of the total media revenue in Finland, and the share of newspapers alone constitutes about one third (Finnish Mass Media, 2010). Internet penetration in Finland is relatively high; nearly 80 % of the population uses the internet regularly (Eurostat 2010).

The daily reach of different media in 2008

	All	Male	Female	10-24	25-44	45-59	60-
Newspapers	78 %	77 %	78 %	56 %	76 %	86 %	88 %
Television	90 %	91 %	90 %	87 %	88 %	93 %	93 %
Radio	74 %	75 %	72 %	65 %	75 %	78 %	75 %
Internet	60 %	63 %	57 %	76 %	79 %	61 %	25 %

Source: Finnish Mass Media 2010.

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⁶¹ FICORA's web page, annual reports <http://www.ficora.fi/en/index/viestintavirasto/suunnittelunjaseurannanasiakirjat.html>

⁶² All documents can be found at FICORA's web page <http://www.ficora.fi/index/viestintavirasto/suunnittelujaseuranta.html>

⁶³ National public service broadcasting company Yle www.yle.fi

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STAGE 1: AN ANALYSIS OF PRESENT-DAY STRUCTURES (2012)

The case of the French Conseil Supérieur de l'Audiovisuel (CSA)

Through regulation the state delegates part of its authority to an intermediary entity. Regulation of media is established between government and communicators to preserve or correct the market balance. Its role can vary from country to country, as it can either ensure that official texts are respected and applied, or encourage the adoption of standards for better practices. In France, the *Conseil Supérieur de l'Audiovisuel* (CSA) acts as a buffer-agency, with members from the state, from the profession and, to a much lesser extent, from civil society (the association in defence of families, UNAF, was part of the first CSA).

Historically, the *Haute Autorité de l'Audiovisuel* was the first entity to regulate media in France (1982-1986). It was replaced by the *Commission Nationale de la Communication et des Libertés* (1986 à 1989) created by the law of September 30th 1986. The CNCL privatized TF1 and attributed the 5th and 6th channels (*La Cinq* and *M6*). In 1989, after much controversy, the CSA was created. Its task has consisted in monitoring the broadcasting norms (for high fidelity) and in negotiating the commercial licensing of public airwaves, as often required by the private sector itself. With the rise of an organized consumer sector, and under the pressure of public opinion as well as political will, CSA has progressively been involved in the management of disputes concerning ethical standards and public service obligations of the networks. It has been required to be increasingly transparent as to its procedures. It cannot practice a priori censorship of programmes but can admonish and fine a posteriori.

NB: This report considers the activities of the CSA in the field of audiovisual media, with a focus on pluralism and protection of minors through the use of examples.

1. LEGAL FRAMEWORK

1.1 DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY

The media regulatory authority in France is the *Conseil Supérieur de l'Audiovisuel* (CSA, audiovisual superior Council) based in Paris. The CSA was established in 1989 by the law of 17th January 1989 that modified the law of 30th September 1986 relating to communication freedom. Its duties include the distribution of frequencies to operators, the organization of electoral campaigns (on radio and TV) and control of content (protection of minors, respect for pluralistic expression, fair treatment of news, respect for human dignity, protection of consumers as well as “the protection and illustration of the French language and culture”).

More recently new duties have been added: making TV programmes available to people hard of hearing or visually impaired, ensuring the representation of the diversity within French society, contributing to actions in favour of health education and protection, etc.

1.2 WHAT ARE THE LEGAL DOCUMENTS (LAWS, RULES, PROTOCOLS, OTHERS) FRAMING THE MEDIA REGULATORY ENTITY?

The CSA is an “independent administrative agency” of the government whose task it to ensure that the law on communication is applied. The 9 members are nominated for 6 years by presidential decree, but only three are designated by the President; three more are designated by the president of the National Assembly and the last three are nominated by the president of the Senate. They cannot be nominated for two mandates and their membership is renewed by a third every two years. They have to adhere to a code of ethics and they cannot have any other employment in the private or public sector. Their nomination is political and is not based on any precise criteria. This can be problematic for independence when all the members belong to the same political majority, in spite of the biennial rotation by a third.

1.3 RELATIONSHIP WITH SELF-REGULATORY AND CO-REGULATORY MEDIA STRUCTURES

Concerning other regulatory media structures, the CSA has formal and informal relationships with the *Autorité de Régulation des Communications Electroniques et des Postes* (ARCEP) that regulates telecommunications since 2005. Former members of the CSA have become members of ARCEP. With the *Autorité de la Concurrence*, the relationship is less close, as it deals with matters of economic transparency.

In terms of policy and reporting (indicators...), CSA is also in a relationship with *Centre National du Cinéma* (CNC) and *Institut National de l'Audiovisuel* (INA).

In matters of protection of minors, the CSA is closely associated with the *Safer Internet Programme* of the EU, as the CSA is a member of the steering committee. The CSA board member in charge of protection of minors is a member of the expert committee of Action Innocence, the French chapter of the Swiss NGO, which has no legal mandate, something which is rather problematic in terms of independence and representativity (http://www.actioninnocence.org/suisse/web/Comite_d'Experts_239_.html, last consulted 10/09/2012).

Concerning self-regulatory media structures, the CSA has formal relationships with the *Autorité de Régulation Professionnelle de la Publicité* (ARPP, ex BVP) whose mission is to oversee advertising from the perspective of professionals, in consultation with civil society and the CSA among others as of 2008.

There are no relationships with the *Conseil National du Numérique* (CNN), created in 2011.

At the European and international level the CSA is a member of the *European Platform of Regulatory Authorities* (EPRA)

2. FUNCTIONS

2.1 MAJOR FUNCTIONS OF THE CSA

According to the law, the CSA has the power to authorize broadcasting agreements and to establish services and obligations. It must negotiate the contracts with each operator, even in domains that pertain to the general interest, like the protection of minors. It aims at maintaining the principles of pluralism and cultural diversity as well as the balance between various opinions, existing rights and expectations of different sections of the public.

In its early days and even today, it incorporated a research department (that commissioned studies, including ones from independent researchers when need be). It produces a newsletter and an annual report. It has full regulatory powers, and it has a certain degree of freedom to apply sanctions (broadcasting corrections, fines, formal summons). It tends to exert soft pressure on the media industry in matters of creating labelling codes or classificatory systems.

Some of its main functions are to ensure the quality of public service and to establish public service obligations for private operators and to apply measures for the protection of minors. Public service obligations relate to commercial as well as public channels. They encapsulate the rights and duties of media in relation to their public. They are implemented in the case of news (through measures like the candidate access rule and the personal attack or political editorializing rule). In fiction, especially in advertising, in youth programming and in documentaries there are also rules, partly established by the law and developed in detail by the CSA. The CSA has very little to do though with local media (no particular attention is paid to priority topics to be dealt with for the community as decided by local authorities).

The measures for the protection of minors enforce existing children's rights. These are often incorporated in the public service obligations. It can lead to procedures like scrambling or protecting anonymity, as well as asking for official permission to broadcast news or fiction where children are featured. This set of measures is characterized by a juxtaposition of various rules, according to the period of emergence of the different media and the moment of negotiation of the TV license, and it tends to show a relatively global coherence (except for some minor points).

The CSA has been a pioneer in establishing parental warning systems ("la signalétique"). They aim at classifying programmes prior to broadcasting according to their content,

by signalling the presence or absence of violent or pornographic messages as well as other categories of material that might damage young people's sensibilities. They belong to a subset of the measures for the protection of minors and the public service obligations. Their nature and their structure have been agreed upon collectively by the channels, but then each of them elaborates its criteria and establishes its screening committees. They are associated with scheduling restrictions. They give a strong ethical signal, and though they were perceived at first as a form of censorship, they have progressively been accepted as a form of parental decision-making tool.

2.2 THE REGULATION IN DIFFERENT MEDIA SECTORS

The field of competences of the CSA has to do with audiovisual sector, radio and TV and media-on-demand. It has no authority in matters related to the Internet (that is for ARCEP). There is a clear separation between the CSA and ARCEP, except in the matter of online audiovisual services where the CSA is the regulator, especially in matters of the protection of minors (not within ARCEP's mandate). Currently there are several proposals concerning a merger between these two entities, especially as expressed by the new political power in 2012 and by M. Boyon, the current president of the CSA.

Media content regulation covers advertising but only subsequent to self-regulation by ARPP. The CSA does not interfere much with the content of advertising but more on issues of overtime, hidden publicity or promotion of tobacco or alcohol (over authorized time).

In the communication law (article 43-11), the mission of media education is part of the mandate of France Televisions, the public service grouping of channels. This is stated in very general terms: *"Elles concourent au développement et à la diffusion de la création intellectuelle et artistique et des connaissances civiques, économiques, sociales, scientifiques et techniques ainsi qu'à l'éducation à l'audiovisuel et aux médias."*

An examination of these missions and obligations reveals that they are kept to a minimum. France 5 is the only channel that provides some content of this type, with no programmes for young people below 18 years of age nonetheless. For instance, the 2010 reports signals two programmes on the topic (*Médias le magazine*, on Sunday on France 5, and *Votre télé et vous*, every month on France 3, with the news ombudsman of the channel). It also mentions three internet sites developed by the group: *Curiosphère.tv*, *Lesite.tv* and *Ciné-lycée*, each with different activities that could come under the category of media education.

The CSA is not expected to perform other duties according to other social actors, except in the case of protection of minors in the media where no other entity is present. The major mission of CSA remains the regulation of the audiovisual sphere. Internet is not really regulated, in spite of many policies such as HADOPI, CNIL, CNN, Ministère de l'Intérieur... A reform is currently being prepared.

There is a functional distinction between state, self and co-regulatory mechanisms but this seems to be due to the evolution and history of media in France. Cinema is the result of co-regulation integrated within the state system, with a commission of classification that is made up of professionals, representatives of association in defence of families

and ministries. Television and radio have a dual system, with public and private sectors, and co-regulation is thus externalized, especially via the CSA. Internet seems to be subject to a mix of state control, regulation and self-regulation, in fluctuating ways.

3. LEGITIMIZING / UNDERLYING VALUES

Pluralism, protection of minors, respect for the dignity of the person, respect for public order are among the principles and values that are used to legitimate state intervention in the media via the regulatory body. Apart from pluralism, these are not principles specific to the media sphere. There is no written normative doctrine (like the “fairness doctrine” in the USA) that organizes the regulatory part of the state in a coherent body of values and actions. The overall reference is the French Declaration of Human Rights of 1789 and the European “*Convention de sauvegarde des droits de l’homme et des libertés fondamentales*”, particularly the right to expression. The evolution of protocols and laws comes from European directives (TV Without Frontiers and then AVMS), from technological innovations (terrestrial digital TV, connected TV, SMAD), and the emergence of social issues that affect policy as a whole (minorities, discrimination, violence against women, for instance), with consequences on media.

As a result the law of September 30th 1986 is the basic reference for audiovisual regulation. It has been modified about 60 times, to accommodate the evolutions mentioned above. In matters of pluralism and anti-trust, the law of 1986 has been modified more than 40 times, particularly in order to include thresholds of ownership within media markets. Public service companies are excluded from the field of application of anti-concentration rules because the promotion of pluralism and diversity is already part of their missions. For private sector operators, measures to guarantee internal and external pluralism are included, notably in terms of limiting to 49% the amount of capital held by a single individual or legal entity. With the launch of Digital Terrestrial Television, the threshold applies to stations with more than 2,5 % average annual audience share. The example of article 15, concerning youth protection is also telling: it moved from 2 lines in 1986 to 15 lines today, taking into account the creation of “*signalétique*” in 1996, the transposition of TV Without Frontiers in 1997 and 2000 and a number of extensions (to mobile phones, in 2007, and to media on demand, in 2009, as a result of the new directive AVMS).

In fact, the creation of “*signalétique*” is a rare case of the CSA anticipating the law, after a series of multi-stakeholder consultations and a research report. In general, CSA presidents tend to underplay the role of their institution and avoid attracting attention to it. When they do, it is to justify actions of consultation or of coercion with the will to avoid controversy. For instance the sanctions against Skyrock, the youth radio (about anti-gay, sexist and obscene language) were not advertised widely though they implied heavy fines (50 000 and 200 000€).

Nonetheless, some ministers have taken the initiative of intervening in the field, with official reports being required on specific themes: Minister of Culture Jean-Jacques Aillagon (2002), Minister of Justice Dominique Perben (2002) Minister of Family Ségolène Royal (1996) and Nadine Morano (2009). Some members of Parliament have also called for specific reports (Yves Bur 2002, David Assouline 2009, Chantal Jouanno 2012).

* * *

Officially, principles of freedom of speech, pluralism, diversity, protection of fundamental rights are of such constitutional importance that they cannot simply be arranged in an identifiable hierarchy. But the architecture of legal texts shows a clear dominance of the principle of freedom of speech and communication. This is partly due to the weight of the European Convention on Human Rights and in particular article 10 on freedom of expression as the guiding principle for media regulation. The French tradition does nonetheless state that such freedom can be legitimately limited by law (article 11 of the French *Declaration of the Human Rights of Citizens*), as some other values and principles can be brought to bear (responsibility, pluralism...). In the communication law of 1986, freedom of expression is stated in article 1.

Several French legal tools and sites have the legitimacy to analyse and make decisions about such constitutional principles as freedom of expression, pluralism, protection of minors, independence of media, diversity, with a variety of appreciations. The Constitutional Council can do so before the proclamation of a law, if asked for by 60 senators or deputies and (since 2008) by individuals within the framework of a lawsuit requiring constitutional evaluation (“*question prioritaire de constitutionnalité*”). The State Council can be asked to appreciate the legitimacy of CSA decisions a posteriori. This allows for such principles as privacy, protection of intellectual property and right to the image of a person to run counter to freedom of expression. The Court of Cassation is called upon on issues related to the right of the press, privacy, right to the image of a person, libel, etc.

In general, the French judges of these different Councils and Courts do not directly use the European Convention but they tend to take into account European jurisprudence in the matters at hand. The legality of infringements on freedom of expression depends on their nature that has to be neither general nor absolute, on the constitutionality of the principles which are set against them. The judge appreciates the compatibility (“conciliation”) of the various principles, and the “balance” between these principles as proposed by legislative measures.

It is to be noted that one of the principles that could complement the right to freedom of expression is the right of the public to access information. But such a right is not clearly formulated or recognized in French law.

* * *

The values defended by the CSA in terms of regulation are not the same as those safeguarded by self-regulation and co-regulation, but some self-regulatory mechanisms tend to align themselves onto the values and processes of the state regulator.

The regulation by the independent authority is done in rather narrow and technical sectors. This is supported by the French Constitutional Council where the judges also ensure that domains entrusted to the administrative regulation are not too wide. It ensures that the law remains the primary reference, and is a warrant of civil liberties because of the

public debates that take place, in particular in Parliament. For instance, on July 27th 2000, the judge annulled a disposition that would have made public the hearings held by the CSA for the nomination of the presidents of France Télévisions and other public companies (*Radio France, audiovisuel extérieur de la France*), putting transparency after the freedom of speech necessary during such hearings and the risks of damaging privacy.

As for self-regulation or co-regulation, they are not as such registered in the national legal apparatus and the word appears nowhere in French legislation. Self-regulation was created by the private sector in order to avoid a finer regulation but it is not generally framed or supervised by the law. Self-regulation in advertising tends to integrate the values of regulation as exemplified by some recommendations published on the site of ARPP.org concerning the image of the human person, eating habits, race, ethnicity, religion, childhood, safety). Its objective is to strengthen the legitimacy of this professional sector and to elaborate a preliminary control that the professionals who have agreed to it can use as guarantee, in principle, that they don't run the risk of contravening the law and the regulation.

Co-regulation does not exist legally but some forms of multi-partite decision-making could be considered as such. The classification of programmes ("*signalétique*") is a form of co-regulation between the CSA and the channels. The CNC that classifies movies also works by consultation with a panel of professionals and experts. The "*Forum des droits de l'internet*" used to have such a role for Internet (but has been replaced by a self-regulatory business alliance, CNN). At the European level, the classification of video games by PEGI is recognized in France. So, there are many variations and levels of co-regulation, some more multi-stakeholder than others, some more integrative of expert opinion than others, etc.

4. PERFORMANCE

It is difficult to appreciate the whole performance of the regulatory authority, as the CSA presents the dual characteristic of having very clear mandates on the one hand (especially in the matter of license allocation, reporting and sanctioning if need be), and on the other hand, of enjoying enlarged competences that are subject to its own discretion.

The CSA is relatively well-endowed in terms of administrative services and qualified staff (308 persons in 2011), which enables it to meet its obligations and fulfil its missions. It publishes an annual report (in July) about them, as part of its duties. It is very useful for researchers and experts because it gives reliable and reusable information. This report is complemented by the stock-taking assessments of the various channels that are published in Autumn and give public access to the activities of the operators.

The law not only creates legal duties for the CSA, it also grants it some competences, which are possible fields of action, subject to its own appreciation. Besides reporting (on matters of content), the CSA has few legal obligations. The content examined the most relates to the issue of pluralism, about which the CSA has an obligation to publish every month its data on political speech in the news (especially important in times of elections). For the other types of content, this obligation is an annual one. Most of the activities of control of content are based on a discretionary decision taken by the CSA on its own initiative. This is

the case when there has been an infringement to the principles that are under its protection as defined in articles 1, 3, 13, 15 in particular: child protection, dignity of the person, incitement to violence or hatred for reasons of race, gender, religion or ethnicity, fairness in the news and pluralism. It also evaluates if the infringement is grave enough to entail a penalty or a formal demand (any penalty that must be preceded by a formal demand).

Not all its areas of competence can give rise to decisions susceptible to a penalty. Such issues as quality of programmes, social cohesion or the representation of diversity are domains in which the legislator has authorized the CSA to act but without determining any threshold. As a result, the CSA has sometimes anticipated the law as in the case of diversity, when it produced a report on the representation of visible minorities on French screens, in 2000, before the law was modified to that effect in 2006, within the legal framework of equality of opportunity. Once the report is published, the CSA often proceeds by requesting the operators to make commitments that they measure more than they evaluate in their implementation stage. No situation has appeared yet where the CSA might have had to enforce a penalty for commitments that were not kept.

The margin that separates the spheres of action required by the law in favour of a societal objective and the spheres of action to ensure their enforcement by media operators can be narrow. When the CSA does not wish to act in the name of respect for human dignity for instance, it intervenes in the name of child protection (and requests measures of classification) or in the name of programme quality (with even more flexible requests, as exemplified in the recent report on reality programming, in September 2011).

Several areas of action are currently of interest to the CSA, especially ones related to sustainable development, media education and obesity-related health issues. But the efficiency of the agency in actually having an impact and transformative change is low, as the publication of results is rarely followed by recommendations or policy-change. For example, the amount of scientific programmes that are supposed to sensitise the public to development (article 7 of *France Television* charter) is questionable and asymmetrical: most of them are broadcast on *France 5* (1060h out of a total of 1343h, or around 80%) and less than 10% are broadcast in prime time (94h out of a total of 1343h), according to the 2010 report (p. 77). The fact that the most watched channel of the group, *France2*, only broadcast 4h17 and *France 4*, the channel for young people, only broadcast 5h50 went by without comment. Besides, when the contents of these programmes are analyzed, it appears that very few of them are really educational, except maybe for the programme "*C'est pas sorcier*". Some of the Internet sites of the group, such as *lesite.tv* or *Curiosphère* are used, arguably, to compensate for the omissions of the channels, but they are not evaluated either. No recommendations for correcting the balance are being made.

The same situation applies in the case of media education (article 15 of *France Television* specifications). The article even mentions the need of programmes to target very young children. But none of the programmes listed in the report fall under the category of youth programming. The only actions related to this obligation are relegated to the Internet where, in some cases they are not targeting the general public of parents and children but rather specific publics, in high school, as on the site *Ciné-Lycée*.

The complexity of the societal issues and the number of actors implicated can also account for some discrepancies between legal competences and actual performance of the CSA. It can be characterized by a regulatory style that favours sensitization of actors over constraints and sanctions or even prohibitions.

The case of health is revealing in this matter, as the CSA acknowledged after due pressure from civil society organisations, particularly consumer groups and *UFC Que Choisir*) the obesity epidemic and considered it as being related to advertising for over-sweetened foods and drinks that encouraged nibbling and snacking while maintaining children passively in front of their screens. The CSA intervened in 2009 by drafting a charter that it brought to the TV channels, the advertisers and a number of operators (*France Télévisions, Lagardère Active, TFI, M6, NRJ12, NT1, TMC, Direct 8, Arte France, Disney France*) to sign, as well as the various ministries implicated (health and agriculture). Among the other signatories were the *Syndicat National de la Publicité Télévisée (SNPTV)*, the *Association des Agences Conseil en Communication (AACC)*, the *Union des Annonceurs (UDA)*, the *Association Nationale des Industries Alimentaires (ANIA)*, the *Autorité de Régulation Professionnelle de la Publicité (ARPP)*, the *Société des Auteurs et Compositeurs Dramatiques (SACD)*, the *Syndicat des Producteurs de Films d'Animation (SPFA)*, the *Syndicat des Producteurs Indépendants (SPI)*, the *Union Syndicale de la Production Audiovisuelle (USPA)*. They all agreed to engage in a process of support of public policy on health, especially the *Programme National Nutrition Santé (PNNS)*, coordinated by the Ministry of Health (CSA report 2011). The CSA grounded the legitimacy of its intervention on the absence of any legal measure in the matter, and connected it to the protection of minors in the media, that falls under its mandate and discretionary competences. It put forward Articles 3-1 (on health) and 439 on its capacity to suspend a programme coming from another member state of the EU.

As a result of this multi-stakeholder agreement, the increase in the number of programmes related to this issue was impressive (78%) though in fact it doesn't represent that many programming hours (159h for *France Télévisions*, across its five channels, though the original agreement mentioned 60h to 75h). The closer analysis of the contents of these programmes shows mitigated results: they do carry the obligatory mention of the site of the Ministry of Health but they do not seem to insist on health as much as aesthetics and economics. In the years to come, they'll be observed by 3 experts on children's health.

The CSA presents this process and its success as rather unique, when it communicates about it (see communiqué of May 11th, 2011 after the signature by the Ministry of Agriculture). But it glosses over the fact that other countries have taken different positions and strategies, more stringent, such as the prohibition of such advertising during certain hours of the day when children watch television in Great-Britain. The lack of evaluation and follow-up is also characteristic of the CSA policy of sensitizing but not sanctioning.

In its daily activity, the CSA tends to complement the activities of self-regulation and co-regulation entities, often acting after the public and private operators have done so. In matters of advertising, CSA and ARPP are complementary: the ARPP makes its decision and gives advice before broadcasting, whereas the CSA can only intervene after the fact. The CSA can contradict a decision by ARP on some matters (protection of minors, health...).

Co-regulation in France, in this domain, is fully integrated into the workings of regulation and thus tends to avoid situations of conflict. It is considered to be a part of regulation, with the participation of representatives of the media sector and other regulatory entities.

The potential for conflict can exist between different regulatory authorities, whose mandates can overlap. The *Autorité de la Concurrence* and the CSA have been in conflict over the sale and acquisition of media. For instance, the *Autorité* annulled the acquisition of *TPS* and *CanalSatellite* by Vivendi Universal and Canal Plus in 2011, and has authorized it since but with drastic injunctions, to avoid a quasi monopoly situation. In the area of protection of minors, the CSA is the only regulatory body and as result no conflict with other (self) regulatory bodies arises.

When citizens, media companies or other actors disagree with the CSA, there are a few appeal mechanisms, all outside the CSA that does not have a complaints bureau (contrary to other authorities elsewhere). To overturn a particular decision taken by the CSA, the operators can appeal to the *Conseil d'Etat* directly and they regularly do so. The case is different for citizens, as there is no formal right to appeal or complain. The only exception is if the citizen has a right to act ("*droit à agir*"), i.e. he is directly and personally implicated by the CSA decision.

The law (article 42) however recognizes the right for family associations (historically they were the first to hold this privilege and for a long time) and also associations in the defence of women and viewers as well as trade unions of the media sector to ask the CSA for a formal notice procedure, against operators in particular. The wording of the article implies that should the CSA fail to do so, the plaintiffs could appeal to the court to override the CSA refusal of the procedure, but this procedure has not yet been tested.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

The legal mechanisms to ensure compliance with the CSA decisions are diverse in nature. The CSA has the power to decide to apply a formal notice procedure, which is published in the *Gazette (Journal Officiel)*, against which the operators can appeal to the administrative judge. The CSA decisions to apply a penalty are checked by the judge, especially when the penalties result in pecuniary fines that pertain to the domain of the tax authorities. By law, the CSA has the means to intervene if its decisions are not followed.

But in the actual facts, some of these decisions are not effectively followed such as the decision to stop one day of broadcasting that was not respected by radio stations for young people, in the 1990s. They were bracing themselves against the CSA's authority and the CSA could legally start new procedures and strengthen the penalties, but it is not always in its political interest to do so. The government was supporting youth radios and therefore it could lose some of its credibility. Since the 2000s, these scenarios have not appeared any more, partly because the CSA has kept well away from current events and societal clashes.

The CSA tends to avoid strictly binding guidelines. It very rarely applies penalties on media content, and it is reluctant to start formal notice procedures. It can formulate

“recommendations” or produce deliberations that clarify its expectations for the respect of certain principles. The recommendations are explanations that clarify the principles of the law and can give rise to a penalty. But most of the time, the CSA tends to stop just before the stage of the penalty, and sends mails to the channels called “warnings”.

Examples taken from the annual report for 2011 show this soft hand strategy. Formal notice procedures were taken against the 3 channels that provide continuous information for infringement on pluralism (around the controversy due to the first ever socialist primary). In advertising, *BFM* was notified for going over the time limit for advertising and *C+* for promoting tobacco. Only 4 formal demands dealt with ethics or child protection: *TF1* was notified for inaccuracy and for humiliation (in the reality programming broadcast *Qui veut épouser mon fils?*) that contravened article 10 of the agreement with *TF1*; *Paris Première* was notified for infringement of child protection (broadcasting of material not suitable for minors without the age logo 16). But no penalty was applied in this domain (the penalties relative to the contents in 2011 concern NRJ’s breach of quota laws and advertising infringements by *BFM* and *France TV*). In matters of child protection, the CSA pronounced only 3 formal demands concerning inappropriate classifications, while it sent 33 “simple” mails to various channels. The CSA itself brings attention to the fact in its report (p. 11), noting that the only penalties taken against reality programming have to do with product placement.

This soft hand strategy per se is not in itself questionable or open to criticism, as it is important that the operators understand the requests which are made of them, and their interpretation by the CSA. But the end result seems to be that the indulgence of the CSA, as made visible by the small number of formal notice procedures, may not be conducive to modifications in the behaviour of the broadcasters (as verified in the case of reality programming).

In the domains that do not fall under legal obligations, the penalties by definition cannot be used. The impact of the CSA is then entirely connected to the publication of information, reports, barometers (diversity), even the signature of charters and agreements (food health) that give rise to reports themselves.

The CSA itself is accountable to the government. It gives its annual report to the President of the Republic, to the government and to the presidents of both assemblies. It also has to provide a number of reports to Parliament, as for example on the advertising for on-line gambling. The CSA also chooses to create committees and to publish its own reports as exemplified by its commission on the evolution of programming, and by its report on reality programming Television.

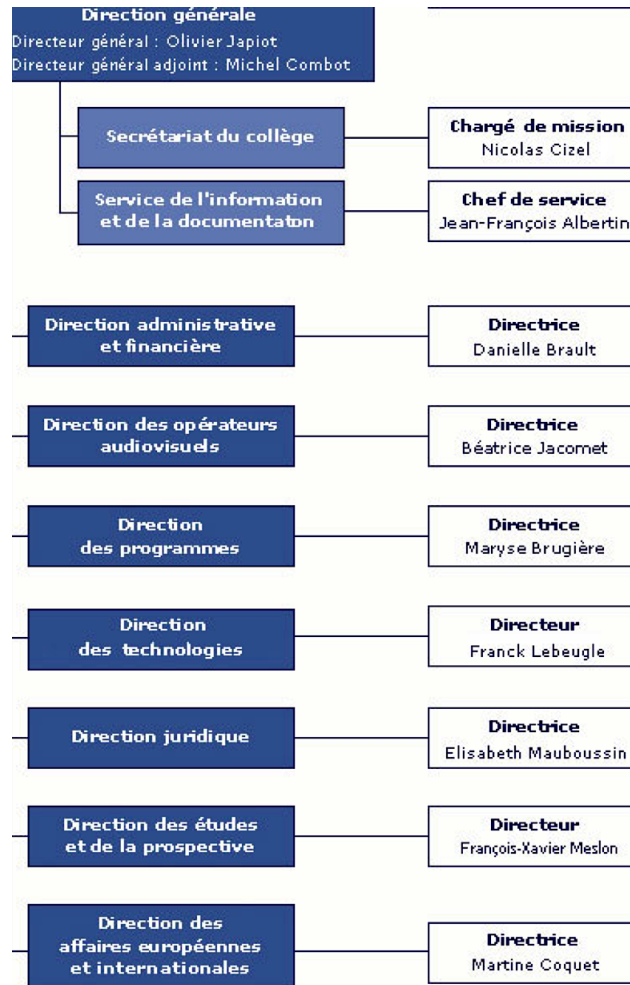
It tries to take part in international comparisons (in particular on the quality of the programs). But it is subjected to no control, except that of the *Cour des Comptes* (that checks the validity of its budget and expenses). The relations with Parliament are kept to a minimum, because in fact they tend to vary according to the missions that the Parliament gives itself. The CSA does communicate to Parliament any information that this one might require.

The CSA board members are subject to incompatibilities to safeguard their independence, as specified by article 5 of the law. Their functions are incompatible with any elective

mandate, any public employment and any other professional activity. Subject to statutory provisions N 57-298 of March 11th, 1957, on literary and artistic property, the members of the board cannot, directly or indirectly, exercise official functions, charge fees, except for services provided before taking office, nor hold interests or shares in any media or advertising company. However, if such is the case, the member of the board is given a three month deadline to comply with the law.

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

Board	Staff	Media sector	Civil Society
9 board members known as "conseillers" gathered in a "College". They each take on some of the missions demanded by law to the CSA, such as child protection (such as implementation of "signalétique" or observatory of diversity). Their decision requires a majority of the votes.	308 members of the staff in 2011. Organised in 7 "directions" services, with specific missions, related to the missions of the CSA board (see list below)	Not directly, though many "conseillers" come from that sector. Media are consulted in "public consultations" or during "concertations" such as the recent one that gathered the operators of social media in France. They are supposed to give their position on the matter at hand.	Civil society is not represented but can be consulted on specific domains and be part of commissions that examine a future decision. It can be present in advisory councils. The major representatives are CIEME and UNAF for children's issues. They give their advice and offer their perspective on the matter, often in contradiction to the operators.
The board members are renewed every 2 years by a third. Their mandate of 6 years is not renewable.	Most of the activities are stable. Some surveys are outsourced	No mandate	No mandate
They are appointed by decree by the president, but 3 only are designated by him; 3 others by head of Parliament, 3 by head of Senate,	According to university diploma and "direction" need	By operators themselves, according to competences	By civil society itself, according to competences and time availability



Source: <http://www.csa.fr/Le-CSA/Presentation-du-Conseil/Les-services/Organigramme>

7. FUNDING

In 2006 senator Patrice Gélard wrote a report on the problems related to independent administrative authorities such as the CSA. It shows that its budget amounted to 34 millions € in 2006 (38M € in 2011), one of the biggest budgets for such entities, surpassed by far nonetheless by the one authority in control of financial markets (63M €). But this report raises the question of the link between independence and financial autonomy, as well as the question of the gap between the stagnation of the means in staff and in financing, while the scope of channels to be controlled and its attendant activities have strongly increased. The number of channels was multiplied by 6 between 1991 and 2004, without counting digital terrestrial TV. The budget of the CSA already stood at 31.7M in 1994, and the staff of 278 (vs. 308 today). The budget of the CSA however was increased in 2010 (passing from 34M to 39M), before dropping again (38M €).

The accounts (expenses and revenues) of the CSA are subject to the control *a posteriori* of the *Cour des Comptes* and of the joint committee of finance of Senate and Parliament.

In France licenses are free and the penalties are not added to the budget of the authority that pronounces them, but go to the financing of the audiovisual sector.

The annual report of the CSA gives some global elements about its financing and the evolution of its human resources.

8. REGULATION IN CONTEXT

The number of TV channels and radio stations is very large in France and covers the local as well as national mediascape. The television offer features the *France Televisions* group, with 7 national public channels (*France 2, 3, 4, 5* and *Ô+*, *Arte* and *LCP*) and a flurry of private operators, such as *TF1, M6, BFMTV, Direct Star, Direct 8, Gulli, iTele, NRJTV, NT1, TMC, W9*, available for free over the air. The national channels by subscription are *Canal+, Eurosport, LCI, Paris Première, Planète, TF6*. There are also 50 local and regional channels such as *Alsace20, direct Azur* or *Tele Bocal*. Thematic channels are also numerous, on cable, satellite or via the Internet (ADSL).

The radio offer features a great number of public stations of Radio France (France Inter, France Musique, France Culture, le Mouv', France Bleu, FIP). Other public radios are Radio France Internationale (RFI) and Radio France Outremer (RFO). The private stations are organized in networks among which the main ones are RTL Group (owned by Bertelsmann), Lagardère Active (Europe 1 and Europe 2), NRJ Group (Chérie, Nostalgie), NextRadioTV (RMC, BFM), Sud Radio Groupe, Groupe Orbus (Skyrock) and Espace group, a gathering of independent stations that share advertising strategies. A whole flurry of regional and local radios is also part of the landscape, characterized by linguistic specificities, around Alsatian, Breton and Basque languages for instance.

Delivery systems and Internet penetration are high though France tends to lag behind most developed countries in Europe. The pay-TV market is expanding, with four-play offers (television+ landline phone + mobile phone + broadband internet). Mergers such as *CanalSatellite* and *TPS Platforms*, and services like *Orange* and *FreeTV* that offer ADSL TV, high-speed telephone and Internet services, are upcoming. Between 1999 and 2009, the penetration rate of Internet has been multiplied by 10, from 7% to 60%, from 3 million persons connected to 29 million, according to the *Observatoire des usages d'internet (Médiamétrie, May 2009)*. The penetration of mobile telephones is expected to reach 40% by 2014 (up from 12% in 2009). One of the major obstacles to penetration is the slow level of computer sales and the changes due to broadband infrastructure.

* * *

The French national media sector presents some general features similar to other European countries and characteristics of its own. Among the features shared with Europe, the public-sector presence is strong and varied (*France Televisions* has numerous channels, including overseas). It benefits from strong state support in terms of subsidies, aids and taxes granted to all media; besides receiving "redevance", it is also allowed to capture revenues from advertising, even if the reform of 2009 suppressed advertising after 8 pm so as to preserve the revenues of the commercial channels and to increase the distinction between public and private sectors. The other common feature with Europe is the oligopolistic nature

of the media markets and the increasing trend towards concentration (see Lancelot report). *TF1*, the leading private operator (owned by construction magnate, Bouygues) enjoyed until recently around 30% of the audience share and more than 50% of advertising revenue. *M6*, the more recent private operator (controlled by the German group RTL/Bertelsmann) enjoyed about 13 % of the audience share and 22% of advertising revenue. More recently, in 2012, the audience share of *TF1* has dropped to 22% while *M6* remained relatively stable but, all in all, altogether these two operators take the lion's share of advertising.

Among the peculiarities of the French media sector, fragmentation is one. France does not have a large multimedia group comparable to Germany (Bertelsmann) or Spain (PRISA). Vivendi's expansion from 1999 to 2001 could have created one, but the difficulties experienced in the United States prevented this evolution. Paradoxically then, the group with significant presence in the 3 markets of radio, television and the press is the German group RTL (Bertelsmann).

Another specific point about the French media system, that makes it akin to the United States, is the presence of large industrial groups that are not related to the media sector: Bouygues Telecom (*TF1*, *TPS*, 8 thematic channels) is a section of a huge construction corporation; Vivendi (*Canal+* group and its thematic affiliates) is ex- Lyonnaise des Eaux, specialised in urban services and utilities; the Lagardère Group (34% of *CanalSatellite*, *Europe FM1* and *Europe FM2* radio network, thematic stations...) is also involved in car manufacturing and has a stake in European aeronautics (with a participation in EADS).

The consequences of this situation are various: fragmentation prevents the French media from competing at the international level with bigger conglomerates such as GE, Disney, CBS, Viacom, News Corp, Bertelsmann, Sony. Besides the weight of industrial groups out of the media sector represents a conflict of interest (especially in the matter of news fairness and pluralism). Finally, these groups are closely related to the state, as visible in their regular success in winning tenders for public services and facilities. They are also closely related to the CSA, where they participate in committees and commissions, with a strong lobbying capacity that can also explain the soft hand strategy adopted by the regulatory entity.

To counterbalance the weight of such corporations, the CSA tries to favour audio-visual diversity through two types of regulations: a system of external pluralism to prevent an individual or legal entity from simultaneously controlling several media markets and systems; multimedia anti-concentration rules. Following the law, CSA has made it illegal to own more than one national TV service but exceptions are being made for Digital Terrestrial Television, where the same entity can own up to seven authorisations at national level. The digital turn is putting a lot of pressure on the CSA to slowly abandon its classic media rules but its relevance remains significant and the current reform of the CSA and its rapprochement with ARCEP may lead to increased attention being paid to the transfer of the values of pluralism and anti-concentration on the digital sphere, though there is no guarantee of such process as yet.

9. IGNORED DIMENSIONS

- The choice of board members is a key issue for the performance of the CSA. Some personality may block a process or stall decision-making. Though the staff is selected on its competences, it is not the case necessarily with the “conseillers”, who are not necessarily chosen for their competence or their engagement in the media sector, especially in matters of contents. The profile of the board members tends to show a bias in favour of journalists or TV anchors as well as high-ranking officials, that may be efficient in maintaining good relations with operators but does not make up for the lack of legal-minded specialists or representatives of civil society.
- CSA does not communicate constructively about its decisions or initiatives on content, as if it did not want to draw attention to this enlarged competence. When it does communicate, as in the case of “*signalétique*”, in spite of well-made awareness-raising campaigns, it is without much conviction, as if not to hurt the operators, to the detriment of the civil society sector that upheld the measure. So there is a need to consider the weak articulation between CSA and the grassroots associations that are concerned with matters of diversity, human rights, protection of minors...
- CSA does not have a clear policy as to the role of the audience. There is no complaints bureau, which makes it difficult to pay attention to the expectations of the public. The complaints that are received are carefully analyzed and it may lead to decision-making but, once more, there is no official recognition of their role and very little public communication and awareness about the issues at hand. The absence of such a bureau means that criticism emanating from the audience is not likely to reach the programme managers and the news editors. The presence of an ombudsman in the public service channel is not advertised much either. Such an absence creates problems in relation to the right to correct information, to the respect of a person’s public image, to the possibility of asking for reply. There is no monitoring of the rights to reply in case of personal attack or political editorializing.
- The lack of integration of the convergence of content on different technological platforms is also problematic, as content regulated over the air may slip unnoticed on the digital networks, a point particularly problematic for the protection of young people. The digital turn presents the risk that the actual levels of regulation will slacken rather than be maintained, on the argument that there is no scarcity and that the multiplicity of media outlets per se serves pluralism and other human rights values.
- The narrow economic focus of the research department within the CSA is also detrimental to content evaluation, on societal issues such as harmful content or TV for babies, for instance. Every time the CSA wants to involve itself in an issue, it tends to outsource the research that leads to specific reports, mostly to survey institutes (and not to independent, public university researchers as in the case of the Catalan CAC). This procedure is not always transparent and may lead to bias in research, not to mention the extra cost of outsourcing.

- The participation of civil society in the consultations by the CSA requires some vigilance. This is particularly the case in situations when independent associations are solicited to take shared responsibility with the industry on issues over which final control is left to the free play of competition. In the case of “*signalétique*”, the classification of programmes, done by the broadcasters, exemplifies this dilemma. Participation in the administration councils of public or private media is another example, as civil society can retain a measure of control on the global editorial line but not manage the daily decisions of broadcasters.
- The evolution of civil society organization is under-estimated by the CSA though they have become a real force in France. The *Collectif Interassociatif Enfance et Médias* (CIEM, renamed CIEME in 2010) has been active in trying to create an active critical awareness of the general public on issues like the rights of minors and other rights related to communication and information. It aims at establishing principles, recommendations and standards of practice and to disseminate them. It encourages cooperation agreements among the different actors implicated in the media process. It has lobbied the CSA in order to be consulted on major issues that apply to basic principles of the protection of minors (having to do with advertising, violence, *Baby TV*...). It is involved in advisory councils for programmes as the CSA officially appoints council members who come from the world of education and of paediatrics. The case of *Baby TV* is quite telling: civil society, in this case represented by CIEM and paediatricians, was successful in getting the attention of the Ministry of Health and the prohibition by the CSA of channels for children under three located in France. Despite this success, and for political reasons, the government of Nicolas Sarkozy did not see it fit to provide civil society lay associations with the means to become a full actor in co-regulation, on a par with the other sectors (State and Media sector). This can have an impact on the co-regulatory evolution of the CSA in the future.

Germany

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0. INTRODUCTORY REMARKS

A comparative view of media structures requires the development of models which allow for a description of the variety of phenomena in a similar manner, in order to draw comparisons and conclusions on the base of equivalents. This approach has to be to a certain extent oblivious towards the specifics of given mediascapes. The general structure proposed in the model applied here for a cross-country comparative analysis of media regulatory bodies starts from the assumption that there is a single or central body with a regulatory task. This is not the case in Germany as the German Federal Republic, as a federalist state, has for several reasons a large number of regulatory bodies. The first reason is federalism in itself in that every one of the federal states (*Länder*) has – as far as broadcasting is concerned – its own regulatory body, with the exception, of a number of *Länder* which share one body. The second reason is that commercial and public broadcasting, the so called dual system of broadcasting, are supervised by different bodies. And the third reason is the fact that different topics of regulation are dealt with in different bodies. This is why the general structure of the project is not fully applicable to Germany. Instead examples will show how the dimensions in question are translated into practice in Germany. Before going into details, we will give you an overview of the variety of regulatory bodies in Germany.

1. OVERVIEW

The federalist principle applies to the public broadcasting sector as well as to the commercial broadcasting sector. Within public broadcasting, the supervisory bodies are the broadcasting councils which are adjoined to the various broadcasting corporations of the *Länder*. The public service broadcasting corporations broadcast television and radio programs as well as a supply of online services. There are nine broadcasting corporations either serving one Land (*Bayerischer Rundfunk, Hessischer Rundfunk, Westdeutscher Rundfunk, Radio Bremen,*

Saarländischer Rundfunk), or two (*Radio Berlin Brandenburg, Südwestrundfunk*) or even three (*Mitteldeutscher Rundfunk*) or four *Länder* (*Norddeutscher Rundfunk*). Together they make up the ARD – *Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands* and produce the first television programme „*Das Erste*“. Other public service channels include *Deutsche Welle*, the international channel, *Deutschlandradio*, a national radio channel, and *ARTE*, the French-German cultural channel. The latter three corporations have separate and individual broadcasting councils.

Generally, German media regulatory bodies are made up according to a common principle: Representatives of the so called “socially relevant groups” – delegates of political parties, trade unions and employers’ organizations, churches, and many different organizations of the civil society – are nominated for the broadcasting council and have the responsibility of controlling the performance of the broadcasting corporations according to the underlying laws and norms and they elect the CEO of the corporation. A second supervisory body is the administrative council, which is responsible for controlling the budget and the human resources management.

For the supervision of the commercial broadcasters, another set of bodies has been established: the state media authorities (*Landesmedienanstalten*), which are authorities under public law organized on the *Länder* level (see 6.). Here, the dominant model is that one regulatory body has scope of competencies for one *Land*. Only Berlin and Brandenburg, and Hamburg and Schleswig-Holstein share one *Landesmedienanstalt*.

Apart from these bodies, the broadcasting councils for public service broadcasting and the state media authorities, there are plenty of other institutions, some of them part of the state media authorities (see 6.), which are responsible for the regulation of special fields. These are named here with their German names including their abbreviation, the English translations and their responsibilities:¹

Abbr.	German	English	Responsibility
KEF	Kommission zur Ermittlung des Finanzbedarfs der Rundfunkanstalten	Commission for the investigation of the financial needs of PSB	To evaluate the budget of the public service broadcasters and decide on the determination of the broadcasting fee
KEK	Kommission zur Ermittlung der Konzentration im Medienbereich	Commission for the investigation of media concentration	To ensure plurality in the commercial broadcasting sector by deciding on admission or negation of licensing of nationwide broadcasting
ZAK	Kommission für Zulassung und Aufsicht	Commission for licensing and supervision	Licensing and supervision of commercial broadcasting according to the provisions of the broadcasting law
KJM	Kommission für Jugendmedien-schutz ¹	Commission for protection of youth in media	To ensure the coordination of the responsibilities of protections of youth in the media on the federal level, concerning commercial broadcasting
FSF	Freiwillige Selbstkontrolle Fernsehen	Voluntary Selfcontrol TV	An association founded by the commercial broadcasters to organize a pre-control for youth protection, esp. with respect to representation of violence and sexual behavior
BNetzA	Bundesnetzagentur	Federal network agency	Federal regulation of the technical infrastructure for telecommunication (and other services)

¹ There are many more self-regulatory bodies for different sectors of the media

Because of this complexity of regulatory bodies, we will concentrate in the following on the regulation only of public and commercial broadcasting and leave out those regulatory fields, which fall into the competency of another body. Further we will concentrate on one national (*ZDF*) and one regional (*WDR*) broadcaster for public service broadcasting, and on one supervisory body for the commercial broadcasting in one country state (*LfM* in North Rhine-Westphalia) and another supervisory body for commercial broadcasting in two country states (*MAHSH* for Hamburg and Schleswig-Holstein).

2. LEGAL FRAMEWORK

Media regulation in Germany is following the general principle of federalism and is in the hand of the country states (*Länder*). This means that all nationwide media laws have to be settled by an agreement of the different *Länder*. This is especially true for the broadcasting laws, which are elaborated as the interstate treaties (*Rundfunkstaatsvertrag*²). These interstate treaties are adapted to new requirements (e.g. by EU regulations) and amended on a frequent base. At present the 15th amendment of the broadcastings interstate treaty (*Rundfunkänderungsstaatsvertrag*³) is in force.

The broadcasting law (*Rundfunkstaatsvertrag*) contains a section on the broadcasting council of the *ZDF*, whose composition and tasks are also defined within the *ZDF Staatsvertrag* and the by-laws of the *ZDF*. The regulations for the broadcasting council, the administrative council and the directors general of all regional broadcasters including *WDR* are laid down in the broadcasting law of the country state (*Landesrundfunkgesetz*⁴). These legal texts provide detailed stipulations for the composition of the broadcasting councils which shall guaranty their independence from state authorities. Accordingly, the stipulations for the *Länder* based supervisory bodies for commercial broadcasting (*Landesmedienanstalten*) are laid down in the broadcasting laws of the country state as well (*Landesrundfunkgesetze*⁵).

In addition there is a law for financing of public broadcasting (*Rundfunkgebührenstaatsvertrag*⁶), an interstate treaty for protection of youth in the media (*Jugendmedienschutzstaatsvertrag*⁷), a telecommunications law (*Telekommunikationsgesetz*⁸), and a law with regulations for the internet (*Telemediengesetz*⁹). The difference in the latter two lies within the distinction of pure individual communication (as e.g. telephone via internet) and the online services which lie in between of individual communication and broadcasting (in other words: individual and mass communication).

² http://www.rlp.de/no_cache/ministerpraesident/staatskanzlei/medien/?cid=104467&did=62428&sechash=e157e5ee

³ http://www.rlp.de/no_cache/ministerpraesident/staatskanzlei/medien/?cid=104467&did=62428&sechash=e157e5ee

⁴ <http://www.lfm-nrw.de/fileadmin/lfm-nrw/Medienrecht/lmg2009.pdf>

⁵ <http://www.die-medienanstalten.de/service/rechtsgrundlagen/landesmediengesetze.html>

⁶ <http://www.gez.de/e160/e161/e392/Staatsvertrag.pdf>

⁷ http://www.kjm-online.de/files/pdf1/_JMStV_Stand_13_RStV_mit_Titel_deutsch3.pdf

⁸ http://www.gesetze-im-internet.de/tkg_2004/BJNR119000004.html

⁹ <http://www.gesetze-im-internet.de/bundesrecht/tmg/gesamt.pdf>

3. LEGITIMIZING/UNDERLYING VALUES

The all overarching values concerning the communication freedoms are laid down in the constitution (*Grundgesetz*¹⁰). Its article 5 stipulates that freedom of opinion shall be given for anything spoken, written or represented in a picture. It includes freedom of information, freedom of broadcasting and film, although these freedoms are limited according to the general laws and the laws concerning protections of youth and protection of dignity.

The fundamental ratio of the German broadcasting system can be found in historical origins. After the disaster of Nazi-dictatorship with radio of a pure instrument of Nazi-ideology, the primordial intention of building up broadcasting in Germany was its independence from any vested interests, either from state authorities or economic actors. Independence of broadcasting in this sense is a core value of the German media system which had been underlined and interpreted in various fundamental decisions of the German supreme court – the constitutional court (*Bundesverfassungsgericht*). The constitutional court has since its first fundamental decision on the freedom of press¹¹ a decisive influence on media freedom in general and on broadcasting in special. In several decisions it shaped the German dual system of public service and commercial broadcasting, stating that commercial broadcasting must not exist without public service broadcasting and that public service broadcasting has a guaranty of existence and development. This means, that it is entitled to take part into new technological developments and that its funding should allow for a sound programming¹².

Broadcasting freedom is defined as a serving freedom, meaning that it should serve the democratic needs of society. This idea had been upheld as well within the transformation of the EU subsidy compromise and the EU broadcasting communication of 2009. In the according broadcasting law it is stated that new online services of the public service broadcasters should serve the cultural, social and democratic needs of society.

In order to serve these needs, plurality is both a core value and an aim of media regulation. The German constitution starts from the assumption that pluralism is vital for democracy and that therefore broadcasting has to ensure the plurality of opinions. Therefore, the structures of the media sector are widely orientated to the federal structure of the state and it lies within the duties of the country states to ensure this pluralism in broadcasting. Two competing models shall guarantee pluralism: the interior plurality and the exterior plurality, the first meaning that it is the plural composition of the broadcasting organization, as it is given with the broadcasting councils, which guarantees diversity. Exterior pluralism means that a variety of services and offers on the media market will cater for a variety of opinions represented in the media as a whole.

Besides the forming of the media system and their regulation on the level of the country states, the influence of EU media politics on the national laws is more and more a given fact, which shall not be explained here.

¹⁰ <http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/index.html>

¹¹ The so called Spiegel-Urteil, a decision in 1966 which condemned the search of the newsroom of Der Spiegel, a famous weekly magazine, by police in 1962.

¹² BVerfG 1961, 1971, 1981, 1986, 1987, 1991, 1992, 1994, 1995, 1998

4. FUNCTIONS AND PERFORMANCE

As it has been spelled out in sections 0., 1. and 2., the different regulatory bodies have each of them different legal grounds, where their duties and obligations are laid down. We will here specify the functions of the broadcastings councils for public service broadcasting, on the one hand, and the supervisory bodies in the country states for commercial broadcasting, on the other. Until now there are no converging tendencies within German media regulation.

Generally, German media law is designed on the principle of the freedom from state intervention. But, due to the characteristics of information goods leading to market failure, broadcasting is believed to require not only supervision whether broadcasting complies with legal provisions or not, but also supporting regulation of the state for safeguarding its functionality and independence from political or other societal groups. Functionality means that the German law allows commercial broadcasting only if a basic service is guaranteed for the citizen by the public service broadcasting, which means the provision of information and entertainment programs following certain quality standards, the possibility for the citizen to receive these programs and plurality of opinion (*Grundversorgungsauftrag*). On these grounds, the regulation authorities differ concerning its organization and performance of supervision and control. From an organizational perspective, the broadcasting and television councils are independent bodies within the public service broadcasting organizations, whereas the state media authorities are separate organizations controlling commercial broadcasting from the outside.

The broadcasting councils within the public service broadcasting corporations in the country states have as a main and most important task to elect the CEO of the corporation. They advise the CEO on all programming questions, approve and decide on the budget and deal with complaints of the audiences, which those are entitled to give in on the base of the remit, laid down in the interstate treaty, programming principles and specific guidelines. Another important document, guiding the task of the broadcasting councils, is the self-obligation declaration (*Selbstverpflichtungserklärung*¹³). This is a tool which has been introduced with the 7th amendment of the interstate treaty of broadcasting, forcing the public broadcasters to define for a given period their aims and instruments for the development of the channels they broadcast. The functions of the broadcasting councils can be compared to those of a board of directors.

Regulation of the commercial broadcasters is organized in another body (*Landesmedienanstalt*), which has very different shapes in the country states. It can have as the deciding body a media council, a general assembly or a commission or a committee. Nevertheless, the underlying principle is the same as with the public broadcasters, which is that the plurality of the society should be represented within these bodies. Each *Land* has then a proper law, defining how the composition of these bodies is done in detail.

These supervisory bodies decide on licensing of commercial broadcasters or cancellation of the license, allocation of frequencies, supervision of platforms, control of programming according to the laws and of media concentration, and decide on licenses of online

¹³ <http://www.ard.de/intern/standpunkte/-/id=1756626/property=download/nid=8236/kwbeb8/selbstverpflichtung.pdf>

services which fall under the law of broadcasting. Apart from these regulatory tasks, the *Landesmedienanstalten* also have competencies in the development of technical and infra-structural development, citizen channels, research and promotion of media literacy.

In order to ensure diversity of programming as well as aligning matters on the national level, the state media authorities cooperate through the *ALM (Arbeitsgemeinschaft der Landesmedienanstalten)* in different decision-taking councils and commissions, some of them already mentioned above (see 1.). These are the *ZAK (Kommission für Zulassung und Aufsicht* or Commission on Licensing and Supervision), the *DLM (Direktorenkonferenz der Landesmedienanstalten* or Conference of Directors of the State Media Authorities), the *GVK (Gremienvorsitzendenkonferenz* or Conference of Chairpersons of the Decision-Taking Councils), the *KJM (Kommission für Jugendmedienschutz* or Commission for the Protection of Minors in the Media) and the *KEK (Kommission zur Ermittlung der Konzentration im Medienbereich* or Commission on Concentration in the Media). Representatives for editorial and advertising content, for the platform regulation and digital access advise the commissions. The joint management office of the state media authorities is located in Berlin.

Both regulatory modes are non-state, non-governmental forms and rely on the representation of the so called socially relevant groups. They may include government representatives, but they are in the minority of both bodies. Anyway, a great share of the regulatory bodies' members represents governments or political parties. Within the television council of the *ZDF*, for example, there are 16 representatives of each federal state and three representatives of the Federal Republic of Germany, as well as 12 representatives of the political parties. Furthermore, nearly all members belong to one or the other of the so called circles of friends, which are either linked with the Christian Democratic Party or with the Social Democratic Party on the national and regional levels. The administrative councils are even more integrated in the political sphere (see 6.).

Another problem caused by the organizational structure of the media regulation bodies is their limited power of enforcement. The state media authorities are criticized for their failure to take action against the violation of statutory provisions. An example was the long-lasting conflict between *Pro7Sat1 Media AG* and *ZAK* about the program *9Live* because of its violation of gambling legislation of the state media authorities. Another year-long controversy between the same company and the *Landeszentrale für Medien und Kommunikation in Rhineland-Palatinate (LMK)* is about so called third broadcaster licenses (*Drittssendelizenzen*) and lead to the change of channel *Sat.1's* regulation authority from *LMK* to *MA HSH* in Hamburg and Schleswig-Holstein. Under these provisions of *Rhineland-Palatinate's* broadcasting law, commercial TV stations have to provide airtime to independent producers and have to pay them for their broadcasts. The intention of this regulation is to ensure plurality. In 2012 *LMK* nominated the production companies *dtcp* and *Live and Pictures* for a third term of five years beginning in 2013, which did not match *Sat.1's* interests. For this reason *Sat.1* applied at *ZAK* to get the license to broadcast in a state in Germany, which will regulate differently concerning this rule, and also got permission to do so from June 2013. The change will not affect the regional job market, because *Sat.1's* headquarters are located in Unterföhring, a place close to Munich. Again, this shows the complexity of the German regulation system.

5. ENFORCEMENT MECHANISMS/ACCOUNTABILITY

Again, we will consider here only the regulation of public service and commercial broadcasting, as it is performed by the bodies presented before. With regard to the regulation of the public service broadcasting, it is an ongoing argument and debate, that the broadcasting councils are too much involved into the corporations structure and that they – for several reasons – are not able to enforce efficient control. These arguments are mainly given by those who are interested in the containment of public service broadcasting and in restricting its scope and activities. They are also brought forward by those who plea for a professionalization of the broadcasting councils. This is a point which is on one hand true with respect of the fact that the broadcasting councils work on a purely voluntary base, with no salary but only an expense allowance. They have in the corporations a small office with some staff to support their work, but compared to the area of monopolist public service broadcasting when this structure was established, media policy has become much more complex, so that the argument of professionalization has some plausibility. Nevertheless this system has until nowadays proved to fulfill its main obligation: to guarantee the independence of broadcasting from state and government authorities.

Enforcement of the legal prescriptions and proving accountability is supervised by the broadcasting and administrative councils, meaning that they have as the main instrument of enforcement the control on the budget and the election (or deselection) of the CEO. Of course, any breeches of laws can be persecuted by the courts.

The case is to some degree similar with those bodies supervising commercial broadcasting (*Landesmedienanstalten*) and there are some differences as well. It is again the media councils – the plural composed organs within the bodies – who decide on the enforcement of legal requirements for the commercial broadcasters. They have as well the competencies of sanctions.

6. INSTITUTIONAL ORGANIZATION/COMPOSITION

The public broadcasting Service *ZDF* (*Zweites Deutsches Fernsehen* or Second German Television) is the only national PBS in Germany, located in Mainz. It is established and run as a nonprofit institution jointly by the federal states. It is governed by the Television Council (*Fernsehrat*) with 77 members representing the political parties and civil society.

The Administrative Council is the supervisory body of the *ZDF*, responsible for corporate guidelines and budget control. Furthermore it participates in all important decision making procedures such as the election of the Director General or the editor-in-chief, which require the consent of the Administrative Council. As members of the Administrative Council serve five of the leaders of the federal states, as well as the Federal Chancellery Minister of State and Commissioner for Culture and the Media and eight other members which are elected by the TV Council.

The *WDR* (*Westdeutscher Rundfunk*) is the biggest public broadcasting corporation in Germany with its headquarter located in Cologne and studios in 10 other cities of North-Rhine Westphalia (*NRW*). It operates the regional TV program in NRW as well as six regional

radio networks. All programs are transmitted regionally and nationally. As a member of the Association of Public Broadcasting Corporations in the Federal Republic of Germany (*ARD*), the network of the German federal public broadcasting corporations, the *WDR* runs eight of its 29 studios abroad and one foreign office in the *ARD* network of Radio and TV correspondents.

In the TV Council of the *WDR* serve 48 members on a voluntarily basis, representing the state legislature of *NRW* and civil society. The supervising Administrative Council of the *WDR* has nine members, seven elected by the TV Council and two by the personnel board for a term of six years. It takes part in decision making about personnel but not about the program and does the financial oversight and auditing.

The German commercial broadcasting is organized and controlled by the 14 state media authorities on the basis of state media legislation. Also the state media authorities for commercial television generally consist of two bodies, the main and the executive body, the latter performing the implementation of the regulation decisions and representing the institution. But in detail the organizational structures of the state media authorities differ between the *Länder* especially concerning the composition of the main decision-making body, which are either consisting of representatives of the government (*Versammlungsmodell*), the parties and the different societal groups, or of a small group of experts (*Sachverständigenbeirat*).

The *LfM* (*Landesanstalt für Medien NRW* or Regional Office for the Media North-Rhine-Westphalia) is the biggest single state media authority with around 50 staff members. It has its headquarters in Düsseldorf and is headed by a director and a deputy director, as well as the Media Commission with 28 members, six of them elected by the North Rhine-Westphalian Parliament. The other 21 members are nominated by different social groups specified in the *NRW* Media Law. The members of the Media Commission serve for six years on volunteer basis. It includes four standing committees, preparing the decision making: the Committee for Budget and Finance, the Committee for Media Development, the Committee for Research and Media Competence, and the Committee for Programming.

The *MA HSH* (*Medienanstalt Hamburg/Schleswig-Holstein*) is one of the two multiple-state media authorities in Germany and is located in Hamburg. These two states have decided to harmonize their media regulation and also public broadcasting operation because of their small size. The director of the *MA HSH* is elected by the Media Council for five years and has the function of a supreme authority as well as the chief executive of the about 25 employees. The position requires the qualification to exercise the functions of a judge because the director has not only to represent the *MA HSH* in public but also to plead its cases in court.

The Media Council of the *MA HSH* has 14 honorary members. Socially relevant groups, organizations and associations can propose seven representatives with adequate qualification for the Media Council to the Parliament of the Free and Hanseatic City of Hamburg and the Parliament of Schleswig Holstein for election. Two representatives need to be qualified to exercise the functions of a judge.

7. FUNDING

The television and broadcasting councils and the administrative councils are part of the Public Service Organizations in Germany. Their members are working on a voluntary base, supported by small offices at the public broadcasting corporations' premises. For the constantly working committees there is a regular budget. This was 2,44 Mio € for the TV council of ZDF in 2011. The WDR broadcasting council's budget is not published.

The German Interstate Treaty on the Broadcasting License Fee (*Rundfunkgebührenstaatsvertrag*) determines in Article 7 that the state media authorities under public law are funded by license fees, which includes the above mentioned central commissions. Article 10 of the Interstate Treaty on the Financing of Public Service Broadcasting (*Rundfunkfinanzierungsstaatsvertrag*) defines the shares as 1,9275 % of the basic licence fee and 1,8818 % of the license fee for television collected in the respective region. The funding is furthermore determined by the different media acts adopted by the federal states applicable to the regional broadcasters. Besides the funding from licence fees, the regulation authorities demand fees for their legal acts. The MA HSH also charges the private broadcasters under their authority a fee which is settled annually and must not exceed 3% of the broadcaster's revenues (Article 48 of the Media Treaty HSH). In 2011 the overall budget of MA HSH was 3.214.000 € and of LfM was 15.545.000 €.

8. REGULATION IN CONTEXT

Media freedom and freedom of expression are guaranteed in Germany within the Constitution (*Grundgesetz*, Art.5). Due to the strong federalism of Germany, there is a variety of actors on different levels. The central actors in the German audiovisual media policy are the political parties, especially the *Länder* organizations of the two large parties, the conservative CDU and the social democratic SPD, which control much of the public broadcasting sector.

After years of strong polarization from the 1950s to the 1970s, media policy is now again based on a broad consensus between the *Länder*. In an agreement between all *Länder*, the basics of a "dual system" of broadcasting have been put in place. It includes regulation for media concentration, stating that one company cannot control more than 30 percent of all TV ratings. The high degree of media concentration, especially the two big groups of TV channels (*Senderfamilien*), is causing concern (see below).

In recent times, debates about the future of German public service broadcasting are more and more influenced by decisions and challenges of the EU. State subsidies do not exist neither within the print sector nor in the electronic media, although special aids, as a reduced value added tax rate and reduced prices for distributing print products via mail, serve as a state generated support for the press.

Germans spend about 225 minutes per day on television, split about evenly between public and commercial programmers. All regional public broadcasters commonly founded the ARD (*Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands*) regulatory body, and contribute according to their size to the nation-wide TV channel *Das Erste* (the first and

oldest TV program). In addition they each independently organize a regional programme (III Program) that offers regional content and more culturally and educationally oriented programming.

The Second German Television *ZDF* (*Zweites Deutsches Fernsehen*) is based on an agreement of all *Länder* (*ZDF-Staatsvertrag*) and is located in Mainz. *ARD* and *ZDF* jointly offer a number of specialized programs: *Arte* (together with France), *3Sat* (together with Austria and Switzerland), *Kika* (for children), and *Phoenix* (events and documentation). Both, *ARD* and *ZDF* have each three specialized digital channels.

Today German commercial television is controlled by two media groups calling themselves broadcaster families (*Senderfamilien*). One, formerly owned by Leo Kirch, is named *ProSiebenSAT.1Media AG* and consists of *Sat 1*, *Pro 7*, *N24*, *Kabel 1* and *sixx* and others (market share 2011: 20.6 percent¹⁴). In 2006 it was acquired by the Anglo-American investment funds *Permira and Kohlberg, Kravis & Co. (KKR)* and took over the *SBS* activities of these funds in ten other European countries.

The other family is controlled by the German giant *Bertelsmann*, the largest media company outside of the US and a global player (largest bookseller in the world): *RTL Group S.A.* owns TV channels in about a dozen European countries. In Germany the family includes *RTL*, *RTL II*, *Super RTL*, *VOX*, *n-tv* (market share 2011: 26,5 percent¹⁵). Many more programs were offered in 2012, some of them independently-owned special-interest channels, while others are subsidiaries of international conglomerates such as *Viacom*, *Disney*, or *NBC Universal*. In large cities such as Berlin, Hamburg etc. regional commercial TV has been established. Germany has an above-average percentage of cable households: 17,72 of 35,49 million households; another 16,17 receive their signal via satellite, leaving only a small share for terrestrial reception¹⁶.

The market share of all public service broadcasters in television is at 41.6 percent, of which *ARD* has a market share of 12,4 percent, *ZDF* 12,1 percent, the third channels 12,5 percent. Among the private channels *RTL* (14 percent), *SAT1* (10.2 percent) and *ProSieben* (6.3 percent) have the biggest audience shares¹⁷. The television advertising market participates in the whole advertising market with a share of 42,4 percent; the radio advertising share is 5.6 percent (print: 38,4 percent).¹⁸

The only pay-TV company *Premiere* had been founded by Leo Kirch and went bankrupt. It was recently taken over by Rupert Murdoch and in 2009 it was renamed *Sky* and integrated into Murdoch's European *Sky* empire. Compared to other European countries, pay-TV is not very successful, due to the many freely accessible channels. In 2011 about 3 million viewers subscribed to *Sky*¹⁹.

¹⁴ <http://www.kek-online.de/kek/medien/zuschauer/2011.pdf>

¹⁵ <http://www.kek-online.de/kek/medien/zuschauer/2011.pdf>

¹⁶ http://www.ard.de/intern/medienbasisdaten/empfangssituation/technische_20reichweiten/-/id=54848/1hwge2l/index.html

¹⁷ <http://www.kek-online.de/kek/medien/zuschauer/2011.pdf>

¹⁸ http://www.ard.de/intern/medienbasisdaten/medienwirtschaft/anteil_20der_20klassischen_20medien_20an_20der_20werb/-/id=54944/1k3w2sh/index.html

¹⁹ <http://www.focus.de/finanzen/news/unternehmen/mehr-als-drei-millionen-abonnenten-sky-deutschland-will-2013->

Radio is a popular medium in Germany: the average daily consumption is 186 minutes (2011)²⁰, of which slightly more than a half comes from public service broadcasters. They usually offer a number – around six – of programs on a regional basis, sometimes with local limitations, concentrating on general audiences as well as special target groups (culture, news, youth etc.). In addition there are two national radio programs, based in Berlin (*Deutschlandradio Kultur*) and Cologne (*Deutschlandfunk*, mainly news) with public funding, based on another *Länder*-level agreement.

Commercial radio is licensed in all *Länder*-states, therefore it follows mostly a regional pattern. There are no national broadcasters, but some that are active in several *Länder* (*NRJ* for youth, *Klassik Radio*). In two Southern *Länder* local commercial radio is the rule. In North Rhine-Westphalia, the largest state, 45 local stations work commercially but with local, non-commercial windows. Non-commercial radio exists but is regulated differently in each state. Some states allow community stations, others prefer public access (also for television), educational stations, campus stations etc. One *Land* has no activities at all. All in all, the situation is extremely diverse.

The largest company in the field of telecommunications is *Deutsche Telekom*, formerly the state administration for telephony and still partly owned by the federal government. It has entered the market of Internet TV, but so far the resonance is limited: its subsidiary *T-Home* entertain provides IPTV for about 1,6 million subscribers (2012).

In 2011 about 73,3 percent of all Germans were using online services; more than 70 percent of them use a broadband line. Online is an established medium and is especially popular among young people: 100 percent of those in the age range of 14 to 19 use it regularly. Among all Internet users about half of them report that they use the Net for up-to-date information. The demand for online video content is also marking a significant growth with more than 68 percent of all onliners using moving images online (28 percent in 2006). All major media in print and broadcasting maintain an online website; the most successful in news had been *Spiegel-online* and was overtaken in 2011 by *bild.de*.

Germany is on the way to digitization. Most terrestrial TV is digitized (DVB-T) and Berlin was the first city worldwide to switch off analogue transmission. The shift from analogue to digital terrestrial television has been completed in April 2012. Digital radio was first introduced in 1999 and the country is covered by a network of DAB transmitters. *DW* also offers short wave programming in DRM. The echo to digital radio was minimal, though, and some services have been terminated.

9. IGNORED DIMENSIONS

Given the extremely diverse and complex situation of media regulation in Germany, it is not a surprise that discussions are going on if and how this regulatory mediascape could be simplified. On the one hand, the existence of very small public service broadcaster as

gewinn-machen_aid_709780.html

²⁰ http://www.ard.de/intern/medienbasisdaten/mediennutzung/zeitbudget_20f_26_23252_3Br_20audiovisuelle_20medien/-/id=54984/sfyd65/index.html

Radio Bremen create again and again the concern about the survival of these corporations and the economic and political ration behind. On the other hand, the federalist principle of regulating commercial broadcasting comes to its limits as the case of *SAT.1* getting its license from another regulatory body (see 4.) in order to have a more convenient regulation shows. Shutting down broadcasting corporations and centralizing the state authorities are the main future trends which are therefore discussed. As all those institutions have a long standing institutionalization and strong lobbies behind them because of the federalist spirit in Germany, it can be doubted that there will be any decisive changing outcomes in the near future.

Greece

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1. LEGAL FRAMEWORK

1.1 DESIGNATION AND LEGAL DEFINITION OF THE MEDIA REGULATORY AUTHORITY

The media regulatory authority in Greece is the Greek National Council for Radio and Television (NCRTV or ESR in Greek), based in Athens. The NCRTV was established in 1989 by the law 1866 and has as its remit the supervision and regulation of the radio/television market. In theory it was created to ensure the maintenance of objectivity and quality within broadcasting, but in practice it worked as a buffer between the partisan interests of the government of the day and the vested interests of the broadcasting companies. Its establishment was modelled on the French supervisory authority of broadcasting, Haute Autorité (HA). Subsequently it was entrusted with new responsibilities, defined in new laws (2173 of 1993, 2328 of 1995, 2644 of 1998).

Until 2001 the responsibilities and the legal status of its members were regulated through legislative provisions. Since 2001 (after the revision of the Greek Constitution) these matters now have constitutional status. More specifically, the NCRTV was included in the independent authorities by the Seventh (Z') Revisionary Greek Parliament. According to the revised 15th article of the Greek Constitution (2nd paragraph) "radio and television shall be under the direct control of the state" and the NCRTV, as an independent administrative authority, is entrusted with the supervision of the broadcasting sector.

The specific legal framework regulating the operation of the NCRTV now consists of the executive constitutional law 3052/2002, the law 2863/2000 as well as the laws regarding the operation of public (1730/1987) and commercial broadcasting (laws 3952/2007, 2328/1995, 2644/1998, 3310/2005 and presidential decrees 109/2010, 77/2000, 310/1996).

There also exists an internal rule ratified by the decision of the Minister of Press and Media (20291/E/6.9.2002), aimed at regulating the internal operation of the body.

1.2 RELATIONSHIP WITH SELF-REGULATORY AND CO-REGULATORY MEDIA STRUCTURES

The NCRTV is not formally linked with the interdisciplinary instruments of self-regulation, designed to contribute to the smooth function of the media market. Such instruments are the Auditing Firm of Research Measuring Mass Media (EEEM-MME in Greek) as well as the Civil Society for Measuring Ratings of the Radio Stations in Attica (AEMAR in Greek). Other institutions, representing attempts at self-regulation in the media field, are the Authors Association of Daily Newspapers of Athens (ESIEA in Greek) and the Union of Magazines and Electronic Press Journalists (ESPIT in Greek). These authorities are members of the Pan-Hellenic Federation of Journalists Unions (POESY in Greek). The members of ESIEA and POESY commit themselves to implementing and guarding a set of fundamental principles, included in the *Code of Professional Ethics and Social Responsibility*, as approved in the general meetings of the authorities.

Additionally, the private TV channels are required to have their own Ethics Committee, which is in charge of examining all emerging ethical issues. A new Bill that has recently been tabled in Parliament, which is aimed at restructuring the public service broadcaster (ERT), refers to the establishment of a three-member Ethics Committee responsible for examining issues of ethics relating solely to the public service radio/television channels (Galani, 2012). However, given that in Greek society elections are imminent there is no guarantee that the new government will leave the proposed Bill unchanged.

2. FUNCTIONS

2.1 THE REGULATION IN DIFFERENT MEDIA SECTORS

The responsibilities of the media regulatory authority, NCRTV, cover only the broadcasting sector of broadcasting. These responsibilities have not been changed since the emergence of the body. They have been redefined in the Constitution revision of 2001. This redefinition is still in force, dictating the present operation of the Council.

The telecommunications sector and the technical infrastructure are regulated by the National Commission of Telecommunications and Postal Services (NCTP or EETT in Greek), established in 1992 by the law 2075. It is an independent authority controlling and supervising the market of electronic communications (companies of fixed and mobile telephony, wireless communications and internet) as well as the postal market (EETT, 2012). It is empowered to: a) supervise and control the network/services providers of electronic communications, b) impose the relevant sanctions, c) manage the register of electronic communications providers, d) issue codes of ethics for the provision of networks and services in the electronic communications field, e) ensure compliance with the legislation on electronic communications, f) regulate matters regarding consumer protection in the electronic communications and postal services sector.

The press field is not subject to any regulatory authority, however in the Constitution (article 14) the freedom of the press is enshrined as an institutional guarantee (Karakostas, 1998: 19).

2.2 *THE NCRTV'S TASKS*

According to the revised Constitution, the NCRTV is expected to perform the following functions:

- Supervise radio and television programmes in terms of content so as a) to meet the aims of objective and equal transmission of information, news, literature and art products (as provided in the Constitution), b) to ensure the quality level of programmes, the respect of human dignity, the protection of children and youth.
- Set codes of conduct for news broadcasts, advertising and entertainment programmes, which are ratified by Presidential Decree.
- Issues statutory notices, grants, renews and revokes the licenses of the terrestrial radio and television stations as well as any permits and approvals under existing broadcasting regulation.
- Addresses public or private broadcasters with instructions, recommendations or questions and expresses opinions on the application of the provisions of relevant laws and regulations.
- Keeps a register of the Media Enterprises, including information regarding the ownership of media companies and enterprises operating in the wider media field.
- Verifies compliance with the provisions relating to proprietary restrictions on business ownership of radio or television stations and publishes information regarding the ownership of radio and television stations.
- Expresses its opinion towards the Minister of Interior Affairs regarding the persons appointed as members of public service broadcaster's Board (ERT SA).
- Supervises compliance with the provisions governing the operation of public and private broadcasters and imposes the prescribed administrative sanctions.

Subsequent to the Constitution Revision (of 2001) the media regulatory body has been exclusively empowered to exercise control and impose sanctions in the broadcasting field. The prior central role of the Minister of Press and Mass Media (who issued enforceable administrative acts on the responsibilities of the NCRTV) was replaced by a simpler one which lies in reviewing the legality of the decisions taken by the media regulatory authority. Consequently, the direct state control over broadcasting, the supervision of compliance with the existing broadcasting legislation and the administrative implementation or enforcement of the law are issues coming under the exclusive competence of the NCRTV. Moreover it is competent to undertake public consultation with the players of the broadcasting landscape. However, despite all these responsibilities, it lacks self-regulatory competence.

2.3 THE REGULATION IN THE ADVERTISING FIELD

In the field of advertising, except for the code of conduct issued by the NCRTV, attempts have been made at self-regulation. As a result the regulation of advertising is also based on the *Greek Code of Advertising and Communication*, defining the rules of professional conduct and ethical behavior that must be followed by all those involved in advertising (namely advertisers, companies or authorities to be advertised, advertising media as well as principals and representatives of all these forms of communication). The Code refers to the advertising of all kinds of products and services, and to all forms of commercial and social communication (EDEE, 2012).

The application of the ethical standards in commercial communications, as defined in the *Greek Code of Advertising and Communication* (SEE, 2012 b), is guaranteed by an independent civil company, of non-profit character, named Council of Communication Control (SEE in Greek). It is in charge of the operation of Boards (primary and secondary one) which have the exclusive competence to judge – automatically or after a complaint – the advertising compliance with the principles of the *Greek Code of Advertising and Communication*. The Council of Communication Control (SEE), since its establishment (December 2003), has been a member of the European Advertising Standards Alliance (EASA). The media regulatory authority (NCRTV) is in collaboration with the Council of Communication Control and is informed of its decisions (SEE, 2012).

2.4 REGULATION AND CYBERSPACE

The NCRTV's functions do not cover the vast space of the internet. In essence, Greece lacks a regulatory entity dedicated to monitoring or supervising online content. The only type of protection provided to internet users derives from a police authority, named Sub-direction of Electronic Crime Prosecution, whose remit is to prevent, investigate or repress crimes and antisocial behaviours, committed through the Internet or other electronic communication means (Hellenic Police, 2012).

3. LEGITIMIZING/UNDERLYING VALUES

The regulation in the broadcasting field is justified by a series of values, included in the Greek Constitution. According to Article 15 (paragraph 2), the direct state control over broadcasting, which is under the exclusive jurisdiction of the NCRTV, aims at ensuring the following values: objective and on equal terms transmission of information, news, works of literature and art, quality level of programmes (mandated by the social mission of broadcasting and by the cultural development of the country), respect of human value as well as protection of children and youth (Mavrias & Spiliotopoulos, 2008: 31-32). These values are protected by the operation of the media regulatory authority, the NCRTV.

On the other hand the values evoked by the Authors Association of Daily Newspapers of Athens (ESIEA in Greek) in order to justify the need for self-regulation through compliance with the *Code of Professional Ethics and Social Responsibility* are quite different. These are

values related to a) safeguarding the freedom of information and expression, the autonomy and dignity of journalists, b) shielding the freedom of press, c) ensuring the social role of journalist in the globalised and oligopolistic communication field and d) resisting any attempts at state influence or other influence over the work of journalists (ESIEA, 1998). Similar values are also protected by other associations of journalists throughout Greece, which have drawn up relevant codes of conduct.

4. PERFORMANCE

In its daily activity the NCRTV conducts meetings in order to perform the duties decreed in the relevant laws:

- Examines the content of specific radio or television programmes and imposes sanctions in the form of fines on the broadcasting companies which are deemed to have violated the broadcasting law.
- Considers requests on the part of broadcasters related to the withdrawal or amendment of already imposed administrative sanctions.
- Issues suggestions, opinions, guidelines and recommendations addressed to all broadcasters.
- Issues a wide range of decisions related to various topics (such as broadcasters' licensing, revocation of certificates of broadcasters' legal operation, closure of television/radio stations and interruption of specific programmes' transmission).

Any act of the NCRTV related either to the license of the broadcasters or to the sanctions against them is an enforceable administrative act that can be challenged before the Council of State as long as an application for annulment is made.

Moreover, the Board members and the specialised scientists of the media regulatory authority participate, on a regular basis, in scientific conferences with the aim of promoting the work of the authority and broadening their knowledge on subjects related to their responsibilities.

In general, the activities implemented by the self-regulation entities do not conflict with those of the media regulatory authority.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

To ensure compliance with the decisions of the NCRTV the law enables the media regulatory authority to impose a number of administrative sanctions and measures. In case of violation of the law (national, European, international) regarding broadcasting services and copyright or in case of violation of broadcasting ethics the NCRTV can decide *ex officio* (or on the basis of a request on the part of the Minister of Press and Mass Media or after a complaint) to impose the following sanctions: a) recommendation for compliance with a specific legal provision along with notice of imposition of other penalties, b) fine, c) temporary suspension of up to three months or termination of the transmission of a

specific programme, d) temporary suspension of up to three months of any programme's transmission, e) temporary suspension of station's license or revocation of station's license, f) moral sanctions (such as compulsory transmission of notice related to imposed sanctions). In urgent cases of obvious violation of the broadcasting legislation the President of the media regulatory body may order the postponement or the interruption of specific (radio/television) programmes' transmission. The broadcaster is notified of the decision in the most expedient way. Within three working days the NCRTV in plenary session finally decides on the transmission or not of the programme.

Additionally, according to the law 3548/2007, the National Commission of Telecommunications and Postal Services (NCTP or EETT in Greek) is empowered to order the immediate interruption of a television station's transmissions when it is officially confirmed the instigation of jamming in the Communications of the Armed Forces, of the Civil Aviation, of the public service broadcaster (ERT), of the Hellenic Telecommunications' Organization (OTE) and of any other legally functioning network or operator. In case the television station fails to comply with the rules, the NCTP shall inform the NCRTV, which may order the immediate shutdown of the station.

The media regulatory authority is accountable to the Prime Minister, to the Parliament President and to Minister of Press and Mass Media through an activities' report drawn up every year until the 31st of March and submitted to them. That report is published in a specific edition of the National Printing Office.

As to the Board Members of the NCRTV the law establishes cases of incompatibility with other public offices and professional activities so as to avoid any form of pressure exerted on them. More specifically the incompatibility regime governs their membership with positions such as that of the Minister, Vice-minister, Parliament Member, General or Special Ministry Secretary, military, security forces servant, civil servant and servant in a political party. Moreover, the NCRTV members during their term and three years after leaving office are not allowed to have any kind of relationship with an organization subject to supervision by the media regulatory body.

6. Institutional organization / composition

The NCRTV Board consists of seven members: the President, the Vice-President and another five persons, subject to personal and functional independence, a feature guaranteed by the constitutional provision of article 101A.

In theory, the members of the NCRTV's Board are personalities distinguished by their scientific knowledge or work experience background and their contribution to public life, in fields related to the delegated responsibilities. In practice, they are selected by the political parties according to their position in the Parliament. Today the composition of the Board includes a Vice-President of the Supreme Court, three journalists, one lawyer, a professor of Modern Greek Literature and one of Computer Engineering and Informatics. The selection of the Board members is based on a Conference of the Parliament Presidents. Their decision seeks unanimity on the part of the parliament or at least a majority of four fifths (4/5). The members have a four-year term of office on the Council Board, eligible to renewal once.

The personnel of the NCRTV are divided in three categories: specialized scientific staff, administrative staff, and staff on a contract basis. The staff members, who have been

given their positions according to their qualifications, cover the needs of four departments (NCRTV, 2011):

- Section on legality and licensing, in charge of examining the application forms regarding the provision or renewal of licenses given to radio/television stations of free reception or to stations of subscription-based broadcasting services. It is composed of 17 members.
- Section on transparency control, responsible for keeping the register of media enterprises and carrying out a number of audit works, as specified by the provisions of presidential decrees and laws. It consists of 13 members.
- Section on programme quality, whose task is to supervise the quality of the broadcasting services and consider any redress applications. It includes 22 members.
- Section on logistics and technical support, whose remit is to ensure the proper functioning
- of the media regulatory authority, support technically the implementation of any responsibilities, prepare and implement the budget as well as the salary scale of the staff. It consists of 23 members.

The NCRTV operates in plenary or according to scaled teams, established by the plenum in order to examine specific issues or topics of general interest. On decision of the plenary session decisive responsibilities for minor issues may be transferred to the scaled teams, which amount to six (NCRTV, 2011 c: 15):

- The first one deals with ethics, examines the complaints of citizens and supervises the ethics of programmes' quality.
- The second one is concerned with controlling transparency.
- The third one considers applications for licensing television stations, licensing networking of radio and television stations as well as granting certificates of legal operation of radio stations.
- The fourth one deals with audience shares measurement, controls the compliance with the principles of political pluralism and with the values of access right to television broadcasting on the part of the political parties.
- The fifth one considers applications regarding the allocation of digital broadcast frequencies to regional or local stations.
- The sixth one controls and evaluates the so-called "Panoptis System".¹

At the end of 2011 the number of persons employed in the NCRTV amounted to 46 (NCRTV, 2011 c: 14). Over the last months the NCRTV has undergone a drastic decrease in the staff members. At first it took place the elimination of seven vacant posts of permanent staff with an employment relationship of public governance (NCRTV, 2011 b) and two months later the same process applied to fifteen vacant posts of staff working under private law for an indefinite period of time (NCRTV, 2012). When needs of additional staff arise,

¹ "Panoptis system" is a tool assisting the media regulatory body in recording and storing the broadcasting flow on a 24-hour basis.

the selection of the personnel is based on the issuing of official governmental notices, published on the website of the media regulatory body as well as in the press.

7. FUNDING

The media regulatory authority is funded by the state budget only. The total budget of the NCRTV in 2010 amounted to €3,126,000. According to the Council's chairman, most of the expenses come from the staff salaries, the facilities rent and the contracts signed for the safety and the cleaning of the building (Petroutsou, Maniatis, Papageorgiou, 2010). In February 2010 the Greek government asked all the independent authorities to cut down on their operating expenses by 25% for the next three-year period (2010-2012) (Petroutsou, Maniatis, Papageorgiou, 2010). On the website of the media regulatory body there are annual activities' reports (covering the period 2001-2011), however they do not include details regarding its financial performance.

8. REGULATION IN CONTEXT

The configuration of the media field has been influenced by three long-lasting characteristics of the Greek nation: a) weak civil society, where the state has dominant and expanded functions in the politico-ideological sphere, b) shortage of self-regulation in the politico-ideological sphere, c) sovereignty of patronage politics (Papathanassopoulos, 2004: 91). These factors have given rise to a regime, where the state is allowed to interfere drastically in the politico-ideological superstructure and exercise tight control over the broadcasting media. In general, Greece represents a small media market, where an oversupply of media services traditionally exceeds demand (Papathanassopoulos, 1999).

To be more precise, the Greek media market is characterized by an overcrowded broadcasting environment, consisting of 135 private national and local television channels and 890 private local radio stations (Papathanassopoulos, 2010: 222). These commercial broadcasters coexist with the public service broadcaster (ERT SA) comprising three nationwide television channels (ET1, NET, ET3), one worldwide television channel (ERT world) and 29 radio stations (7 based in Athens, 3 based in Thessalonica and 19 regional stations across the country).

In effect, all private national and local TV stations technically speaking are semi-illegal since they operate on a temporary legal basis (every six months the state renews their licenses until some future government decides the day when the official licenses will be granted). In fact, the channels lack official broadcasting licences due to the state's inability and reluctance to set the television field in order officially. In this cloudy regulatory regime the dominance of commercial broadcasters has been undeniable since the deregulation of the broadcasting field (1989). As a result, the decline in viewership of the public service broadcasting services is a traditional feature of the broadcasting scene.

In Greece the broadcasting services are mainly provided by analogue terrestrial TV, which is the main platform adopted by 99% of the audience. The Greek broadcasting market virtually lacks cable television and satellite television seems to be a neglected field, even

though the deregulation of the broadcasting system started with the retransmissions of satellite channels via the terrestrial frequencies. Since the beginning of the new century digital satellite television has been embraced by a small part of the Greek society, now representing approximately 13% of the TV audience. Digital terrestrial television has penetrated the Greek audience at a rate of 20%. The penetration of IPTV stands at 3.5%, while to date there are no mobile TV services. Greece is planning to switch off analogue broadcasting by the end of 2013. However, given that so far there is no official provision of digital broadcasting licenses and no official specification of properties to be used for antenna parks, the target is reasonably in doubt.

According to Eurostat, Internet has approximately entered half Greek households. In 2010 46% of them have internet connection and in terms of broadband connection exclusively the corresponding figure stands at 41% (Vergi, 2011: 3 & 5). According to the Observatory for the Digital Greece (Pappas, 2011: 2), in the Greek society as a whole the penetration of fixed broadband is at the level of 19.9% on January 1st, 2011. That means a remarkable increase of 17.5% compared to the corresponding penetration of 2010, however the gap between Greece and the rest of Europe is still wide. The penetration of mobile broadband (either via 3G mobile phones, or via mobile internet cards for PC) at the end of 2010 stands at 24.6% (Pappas, 2011: 18). This considerable adoption of mobile broadband can be mainly attributed to the rapid increase in the use of 3G mobile phones. Placing Greece in the European context, it is quite below the average penetration of mobile broadband.

9. IGNORED DIMENSIONS

Over the first years of its operation the NCRTV was an inactive institution. Particularly in the 1990s it was traditionally associated with features such as inconsistency of actions, inefficiency and slackness with regard to the duty of exercising control on radio and television. The failure of the authority in the audit work was reflected in the fact that most of the fines imposed on the delinquent television stations remained unpaid (Leandros, 2000: 209).

One of the chronic problems afflicting the institution lies in its inability to resist the political patronage. Over the 1990s this flaw, according to Papathanassopoulos (2004: 64), derived from the fact that it was “an independent authority for the supervision of the [broadcasting] sector, without a legal personality, of a decentralized [...] public service institution”. In the past the potential of the political power to interfere in the institution was dictated by the fact that most of the members’ appointment was a political decision derived from the three biggest political parties.

Although such an authority is in the last analysis an illusion of liberalism by permitting the politicians to show their distance from the media, it took some years for the NCRTV to get real power, since up to 2000 it could only advise the government but not take decisions, meaning that the central government was still in a position to maintain control over the state electronic media. Thus, the NCRTV could not play a major role in the broadcasting landscape, suffering from an inherent inability to have substantial powers. That is the reason why it has been characterized a “simple observer of the broadcasting events” (Papathanassopoulos,

1993: 253), falling far short of its creators' expectations. Its virtual absence, especially at the beginning of the broadcasting deregulation, contributed to the rise and evolution of the private broadcasters in a disorderly manner. In essence, the commercial players managed to demonstrate flexibility in matters related to programming, advertising and journalistic ethics with a view to increasing profits. For this lack of substantial action by the NCRTV the blame can be put on the political power of the country, which turned out to be reluctant to delegate to the media regulatory authority important responsibilities.

In 1998 and 2000 there seem to have been attempts aiming at upgrading the operation of the NCRTV. Its real activation started with the Seventh (Z') Revisionary Greek Parliament. It was believed that since it became an independent administrative authority and was constitutionalized (2001), it could solve the problems of lack of real independence and correct policy. The new authority, as emerged by the Seventh Revisionary Parliament, was charged with a highly difficult task: the arrangement of a traditionally anarchic media field overwhelmed by interests (Papathanassopoulos, 2004: 65).

Over the last years the work of the independent administrative authority has been challenged even by the Parliamentary Committee in charge of Institutions and Transparency (Petroutsou, Maniatis, Papageorgiou: 2009). Recently a decision taken by the Council of State has come to enhance the impression of unreliability accompanying the work of the media regulatory body. The Court ruled unlawful the independent authority's Board over the period 2007-2008. As a result, one decision of that period taken by the NCRTV was put into question and underwent cancellation (I.O.M., 2011: 2). More recent decisions are also threatened with cancellation in case of appeals to the Council of State (Petroutsou, Maniatis, Papageorgiou: 2011).

Generally, over the last year the NCRTV has been highly marginalized due to a series of decisions taken by the Council of State. These are decisions that afflicted not only the operation of the media regulatory body but also the entire edifice of the broadcasting market (Papachristoudi, 2011). In short, the Council of State:

- Undermined the sanctionary policy of the independent authority.
- Put into question a wide range of fines, issued by the media regulatory body.
- Recognized as unlawful the broadcasting legislation. The long-term regime of "temporary legitimacy" of the broadcasting market was considered to be a case of arbitrariness regarding the occupation of the broadcasting frequencies, which traditionally constitute a public good.

In reality, the effective and efficient operation of the media regulatory authority has never been achieved due to the lack of the necessary independence, a flaw that can be attributed to a range of long-lasting facts:

- Lack of self-regulatory competence.
- Limited administrative and financial autonomy.
- Reliance on the involvement of the Minister of Press and Mass Media when it comes to procedural matters.
- Admission of its decisions to legality review by the Ministry of Press and Mass Media.

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1. LEGAL FRAMEWORK

1.1 AND 1.2 WHAT IS THE DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY (OR BODIES) AND LEGAL FRAMEWORK OF THE MEDIA REGULATORY ENTITIES?

The main regulatory bodies are the Broadcasting Authority of Ireland (BAI)¹ and the Commission for Communications Regulation (ComReg)².

BAI

The Broadcasting Act 2009, in s.7(1) provides that the Broadcasting Authority of Ireland (BAI) “is a body corporate with perpetual succession and the power to sue and be sued and to acquire, hold and dispose of land and other property”. A body corporate is a statutory corporation created under an Act of the Oireachtas (Parliament). It operates as a commercial company and does not have shareholders. A body corporate makes a surplus or deficit rather than a profit or loss.

The Broadcasting Authority of Ireland (BAI) is the body responsible for broadcasting in Ireland and regulates content across all broadcasting. The BAI regulates the independent commercial sector and the community sector. It also regulates public service broadcasting media, RTE³ and TG4⁴, in some respects, although both are established as corporations with their own Boards. In both cases, RTE and TG4, the Director-General (chief executive officer) reports directly to the Board, which is the governing body.

¹ www.bai.ie

² www.comreg.ie

³ www.rte.ie

⁴ www.tg4.ie TG4 is the Irish-language television broadcaster.

ComReg

The Commission for Communications Regulation (ComReg) was established by the Communications Regulation Act 2002, s.6(1). Like BAI, ComReg is a body corporate with perpetual succession and the power to sue and be sued and to acquire, hold and dispose of land and other property.

The Commission for Communications Regulation (ComReg) is the national regulatory authority responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector.⁵ It is referred to in the Broadcasting Act as the 'Communications Regulator'. It has a role in the granting of licences to BAI and also licences in respect of digital television, multiplexes, etc.

1.3 DOES THE LAW CLARIFY THE NATURE OF THE STATE MEDIA REGULATORY IN TERMS OF ITS INDEPENDENCE REGARDING THE GOVERNMENT OF THE DAY? IS IT FORMALLY AN 'INDEPENDENT' ENTITY/AUTHORITY OR, FOR EXAMPLE, AN ADMINISTRATIVE AGENCY OF THE GOVERNMENT?

Section 24 of the Broadcasting Act 2009 provides that the Broadcasting Authority and each of its statutory committees, i.e. the Compliance Committee and Contract Awards Committee) shall be independent in the performance of their functions. Members are appointed by Government, five of them on the nomination of the Minister and the other four following the advice of a joint Oireachtas (Parliament) committee (Broadcasting Act s.8). All members are to represent the public interest (s.9(2)). (See Dimension 5 for information on eligibility and dismissal procedures of the BAI which also safeguard the independence of the BAI.)

Section 11 of the Communications Regulations Act 2002 similarly provides that ComReg shall be independent in the exercise of its functions. Commissioners are appointed by the Minister but not unless the Civil Service and Local Appointments Commissioners, after holding a competition on behalf of the Commission, have selected him or her for appointment as a Commissioner (2002 Act s.15).

In both cases the Department of Communications sets overall policy but the regulators are independent in the implementing their statutory duties.

1.4 ARE THERE FORMAL LINKS WITH CO-REGULATORY AND SELF-REGULATORY MEDIA STRUCTURES?

The Broadcasting Act 2009 provides for formal links between itself and ComReg, both of which are statutory regulators. The Act makes no reference to bodies such as the self-regulatory Advertising Standards Authority of Ireland (ASAI), which has a role in respect of broadcast advertising (see further below). Indeed, the Act makes little or no reference to co-regulation or self-regulation (apart from s. 46(1) as set out below) or inclusion of schemes or procedures that might be regarded as either co-regulatory or self-regulatory in the sense in which these terms are generally understood.

Section 46 of the Broadcasting Act states:

“(1) In this section “self-regulatory system” means a system whereby the members

⁵ Information available at http://www.comreg.ie/about_us/roles_what_we_do.523.html

of a group of persons with a shared interest voluntarily adhere to rules or code of conduct established by that group.

(2) The Authority may co-operate with or give assistance to one or more persons (whether residing or having their principal place of business in the State or elsewhere) in

- the preparation by that person or those persons of standards, or
- the establishment and administration by that person or those persons of a self-regulatory system, in respect of broadcasting content or related electronic media.”

There is some provision, however, outside of the Broadcasting Act for formal links with self-regulatory bodies in relation to media advertising and on-demand services.

Self-regulation - ASAI

The Advertising Standards Authority of Ireland (ASAI), an independent self-regulatory body, operates an advertising code that relates to all media, including broadcasting.

ASAI's objective is to ensure that all commercial marketing communications are “legal, decent, honest and truthful”. Advertising standards are set out in the Code of Standards for Advertising, Promotional and Direct Marketing, which were drafted by the Board of ASAI in consultation with relevant interest groups including the public, advertisers, agencies and media, consumers' representatives and Government Departments.⁶ The ASAI system, as a self-regulatory system, is subordinate to and complements legislative controls on advertising.

ASAI also plays a role in the self-regulatory system that applies to the On-demand (non-linear) sector. The sector is subject to a voluntary code, the On-demand Audiovisual Services (ODAS) Code 2011.⁷ The code was developed in compliance with the European Communities (Audiovisual Media Services) Regulations 2010 (Statutory Instrument S.I. 258 of 2010), which required *inter alia* that providers of on-demand audiovisual media services develop codes of conduct (s.13(1)).

Firstly, the Code (Part 1, s.1(e)) provides that commercial communications shall comply with the relevant provisions of the ASAI Code, and any provisions of the voluntary industry code in place in relation to alcoholic beverages.⁸

A further role of ASAI in relation to the ODAS Code is to handle complaints relating to audiovisual commercial communications, using its normal complaint procedures. Audiovisual media service providers are required to abide by decisions and recommendations of the ASAI and to take appropriate action if required.

Self-regulation - CCCI

The Central Copy Clearance Ireland (CCCI), a self-regulatory body, which was developed by the drinks and advertising industries on an independent footing as a positive response to

⁶ See <http://www.asai.ie/about.asp>

⁷ The ODAS code is available at www.bai.ie/?page_id=2082

⁸ Other voluntary codes include the drinks' industry's MEAS code on the naming, packaging and promotion of alcoholic drinks: <http://www.meas.ie/code-of-practice>; and the voluntary codes agreed between the Department of Health and Children, the drinks industry and the media in relation to television, radio, cinema and outdoor/ambient media are the Alcohol Marketing, Communications and Sponsorship Codes of Practice of 2008, which were subject to review in 2010. These are voluntary codes, a collaboration between the Health Authorities, drinks industry and media. See http://www.dohc.ie/publications/alcohol_codes_practice.html

the concerns of the Department of Health and Children about the content of some advertising and its appeal to children, has pre-vetted all alcohol advertisements against the BAI regulations and the ASAI self-regulatory code since 2003. No alcohol advertisements can appear on the Irish media before pre-vetting and obtaining a certificate from CCCI.⁹

Co-regulation

The BAI has no role in relation to Part 1 of the ODAS On-demand Code (audiovisual commercial communications), for which the ASAI is the designated complaints body. However, the 2010 Regulations (S.I. 258 above) which required providers of on-demand audiovisual media services to develop codes of conduct, required them to do so *in co-operation with the BAI*, and other relevant bodies (s.13(1)).

S.13(3) goes further and requires BAI approval for codes of conduct:

Codes of conduct shall be prepared in co-operation with and *subject to approval by the BAI*.

The ODAS Code of Conduct that was developed on foot of the 2010 Regulations repeats the requirement and also states that service providers *are advised to take on board provisions of the BAI Code* in regard to children's advertising for foods and beverages.... (Code Part 1, s.1 (j), emphasis added)

The Code also makes provision for the Compliance Committee of the BAI to accept appeals against the resolution offered by the service provider with regard to breaches of sub-sections 1 & 2 of PART 2 of the Code (content, protection of minors, etc.) and make determinations on complaints (Code, Part 3, s.7).

Part 3, s.8 of the Code further provides that audiovisual media service providers are required to abide by decisions and recommendations of the ASAI and the BAI and to take appropriate action if required. ODAS¹⁰ will put in place a range of sanctions beyond the publicity associated with a ruling by the ASAI or BAI against the provider including:

- Requiring the provider to remedy the cause of the complaint; and/or,
- Require an assurance from the service provider regarding future behaviour; and/or,
- Require the service provider to reimburse service charges paid in connection with the matter giving rise to the complaint; and/or,
- Publicise the decision and identify the provider concerned; and/or,
- Suspend the service provider from the regulatory system.

Co-regulation – print media

The Press Council and Press Ombudsman system handles complaints against the print media. It operates on the basis of a Code of Practice. It is independent of the Government and essentially self-regulatory, having initially been set up by the print media industry on an independent basis. The members of the Council are appointed through an independent

⁹ See <http://www.ccci.ie/index.php>

¹⁰ ODAS is the On-Demand Audiovisual Services Group, the body that drew up this Code. See www.ibec.ie or http://www.bai.ie/?page_id=2082. The On-Demand Audiovisual Services (ODAS) group within IBEC's Audiovisual Federation (AF) and Telecommunications and Internet Federation (TIF), the Broadcasting Authority of Ireland (BAI) and the Advertising Standards Authority for Ireland (ASAI) jointly launched the code on 4th May 2011.

public process and the members then appoint a Press Ombudsman (PO). However, the Press Council (and Ombudsman) is now *recognised* under the Defamation Act 2009, which contains provisions about its composition, duties and procedures, as well as the general scope and purpose of the Code. The Council can be disbanded but only by a resolution of the Oireachtas (Parliament) if it fails to comply with the provisions of the Act. The system, therefore, can best be described as co-regulatory.

2. FUNCTIONS

2.1 WHAT MEDIA/NEW MEDIA SECTORS DOES IT COVER? HOW IS THE INTERNET MENTIONED?

The BAI regulates all broadcast media (linear) but has only a limited role in relation to on-demand (non-linear) services – see above in relation to the ODAS Code. It does not regulate the print media. In Ireland the print media are subject to the Press Council of Ireland (above).¹¹

The BAI is responsible for licensing matters and content. It has two Committees, the Contracts Committee (licensing) and the Compliance Committee (compliance with licences and with broadcasters' obligations set out in legislation and in BAI codes in relation to content). The BAI's remit extends to all linear broadcasting in Ireland in accordance with the Broadcasting Act 2009.

ComReg's remit includes the allocation of frequency and provision of licences for broadcasting transmitters to BAI (Broadcasting Act 2009, s.59) and licences to the public service broadcasters (s.121), including digital multiplex licences (s.132) to RTÉ and BAI. ComReg must also be consulted by BAI with regard to rules in respect of Electronic Programme Guides (EPGs) ((2009 Act, s.75).

ComReg has responsibility for all types of transmission networks including: traditional telephone wire; traditional television and radio; radio communications including fixed wireless; MMDS and deflector operators providing voice and data services; Licensing Framework for Satellite Services in Ireland; and postal delivery network.¹²

Internet

The Broadcasting Act 2009 expressly excludes audio and audiovisual services provided by means of the Internet in the definition of 'broadcasting service' but includes it in the definition of 'electronic communications network' (s.2). A content provision contract is required for the supply of a compilation of programme material *inter alia* over the Internet (s.71(2)). Among the public service broadcasters' duties is one to make available their broadcasting services *inter alia* by any form of electronic means, including over the Internet (RTÉ s.114(4) (r) and TG4 s.118(4)(r)).

Among the objectives of ComReg set out in the Communications Regulation Act 2002, s.12 is encouraging access to the internet at reasonable cost to users.

¹¹ <http://www.presscouncil.ie/>

¹² http://www.comreg.ie/about_us/roles_what_we_do.523.html

The monitoring of harmful Internet content is undertaken by the Office for Internet Safety (OIS) which was established as an Executive Office of the Department of Justice and Equality in 2008.¹³ The OIS is responsible for promoting Internet safety, particularly in relation to child pornography. The OIS also oversees the self-regulatory body the Internet Service Providers Association of Ireland (ISPAI)¹⁴ which was established in 1998 and operates on the basis of an Industry Code of Practice and Ethics. The Office for Internet Safety has primary oversight responsibility in respect to reviewing and ensuring the appropriate operation of the Code and the wider self-regulatory system. The ISPAI also operates and financially supports the Irish hotline (www.hotline.ie), the service for reporting illegal content on the internet.

Given the supervisory role of the OIS, established by Government, the system involving the self-regulatory ISPAI, could be regarded as co-regulatory.

2.2 IF THE REGULATORY BODY IS A CONVERGENT BODY (MEDIA & TELECOMS, ETC), WHEN DID IT ACQUIRE THE PRESENT-DAY FORMAT?

BAI, though not a converged regulator in the sense of becoming a single regulator, was established under the Broadcasting Act 2009 and took over the role of the former regulator, the Broadcasting Commission of Ireland (BCI), and the Broadcasting Complaints Commission (BCC). The 2009 Act also brought the public service broadcasters under the Authority in some respects, e.g. annual performance reports to go to BAI and Minister (s.102), and gave BAI a consultative role in respect of other activities of public service broadcasters, e.g. establishing total daily and maximum hourly limits on advertising (s.106(3)). The Act also established formal links between BAI and ComReg, while retaining them as separate bodies. However, the current Government (Dept of Public Expenditure and Reform) announced plans in 2011 for the rationalization of a number of bodies and for a merger between BAI and ComReg to be subject to critical review by the end of June 2012.¹⁵ It is understood that at the time of writing talks are ongoing.

ComReg, which replaced the Office of the Director of Communications Regulation (ODTR) in 2002 under the Communications Regulation Act of that year, became responsible for the regulation of the electronic communications sector (telecommunications, radio communications and broadcasting transmission) and the postal sector.

2.3 WHAT ARE THE FUNCTIONS OF THE MEDIA REGULATORY ENTITY(IES) IS (ARE) EXPECTED TO PERFORM ACCORDING TO THE LAW?

BAI

The functions of the BAI are set out at s.26 of the 2009 Act and include the following:

- Prepare a strategy for the provision of broadcasting services in the State additional to those provided by RTE, TG4, the Houses of the Oireachtas Channel and the Irish

¹³ <http://www.internetsafety.ie/>

¹⁴ <http://www.ispai.ie/>

¹⁵ <http://reformplan.per.gov.ie/appendix-ii-rationalisation-of-state-agencies/>

Film Channel,¹⁶

- liaise and consult with the Communications Regulator (ComReg) in the preparation of the allocation plan for the frequency range dedicated to sound and television broadcasting,
- prepare or make broadcasting codes and rules,
- prepare a scheme for the exercise of the right of reply,
- direct the Contract Awards Committee to make arrangements and make recommendations to the Authority, which the Authority must follow, for the provision of:
 - ⌘ broadcasting services additional to any broadcasting services provided by RTE, TG4, the Houses of the Oireachtas Channel and the Irish Film Channel, and
 - ⌘ multiplex services additional to any multiplex services provided by RTE,
- prepare rules and enter into contracts in respect of electronic programme guides,
- prepare and issue guidance to RTE and TG4 as to the fulfilment of their obligations under the Act,
- make a report to the Minister under in respect of preparedness for analogue switch-off,
- provide information to the public on the availability of services by means of television multiplexes,
- prepare and implement schemes for the granting of funds such as the Sound and Vision scheme (as set out in Pt 10, s.154 of the 2009 Act).

The Authority has other ancillary functions including:

- Collect and disseminate information on the broadcasting sector in the State,
- monitor developments in broadcasting internationally,
- initiate, organise, facilitate and promote research relating to broadcasting matters and media literacy,
- co-operate with other bodies, including representative bodies within the broadcasting sector, to promote training activities in areas of skill shortages in the broadcasting sector, and co-operate with other bodies outside the State which perform similar functions to the Authority.

ComReg

ComReg's functions are set out under section 10 of the Communications Regulations Act 2002, as amended by the Communications Regulation (Amendment) Act 2007, s.5. They are

- a) to ensure compliance by undertakings with obligations in relation to the supply of and access to electronic communications services, electronic communications networks and associated facilities and the transmission of such services on such networks,
- b) to manage the radio frequency spectrum and the national numbering resource, in accordance with a direction under *section 13*,
- c) to ensure compliance by providers of postal services with obligations in relation to the provision of postal services,

¹⁶ The Houses of the Oireachtas Channel and the Irish Film Channel are new channels which are not yet in existence.

- d) to investigate complaints from undertakings and consumers regarding the supply of and access to electronic communications services, electronic communications networks and associated facilities and transmission of such services on such networks, and
- e) to ensure compliance, as appropriate, by persons in relation to the placing on the market of communications equipment and the placing on the market and putting into service of radio equipment.

Its objectives are set out in s.12 of the 2002 Act. They are:

- a) to promote competition,
- b) to contribute to the development of the internal market, and
- c) to promote the interests of users within the Community,
- d) to ensure the efficient management and use of the radio frequency spectrum and numbers from the national numbering scheme in the State in accordance with a direction under *section 13*, and
- e) to promote the development of the postal sector and in particular the availability of a universal postal service within, to and from the State at an affordable price for the benefit of all users.

2.4 DOES MEDIA CONTENT REGULATION COVER ADVERTISING?

Yes. Section 42 of the Broadcasting Act, 2009, provides that:

1. The Authority (BAI) shall prepare, and from time to time as occasion requires, revise, in accordance with this section, a code or codes governing standards and practice (“broadcasting code”) to be observed by broadcasters.
2. Broadcasting codes shall provide –
 - ⌘ that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, in particular advertising and other such activities which relate to matters likely to be of direct or indirect interest to children, protect the interests of children having particular regard to the general public health interests of children,
 - ⌘ that advertising, teleshopping material, sponsorship and other forms of commercial promotion employed in any broadcasting service, other than advertising and other activities as aforesaid falling within paragraph (g), protect the interests of the audience.

The General Commercial Communications Code (“the Code”) and the Children’s Commercial Communications Code have been developed by the Broadcasting Authority of Ireland in accordance with its statutory obligations.¹⁷

(See also above at 1.4)

¹⁷ See <http://www.bai.ie/wordpress/wp-content/uploads/General-Commercial-Communications-Code.pdf> and <http://www.bai.ie/wordpress/wp-content/uploads/Childrens-Commercial-Communications-Code.pdf>

2.5 *IS MEDIA EDUCATION/DIGITAL LITERACY INCLUDED IN THE EXPLICIT (OR IMPLICIT) FUNCTIONS?*

Yes. Media education/digital literacy is explicitly included in the functions of the BAI.

Section 26(2)(g) of the Broadcasting Act 2009 expressly includes the promotion of media literacy in the ancillary functions of the BAI. Section 26(2)(g) provides that the ancillary functions of the BAI include *inter alia*,

“to undertake, encourage and foster research, measures and activities which are directed towards the promotion of media literacy, including co-operation with broadcasters, educationalists and other relevant persons.”

Media literacy is also included in the types of programme to which BAI may award funding under s.154 of the 2009 Act:

The Authority shall prepare and submit to the Minister for his or her approval a scheme or a number of schemes for the granting of funds to support all or any of the following - new television or sound broadcasting programmes to improve adult or media literacy,

2.6 *WHAT ARE THE FUNCTIONS THE MEDIA REGULATORY ENTITY IS EXPECTED TO PERFORM ACCORDING TO OTHER SOCIAL ACTORS? (THIS IS PARTICULARLY RELEVANT IF THERE ARE SOCIAL DEBATES ABOUT ABSENCE OF REGULATION ON SOME SECTORS/AREAS).*

There is public debate about the lack of specific provisions in current legislation in relation to the Internet. BAI has no role in relation to Internet services except as detailed above in paras 1.4 and 2.1. The role of ComReg is also referred to in para. 2.1 above. Its role in promoting competition involves enabling maximum competition in Broadband, Voice and Voice over Internet Protocol through a range of measures, including LLU, bitstream, wireless broadband (including mobile wireless broadband), cable and alternative infrastructure. It also includes promoting enhanced competition in mobile via MVNO entrants, reviewing and (where appropriate) making adjustments in the fixed network wholesale pricing regime, and overseeing operators' compliance with obligations under the regulatory frameworks for telecoms and spectrum. ComReg does not regulate content.

2.7 *IS THERE A FUNCTIONAL DISTINCTION BETWEEN STATE, SELF AND CO-REGULATORY MECHANISMS?*

BAI is the principal content regulator, comprising also a Contracts Committee and Compliance Committee. ComReg, the other statutory body, has responsibility for the infrastructure and licensing processes but does not regulate content.

The co-regulatory measures regarding on-demand services involve BAI in a residual or back-stop capacity (para. 1.4 above). As on-demand services are non-linear and subject to a lower level of regulation under AVMSD, the BAI role is only in relation to appeals concerning protection of minors and hate speech. The system for Internet regulation involves the operation of the self-regulatory ISPAI on the basis of a code, which is overseen by the OIS, established by Government (para. 2.1 above). The ISPAI, as an industry self-regulatory body is concerned with other industry issues as well as Internet content.¹⁸

ASAI, a self-regulatory body deals only with commercial communications but across all media, including broadcasting and the Internet.

¹⁸ See <http://www.ispai.ie/mission.htm>

The Press Council of Ireland (see above para. 2.1) handles complaints against member newspapers and magazines. Its main objects under the Defamation Act 2009 are to ensure the protection of freedom of expression of the press; protect the public interest by ensuring ethical, accurate and truthful reporting by the press; maintain certain minimum ethical and professional standards among the press; and ensure that the privacy and dignity of the individual is protected. It operates on the basis of a Code of Practice, which contains provisions on these issues.

All of these bodies therefore have distinct functions and clear roles.

3. LEGITIMIZING / UNDERLYING VALUES

3.1 WHAT ARE THE VALUES THAT JUSTIFY MEDIA STATE REGULATION? WHERE CAN THIS 'NORMATIVE THEORY' BE FOUND (E.G. LAW, AGREEMENTS, PROTOCOLS, POLITICAL DISCOURSES, OTHERS?)

Is it identifiable a hierarchy of values? (e.g. freedom of speech/press, independence, pluralism/diversity, protection of fundamental human rights, quality, empowerment, others).

The values defended by state media regulatory structures are similar to those safeguarded by self-regulation and co-regulation?

Values

The basic values that justify media state regulation are to be found in the Irish Constitution (Bunreacht na hEireann)¹⁹. The Irish Constitution specifically mentions the media in Article 40.6.1, which provides for freedom of expression. This freedom is subject to restrictions *inter alia* in order to protect public order and morality.

Article 40.6.1 provides *inter alia* that:

“The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.”

Article 40.6.1 also outlaws the publication or utterance of blasphemous, seditious or indecent matter.

Elsewhere the Constitution protects the right to one's good name (Article 40.3.2), the right to privacy (an unspecified right recognised by the courts as coming under Article 40.3.1), the right to communicate (also an unspecified right recognised by the courts as coming under Article 40.3.1) and the right to a fair trial (Article 38). All such rights guaranteed by the Constitution provide justification for regulation of the media.

Hierarchy

Freedom of expression is a fundamental right protected by the Irish Constitution, as are the right to good name etc. The Supreme Court has stated that where there is a conflict

¹⁹ <http://www.constitution.ie/constitution-of-ireland/default.asp>

of rights it strives for a mutually harmonious application of constitutional rights and it is only where that is not possible that it resorts to a hierarchy of rights, both as between the conflicting rights and the general welfare of society.²⁰

The basic right to freedom of expression is the central right applicable to the media. Media issues, such as independence, pluralism and diversity are addressed mainly by legislation. For example, s.25 of the Broadcasting Act 2009 provides as follows:

25.—(1) The Authority and the statutory committees, in performing their functions, shall endeavour to ensure—

- that the number and categories of broadcasting services made available in the State by virtue of this Act best serve the needs of the people of the island of Ireland, bearing in mind their languages and traditions and their religious, ethical and cultural diversity,
- that the democratic values enshrined in the Constitution, especially those relating to rightful liberty of expression, are upheld, and
- the provision of open and pluralistic broadcasting services.

The broadcast regulator, BAI, implements these and other such objectives through codes, policy statements, etc.

Values similar?

The fundamental values and principles defended by state media regulatory structures are similar to those safeguarded by self-regulation and co-regulation. All are concerned with freedom of expression, democratic values and media standards in the interests of audiences and consumers, within their various remits.

4. PERFORMANCE

4.1 WHAT ARE THE TASKS THAT THE REGULATORY ENTITY(IES) ACTUALLY PERFORM IN ITS/THEIR DAILY ACTIVITY? (THIS IS PARTICULARLY RELEVANT TO MENTION DISCREPANCIES BETWEEN LEGAL DUTIES AND ACTUAL PERFORMANCE).

BAI's daily tasks include the drafting of codes, development of policies, liaison with the Department of Communications, licensing new stations and reviewing licences of existing stations, and administering various funding and other schemes aimed at developing and supporting the broadcasting sector in Ireland. A recent major issue has been the development of multiplexes and preparation for the digital switch-over. BAI has been very efficient in carrying out its tasks, which are extensive and onerous under the Broadcasting Act 2009, although it is hampered somewhat by the inability to fill staff vacancies due to limits imposed on public service recruitment as a result of Ireland's economic recession.

²⁰ *Irish Times Ltd v Judge Murphy* [1998] 1 I.R. 359, [1998] 2 I.L.R.M. 161

4.2 IN DAILY ACTIVITY, THE STATE REGULATORY BODY(IES) COMPLEMENT AND/OR CLASH WITH THE ACTIVITIES OF SELF-REGULATION AND CO-REGULATION ENTITIES?

The various bodies either deal with separate sectors of the media or complement each other.

4.3 WHEN CITIZENS, MEDIA COMPANIES OR OTHER ACTORS DISAGREE WITH MEDIA REGULATORY DECISIONS/ PERFORMANCE, ARE THERE APPEAL MECHANISMS? CAN COURTS OVERTURN A PARTICULAR DECISION TAKEN BY THE MEDIA REGULATORY BODY?

A decision of BAI can be judicially reviewed in the High Court and its decision further appealed to the Supreme Court. Judicial review is confined to consideration of the fairness of the process by which the decision was reached. A decision to terminate or suspend a broadcaster's contract by the Authority under any provision of the Broadcasting Act or a provision of the contract, may be appealed by the holder of the contract to the High Court (s.51(4)), as can a decision to impose a financial sanction (s.55(5)).

A decision of ComReg can also be judicially reviewed or appealed.

In relation to the print media, there is an appeal from decisions of the Press Ombudsman to the Press Council and complainants who use the Press Council process are also entitled to proceed to court if they have a cause of action.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

5.1 WHAT ARE THE LEGAL MECHANISMS TO ENSURE COMPLIANCE WITH THE MEDIA REGULATORY BODY(IES)' DECISIONS?

BAI has a monitoring and enforcement role under the Broadcasting Act 2009, including in some instances power to terminate or suspend a contract (s.51), for example where the broadcaster has supplied misleading information or has failed to comply with the term(s) of the contract. The Act also provides the BAI with investigatory powers (s.50, s.53) and the power to recommend the imposition of financial sanctions in certain circumstances, including breach of a broadcasting code or rule (s. 54(4)). Financial sanctions of up to €250,000 can be imposed but only by a court on the recommendation of BAI, unless the broadcaster concerned opts to allow the BAI to decide.

The Compliance Committee handles complaints from the public of breaches by broadcasters of their statutory obligations or provisions of the codes. Its decisions are published on its website.²¹ Where a complaint against a broadcaster is upheld in whole or in part, the broadcaster is required to broadcast the Committee's decision (s.48(11)).

ComReg, in accordance with the Communications Regulations Act 2002, can ensure compliance with their decisions under Part 3 of the Act through the use *inter alia* of authorised inspections, search warrants and monetary fines. ComReg can also issue notices requiring the production of evidence or documents (2007 Act, s.10) and it is an offence not to

²¹ http://www.bai.ie/?page_id=183

appear before the Commission without reasonable excuse or to refuse to be sworn in or to answer a question or produce a document (s.10). ComReg can prosecute summary offences.

In the case of the Press Council/ Press Ombudsman system, remedial action may consist of a number of remedies as set out under s.44 of the Defamation Act 2009, including the publication of the Press Ombudsman's decision in the offending publication, the publication of a correction in due prominence, the publication of a retraction or such other action as the Ombudsman may, in the circumstances deem appropriate.

5.2 ARE THESE LEGAL ENFORCEMENT MECHANISMS USED AND HOW?

Court cases do result but rarely and in most cases to date the decisions of BAI's predecessors have been upheld. Suspension or withdrawal of licences is extremely rare. The termination of the licence of Radio Limerick One was upheld by the Supreme Court in 1997, while the licence of TV3 in 1992 was eventually reinstated following a court judgment quashing the regulator's decision on the grounds of natural justice.

An example of the BAI's use of its enforcement mechanisms can be seen in its recent investigation into a breach of the Broadcasting Act by the state public service broadcaster, RTE. In May 2011, a television programme entitled "Prime Time Investigates- Mission to Prey" was broadcast by RTE. The Compliance Committee decided to launch an investigation into apparent breaches of the Broadcasting Act under s.39(1). An investigating officer was appointed. The officer notified RTE, who submitted a detailed response. RTE were found to be in serious breach of s.39(1)(b) and (e) of the Broadcasting Act and the BAI imposed a financial sanction of €200,000 on RTE.²² This was a very serious and very exceptional case which also resulted in a court action for defamation, which was settled for a sum believed to be in the region of €1 million.

Comreg, whose enforcement powers were increased in the 2007 Amendment Act, has taken a number of court cases against mobile operators, the postal service and other operators under its remit. For example, as a result of a court case taken against it by ComReg in 2007, Eircom formally delivered its market requirement document to ComReg in relation to local loop unbundling.²³

5.3 HOW RELEVANT ARE NON-BINDING GUIDELINES AND REGULATORY DOCTRINES?

Guidelines are useful for understanding how certain policies and regulatory processes operate. They provide transparency and are built into the regulatory systems. For instance, BAI's guidelines or guidance notes on issues such as referenda and election coverage, the complaints' process and access rules have been particularly useful.

ComReg's guidelines can also be a useful aid to understanding technical issues.

The open consultation process is also an important part of the regulatory processes of both bodies.

²² See http://www.bai.ie/wordpress/wp-content/uploads/20120504_StatementofFindings_VFINAL_SO.pdf

²³ <http://www.rte.ie/news/2005/1024/comreg-business.html>

5.4 WHOM IS/ARE THE MEDIA REGULATORY ENTITY(IES) ACCOUNTABLE TO?

BAI is accountable to the Minister for Communications in so far as it must submit annual reports to the Minister (Broadcasting Act 2009, s.38(1)), as well as the strategic plan (s.29). Broadcasting codes and rules must also be presented to the Minister (s.45). A copy of any agreement or arrangement regarding broadcasting rights to major events must be given to the Minister (s.171). The Minister may by order remove a member of the BAI or its statutory committees for stated reasons but a copy of the order must be laid before the Oireachtas (s.10(8)).

BAI accounts must be submitted annually to the Comptroller and Auditor General, an office established in accordance with Article 33 of the Constitution to control on behalf of the State all disbursements and to audit all accounts of moneys administered by or under the authority of the Oireachtas.

BAI is also accountable in various other ways to the public. For instance, every broadcasting licence and contract shall be open to inspection by the public (s.59(4) and s.69(5) of the 2009 Act), as must every draft code and rule (s.44). BAI must also provide means of redress for anyone making a written complaint in good faith that comes within the areas set out in s.48 (s.47).

The Chief Executive of BAI and the Chief Executive and chairman of the public service broadcasters' boards are accountable to specified Oireachtas (Parliament) Committees (2009 Act, s.19, 20).

ComReg is also accountable to the Minister and public. For example, it must submit an annual action plan to the Minister and arrange for a copy of it to be placed before the Houses of the Oireachtas (2007 Act, s.9). It must then make it available to the public.

5.5 ARE THE MEDIA REGULATORY BOARD MEMBERS SUBJECT TO ANY INCOMPATIBILITY REGIME TO SAFEGUARD THEIR INDEPENDENCE OR TO PROTECT OTHER VALUES CONSIDERED RELEVANT?

See above at 1.3.

The eligibility criteria for members of the BAI are set out in s.8 of the Broadcasting Act 2009. In accordance with s.8, there shall be 9 members of the Authority, 5 to be appointed by Government on the nomination of the Minister and 4 to be appointed by Government on the nomination of the Joint Oireachtas (Parliament) Committee. In order to be eligible for appointment as a member of the Authority or a statutory committee, a person must have or have had experience of or shown capacity in one or more of the areas of expertise set out in s.9, such as experience of media, broadcasting or legal or regulatory affairs.

In accordance with s.9(2), each member of the Authority and a statutory committee shall be appointed for a period not exceeding 5 years and shall represent the public interest in respect of broadcasting matters. S.9(5) further stipulates that members cannot serve more than 2 consecutive terms of office.

In order to safeguard the independence of the BAI, section 12(1) of the Broadcasting Act 2009 sets out exclusions from membership of the BAI and its statutory committees:

Where a member of the Authority or a statutory committee is nominated as a candidate for election to the European Parliament, or to either House of the Oireachtas, he or she shall thereupon stand suspended from membership of the Authority or the statutory committee.

There are similar restrictions placed on members of the Board of the public service broadcasters (s.86).

Members and staff of the Authority or a statutory committee must disclose any interest in any body or concern with which the Authority has made a contract or proposes to make a contract, or any interest in any contract which the Authority has made or proposes to make (Broadcasting Act 2009, s. 21, 22). They must also abide by a code of conduct (s.23).

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The membership of the Broadcasting Authority of Ireland is nine. At least four of the nine members of the Authority must be men and four must be women (s.8).

The Contract Awards Committee comprises eight members, four of whom are appointed by the Government on the nomination of the Minister and the other four are appointed by the Authority itself, two of them being members of the Authority and two being members of staff of the Authority. As far as practicable the Minister and Authority must endeavour to have an equal number of men and women. The membership requirements for the Compliance Committee are the same (s.8) but no person can serve on both committees (s.12 (8) and 12(9)). The Government, on the nomination of the Minister, also appoints a Chairperson for the Authority and each of the Committees (s.11). The Authority itself may establish advisory committees to advise and assist it or a statutory committee in the performance of its functions (s.17).

The functions of the Authority are as set out above at 2.3. Members must have experience in one or more of a wide range of areas of media or legal or regulatory affairs (see above) and must represent the public interest. They are appointed for a term of five years – see above 5.5.

A Chief Executive Officer to the Authority is appointed, by means of a public competition, by the Authority with the consent of the Minister (s.14). BAI had an Executive staff of 40 (as at December 2009). Since then, staffing levels have fallen due to an embargo on recruitment in the public service and on replacing staff who leave. This is due to the recession being experienced in Ireland. The Department of Communications lists the staff of BAI as 33, while the answer given to a parliamentary question on 28 June 2011 was that BAI's staff numbered 32.²⁴ Staff are employed in the main divisions of BAI's work, i.e. licensing, codes and standards, funding and development, broadcasting complaints and the corporate functions. BAI has also had additional functions conferred on it since 2009, for example, in connection with DTT (digital terrestrial television), e.g. Statutory Instrument (S.I. 67 of 2011 in relation to the provision of broadcasting services on the RTÉ multiplexes).

ComReg is currently headed by two Commissioners, one of whom is appointed Chairperson by the Minister, and is organised in a number of divisions: corporate services,

²⁴ Dáil Éireann Debates Volume 736 No.4, 28 June 2011, available at <http://debates.oireachtas.ie/dail/2011/06/28/00193.asp>. A later written answer of 16 November 2011 gave the staff number as 33 as of 30 September 2011: <http://debates.oireachtas.ie/dail/2011/11/16/00155.asp>

general counsel, market framework, retail and consumer services, wholesale, and also has a senior economic advisor. The structure is based on cross-functional teams operating in a multi-disciplinary environment. The total number of staff in 2010 was 117 but ComReg, like BAI, is affected by restrictions on public service recruitment.²⁵

Each Commissioner is appointed by the Minister, but only when the Civil Service and Local Appointments Commissioners, after holding a competition on behalf of the Commission, have selected him or her for appointment as a Commissioner. Commissioners are appointed on a full-time basis for a period of not less than 3 years and not more than 5 years and will normally not serve more than two terms (2002 Act, s.15).

ComReg's functions are set out above.

7. DIMENSION: FUNDING

7.1 HOW IS/ ARE THE MEDIA REGULATORY BODY(IES) FUNDED? WHAT IS THE PROPORTION OF REVENUES (STATE BUDGET, LICENSES, FEES, FINES, ETC.). WHAT ARE THE EXPENSES/REVENUES (TOTALS) PER YEAR? IS THERE ANY YEARLY FINANCIAL REPORT? IS IT PUBLIC?

The BAI is funded by means of a levy imposed on broadcasters (see Broadcasting Act 2009, section 33). The Authority can charge for services or facilities it provides under s.36(2). Section 34 of the Act also provides that in exceptional circumstances, the Government may contribute funding to the BAI. According to section 37, the BAI must prepare an annual financial report to be laid before the Houses of the Oireachtas. Details are included in BAI's Annual Reports and Accounts.²⁶

The precise terms attaching to the levy, including the method of computation and payment terms, are set out in a levy order made by the BAI: Broadcasting Act 2009 (Section 33) Levy Order 2010, Statutory Instrument No 007 of 2010, which was laid before both Houses of the Oireachtas on 19 January 2010, as required by the 2009 Act.

The BAI levy model is cost-recovery in nature, i.e. the baseline levy percentage is set at a level to ensure full recovery of the costs properly incurred by the Authority and its constituent committees. As a result, the levy computation must have full regard to the qualifying incomes of public service broadcasters and broadcasting contractors required to pay the levy as well as to the operating costs of the Authority for the relevant period.

An additional feature of the BAI levy model is a sliding scale element, whereby the levy amount paid (expressed as a percentage of total qualifying income) falls as the value of qualifying income rises. This feature is intended to reflect the fact that, other things being equal, the minimum or fixed costs of regulation are smaller as a proportion of total qualifying incomes for larger entities. All broadcasters must pay something.²⁷

ComReg is funded by levies imposed on providers of electronic communications services (Communications Regulations Act 2002, s. 30(1)(b)) and by providers of postal

²⁵ Annual Report 2010, p.58, available at http://www.comreg.ie/_fileupload/publications/COMREG_AR_2010_ENGLISH.PDF

²⁶ See http://www.bai.ie/wordpress/wp-content/uploads/BAI_AR_2010_English.pdf

²⁷ See www.bai.ie. S.I. 7 of 2010 (levy order) is available at: <http://www.bai.ie/wordpress/wp-content/uploads/SI-07-20101.pdf>

services (s. 30(2)). Income is also generated from the issue and renewal of wireless telegraphy licences and fees for the use of spectrum.²⁸ A detailed financial statement is included in annual reports. In accordance with s. 32 of the Act, ComReg must prepare an annual financial report to be laid before the Houses of the Oireachtas, thereby becoming a public document.

The Press Council is entirely funded from subscriptions paid by members of the Press Council in accordance with section 44(7)(1) of the Defamation Act 2009. The PCI's financial accounts are included in its annual reports which are publicly accessible.

The ASAI system is financed entirely by the advertising industry. The main income source is an annual subscription from advertiser members, collected and remitted by their advertising agencies or media-buying companies by means of a levy of 0.2% (€2 per €1000) of media spend. Audited accounts of the ASAI are published with the Annual Report, copies of which are available on request and on the ASAI website.²⁹

ISPAL is a not-for-profit activity, which is completely funded by the industry on a cost-sharing basis. It funds and operates the www.hotline.ie service which permits members of the public to report suspected child pornography or other illegal content they may encounter on the Internet. The Hotline currently receives part-funding of its operations from the European Commission's Safer Internet Programme.

8. REGULATION IN CONTEXT

8.1 GENERAL BRIEF DESCRIPTION OF THE NATIONAL MEDIA SYSTEM WHERE THE MEDIA REGULATORY BODY IS INSCRIBED (LEVEL OF MARKET CONCENTRATION, PSB (YES OR NO), NO OF CHANNELS, NO OF RADIO STATIONS, DELIVERY SYSTEMS, INTERNET PENETRATION, ETC.)

Ireland is a small country with a small media market compared to its nearest neighbour, the U.K. Print and broadcast media from the U.K. are widely available in Ireland. BBC1, UTV, S4C, BBC2, and Sky 1 had a combined share of 15.1% of the Irish market in 2010, while the UK satellite packager BSkyB, for example, had over 600,000 Irish subscribers at the end of 2010.

The BAI licenses 14 television and 60 radio services and regulates the 3 national TV and 4 national radio services. It also licenses 3 satellite content television services (Setanta Sports Channel Ireland, Setanta Sports 1 and Setanta Sports North America), 7 Cable/MMD (multichannel multipoint distribution) content television services (3e, UPC, City Channel Dublin, City Channel Waterford/South East, City Channel Galway, Munster, Hungary) and 3 community content television services (DCTV, P5TV and Cork Community TV CCTV). RTE and TG4 are public service broadcasters but public service obligations are imposed on all broadcasters licensed by BAI, except as permitted by the Broadcasting Act, e.g. derogations in certain circumstances (s.39).

²⁸ See annual report 2010, available at http://www.comreg.ie/_fileupload/publications/COMREG_AR_2010_ENGLISH.PDF

²⁹ See <http://www.asai.ie/selfregulation/funding.asp#funding>

Athena Media³⁰ reported in 2010 that while the majority of viewers have significant digital choice (nearly 80% of satellite or cable viewers have access to digital services, with less than 22% relying on terrestrial analogue), over half of what Irish audiences watch is confined to RTÉ and TV3. RTÉ One is the most popular station followed by TV3. Irish audiences have a potential choice of over 558 channels but in reality, core viewing is spread across 20-25 services with domestic channels performing extremely well. The date for analogue switch-off has been set by the Government for 24th October 2012. RTE has already established a number of digital channels. The channels and services to be made available on SAORVIEW (digital) are: RTÉ One, RTÉ Two HD, TV3, TG4, RTÉ News Now, 3e, RTÉjr, RTÉ One + 1 and RTÉ Digital Aertel.

Athena Media says in its report that while most cable and satellite subscribers are moving to digital platforms, there has been little development in the IPTV and mobile television markets. There are three operators (Magnet networks, 3Play Plus, and Smart Telecom) in the IPTV market, but the number of subscribers is still relatively low (less than 20,000 households in 2011 according to ComReg). The mobile television market is still in its early stages.

There are 7 national daily newspapers, 1 evening, 6 Sundays and over 40 audited regional newspapers. While there is considerable choice in the market, as many British newspapers also produce Irish editions, issues have arisen in the past about the dominant position enjoyed by Independent Newspapers (Independent News & Media). These issues have now become even greater with the acquisition by Denis O'Brien's Communicorp, which controls, and/or has substantial interests in, six independent radio services in Ireland, of a 29.9% stake in Independent News & Media (INM). BAI found recently that, while Denis O'Brien did have a substantial interest in INM, he did not have a controlling interest in it.³¹ However, the Government is preparing new legislation to address media mergers and acquisitions. Currently these matters are provided for in s. 23 of the Competition Act 2002, which results in BAI, the Competition Authority and the Minister all having a role in deciding whether to permit particular mergers and acquisitions on a variety of different criteria.

There were 3,122,358 internet users in Ireland (representing 66.8% of the population) in December 2011, according to Internet World Stats. (Internet World Stats, April 2012). Over three quarters of adults (77%) in Ireland use the internet for personal use; there is near universal use of the internet from home, according to ComReg Consumer ICT Survey Q2 2010 carried out by MillwardBrown. Internet subscriptions (1,688,543) increased as rises in cable (+5.8%), fibre/satellite (+5.2%) and DSL (+0.4%) subscriptions compensated for falls in FWA (-7.1%) and narrowband subscriptions (-13.9%), according to the Commission for Communications Regulation (ComReg)'s Quarterly Report on the Irish telecommunications market for the period 1st October to 31st December 2011 (Q4). (ComReg, March 2012).

³⁰ See Athena Media, *Irish Broadcasting Landscape: Economic and Environmental Review for the Broadcasting Authority of Ireland (BAI)*, 2010, available at http://www.bai.ie/wordpress/wp-content/uploads/20110325_StratEconAnlysRpt_vFINAL_AC.pdf According to data from ComReg in May 2011, 73% of Irish TV households received digital television. Pay-TV households had reached 80% in May 2011, divided between satellite and cable/MMDS. For further information on the television market in Ireland, see <http://mavise.obs.coe.int/country?id=17>

³¹ See <http://www.bai.ie/?p=2649>

8.2 GENERAL COMMENT ON YOUR OWN PERCEPTION REGARDING THE RELEVANCE OF THE MEDIA REGULATORY BODY(IES) IN THE NATIONAL MEDIA SYSTEM. IS/ARE IT/THEY SIGNIFICANT?

BAI and ComReg are very significant in the national media system. The self-regulatory bodies identified in the commentary above are also significant in their own right and in their own realms.

Italy

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1. LEGAL FRAMEWORK

The Italian *Communications Regulatory Authority* (AGCOM, 'Autorità per le Garanzie nelle Comunicazioni') is one of the independent regulatory agencies created in Italy after the completion of the European Internal Market, in order to develop a free, competitive market in the public utilities sector. The European law has, therefore, decisively contributed to affirm the importance of competitiveness in several economic fields, in opposition to the previous Italian model of governmental control over national and local public services (Merusi and Passaro, 2003). AGCOM, as all other Independent Regulatory Agencies, are characterized by a *de jure* independence from political institutions (*formal independence*), as well as by a *de facto* independence, meaning a high level of autonomy both in its internal organisation and in the management of its financial resources by politics.

AGCOM was established in 1997 by Parliamentary Law no. 249 of July, 31st in order to support the Italian liberalisation of the telecommunications market, as the European Law clearly states. The AGCOM replaced the former *Radio and Publishing Guarantor* ('Garante per la Radiodiffusione e l'Editoria') that was responsible for overseeing television and radio broadcasting, and the press¹. In contrast to such a *Guarantor*, the new agency now operates

¹ Due to its lack of formal independence from Parliament and the Government, the Guarantor was unable to ensure the creation and regulation of a competitive market free from political interests. Such a body had been created with the Act no. 223 of 1990 and was composed of a guarantor - appointed by the President of the Republic though nominated by the Presidents of the two Houses of the Italian Parliament - and by a public administrative structure. Its main task was to monitor activities of TV, radio and the press. It had neither regulatory functions nor expenditure autonomy.

with complete autonomy and independence in its judgements and evaluations². The creation of an independent agency was conceived as a necessary step for the completion of the European Internal Market and for a more liberal and pluralist communication system in a national context marked by strong market dualism and political influence.

AGCOM's organisation and functions are primarily specified in the 1997 Law (see points 2 and 6). Other AGCOM duties are listed in Act no. 28 of 2000 on equal rights of access to TV and radio programmes for all political and social forces (the so-called '*par condicio*'), in the 2003 *Code for the protection of personal data* and in the 2004 *Code of self-regulation in respect of pluralism*.

Generally speaking, two fundamental features make AGCOM an interesting case-study in the landscape of European Independent Regulatory bodies. Firstly, according to Law no. 249 of 1997 AGCOM is a *convergent* Authority. This choice made by the Italian legislator represents one of the first attempts in Europe to create a single regulatory agency designed to actively promote the integration between the telecommunication and media markets³, in line with European Union recommendations. Secondly, AGCOM is the only Italian Independent Authority providing a decentralized complex system of regulation based on *Regional Communications Committees* ('Comitati Regionali per le Comunicazioni' – Corecom) established in each of the twenty Italian Regions. These local Committees have an autonomous administrative structure and a budget allocated by Regional Governments, with a fixed contribution per annum provided by AGCOM. Corecoms have a dual nature: (1) they were created in each Region with Regional Acts between 2001 and 2009 and endowed with advisory and other functions by Regional Councils. For this reason their organisation and performance tend to vary across the different Regions; (2) they also constitute delocalised branches of AGCOM and therefore perform some regulatory functions on behalf of the national Authority, according to the subsidiarity principle. In particular, Corecoms monitor local broadcasting programmes and content, as well as commercials and political messages during electoral campaigns. They also settle disputes between telephony or broadcasting operators and users. Finally, they are required to issue the annual list of local broadcasters entitled to receive State funds.

2. FUNCTIONS

Act no. 249 of 1997 describes in detail AGCOM's organisation and functions. The official website provides a useful summary of these activities⁴.

The *President* of the Authority "convenes the meetings of the collegial bodies, determines the agenda, chairs the proceedings, and supervises the implementation of decisions".

The Commission for Infrastructures and Networks:

² "È istituita l'Autorità per le garanzie nelle comunicazioni, di seguito denominata «Autorità», la quale opera in piena autonomia e con indipendenza di giudizio e di valutazione." (*Trans*: "The Act established the Communications Regulatory Authority, hereafter named Authority", which operates in full autonomy and independence in its judgements and evaluations.") Available at: <http://www.agcom.it/default.aspx?message=viewdocument&DocID=405>, 2012.

³ See G. Morbidelli, F. Donati (a cura di)(2004), *Comunicazioni: verso il diritto della Convergenza?*, Giappichelli, Torino, p. 2.

⁴ See <http://www.agcom.it/Default.aspx?message=contenuto&DCId=295> (2012).

- “defines measures to ensure the security of communications;
- sets standards for decoders in order to promote the utilisation of the service;
- defines objectives and criteria for interconnection and access to telecommunications infrastructure on the basis of non-discriminatory criteria, as well as setting maximum tariffs;
- regulates relations between operators and users of telecommunications infrastructures;
- verifies that telecommunications infrastructure operators provide interconnection and access to network infrastructure and service operators;
- promotes technological agreements between operators in order to avoid proliferation of technical transmission plants throughout the territory;
- settles disputes on interconnection and access;
- is periodically informed by the incumbent on all cases of service interruption;
- defines objective and subjective ambits of universal service’s obligations;
- promotes interconnection between national telecommunications systems and those of other countries;
- defines criteria for the drawing up of national telecommunication numbering plans, according to the principles of objectivity, openness, impartiality, equity and celerity;
- settles disputes between the incumbent and private users;
- verifies that radio-frequency ceilings compatible with human health are not exceeded”.

The Commission for Services and Products:

- “ascertains that services and products supplied by operators are consistent with the regulations in force and meet all the legal criteria required;
- promotes the integration of technologies and the offer of telecommunications services;
- issues directives on general standards of quality in services and on the adoption, by each operator, of a specific service charter;
- supervises modalities of distribution of services and products, including advertising, and may issue regulations, in conformity with European legislation, on the relation between fixed and mobile service operators and resellers of telecommunications activities;
- ensures that minimum periods are respected in order to use audiovisual contents;
- issues regulations on advertising and television-sales and regulates the interaction between suppliers and network operators and end-users, including proper use of private information;
- ascertains that regulations on safeguarding of minors in the radio-television sector are observed, in accordance with the self-regulatory codes adopted by operators and with the guidelines provided by the Parliamentary Commission for general policy and supervision of radio and television services;
- ascertains that the protection of linguistic minorities in mass media communications is observed;

- ascertains that regulations on the right of reply in the radio-television sector are observed and respected;
- guarantees the application of provisions currently in force regarding propaganda, advertising and political information, as well as the observance of regulations concerning equal treatment and parity in access to publications and transmission of information and electoral propaganda and issues specific regulations for their implementation;
- is responsible for surveys on mass-media audiences and the compilation of ratings;
- verifies correctness of methodologies used and the veracity of published data;
- ascertains the publication and distribution of surveys in accordance with criteria established by AGCOM;
- monitors radio-television transmissions;
- applies sanctions contained in article 31 of law no. 22 of August 6th 1990”.

The Council:

- “communicates its views to the Minister for Communications on the guidelines of the National plan for the distribution of frequencies;
- draws up, in cooperation with the Minister of Communications and having consulted the broadcasting licensees and the national associations of radio-television operators, plans for the allocation of frequencies;
- advises Government on opportune interventions – including legislative ones - on matters of technological innovation and development in the field of communications;
- guarantees application of legislative provisions regarding access to media and communication infrastructures, as well as drawing up specific regulations;
- promotes research and studies on technological innovation and development in the communications and multimedia services sectors;
- promotes integration of technologies;
- adopts regulations and criteria for the awarding of licences and authorisations as well as on the level of fees of contributions, both in the telecommunications and in the radio-television sectors;
- proposes to the Minister of Communications regulations to be annexed to concessions and authorisations in the field of radio and television broadcasting;
- verifies financial statements and data regarding activities and assets of authorised operators and radio-television licensees in accordance with regulatory arrangements;
- ascertains the existence of dominant positions in the radio-television sector and adopts the consequent measures;
- carries out the functions and tasks previously assigned to the *Radio and Publishing Guarantor*;
- maintains the national Register of communications operators;
- checks whether the guidelines issued by the Parliamentary Commission for general policy and supervision of radio-television services are respected by the licence holders for radio-television services;

- proposes to the Minister of Communications the outline of the agreement to be annexed to the licenses for public radio-television services and monitors the implementation of all envisaged duties;
- gives advice on measures taken by the Antitrust authority with regard to operators in the communications sector;
- prepares the Annual report on the activities and the programmes of work of AGCOM, which has to be submitted to Parliament by June 30th of every year;
- authorises conveyances of property of companies operating in the communication sector;
- adopts regulations concerning human resources and financial management of the AGCOM;
- approves the Ethical Code of Conduct which is obligatory for all personnel of AGCOM;
- exercises all other functions envisaged in Law no. 481/1995, as well as those not expressly attributed to the Commissions”.

The Code *for the protection of personal data* ('Codice per la protezione dei dati personali', 2003) and the *Code of self-regulation in respect of pluralism* ('Codice di autoregolamentazione in materia di attuazione del principio del pluralismo', 2004) increase the powers of the Authority in monitoring the adherence to such codes.

Act no. 112 of May 3, 2004, is concerned with the competitive market in the field of both mass media and telecommunications (including the Internet), giving AGCOM further *antitrust* powers. Moreover, the subsequent *Single Text for Radio-television* ('Testo unico della Radiotelevisione') lists the principal subjects disciplining the markets of telecommunications and mass media, which has been re-named *Integrated Communications System* ('Sistema Integrato delle Comunicazioni' – SIC). Those subjects are: AGCOM, Corecoms – considered in their double nature as implementing bodies of AGCOM and advisory structures of the Regions – the Ministry for Communications, the Government itself, the Italian *antitrust* authority, the Italian Guarantor of privacy.

As stated above, some regulatory functions have been delegated by AGCOM to the Regional Committees (Corecoms). The so-called 'first degree' delegated functions have been established by means of a general agreement signed by AGCOM and the *Conference between State and Regions* ('Conferenza Stato – Regioni') in 2003. Such functions include:

1. monitoring the content of TV and radio programmes in order to protect minors against threatening, violent or erotic images;
2. monitoring the respect for each citizen's right of reply in TV and radio programmes;
3. control over the publication and distribution of surveys in response to criteria provided by AGCOM;
4. settling of disputes between users and operators or amongst operators;
5. monitoring the compliance with *antitrust* rules by local broadcasters.

Nowadays all Regions – except Sicily - have been delegated to fulfil these tasks. Some of them have also received from AGCOM so-called ‘second degree’ functions, listed in a second Agreement of 2008:

1. A complete monitoring of radio and TV programs broadcast in the Region, in line with national law and regulations set up by the boards of AGCOM;
2. The updating of the *Register of communications operators* (‘Registro degli Operatori di Comunicazione’) for every Region;
3. The *definition of disputes* (‘Definizione delle Controversie’), a sort of ‘second level judgement’ for those disputes which were not been settled during the first conciliatory attempt.

Furthermore, national Laws no. 448 of 1998 and no. 28 of 2000 involve Corecoms in the completion of two further tasks:

- The allocation of State contributions to national and local television and radio stations, distributed by the Minister of Communications on the basis of a list of criteria supplied annually by the Corecoms;
- Monitoring the equal right of access to TV and radio programmes by all political and social parties (*par condicio*). Act no. 28 of 2000 on that matter entitles every Corecom – as a functional organ of AGCOM – as well as AGCOM itself, to ensure the right to be represented and the participation in radio and television programs of every social, cultural or political group, as well as to publish political or social messages in newspapers if needed. Corecoms are required to collect citizens’ reports of alleged violations and to inform AGCOM on this and related matters.

Currently, only eleven Corecoms have received ‘second degree’ type of delegations; in the remaining Regions AGCOM carries out the duties.

Corecoms’ performance depends on a series of elements such as: staffing (human resources); the financial resources allocated by the Regions; the number of disputes between citizens and operators filed each year, the number of local television and radio stations to be monitored and controlled. Generally speaking, Corecoms have successfully fulfilled the expectations placed on them over the last few years; despite existing differences between regions, Corecoms have achieved their goals in terms of monitoring of TV and radio programmes, protection of minors and resolution of disputes between users and operators. According to AGCOM annual reports, Corecoms have become reliable institutions in the field of telecommunications regulation.

According to the national law, AGCOM should collaborate with the Minister of Communications on matters concerning licensing, frequency allocation, protection of human health, and promotion of public interest; and with the Postal and Communications Police (*Polizia postale e delle comunicazioni*) and the Financial Police (*Guardia di Finanza*) to prosecute crimes, frauds and abuses in the fields of telephony, broadcasting, radio and internet⁵.

⁵ In particular, the Authority may require the collaboration of the Postal and Communications Police for the following activities: monitoring of services or products relating to telecommunications; controls on the conformity to the requirements of the services provided; verification on the ways of distribution of services, products and information to users; verification of

AGCOM is endowed with important *antitrust* powers, in order to preserve competitiveness in the telecommunication market. Nevertheless, the law does not make a clear distinction between AGCOM's functions and those assigned to the Competition Authority; as a consequence, competences often overlap and in day-by-day activities both agencies may intervene in cases of abuse of dominant positions in the telecommunication market. However, while the *antitrust* agency punishes the *abuse* of the existing dominant position of a TV or radio company, AGCOM aims to prevent and stop the *dominant position* itself.

Finally, it is important to recall the existence of a peculiar self-regulatory body in the Italian market of telecommunication: the *Committee for the Implementation of the Code for TV and Minors regulation* ('Comitato di attuazione del codice di regolamentazione convenzionale tv e minori'). In 1993 the *Federation of national and local Italian television stations* (FRT – 'Federazione Radio e Televisioni') and 21 associations of users, customers, teachers and parents wrote and signed a Code of self-regulation for the airing of appropriate TV and radio programmes for minors during a precise time slot of the day (16.00 to 19.00). The Committee is composed of representatives of national and local television stations and members of those associations who signed up to the Code. This body has not only advisory and monitoring tasks, but it also enables the co-operation between users and media operators in the exchange and sharing of ideas⁶.

3. LEGITIMIZING / UNDERLYING VALUES

The annual AGCOM report informs citizens about the purposes and the goals the Authority has achieved during the course of the year in the following fields of activity⁷:

1. Market *Competitiveness*. Since its inception, AGCOM has been endowed with important *antitrust* powers and one of its most relevant duties has been to create a free and competitive market in the field of telecommunications, according to European Union legislation. Nevertheless, while important improvements have been achieved in the country in the field of telephony (according to national and European data Italy has one of the most competitive telecommunication markets in Europe), the broadcasting sector has remained less competitive to date. Three big companies – the public sector RAI, Mediaset and Sky – have the monopoly over the national TV market, while hundreds of regional and local television stations struggle to maintain their position within local markets.
2. Media *Pluralism*. The oligopolistic structure of the Italian media market does not guarantee objective information that is independent of economic or political interests. AGCOM's regulations have not improved the situation to date, nor has it contributed to the introduction of digital technology between the years 2009

the infrastructures and networks; implementation of security measures in communications; verification on any interruption of public services in communications; verification of compliance with the rules concerning the protection of minors and protection of copyright.

⁶ For more information visit the official website of the committee: <http://www.comitatotveminori.it/> (2012).

⁷ Read the Introduction to the annual reports on the website of AGCOM: <http://www.agcom.it/Default.aspx?message=contenuto&DCId=5> (2012).

and 2011, as national incumbents hold the greater part of the digital spectrum. This is the reason why subsequent to the introduction of the digital TV, the Italian television market has not significantly changed.

3. *Technological Innovation.* Since its inception AGCOM has promoted the spread of digital technology in the audiovisual sector, while the diffusion of broadband connections and optical fibre for access to the Internet is still lagging behind, due to technical and economic problems. AGCOM has also made many efforts in the areas of media education and digital literacy, even though during the last few years the Authority has been confronted with the economic crisis, which has prevented bigger investments in activities aimed at promoting media literacy.
4. *De-centralisation.* Corecoms are the local regulatory and advisory bodies closest to the citizens' needs and rights and to the local broadcasting operators' activities. That is the reason why the decision to strengthen some of AGCOM's activities at local level is one of the most peculiar characteristics of this IRA.
5. *Relationships with other national and international bodies.* AGCOM co-operates with other regulatory bodies, Universities and research centres at the national level. It collaborates with the Minister of Communications, the Italian antitrust agency and the Guarantor for the protection of personal data (*'Garante per la protezione dei dati personali'*). Moreover, AGCOM is member of several European and international communication and media networks such as BEREC, EPRA, IRG, and the Mediterranean Network of Regulators EMERG.

4. PERFORMANCE

The OECD has tried to assess what an independent and accountable Communications Regulatory Authority should be and has outlined some empirical indicators (OECD, 2009) related to IRAs main policy goals in this field:

- Improving the economic efficiency of communication markets shielded from short term political and administrative risks;
- Consumers' protection;
- Avoidance of dominance by specific interests.

Those indicators are, for example: the executive structure of the regulator; his or her appointment, nomination and reappointment; the possibility of overturning IRA's decisions; leadership; types of relations with the political system and the quality of the staff.

There is no empirical data to assess AGCOM's overall regulatory performance, but it can be assumed that the regulatory capability of improving the economic efficiency, consumer protection and capture avoidance has been achieved to a greater extent in the telecommunications field (notwithstanding the presence of the incumbent national operator Telecom) rather than in the broadcasting sector. Over the last twenty years the "Berlusconi factor" has deeply influenced the regulation of the Italian broadcasting sector and AGCOM's *de facto* independence has been seriously challenged by elected politicians through both the

nomination of the AGCOM President and Board and the possibility of overturning AGCOM's decisions by means of legal and political appeals on the part of Government.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

The *Guarantee Commission* ('Commissione di Garanzia') checks the transparency of AGCOM's financial administration and the legal correctness of the annual financial report. The Committee is established by article 42 of the 1997 Act, named 'Regulations on Accountability and Administrative Management of the Authority'.

Regarding inter-institutional *accountability*, AGCOM is accountable to the National Parliament and to the Court of Accounts. The independent regulator must present an annual report on its activities to Parliament, according to Act no. 249 of 1997. The Court of Accounts checks the correctness of AGCOM's annual financial report.

Act no. 103 of 1975 – article 1 - created a special *Parliamentary Commission for Vigilance and Control of Public Television and Radio* ('Commissione parlamentare per la vigilanza ed il controllo della radiotelevisione pubblica') composed of forty deputies of both Houses of the Italian Parliament, elected by the Presidents of the Senate and of the Chamber of Deputies ('Camera dei Deputati'). The main task of such a body is to ensure independence, objectivity and freedom of speech to all the political, social and cultural parties in the Country within PSB programs. The 1997 Law details the Commission's functions in relation to AGCOM. According to article n. 1, paragraph 4 of the Act no. 249 of 1997, the Commission shall ensure the respect of all norms regulating the public service broadcaster RAI and the collaboration between the Commission and the Minister of Communications. In order to fulfil its tasks, the Parliamentary Commission coordinates its activities with AGCOM through periodical consultations, as mentioned in the annual reports of AGCOM.

According to Law no. 249 of 1997 the Administrative Tribunal of The Region of Lazio (TAR Lazio) is competent to suspend and judge the AGCOM decisions in case of disputes.

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The Steering Boards of the Authority are as follows:

- The *President*, who is responsible to Parliament for the general management of the Authority. He coordinates the activities and chairs the meetings of the boards.
- The *Infrastructures and Networks Commission* ('Commissione per le Infrastrutture e le Reti') and the *Services and Products Commission* ('Commissione per i Servizi e Prodotti'), is composed of four members each.
- The *Council*, is made up of all the members of the two commissions.

Advisory bodies of the AGCOM are:

- The *National Council of Users* ('Consiglio Nazionale degli Utenti'), is established by article 1, paragraph 28 of the Act of 1997 and is subject to the decisions by the Council no. 54/99/CONS. It is composed of experts from different associations

representing users. It monitors the regard for democracy, pluralism, human dignity and neutral information, as well as the representation of all social and cultural differences in the Country, in television and radio programmes. It issues non-binding opinions on the rule making process. Members are selected from a list created by national users' associations and are appointed by the Authority. Their number is restricted to 11 and their term of office is renewable once.

- The *Committee for Judicial Trials on television* ('Comitato Processi in TV - Comitato per l'applicazione del codice di autoregolamentazione in materia di rappresentazione di vicende giudiziarie nelle trasmissioni radiotelevisive') enforces the application of the self-regulatory Code on representation of legal affairs in television broadcasting. It was established in 2009 when the new Code (mentioned above) came into force. The Committee is made up of representatives of all associations which subscribe to the Code, as well as three members appointed by the President of AGCOM. All commissioners must have experience and expertise in the field of telecommunications and cannot be involved in the making of TV shows the content of which falls under the remit of the Committee.
- The *Ethical Committee* ('Comitato Etico') consists of three members, according to decision no. 18/98/CONS of the Council. It monitors the transparency and fairness of the decisions made by the members of the Authority.

The election and appointment of the President and the commissioners are subject to the following rules:

- The *President* is appointed by the President of the Italian Republic, upon nomination by the President of the Council of Ministers together with the Minister of Finance.
- Both the *Infrastructures and Networks Commission* and the *Services and Products Commission* are composed of the President and four members. The Parliament elects four members, two for the first Commission and two for the second one. Members must be elected by a majority of votes and are then appointed by the President of the Republic.
- The *Council* consists of the President and all designated commissioners.

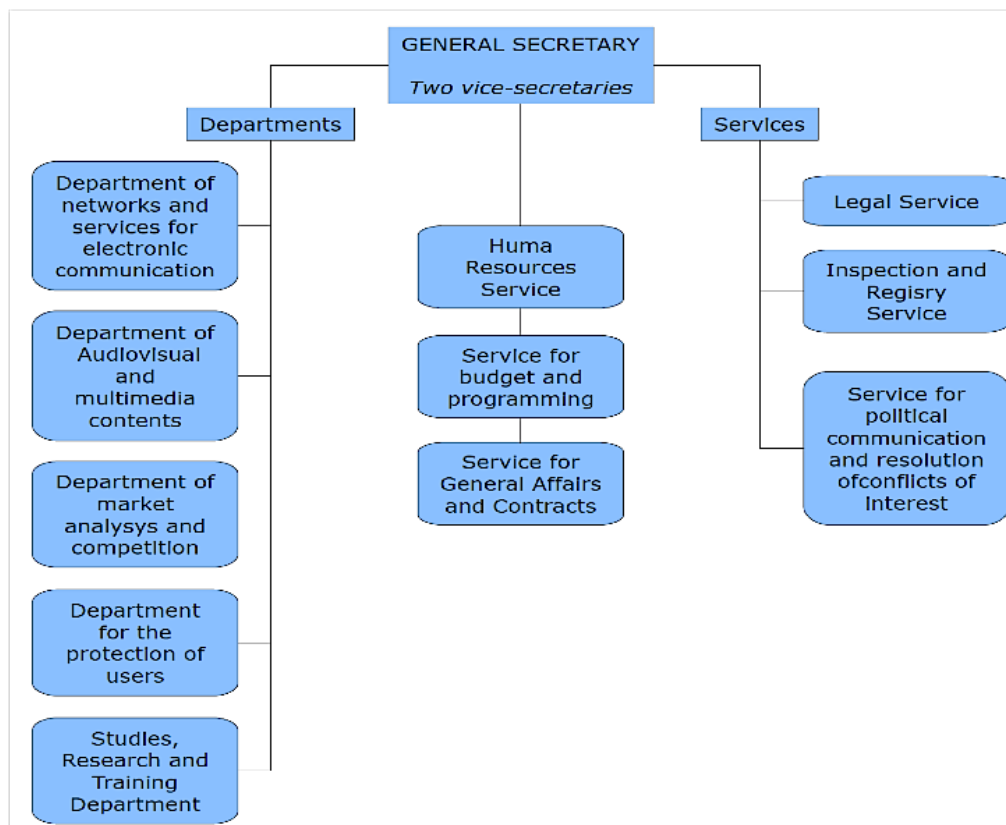
Commissioners must be chosen among experts in the field of communications, acknowledged for their experience and competence. Their mandate lasts seven-years and is not renewable. They cannot fill other public offices or political roles in national or local institutions. Moreover, they are not allowed to have any relationship with public or private companies in the field of telecommunications, during their term of office or for the four years subsequent to its end. The efforts of the Italian Parliament to endow the agency with a board independent of political interests or economic influence are clear. Following the standard procedure, four members are nominated by the Government and four by the opposition.

AGCOM's offices are located in Rome and in Naples. This choice arises from the Legislator's desire to decentralise some important offices of the Administration of the State and to place them closer to citizens (as in the case of Corecoms).

As an independent agency, AGCOM is entitled in law to adopt its own regulations on the internal organisation of human and economic resources. The regulation is adopted by means of a Decree of the President of the Council of Ministers, in consultation with the Ministers of Finance, Communications and Public Administration and with AGCOM itself. The same law limits to a maximum of 260 the number of public officers directly hired by AGCOM. However, since 2009 the number of employees has exceeded this limit⁸. The number of employees who held permanent positions within AGCOM was 271 in 2009, 278 in 2010 and 279 in 2011. The law also determines the maximum number of temporary staff seconded from other public bodies (30 units). In 2009 overall AGCOM's staff consisted of 297 people (not including the members of the boards); in 2010 it amounted to 348 and in 2011 to 354.

The following chart shows the current internal organisation of AGCOM.

Chart 1: Administrative structure of AGCOM in 2012



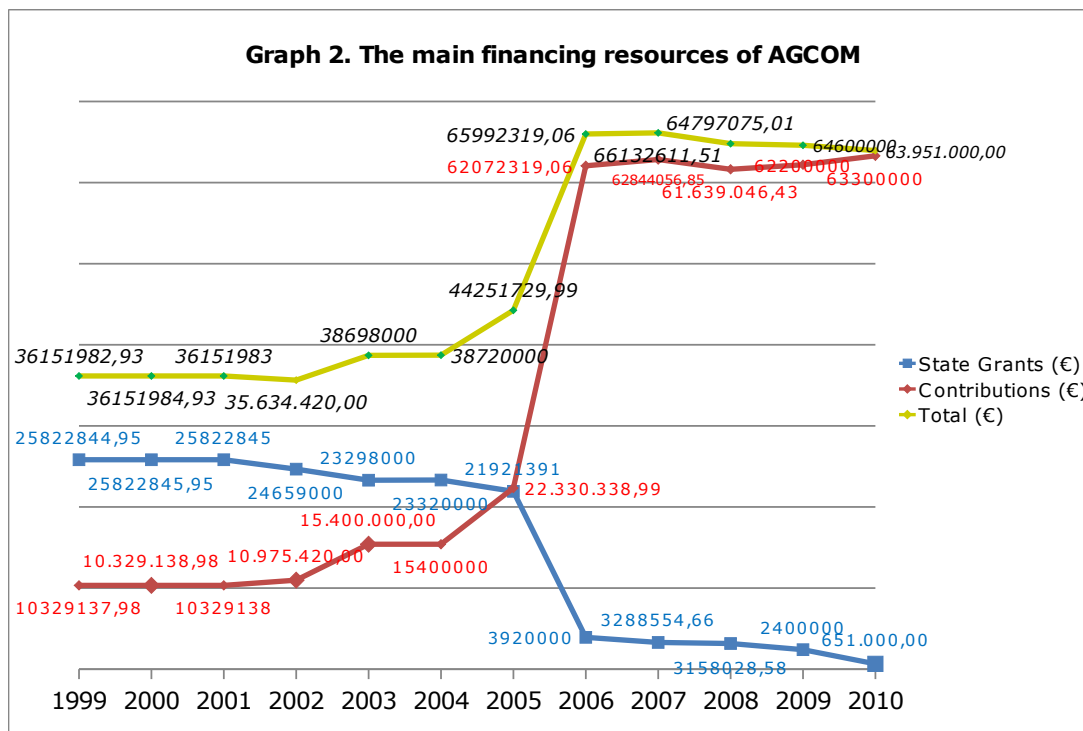
Source: Official website of AGCOM.

7. FUNDING

Law no. 249 of 1997 defines AGCOM as a financially autonomous agency. Its budget depends on: (1) a fund from the annual State budget, granted to the Authority by a Decree of the Ministry of Economy and Finance; (2) a contribution from telecom and broadcasting

⁸ See the annual reports of AGCOM on the official website for further details: <http://www.agcom.it/Default.aspx?message=contenuto&DCId=5>, 2012.

operators, determined by the Ministry; this consists of a fixed percentage of the annual income of each operator. Although Act no. 481 of 1995 has fixed a maximum of 1 per thousand for this contribution, the limit has been exceeded in the years 2006 and 2007, when the Minister of Finance allowed the application of a percentage of 1.50 per thousand; while in 2008 and 2009 the percentage decreased to 1.45 per thousand. In 2010 it increased again up to 1.50 per thousand. Neither the annual reports nor other official documents explain the reasons of such variations; they probably depend on the reduction of the state grant through the years, which made inevitable a substantial change in the system of funding. It is interesting to point out, therefore, how the revenue from the contributions of the economic operators has progressively replaced State aids in the general financing of the Authority. If, on one hand, the central Government has cut resources through the years, on the other hand, through 'private' contributions, AGCOM could rely on a 'proper' source of income, thus becoming more and more independent from the State budget⁹.



Sources: Annual Reports of AGCOM

8. REGULATION IN CONTEXT

The liberalisation of the Italian media sector began in the 1960s, as a result of several rulings by the Italian Constitutional Court, which progressively recognised the importance of private companies, thus eliminating the exclusive right of broadcasting by public television

⁹ AGCOM annual budget is available on the official website: <http://www.agcom.it/Default.aspx?message=contenuto&DCId=331>

(PSB)¹⁰. In 1973, the new Postal and Telecommunication Code ruled that the installation of devices for broadcasting under previous authorisations of the Government was also open to private companies. A subsequent act of 1975 reaffirmed the importance of the role of the State in the making and broadcasting of radio and television programmes, and created new regional advisory and regulatory bodies, *Co.Re.Rats* (Regional Committees for radio and television services - *Comitati Regionali per il Servizio Radiotelevisivo*) later replaced by Corecoms (Regional Committees for Communications - *Comitati Regionali per le Comunicazioni*).

A subsequent judgement by the Italian Constitutional Court declared as 'illegitimate' some provisions of the 1975 Act, thus allowing the establishment of commercial television and radio at a local level, while PSB was responsible for transmitting programmes of public interest¹¹.

It was only in 1990 that the Italian Parliament approved an organic law aimed at reorganising the national media market, composed of hundreds of small and medium-sized local broadcasting companies, some of which were struggling to achieve a national dimension and able to compete with the incumbent national TV and radio broadcaster RAI. Act no. 223 of 6th August 1990 allowed private television and radio broadcasters to air their programs on a national level under a special authorisation and also established a number of rules for both private and public television. The Act also created the above mentioned *Radiodiffusion and Publishing Guarantor*, but did not introduce any *antitrust* rules concerning the concentration of media ownership. A specific regulation was introduced as late as 1997 with Law no. 249.

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¹⁰ See the Italian Constitutional Court's rulings n. 59/60, 225/74, 226/74.

¹¹ Ruling n. 202/1976.

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Netherlands

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1. LEGAL FRAMEWORK

In the Netherlands three regulatory authorities have direct control of the media sector:
The Netherlands Media Authority (CvdM, short for *Commissariaat voor de Media*);
The Independent Post and Telecommunications Authority of the Netherlands (OPTA,
or *Onafhankelijke Post en Telecommunicatie Autoriteit*);
The Radiocommunications Agency (AT or *Agentschap Telecom*).

Both CvdM and OPTA are so-called autonomous administrative bodies, AT being only an administrative agency, falling under the direct control of the Ministry of Economic Affairs, Agriculture and Innovation. Carrying out functions that are operational rather than strategic in nature, at least when compared with OPTA and CvdM, AT is specifically in charge of obtaining and allocating frequencies and monitoring their use.

As far as fair competition in general is concerned, the Netherlands Competition Authority (NMa or *Nederlandse Mededingingsautoriteit*) is the designated authority. In 2006 the NMa adopted separate supervision programs for media and telecom businesses. Programs like these serve strategic and practical needs: when required and in order to proactively monitor the market and collect relevant data, the NMa is able to take immediate action. Whenever media companies are involved in a potential merger, the NMa informally seeks the opinion of CvdM. For general matters concerning consumer protection the Consumer Authority (CA or *Consumentenautoriteit*) can also be involved. Although newspapers and magazines are addressed by chapter 9 of the Media Act via the Netherlands Press Fund [SvdP or *Stimuleringsfonds voor de Pers*] – an autonomous administrative body whose mission it is to improve diversity of news media and to fund innovation within all possible media sectors

dealing with news and news reflection – printed media are not explicitly covered by media regulation in a similar way as television, radio, online and mobile services are.

The three regulatory authorities are subject to laws defining their status, their responsibilities, their operations and procedures as well as their administration and management. In the case of the Media Authority the legislation concerned is the Media Act, which came into force in 1987 and has been updated several times since [*Mediawet 2008*]. With regard to OPTA, the laws concerned are the 2007 Independent Post and Telecommunications Authority Act [*OPTA wet 1997*] and the 1998 Telecommunications Act [*Telecommunicatiewet 1998*].

In addition the following act is relevant with regard to autonomous administrative bodies like OPTA and the Media Authority: the 2006 Framework Act for autonomous administrative bodies [*Kaderwet zelfstandige bestuursorganen 2006*].

Independence

Autonomous administrative bodies [so-called *zelfstandige bestuursorganen* or ZBO's] are also referred to as 'independent administrative authorities', their independence being explicitly defined in the 2006 Framework Act. Nevertheless, the independence of autonomous administrative bodies whose specific task it is to oversee the media sector should be interpreted as a 'formal' independence: they perform a number of legal tasks, but are kept at arms' length from the Dutch government. Independent functioning of the Media Authority is guaranteed in that the Minister does not intervene in its research endeavours or complaint procedures. However, the Minister can overrule decisions of the Media Authority [2008 Media Act, article 7.9]. The Media Authority has policy-implementing powers, as enshrined in the Media Act, and no general rule-making or policy-setting powers. In practice, the Media Authority and the Minister meet regularly to discuss a variety of issues, on a structural basis (law and policy issues) as well as with a view to specific issues (e.g., reorganizing the public service broadcaster).

Similarly to the Media Authority, OPTA operates at arms' length from the Ministry of Economic Affairs, Agriculture and Innovation. However, in contrast to the Media Authority, the Minister has no direct control over decisions made by OPTA. Although he/she can give instructions, the Minister cannot interfere with individual cases. The ministry does bear political responsibility for OPTA, appointing the members of its board and approving its budget, thus guaranteeing its continued existence.

Self- and co-regulation

In the area of co-regulation, a formal link exists between the Media Authority and the Netherlands Institute for the Classification of Audiovisual Media (NICAM). Founded in 1999, NICAM has developed a uniform classification system for audiovisual media [the so-called *Kijkwijzer* or 'watching guide'] with the intent to warn parents against content that is potentially harmful to minors. In this sense it is meant to be an advisory tool and not an instrument of censorship. Legally enshrined within the Media Act [chapter 4], the Media Authority and NICAM have developed a co-operation protocol. The Media Authority regularly monitors the compliance of the media sector with the *Kijkwijzer* and can impose fines in case of

non-compliance. In addition, the *Kijkwijzer* classification system is evaluated on a yearly basis by the Media Authority.

A formal link also exists between the Media Authority and the Advertising Code Authority (*Stichting Reclamecode*, SRC), a self-regulatory body for advertisers. SRC has developed a code aimed at ensuring responsible advertising and the prevention of misleading and aggressive advertising. Membership is compulsory for all linear and non-linear audiovisual media services that publish advertising (Media Act, articles 43b & 71r). In order to obtain a broadcasting license from the Media Authority, applicants have to submit a written statement, thus proving their membership of SRC.

There is also an informal link with the Committee for Integrity of the Public Service Broadcaster (*Commissie Integriteit Publieke Omroep*, CIPO). Dedicated to improving the compliance of the PSB with its own governance code, CIPO consults with the Media Authority four times a year.

Furthermore, a co-operation protocol exists with OPTA dealing with must-carry program-related issues, and with AT on the supervision of compliance with format obligations on part of private radio broadcasters which acquired terrestrial frequencies in 2003 on condition that they respect these format obligations. Meanwhile, a protocol between the Media Authority and NMa – entered upon in the framework of the Temporary Law on media concentration on which the Media Authority advised NMa in case of mergers of media companies – has become redundant following the law's withdrawal on January 1st of 2011 (for further information see www.cvdm.nl; www.opta.nl; www.nma.nl).

2. FUNCTIONS

The Media Authority is responsible for tasks laid down in the Media Act. The Media Authority's central mission is to supervise public and private broadcasters, thereby contributing to independence, quality and plurality of media information services for the public, non-commerciality of public media, creating a level playing-field between public and private media and fostering transparency of media ownership.

OPTA is responsible for tasks laid down in the Telecommunications Act. According to the organization's mission statement, OPTA ensures fair competition and trustworthy conditions within the telecommunication sector on behalf of the consumer.

Regulation of (new) media sectors

Regarding the division of tasks in the field of regulatory responsibility, the following responsibilities are to be distinguished:

- Audiovisual content: Media Authority (always ex post, based on Media Act article 7.20);
- Transmission (or network) aspects of audiovisual content: Media Authority (partly, as described under section about self- & co-regulation); AT (to a lesser extent);
- Distribution (or service) aspects of audiovisual content: Media Authority (partly); OPTA (to a lesser extent, ex ante). Commercial broadcasters have to apply for a

license with the Media Authority. In awarding licenses, the Media Authority does not distinguish between analogue and digital broadcasts, as the type of transmission is determined by negotiations between network provider and broadcaster, and not by the Media Authority. OPTA can act when a broadcaster is refused access to the cable operator's network on unfair grounds;

- Spectrum: AT;
- Electronic communications (network and general services): OPTA.

In response to convergence in the media landscape both the Telecommunication Act and somewhat later the Media Act 2008 have adopted a platform-neutral and technology-independent regime. The changes have also affected the scope of audiovisual media services that have to comply with certain requirements of the Media Act. With the implementation of the 2009 EU Audiovisual Media Services Directive, online and mobile audiovisual media services have become subject to the Dutch Media Act. In this way the government wants to create a level playing-field for all 'television-like' services, regardless of whether they are offered through traditional distribution networks or through new digital networks. The 2008 Media Act distinguishes between the provision of linear and 'on demand' commercial media services (for further reading, see EU-INDIREG-study).

Advertising

Media content regulation covers advertising as regards breaks for commercials, tele-shopping and sponsored programs for all media platforms. As the Media Act distinguishes between public and private media services, the latter are subjected to a 'lighter' regime. As mentioned above in the section on self- and co-regulation, SRC regulates the more ethical aspects, through supervising compliance with the Advertising Code of the authorities' members.

Media education

Media education/digital literacy is neither explicitly nor implicitly included in the functions performed by the media regulatory authorities.

Converging bodies

The current liberal-conservative government is preparing legislation to merge NMa, OPTA and the Consumer Authority into one regulatory body. One of the reasons is that telecommunication regulations, in response to increased competition, are moving more and more towards general competition regulation. Specific ex-ante regulation for operators of telecommunication networks is decreasing and therefore it becomes more logical to have one regulatory body that applies (to a large extent) the same principles to each economic market. By January 1st 2013, NMa, OPTA and the Consumer Authority will merge into the new Consumer and Market Authority (ACM).

It has frequently been suggested to include the Media Authority in such a merger, thus copying the British OFCOM model. The main argument is that the convergence of media and telecommunication networks and services would logically also lead to a converged

regulatory authority. Another argument is that a merger would lead to a more efficient system, reducing the coordination costs as well as some overlap in competencies. Against such a plea for a merged regulatory authority, one could argue that although content in all formats (text, audio, video) can now be distributed over different networks and although telecommunication networks now also carry media content, there is still a difference between the network and the content. So far these discussions have not resulted in any concrete proposals for change from government or parliament. The constellation in which the Media Authority is mainly concerned with the content and the Telecommunications Authority with the networks has largely remained in place (for further details, see 2011 OPTA's annual report and market monitor).

3. LEGITIMIZING/UNDERLYING VALUES

Founded in 1988, the Media Authority is an autonomous body responsible for implementing the Media Act. It was set up in order to create more distance between the government and the media. Tasks that used to be performed by the Ministry are now delegated to the Media Authority.

OPTA was established in 1997 as an independent regulator to stimulate the transition of a monopoly situation to a liberalized, competitive and open post and telecommunications market. This involved granting more favourable conditions for new market entrants vis-à-vis the former state-owned incumbent KPN, most importantly through ex-ante regulation to guarantee non-discriminatory access to the incumbents' fixed telecommunication network.

In this respect it is important to mention that OPTA was always meant to be a temporary regulator; once the integrated market as described above is fully implemented, NMa will take over OPTA's supervisory role.

There are differences in the kind of supervising and monitoring tasks of the telecommunications authority and the media authority that are based on different sets of principles. Whereas telecommunication law is basically a particular form of competition law, with more provisions for ex-ante regulation and consumer protection, media law is to a large extent based on a different set of principles and instruments, such as guarantees for media diversity and access to information.

4. PERFORMANCE

Daily tasks

The Dutch Media Authority, established on January 1st, 1988, has three important tasks which are laid down in the Media Act (1987, updated several times since):

- Supervision of public service broadcasters, private broadcasters and cable network operators, as far as the provisions in the Media Act apply to them, and basically in relation to the content transmitted through the networks. The supervision (monitoring) of radio and television programs is always ex post. The monitoring is largely done in order to ensure that public service and private broadcasters comply with the

regulations for advertising and sponsorship. The Media Authority also supervises the extent to which the public service and commercial broadcasters comply with their so-called program regulations: the percentage of television broadcasting time that has to be filled with European production, programs by independent producers (EU Directive) and (for the public service broadcasters only) the percentage of broadcasting time that has to be devoted to information, culture and education. The Media Authority also monitors the level of diversity and plurality in the Dutch media markets.

- Allocation of broadcasting time/permission for commercial broadcasting: the Media Authority allocates national broadcasting time to educational broadcasting organizations, religious and spiritual organizations, political parties, and for government information. It also allocates broadcasting time to regional public-services and local broadcasters, both for radio and television. Furthermore, the Media Authority gives permission for commercial broadcasting, on the national, regional and local level, both for radio and television. This permission is given for a five-year period. Commercial broadcasting includes: general interest channels, thematic channels, subscription channels, so-called 'electronic newspapers' broadcast via the cable-networks.
- Financial control: the Media Authority is responsible for the actual payment of the public-service broadcasting organizations. The budget available to them is established every year by the Minister of Education, Culture and Science. The budget has two sources: the state broadcasting contribution (directly from tax revenues), and the revenues from advertising broadcast on the public radio and television channels. The Media Authority examines the financial records of the public broadcasting organizations, and this includes the revenues they obtain from sponsors.

In addition, the Media Authority monitors the public broadcaster's secondary activities, supervising the proper functioning of NICAM's classification system (see section on self- & co-regulation) and advising the ministry on the mechanism determining the number of members of the public broadcasting organizations (i.e. the criterion upon which broadcasting time and budget are allocated), and current and future media policies.

In general, OPTA is concerned with enhancing competition within the telecom sector and safeguarding consumer protection. With regard to competition, OPTA makes an annual analysis of the markets for electronic communication, foremost the television market and the business-directed telecom market. In its analysis OPTA focuses on price variations, positions of significant power and entrance to the market for newcomers. With regard to consumer protection, OPTA upholds the Telecommunications Act, taking action against businesses that do not comply with the rules. Additionally, OPTA informs consumers of their rights and obligations by means of a web-based service called *ConsuWijzer*.

Other tasks include:

- issuing telephone numbers;
- tracking down and fining spyware distributors;

- making sure that the legally stipulated minimum level of service is provided in the postal and fixed telephony sectors;
- adjudicating disputes concerning access to and interconnection between networks;
- monitoring and assessing the rates charged by (formerly state-owned) KPN;
- regulating electronic signature certification-service providers.

In their operation both OPTA and the Media Authority struggle with discrepancies between legal duties and actual performance. The fact is that budget cuts force the regulators to make choices among their daily activities: insufficient time or inadequate human resources make it impossible for them to cover every task in the same detail. These choices are based on an estimation of which current problems are more pressing or causing social upheaval or might be damaging to the media or telecom sector. Recently, OPTA was asked to monitor compliance of all web sites with the Dutch cookie law enacted as of June 5th, 2012, principally targeting all web sites across the globe, in practice so far only the 25 web sites attracting the most Dutch visitors were monitored.

State tasks vs. co- and self-regulation

Neither OPTA nor the Media Authority experience conflicts, as co-operation protocols between state regulators and co- or self-regulators (as well as between state regulators) see to it that regulators are complementary in terms of their responsibilities and tasks.

Appeal mechanisms

All parties with a direct interest in a decision of the Media Authority have the right to lodge an appeal. Following the General Administrative Act (chapter 6), the Media Authority in this instance is obliged to take a formal legal decision. In an internal hearing, parties involved will be in a position to give their opinion and to defend their position. If the complainant disagrees with the decision of the Media Authority, (s)he can lodge an appeal to a (higher) court (administrative court, Council of State and eventually Court of Human Rights) or the national ombudsman. An appeal always has to be lodged first internally with the Media Authority. In some cases an Advisory Committee on Appeals is the appointed appeal body. A decision by the Media Authority stands pending appeal unless the appeal body suspends it. Accepted grounds for appeal are errors of law, errors of fact and a full re-examination. In case the complainant lodges an appeal with the court, the latter two grounds are accepted only when there is no appreciation margin for regulatory authority regarding specific policy.

According to section 7.9 of the Media Act, decisions by the Media Authority can also be suspended or rescinded by the Minister during the eight weeks after reception.

The Telecommunications Act has similar provisions with regard to decisions of OPTA. Parties having a direct interest can take a case to court whenever they disagree with the outcome of a direct appeal with OPTA. Only in a few specific cases, such as for instance disagreement of a stakeholder with an analysis of the market, an appeal is lodged directly with a (higher) court. Likewise, a court can overturn (part of) a particular decision (for further reading, see EU-INDIREG-study; www.opta.nl).

5. ENFORCEMENT MECHANISMS/ACCOUNTABILITY

Compliance (legal mechanisms)

If broadcasters do not comply with the rules, the Media Authority can apply sanctions, varying from warnings and administrative fines (to a maximum of €225,000) to reduction of airtime and ultimately revoking the license. Likewise, if telecom and cable operators do not comply with the rules, OPTA can apply administrative fines or a provisional order for penalty payment (maximum €450,000 or 10% of the relevant revenue).

In reality the Media Authority only applies the reduction of airtime or the revoking of a license in very rare instances, whereas it regularly issues warnings and imposes fines. In case of OPTA, both fines and provisional orders are regularly applied, particularly against business circulating of spam.

Non-binding guidelines/regulatory doctrines

Apart from outlining a more general view on how the two regulators look upon the circumstances in which they operate, neither the Media Authority nor OPTA adopt either regulatory doctrines or non-binding guidelines (i.e. recommendations).

Accountability

Commissioners should be independent of politics and media or telecom organizations. Both the Media Authority and OPTA are only accountable to their respective Ministers. Reporting obligations consist of the usual documents (annual report, financial account, budget plan, all statistically validated) for which no formal approval by the Minister is obliged. In addition, the Media Authority writes a yearly letter of maintenance, on a voluntary basis, to the Minister. Twice a year, upon submitting the annual budget plan and the annual account, a financial audit is held by a private firm. Every five years an external work audit is ordered by the Minister, and carried out by a private firm. If the Minister considers the authority's tasks seriously neglected, section 23 of the Framework Act for autonomous administrative bodies offers the tools necessary for measures to be taken (for further reading, see EU-INDIREG-study; www.opta.nl).

6. INSTITUTIONAL ORGANIZATION/COMPOSITION

Media Authority

Board	Staff	Media sector	Civil society
3 (possibility of 5)	60 (53.75 fte)	n.a.	n.a.
Appointed for 5 years, max. 1 renewal	n.a.		

Post and Telecommunications Authority

Board	Staff	Media sector	Civil society
3	134 (formation 143 fte)	n.a.	n.a.
Appointed for 4 years, 1x renewal	Only incidentally and to a very limited extent, precarious labor is made use of		

The boards of the regulatory authorities are appointed by the State. The political culture developed in the Netherlands is such that board members are first and foremost appointed because of their knowledge of the field and/or their experience in public administration or management and not because of their loyalty towards government or a particular political party. Direct political appointments to these bodies have not taken place over the past decades, although informally some balance will be sought in the composition of boards between expert members with different (political) views or affiliations, to the extent that these are known.

The Media Authority is run by three commissioners, appointed by the Minister of Education, Culture and Science for a term of five years. Reappointment for another term is possible once. Practice over the last fifteen years shows the ministry will seek consent of existing board members and takes into account suggestions of board members about a new member.

OPTA's board has three independent experts, appointed by the Minister of Economic Affairs, Agriculture and Innovation for a period of four years. They usually have different scientific backgrounds (economics, law). Daily management is the responsibility of the chair assisted by two managers.

The boards of the self-regulatory bodies usually consist of representatives from the industry, professional associations, and sometimes also from consumer associations. They are usually financed by the stakeholders themselves and sometimes receive some additional government funding (for more details, see annual reports of CvdM and OPTA).

7. FUNDING

The Media Authority is mostly funded by the State and additionally through license fees. Each year it submits a budget plan for approval by the Minister of Education, Culture and Science. OPTA's funding follows a different logic: as the authority is obliged by law to calculate fees based on its supervision activities and charge these to the supervised parties, it is mostly funded by fees and additionally by the State.

In 2011 CvdM's expenditure amounted to €6.17 million on a budget of €5.92 million. Revenues amounted to €6.13 million, 77% of which was State-funded (i.e. the ministry). OPTA's expenditure amounted to €16.11 million on a budget of €17.95 million. Revenues amounted to €17.1 million, 91% of which were fees related to supervision. The two authorities transfer money coming in from imposed fines to their respective ministries.

The Media Authority's annual accounts form part of its annual report and are published on its website. OPTA publishes its annual accounts and report separately on its website (for more details, see www.cvdm.nl and www.opta.nl).

8. REGULATION IN CONTEXT

Media landscape

In 2011, 23 television channels specifically focused on the Netherlands. Ten of them are generalist channels with wide-ranging programs and divergent genres. The others are

special-interest channels, customized for Dutch audiences. There are 19 radio stations, nearly all presenting a music format. The average viewing time per day amounts to 191 minutes, the average daily listening time is 203 minutes.

In addition to the national public channels, each Dutch province also has its own regional public television channel and radio station and there are a further 285 local public broadcasters offering television and/or radio services catering for one or more towns and villages. Dutch audiences can also tune into a large number of foreign channels, including the public television channels and radio stations of neighboring countries.

Both television and radio broadcasts are mainly received via the cable network. In less densely populated areas and in areas with a relatively large population of ethnic minorities satellite dish antennas are often used. At the end of 2011 98% of all Dutch households owned one or more television sets, and nearly three quarters of households received digital television. Eurostat statistics reveal that in 2011 94% of Dutch households had access to the internet, of which 83% made use of a broadband connection.

With regard to the print media there are 9 national, 19 regional newspapers and 2 free newspapers. The total daily circulation of newspapers stands at 3.36 million copies. Among the national newspapers, 4 quality and 2 popular newspapers can be distinguished (including the largest national newspaper of the Netherlands, *De Telegraaf*, with a circulation of 597,579). Each of the twelve Dutch provinces has at least one regional newspaper (for more details, see CvdM, 2012a; kijkonderzoek.nl).

Market concentration and coverage

The overall television market has been dominated over the past ten years by three large players: the public broadcaster (*Nederlandse Publieke Omroep, NPO*), Bertelsmann's RTL Netherlands and Sanoma Group. NPO's share of viewing time in 2011 amounted to 32%; jointly these three broadcasters controlled ten general-interest channels and little under three quarters of the television market. The overall radio market is slightly less characterized by concentration although it too is dominated by just a handful of players, among which the *NPO, Talpa media and Telegraaf Media Groep (TMG)*. In 2011 NPO's share of listening time was 33.2%.

No figures about market shares are available for the internet. On the basis of the average monthly coverage achieved by publishers and broadcasters on the internet (calculated by adding up unique visitors on all the websites which they control) we find that *Sanoma Group (nu.nl)*, *TMG* and *NPO* all rank among the top ten. Of all news sites focusing on the Netherlands *nu.nl* had the highest monthly coverage (38.1%), followed by NPO's *nos.nl* (31.9%) and *telegraaf.nl* (25.5%).

In 2010 the overall market of national, regional, free and specialist newspapers was dominated by three large groups: *TMG, Mecom* and *De Persgroep*. *TMG* is the largest of the three, with a market share of 27% on the basis of circulation. The joint total of the three groups stands at 70.3%. All Dutch newspapers together reach an average of 64.5% of the population on a daily basis, meaning that somewhere between six and seven out of ten Dutchmen read a newspaper every day. As far as readership is concerned, *De Telegraaf* is the largest paper, reaching a daily average of nearly 2.1 million readers of 13 years and over.

In 2011, and lumping together the markets of newspapers, radio and television, *NPO* (public broadcasters) had by far the biggest market share (65.2%). *TMG* occupies the second position (42.2%), and *De Persgroep* ranks third (27.4%) (for further reading, see www.media-monitor.nl and *NOM printmonitor 2010-I/2011-II*).

9. IGNORED DIMENSIONS

When it comes to self-regulation, the role of the Netherlands press council, charged with the examination of complaints against violations of good journalistic practices, seems to become more peripheral as more media actors tend to distance themselves from it and to appoint an internal ombudsman.

As to co-regulation, NICAM, the Netherlands Institute for the Classification of Audiovisual Media, merely focuses on what is not suitable content for minors rather than looking at what is suitable content; in other words, programs that are not qualified as 'inappropriate for minors' can be watched, while complementary to this coding, the question whether a program is actually made for this group is not looked into.

Finally, national supervision of media concentrations is becoming more problematic due to foreign owners (e.g., the case of RTL, operating in the Netherlands with a license from neighboring country Luxemburg) and private equity investors, both with activities and interests within and beyond Europe.

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EXPERTS INTERVIEWED

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1. LEGAL FRAMEWORK

1.1 DEFINITION OF THE MEDIA REGULATORY AUTHORITY

In December 1992 the Sejm passed the Broadcasting Act, which came into force on March 1, 1993¹. Under the law, the National Broadcasting Council was appointed as a state organ competent as regards matters connected with radio and television. Earlier, a draft had been prepared to amend the Constitution by incorporating the provisions regarding the National Broadcasting Council into this fundamental act of law².

The National Broadcasting Council has worked since April 28, 1993.

The National Broadcasting Council (hereinafter referred to as “the National Council”) shall hereby be established and shall constitute the state authority competent in matters of radio and television broadcasting (Article 5 Broadcasting Act 29 December, 1992).

1.2 LINKS WITH SELF-REGULATORY NAD CO-REGULATORY MEDIA STRUCTURES

According to the Broadcasting Act, the National Council is obliged to promote self-regulation or co-regulation in the area of provision of media services under this Act, including the submission, upon request of a media service provider, an opinion on the code referred to in Article 3a.

In practice, the National Council cooperates with the UKE (Office of Electronic Communications) when granting licenses for radio and television broadcasting. Also, both bodies cooperate in the process of implementation of digital terrestrial television (multiplexes competitions)

In Regulatory Strategy 2011-2013 the National Council calls for a radical change in the law impeding the business of broadcasting, in terms of the introduction of self-and

¹ Broadcasting Act 29 December, 1992 (Official Journal 1993 no 7, pos. 34 with its later amendments).

² The Constitution of the Republic of Poland (Chapter IX art. 213) adopted by National Assembly on 2 April 1997, confirmed by referendum in October 1997.

co-regulation by broadcasters³. The mechanisms are to date non-existent in the Polish audio-visual market. The National Council wants to make it the model which means the introduction of deregulation legislation and an enforcement of rules for obtaining licenses. Licensing, as long as it is not associated with rationing scarce goods should be reduced to a minimum. There are good experiences and the specific proposals are set out in Strategy. Specially, National Council would like to put in place mechanisms to support local media, social and environmental and they also want to introduce appropriate anti competition provisions⁴.

There are two examples of self-regulation as a beginning of the process: advertising market and journalistic code of ethics.

There has been self-regulation of the advertising market in Poland for six years. The system, which includes major advertisers, media and advertising agencies, is based on the Code of Ethics in Advertising, a document defining the standards for commercial marketing communications.

The Journalistic Code of Ethics is based on the principles of the Charter of Media Ethics and the Declaration of the International Federation of Journalists⁵.

2. FUNCTIONS

The main function of the Council is to protect:

- freedom of speech and the independence of broadcasters,
- interests of viewers and listeners,
- open and pluralistic character of radio and television.

The National Council shall safeguard freedom of speech in radio and television broadcasting, protect the independence of media service providers and the interests of the public, as well as ensure an open and pluralistic nature of radio and television broadcasting.

According to the Broadcasting Act December 29, 1992 Article 6, the main functions of the National Council are, in particular:

1. to draw up, in agreement with the Prime Minister, the directions of the State policy in respect of radio and television broadcasting,
2. to determine, within the limits of powers granted to it under this Act, the terms of conducting activities by media service providers,
3. to make, within the scope set forth by the Act, decisions concerning broadcasting licences to transmit programme services, entry into the register of programme services, hereinafter the "register", and keeping the register,
4. to grant to a broadcaster the status of a social broadcaster or to revoke such status, on terms laid down in the Act,

³ NBC Regulatory Strategy 2011- 2013 http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/strategie/strategia_110420.pdf

⁴ Chairman of NBC speech in Parliament 27 June 2012 <http://www.sejm.gov.pl/Sejm7.nsf/wypowiedz.xsp?posiedzenie=17&dzien=2&wyp=226>

⁵ Declaration of Principles for International Federation of Journalists IFJ - Federation Internationale des Journalistes IFJ (International Federation of Journalists) adopted by the Second World Congress of the International Federation of Journalists at Bordeaux in April 1954 and amended by the 18th IFJ World Congress in Helsingör in June 1986

5. to supervise the activity of media service providers within the limits of powers granted to it under the Act,
6. to organise research into the content and audience of radio and television programme services,
7. to determine fees for the award of broadcasting licences and registration,
8. to determine licence fees in accordance with the principles set forth in the Licence Fees Act of 22 April 2005⁶,
9. to act as a consultative body in drafting legislation and international agreements related to radio and television broadcasting,
10. to initiate research and technical development and training in the field of radio and television broadcasting,
11. to organise and initiate international co-operation in the field of radio and television broadcasting, including cooperation with regulatory bodies of Member States of the European Union competent for media services,
12. to co-operate with appropriate organisations and institutions in respect of protecting copyright as well as the rights of performers, producers and media service providers,
13. to hold public and open competitions to select members of Supervisory Boards of public radio and television broadcasting organizations,
14. to promote self-regulation or co-regulation in the area of provision of media services under this Act, including the submission, upon request of a media service provider, an opinion on the code referred to in Article 3a,
15. to promote media literacy (media education) and to cooperate with other state authorities, non-governmental organizations and other institutions in the area of media education.

Statutory mission of the National Broadcasting Council is to exercise control over the advertising broadcasters, including the control of issued advertisements, teleshopping and sponsored programs for compliance with the Broadcasting Act, the provisions of concessions and other legislation related to the sphere of advertising and sponsorship.

Control activities of television and radio broadcasters, as well as any interventions related to advertising and sponsorship activities, are carried out in accordance with the tasks and competences of the Chairman of the National Council, according to the Broadcasting Act of 29 December 1992 on radio and television.

Under Broadcasting Act December 29, 1992 Article 6 point 13, the National Council is committed to promote media literacy (media education) and to cooperate with other state authorities, non-governmental organizations and other institutions in the area of media education.

In fact, the National Council arranges conferences and seminars in that area, inviting government, and non-government organizations, universities, independent experts etc to take part in these.

The National Council arranges social consultations among other social actors.

⁶ Licence Fees Act of 22 April 2005 (Official Journal "Dz.U.", No. 85, item 728 and No. 157, item 1314, and of 2010, No. 13, item 70 and No. 152, item 1023)

3. LEGITIMIZING / UNDERLYING VALUES

According to the Constitution and the Broadcasting Act 29 December 1992, the main values of the National Council are to protect :

- fundamental human and civic rights
- right to information
- broadcasters and editors independence,
- open and pluralistic character of radio and television and programming offer quality

4. PERFORMANCE

In its activities the National Council is guided by the following principles:

- collegiate work based on professional distribution of responsibilities and authority among all its members,
- openness attained by means of regular public presentations of problems addressed by the Council and public hearings of individuals and entities applying for licenses,
- independent operations and adoption of the solutions in accordance with the law, devoid of any illegal and unprofessional pressure,
- cooperation with other state bodies and coming forth with the proposals of joint operations in broadcasting and planning of the state policy in that area, democracy and pluralism, as well as the development of protection of radio and television by ensuring broadcaster independence.

The Chairman of the National Council is authorized to:

- order (pursuant to the Council's resolution) that the broadcasting of programmes that violate the law be discontinued,
- require from a broadcaster all materials necessary to assess programmes as to their compatibility with the applicable law,
- fine a broadcaster or its owners in the event of any violations of the law or should it refuse to carry out the decisions taken by the Council's Chairman in the form of valid resolutions,
- allocate (in cooperation with the President of the Office of Electronic Communications) frequencies to public radio and television companies.

The cooperation with self-regulatory and co-regulatory organizations is very poor and rather unsystematic. Hence, it is difficult to say that the activities are complementary or overlapping.

5. ENFORCEMENT MECHANISM / ACCOUNTABILITY

Under the Broadcasting Act December 29, 1992 Article 9:

1. The National Council shall issue regulations and adopt resolutions on the basis of the existing legislation and for the purpose of its implementation.

2. The National Council shall adopt resolutions by a two-thirds majority of votes of the total number of its members specified in the Act.
3. The National Council shall adopt the internal rules of procedure binding upon the Council.

According to the Constitution of 1997, the National Broadcasting Council shall exercise its authority as the other bodies of executive power. The National Broadcasting Council is bound by a form of an implementing act referred to in the Act. If the authorization does not indicate the form of national legislation the Council acts in the form of a resolution. The concept of resolution in paragraph 1 Article 9 of the Act on radio and television is a form of legal act, and the same concept in the paragraph 2 - how to determine the will of the National Broadcasting Council

Measure the impact in the form of a call the sender to refrain from acts inconsistent with the Act, the resolutions of the National Council or the terms of the concession is similar in terms of the legal nature of the activities provided in the paragraph. The call is not a decision within the meaning of Code of Administrative Procedure, and is not subject to execution. The essence of this measure amounts to an infringement of law or the terms of the license to broadcast and call the sender to remove them

Decisions issued under the provisions of paragraph 4 subject to administrative enforcement of general rules, i.e. under the Act of June 17 for administrative enforcement proceedings (Acts, U 1991 No. 36 item 161)

The National Council Broadcasting is a state body, without specifying its state structure nature. The nature of the tasks of National Council indicates that this is the executive authority, in such a concept which gives it a Constitutional Act on Mutual Relations between the executive and legislative authority.

The National Broadcasting Council has the administrative functions, although not part of the government. It is undoubtedly part of the government. Ideally situated outside the national government administration, the Council problems of interpretation make the laws governing the powers supreme and central administrations. Generally, the National Council should be included in this category; therefore, its members must include the category of persons holding the highest positions in the state.

The Chairman of the National Council may require a media service provider to provide materials, documentation and information to the extent necessary for the purpose of supervising the provider's compliance with the provisions of the Act, the terms of the broadcasting licence or self-regulation acts binding upon it.

The Chairman of the National Council may call upon a media service provider to cease practices in respect of provision of media services if they infringe upon the provisions of the Act, resolution of the National Council or terms of the broadcasting licence.

Acting by virtue of the Council's resolution, the Chairman of the National Council may issue a decision ordering the media service provider to cease the practices referred to in paragraph 3.

Paragraphs 2-4 shall apply respectively to the retransmission of radio and television programme services.

By the end of March each year, the National Council shall submit to the Sejm, the Senate and the President an annual report on its activities during the preceding year, as well as information concerning key issues in radio and television broadcasting. In fact, National Council is accountable to both houses of the Parliament and the President of Poland

Each year, the National Council shall present to the Prime Minister an annual account of its activities as well as information on key issues in radio and television broadcasting.

By way of resolutions, the Sejm and the Senate shall accept or reject the report referred to in paragraph 1. A resolution concerning acceptance of the report may contain remarks and reservations.

In case of rejection of the report by both the Sejm and the Senate, the term of office of all the members of the National Council shall expire within 14 days from the date of the last resolution to this effect, subject to the reservation contained in paragraph 5.

The National Council's term of office shall not expire unless so approved by the President of the Republic of Poland.

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The term of office of the members of the National Council shall be six years from the day of appointment of the last member. Members of the National Council shall perform their functions until the appointment of successors.

Prior to December 2005, the National Council consisted of 9 members. Pursuant to the Act of 29 December 2005, on transformations and modifications to the division of tasks and powers of state bodies competent for communications and broadcasting, the term of office of the previous National Council has expired and a new board has been established⁷. The act has reduced the number of members of the Council to five. Two of them are appointed by the Sejm (lower house of the Parliament), two by the President of Poland, one by the Senate (upper house of the Parliament).

A member of the National Council may not be appointed for another full term of office.

The body which is empowered to appoint a member of the National Council shall dismiss such a member solely in cases when the said person:

1. has resigned,
2. has become permanently unable to discharge of duties for reasons of ill health,
3. has been convicted of a deliberate criminal offence by a valid judgement,
4. has submitted an untruthful screening statement, as confirmed by a final and valid decision of the court,
5. has committed a breach of the provisions of the Act and the said breach has been confirmed by the decision of the Tribunal of State.

According to the European Platform of Regulatory Authorities, Poland represents the French model of appointment where both the legislative and the executive branch have the power to appoint the members of the regulatory authority.⁸

⁷ Act of 29 December 2005, on transformations and modifications to the division of tasks and powers of state bodies competent for communications and broadcasting (Official Journal 2005 no. 267, pos. 2258)

⁸ According to M. Glowacki this system was first implemented in France in order to attain a certain balance of power between

National Council Office

The National Council Office employs 140 people. What is based on precarious and stable labour is Code of Labour and Code of Rules. The Office is an executive body of the National Council; it operates under the internal regulations adopted by the Council and is subordinate to its Chairman. The Office consists of the following departments:

- **Presidential Department:** in cooperation with appropriate departments of the Office, guarantees the servicing of the Chairman's and the National Council's work, it supervises the implementation of decisions, orders and tasks stemming from the Council's work. Moreover, it drafts plans of debates, prepares necessary materials and takes the minutes at the Council's sittings.
- **Economic and Financial Department** prepares analyses of the economic situation in public radio and television, and those economic entities to which the President of the Council is a founding body or over which he/she fulfils supervisory functions. Department runs financial management and accountancy of the National Council and the Office, it also analyzes and drafts reports on the utilization of central budget funding
- **Legal Department** represents the National Council in legal and administrative proceedings and before other judiciary bodies, gives opinions and legal advice, and provides legal interpretations, issues legal opinions on draft legislation and other acts of law.
- **Public Media Department** organizes and conducts studies on the contents and reception of radio and television programmes, supervises if broadcasters meet their programming obligations stemming from the law and the terms of their licences, monitors radio and television programmes.
- **Regulation Department** is charged with the organizational and professional aspects of the licence granting process. It also collects data about licensed broadcasters.
- **Monitoring Department** prepares analyses and assessments of the advertising activities pursued by radio and television broadcasters under the Broadcasting Act, cooperates with public opinion polling centres, advertising agencies and scientific centres dealing with marketing and advertising.
- **Strategy Department** prepares the regulatory strategy of National Council

7. FUNDING

According to the Broadcasting Act the operations of the National Broadcasting Council and its Office are fully financed by the state budget, ca. 4,7 M. Euro.

8. REGULATION IN CONTEXT

The Polish media landscape is an effect of the country's socio-political and economic transition subsequent to the fall of communism in 1989. Important post-communist media

political forces and adopted in other countries, such as Romania, Bulgaria and the Ukraine. See: 'Political pressure on Public Television in Poland. The Case of the National Broadcasting Council', in *Comparing Media Systems in Central Europe* (eds. B. Dobek-Ostrowska, M. Glowacki) Wroclaw 2008, University of Wroclaw Publisher

developments include: privatisation of the press sector, the transformation of state radio and television into public broadcasting organisations, licensing of private broadcasters, influx of foreign capital into the Polish media market and European integration of audio-visual media policies.

Following the fall of communism, the Polish audiovisual media sector grew rapidly. These developments led to the establishment of a public and private duopoly.

Radio

80 percent of all Poles listen to radio; more than half say they listen to radio for more than three hours per day (Radio Track)⁹. Apart from the public radio broadcaster, there are 255 licensed commercial or private radio broadcasters in Poland¹⁰.

The PSB radio – Polskie Radio (PR) S.A. – is owned by the State Treasury. It operates five national radio stations: Program 1 is of a general nature, Program 2 is devoted to high culture, Program 3 is known for its news services, Polskie Radio Four targets young listeners and Radio Parlament broadcasts parliamentary sessions. PR S.A. also runs 17 regional radio stations and Polskie Radio External Service, which targets Poles and other listeners abroad. A 2009 survey showed Program 1 and Program 3 to be the most popular public radio stations, with 12 percent and 8.0 percent of total radio audience share (Radio Track).

On the national level, the commercial radio stations, Radio RMF FM (owned by Bauer Media Invest) and Radio Zet (owned by Eurozet LTD) have the highest radio audience shares: 25.8 and 16.6 percent, respectively. The Catholic station Radio Maryja, with an audience share of 3.0 percent, is the third-most popular national private radio broadcaster in Poland (Radio Track). Other regional private radio stations include: Radio Wawa and Radio TOK FM. Regional and local commercial radio stations in Poland operate as networks, monopolised by the biggest media groups including Broker FM, Eurozet, ZPR and Agora. Independent broadcasters, such as universities and local governments, run some of the local radio stations.

In 2008, Polish radio advertising revenue came to approximately half a billion euros, which accounted for 10 percent of total media advertising revenue (Radio Track). In the first half of 2009, the Polish radio market noted a 7.5 percent decrease in its advertising revenues (CRMC).

Television

A 2009 survey revealed that the average Pole watches television for three hours and 42 minutes per day¹¹. Apart from the public TV broadcaster, there are 213 licensed commercial television broadcasters in Poland, including seven terrestrial, 56 satellite and 150 cable broadcasters.

The PSB TV – Telewizja Polska (TVP) S.A., owned by the State Treasury – continues to dominate the market more than any other European public broadcaster. The combined audience share of its channels accounts for more than half the total TV audience share.

⁹ Radio Track Radio Audience Research carry out by SMG/KRC Milword Brown since 2001

¹⁰ Based on National Broadcasting Report 2010

¹¹ Based on Establishment Survey TNS Poland 2009

TVP S.A. operates three terrestrial channels: TVP1 and TVP2 air nationwide and TVP Info broadcasts regionally. In 2009 the audience shares of TVP 1 and TVP 2 were 22.8 and 15.9 percent respectively. TVP Info, which shares its programmes with a network of 16 regional centres, reached 4.2 percent¹². The public broadcaster also runs four channels available via satellite, cable and digital platforms: TVP Polonia, designed to broadcast PBS to Poles abroad; TVP Kultura and TVP Historia, dedicated to cultural and historical programming; as well as the first commercially-based TVP channel, TVP Sport. In 2008, TVP HD, the first TVP high-definition television channel, was launched

The main players in the national commercial TV market are Polsat, with a 2009 audience share of 14.8 percent, and the multi-regional TVN, with 13.7 percent¹³. Telewizja Polsat S.A., controlled by the Polish businessman Zygmunt Solorz-Żak, owns Polsat. TVN is owned by ITI Holdings S.A., whose main shareholders are two Poles: Jan Wejchert and Mariusz Walter. Both Polsat and TVN run thematic channels in addition to their main channels. Other private terrestrial TV channels in Poland include two Roman Catholic channels, TV Trwam and TV Puls, as well as local channels. The audience share of each of these channels does not exceed 3 percent¹⁴.

Poland is the third-biggest cable television market in Europe, with approximately 4.5m subscribers in 2009. Big operators with significant foreign capital dominate the market: UPC, Vectra, Multimedia Polska, Aster City Cable, TOYA, INEA, etc. The combined market share of these players is more than 60 percent. Most of these operators offer radio and TV broadcasting, Internet and telephony services.

In the first half of 2009 the advertising revenue in the Polish TV market decreased 8.2 percent over the previous year. The total Polish media advertising revenue is expected to reach 1.58bn euro in 2009.

Telecommunications

In 2008 the number of households using broadband Internet services in Poland increased 12 percent over the previous year to 4.7m. Mobile Internet access services noted a 45 percent increase, to 1.06m subscribers. The number of dial-up Internet users decreased to 378,000. Thirteen telecommunications operators dominate the broadband Internet market in Poland, including fixed telephony, mobile telephony and cable television operators. The leader is Telekomunikacja Polska (TP) S.A., the national Polish telecommunications provider. It has a 44.6 percent market share of users.

In terms of fixed telephony, TP S.A. has the largest share of the market with 76.9 percent of subscribers in 2008 – despite an increase in use of alternative operators. Among the alternative operators, Netia S.A. had the highest share of 3.5 percent¹⁵

In 2008 mobile telephony in Poland had about 43 million users, which accounted for a penetration level of 97.5 percent. Fifteen providers operate in the domestic mobile market .

¹² Op.cit

¹³ Op. cit

¹⁴ Op.cit

¹⁵ Based on Office of Electronic Communications 2010

Online media

At the end of 2008 the number of Polish Internet users reached 15.8m, which accounts for 44 percent of the population over seven years old. The number of Internet users grew 74 percent during the eight-year period between 2004 and 2012.¹⁶

All the mainstream media outlets in Poland have developed their online portals. Approximately 75 percent of Polish Internet users say they watch TV online. About 67 percent listen to radio and 64 percent read the daily press. The most popular among the mainstream outlets are: TVN, Radio RMF FM and Gazeta Wyborcza. The popularity of news websites available exclusively on the Internet has been growing. The most visited of these are Onet, Wirtualna Polska and Interia¹⁷.

Digital media

At the end of 2008 there were 4.7m subscribers to the five digital satellite platform operators in Poland. Cyfrowy Polsat, with 2.7m subscribers, is the biggest digital satellite platform in central eastern Europe. It ranks as No.5 in all of Europe. It is owned by Cyfrowy Polsat S.A., whose main shareholder is Zygmunt Solorz-Żak. Cyfra+, with 1.38m subscribers, is owned by Canal+ Cyfrowy. Its shareholders are Canal+ Group (49 percent of shares), Polcom Invest S.A. and Chello Media Investment. N and TnK platforms, owned by ITI Holdings S.A., had half a million and 92 thousand subscribers respectively. Platforma Orange, with 112,000 subscribers in 2009, is owned by TP S.A. (Wirtualne Media).

In 2005 the Polish government adopted a strategy for the transition from analogue to digital broadcasting, via regional multiplexes. This will last until the complete analogue switch-off planned for July, 2013. Available frequencies will be allotted to applicant multiplex operators in a tender organised by the Office for Electronic Communication. The National Broadcasting Council will grant licences to TV channels to broadcast within the multiplexes.

9. IGNORED DIMENSIONS

I miss the phenomenon of politicization as a critical dimension to the examination of the media regulatory body. In Poland and many CEE countries there are dilemmas between political independence and dependence of that body.

In Poland broadcasting policy was based on the creation of the National Council as a mechanism of democratic control over public broadcasting and an impartial regulator of private broadcasting has paradoxically led to a very different situation. The National Council composition has been systematically politicized, not only in a sense of who appoints its members, but, more importantly, in the fact that members have been more or less clearly affiliated to political parties. The practice is so established that attempts to tackle the problem appear so far to have consisted in fights to appoint National Council members with different political affiliations, rather than promoting a composition that is politically independent and professionally qualified.

¹⁶ Gemius Research 2010

¹⁷ Polish Internet Research Consortium 2010

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Portugal

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1. LEGAL FRAMEWORK

The Portuguese state media regulatory entity is the ERC (the English unofficial translation is Regulatory Entity for the Media, while the Portuguese name is *Entidade Reguladora para a Comunicação Social*¹), which is an independent administrative body. It is a legal entity, is subject to public law and has administrative and financial autonomy. It was created in 2005 by Law no. 53/2005 of November, 8 (the ERC's statutes are annexed to this law)². This is the body responsible for regulating media content in Portugal, specifically on television, radio and in the press. It is the only regulatory body with constitutional protection (article 39, on media regulation, of the Constitution of the Portuguese Republic³). Other laws also apply to the ERC's activities: Television Law⁴; Decree-Law no. 103/2006 which establishes the regime of regulation and supervision taxes⁵; Radio Law⁶; Press Law⁷; Contract of Public

¹ <http://www.erc.pt/pt/>, accessed 15.06.2012.

² Law no. 53/2005 of November, 8 [in Portuguese: www.erc.pt/documentos/legislacaosite/lei53.pdf, accessed 15.06.2012].

³ Constitution of the Portuguese Republic [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=126&lang=pt>, accessed 15.06.2012].

⁴ Television Law no. 8/2011 of April, 11 [in Portuguese: www.gmcs.pt/download.php?dir=121.549&file=lei_tv.pdf, accessed 15.06.2012]. This law replaces Law no. 27/2007 of July, 30 and transposes Directive no. 89/552/CEE, based on the lettering of Directive no. 97/36/CE and no. 2007/65/CE.

⁵ Decree-Law no. 103/2006 of June, 7, amended by the Decree-Law no. 70/2009 (March, 31), on regulation and supervision taxes [<http://dre.pt/pdf1sdip/2009/03/06300/0194901961.pdf>, accessed 15.06.2012].

⁶ Radio Law no. 54/2010 of December, 24 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=1547&lang=pt>, accessed 15.06.2012].

⁷ Press Law no. 2/99, of January, 13, modified by Declaration no. 9/99. (February, 18) and by article no. 57 of Law no. 18/2003, of June, 11 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=88&lang=pt>, accessed 15.06.2012].

Service Television⁸; Contract of Public Service Radio⁹; Contract with the Portuguese news agency called *Agência Lusa*¹⁰; and the Code of Advertising¹¹.

Despite the fact that the ERC is the body responsible for media content regulation in Portugal, there are several entities that also play a significant role in this matter, such as ANACOM¹², AdC¹³ and *Gabinete para os Meios de Comunicação Social*¹⁴, whose functions and legal framework are described in the next few paragraphs.

On one hand, the National Authority for Communications (ANACOM - *Autoridade Nacional de Comunicações*) is in charge of the regulation and supervision of the electronic and postal communications sector in Portugal. It promotes competition and protects the interests of citizens, ensuring the provision of clear information and transparency in terms of tariffs and conditions for the use of services. It also encourages the development of communication markets and networks.

On the other hand, the Competition Authority (PCA or, in Portuguese, AdC - *Autoridade da Concorrência*) has duties of ensuring compliance with competition rules, having regulatory, supervisory and disciplinary powers in relation to the approval of regulations required to enforce a competitive environment, as well as to the identification and investigation of prejudicial practices to free competition regarding national and Community laws. Moreover, it decides on notifications of mergers and acquisitions and prepares and decides on anti-trust cases, using sanctions or preventive measures.

The state agency for the media (GMCS - *Gabinete para os Meios de Comunicação Social*) began its activity in 2007 and it has as its main objective to support the government in the conception, implementation and evaluation of public policy in the media field.

All these entities share, somehow, the duties of regulation and supervision of the Portuguese media sphere and there are no records of strong misunderstandings between them. Nevertheless, situations of conflict have arisen in the past, especially between the ERC and ANACOM, as outlined above.

In the Portuguese mediascape, there are no mechanisms of self-regulation or co-regulation actually performing their activities on a daily basis. However, there are some experiences with self-regulation but they occur within the confined space of newsrooms. This specific case, for example, includes mechanisms such as newsroom councils, internal codes of procedures; in another instance, the role of ombudsman can also be mentioned (one for

⁸ Contract of Public Service Television, dated March, 8 of 2008 [in Portuguese: www.gmcs.pt/download.php?dir=27.188&file=cont._conc._serv._p%FAblico_televis%E3o.pdf, accessed 15.06.2012].

⁹ Contract of Public Service Radio, dated June, 30 of 1999 [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=106&lang=pt>, accessed 15.06.2012].

¹⁰ Contract with the news agency called Agência Lusa, dated July, 31 of 2007 [in Portuguese: www.gmcs.pt/GMCS/cpsip/contrato_Estado_Lusa.pdf, accessed 15.06.2012].

¹¹ Code of Advertising – Decree-Law no. 330/90 (October, 23), modified by Decree-Law no. 74/93 (March, 10), Decree-Law no. 6/95 (January, 17), Decree-Law no. 61/97 (March, 25), Law no. 31-A/98 (July, 14), Decree-Law no. 275/98 (September, 9), Decree-Law no. 51/2001 (February, 15), Decree-Law no. 332/2001 (December, 24), Decree-Law no. 81/2002 (April, 4), Law no. 32/2003 (August, 22), Decree-Law no. 224/2004 (December, 4), Law no. 37/2007 (August, 14), Decree-Law no. 57/2008 (March, 26) and Law no. 8/2011 (April, 11) [in Portuguese: <http://www.gmcs.pt/index.php?op=fs&cid=124&lang=pt>, accessed 15.06.2012.]

¹² <http://www.anacom.pt/render.jsp?languageId=1>, accessed 15.06.2012.

¹³ <http://www.concorrenca.pt/vEN/Pages/Homepage-AdC-vEN.aspx>, accessed 15.06.2012.

¹⁴ <http://www.gmcs.pt/index.php?op=cont&cid=77&sid=314>, accessed 15.06.2012.

the press and one for radio and television), as well as experiences of readers' letters. As Fidalgo¹⁵ states (2009: 385), the Code of Ethics for journalists and the Council of Ethics of the Portuguese Journalists' Union can also be placed within self-regulation, taking into account their character as instruments that "imply all the professional group [of journalists] as such".

There is an example of self-regulation in which the ERC has played a very important role as promoter of the initiative. This concerns the case of an agreement on the classification of television programs among the television operators (the public service broadcaster, RTP, and the private broadcasters, SIC and TVI), dated September 2006¹⁶. The ERC has the legal and statutory duty (prescribed in article 9 of Law no. 53/2005) of promoting co-regulation and encouraging the "adoption of mechanisms of self-regulation by the entities that pursue media activities as well as by trade unions, associations or other entities of the sector". Despite this legal reference to other mechanisms of regulation, there are no formal or established links between the ERC and other self-regulatory or co-regulatory structures. On the other hand, the cooperation between the ERC and other regulatory bodies is required, namely in cases of acquisition of media companies, as explained before, or when defining the "economically relevant markets" is needed. In the first case, the ERC has the legal duty to issue an opinion on subjects of media property takeover (article 24, no. 3, paragraph p) but the final decision is made by the National Authority for Communications (ANACOM). Another example of is the joint determination between the ERC and the Competition Authority (AdC) of the "economically relevant markets" in the media sector (article 24, no. 3, paragraph o), which is a concept that has led to controversy and might need clarification.

2. FUNCTIONS

The ERC is responsible for the regulation of the audiovisual sector (excluding on demand media services) as well as of general media content, including the print media and news agencies.

According to its Statutes (article 8), it has the following main functions:

- To ensure the free exercise of the right to information and of press freedom;
- To ensure non-concentration of ownership in media companies aimed at the protection of pluralism and of diversity, without prejudice to competencies of the Competition Authority;
- To ensure the independence from the political and economic powers of entities pursuing media activities;
- To ensure the respect for citizen's rights, liberties and guarantees (in Portuguese, commonly known as DLG's – *Direitos, Liberdades e Garantias*);
- To assure the effective expression and confrontation of the various currents of opinion in respect of the principle of pluralism and of the editorial guidelines of each media company;

¹⁵ Fidalgo, J. (2009) *O Lugar da Ética e da Auto-regulação na Identidade Profissional dos Jornalistas*. Lisboa: Fundação Calouste Gulbenkian/Fundação para a Ciência e Tecnologia (FCT).

¹⁶ In Portuguese: www.gmcs.pt/download.php?dir=58.318&file=classificacao_programas_tv.pdf, accessed 16.06.2012

- To assure the exercise of the rights to broadcast, the right of reply as well as the right of political reply;
- To assure, in conjunction with the Competition Authority (AdC), the regular and efficient functioning of print and audiovisual markets, based on conditions of equity and transparency;
- To collaborate in the definition of policies and strategies that underlie the radio spectrum planning, without prejudice of tasks assigned by law to ANACOM;
- To monitor compliance by advertising campaigns developed by the State, Autonomous Regions and local government authorities with the constitutional principles of fairness and impartiality of Public Administration;
- To ensure compliance with regulatory standards established for media activities.

To summarize, the ERC's scope of activity, of intervention and supervision includes entities pursuing media activities under the jurisdiction of the Portuguese state, namely the news agencies, persons who, individually or collectively, edit periodic publications regardless of their distribution mean and radio and television operators (including content broadcast electronically).

3. LEGITIMIZING / UNDERLYING VALUES

The fact that the state media regulatory body is enshrined in the Constitution of the Portuguese Republic is an extraordinary example of the importance given to media regulation. Similarly significant is the establishment of the ERC as an independent administrative entity financially autonomous (article 39 of the Constitution).

Based on this legal framework and on Law no. 53/2005 that created ERC, it is possible to draw some general considerations which might help the reader to understand the value and main goals of media regulation, in general, and of the ERC's activity, in particular:

- To safeguard and promote freedom of expression, freedom of enterprise and the right to inform and to be informed;
- To protect rights, freedoms and guarantees of citizens (namely the right to personality, the right to privacy, the right to equality, among many others);
- To prevent concentration of media ownership;
- To guarantee plurality of opinions and voices and diversity;
- To safeguard independence from political and economic powers.

The state media regulatory entity currently operating in Portugal replaced, with some significant changes, its predecessor called *Alta Autoridade para a Comunicação Social* (AACS; High Authority for the Media, in English). In fact, the implementation of another entity responsible for media regulation in 2005 introduced a relevant feature in the Portuguese context since the ERC is the only regulatory body which has constitutional protection.

The Portuguese Constitution enshrines media regulation in Portugal since 1976 but it was the constitutional revision of 1989 that opened the range to public regulation of

all media sectors. At that time, media regulation was undertaken by the High Authority, leaving behind a tradition of regulation of state media bodies only (as it was developed by the Press Council, for example). The subsequent constitutional revision in 2004 introduced the notion of public regulatory intervention in the media field on behalf of the citizens' rights and principles of freedom of the press and of information (articles 37 to 39 of the Portuguese Constitution).

There is no determined hierarchy of values justifying media regulation in Portugal by way of the reading of laws but rather there are some more or less explicit references to the freedom of speech and of the press, the citizens' right to information, to inform and to be informed as well as the protection of their fundamental rights, the guarantee of pluralism and diversity and the quality of information. In fact, Augusto Santos Silva, the minister responsible for the initiative that created the ERC, explains that the option for the name should not only be decisive but, most of all, meaningful. The reference to a regulatory entity *for* the media was meant to represent a constant concern with citizens: "it is preferable to talk about regulation for the media emphasizing a double scope: in favour of the media, towards citizens" (Silva¹⁷, 2007: 19).

4. PERFORMANCE

Regarding the ERC's performative dimension on a daily basis, there is a set of tasks that it is responsible for, namely the reception and managing of complaints (either from individual citizens or from institutions), the registration and classification of audiovisual program services, the regular supervision and monitoring of audiovisual content (for example, compliance with the legally established quotas for the playing of Portuguese music in radio or the quotas for advertising breaks on television).

One of the most controversial issues is related to the right of reply in the press. There has been a vigorous debate for many years amongst media professionals, the regulator and researchers on the establishment of some self-regulatory mechanism as, among other reasons, it is time-consuming and resource intensive for the state media regulator to deal with this matter. Nevertheless, dealing with all situations involving the right of reply is one of the tasks currently performed by the ERC.

In general, the daily performance of the state media regulatory body is consistent with legal requirements concerning it and there are no major discrepancies between what it is supposed to do and what it really does, although there are some comments and complaints about there being an excessive range of competences mentioned in the law.

The character of decisions made by the ERC is, most of the times, binding, although citizens, media companies or other actors can appeal to the courts. It is worth noting that the same procedure has to be undergone when it is intended to begin any kind of judicial process in the civil courts.

¹⁷ Silva, A. S. (2007) 'A hetero-regulação dos meios de comunicação social'. *Comunicação e Sociedade*, 11: 15-27.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

Although an independent administrative entity, the ERC is accountable to the Parliament, and it also has to submit the mandatory annual reports. In fact, most of the ERC's budget comes from the Parliament, which also indicates a certain degree of commitment.

The annual report includes an analysis of the current state of the media field as well as a description of the ongoing activities and expenses incurred in the correspondent year by the regulatory body.

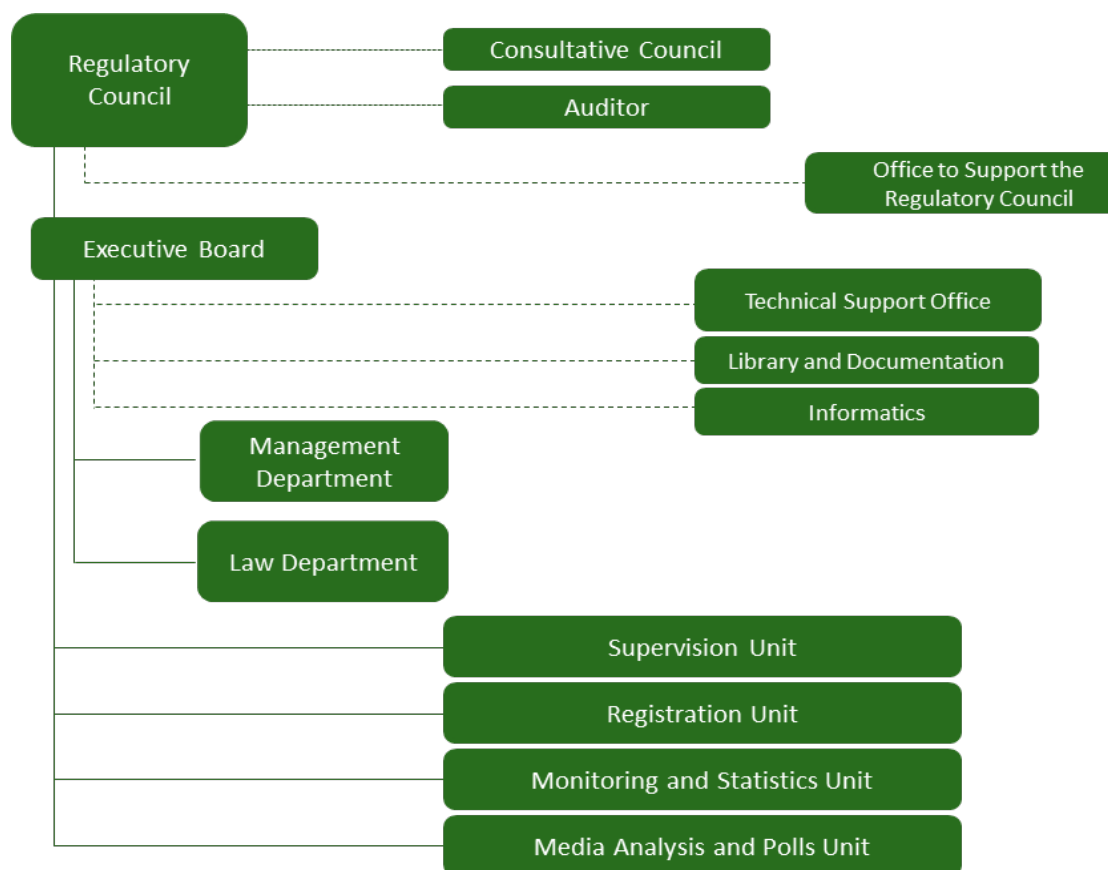
There is a set of enforcement mechanisms normally used by the Regulatory Council in cases of misconduct or non-compliance of media. Addressing warnings, recommendations and reminders are the most commonly made decisions but there are also other sanctions that have not been used so frequently. All these forms of enforcement are discussed and voted upon during the Regulatory Council's meetings, based on the analysis of the circumstances developed by any of the ERC's specialized departments, described in the next section.

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

The internal organization of the ERC is not very complex since it is divided into four main thematic areas that deal with certain matters and act in accordance with legal requirements specifically addressed to the same issue.

The ERC's structure is divided into departments, units, and offices:

- Law Department;
- Management Department;
- Supervision Unit;
- Registration Unit;
- Monitoring and Statistics Unit;
- Media Analysis and Polls Unit;
- Office to Support the Regulatory Council;
- Technical Support Office;
- Library and Documentation;
- Informatics.



The law does not foresee a total number of staff for the ERC. Nevertheless, according to its latest annual report on activities and budget¹⁸, there were 66 members of staff at the end of December 2010 (45 female workers and 21 males), most of them aged between 25 and 29 and 30 and 34. Moreover, in general, the average age of workers is 42 years old: 40 years old in females and 47 in males. Regarding wages, the total amount of expenses with employees is, according to the same report, of 2.097.739,29 Euros in 2010 and 1.993.534,20 Euros in 2009. A total of 26 employees had a contract of employment based on the Portuguese Labor Code in 2010 and only 2 employees worked on the basis of services provision. According to data gathered from previous annual reports on the ERC's activities and finances, by the end of the year 2009, there were 72 people working at the ERC (47 women and 25 men), which represents an increase when compared to the previous year (60 members of staff in December of 2008).

The Regulatory Council is the ERC's highest decision-making body and it is comprised of five members elected for a period of five non-renewable years: four of them are appointed by the Parliament and the fifth member is co-opted by the appointed members. Re-elections are not possible. The members shall be persons "of recognizable reliability, independence and with technical and professional competence" (article 18, no. 1 of Law no. 53/2005), who shall "perform their duties with exemption, rigor, independence and high sense of responsibility" (article 20, no.3). This is the organism responsible for the determination

¹⁸ Available online at <http://www.erc.pt/documentos/Relatorios/v3-erc-rac-2010/index.html> [accessed 01.03.2012].

and implementation of guidelines of regulatory activity, the approval of annual reports of activities (as well as plans and budget), the approval of deliberations and general guidelines regarding the activity of media actors under its scope of intervention, the approval of internal rules and procedures and the organization of human resources. The general competences of this Council can be subsumed in the following topics (INDIREG, 2010: 13)¹⁹:

- To “ensure that the content of media operators (press, radio, tv), respect principles and requirements legally prescribed”;
- To “grant licenses to radio and television operators”;
- To “monitor the way they use those licenses”;
- To “rule on any complaints by the public regarding media misbehavior”;
- To “make a binding statement for the appointment of editors-in-chief for the Public Broadcasting Service”;
- To “give opinion on transactions concerning media ownership and media concentration”.

The Regulatory Council’s decisions are taken by majority vote although with at least three votes in favor. There are cases in which the presence of all five members might be required.

The media sector finds representation in the framework of this regulatory body through its presence in the Consultative Council, an advisory organ that assists the Regulatory Council in the definition of its regulatory guidelines for its activity. It comprises representatives from various public and private entities which fall in the media area, namely the telecommunications regulator and the Journalist’s Union. It meets twice a year and there is the possibility of extraordinary meetings when convened by its President or at the request of a third of its members. Seeing that the state General Directorate for Consumer Affairs is also represented in the Consultative Council, civil society can be seen to be somehow present in the ERC’s structure. These members are elected by competent bodies of the represented organs in the Council for a period of three years, with replacements possible at any time.

Most of the daily activities carried out by the regulatory body are completed by four units dedicated to specific matters. The focus of the Supervision Unit is mainly on radio and television and it is responsible for the completion of tasks such as the verification of compliance with advertising schedules when spots are broadcast, with quotas of television independent productions or with quotas of Portuguese music broadcast in radio, amongst others. The Registration Unit is the one responsible for the record-keeping of media operators, that is to say it has to deal with the registration of journalistic companies and with the verification of the reliability and correspondence of written information and data provided by media operators with what really occurs. Daily information is, on the other hand, an issue under the sphere of competences of the Monitoring and Statistics Unit. It works with

¹⁹ Information available in the Portuguese table developed by Joaquim Fidalgo within the framework of the research project called INDIREG - “Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive”, a partnership between the Hans Bredow Institute for Media Research, the ICRI (K.U. Leuven), the CEU/CMCS (Central European University, Budapest) and the Cullen International [http://www.cullen-international.com/cullen/cipublic/studies/Independence_media_regulators/Indicators_independence_efficient_functioning_AVMS_reg_bodies.htm, accessed 20.02.2012].

information in a systematic and on a daily basis, having as its main objective the verification of diversity and rigor, not only on television but also in radio and in the press. For example, when reports on political pluralism (in public service TV broadcasts) are being prepared, this unit is one of the main actors involved in the task. Finally, the Media Analysis and Polls Unit deals mainly with single cases for deeper analysis and with polls. In the first situation, the origin of the analysis of a certain issue can be a complaint or a decision by the Regulatory Council, when members consider that a more complex analysis is pertinent but this department also works systematically for annual reports or for special research projects (including, for instance, questions as regional press or the journalistic coverage of electoral campaigns). Regarding polls, their work is developed before their publication (in order to verify compliance with legal requirements) but also when complaints about polls or their content take place.

7. FUNDING

The ERC's funding derives mainly from state budget, industry fees and fines (which result from the imposition of penalties).

Although there is no direct source of income from spectrum fees, there is an amount transferred from the telecommunications regulator ANACOM to the ERC, whose financing derives primarily from these types of fees. In 2010, this contribution amounted to 812.686,00 Euros.

According to the ERC's annual report on finances and activity dated 2010 (the latest available), the total amount of income was: 1.059.028,75 Euros from regulation and supervision fees (legally²⁰ defined for all media operators, namely press, radio, open TV, cable TV and mobile communications, based on criteria of scope and dimension of each operator, which establish the distinction between tax of "high regulation", of "medium regulation" and of "low regulation"); 418.978,00 Euros from the attribution of titles enabling emission; 62.000,00 Euros from fines; 812.686,00 Euros from ANACOM; and 2.340.178,00 Euros transferred from the Assembly of the Republic.

The ERC is legally obliged to annually deliver to the Assembly of the Republic, by March, 31 of each year, a report on its regulatory activities as well as a report on activities and finances. The ERC sends the report to the Portuguese Assembly for its discussion, which also takes place at a hearing in the Parliamentary Commission on Constitutional Matters and Rights, Liberties and Guaranties (article 73, no. 2 of Law 53/2005). The document is then publicly available on the ERC's website.

8. REGULATION IN CONTEXT

In Portugal, there are 42 linear commercial TV channels and two main non-linear commercial services for video on demand, namely "Meo/Portugal Telecom" and "Zon / TV Cabo".

²⁰ Decree-Law no. 103/2006 (7 June), amended by the Decree-Law no. 70/2009 (31 March), on regulation and supervision taxes. Available online at <http://dre.pt/pdf1sdip/2009/03/06300/0194901961.pdf> [accessed 27.03.2012].

There is public service broadcasting²¹: two national open-access channels (RTP1 and RTP2) and 7 smaller channels (RTP Madeira, RTP Açores, RTP Internacional, RTP África, RTPN, RTP Memória and RTP Mobile). There are some recent debates regarding the future of PSB in Portugal, especially related to the alleged political intention (of the Government) of privatizing RTP as well as of closing RTP2. The two private broadcasters appeared in the 1990s. SIC (*Sociedade Independente de Comunicação*), which means Independent Communications Society, is led by the former Prime Minister Francisco Pinto Balsemão, while TVI (*Televisão Independente* – Independent Television) had close ties to the Catholic Church in its origin. Opening television broadcasting to private initiatives was the “most relevant media decision during Cavaco Silva’s mandates, and these two actors successfully lobbied to determine the outcome that best suited their interests” (Pinto & Sousa, 2004: 185)²².

Portugal has completed, last May 2012, the process of transition to Digital Terrestrial Television (DTT). The Telecommunications Regulator, ANACOM, was the body in charge of, as stated in its website²³, assuring that “the population took timely precautions in order to continue receiving television signals, in digital format only, considering the switch-off”. Recently, there has been a serious debate on this subject since a PhD thesis²⁴ has concluded that ANACOM has favoured Portugal Telecommunications (PT) and there is evidence towards regulatory capture by the regulated, leading to several (re)actions (namely threats of lawsuits) and also to the promotion of a public petition for academic freedom²⁵.

There are about 400 local radio stations and “national and regional stations’ ownership of which is concentrated in the hands of the state and Portuguese media groups” (Correia & Martins, 2007: 270), with Catholic Renascença Group leading.

In the press field, there are four main media groups controlling media property in the print media (namely, *Impresa*, *Media Capital*, *Cofina* and *Controlinveste*) and the number of regional newspapers, mostly weekly, is high: around 600 local and regional newspapers, a sector where the “Church is, directly or indirectly, the main owner” (Correia & Martins, 2007: 265)²⁶.

Regarding Internet, there were 1.4 million of users by the end of 2005 and “11.1 million subscribers of mobile phone service” (Correia & Martins, 2007: 271).

²¹ See <http://www.rtp.pt/homepage/> [accessed 30.06.2012].

²² Pinto, M. & Sousa, H. (2004) “Portugal”, in Kelly, M., Mazzoleni, G. & McQuail, D. (eds.) *The Media in Europe – The Euromedia Handbook*. London: Sage, pp. 180-190.

²³ Information on the DTT transition process at <http://www.anacom.pt/render.jsp?categoryId=344204> [accessed 15.11.2012].

²⁴ Available online at http://www.lasics.uminho.pt/ojs/index.php/TDT_Portugal/ [accessed 01.12.2012].

²⁵ Available online at <http://www.peticaopublica.com/?pi=P2012N31407> [accessed 01.12.2012].

²⁶ Correia, F. & Martins, C. (2007) “The Portuguese Media Landscape”, in Terzis, G. (ed.) *European Media Governance – National and Regional Dimensions*. Bristol: Intellect, pp. 263-276.

Spain

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0. INTRODUCTION

In Spain there is neither a single media regulatory body nor a specific audiovisual authority, but instead there are several entities involved in different fields affecting the Spanish media: market competition, content and cultural industries, intellectual property, broadcasting licenses, public service broadcasting, telecommunication networks and services and other digital services. In addition, the authority in these different areas is shared among central and regional institutions (Autonomous Communities).

Market competition, telecommunications, intellectual property and most digital services regulation is basically under the authority of the State, directly attributed to parliamentary and governmental institutions, or to independent authorities or agencies. The State and the regions share the responsibility in areas related to content and cultural industries, broadcasting licensing and other audiovisual media regulations, especially public service broadcasting (see table).

Apart from central or regional regulation, however, market regulation must be considered as an important factor within the scenario when analysing the configuration and role of media regulatory bodies in Spain. In fact, the debate and creation of independent or specific regulatory bodies follows the liberalisation of former public monopolies, such as telecommunications and television. In contrast, there is less regulatory development affecting other media – print media, cinema, internet – regulated by the market and private entities.

In the case of telecommunications, a dedicated commission has been created which focuses on market issues (Telecommunications Market Commission), but in the case of audiovisual activities, there is no consensus in Spain for the necessity of such a body. Instead, the existing market regulatory bodies (Competition Commission; in some cases, Stock Market Commission), together with the Telecommunications Market Commission and the Intellectual Property Commission, are considered to be more appropriate institutions to

regulate and supervise the economic performance of media broadcasting, limiting the State intervention in issues involving content control, where some self-regulatory bodies act, both at national and regional level.

Regulation bodies	
National level	
Secretary of State for Telecommunications and for the Information Society	Central Government
Parliamentary Commission for the control of CRTVE	National Parliament
RTVE's Administration Council	National Parliament
Telecommunications Market Commission (CMT)	Independent authority
National Commission for Competition (CNC)	Independent authority
Intellectual Property Commission (CPI)	Governmental agency
Regional level	
Parliamentary Commissions for the control of regional public service broadcasters	12 regional Parliaments
Administration Councils of Public Service Broadcasting	12 corporations: Euskadi, Catalunya, Galicia, Andalucía, Canarias, Comunitat Valenciana, Madrid, Illes Balears, Región de Murcia, Aragon, Asturias, Castilla-La Mancha
Regional ministries of Culture, Presidency departments	17 Autonomous Communities
Audiovisual Councils	Catalonia, Andalusia, Navarra

The regulatory structure was modified by the General Audiovisual Law adopted in 2010, which included, for the first time, the creation of an independent audiovisual authority, the State Council for Audiovisual Media (CEMA). Furthermore, the economic crises and the change in political structure after the elections in 2011 have again put the new system under revision even before it was fully implemented. The following data refers to the situation in July 2012, when the new government had already renounced creating the CEMA by way of a reform of the whole Spanish regulatory bodies' structure.

1. LEGAL FRAMEWORK AND FUNCTIONS

Spanish legislation outlines three main fields of regulation: telecommunications, information society services and broadcasting, covered by three corresponding laws.

The Telecommunications Law (Ley 32/2003) established the Telecommunications Market Commission, which complements legislative and executive actions in this field.

There is no independent authority assigned for the regulation of the Internet and digital content services, regulated by the Information Society services and e-commerce Law (Ley 34/2002). Instead, the Secretary of State for Telecommunications and for the Information Society is the main body responsible for the public intervention in this area.

As for the audiovisual services, the General Audiovisual Law (Ley 7/2010) planned the creation of the CEMA as an independent body for the regulation, supervision and control of the national broadcasting system, including the control of the PSB, also subject to the control of a Parliamentary Commission and of an Administrative Council elected by the Parliament and Senate.

In addition to these, at a national level, the Competition Commission, an independent body, and the Intellectual Property Commission, an administrative agency, cover economic issues affecting media activities.

Regional governments exert legislative and executive functions concerning their regional and local media. In most cases, all the regulatory activity is divided between the regional Parliaments and Governments, without independent regulatory bodies. Regional Parliaments are responsible for the adoption of media laws affecting their territories, and, when there is a regional public service broadcaster, a parliamentary commission is established to control it. Regional Governments tend to concentrate their media regulation activities within the Presidential Department or/and Culture Departments. In most cases, the allocation of broadcasting licenses for regional and local private television and radio is controlled by the Presidential Departments.

Currently, two regions have their own media councils, Catalonia (since 2000) and Andalusia (since 2004). There used to be a third one in Navarra (Consejo Audiovisual de Navarra, COAN. 2001 – 2011), but it was disbanded due to the economic crisis.

1.1 SECRETARY OF STATE FOR TELECOMMUNICATIONS AND THE INFORMATION SOCIETY (*SECRETARÍA DE ESTADO DE TELECOMUNICACIONES Y PARA LA SOCIEDAD DE LA INFORMACIÓN, SETSI*).

Under the authority of the Ministry of Industry, Energy and Tourism and ratified after the restructuring of the cabinet, due to the change in government in 2011¹, this area includes a General Directorate for Telecommunications and Information Technologies (*Dirección General de Telecomunicaciones y Tecnologías de la información*) which is in charge of proposing and executing the policies of the government in areas of telecommunications and Information Society².

The General Directorate includes different Sub-Directorates related to broadcast and digital Media: General Sub-directorate for the Promotion of the Information Society, General Sub-directorate for the Information Society Services, and General Sub-directorate for Audiovisual Media³.

The main functions of this Directorate⁴ are related to technical regulations affecting telecommunications, including regulations on telecommunications universal service provision and other services and infrastructures for telephony, Internet and broadcasting. It is also in charge of subsidy requests and for licensing rights to use the spectrum. The Directorate holds sanction capacities and has authority on taxes for the use of the spectrum defined as a public domain.

¹ Real Decreto 1823/2011, de 21 de diciembre, por el que se reestructuran los departamentos ministeriales; Núm. 307 Jueves 22 de diciembre de 2011 Sec. I. Pág. 139961

² Real Decreto 1887/2011, de 30 de diciembre, por el que se establece la estructura orgánica básica de los departamentos ministeriales, Núm. 315 Sábado 31 de diciembre de 2011 Sec. I. Pág. 146666

³ Real Decreto 1152/2011, de 29 de julio, por el que se modifica el Real Decreto 1226/2010, de 1 de octubre, por el que se desarrolla la estructura orgánica básica del Ministerio de Industria, Turismo y Comercio. Núm. 209 Miércoles 31 de agosto de 2011 Sec. I. Pág. 94914

⁴ Orden IET/556/2012, de 15 de marzo, por la que se delegan competencias del Ministro de Industria, Energía y Turismo, y por la que se aprueban las delegaciones de competencias de otros órganos superiores y directivos del departamento. (BOE Núm. 67 Lunes 19 de marzo de 2012 Sec. III. Pág. 24828

1.2 COMMISSION FOR THE CONTROL OF NATIONAL PUBLIC SERVICE BROADCASTING

Control of PSB in Spain is attributed to a parliamentary commission, Joint Commission for Parliamentary Control of RTVE Corporation and its Subsidiaries (*Comisión Mixta de Control Parlamentario de la Corporación RTVE y sus Sociedades*), composed of members of Congress and the Senate. Parliament is also responsible for proposing and adopting the nine-year framework mandate for RTVE⁵, which has to be supervised by the Joint Commission. The activity of the Joint Commission is based on periodical sessions where the members present questions orally to the President or other representatives of the RTVE Corporation.

In addition, Parliament also elects an Administrative Council for the RTVE Corporation (*Consejo de Administración de la CRTVE*), regulated by Public Service Broadcasting Law⁶, and reformed by the new government in 2012⁷. This board has to negotiate with the government for the adoption of a three-year programme-contract derived from the framework-mandate.

1.3 TELECOMMUNICATIONS MARKET COMMISSION

(*Comisión del Mercado de Telecomunicaciones. CMT*).

The Telecommunications Market Commission is defined as a public body responsible for setting and supervising the duties of telecommunication operators and for promoting competition in the audiovisual services market. It also intervenes in the resolution of conflict between operators, acting as an arbitration body.

In addition to the law regulating public administration⁸, the specific regulations in the Telecommunications Market Commission are: the Telecommunications Law (2003)⁹, article 48; the Rules of the Telecommunications Market Commission (1996)¹⁰, and the Internal Rules (2007)¹¹.

Although a public body, under the Ministry of Industry, Tourism and Trade, it has “full autonomy” in its activity. The government appoints the board on the recommendation of both the Economic and Science and Technology Ministers, subsequent to the appearance of the candidates before the appropriate parliamentary commission.

The law clearly specifies the distinction between the regulation of rights to use the spectrum, the networks and coverage obligations (aspects regulated by the Telecommunications Law, and related to the CMT’s attributions), and the regulation of

⁵ The framework mandate currently in force was adopted in 2007: Aprobación por los Plenos del Congreso de los Diputados y del Senado del mandato-marco a la Corporación RTVE previsto en el artículo 4 de la Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal. (Boletín Oficial de las Cortes Generales Serie A: Actividades parlamentarias, 18 de diciembre de 2007 Núm. 470.)

⁶ Ley 17/2006, de 5 de junio, de la radio y televisión de titularidad estatal (BOE num. 134 Martes 6 junio 2006, pp. 21207).

⁷ Real Decreto-ley 15/2012, de 20 de abril, de modificación del régimen de administración de la Corporación RTVE, previsto en la Ley 17/2006, de 5 de junio. (BOE núm. 96 Sábado 21 de abril de 2012 Sec. I. Pág. 30985)

⁸ Law 30/1992 on the Legal Regime of Public Administration; Law 6/1997, on the organisation and functioning of the General State Administration

⁹ Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones. BOE núm. 264, Martes 4 noviembre 2003, pp. 38890.

¹⁰ Real Decreto 1994/1996, de 6 de septiembre, por el que se aprueba el Reglamento de la Comisión del Mercado de las Telecomunicaciones, BOE, n. 232, miércoles 35 de septiembre de 1996, p. 28605

¹¹ Resolución de 20 de diciembre de 2007, de la Comisión del Mercado de las Telecomunicaciones, por la que se publica el texto consolidado del Reglamento de Régimen Interior de la Comisión del Mercado de las Telecomunicaciones. BOE n.27, jueves 31 de enero de 2008, p. 5698

audiovisual content and services (regulated by Audiovisual Law), and “information society services” different from signal transportation services (regulated by the Information Society Services and e-commerce Law). So the CMT covers telecommunications, broadcasting and digital services only for issues related to the transmission or broadcasting telecommunications networks they use.

In terms of organization, the CMT relies on two specialized committees that carry out the specific functions associated with each field: the Audiovisual Committee, with attributions related to the planning and licensing of the spectrum for broadcasting services; and Telecommunications Services Committee.

The CMT was created as a convergent body (telecoms-audiovisual), as described before, in 1996, although from the beginning, there has been a debate about whether there should be a separate body to regulate audiovisual activities, or should the CMT broaden its objectives and functions to include the specific aspects of audiovisual media regulation, which seems to be the plan of the new conservative government elected in 2011.

The functions of the CMT affecting the broadcasting industry are:

- a) Registration of telecommunication operators
- b) To Safeguard competition in audiovisual markets, in coordination with other competing authorities
- c) Preparing technical plans for the use of the spectrum
- d) Providing Information and conditions for tendering for licenses for the use of the spectrum
- e) Technical inspections and sanctions.

Other functions of the CMT related to telecommunications are:

- a) Arbitration, number assignment, public service definition, safeguarding of plurality-in competition, safeguarding of technological neutrality, pricing policies...
- b) Provision of Information about merger agreements
- c) Informing the government on decisions related to telecommunications
- d) Technical inspections and sanctions

1.4 NATIONAL COMPETITION COMMISSION

(Comisión Nacional de la Competencia, CNC).

Defined as a Public law entity, under the Economic Minister with organizational and functional autonomy, the National Competition Commission has a Directorate for Research, with four areas, one devoted to the Information Society (*Dirección de Investigación: Sub-dirección de la Sociedad de la Información*). It is regulated by the Competition Protection Law¹² and the Statutes of the National Commission for Competition¹³.

Both the Law and Statutes establish that the National Competition Commission is an autonomous body, which must act with total independence from the public administration.

¹² Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

¹³ Real Decreto 331/2008, de 29 de febrero, por el que se aprueba el Estatuto de la Comisión Nacional de la Competencia

However, the board (President, Board of directors and Research Director) is elected by the government.

The Commission has intervened in different cases affecting different media: television, radio, press, magazines, cinema, rights management (collecting societies, football TV rights), cable and broadcast telecommunication networks. It has also announced the adoption of different laws affecting media (changes in the regulation of RTVE, laws relating the use of the spectrum and the digital divide). Thus, although it is not a specific media regulatory body, the CNC plays an active role in regulating the media industry structure.

1.5 INTELLECTUAL PROPERTY COMMISSION

(Comisión de la Propiedad Intelectual, CPI).

By Royal Decree in 1989, an Arbitral Commission of Intellectual Property was created. This was also included in the Intellectual Property Law passed in 1996. But it was with the approval of the Sustainable Economy Law in May 2011 that this Commission adopted its present form, with a new structure and with wider objectives and functions.

Within the first days of its mandate, the government, elected in November 2011, developed a law for the adoption of day-to-day norms for the Commission. Therefore the legal documents framing this commission are the final disposition nr. 43 of the Sustainable Economy Law¹⁴, which amends article 158 of the Intellectual Property Law, referred to the Intellectual Property Commission; and the Royal Decree regulating the running of the Intellectual Property Commission¹⁵.

The CPI is defined as a collegiate body attached to the General Sub-Directorate of Intellectual Property of the Ministry of Education, Culture and Sports. It is an administrative agency of the government.

It is composed of two sections: First Section, with mediation and arbitration functions, and the Second Section, dedicated to the safeguarding of intellectual property rights against infringements coming from information society services. Members of the First Section are appointed by the Ministry of Education, Culture and Sport, at the proposal of the sub-secretaries of three Ministers: Justice; Education, Culture and Sport; and Economy and Competitiveness. Members of the Second Section are appointed also by different departments, among their own staff. In this case, the ministries involved are: Education, Culture and Sport; Industry, Energy and Tourism; Presidency; and Economic and Competition.

The CPI covers issues related to intellectual property rights, whatever media is involved, but in its new format, the Second Section of the Commission is particularly dedicated to internet in relation to copyright infringement.

The commission has mediation and arbitration rights in cases related to copyright conflicts and when some party demands a revision of the fares set by collecting societies (First Section). It has also to safeguard copyrights in cases of infringement by internet service providers (Second Section). The Section can order the removal of some content from ISP's sites and can even order the closure of the sites that are considered to infringe copyright.

¹⁴ Ley 2/2011, de 4 de mayo, de Economía Sostenible

¹⁵ Real Decreto 1889/2011, de 30 de diciembre, por el que se regula el funcionamiento de la Comisión de Propiedad Intelectual

1.6 STATE AUDIOVISUAL MEDIA COUNCIL

(*Consejo Estatal de Medios Audiovisuales, CEMA*).

The General Law on Audiovisual Communication¹⁶ adopted in 2010 defined the CEMA as the audiovisual sector's regulatory and supervisor body. However, the government of PP which emerged from the elections in November 2011 announced that they are not going to create the Council, and instead they will include its responsibilities in another body, probably the CMT. The economic crises and the obligations to reduce the public deficit are the reasons given for this decision; however, this is in tune with the opposition of the PP against the creation of such a body in previous parliamentary debates.

The CEMA was defined as an independent authority. The government was required to elect the board, on recommendation by Parliament with a 3/5 majority (if there is no such majority, two months after the first vote it can be proposed with a simple majority).

It was meant to cover radio, television and connected and interactive services. It had also some attributions related to cinema. But the law specified that the CEMA was dedicated to the audiovisual sector, and it had responsibilities for the providers of broadcast communication services. It did not include internet services (which are regulated by the Information Society Services and e-Commerce Law), except in the case that they were connected to broadcast services.

The CEMA was expected to safeguard and adopt the measures required to fulfil the rights and obligations stated in the audiovisual regulation. It was planned to:

- a) Include a registry of service providers.
- b) Approve the list of events of general interest.
- c) Inform the conditions for broadcasting licenses tenders and approve the renewal of the licenses.
- d) Check consideration of concentration limits, of networked radio broadcasting, and of other obligations or limits established by the Audiovisual Law.
- e) Check the fulfilment of public service mandate, and the proportionality of public funds assigned for public service media.
- f) Safeguard pluralism and competition.
- g) Assess the influence of new technologies on the audiovisual market and on public service.
- h) Arbitrate in conflicts between audiovisual service providers, production companies and other content providers, and broadcasting license holders.
- i) Promote media literacy.
- j) Some responsibilities in relation to cinema (mainly, regarding quotas for independent and national production).
- k) Sanction facility.
- l) Advise Parliament and other institutions in the audiovisual area. To present a report for each law or norm affecting the audiovisual sector.

¹⁶ Ley 7/2010, de 31 de marzo, General de la Comunicación Audiovisual

1.7 NATIONAL AGENCY FOR RADIO COMMUNICATION/BROADCASTING

(*Agencia Nacional de Radiocomunicaciones*)

Planned also in 2010 by the General Law on Audiovisual Communication as the body in charge of the planning of the uses of the spectrum, it has not been created.

1.8 REGIONAL AUDIOVISUAL COUNCILS

The **Catalan Audiovisual Council** (Consell Audiovisual de Catalunya, CAC) is defined by law as an independent body, with powers of regulation and sanction as well as having organic and functional autonomy. The board is appointed by the Parliament and the board's president by the regional Government. It is regulated by the Law 2/2000, of 4th May, by means of which the Audiovisual Council of Catalonia was created¹⁷.

The **Andalusian Audiovisual Council** (Consejo Audiovisual de Andalucía) is defined as an independent public entity, with its own legal personality. (Dcr. art. 1; 2). The board is appointed by the Andalusian Parliament (Dcr.art.8). It is regulated by the Law 1/2004, of 17 December, by which the Andalusian Audiovisual Council was created¹⁸.

The former **Audiovisual Council of Navarra** (Consejo Audiovisual de Navarra) (2001 – 2011, which is actually an administrative agency) was defined as a public body with organic and functional autonomy, independent of Navarra governmental institutions and budgets, and with regulation and sanction capacities.

The activity of the Catalan and the Andalusian audiovisual councils focuses on radio and TV, despite the Catalan one having legal jurisdiction over the Internet as well. The legal activities outlined are very similar for both regional bodies. Their mission is to safeguard political, religious, social, linguistic and cultural pluralism as well as ensuring neutral and honest information. Furthermore, in order to safeguard rights and freedoms recognized in the Spanish Constitution and the regional statutes, the Catalan and the Andalusian audiovisual authorities are obliged to guarantee:

- Political, religious, social, linguistic and cultural pluralism as well as neutral and honest information;
- Conformity with programming and advertising rules;
- The conditions of the license concessions;
- Conformity with European normative and international agreements on media issues.

The main difference between both regional authorities is in the capacity to grant licenses: while the Catalan council achieved full legal capacity, the Andalusian only

¹⁷ (Llei 2/2000, de 4 de maig, del Consell Audiovisual de Catalunya), It is also regulated by the Agreement 3/2001, of 28 February, establishing the organic and functions statutes of the Audiovisual Council of Catalonia (Acord 3/2001, de 28 de febrer, pel qual s'aprova l'Estatut orgànic I de funcionament del Consell Audiovisual de Catalunya); and the Law 22/2005 of 29 December of audiovisual communication in Catalonia (Llei 22/2005 de la Comunicació Audiovisual de Catalunya)

¹⁸ (Ley 1/2004, de 17 de diciembre, de creación del Consejo Audiovisual de Andalucía); It is also regulated by the Decree of 219/2006 Organic law approving the organic and functioning reglament of the Andalusian Audiovisual Council (DECRETO 219/2006, de 19 de diciembre, por el que se aprueba el Reglamento Orgánico y de Funcionamiento del Consejo Audiovisual de Andalucía)

establishes the licensing requirements. On the other hand, given its particular culture, the Catalan media council has the mission to promote Catalan and Aranese languages.

To sum up, regulation of technical aspects related to audiovisual media is entrusted to the CMT. This commission also controls competition in audiovisual and telecommunication markets together with the CNC, but with a wider brief. Other economic issues of growing relevance for media industries, such as those related to intellectual property, also receive the attention of a dedicated body, in this case a governmental administrative agency.

Supervision of public service of broadcasting remains mostly in the hands of Parliament, both at a national and regional level, just as licensing for private broadcasting is kept as a governmental decision. Only in Catalonia, the Audiovisual Council has significant powers in these two areas.

Advertising issues are covered in the case of audiovisual authorities in Catalonia and Andalusia, and it was expected to be a matter for the *non nata* CEMA, as it was committed to safeguarding the compliance with the limits to advertising established by the Audiovisual Law. The other bodies (CMT, CPI or CNC) do not have powers related to advertising (unless it affects the fields under their responsibility, such as intellectual property or competition).

As for functions related to media education and digital literacy, only the regulation of the CEMA explicitly included digital and media education (art. 47. 1^o), unlike the norms regulating the regional authorities, which do not mention any function related to media literacy.

2. THE SOCIAL DEBATE: REGULATION OR SELF-REGULATION

One important issue which helps to understand the regulatory bodies' legitimacy concerns the functions the media regulatory entities are expected to perform according to other social representatives within the social debate.

At national level, social debates have focused on the need for an audiovisual authority itself, more than the concrete functions it should develop. The debate focuses on whether the CEMA should be created or is it possible to include the audiovisual specific functions within the CMT. This is likely to involve a revision of the functions, probably a reduction in the intervention capacity of the Commission on issues related to content and performance of private TV and radio operators. Voices from the private sector and liberal circles consider that there should be no intervention by any State authority that may condition content offered, as it could become a sort of censorship. They advocate a model of self-regulation, in addition to the influence of already existing market regulation authorities.

There is also some debate about the responsibility for regulating, controlling and ruling public service media, both at a national and regional level. Despite the reformist efforts to improve the independence of the public service broadcaster (PSB), *Televisión Española*, from government and political parties' control introduced with the reform of the PSB law¹⁹ and the creation of the CEMA, the reality is that in almost all cases, the parliamentary majorities keep their power to elect the boards of PSB and control the Parliamentary Commissions of Control. The CEMA was supposed to include the obligations regarding public service derived

¹⁹ Ley 17/2006, de 5 de junio, de la radio y la televisión de titularidad estatal. BOE num. 134, Martes 6 junio 2006, pp. 21207

from the European Directives and national audiovisual laws, especially in relation to the PSB contract and the proportionality and use of public funds. At the regional level, only the Catalan Council includes these functions.

Financing of PSB is another issue of conflict, amplified by the private media competing with PSB for advertising resources. The elimination of advertising in TVE has been socially accepted, in view of the audience response; at the same time, it met the interests of private broadcasters.

The national debate on the elimination of advertising in TVE moved to the regional levels, as pressures to eliminate or limit advertising in public broadcasters is growing. In the case of Catalonia, the first region to reduce advertising through self-regulation codes, the Audiovisual Council passed an instruction to limit advertising in public radio to 6 minutes/hour – previously there were no limits. The new norm led to a demand from the Private Radio Association arguing that there should be bigger restrictions.

Another main point of discussion related to both national and regional authorities, is that of the power to assign licenses. With the exception of the Catalan Audiovisual Council, the license granting is the responsibility of local governments (through the correspondent directorates or secretaries); however the CMT and the regional audiovisual authorities in their regions, have to inform the tender's conditions and to evaluate the candidates. There are calls for these independent authorities to be responsible for making the decisions, instead of local governments.

Other functions the regional media authorities are expected to perform according to other social representatives are the decision capacities and mechanisms preventing media concentration, considering that media markets need specific restrictions beyond general competition regulation, due to their social significance. Regarding the distribution of spectrum, there is an on-going debate emanating from non-profit organisations and other social activists calling for a balanced representation in media sectors'. Specifically, a top issue over the last four years in Catalonia and Spain has been the integration of a third media sector (citizen's promoting their own radio and TV) within the legal framework as well as in license planning.

Planning of Digital Terrestrial Television has also raised some controversies, due to the confusion and technical problems associated with the creation of the DTT demarcations, aggregations of municipalities expanding the traditional local coverage of local television.

In contrast to the reluctance to establish regulations on content in those areas, where audio-visual authorities exist, the public approach these entities mainly with issues related to content. In fact, basically content claims emanate from political parties. The most recent cases by the Catalan Audiovisual Council, dealing with audiences', claims are related to safeguarding the correct representation of parliamentary forces, or to correct lack of precise presentation of facts (i.e. a report about Catalan cooperatives). Similarly, the council periodically publishes specific reports on media pluralism.

Besides the periodic reports and isolated cases on media pluralism, recent responses of the Andalusian council to audience's claims have dealt with broadcasts on astrology and sex advertising outside its schedule as well as certified movies; the negative representation of a neighbourhood was one of the last cases.

In relation to the CPI, there has been and still is great controversy about its very existence and functions, with wide reaching protests and campaigns. Different representatives from civil society (internet users and other activists), from the internet service providers of the commercial sector and even from the cultural industries, defend an opposite approach to internet and the opportunities it provides for the circulation of cultural creations, both for non-profit and commercial purposes. In this case, the social debate revolves not around the absence of, but the excess of regulation, and also about the administrative proceedings, which are considered not to guarantee enough judicial protection in cases that may involve fundamental rights (privacy, right to information, freedom of expression).

2.1 REGULATORY BODIES AND SELF-/CO-REGULATORY MEDIA STRUCTURES

As has been pointed out, the liberal discourse advocates less state regulation both in terms of norms affecting content as well as the conditions of their commercial activity. On the contrary, self-regulatory authorities have been seen as better institutions to address some of these issues, especially in the areas of advertising, protection of children, respect of minorities, and other values associated with informative content. Self-regulation entities play a crucial role in collecting and distributing copyright royalties among authors and producers. These are the main areas of self-regulation in Spain.

The **Association for the Self-regulation of Commercial Communication** was created in 1995, after some years of aggressive commercial strategies in television, subsequent to the introduction of private channels, which lead to dysfunctions in the advertising market. The association gathered the main advertisers, advertising agencies, and media, and it tackles issues related to advertising practises. They have promoted two Codes: General Code of Advertising Practice (last updated in 2011) and a Code on Interactive advertising and e-commerce B2C (2003). They deal with claims and complaints about specific content (conflicts involving gender principles, cultural diversity, topic representations), and offer legal and creative advice to professionals about risks associated with their campaigns.

Faced with the existing regulatory vacuum concerning child programming, in 2004, the government and the main television companies agreed on a **Self-regulating Committee** and a **Self-regulatory Code of Television Content and Childhood**. The agreement came in response to the demands of Parents Associations and other social groups related to quality of TV programming and children, but also as a response to the requirements of European institutions. The Committee is composed of executives of the main television groups, one representative of production companies, and one journalist, and it deals with claims and complaints, most of them about social behaviours presented in specific programs, not only for children.

In order to ensure the achievement of the principles of journalistic ethics some institutions were created in the 90s, such as the **Federation of Journalists Ethics Complaints Commission** in Spain, or the **Information Council** in Catalonia. There are also other internal institutions inside media companies, such as the **News Council** and the **Newsroom Statute**, which are aimed at organizing the participation of journalists in the running of media

enterprises, as a way of guaranteeing journalistic independence. The constitution of such News Councils is binding for national Public Service Broadcasters.

In any case, these self-regulatory bodies and codes have a limited binding capacity, and they have little or no connection with other regulatory entities. Neither the national or regional institutions have formal links between self- or co-regulatory media structures, apart from some references to the importance of self-regulation (for example in the case of the Andalusian Council, Dcr. Art. 26.2).

Only in the case of the CEMA, the law itself included a co-regulatory body, a Consultative Committee, where the sector and users would be represented. However, the Committee would only have an advisory function. In addition, the law specified that the Council had to make previous consultations with the stakeholders on issues related to:

- The list of events considered to be of general interest: the council had to hear the competition's organizers and service providers.
- Arbitration in conflicts between operators: the council had to coordinate its activity with the National Commission for Competition, the National Telecommunications Commission, the State Agency of Broadcasting.
- When needed, it had to coordinate its activity with regional broadcasting authorities.

Finally, in relation to intellectual property and rewards to authors, self-regulatory bodies play a crucial role, as the law gives the responsibility of collecting royalties and distributing them among copyright holders to private non-profit entities representing the authors, producers and other copyright holders. In this case, there is a clear distinction made between state and self-regulatory entities, with the state, through the Intellectual Property Commission, with mostly arbitration and mediation functions (a part of the sanctions function related to download services and copyright infringement).

3. LEGITIMIZING / UNDERLYING VALUES

The main values behind the authorities already functioning are those of liberalism, related to the safeguard of competition and free market, as effective competition in the market is considered to be the most efficient way of ensuring efficient production and the best conditions for consumption (in terms of price formation, innovation, quality of services offered...). These principles appear in the legislation and regulations and also in political discourses about the functions and performance of both the CMT and CNC, but also of the CPI and the CEMA. Regulation and control derived from cultural, social or political values associated with public service media, are left mostly in the hands of the political system (governments, parliaments), staged by the main political parties. While other principles attached to freedom of expression and the right to information and culture are shared out among regulatory, co-regulatory and self-regulatory entities.

Apart from free market principles, other values mentioned in the regulation of the CMT are the convergence of telecommunications, audiovisual and electronic services to promote the development of the information society, and the user's rights, guaranteeing a universal public telecommunications service.

A combination of fundamental rights (included in the Human Rights Convention and the Spanish Constitution) appear to justify the creation of the CPI: right to express and spread thoughts, ideas and opinions through different media; freedom of expression; right to literary, artistic, scientific and technical creation and production; and right to equitable remuneration, are mentioned to justify the protection of intellectual property as a need to preserve creativity and cultural diversity. Besides this, the law also explicitly mentions economic values, such as minimizing losses in media and cultural industries, supporting development for new business models, or contributing to a successful European internal market.

In the regulation of the CEMA there were a combination of values related to economic principles (free enterprise) and values related to the specific role of the media in society. In this case, the values that justify regulation are those of pluralism, media independence, and protection of fundamental rights, especially children's rights. These principles appear in the Audiovisual Law, in previous drafts for the creation of the audiovisual authority and in the parliamentary debates about the creation of the authority.

Regulation of **regional audiovisual authorities** is focused more on the principles related to human rights, although it also mentions the liberal principles of free market and competition.

Principles guiding the **Catalan Council's** actions are freedom of expression, communication and information, principles that should be compatible with those of pluralism, neutrality, information honesty and free competition. Other principles guiding the Council's actions are the proportionality between the infractions and the sanctions as well as promoting operators self-regulation.

The **Andalusian Authority** is supposed to act under similar principles of protection of freedom of expression; the right to honour and confidence, truthful information and communication, gender equality and non-discrimination; compatibility with the principles of pluralism, objectivity and free competition (art 3.1). Tolerance, equality, solidarity and respect for human dignity are also values inspiring the council actions, as well as the will to reinforce the Andalusian identity, cultural diversity and social, economic and territorial cohesion. (Dcr. Art. 3.2). Besides the general principles detailed above, other principles are respecting gender equality (in inner and external actions) (Dcr. Art 4) and protecting children and youth (Dcr. Art 5).

4. PERFORMANCE, ENFORCEMENT MECHANISMS, ORGANIZATION AND DIMENSION

4.1 TELECOMMUNICATIONS MARKET COMMISSION

The CMT is composed of two main areas: instruction; and resources and services. The first includes the regulation of operators, market studies and technical issues. In this field, the commission has control and sanction powers, and they are allowed to adopt provisional measures to enforce the fulfilment of the law. The second area includes statistical research, information services, and user's services, with mainly informative powers. There are also administrative and advisory departments (legal, international).

The activity of the CMT includes regulation of telecommunication services' prices; monitoring the level of competition in the different markets (mobile and land line telephony,

broadband internet access, wholesale telecommunications market, transmission services); adopting regulations of telecommunications activities; setting technical parameters; regulating and monitoring the telecommunications universal service; and informing the adoption of laws regarding telecommunications.

In many cases, all of these include measures affecting audiovisual media. For instance, during 2011 the CMT has been very active in relation to telecommunication services used by television channels: it adopted instructions regarding the price of transmission services; it arbitrated in conflicts between channels sharing a DTT multiplex; and it advised the SETSI in relation to the technical plans for the use of the spectrum, specially for the allocation of the digital dividend.

The overall number of staff members in the regulatory body is 145. The CMT's structure is based on stable work, although it is subject to labour contracts (not civil servants). The recruitment policy consists of public employment announcements. Neither the media sector nor civil society is represented on the CMT.

The Telecommunications Market Commission's board is formed by 9 members (president, vice-president and 7 directors). Members of the board, subject to the general regime of incompatibilities in public administration, are selected among professionals with experience in the telecommunications sector and market regulation.

The board is responsible for passing the internal regulation of the commission and the budget proposals, as well as for the structure and staff of the commission. The President, vice-president and secretariat carry out other specific functions (presenting the budget, establishing objectives, preparing reports, etc.). The mandates span over six years and there is the possibility of just one mandate renewal.

The **CMT** is funded mainly by telecommunication fees (and some other taxes), plus some grants. Taxes or fees account for 87.58% of total income, and 12.5% comes from grants or subsidies. CMT's revenues have decreased over the last few years, falling to 34 million in 2011, compared to 43 million in 2009, while expenses have been growing in the same period.

Telecommunications Market Commission's budget			
	2011	2010	2009
Income	34.316.849,73	40.026.555,74	43.276.978,85
from public budget	2.000.000,00	5.000.000,00	5.000.000,00
from taxes	29.843.139,70	32.829.039,71	34.182.840,54
Other	2.449.254,23	2.197.516,14	4.094.138,31
Expenses	49.940.042,52	46.687.329,40	29.359.455,89
Employee costs	10.179.489,63	10.012.480,69	10.024.878,24
Current transfers	0,00	0,00	0,00
Discontinued operation costs*	29.824.259,66	27.277.289,90	10.959.790,76
Other	9.936.293,23	9.397.558,81	8.374.786,89
Profit/losses	-15.623.192,79	-6.660.773,66	13.917.522,96
Staff (n. employees)	142	145	145

* Correspond to extraordinary costs derived from the allegations of telecommunications companies against the tax system.

Source: Informe anual CMT 2011, 2010, 2009.

4.2 NATIONAL COMMISSION FOR COMPETITION

The activity of the CMT regarding competition within audiovisual and telecommunication markets is complemented by the National Commission of Competition, which, in fact, has the authority in this field. Monitoring competition, resolving merger authorisation and dealing with accusations of anticompetitive practises is under the responsibility of the CNC's Research Directorate, which is divided into sections corresponding with different economic areas, including a Sub-directorate for the Information Society.

The **CNC** has resolved several proceedings related to media mergers (22 between 2009 and 2012), most of them authorising acquisition deals, and also regarding anticompetitive performance (21 cases in the same period). It has presented different studies and reports proposing measures to improve competition in the football rights market, copyright market and rights collecting system and the wholesale broadcasting services market (transportation services offered by telecoms to TV channels), three areas with a great impact in the economics of audiovisual and digital media. Among them, the report on the copyright collecting system has been one of the most commented upon. It came to add more arguments to the already existing debate about the failures of the Spanish copyright royalties collecting and distributing system, as the CNC report denounced the system ruled by self-regulation entities (collecting societies representing authors and producers) as an inefficient and anticompetitive system which should be reformed.

The CNC has also intervened in the reform of the audiovisual legal framework with its reports on the Audiovisual Law, on the changes in the PSB funding, on digital dividend and other issues related to technical plans for the use of the spectrum.

There is, therefore, a certain overlap between the CMT and the CNC, on issues related to market competition and reports on laws.

National Commission for Competition budget			
	2011	2010	2009
Income	n.d.	n.d.	n.d.
from public budget	11.902.450,00	11.153.620,00	9.281.500,00
from taxes	n.d.	842.608,00	
other	n.d.		
Expenses	12.341.020,00	13.348.640,00	13.432.278,00
Employee costs	9.355.710,00	9.949.100,00	9.890.468,00
Current transfers	321.740,00	207.020,00	0,00
Discontinued operation costs	724.820,00	845.860,00	1.193.640,00
Other	1.938.750,00	2.346.660,00	2.348.170,00
Staff (n. employees)	189	210	219

Source: CMT's Annual Reports

4.3 INTELLECTUAL PROPERTY COMMISSION

Set up in February 2012, in a period of three months the CPI had received more than 300 reports of copyright infringement on the internet. This is the main task of the Commission, especially in its second section.

The Intellectual Property Commission's board is formed by two sections and the president. The first Section mediates and arbitrates in cases of conflicts related to intellectual property and royalties. It has 3 members, appointed by Government Ministers and includes experts on intellectual property, with a mandate spanning three years with one possibility of mandate renewal. In its mediation functions, the First Section decisions are not compulsory, while the arbitration decisions are considered to be binding agreements.

The second Section, composed by 5 members, evaluates and sanctions cases of copyright infringement by internet service providers. The president is often the Culture Secretary of State or a person to whom it delegates and has the support of four members, selected from the ministers of Education; Culture and Sport; Industry, Energy and Tourism; Presidency; Economic and Competition. There are no limits for the renewal of these members, subject to the general regime of incompatibilities in the public administration.

For the Second Section decisions there is a period for the voluntary acceptance of the decisions to remove content, and proceedings to force the closure of the websites that do not accept the decision of the Section, with the participation of the Central Chamber for Administrative Litigation.

4.4 STATE COUNCIL FOR AUDIOVISUAL MEDIA

The State Council for Audiovisual Media's board was planned to be composed of a President, a vice-president and seven directors.

The law only established the powers of the Presidency, and it would have been the Council itself which defined the powers in their statutes. Mandates should span six years without possibility of mandate renewal. Members were to be appointed by the Government, subsequent to a proposal to Parliament, selected from people with accredited competences in the field.

In addition to the general code of incompatibilities for the high level civil servants, the board members of the **CEMA** were not allowed to maintain any direct or indirect interests in the audiovisual sector and connected activities (production, telecommunications and information society services), during the mandate and the following two years.

There were some other mechanisms directed to safeguarding the independence of the board: the term of the mandate was set at six years (different from the term of office), and the members should have been proposed with a 3/5 majority in the first vote (although a majority of 1/2+1 was sufficient second vote).

The media sector was represented in the Advisory Council of the CEMA, which would have to include the participation of audiovisual service providers, associations of producers and advertisers, as well as the most representative unions of the sector. Civil society had some representation in the Advisory Council also, with the participation of the association

for the protection of audiovisual services users, and the Consumer and User Council. All of which were assigned an advisory role.

The **CEMA** was planned to be funded by taxes from the services provided, capital gains and transfers from the public budget. A planned budget of 7 million Euros was mentioned.

4.5 REGIONAL AUDIOVISUAL COUNCILS

Both the Catalan and the Andalusian audiovisual authorities have very similar duties entrusted by law:

- Guaranteeing the adherence to regulations, in particular with respect to pluralism, objectivity and truthful information principles;
- Informing on project regulations;
- Informing on license grant requirements and candidates (the Catalan media council has capacities to grant local and regional licenses);
- Sanctioning content and advertising law infractions;
- Guaranteeing the compliance with advertising rules;
- Guaranteeing the compliance with media laws protecting children and youth;
- Restabilising the effects of contents and advertising against human dignity and equality;
- Stopping or rectifying prohibited or illicit advertising;
- Safeguarding and promoting cultural and linguistic pluralism;
- Other functions assigned by law.

Regional authorities are accountable to the Autonomous Communities' Parliaments through its competent parliamentary commissions. When citizens, media companies or other representatives disagree with media regulatory decisions or performance they can appeal by addressing the Council involved who use administrative procedures to provide resolutions; any appeal against these decisions must go to the Chamber for Administrative Litigation.

4.5.1 CATALAN AUDIOVISUAL COUNCIL

To fulfil the duties entrusted by law, the Catalan Audiovisual Council carries out the following tasks:

- Concerning content: the Council checks the performance of regional and local channels or stations in order to safeguard the compliance with the regulations regarding programming and other general obligations derived from law. It also adopts binding resolutions to deal with media users' claims.
- Concerning operators: over the last few years, the Catalan Council acquired the ability to grant licenses and they have been very active in this process (adoption of the conditions for tenders, reports and grading of candidates); it also controls media concentration by approving or disapproving mergers. The Catalan council approves norms in different fields of programming, broadcasters' information obligations, advertising or the use of the Catalan language.

- Concerning its accountability: the Council should present an annual report and proposals to improve the Catalan media system. It also presents reports about law proposals or modifications as well as a licensing specifications sheet and license candidates.

To sum up, some of the latest cases of the Catalan Audiovisual Council related to these issues have been the approval of a modification of the programming conditions of a DTT channel; the authorization of a transmission licence and for a license rental; the adoption of a request to establish the procedure for broadcasting via internet; a public declaration on the local broadcasting system; a document on the quality of information during electoral campaigns, and an instruction limiting advertising on public radio, among other cases.

The council's structure is formed by the Board, the Council's secretary, a Presidency Cabinet, a council's Administrator, an auditor, and administration services. Administration services are: Law services; Audience Defence Office; Content Analysis Services, License and Audiovisual Operators Services; Research, Studies and Publication Services; Documentation, Video-library, and Archives Services; Complaints Services; General Services; Human Resource and Financial Management Services.

The board of the Catalan audiovisual authority was reduced from 9 to 6 members, besides the president and a vice-president. The Board's main functions are debating and voting Council's actions. The mandates span over 6 years, and one third of the members (not the president) are renewed every 2 years. There is no possibility of renewal. Board members are also subject to the general incompatibilities of high administration (it is prohibited to work in Public Administration, unions, etc.). Members of the Catalan media council cannot have another employment, and they cannot have a vested interest in the media business. They can teach only part-time, in universities or higher education.

The media sector representation does not exist in a regular way, although on occasion the Council has promoted the creation of temporary working groups. For instance, during the revision of the regulation of local television, the Council promoted different forums and round tables within the sector.

Until 2011, the most stable representation of civil society within the Catalan Audiovisual Council was a working group focusing on cultural diversity content (*Mesa per la diversitat en l'audiovisual*). This working group brought together representatives from various cultures, institutions, corporations, professional associations, research groups, universities, media and other bodies and people interested in promoting a better representation of multiculturalism and diversity in the media of Catalonia. It intended to reflect the representation of cultural diversity in the media; initiating research and training on migration and diversity; to submit proposals to the audiovisual sector for better promotion of diversity, and to gather information on best practices.

In 2011, a Forum for Audiovisual User Organisations was created holding legal entity inside the council grouping 79 entities together (universities, unions, media, journalist associations, and different social groups or associations). The Forum was organised into working groups and regional offices for an in-depth study of specific topics and to draw up documents which helped foster content quality and best use of the media.

The Catalan autonomous Government (*Generalitat de Catalunya*) receives funding from providing radio and TV licenses, hence supplying a budget to the Council that represents approximately an amount of 10.000.000 Euros per year. The council may also obtain other financial funding through services and publications.

Consell Audiovisual de Catalunya			
Budget by chapters and years			
Chapters	2009	2010	2011
Chapter I. Staff	5.832.402,19€	5.913.285,06€	5.452.499,46€
Chapter II. Current transfers	2.891.236,06€	3.794.736,06€	2.913.812,28€
Chapter IV. Spending of transfers to local corporations and private enterprises	150.000,00€	180.000,00€	120.000,00€
Chapter VI. Real investments	687.400,00€	759.900,00€	48.019,00€
Chapter VII. Staff advances	15.000,00€	20.000,00€	20.000,00€
TOTAL	9.576.038,25€	10.667.921,12€	8.554.330,74€
Staff	96	93	

Source: Consell Audiovisual de Catalunya (2010). Memòria annual CAC 2009; Consell Audiovisual de Catalunya (2011). Memòria annual CAC 2011.
 [Online: <http://www.cac.cat/web/informacio/index.jsp?MTE%3D&Q%3D%3D&L3dlyi9pbmZvcmlhY2lvL2NvbnRlbnRNZW1vcmlleWw%3D%3D>] Accessed: 07/2012.

4.5.2 ANDALUSIAN AUDIOVISUAL COUNCIL

To fulfil the duties entrusted by law, the Andalusian Audiovisual Council carries out the following activities:

- Concerning content: the Council controls the content to check the compliance with media law protecting children, youth, disabled people and pluralism (social, religious, political, linguistic); it stops illicit programs and advertising and re-establishes negative effects.
- Concerning operators: the Council establishes licensing requirements (the autonomous government, Junta de Andalucía, is a body with the ability to grant licenses, through its General Direction of Social Communication); thus, the council must control media concentration, the decision power relies on the regional government; the council can approve general instructions to ensure that operators accomplish laws, and approves binding resolutions to attend media users' claims.
- Concerning its accountability: the Council presents an annual report to the Andalusian Parliament as well as proposals to improve the media system.

Besides the periodic reports on media pluralism, the latest cases of the Andalusian media council have been: a declaration showing its concern about an amendment of the Spanish media act that sets out the rights of minors with reference to television content; a statement claiming for the regulation of advertising of prostitution in the media; a public

call on broadcasters to promote the knowledge and dissemination of flamenco after finding that its presence on screen is marginal; and a fine to a TV station penalizing the emission of clairvoyance programs during child-protected scheduling times, etc.

The structure of the Andalusian Audiovisual Council is formed by the board, three thematic and administrative areas (Organisation; Legal; Content), and an auditor.

The board, composed of 11 members, is able to make decisions, recommendations, sanctions and instructions about media content through ordinary and extraordinary meetings. It also informs law projects. It is represented by a President and assisted by a General Secretary, a Presidential cabinet, and press office. Its mandate spans over 5 years, with the possibility of one renewal. According to the law, board members should be elected by the Andalusian Parliament of which include well known personalities, in the media, science, education, culture or social fields. Recruitment policy is based on Public Administration policy and employees may or may not be civil servants.

Civil society and the media sector are not represented in a regular way, with the exception of the consortiums created in order to manage the new territorial demarcations derived from the rollout of the Digital Terrestrial Television.

The Andalusian Council is mainly funded by the Andalusian autonomous government (Comunidad Autónoma de Andalucía); it also may receive grants from other Public Administrations. Other sources can be profits obtained from reports or agreements as well as the profits from the Council's own patrimony. The annual budget represents approximately an amount of 7.000.000 euro per year, being reduced in 2010 due to economic problems.

Consejo Audiovisual de Andalucía		
Budget by chapters and years		
Chapters	2009	2010
Chapter I. Staff	4.124.765,00 €	4.061.593 €
Chapter II. Ordinary expenditures in Goods and Services	2.432.747,42 €	2.125.558 €
Chapter III. Current transfers	96.922,58 €	101.528 €
Chapter IV. Real investments	1.113.750,00 €	925.230 €
TOTAL	7.768.185 €	7.213.909 €
Staff	55 people	35 people

Source: Consejo Audiovisual de Andalucía (2010): Memoria 4. Informe 2009 del Consejo Audiovisual de Andalucía al Parlamento de Andalucía; Consejo Audiovisual de Andalucía (2010): Memoria 5. Informe 2010 del Consejo Audiovisual de Andalucía al Parlamento de Andalucía. [Online: www.consejoaudiovisualdeandalucia.es, accessed: 07/2012].

Board members of the Andalusian Council should be employed full-time and they cannot have any other employment. They follow a set of incompatibility rules (Dcr. Art 14.1f). It is also stated that councillors have total independence when taking decisions (Dcr. Art 14.1a)

5. REGULATION IN CONTEXT

The Spanish media system is characterized by an important level of concentration and internationalization, especially in the audiovisual sector, together with a strong public sector composed of national, regional and local public service broadcasters.

Big USA and European media groups have a strong presence in the audiovisual and advertising industries, but they are also present in the press market. Mediaset and Bertelsmann are stockholders of the two main TV companies, Telecinco and Antena 3 TV, while US groups are the main content providers. The six big international advertising groups (Aegis, Havas, Publicis, WPP, Omnicom, and Interpublic) hold a dominant position in the advertising market, while US investment funds and the Italian RCS are behind the two main Spanish newspapers.

Two Spanish groups, Prisa and Planeta, stand out among the Spanish media companies, with investments in all media sectors, in both cases in alliance with foreign capital. A third group of medium sized companies complete the scenario, together with a group of small and micro enterprises and freelancers offering services in the intra-industrial market and, or in local markets.

The dominance of the main media companies is counterbalanced by the weight of the public sector, in television and radio, and by the regional and local press. In fact, the importance of regional and local markets is one of the characteristics of the Spanish media system, although the economic crises and the restructuring of media industries with digitalisation, have adversely affected the smaller markets. The internet has meant greater internationalisation, with the main international internet service providers leading the rankings.

Public service media benefit from the direct frequencies allocation while private operators (including both commercial and civil society media) must put up for tender their license applications. Licenses have a 15 year period of validity and are automatically renewed (according the *General Law on Audiovisual Communication* 2010, which modified licensing conditions).

Daily reach of media in Spain (% population)- October 2011-May 2012										
	all	male	female	14-19	20-24	25-34	35-44	45-54	55-64	+65
Newspapers	36.4	44.4	28.7	27.9	35.8	37.6	39.6	41.2	39.4	29.2
Magazines	46.1	42.2	49.8	54.0	54.2	53.5	50.4	46.8	41.7	32.7
Radio	60.8	64.7	57.0	60.0	64.7	67.7	67.7	64.3	58.0	45.9
Television	88.9	88.6	89.1	87.9	86.2	85.8	87.2	89.4	91.5	92.2
Internet	44.7	49.9	39.7	74.7	70.6	64.3	55.7	40.5	28.9	13.8

Source: EGM. Readers/listeners/viewers/users per day.
<http://www.aimc.es/-Datos-EGM-Resumen-General-.html>

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Switzerland

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1. LEGAL FRAMEWORK

A) DESIGNATION AND LEGAL DEFINITION OF THE STATE MEDIA REGULATORY BODY

In Switzerland, the state media regulatory authority is the Federal Office of Communication (OFCOM).¹ OFCOM is part of the Federal Department of the Environment, Transport, Energy and Communications (DETEC)² and performs tasks both for the DETEC and for the Federal Communications Commission (ComCom)³. OFCOM's mandate derives from the Law on Telecommunications (LTC) as well as from the Federal Law on Radio and Television (LRTV).

At the time of its creation in 1992, OFCOM was assigned two major tasks, namely to establish the conditions needed to open up the telecommunications market and to regulate the public and commercial radio and television sectors. In 2012, it was charged with a new task, to support the Federal Department of the Environment, Transport, Energy and Communications (DETEC) with regard to postal policy. Situated within DETEC, OFCOM attends to these matters on behalf of the Federal Council and the Federal Communications Commission (ComCom), while fulfilling an advisory and co-ordinating function for the public and policymakers.

¹ In German: BAKOM – Bundesamt für Kommunikation; in French: L'OFCOM – Office fédéral de la communication.

² In German UVEK – Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation; in French: DETEC – Département fédéral de l'environnement, des transports, de l'énergie et de la communication. Holder of the department is the Federal Council Doris Leuthard.

³ In German: Eidgenössische Kommunikationskommission (ComCom); in French: commission fédérale de la communication (ComCom).

OFCOM has to pursue the following objectives in order to fulfill its mission:

- In the area of telecommunications, OFCOM has to guarantee that the population and the economy are provided with reasonably priced and high quality offerings. To this end, OFCOM promotes effective and sustainable competition. Where necessary, it ensures a nationwide and affordable universal service. Moreover, OFCOM has to establish appropriate conditions for the development, deployment and utilisation of innovative, high quality and competitive technologies and service.
- In the area of broadcasting, OFCOM has to ensure that Switzerland is provided nationwide with a wide range of radio and television programming at the level of the different language regions as well as at regional and international level.

OFCOM prepares the decisions of the Swiss government (the Federal Council) and develops important international activities.⁴ Both, OFCOM and DETEC are in charge of supervising the performance of Swiss radio and television broadcasting: “OFCOM steps in when the sponsoring codes contained in the Federal Radio and Television Act are infringed. It supervises radio and TV stations in Switzerland not just in terms of product placement, but also decides on frequency allocations and ensures that the Swiss Broadcasting Corporation fulfills its duty to provide programming for all parts of the country.”⁵

However, OFCOM has no decision making powers. It is solely a supervisory and administrative agency of the Department for the Environment, Transport, Energy and Communications (DETEC) and the Swiss Federal Communications Commission (ComCom).

Since ComCom is not subject to any Federal Council or Department directives, it is considered to be an independent authority for the telecommunications market. However, the Commission is independent of the administrative authorities and has its own secretariat. It informs the public of its activities and produces a report each year for the attention of the Federal Council. The president convokes the Commission as required or upon a request put forward by a member. The Commission may also take its decisions by way of circulation. Established by the Law on Telecommunications (LTC) of 30 April 1997, it consists of 7 members – who must be independent specialists – nominated by the government (Federal Council). As provided for in law, the Commission instructs the Federal Office of Communications (OFCOM) to prepare its business and implement its decisions. The Commission has moreover delegated some of its tasks to OFCOM.

The main activities and competencies of the ComCom are:

- Granting licenses for the use of radio frequencies
- Awarding of universal service licenses
- Laying down the access conditions (unbundling, interconnection, leased lines, etc.) when service providers fail to reach an agreement
- Approval of national numbering plans
- Fixing the terms of application of number portability and carrier selection
- Decisions about supervisory measures and administrative sanctions

⁴ <http://www.bakom.admin.ch/index.html?lang=en>

⁵ <http://www.uvek.admin.ch/org/00469/00473/index.html?lang=en>

Where are the boundaries between OFCOM and ComCom? OFCOM prepares the commercial transactions of ComCom, makes the necessary applications and implements its decisions. In the telecommunications sector, OFCOM grants inter alia those radio licences which do not involve any telecommunications services, e.g. company radio and amateur radio licences. In addition, OFCOM licenses all providers of fixed network services (without a tender procedure). ComCom, for its part, awards the basic provision licence and licences for the provision of mobile telephone and other radio services where the licence is awarded on the basis of an invitation to tender. It also rules on interconnection disputes. ComCom additionally approves frequency and numbering plans.

COMCO⁶ is an independent federal authority. It should combat harmful cartels, monitor dominant companies for signs of anti-competitive conduct, enforce merger control legislation and prevent the imposition of restraints on competition by the state.⁷

Concerning advertising, OFCOM is also involved in a supervisory capacity. Advertising is regulated in the Federal Law on Radio and Television (LRTV)⁸ (paragraphs 9 – 14) of 2006. Amongst other matters, the law specifies the duration of advertising, products and fields that may or may not be advertised (tobacco, alcohol, political parties and religious groups are prohibited), as well as specific limitations concerning children's programs (no advertising breaks) and Public Service (no advertising on public radio).⁹ Thus, OFCOM monitors compliance with advertising law. The federal state i.e. the federal government and the federal parliament are responsible for legislation on radio and television.

B) THE POWERFUL STAKEHOLDERS BEHIND THE OFCOM: THE FEDERAL PARLIAMENT AND THE FEDERAL COUNCIL

OFCOM is solely an implementation and supervisory authority and is part of the administration that has to put into practice the politics of the Federal Council and the Federal Parliament. For these reasons it is important to look at the power structures of Swiss media politics and Swiss media regulation.

As in other countries, there is a clear hierarchy in Switzerland. The starting point is the Federal Constitution that is compatible with other existing international contracts in the field of media politics (e.g. EMRK, notably article 10, as well as the European contract on transnational television). The constitution and any amendment to it must be accepted by parliament and by vote from the popular majority as well as from the majority of the cantons (mandatory referendum). Crucial for media politics are articles 16, 17 and 93 of the Federal Constitution.

Article 16 guarantees freedom of speech and freedom of information. Every person has the right to freely form, articulate and spread his or her opinion. Every person has the right to receive information freely from accessible common sources.

Article 17 guarantees freedom of the press, radio and TV as well as other forms of

⁶ In German: WEKO – Wettbewerbskommission; in French: COMCO – commission de la concurrence.

⁷ <http://www.weko.admin.ch/index.html?lang=en>

⁸ In German: RTVG - Bundesgesetz über Radio und Fernsehen; in French: LRTV – loi fédérale sur la radio et la télévision

⁹ <http://www.admin.ch/ch/d/sr/7/784.40.de.pdf>

public broadcasting of presentation and information. Censorship is prohibited; newsroom secrecy is guaranteed.

Article 93 paragraph 1 states that the Federal Government is the regulatory authority. In paragraph 2 the law specifies the specific legal position of radio and television – in contrast to that of the press. The law does allow the same freedom for the press, radio and TV. Thus, it demands from radio and TV a programming mandate. Due to tight codifications, the Government has no direct means of influencing programs; at most it can influence them indirectly via the regulation of licences.

The government is bound to be considerate of the press when it comes to legal actions in favour of radio and TV. For this reason, not only do radio and TV enjoy some sort of protection but also the press.

Subsequent to the constitution there are the federal acts (e.g. Federal Act on Radio and Television – RTVA) which were decided upon by both houses and which were subject to the facultative referendum.

Regulations, which follow the acts, put flesh on the paragraphs of the single acts. Regulations are formulated not only by the parliament but also by the government and administration. The more open the parliament formulates the act, the stronger the parliament can unfold and take influence and vice versa. The parliament decides on what level certain matters of fact will be regulated.

The government also plays a dominant role when it comes to licencing of radio and television. The Federal Council assigns the licences, which the OFCOM and DETEC have suggested. The Federal Council also formulates the performance and acts in accordance with the Federal Act on Radio and Television and the Radio and Television Decree.

Furthermore, along with the acts and decrees there are professional norms and rules as well as ethical rules which are generally congruent with the legal norms or even norm binding in cases where the constitution and the acts fail to capture the elements of an offence. Professional rules may be stronger or weaker than legal norms.

The federal government as well as the parliament are the crucial institutions when it comes to formulating and accomplishing media policy, notably for radio and TV. The parliament underlines its influence in the reform of the Federal Law of Radio and Television. On the other hand, the federal government shows its power with the corresponding regulations and by awarding and renewing licences. Since the establishment of the first Federal Law on Radio and Television in 1991 there have been revisions of the statute on a regular basis. Taking into account that the parliamentary process is laborious, it takes six to seven years to accomplish a revision. Currently a partial revision of the Federal Act on Radio and Television (RTVA) is under way: DETEC started the consultation procedure in spring 2012 and is at present about to evaluate the reactions of the cantons, political parties, corporations, associations and NGOs. The consultative phase gives the government the opportunity to react to the results by changing or stating more precisely its suggestions before giving it to parliament for discussion. In the present case, the revision focuses on the financing of radio and TV and on the subsequent question as to whether to introduce a reception fee bound to households rather than to devices.

2. FUNCTIONS OF OFCOM

OFCOM was founded in 1992. OFCOM's mandate derives from the Law on Telecommunications (LTC) and the Federal Law on Radio and Television (LRTV). OFCOM is involved in the following tasks:

- a) Telecommunication: regulation and supervision of markets and competition
- b) Radio and television: binding mandate: supervision and control of content according to the Swiss Federal Constitution article 93/2: "Radio and television shall contribute to education and cultural development, to the free shaping of opinion and to entertainment. They shall take account of the particularities of the country and the needs of the Cantons. They shall present events accurately and allow a diversity of opinions to be expressed appropriately".¹⁰
- c) IT-Technologies: technical regulation to ensure its functioning and its security
- d) Internet: spam, domain names, internet crime, electronic signatures
- e) Information society (digital literacy): implementation of the strategy of the Federal Council through the information Society Business Office of the OFCOM.
- f) Frequencies and antennas: allocation and control of radio frequencies
- g) Equipment and installation.

OFCOM is not responsible for the regulation of the press. Freedom of the press is guaranteed in the Swiss Federation Constitution (art 16)¹¹: "Art. 16. Freedom of expression and of information: Freedom of expression and of information is guaranteed. Everyone has the right to freely form, express, and impart their opinions. Everyone has the right to freely receive information and to gather it from generally accessible sources and to disseminate it."¹² Furthermore, article 93/4 calls for the protection of the press by stressing the fact that the state is responsible for legislation on radio and television and guaranteeing at the same time to respect the roles and duties of other media, in particular the press. There is no legal obligation for the Swiss press to fulfil a public service mandate. Newspapers – as private enterprise are subject to free entrepreneurial decisions and the market. One acts on the assumption that the press is self-regulated.

OFCOM is also involved in the field of digital literacy, media education and information society. The commitment of the Federal Council to the information society shows its awareness of the potential of ICTs and the importance of digital literacy. The "Information Society Strategies", for the first time formulated in 1998 and updated in 2006 and 2012, are being implemented by the newly created "Information Society Steering Committee" with the support of the "Information Society Business Office", based within the Federal Office of Communications (OFCOM).¹³ According to the Federal Councillor, Doris Leuthard, the follow-

¹⁰ <http://www.admin.ch/ch/e/rs/1/101.en.pdf>

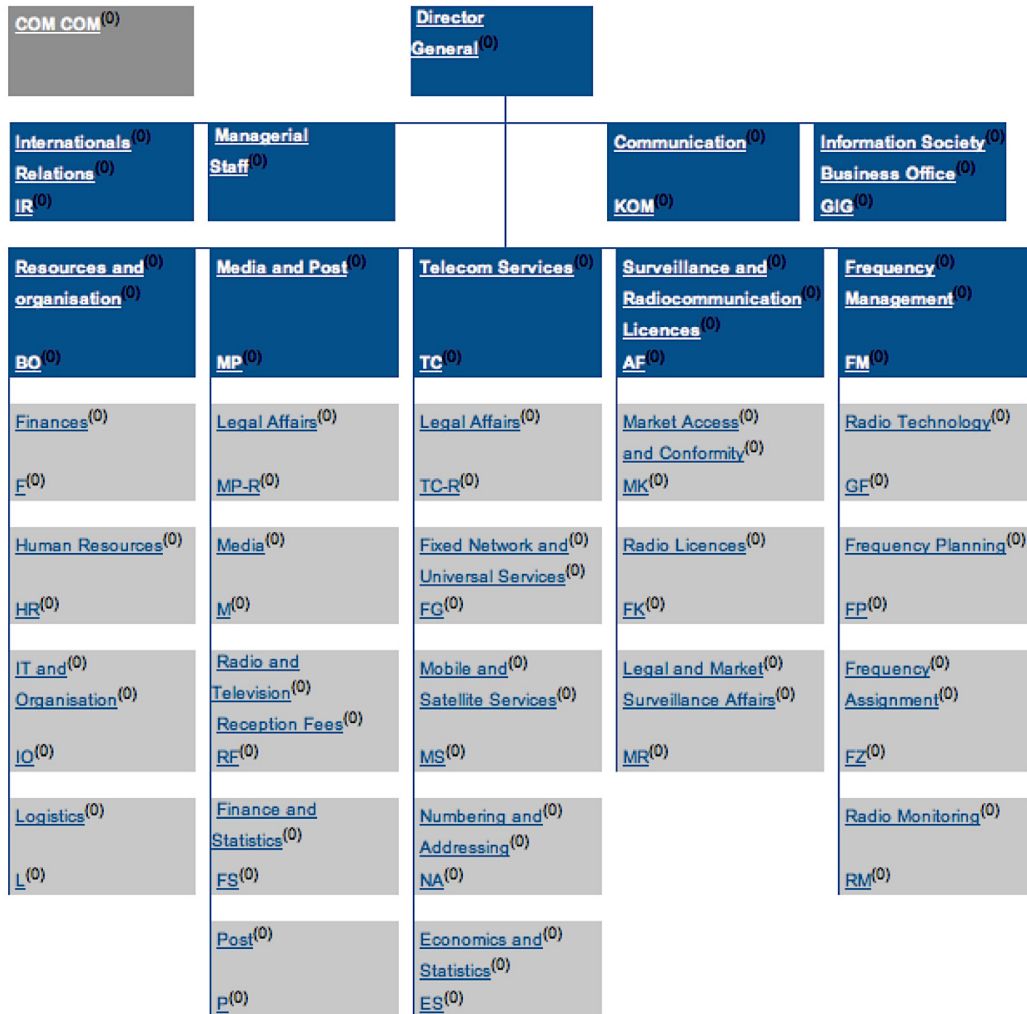
¹¹ In German: Bundesverfassung: Artikel 16: Meinungs- und Informationsfreiheit; in French: Constitution fédérale de la Confédération suisse: Libertés d'opinion et d'information.

¹² <http://www.admin.ch/ch/e/rs/1/101.en.pdf>

¹³ See: Federal Department for the Environment, transport, Energy and Communication DETEC (2012): Strategy of the Federal Council for an Information Society in Switzerland. Bern.

ing areas of activities are vital: infrastructure, security and trust, economy, e-Democracy and e-Government, education, research and innovation, culture, health and health care system, energy and resource efficiency.

OFCOM: Organisation:



OFCOM is headed by the director general Martin Dumermuth, a doctor of law. Dumermuth has been working for OFCOM since 1994 and became its director general in 2005.

OFCOM is divided into nine divisions each with three to five sections:

1. International Relations
2. Managerial Staff
3. Communication
4. Information Society Business Office
5. Resources and organisation
6. Media and postal services
7. Telecom Services
8. Surveillance and Radiocommunication Licences
9. Frequency Management

3. LEGITIMIZING OFCOM AND ITS UNDERLYING VALUES

The presence of OFCOM can be legitimized by posing the questions that followed the liberalization and deregulation of markets and the subsequent so called free play of competition in telecommunications, radio, TV and postal services: Who supervises the big players? Who makes the rules? Who guarantees that the rivalry will be truly competitive?

OFCOM, the Federal Office for Communications, sees itself as a neutral referee on the playing field who has to ensure that everyone has access to the complex market in order to compete. In relation to the fulfillment of its mission, OFCOM bases itself on the following values (Mission statement):

Acceptance of responsibility: “As OFCOM employees, we accept responsibility for our performance and results. We apply ourselves critically and constructively, both within and beyond our narrow area of responsibility. As a result we work better and avoid mistakes. Externally, we argue loyally for decisions.”

Future-oriented: “We recognize social, political, technical and economic developments at an early stage. From this we derive any need for action or change and indicate possible actions to the relevant decision-makers.”

Employee development: “All OFCOM employees have a responsibility to develop themselves. OFCOM promotes the development of its employees and supports targeted measures which contribute to ensuring that their tasks can continue to be carried out successfully in the future.

Respect: “For us, respect means more than politeness when dealing with other people. We take the concerns of our counterparts seriously and take time to listen and explain our positions and decisions fully and comprehensibly.”

Cost consciousness: “We use our resources so that they have the maximum effect on the fulfillment of our mission. To this end, we always ask ourselves whether an objective can be achieved with fewer resources. In our actions, we also consider the financial consequences on third parties.

Interdisciplinarity: We work together across technical specialisms, professional groups and the Office. This requires openness towards other people, approaches and perceptions, but also an interest in the content of relevant specialist areas outside our own area of activity.¹⁴

Admittedly, it remains unclear how the mission statement can be implemented in practice.

4. PERFORMANCE

OFCOM sees itself as having six different roles. According to their website OFCOM tries to complete the following tasks and activities:

a) OFCOM as the regulatory body

OFCOM steps in as a regulatory body when something goes wrong. For example, non-conforming telecom installations can substantially disturb the traffic. Thus, OFCOM's

¹⁴ <http://www.bakom.admin.ch/org/strategie/index.html?lang=en>

role is to guarantee the population access to a high-quality universal service in relation to telecommunications, radio & television and the postal services and to provide unlimited access to communication for everyone.

OFCOM prepares most tasks about which the Federal Council and the Federal Communications Commission need to make policy decisions. In the postal sector for instance, since July 2012 OFCOM has been responsible for reviewing the support measures targeted at the print media. Such decisions are politically and economically important for Switzerland. OFCOM would like to be a partner of local radio stations, national television stations, telephone companies, manufacturers, retailers, users and operators of telecommunications installations, internet service providers and postal service providers. OFCOM takes part at large events to ensure the functionality and security of wireless communications, for example at major sporting events such as World Cup skiing, horse races and cycle races. On these occasions, the OFCOM specialists ensure that the equipment is operating on the appropriate frequencies; that any sources of interference are identified, and that those affected by interference are informed about suitable measures to overcome this.

b) Creating a common platform

OFCOM helps in the creation of a common basis, meaning a common language, common standards, as well as common channels. Thus, OFCOM promotes technical standards, assigns frequencies, and participates in awarding licenses.

c) OFCOM as an assistant

In order to make radio and television more attractive, OFCOM serves as an advisor to the commercially and publically operated radio and television stations (Swiss Broadcasting Corporation) in the procedures for granting licenses or in the application of the obligations set out in the license.

But rules also have to be complied with. And this needs oversight. In the interests of providers, as well as of the viewing and listening public, Switzerland levies radio and TV reception fees in order to ensure that rural and mountainous regions can also enjoy a high level of public and commercial broadcasting stations. OFCOM makes sure that the fees are collected and, as the Federal Council's representative, that they are set correctly and allocated as intended to the public and private stations.

d) OFCOM as a co-ordinating body

The divisions between computers, television and telecommunications are becoming increasingly blurred. New opportunities and new questions also arise within the framework of the so called information society like flexible working arrangements, broader access to education and knowledge, new forms of political participation and e-commerce. However, the consequences of these developments are far-reaching. For this reason, the Federal Council regularly adopts basic guidelines for the information society, taking into consideration among other things the preparatory work done by the Information Society Business Office (ISBO), a department within OFCOM which closely monitors the global evolution of

the situation and which attempts to forecast what the future will bring. ISBO respectively OFCOM sees itself as a center of competence and collects information, develops strategies and encourages decision-making under the heading of equal opportunities. OFCOM promotes the use of new technologies and helps to ensure that no-one is excluded from the information society.

e) OFCOM as a negotiating partner

Globalization has become an everyday reality in the world of media and telecommunications. Here, OFCOM is Switzerland's ambassador and advocate, in dozens of organizations. Some technical standards will have to be applied on a worldwide basis; especially frequencies have to be allocated internationally. This sometimes requires meetings that extend over weeks and involve several hundred delegates from different countries.

f) OFCOM as a pioneer

The boundaries previously set by the law between mass and individual communications are tending to disappear. In fact, nowadays, we can watch TV over telecommunications connections and make phone calls using television networks. In this fast changing world, the role of the printed press or the traditional postal services in the future is rather unknown. OFCOM has to have to answer these questions by proposing measures and preparing draft legislation for the Federal Council. In the Eyes of OFCOM, new developments represent new opportunities and the future can be shaped. OFCOM does not want to prohibit, but to develop a framework that enables innovation to take place and that enables the requirements of the universal service and the public service to be met.

g) OFCOM in the service of customers

The desire to serve customers and provide them with optimal services is one of the main priorities for OFCOM's teams. Their members have to be prepared, when radiocommunications do not function smoothly or when interference has to be eliminated. In general, The Office has to provide information and advice on all aspects of the electronic media, telecommunications, frequency management, press support measures and the surveillance of specific postal activities - at several locations in Switzerland. Since 1 January 1999, OFCOM has been run according to the principles of new public management. This provides for open information, transparency for the Federal Council, Parliament, customers and the general public. In accordance with the principle that the user pays, customers are only charged for the services they use.¹⁵

5. ENFORCEMENT MECHANISMS AND ACCOUNTABILITY

OFCOM is responsible for the enforcement of resolutions from government and parliament by telecommunication companies and radio and broadcasting stations. OFCOM, however, is neither willing nor capable of checking if licenced commercial as well as public broadcasters

¹⁵ <http://www.bakom.admin.ch/org/00598/index.html?lang=en>

fulfil their obligations concerning law, acts and concessions. That is the responsibility of social science research (legal basis: article 77, Federal Law on Radio and Television (LRTV)). Scientific research provides insights into program contents, behaviour of the public, market trends and chances of innovation. Furthermore, the continuous support through research activities ensures the availability of specific professional competence (cf. Dumermuth 2012: 9). OFCOM has an annual budget for research of approximately 1 million Euros.

OFCOM places orders for research in accordance with two aims: Firstly, need results from basic research is needed in order to be able to prepare strategic decisions and concepts for the government and the administration. Secondly, scientific supervision and monitoring is needed as a basis for the discussion of the fulfilment of the performance related mandates of radio and TV providers. Knowing well that the scientific results cannot be simply adapted by the regulators, politicians and journalists, the OFCOM regards the research findings primarily as the basis for the discourse. Only secondarily are the findings used to give basic principles for decisions concerning media policy or business strategies in media corporations.

6. INSTITUTIONAL ORGANIZATION AND COMPOSITION

OFCOM has its head office in Biel, a bilingual city some 40 kilometres away from the capital Berne. It has some additional support points throughout Switzerland. At the end of 2011 OFCOM had 273 employees of which 35% were women.

7. FUNDING

The income and expenditure statement for 2011 shows a total expenditure of CHF 85.1 million (71 million Euro). Of this, 69% was attributed to operating expenses and 31% to transfer costs.

The operating expenditure includes OFCOM's financial outlay on human resources and administration, the service charges of other federal agencies and the non-financially effective depreciation of fixed assets. The transfer costs include subsidies in the radio and television sector and contributions to international organisations.

The revenue which can be allocated to the 2011 accounting year amounts to CHF 54.3 million (45 million Euro). Of this, 44% was attributed to operating revenue and 56% to revenue outside the global budget. The operating revenue corresponds to OFCOM's administrative fees. The revenue outside the global budget includes radio licence fees - which constitute the major part at CHF 27 million (22.5 million Euro) (89%) - the licence fees of the licensed radio and television stations for special financing in the radio and television sector and the revenue from violations of the law (fines and confiscated profits).

Total expenditure in 2011 was CHF 30.8 million (26 million Euro) (34%) higher than total revenue. A revenue surplus was reported in the transfer area, with expenditure of CHF 26.6 million and revenue of CHF 30.4 million (25.5 million Euro). In the operating sphere, operating expenditure (CHF 58.3 million (49 million Euro)) exceeded operating revenue

(administrative fees: CHF 24.0 million (20 million Euro)) by CHF 34.3 million (29 million Euro) (59%).¹⁶

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OFCOM – Federal Office of Communication www.bakom.admin.ch

The Federal Authorities of the Swiss Confederation www.admin.ch

¹⁶ <http://www.bakom.admin.ch/org/jahresberichte/03962/03971/04003/index.html?lang=en>

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1. LEGAL FRAMEWORK

The main media and communications regulatory body in the UK is the Office of Communications (Ofcom), with offices in London. Ofcom is a statutory body, organizationally separated from government and operating at arm's length from it, created by the Office of Communications Act 2002¹. Its main powers and functions were conferred on it by the Communications Act 2003², which sets out no less than 263 separate statutory duties³. Ofcom is accountable to Parliament to which it reports on its activities annually. As will be detailed below, Ofcom has regulatory duties across most of the 'converging' electronic communications sector, often in an advisory capacity to government in areas such as media ownership rules and public service broadcasting, and is in charge of implementing and enforcing legislation. Other Acts of Parliament under which Ofcom operates include the Broadcasting Acts 1990⁴ and 1996⁵, the Human Rights Act 1998⁶, the Enterprise Act 2002⁷, the Wireless Telegraphy Act 2006⁸, and the Digital Economy Act 2010⁹.

There are other governmental and non-governmental bodies that have powers and duties in relation to media and communications matters. The two main government departments with policy responsibilities over media and communications are the Department for Culture, Media and Sport (DCMS) and the Department for Business, Innovation and Skills (BIS). The two general competition authorities, the Office of Fair Trading (OFT) and the

¹ See <http://www.legislation.gov.uk/ukpga/2002/11/contents>

² See <http://www.legislation.gov.uk/ukpga/2003/21/contents>

³ See 'A Case study on Public Sector Mergers and Regulatory Structures', available at <http://www.ofcom.org.uk/about/what-is-ofcom/a-case-study-on-public-sector-mergers-and-regulatory-structures/>

⁴ See <http://www.legislation.gov.uk/ukpga/1990/42/contents>

⁵ See <http://www.legislation.gov.uk/ukpga/1996/55/contents>

⁶ See <http://www.legislation.gov.uk/ukpga/1998/42/contents>

⁷ See <http://www.legislation.gov.uk/ukpga/2002/40/contents>

⁸ See <http://www.legislation.gov.uk/ukpga/2006/36/contents>

⁹ See <http://www.legislation.gov.uk/ukpga/2010/24/contents>

Competition Commission, also undertake competition investigations in media and communications markets, where Ofcom has concurrent powers.

As will be discussed in more detail below, there are a number of industry bodies operating either self-regulatory or co-regulatory schemes in relation to various aspects of media and communications regulation (with Ofcom, in the latter case, acting as 'back-stop regulator')¹⁰. These include: the Press Complaints Commission (PCC); the Advertising Standard Authority (ASA); the Internet Watch Foundation (IWF); the Authority for Television On Demand (ATVOD); the British Board of Film Classification (BBFC); PhonePayPlus; the Independent Mobile Classification (IMCB).

This report will focus on Ofcom as the main sectorial regulator but will also discuss Ofcom's working relations with some of the above-mentioned bodies, in particular in areas of media and communications where co-regulatory arrangements are in place.

2. FUNCTIONS

Ofcom presides over most of the converging electronic communications sector, including broadcasting, telecommunications and wireless communications services (i.e., management of the radio spectrum). Its creation in 2003 involved the merger of five pre-existing regulators responsible for specific areas of media and telecommunications regulation. Under the pre-Ofcom regulatory regime, television regulation was divided between the Broadcasting Standards Commission (BSC), responsible in matters of standards and fairness, and the Independent Television Commission (ITC), a statutory body that licensed and regulated commercial television services, and whose responsibilities included economic regulation, advertising regulation and public service obligations. The other three 'legacy' regulators that Ofcom replaced were: the Office of Telecommunications (OfTel, a non-ministerial government department responsible for the licensing and regulation of telecommunications operators); the Radio Authority (a statutory body responsible for the regulation of commercial radio broadcasting); and the Radiocommunications Agency (a departmental agency responsible for allocation and supervision of the radio spectrum)¹¹.

Ofcom was created in anticipation of technological and market convergence (Smith 2006). Its advocates (e.g., Collins and Muroli 1996) argued that a single regulator encompassing both broadcasting and telecommunications would contribute to the simplification and rationalization of the regulatory framework, and would reduce costs and inefficiencies¹².

Ofcom's functions and duties are wide-ranging. In relation to *media* regulation, they include:

¹⁰ See Ed Richards, 'Models of Media Regulation', 5 October 2011, available at: <http://media.ofcom.org.uk/files/2012/02/Teach-in-presentation-by-Ed-Richards-05-10-11.pdf>

¹¹ Since 1 October 2011, Ofcom has also been given responsibility over postal services, having taken over from the previous regulator Postcomm. The relevant legislation is The Postal Services Act 2011. See <http://www.legislation.gov.uk/ukpga/2011/5/contents>

¹² On the other hand, critics warned against the danger that a single regulator would concentrate too much power and that there would be uncertainty over its hierarchy of values, having to oversee sectors (broadcasting and telecommunications) with different regulatory traditions (see Section 3 below).

- Licensing of all radio and television broadcasters, and monitoring compliance with the conditions set out in the licenses, including a duty to be satisfied that persons holding broadcasting licences are 'fit and proper';
- Setting standards for television and radio programmes on matters relating to taste, fairness and privacy, and monitoring broadcasters' compliance with Ofcom's Broadcasting Code;
- Reviewing Public Service Broadcasting (PSB) at least every five years¹³;
- Reviewing Media Ownership Rules at least every three years¹⁴;
- Concurrent competition powers with OFT in respect of anticompetitive agreements and abuses of a dominant position in the sectors regulated by Ofcom;
- Evaluating 'media public interest considerations' in relation to certain media mergers, triggered by an intervention notice issued by the Secretary of State;
- Regulating the scheduling of broadcasting advertising, sponsorship, and product placement;
- Promoting media literacy, primarily through the undertaking of research to inform policy;
- More recently, establishing a framework to implement provisions in the Digital Economy Act 2010 around online copyright infringement, one of Ofcom's 2012/13 strategic priorities¹⁵.

Under the Communications Act 2003, Ofcom has also been given some regulatory powers over the BBC. This has marked a departure from the self-regulatory regime historically governing the UK's main public service broadcaster. Regulatory responsibilities are now divided between Ofcom and the BBC Trust, 'the sovereign body within the BBC'¹⁶. Ofcom's Broadcasting Code applies to the BBC, as well as commercial broadcasters, but only in respect of standards on harm and offence, privacy and fair treatment. The BBC Trust retains responsibility over matters of accuracy and impartiality in news and current affairs programming. Under the BBC's New Charter and Agreement that took effect in 2007 and remains valid until 2016, Ofcom is also responsible for conducting market impact assessment for proposed new BBC services or for significant changes to existing ones. Market impact assessments are one of the two elements of the Public Value Tests, the other being the Public Value Assessments undertaken by the BBC Trust. Finally, Ofcom is in charge, concurrently with the BBC Trust, of monitoring BBC's compliance with obligations relating to independent television production quotas, as well as news and public affairs quotas, programming for the nations and regions, and quotas for original productions.

¹³ Under the Communications Act 2003, all terrestrial broadcasters, namely BBC, ITV, Channel 4 and Channel 5, are designated as 'public service broadcasters', irrespective of their ownership and funding. Ofcom has completed two major PSB reviews so far.

¹⁴ The present UK's Coalition government is considering reducing the frequency of both the public service broadcasting and media ownership rules reviews, as part of its broader agenda to reduce the budget, size and scope of activities of independent regulatory authorities (see Lunt and Livingstone 2012).

¹⁵ See 'Ofcom Annual Plan 2012/13', available at http://www.ofcom.org.uk/files/2012/03/Annual_Plan_2012-13.pdf

¹⁶ See 'Memorandum of Understanding between Ofcom and the BBC Trust', available at: <http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/ofcom-bbc-joint-steering-group/memorandum-of-understanding-between-the-office-of-communications-ofcom-and-the-bbc-trust/>

In a number of areas Ofcom has delegated powers to industry regulatory bodies establishing what are referred to as 'co-regulatory partnerships'. This is in accordance with the legislative mandate. Under the Communications Act 2003, Ofcom is required to promote the development of self-regulation. Since Ofcom's creation, there has indeed been a move towards a greater role for 'self-regulation', although, in fact, the arrangements put in place are better described as 'co-regulatory' since Ofcom, as the statutory regulator, typically retains certain powers and responsibilities. An important area where a 'co-regulatory partnership' has been put in place is the regulation of broadcasting advertising *standards*. Ofcom devolved the exercise of this function to the Advertising Standard Authority (ASA) in November 2004¹⁷. The regulation of sponsorships remains under Ofcom's responsibility, and so does the regulation of advertising *scheduling*, as already mentioned. The ASA is a non-statutory body funded by the advertising industry. Its main function is to regulate the content of all forms of advertising, sales promotions and direct marketing by investigating complaints and adjudicating whether advertising complies with its standards codes. As a 'backstop regulator', Ofcom remains ultimately responsible for ensuring that broadcasters observe relevant standards and retains the power to require ASA to amend the code, which it did once in 2007 when introducing a ban on advertising for products that are high in fat, salt or sugar during children's television airtime. Likewise, Ofcom must approve any change to the code recommended by the ASA. Finally, in the event of ASA failing to secure advertisers' compliance with its decisions, Ofcom can step in and force compliance on broadcasters and impose sanctions.

An area where Ofcom has recently put in place similar co-regulatory arrangements is the regulation of on demand programme services (i.e., according to the terminology adopted by the European Union, non-linear TV-like services)¹⁸. These services are regulated under the Communications Act 2003 as amended in December 2009 to implement the European Union's 2007 Audio Visual Media Service Directive. In 2010 Ofcom delegated powers to the Authority for Television On Demand (ATVOD) in matters of editorial content (regulation of advertising on video-on-demand services is responsibility of the ASA). Like the ASA, ATVOD is a non-statutory body funded by a fee paid by on demand service providers, whose board comprises five independent and four non-independent (i.e. industry representatives) members. Its main task is to ensure that on demand service providers falling within the scope of regulation notify it and comply with its standards code in matters of incitement to hatred and protection of minors. Ofcom retains similar powers as those described earlier in relation to advertising, namely approval of the code and changes to it, as well as enforcement powers.

To summarise, Ofcom's duties and powers in relation to media regulation are wide-ranging. Ofcom exercises its statutory functions either solely or through co-regulatory schemes involving industry bodies such as ASA and ATVOD as co-regulators. However, there are areas (Internet content, the press) and institutions (the BBC) that remain wholly or partly outside of Ofcom's purvey. In the words of its Chief Executive Ed Richards, overall 'Ofcom

¹⁷ For an assessment, see Dacko and Hat (2005).

¹⁸ For a discussion see Dawes (2011).

has extensive supervisory powers in relation to TV and radio broadcasting content. Our role in relation to Internet services is much more limited. We have only an extremely narrowly defined – and rarely triggered – role in relation to the regulation of newspapers. We have no role in relation to newspaper content¹⁹.

Regulation of newspaper content is currently a highly topical and hotly contested issue. In the wake of the News International phone hacking scandal²⁰, in July 2011 the government set up a public enquiry into the culture, practices and ethics of the press led Lord Justice Leveson (the so-called 'Leveson inquiry')²¹. The UK press is currently self-regulated by the Press Complaint Commission, an industry body established in 1990 that is now widely regarded as toothless and ineffective. There are societal calls for subjecting the newspaper sector to statutory regulation, possibly involving Ofcom. But there is also strong opposition to statutory regulation of the press. The Leveson inquiry is expected to publish a report with recommendations to government for a more effective system of press regulation later in the year. At the time of writing (July 2012), the most likely outcome will be a strengthened system of self-regulation.

3. LEGITIMIZING / UNDERLYING VALUES

The underlying values informing Ofcom's regulatory activity are found in primary legislation. Section 3(1) of the Communications Act 2003 sets out Ofcom's core purposes as follows:

It shall be the principal duty of Ofcom, in carrying out their function, a) to further the interests of *citizens* in relation to communications matters (i.e. matters in relation to which we have functions); and (b) to further the interests of *consumers* in relevant markets, where appropriate by promoting competition. (emphasis added).

In the words of Ofcom's chairman Colette Bowe 'meeting these two duties is at the heart of everything we [Ofcom] do'²².

During the passage of the Act the question of in whose interest Ofcom should regulate (consumers versus citizens) was hotly debated and fought over in Parliament and outside it. This 'discursive struggle' over Ofcom's core purposes is recounted by Peter Lunt and Sonia Livingstone (2012: 41-63). They argue that 'what might, at first sight, seem to be mere semantic struggles in fact pointed to a profound philosophical difference with very practical consequences' (p. 42). Civil society coalitions and defenders of public service-type and socially-oriented regulation secured a major victory in Parliament when they managed to have an amendment passed that put citizen interest alongside consumer interest. Earlier drafts of

¹⁹ See 'Witness Statement of Ed Richards to the Leveson Inquiry into the Culture, Practice and Ethics of the Press', available at <http://media.ofcom.org.uk/files/2012/02/Witness-Statement-of-Ed-Richards.pdf>, p. 25.

²⁰ The News International phone hacking scandal is an on-going controversy involving the defunct News of the World (closed in July 2011), the UK's best-selling Sunday newspaper published by News International, a subsidiary of Rupert Murdoch's News Corporation. As reported in the relevant Wikipedia entry, 'employees of the newspaper were accused of engaging in phone hacking, police bribery, and exercising improper influence in the pursuit of publishing stories'.

²¹ See <http://www.levesoninquiry.org.uk/>

²² See 'Witness Statement of Colette Bowe to the Leveson Inquiry into the Culture, Practice and Ethics of the Press', available at <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Colette-Bowe.pdf>

the communications bill only referred to the interests of 'consumers'. Such a redefinition of Ofcom's core purposes went some way towards mitigating concerns that as a 'convergent' regulator Ofcom would give priority to an economic and competition-oriented approach to regulation of the kind applied to telecommunications. However, it did not contribute to resolve underlying ambiguities over Ofcom's underlying values, and the hierarchy between them. Commentators have pointed out that Ofcom must 'balance numerous broad and sometimes conflicting economic and cultural policy considerations' (Doyle and Vick 2005: 77). It has also been noted that the Communications Act is generally informed by a deregulatory thrust and that among Ofcom's regulatory principles is a 'bias against intervention' (see e.g. Hitchens 2006). Ofcom's duty to further citizen interest, which can require a robust and interventionist approach to regulation, might thus be difficult to reconcile with the general thrust of the legislation. Lunt and Livingstone (2012) argue that in its interpretation of its core purposes, as reflected for instance in the institutional structures that it set up for itself, Ofcom has prioritized consumer over citizen interest. They note that from 2003 onward Ofcom 'established institutional structures and roles relating to consumer policy' (p. 50), but that 'strikingly, little equivalent activity or accountability was forthcoming regarding actions to further citizen's interests' (Ibid), further commenting that 'Ofcom gives the impression of being more comfortable dealing with consumer than with citizenship issues' (p. 62), probably because the latter are difficult to define and less amenable to quantitative analysis.

Ofcom's new strategic priorities, set out in 2011 in the context of a significant reduction in the regulator's budget (see Section 7 below)²³, seem indeed to point to the marginalization of social/cultural concerns in its policy agenda. Only one of these five strategic aims reflects citizen-oriented concerns ('To provide appropriate assurance to audiences on [broadcasting] standards'), whereas three other priorities reflect Ofcom's primary concern with economic-type regulation ('To promote effective and sustainable competition'; 'To promote efficient use of public assets'; 'To help markets work for consumers').

4. PERFORMANCE

Information on the work undertaken by Ofcom during the year, and a self-assessment of its performance against the strategic priorities set in the annual plan, are found in Ofcom's Annual Reports. The picture emerging from these reports is that of a very active and busy regulator, as evidenced, among others, by the number of public consultations and regulatory impact assessments undertaken annually (e.g., respectively, 47 and 46 in 2011/12), the enforcement activity in relation to television and radio content (7,551 cases assessed in 2011/12) and the substantial investment in research, including annual reports and audience/consumer surveys (e.g., the Communications Market Reports) as well as *ad hoc* research.

There appears to be a clear division of labour between Ofcom and the industry bodies with which it has co-regulatory schemes, although of course this is not an assessment of whether co-regulatory arrangements are more or less appropriate and effective

²³ See 'Ofcom Annual Plan 2012/13', available at: <http://www.ofcom.org.uk/about/annual-reports-and-plans/annual-plans/annual-plan-201213/>

than statutory regulation. Ofcom's Chief Executive Ed Richard has recently commented that 'Ofcom's experience of co-regulation to date has been mostly positive'²⁴. Ofcom has developed a set of criteria for assessing whether any of its functions should be delegated to a co-regulatory body²⁵. At the time of writing, Ofcom is undertaking a formal review and applying these criteria to evaluate how co-regulation of editorial content on demand programme services has worked since its inception in 2010 and whether the ATVOD remains 'an appropriate regulatory authority'²⁶.

5. ENFORCEMENT MECHANISMS / ACCOUNTABILITY

5.1. ENFORCEMENT MECHANISMS

Ofcom has statutory powers²⁷ to impose sanctions against a radio or television broadcaster in the event of a breach of its code and/or the conditions of the broadcaster's licence. The procedure is generally initiated by complaints from listeners and viewers. Ofcom has a duty to assess any complaint it receives. Individual complaints received by Ofcom are assigned to cases. In its latest Annual Report²⁸, Ofcom revealed to have assessed 21,484 complaints about harmful and offensive material in 2011/12 ('broadcasting standards') and 288 complaints about unfairness and/or unwarranted infringements of privacy, for a total of 7,551 cases. Ofcom does not uphold most complaints. For instance, in 2011/12, in relation to broadcasting standards cases, out of a total of 7,263 cases, 6,816 were either found not to be in breach of the Broadcasting Code or outside Ofcom's remit. Some of the other cases (57) were 'resolved' (when a broadcaster takes immediate and appropriate steps to remedy a breach and Ofcom decides not to record it). The remaining cases were further investigated and 248 investigated cases resulted in breaches of the Broadcasting Code.

If it considers that a broadcaster has 'deliberately, seriously, repeatedly and/or recklessly' breached the Broadcasting Code or any other licence condition, Ofcom has the power to:

- Issue a direction not to repeat a programme or advertisement, or a direction to broadcast a correction or a statement of Ofcom's findings;
- Impose a financial penalty (for commercial television or radio licensees, up to £250,000 or 5% of the broadcaster's 'Qualifying Revenue', whichever is the greater);
- In the most severe cases, shorten, suspend or (in certain cases) revoke a licence.

In its latest Annual Report, Ofcom reports to have applied financial penalties in 10 cases during the last financial year. In one case (More FM Ltd) the sanction was to reduce the period for which the licence is to be in force by a period of twelve months.

²⁴ See 'Witness Statement of Ed Richards to the Leveson Inquiry into the Culture, Practice and Ethics of the Press', available at <http://media.ofcom.org.uk/files/2012/02/Witness-Statement-of-Ed-Richards.pdf>, p. 34.

²⁵ See Ofcom (2008) 'Identifying Appropriate Regulatory Solutions: Principles for Analysing Self- and Co-regulation', available at: <http://stakeholders.ofcom.org.uk/consultations/coregulation/statement/>

²⁶ See 'ATVOD Review' available at: <http://stakeholders.ofcom.org.uk/broadcasting/tv/video-on-demand/>

²⁷ Under the Broadcasting Act 1990 and 1996, and in some cases the Communications Act 2003, depending on the type of licence.

²⁸ See 'Ofcom Annual Report 2011/12', p. 112-115.

Broadcasters and affected media workers can appeal against an Ofcom decision via the judicial system.

5.2. ACCOUNTABILITY

Ofcom is accountable to Parliament, but is intended to operate at arm's length from the State. It has a statutory duty to publish an annual report and present it to Parliament. In the annual report, Ofcom must provide 'a summary of the manner in which they have resolved conflicts arising from their general duties in "important" cases'. The annual report is made available on Ofcom's website in July of every year²⁹. Another mechanism through which the regulator is held accountable to Parliament is its duty to give evidence to parliamentary committee inquiries. In the course of 2011/12, Ofcom gave evidence on issues ranging from privacy to media plurality, and from the future of investigative journalism to superfast broadband.

Some of the regulatory principles informing Ofcom's activities are intended to enhance its accountability to various stakeholders, and, more generally, public engagement and transparency in the regulatory process. Under the terms of the Communications Act 2003, Ofcom's statutory principles include:

- A duty to publish an Annual Plan, publicly reviewed and made available on the regulator's website³⁰, where strategic priorities and policy objectives for the forthcoming year are clearly articulated;
- A duty to consult widely before deliberating and to assess the impact of proposed regulatory action;
- A duty to ensure that its interventions are 'evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome'.
- A duty to undertake consumer and audience research, which, as noted by Lunt and Livingstone (2012), in addition to contributing to evidence-based policy-making, is also regarded by Ofcom 'as a valuable means of reaching the wider public' (p. 79), especially 'those who, for whatever reason, do not find themselves sufficiently represented among those parties who put themselves forward in the consultation process' (Ibid).

Lunt and Livingstone (2012) provide a careful and insightful assessment of Ofcom's achievements in engaging the widest possible range of stakeholders, including civil society, consumer groups and individuals, through public consultation, research and meetings like the Consumer Forum on Communications, as well as some of the intrinsic limitations of these mechanisms working against the possibility of truly inclusive policy-making.

To embed consumer and citizen representation into the very structures of Ofcom, and thus further enhance its accountability towards the public, the Communications Act required Ofcom to establish, respectively, a Consumer Panel and a Content Board (for more

²⁹ See <http://www.ofcom.org.uk/about/annual-reports-and-plans/>

³⁰ See <http://www.ofcom.org.uk/about/annual-reports-and-plans/>

details over the structure and composition of these bodies see Section 6 below). Expected to represent citizen interests, the Content Board is essentially given responsibility over content broadcasting regulation, in a rather dubious equation of citizen interest with merely broadcasting issues (see Lunt and Livingstone 2012). In the words of its former chairman, the Content Board is charged with 'understanding, analyzing and championing the voices and interest of the viewer, the listener and citizen' and examining 'issues where the citizen interest extends beyond the consumer interest with focus on those aspects of the public interest which competition and market forces do not reach'³¹.

The Consumer Panel (renamed Communications Consumer Panel in 2008) is in charge to represent specifically the interests of consumers to Ofcom, as well as Parliament, government and European institutions. Lunt and Livingstone (2012: 75) note that the Communications Consumer Panel 'may be seen to embed the concerns of statutory civil society body within the regulator'. The areas of consumer interest covered by the Panel explicitly exclude matters related to broadcasting and other type of content delivered over electronic communications networks³².

6. INSTITUTIONAL ORGANIZATION / COMPOSITION

Ofcom's main decision-making and governing body is the Board responsible for providing overall strategic direction. Under the Office of Communications Act 2002, the Board consists of up to ten members, a majority of whom are non-executive members including a Chairman and up to three are executive members (including the Chief Executive).

The Chairman and the non-executive members are appointed by the government in the person of the Secretary of State for Culture, Media and Sport for a period of five years. In turn, the Chairman and other non-executive members of the Board appoint the Chief Executive (subject to the approval of the relevant Secretary of State). They also appoint any other executive Board member from among Ofcom's employees.

Ofcom's Executive Committee, led by the Chief Executive, is responsible for running the organization and is accountable to the Board. It operates alongside Ofcom's Policy Executive, which also comprises senior executives and is responsible for the development of Ofcom's overall regulatory agenda and providing a forum for discussion.

Charged with the task of performing functions related to broadcasting content and media literacy, the Ofcom Content Board is a committee of the main Board comprising ten members appointed by the Ofcom Board. A majority of its members is made up of individuals who are neither members nor employees of Ofcom, some of whom must have extensive broadcasting experience. The chairman and at least one other member of the Content Board must be non-executive members of the Board (other than their chairman). The Content Board must also include a representative for each of the nations (England, Scotland, Wales and Northern Ireland).

³¹ See 'Witness Statement of Philip Graph to the Leveson Inquiry into the Culture, Practice and Ethics of the Press', available at <http://www.levesoninquiry.org.uk/wp-content/uploads/2012/02/Witness-Statement-of-Philip-Graf.pdf>

³² For an assessment of the role of consumer representation in communications policy-making in the UK see Tambini (2012).

As discussed in Section 5 above, consumer interest is instead championed by the Communications Consumer Panel, a policy advisory group established under the Communications Act 2003, independent of Ofcom but 'resourced and administered from within Ofcom' (Lunt and Livingstone 2012: 75). As stated on its website, 'The Panel is made up of independent experts with experience from many different fields: consumer advocacy, regulation, the third sector, academia, the trade union movement, market research and industry'³³.

Internally, Ofcom has recently been reorganized into seven 'groups' whose directors report directly to Ofcom's Chief Executive³⁴:

- Content;
- International and Regulatory Development;
- Legal;
- Consumer;
- Strategy, Chief Economist and Technology;
- Competition Policy; Spectrum Policy;
- Operation.

As of 31 March 2011, Ofcom had 720 employees, down from 873 in 2010. In the course of 2011 Ofcom implemented a redundancy plan in order to reduce staff costs and meet savings targets required by government (see Section 7 below).

7. FUNDING

Ofcom is funded by a combination of government funding and industry fees³⁵. Total income for the year ending on 31 March 2011 was £144m. Two thirds of that income came from government, specifically a grant-in-aid from the Department for Business, Innovation and Skills (BIS), totaling 93.8m. This is supplemented by a small grant-in-aid from the Department of Culture, Media and Sport (DCMS) to cover Ofcom's activities in respect of media literacy (amounting to £0.5m in 2010/11)³⁶. The remaining one third of Ofcom's income is generated through fees paid by the industry, namely telecommunications operators ('network and services administrative and application fees') and broadcasting licensees ('Broadcasting Act licence and application fees'). In 2010/11, telecommunications and broadcasting amounted to £28m and £20m respectively.

Nearly 50% of the total costs incurred by Ofcom in 2010/11 were staff costs (salaries, benefits, pensions and national insurance costs). The rest of the regulator's operating costs were incurred in respect of several activities, most significantly: professional fees, outsourced services, audience and consumer research, spectrum clearance scheme, premises

³³ See <http://www.communicationsconsumerpanel.org.uk/>

³⁴ See Oxford Media Convention. Speech by Ed Richards, January 24, 2011, available at: <http://media.ofcom.org.uk/2011/01/24/oxford-media-convention-speech-by-ed-richards/>

³⁵ See 'Ofcom Annual Report 2010/11', Section D, available at <http://www.ofcom.org.uk/about/annual-reports-and-plans/annual-reports/annual-report-2010-11/>. Ofcom Annual report is published in July and is available in English and Welsh. Information provided in this section comes from Ofcom's 2010/11 Annual Report.

³⁶ The role of main sponsor body was assigned to DCMS from BIS from 01 April 2011.

costs, administration and office expenses, information and technology costs, and amortisations and depreciations.

Ofcom has not been spared by the major public sector cuts implemented by the UK's present Coalition government in response to the financial crisis. The regulator has been required to significantly reduce its expenditure. The result of an internal review completed in February 2011 was to identify savings, entailing significant job losses, intended to reduce Ofcom's budget by 28% in real terms over the following four years beginning from April 2011. Ofcom's total budget for 2011/12 was set at £115.8m. The reduction in the budget was made possible, as put by Ofcom in its Annual Report, through 'a combination of efficiencies, streamlining project management and governance and ceasing some activities altogether'³⁷. As an example of an area where Ofcom might be asked to do less, the Annual Report mentions the Government's proposal to reduce the frequency of media ownership and public service broadcasting reviews (currently every three and five years respectively). But the report also notes that, at the same time, Ofcom has been asked to take on new responsibilities, for example, implementing the provisions in the Digital Economy Act and the regulation of postal services.

8. REGULATION IN CONTEXT

Some of the key, distinctive features of the UK media and communications system include:

- A strong tradition of public service broadcasting. In the UK all terrestrial broadcasters, namely BBC, ITV, Channel 4 and Channel Five, are designated as 'public service broadcasters', irrespective of their ownership and funding (ITV, Channel 4 and Channel 5 are commercially funded, and ITV and Channel 5 are for-profit companies). As public service broadcasters, they are required to fulfill public service obligations, although in recent years these have been reduced for the commercial public service broadcasters (especially ITV and Channel Five). UK's main public service broadcaster is the BBC, publicly funded via the licence fee and operating under the most comprehensive public service remit of all UK's 'public service broadcasters. By international standards, the BBC is a very well-resourced public broadcaster and enjoys relative independence of government;
- The comparatively minor role played by local media vis-à-vis national media (both in the press and broadcasting sectors);
- Generally, a high take-up of new communications technologies, including digital TV (94% of homes in 2011), and broadband Internet (76% of homes in 2011);
- A wealthy market – e.g., the UK is by far the largest pay-TV market in Europe; online advertising revenues are the highest in Europe.
- A newspaper market characteristically divided into the tabloid/popular and broadsheet/quality segments, the latter displaying high professional standards, while the former, the largest segment in terms of circulation and readership, now at the

³⁷ See 'Ofcom Annual Report 2010/11', p. 40.

center of controversy over its practices and professional standards. The phone-hacking scandal which erupted in the course of 2011 revealed widespread unethical, and even illegal practices among tabloid journalists and led to the closure in July 2011 of the best selling Sunday newspaper, *News of the World* (owned by Rupert Murdoch's News Corp);

- High level of press and cross-media ownership concentration, with Rupert Murdoch's News Corp controversially holding a dominance position in both the national newspaper and pay-TV sectors (respectively through News International and BSkyB).

In keeping with its commitment to researching communications markets 'constantly' (one of its regulatory principles), Ofcom provides a rich source of updated figures and data on the UK media and communications markets, technologies and audiences, notably through its annual Communications Market Reports, Public Service Broadcasting Report and regular surveys of media consumption. This research is available on Ofcom's website.

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A comparative overview

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Editors

This collective e-book, “*Media Regulators in Europe: A Cross-country Comparative Analysis*”, tries to organize disperse information about state media regulatory bodies in Europe. Thirteen country reports (Austria, Finland, France, Germany, Greece, Ireland, Italy, Poland, Portugal, Spain, Switzerland, The Netherlands, and the United Kingdom) are presented. These texts give us relevant insights on media statutory regulation and may enable us to draw some empirically-based comparisons.

The table presented in the next page offers a synoptic overview of similarities and differences between the thirteen countries, regarding the various dimensions subject to analysis.

The research shows that almost all democratic countries under study have independent bodies performing tasks of media regulation, and that they usually have administrative and financial autonomy regarding the state. This leads us to the understanding that states perceive media regulation as an important feature for democracy and for the qualification of symbolic environments, therefore constituting these kinds of external media regulation structures. Moreover, there are also cases in which several state bodies intervene, on a systematic and permanent basis, in the media field, leading to a cumulative scrutiny by different bodies, namely observatories.

The analysis undertaken in this study demonstrates that several different possibilities are drawn in terms of institutional organization and composition, especially in what concerns to mandates' duration and election mechanisms. A quick look at the table above allows us to conclude that the tendency is for the constitution of collegial bodies, and the exception is of single-running organs of decision.

Alternating between nominations by the President, the Government or National Assemblies, members are usually subject to a common rule regarding incompatibility for performing duties in such regulatory bodies: some kind of relationship with media companies. On the other hand, the pre-requisite of experience in any area of the media field is regularly safeguarded by the time members are designated.

Dimensions of Analysis

Legal figure	Institutional organization								Enforcement mechanisms			Accountability			Funding			Functions			Convergent regulatory body	
	Collegial body	Rotative system (members)	Renewal of mandates	Re-election of members	Media participation	Civil Society participation	Sanctioning powers	Parliament	Ministry	Government	Mixed	State	Fees	Press	TV	Radio	Telecommunications	Yes	No			
Austria	•	•	•	NA	Y	Y	Y	•	•	•	•	•	•	•	•	•	•	•	•	•		
Finland	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
France	•	•	•	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Germany	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA		
Greece	•	•	•	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Ireland	•	•	•	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Italy	•	•	•	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Poland	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Portugal	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
Spain	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA		
Switzerland	•	NA	NA	NA	NA	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•		
The Netherlands	•	•	•	NA	NA	NA	NA	NA	•	•	•	•	•	•	•	•	•	•	•	•		
United Kingdom	•	NA	NA	NA	NA	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		

Indicators of independence of the regulatory body(ies)

The place of civil society and media representatives in regulatory bodies' institutional organization is also an interesting motto for debate. Indeed, as we perceive from the table, both sectors are under-represented, which is more significant in the case of media professionals. These indicators tend to point out a portrayal of state media regulatory bodies in which there is not a place, at least within the structures of decision-making, for both sectors, redirecting them, in some cases, for structures with advisory functions.

National Parliaments seem to be the most common organism to which state media regulatory bodies are accountable to, probably due to the fact that this is where major political parties are represented.

The data clearly indicate that the tendency for funding state media regulatory bodies in the thirteen European countries under study is to have mixed budgets, usually combining public funding with fees imposed to media.

Independence of state media regulatory bodies is probably one of the most difficult challenges to embrace and deconstruct in practice. Our study corroborates our previous conclusion (Sousa et al., 2012: 8) that states have been adopting two major acting lines: either creating autonomous bodies, with financial and administrative independence, or creating (or maintaining) agencies embedded in their own governmental structures. In fact, the European Union has been promoting, on a trans-sectorial basis, the idea of independent bodies of regulation. In the media field, traditional governmental structures that used to support political decision-making and to guarantee media systems surveillance seem to be less prepared to meet challenges emanating from interests' struggles that move across the media sector, as well as to assure non-interference and miscegenation between political forces and the common good that regulatory bodies are to preserve.

Although several changes have been introduced with new technologies and globalization, we continuously verify that media content regulation is, in almost all of the cases under review, confined to broadcasting. It seems that digital (r)evolution is building a selfish one-way road whilst existing media regulatory bodies keep walking in quite comfortable paths. Convergent regulatory bodies (as in the United Kingdom or in Italy) are not a tendency, as well as having the press amongst the bodies' competences: this only happens in Portugal and in Italy.

This comparative analysis demonstrates the relevance of the nations' political and administrative characteristics and the countries' historical background. The issue of decentralization is the best example to illustrate this, since there are countries with several regionalized structures of media regulation, namely Germany and Spain. In both cases, various different bodies are in charge of media regulation. It is also worth mentioning the Italian experience, as it presents regional committees within state media regulation.

All in all, achieving democracy is thus seen as a corollary of media regulation along with accountable media due to their role as informers, as providers of a "platform for public discourse and deliberation", as givers of "voice to a variety of social groups" as well as mediators, and also as controllers of "those in power by fulfilling a watchdog function and by holding them accountable" (Trappel & Meier, 2011: 7).

Some scholars argue that the debate around the concept of media regulation is nowadays weakened. In fact, the term is inconsistently used across Europe and its meaning is also changing fast. Moreover, these conceptual controversies are even more evident in academic and political discourses. For instance: “In American legal political studies regulation means a form of state influence on economic processes, whereas in Europe the term is generally understood as being used (...) to describe means to achieve public policy objectives” (Hans Bredow Institute, 2006: 11). Our comparative work aims at reflecting about these concerns, since facing different realities and experiences is a fruitful starting point. Although we refer to state-centric national structures, the dynamics and permanent character of sub-national and international links must be taken into consideration at all times. The country reports we have presented open up avenues for a more substantiated theoretical discourse on media regulation. Considering the cases we have examined, it is apprehensible the resilience of the state in times of so-called globalization and erosion of cultural and symbolic frontiers. Media regulation is certainly a highly complex system that goes far beyond top-down statutory entities but this model helps us understanding this (still) critical dimension of wider systems and it has the potential to be replicated. If the model is applied in other geographies, new lessons can be learnt.

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