

LSE MEDIA POLICY PROJECT

Regulatory Independence based on Performance Outcome

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Article 30 of the Audiovisual Media Services Directive assumes the independence of audiovisual media regulators. However, current legal instruments only focus on pre-existing legal safeguards of independence, since at this time there are no clear and enforceable safeguards available in the European legal and regulatory context¹ to ensure that regulators operate independently within member states. Recent research projects have highlighted the need for policy change and argued for a more 'activist' role for the EU, as well as the need to establish a monitoring system at the European level to evaluate the independence of national regulatory authorities (NRAs) on the basis of specific, evidence-based criteria². In this paper we propose establishing a European monitoring system based on assessing the performance of NRAs, rather than on their legal basis.

We have observed a paradox in Hungary. Though the new Hungarian "super authority" was considered formally compliant with European requirements³, there are serious anomalies in its operations. The interpretation of the legal conditions which regulate the authority's operations, as well as of applicable electoral, organisational, financial and procedural rules, are significantly influenced by the prevailing national constitutional and political culture.

Criteria derived from reviewing the authority's actual work

The objective of independence is to ensure that all players operate on equal ground: different opinions have equal chances of reaching an audience if each market player can expect and

attain equal treatment in terms of market access and potential sanctions. To measure whether equal treatment prevails, conclusions can be derived from an evidence-based review of the authority's performance.

Transparency of the authority's operations.

Access to knowledge of NRA activities provides market players with the guarantee that the authority will apply the law consistently and predictably. The following could be measured as components of transparency:

- whether the authority's decisions are publicly accessible and explained;

Example: Critical decisions of the Hungarian NRA are published without any substantial reasoning, even in case of requests for public data regarding the decision, and the minutes of the sessions of the Media Council do not entail any information on the decision's grounds.

- the existence and accessibility of long-term strategic documents (e.g. a frequency management plan), and the option to find out about the authority's position concerning legislative plans that affect the media system in its entirety;

Example: As we have reported systematically⁴, despite its legal obligation, the Hungarian NRA has not made available any information on strategically critical issues such as spectrum management, nor any position paper on key legislative initiatives concerning the media system⁵.

- the frequency of public consultations and their impact on decision-making.

Practice of market entry proceedings. This refers to practice in relation to the frequency tenders; distribution of must-carry capacities, and other aspects of the regulation of market

conditions. The experiences with the practices of the Hungarian regulator are especially revealing in terms of the effects of biased market entry decisions on the market structure. The following could serve as indicators in the analysis of such decisions:

- the licences won in the given period or the proportion of successful applications as a percentage of all applications for particular market players;

Example: As a result of the Hungarian media authority's activities, the coverage area of media provider Lánchíd Rádió increased by 13 additional frequency licences between 2010 and 2013, while 31% of all successful frequency tenders were won by a mere four players in this period⁶.

- the rate at which licences and operating conditions for media service providers that won frequency tenders were subsequently amended;
- the intensity of competition in tender procedures;

Example: In the Hungarian authority's practice 17% of all tenders in 2011 featured a single applicant, while by 2013 that proportion had surged to 47%;

- the percentage of the body's decisions that were adopted unanimously;

Example: All of the frequency tender decisions – and most of the Hungarian NRA's other decisions – have been decided by unanimous votes.

- other decisions by the authority with an impact on market entry, such as the predictability and consistency of proceedings concerning media market concentration.

Sanctions practices. This is a key determinant in whether market players can assume that the NRA will always assess a given action or conduct in the same way. The following could be used to assess such practices:

- the extent to which certain players received remarkably hefty or lenient sanctions, and the frequency with which the complaints of certain players among those are rejected;
- the extent to which the criteria employed in applying sanctions are publicly available and the consistency of their application;

- the level of administrative burdens on the operation of media services, such as undue data provision requirements;

Example: The Hungarian NRA requires community radios to submit detailed statements on their broadcast programme, which is an enormous administrative burden for a group that is predominantly made up of non-profit broadcasters.

- the number and distribution of sanctions related to violations that were sensitive with respect to political independence, such as political advertisements and balanced election coverage.

Example: The Hungarian NRA has not decided on cases related to political advertisements even when a court had determined a violation of the law took place⁷.

Recommendations

The Hungarian case showed that conclusions can be drawn as to the de facto independence of an NRA based on clear and usually easily available data on their practices in relation to transparency, market entry regulation, and sanctioning. Monitoring of NRA practices in these three areas could be an efficient tool for encouraging independence, supposing that it is accompanied by adequate organisational background and enforcement power. Based on the Hungarian experiences, it seems necessary to introduce new criteria into EU legislation that assess the real performance of NRAs as an integral part of independence. ^{LSE}

¹ We refer inter alia to the AVMS Directive Recital (94), Article 30; the ECHR Article 10; the TFEU Article 288 para. 3; the Framework Directive Recital (11) and Article 3 and 3a and the Review Directive Recital (13) and Article 1; also to Council of Europe, Recommendation No. R (2000) 23 and to Council of Europe, Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector.

² INDIREG study, Freiberga Report and RSCAS PP 2013/01 report. See Wolfgang SCHULZ / Peggy VALCKE / Kristina IRION (eds.), *The Independence of the Media and its Regulatory Agencies*, Intellect Ltd. (2014).

³ See the agreement between the Council of Europe and the Hungarian government in Jan 2013.

⁴ See Mérték Media Monitor, Media Council redraws the radio market - Report on the frequency tendering by the Media Council (2013), <http://mertek.eu/en/reports/media-council-redraws-the-radio-market-report-on-the-frequency-tendering-by-the-media>; 'The Media Council's Tender Procedures for Broadcasting Frequencies', <http://mertek.eu/en/reports/the-media-councils-tender-procedures-for-broadcasting-frequencies-executive-summary>

⁵ See Mérték Media Monitor, The advertisement tax and Hungarian media policy (2013), <http://mertek.eu/en/article/the-advertisement-tax-and-hungarian-media-policy>

⁶ Krisztina NAGY, A Médianács frekvenciapályáztatási gyakorlata 2010-2013 [The Media Council's frequency tender practices, 2010-2013], in: Gábor POLYÁK / Erik USZKIEWICZ (eds.) *Foglyul ejtett média. Médiapolitikai írások* [Captured media. Media policy writings], Budapest 2014.

⁷ E.g. the ruling of the Hungarian Supreme Court on political advertisement aired by the second national commercial broadcaster, TV2. See Gábor POLYÁK: Ki az, aki jobban teljesít? [Who does better perform?], Mérték Blog (2014) <http://mertek.hvg.hu/2014/03/19/ki-az-aki-jobban-teljesit/>