

LEGAL ASPECTS OF THE INDEPENDENCE OF REGULATORY AUTHORITIES FOR THE BROADCASTING SECTOR

By
Živilė Stubrytė

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Central European University
Department of Legal Studies
Comparative Constitutional Law

Supervisor: Professor András Sajó

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ABSTRACT

The independence of broadcasting regulatory authorities is seen as a main precondition of a professional and credible regulatory process consequently, leading to the freedom of broadcasting. While there is a common consensus on the set of main legal standards which should contribute to authority's independence, the research aims to explore how these safeguards are implemented and observed in different countries with a special focus on the US, the UK and Lithuania. The outcomes suggest firstly, that new tools are needed because the legal norms are not enough to achieve the independence because of their ineffectiveness to tackle influences by the industry. Secondly, there is a need to improve the existing legal frameworks by tailoring the existing legal safeguards to the objectives of credible and professional performance.

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LIST OF ABBREVIATIONS

AGCOM – Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*)

CSA – French Council for Audio-visual media (*Conseil supérieur de l'audiovisuel*)

EPRA – European Platform of Regulatory Authorities

FCC – US Federal Communications Commission

IRA – Independent Regulatory Authority

LRTK – Lithuanian Radio and Television Commission (*Lietuvos Radijo ir Televizijos Komisija*)

KRRiT – Polish Radio and Television Council (*Krajowa Rada Radiofonii i Telewizji*)

OFCOM – British Office of Communications

INTRODUCTION

Independent regulatory authorities (IRAs) are mainly understood as bodies which perform public functions but are not a part of legislative, nor executive nor judiciary power and not directly responsible to any of these branches. Independent regulatory agencies primarily act in different spheres of the economy - transportation, telecommunications, broadcasting, finance, competition to name just few. Given the importance of the media sector as a whole, and its wider social and cultural impact in modern information societies, the research will be limited to the institutions regulating the broadcasting field. Moreover, as a system of communication, broadcasting has always been a reflection of changing political and economic circumstances. Thus the medium of broadcasting offers a particularly good platform for observing the interaction of the various factors of technological, economic, and political development.¹

The broadcasting media plays a central role in bringing information to peoples' attention and then placing it in some context, offering interpretations of it and suggesting a proper meaning for it. In modern, democratic societies media has become a dominant part of daily lives. The media may contribute to the understanding of what is normal and what is deviant, acceptable and unacceptable. To the extent that knowledge is used by the state, by public and private sectors, it may be seen as powerful means of exerting social control and even serving particular interests.²

Given the essential role played by broadcast media in democratic societies regulatory institutions in this field have a mission to guarantee a wide range of independent and autonomous means of communication, making it possible to reflect the diversity of ideas

¹ Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (New York: Guildford Press, 1996), 1.

² Thomas Gibbons, *Regulating the Media* (London: Sweet & Maxwell, second ed. 1998), 2

and opinions. Therefore first and foremost these institutions have to be insulated from political influences. Yet no less important is regulators' independence from the industry it regulates. Generally it is assumed that independence of regulatory authorities is crucial for enabling them to carry out the functions properly and for enhancing their professionalism as well as credibility.

There is a common consensus on the set of main legal norms (standards) which should contribute to enhance regulatory authority's independence. The legal norms related to the competence of the authority and its institutional as well as organizational design are expected to serve as the safeguards of independence and consequently as a main precondition of credible and professional regulation. As far as broadcasting sector is at stake, these expectations would mean that the independence of broadcasting regulatory authorities should empower them to achieve their main objective which is to guarantee a wide range of autonomous means of communication.

In most European countries and the United States broadcasting regulation is also vested with independent regulatory authorities, however, each country has relied on different aspects of the legal standards in order to pursue independence. Moreover, despite the declared adherence to non-interference with the regulatory process in several countries there have been attempts both from the government and the industry to capture the broadcasting regulators.

The thesis aims to explore how these legal safeguards have been implemented in broadcasting sector in different countries and if they were effective in achieving independence as well as the desirable outcomes of regulatory authorities?

To explore these issues the first chapter assesses the concept of independence, examines its importance in general and in broadcasting sector particularly. The second chapter analyzes broadcasting regulators' independence in terms of their remit and powers possessed,

while the institutional guarantees of independence are examined in the third chapter.

The method by which the research will proceed is comparative. Comparison is at the center of all serious inquiry and learning. Moreover, the natural curiosity prompts to compare experiences, beliefs, customs, traditions, and natural and institutional settings. Consistent with this, the study of law, naturally, should be drawn to – and benefit from – comparative analysis in general, and comparative constitutional analysis in particular.³ The research shall cover several jurisdictions worldwide but a more profound analysis will be limited to only three jurisdictions. On the one hand the country which is a pioneer of the modern broadcasting system worldwide was chosen (the United States); selected on the other hand two countries (from common and civil law traditions) that equate broadcasting with the public service concept (the United Kingdom and Lithuania).

The three legal systems at the centre of this research will be comparatively examined in relation to every major aspect of the topic (the broadcasting institutions' competence and institutional arrangements). A summary of the conclusions at the end of all chapters will also provide the basic results of comparative study.

The analysis is based upon materials that are accessible to the public. For performing a comprehensive analysis the primary (e.g. Constitutions, laws on broadcasting, administrative procedure acts), secondary (e.g. annual reports of broadcasting institutions, academic publications and jurisprudence) sources of correspondent states' will be examined as well as international instruments (e.g. Council of Europe, Committee of Ministers recommendations for Member States).

³ Norman Dorsen et al., *Comparative Constitutionalism: cases and materials* (West Publishing Company, 2003), 1.

CHAPTER 1: INDEPENDENT REGULATORY AUTHORITIES

1.1 Proliferation of IRAs

Historically public ownership has been the main form of regulation in Europe. It was assumed that public ownership would give the state the power to control strategically important sectors such as gas, electricity, water, public transportation, and telecommunications in favor of the public interest.⁴ However, public ownership failed to impose effective public control, and it came at a cost, since it proved less than ideal in terms of administrative and management efficiency. This led to the process of deregulation witnessed by the establishment of Independent Regulatory Authorities (IRAs) as an alternative mode of governance.

By contrast, in the US the general prevailing assumption was and still remains that the market normally functions well, and that interference with the market is only justified in obvious cases of its failure⁵. Therefore as early as the beginning of 20th century the management of public utilities has been left mainly in private hands, and the threat of market failure has been addressed by subjecting the private players to regulation by federal or state agencies.

The American broadcast regulation was established under the Radio Act of 1927 and the subsequent Communications Act of 1934. Already then the responsibilities and the supervision were bestowed to an independent agency – the Federal Radio Commission, a

⁴ See for example Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited June 16, 2008) or Fabrizio Gilardi, “Delegation to Independent Regulatory Agencies in Western Europe: A Cross-Sectional Comparison”, <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws15/Gilardi.pdf> (last visited June 16, 2008) or Mark Thatcher, “Regulation after Delegation: Independent Regulatory Agencies in Europe.” *Journal of European Public Policy*, Vol. 9, No. 6, (2002).

⁵ Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited June 16, 2008), 6.

predecessor of the Federal Communications Commission. Moreover, at no time did the federal government have a broadcasting monopoly, because this would have conflicted with the right of freedom of speech and the press established under the First Amendment.

In Europe where broadcasting developed as a public function with the state possessing the powers over the public service monopoly the market experienced a different transformation process.

During 1980s and 1990s the “US style regulation”⁶ was progressively adopted in many countries and independent regulatory authorities (IRAs) were established by central governments in order to develop and oversee newly created markets or former but recently opened up public monopolies. Therefore almost everywhere in Europe⁷ the powers to regulate broadcasting sector were conferred to independent regulatory authorities. The public service broadcasters and State televisions had to face new challenges when the frequencies were opened to private players. Thus here as well as in the case of above mentioned sectors the public ownership had to give way to private ownership subjected to rules built by independent regulatory authorities. As to the regulation of public media, public service broadcasters were granted a status of public organizations or corporations and are subject to a form of self regulation usually through a council of governors, a management board and the director general⁸.

Although various historic, economic and political experiences resulted in different regulatory frameworks the essential idea was that regulatory authorities were to be built on the fundament of independence.

⁶ Gurcan Gulen et al., “Improving Regulatory Agency Efficiency and Effectiveness” <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 1.

⁷ European Platform of Regulatory Authorities, <http://www.epra.org/content/english/index2.html> (last visited January 3, 2008).

⁸ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, “Television across Europe: regulation, policy and independence”, Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008) 54.

1.2 The Concept of Independence

Independence is a complex concept and due to the variety of its layers it can be understood in many different ways. For example, independence of regulatory authorities can be understood from two different perspectives, as material (formal) independence and as *de facto* or actual independence. Material independence describes the status of an IRA according to the legal acts establishing the authority. It includes the legal framework (acts of legislature as well as executive) under which the IRA was established and responsibilities were officially delegated to it. By contrast, *de facto* independence describes the autonomy of the IRA to shape its regulatory actions in daily life. It refers to the pronounced relationship between the IRA and constitutional branches, as well as the regulatees and consumers.⁹

Generally independence of regulators is understood in the sense that the authorities “are allowed to operate outside the line of hierarchical control by the departments of central government”¹⁰. Government includes not only the current leaders but also a group of politicians, ministries, courts, and state agencies among others¹¹. Similarly, Thatcher defines IRAs as bodies that are “legally and organizationally separated from government departments and suppliers, are headed by appointed members who cannot be easily dismissed before the end of their terms and have their own staff, budgets and internal organizational rules”¹². Thus, IRAs are constitutionally to be classified together with other non-majoritarian

⁹ Tenbucken Schneider „Divergent convergence: structures and functions of national regulatory authorities in the telecommunications sector” in *The Politics of Regulation*, ed. Jacint Jordana, David Levi-Faur, (Northampton, MA: Edward Elgar Pub. 2004) 254-255.

¹⁰ Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited December 1, 2007) 1-2.

¹¹ Sanford Berg, “Developments in Best-Practice Regulation: Principles, Processes, and Performance”, *The Electricity Journal*, July, 2000.

¹² David Coen and Mark Thatcher, “Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies”, http://journals.cambridge.org/download.php?file=%2FPUP%2FPUP28_01%2FS0143814X08000779a.pdf&code=781cd3ead897f23e3592b187924f0996 (last visited December 17, 2007) 2, see also Majone, Gilardi.

institutions (NMIs).¹³ “Non-majoritarian” meaning that these institutions are neither a product of direct elections, neither they are run by elected politicians nor are they directly accountable to them. In other words the independence of regulatory authorities primarily refers to IRAs’ distance from the ministry or other government bodies and from improper influences.

Obviously, the regulator should also be independent from the industry which it regulates. For example, in the WTO context the definition of the independent regulator stresses this second element of independence according to which IRA is an authority that is separate from, and not accountable to, any provider of telecommunications services. This description does not require the regulatory authority to be independent of any ministry, nor does it preclude the government from being the regulator.¹⁴ Smith¹⁵ also acknowledges that regulators can be captured by specific groups. Thus, it is expected that IRAs are insulated from improper influences not only by regulatees but by consumers as well. To this point Berg notices that “even the group of customers is complex, encompassing a wide range of different size users from smallest residential to largest industrial”¹⁶. However, there is a greater risk of regulatory agencies being captured by the industry than by the consumers. The reason for this is that enterprises which are a few and easily organized often benefit significantly from regulation¹⁷. Moreover, business representatives are likely to have more information about the matters than the consumer organizations. Thus collective action is harder to achieve for

¹³ Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited December 1, 2007) 5.

¹⁴ Working Party on Telecommunication and Information Services Policies “Telecommunications Regulations: Institutional Structures and Responsibilities”, 2005, <http://www.oecd.org/dataoecd/56/11/35954786.pdf> (last visited January 12, 2008) 5.

¹⁵ Warrick Smith, “Utility Regulators – The Independence Debate”, The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008)

¹⁶ Sanford Berg, “Developments in Best-Practice Regulation: Principles, Processes, and Performance”, *The Electricity Journal*, July, 2000.

¹⁷ Mark Thatcher, “Regulation after Delegation: Independent Regulatory Agencies in Europe.” *Journal of European Public Policy*, Vol. 9, No. 6, (2002).

consumers who are numerous, dispersed and usually lacking more specific information on economic, technological and political issues.

Another distinguishing characteristic of independent regulatory authorities is their competence and the powers they possess. A move towards privatization also influenced the separation of three main functions: policy making, commercial activities and regulation. Policy making function is vested usually with the government and the commercial provision of services is assigned to private and public companies. In order to implement the governmental policies IRAs are assigned with a regulatory function which usually has a primary objective to avoid market failure while ensuring competition, efficiency, quality of services and protection of consumers. In order to properly perform the functions independent regulators should be vested adequate powers. Thus the main characteristic of the regulatory powers vested with independent agencies is that the powers include¹⁸ rule making, supervisory and adjudicatory functions, or as Professor Strauss rightly notes the functions performed by the agencies “believe simple classification as “legislative,” “executive,” or “judicial,” but partake of all three characteristics”¹⁹.

On the one hand the regulator has to be insulated from improper political interventions, while on the other hand it has to be responsive to governmental policies and implement them. Therefore some of the authors use the British concept of “arm’s length relationship” to define the regulator’s insulation from politicians, and, particularly, from the government of the day. According to Smith independent regulator is the one which has an arm’s-length relationship *inter alia* with political authorities. “Arm’s length” is the term commonly used to characterize the proper co-operative and respectful relationship between

¹⁸ See for example, Warrick Smith, “Utility Regulators – The Independence Debate”, The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008) or Anders Larsen et al, “Independent Regulatory Authorities in Europe”, <http://www.sessa.eu.com/documents/wp/D73.1-Larsen.pdf> (last visited June 15, 2008) 11.

¹⁹ Peter Strauss “The Place of Agencies in Government: Separation of Powers and the Fourth Branch”, *Columbia Law Review*, No. 84(3), 1984, 573.

government, industry and the regulators, with particular emphasis on the independence of regulators from political and commercial interests.²⁰

In fact, IRA is a “non-political enforcer of government-determined policies”²¹ by means set out in the statutes drafted by the legislator which is to be insulated from undue political influences in its day-to-day activities. However, the distance from the government is relative and relationship between IRA and a certain ministry is inevitable because at the end of the day regulator is responsible for implementing governmental policies.

Obviously, the regulators while carrying out their functions must take into account various viewpoints and interests, including economic, social and political objectives²². Therefore IRAs interaction with governmental or private entities is inevitable and independence can be seen as the balancing role a regulatory agency should play with respect to interests of three main stakeholder groups: government, regulatees and consumers.²³ Moreover, the independence of regulatory institutions must not be understood as autonomy for developing actions and programming policies ignoring the government, but rather as the probability of implementing policies in accordance with the rule of law and without the interference of political agents or of agents of the private sector²⁴.

Thus independence of regulatory authorities is primarily seen as an institutional distance from government, while regulators` members are not elected, they are not politicians and the institution is not directly accountable to constitutional branches of the government. Secondly, in theory independence requires the absence of direct ministerial intervention in

²⁰ Television across Europe: Regulation, Policy and Independence (2005) - Reports, press releases, media coverage, the United Kingdom Report, http://www.eumap.org/topics/media/television_europe (last visited February 1, 2008) 11.

²¹ Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.3107.html> (last visited July 24, 2008).

²² Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.1260.html> (last visited July 24, 2008).

²³ Sanford Berg, “Developments in Best-Practice Regulation: Principles, Processes, and Performance”, *The Electricity Journal*, July, 2000, 11-18.

²⁴ Gesner Oliveira et al., “Aspects of Independence of Regulatory Agencies and Competition Advocacy”, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf (last visited July 23, 2008) 6.

day-to-day activities, pressure from the industry or even consumers. In practice this means the ability of regulatory authority to balance the potentially conflicting interests of the government, regulatees and consumers.

1.3 Why is Independence Important?

Generally IRAs are established in sensitive but economically significant sectors of the economy where their independence is seen as a prerequisite for ensuring market efficiency, consumer protection, limiting government failures and creating investment friendly environment²⁵. There is a near consensus on the main objectives of regulators. For example, Smith²⁶ identifies three: to protect consumers from abuse of market power, to support investment by protecting investors from arbitrary action by government, and to promote economic efficiency. Johannsen²⁷ focuses on promoting competition, market transparency and protecting customers as most common objectives of regulators. Ironically, one more reason why sometimes independent agencies are created is that delegation of certain functions to these bodies makes possible to blame regulators instead of governmental officials for unpopular decisions or even regulatory failures.²⁸

While the creation of IRAs is mainly based on considerations related to the functions they have to perform the granting of independence is at least in theory determined by the expected quality of regulation.

²⁵ Anders Larsen et al., “Independent Regulatory Authorities in Europe”, <http://www.sessa.eu.com/documents/wp/D73.1-Larsen.pdf> (last visited June 15, 2008) 11.

²⁶ Gurcan Gulen et al., “Improving Regulatory Agency Efficiency and Effectiveness” <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 3.

²⁷ Gurcan Gulen et al., “Improving Regulatory Agency Efficiency and Effectiveness” <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 3.

²⁸ Gesner Oliveira et al., “Aspects of Independence of Regulatory Agencies and Competition Advocacy”, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf (last visited July 23, 2008), 7.

For example, Christensen and Lagreid in their research²⁹ find that the creation of independent agencies is justified by the perceived need to insulate certain activities from improper influences and acknowledge that the independence enables regulators to provide greater policy continuity, predictability, and consistency than ministries. According to Gilardi and Genoud, the following benefits would result from independence of regulatory agencies: expertise, flexibility, credibility commitment, stability, efficiency. Most common and probably most important advantages of independence are credibility and professionalism. Likewise Majone, admits that the actual comparative advantage of independent regulators is the combination of expertise and commitment. He argues that independent agencies enjoy a possibility to make credible policy commitments because of their independence from partisan political considerations. This argument is based on an idea that independent agencies have a possibility to commit to credible policy, because their existence is not tied to popular elections. The time limit imposed by the requirements of elections at regular intervals is a strong constraint on the arbitrary use by the winners of the powers entrusted to them by the voters. Nevertheless, segmentation of the democratic process into relatively short time periods provides the politicians with few incentives to commit themselves to a long-term strategy (which success, if at all, will come after new elections).³⁰ It is assumed that credibility requires independence, and once agencies are insulated from political and electoral influence they should be able to adjust their regulatory functions in the long term and create a more stable and predictable regulatory environment.

There can be distinguished two dimensions of credibility. Firstly, there is a credibility of policy commitments which is increased when governments delegate policy-

²⁹ Tom Christensen and Per Lagreid, "The Regulatory Orthodoxy in Practice", 2007, https://bora.uib.no/bitstream/1956/2448/1/Nr_06-07_Christensen_Laegreid.pdf (last visited March 14, 2008).

³⁰ Giandomenico Majone, "The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union" http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited June 16, 2008), 2.

making functions to independent agencies.³¹ In this case it seems that credibility is already achieved by simply delegating policy making powers to an agency which according to Majone is capable to commit itself to a long term strategy. Similarly, Genoud argues that:

“Credibility is essentially a time-consistency problem. Politicians and governments are constrained by the political agenda and are therefore subject to change their policy preferences. To increase their commitment to a policy, and thus its credibility, politicians and governments give their discretion and delegate elements of their power to independent agencies and commit themselves to more fixed rules.”³²

Further, Genoud raises an important issue by questioning: “[i]f credibility is achieved through delegation, does an IRA have to be credible in order to make a policy credible?”³³ After all not many independent regulators enjoy the powers of policy making and more often agencies are charged with the function of implementation, yet the issue of credibility is also at stake here.

Secondly, there is a credibility of the independent regulatory authority. While some see independence as inevitable prerequisite of institution’s credibility, Genoud finds independence as only one of the factors which is necessary for retaining credibility of the agency:

“To be credible, an organization has to be institutionally credible, i.e. actors in a system have to be convinced that certain institutional conditions (goals, resources, instruments, powers, independence) are met, so that a given organization will be, at least theoretically speaking, able to pursue its goals in an appropriate and effective way.”³⁴

³¹ Ibid.

³² Christophe Genoud, “Regulation as a Game: The role of Independent Regulatory Agencies in the Regulatory Process”, <http://www.lse.ac.uk/collections/CARR/pdf/ChristopheGenoud.pdf> (last visited April 28, 2008), 3.

³³ Christophe Genoud, “Regulation as a Game: The role of Independent Regulatory Agencies in the Regulatory Process”, <http://www.lse.ac.uk/collections/CARR/pdf/ChristopheGenoud.pdf> (last visited April 28, 2008), 3.

³⁴ Ibid.

Moreover unlike Majone he is not convinced that credibility is not possible only because an agency is not “sufficiently independent”³⁵. After all although lacking institutional credibility an agency can still act credibly and offer credible outputs. Thus Genoud distinguishes between institutional credibility and what he calls the earned credibility, i.e. credibility in terms of institution’s actual actions and its outputs.

In conclusion, credibility is important to policy makers but even more to the regulators. Independence is seen to be beneficial for the regulators as a necessary attribute to ensure that the regulatory role will be carried out effectively and credibly.³⁶ Moreover, the credibility of the regulator may be severely limited if other government authorities have the ability to intervene or overrule the regulator.

Similarly it is accepted that professionalism results from independence of the regulatory institution³⁷. Firstly, it is assumed that experts are attracted to the institution because an independent regulator has a flexible organizational structure which creates a more appealing working environment for sector experts³⁸. Secondly, the experts should be retained due to the independence which keeps the regulator free from shorter-term political pressure and enables it to develop a high level of expertise necessary to make decisions on complex questions³⁹. Independent regulatory agencies are closer to the regulated sector than the

³⁵ Ibid

³⁶ Gesner Oliveira et al., “Aspects of Independence of Regulatory Agencies and Competition Advocacy”, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf (last visited July 23, 2008), 9.

³⁷ See generally, Fabrizio Gilardi, “Delegation to Independent Regulatory Agencies in Western Europe: A Cross-Sectional Comparison”, <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws15/Gilardi.pdf> (last visited June 16, 2008) or Christophe Genoud, “Regulation as a Game: The role of Independent Regulatory Agencies in the Regulatory Process”, <http://www.lse.ac.uk/collections/CARR/pdf/ChristopheGenoud.pdf> (last visited April 28, 2008) or Warrick Smith, “Utility Regulators – The Independence Debate”, The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008).

³⁸ Gesner Oliveira et al., “Aspects of Independence of Regulatory Agencies and Competition Advocacy”, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf (last visited July 23, 2008), 7.

³⁹ Working Party on Telecommunication and Information Services Policies “Telecommunications Regulations: Institutional Structures and Responsibilities”, 2005, <http://www.oecd.org/dataoecd/56/11/35954786.pdf> (last visited January 12, 2008), 7.

ministries and can better compile and analyze the relevant information⁴⁰. Last but not least Smith and Majone recognize a mutual impact of independence and expertise because professionals are oriented by goals, standards of conduct and career opportunities giving them strong reasons for resisting improper influences and directions⁴¹.

To sum up, independence in terms of insulation from short-term political pressures and improper influences of industry representatives is seen as a prerequisite which enables agencies to exercise discretion based on competent analysis. The tasks assigned to the regulatory authorities are assumed to be best carried out by institutions which combine professionalism and credibility and therefore are “capable of committing themselves to clearly defined regulatory objectives”⁴².

Both credibility and professionalism are crucial for the regulator to function efficiently. On the other hand, independence is necessary for gaining and retaining expertise and credibility of independent regulatory authority.

1.4 Why is Independence Important in Broadcasting Sector?

The underlying principle is that broadcasting sector should be regulated in a way that safeguards its regulation process from the public authorities, political and economic influences. Before turning to arguments related to the independence of the broadcasting regulator it is worth to take into consideration the role of media and the audio visual means of communication in particular.

⁴⁰ Gesner Oliveira et al., “Aspects of Independence of Regulatory Agencies and Competition Advocacy”, http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/NGA_Submission_Aspects_of_Independence.pdf (last visited July 23, 2008), 7.

⁴¹ Warrick Smith, “Utility Regulators – The Independence Debate”, The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008), 1-3, and Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited June 16, 2008), 4.

⁴² Giandomenico Majone, “The Agency Model: The Growth of Regulation and Regulatory Institutions in the European Union” http://www.eipa.eu/files/repository/eipascope/scop97_3_2.pdf (last visited June 16, 2008), 2.

In modern, democratic societies broadcasting media has become a dominant part of daily lives. Broadcasting is the most pervasive, powerful means of communication in the world⁴³. The media may affect people's thinking and behavior because it has all the means to contribute to the understanding of what is good and what is bad, acceptable and unacceptable. To the extent that television and radio may be used by the state, by public and private sectors, it is seen as powerful means of exerting social control and even serving particular interests⁴⁴. Moreover, the role of broadcast media is essential in furthering democracy: as a "watchdog over the powerful" it promotes public scrutiny and enables citizens to make informed choices by the ballot boxes as well as strengthens government responsiveness to society's needs⁴⁵.

The role of the broadcast media in a way determines the goals for its supervisory authorities. For instance the World Bank research on broadcasting and development describes the objectives of broadcasting regulation as follows:

"The goal of regulation in the public interest and of a specifically public interest approach to media is to tread a path that mediates among these interests, encouraging and offering incentives and, where necessary, imposing obligations and constraints on each group, while evading capture by any specific interests."⁴⁶

In this respect regulatory authorities for broadcasting sector have an essential mission to further freedom of broadcasting while ensuring a wide range of independent and autonomous means of communication and making it possible to reflect the diversity of ideas and opinions. On the one hand to ensure plurality and diversity of independent and autonomous means of communication it is crucial to guarantee freedom of expression. On the other hand freedom of expression is not possible if there is no free, independent and

⁴³ Eve Solomon for the CBA and UNESCO, "Guidelines for Broadcasting Regulation", <http://www.cba.org.uk/documents/guidelines.pdf> (last visited May 10, 2008), 7.

⁴⁴ Thomas Gibbons, *Regulating the Media* (London: Sweet & Maxwell, second ed. 1998), 2.

⁴⁵ Pippa Norris, *A Virtuous Circle* (Cambridge: Cambridge University Press, 2000). Cited in Pippa Norris, *The Role of the Free Press in Promoting Democratisation, Good Governance and Human Development* (paper delivered at UNESCO World Press Freedom Day conference in Colombo, Sri Lanka, May 1–2, 2006), 4.

⁴⁶ Steve Buckley et al., *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, <http://hdl.handle.net/2027/spo.5661153.0001.001> (last visited June 12, 2008), 4.

pluralistic media. Moreover, under the framework of ECHR freedom of expression which includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers constitutes one of the essential principles of a democratic society.

No less important than the individual's freedom of expression is the role of broadcasting media in giving voice to poor and marginalized communities, cultural and linguistic minorities.⁴⁷ Broadcasting regulatory framework is central to their ability to articulate concerns, opinions to one another and to government. Media thus has a potential to foster a "public sphere": "a network for communicating information and points of view"⁴⁸ in which issues affecting the society and community can be explored openly as well as "filtered and synthesized in such a way that they coalesce into . . . public opinions."⁴⁹

Moreover, freedom of the broadcast media is not just freedom of expression with a wider range through technical means of dissemination. Natural speech and media-based speech differ in a more respect, since everyone can express his opinion, not everyone can amplify his speech via the means of mass media. As Professor Grimm rightly puts it "media-based speech is therefore speech by a few for the many"⁵⁰. The mechanism used for assigning the spectrum to commercial radio and television broadcasters is through licensing. This is why decision making function on who shall hold a broadcast license should be left for independent regulatory authorities.

In the context of broadcasting, freedom of expression also encompasses the freedom of broadcaster to determine its programs. Necessity to guarantee independence of broadcaster is another argument why broadcasting regulators should be insulated from improper interferences. Therefore it has been stressed that: "the best way of guaranteeing the

⁴⁷ Steve Buckley et al., *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, <http://hdl.handle.net/2027/spo.5661153.0001.001> (last visited June 12, 2008), 2.

⁴⁸ Jürgen Habermas, *Between Facts and Norms* (Cambridge, MA: MIT Press, 1996), 360.

⁴⁹ Ibid.

⁵⁰ Dieter Grimm. "Freedom of Speech in a Globalized World", personal electronic copy, 4.

independence of the supervisee is to guarantee the independence of the supervisor. The independence of the supervisor becomes then the guarantee of the independence of the supervisee but also of the efficiency and competence of the supervision.”⁵¹

Similarly, the explanatory memorandum to the Council of Europe Recommendation Rec(2000) 23⁵² emphasizes that while safeguarding broadcasters' independence with regard to programming, the regulatory authorities themselves have to be protected from all forms of political and economic interferences. The underlying principle is that the issue of regulators' independence is closely connected with that of the independence of broadcasters and of media in general.

Thus independence of broadcasting regulators should enable them to serve the individual right to freedom of expression, not political or economic monopolies on the exercise of this right. This would make broadcasting regulatory authorities guardians of a crucial aspect of democracy, because without individual freedom of expression, there can be no democracy.⁵³

Last but not least the general concerns of professionalism and credibility are relevant in broadcasting field as well. In the audio visual media sector expert knowledge is essential due to complexity and rapid development of this sector that was influenced by the emergence of new technologies, digitalization and convergence of communication and information technologies. While technical and economic developments lead to the expansion and the further complexity of the broadcasting sector, the Council of Europe

⁵¹ François Jongen, *La Police de l'Audiovisuel, Analyse comparée de la régulation de la radio et de la télévision en Europe*, 372, as cited in the Summary of 15th EPRA Meeting, 2002, Plenary session on The Influence of Politics on Broadcasting, http://portal.unesco.org/ci/en/files/15939/10868618861Minutes_Public_Broadcasting_Service_workshop_4_May_04.doc/Minutes_Public%2BBroadcasting%2BService%2Bworkshop_4%2BMay%2B04.doc (last visited February 14, 2008).

⁵² Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23, [https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

⁵³ Karol Jakubowicz, Keynote Speech (prepared for delivery at the Plenary session: “The Independence of Regulatory Authorities”, 25th Meeting of the European Platform of Regulatory Authorities (EPRA) Prague, May 16-19, 2007), 3.

Recommendation Rec(2000) 23 of the Committee of Ministers to member states on The Independence and Functions of Regulatory Authorities for the Broadcasting Sector (hereinafter, Recommendation Rec(2000) 23 or Recommendation)⁵⁴, insists broadcasting regulators to be equipped with expert knowledge in order to fulfill their functions properly.

Given the essential mission of regulatory authorities for broadcasting sector to further freedom of broadcasting while ensuring a wide range of independent and autonomous means of communication these bodies have to be protected from political and economic interferences. Otherwise in the hands of politicians, or under the influence of powerful economic interests the regulation of audio visual media sector risks to become an obstacle not only to diversity but consequently to democratic debate and plurality of opinion⁵⁵.

Therefore it is assumed that the regulatory authorities for the broadcasting sector should be guaranteed independence, especially, through a legal framework covering all aspects of their work, and enabling them to perform their functions effectively and efficiently. Broadcasting regulator's independence from political and economic interests is believed to be inevitable in providing credible and professional means to foster plurality of independent and autonomous means of communication making it possible to mirror diversity of ideas and opinions.

Thus it is important to bear in mind that the ultimate goal is not to have an independent regulatory authority *per se* but an effective regulatory framework which enables a fair competition in the market, enhances efficiency and ensures consumer interests. In the broadcasting sector this would mean an establishment of such a regulatory framework under which the given scope of independence to broadcasting regulators enables to guarantee the freedom of broadcasting whilst at the same time ensuring a balance between that freedom and other legitimate rights and interests.

⁵⁴ <https://wcd.coe.int/ViewDoc.jsp?id=393649&Lang=en> (last visited February 15, 2008)

⁵⁵ Steve Buckley et al., *Broadcasting, Voice, and Accountability: A Public Interest Approach to Policy, Law, and Regulation*, <http://hdl.handle.net/2027/spo.5661153.0001.001> (last visited June 12, 2008), 3-5.

Given the importance of broadcasting regulatory authority's independence it is crucial to determine how if at all the legal safeguards can contribute institution's independence and its better performance. The main legal safeguards which are believed to enhance independence of broadcasting regulatory authorities are linked with the delegated mandate, the conditions for appointments and dismissals of the members, conflicts of interest provisions and financial autonomy.

CHAPTER 2: COMPETENCE OF INDEPENDENT BROADCASTING REGULATORY AUTHORITIES

There is a near consensus that in order to be properly independent IRAs have to be vested adequate powers. Adequate in a sense that the given discretion should enable them to fulfill the assigned functions and achieve the set objectives. Once IRAs are institutionally separated from the executive, they should also be insulated from minister's discretionary powers and given clearly defined and exclusive competencies⁵⁶. The delegation of adequate (proper) powers should enhance the independence of the regulatory authority. In this regard the Recommendation Rec(2000) 23 outlines the necessity to provide regulatory bodies with adequate powers to fulfill their missions as one of the essential prerequisites for institution's independence from political forces and economic interests.

IRAs are usually set up by a legislature's enacted statute which establishes the basic framework and provides the agency with some powers. Since governments have to decide on the scope of delegation, Smith distinguishes four main considerations related to the determination of the issues which remain the preserve of the government, and those which are the responsibilities of independent regulators. The allocation of responsibilities between IRA and the government depends on the following issues:

1. Basis for the decision. If the matter in question is judged to be appropriate for decision on political criteria the responsibilities shall be vested with the government (e.g. tax and subsidy issues), whereas responsibilities requiring decision making based on technical criteria shall be delegated to an independent agency;

⁵⁶ Anders Larsen et al, "Independent Regulatory Authorities in Europe", <http://www.sessa.eu.com/documents/wp/D73.1-Larsen.pdf> (last visited June 15, 2008), 9.

2. Conflicts of interest. The allocation of particular powers shall depend on whether the delegation of particular functions could create conflicts of interest.
3. Expertise. The responsibilities shall be vested with the body which has expertise in a particular field or is responsible for performing related similar tasks.
4. Reliability. The government before delegating certain responsibilities shall consider if the independent regulator is reliable enough.⁵⁷

If government decides on delegation under these considerations, responsibilities would be granted only in areas requiring technical decisions and only to agencies which are trusted by the ministers and possess the required degree of expert knowledge enabling to overcome the potential conflicts of interests. Therefore, based on these considerations the executive generally retains the responsibilities for policy making while the agency is entrusted with the powers of policy implementation. Obviously, these considerations also prevail in deciding whether to grant actual or only consultative powers to the agency. Sometimes even if the government retains substantial powers, the independent agency is still given an advisory role.

Generally, there is a distinction between regulatory authorities that possess actual decision-making powers and authorities that are merely consultative. Mainly it is believed that regulators which do not have to negotiate with government before the final decision is made hold actual decision-making powers which enable them to resist political influences and consequently this independence allows them to base their decisions on expert

⁵⁷ Warrick Smith, "Utility Regulators – Roles and Responsibilities", The World Bank Group, *Private Sector*, Note No. 128, October 1997, <http://www.cepis.ops-oms.org/bvsarg/i/fulltext/note128/note128.pdf> (last visited January 12, 2008), 3.

knowledge. Nevertheless, some authors⁵⁸ think that even an institution with less autonomy (e.g. consultative agency) may prove to provide professional regulation.

The near consensus⁵⁹ is that agencies which qualify as independent regulatory authorities usually encompass rule making, supervisory and adjudicatory powers, or in other words IRAs while performing public functions, wield powers generally attributable to the traditional branches of government.

2.1. Remit of Independent Broadcasting Regulatory Authorities

Before turning to a more comprehensive analysis of broadcasting regulators' responsibilities it is necessary to delineate remit of these agencies. Mainly the competence of broadcasting regulators has two aspects. Firstly, regulatory oversight of broadcasting can be performed either by a separate regulator or by a converged regulator in a sense that the agency is responsible for telecommunications (i.e. carriage) as well as broadcasting (i.e. content). Secondly, since the broadcasting sector is divided between commercial and public service broadcasters, some countries make up for two regulators responsible for each sector, while others rely on the self-government of a public service provider and regulate only commercial broadcasters.

There is no consensus whether institution's organization as a converged or non-converged regulator is a better guarantee for its independence. Some authors⁶⁰ for instance claim that a converged regulator reduces the risk of economic capture because it has broader

⁵⁸ Jon Stern, "Effective Utility Regulation and Independent Regulation: What Makes an Independent Regulator Independent?", *Business Strategy Review*, June 1997.

⁵⁹ See for example, Warrick Smith, "Utility Regulators – The Independence Debate", The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008); C. Talbot, "The Agency Idea: Sometimes old, sometimes new, sometimes borrowed, sometimes untrue" in C. Pollitt and C. Talbot, *Unbundled Government: A Critical Analysis of the Global Trend to Agencies, Quangos and Contractualisation* (London and New York: Routledge, 2004), 3-21.

⁶⁰ Warrick Smith, "Utility Regulators – Roles and Responsibilities", The World Bank Group, *Private Sector*, Note No. 128, October 1997, <http://www.cepis.ops-oms.org/bvsarg/i/fulltext/note128/note128.pdf> (last visited January 12, 2008), 1, and Gurcan Gulen et al., "Improving Regulatory Agency Efficiency and Effectiveness" <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 5.

responsibilities making it difficult for the industry and the institution to develop a tight relationship which could lead to promotion of particular interests rather than the public good. Furthermore, it is deemed that a converged agency may be exposed to less risk of political capture because accumulation of different functions creates a system of checks and balances. Obviously, making an authority responsible for more than one sector (e.g. telecommunications and broadcasting) may have an impact on institution's independence. On the other hand "simply put, replacing many regulators with one does not in itself guarantee either more consisted or more principled regulation, or regulation which necessarily better serves objectives which might be associated with the public interest"⁶¹.

Majority of European countries have two separate regulatory institutions correspondingly in charge of the regulation of broadcasting and telecommunications. For example in Lithuania, the Lithuanian Radio and Television Commission (*Lietuvos Radijo ir Televizijos Komisija*, LRTK) is responsible for regulation of the activities of radio and television broadcasters, and re-broadcasters, while the Lithuanian Communications Regulatory Authority (*Ryšių Reguliavimo Tarnyba*, RRT) regulates the telecommunications sector. Although the two institutions perform their duties separately there are some fields where the cooperation is inevitable, therefore currently there have been debates concerning the establishment of a single regulator.

Other countries, such as Bosnia and Herzegovina (*Regulatorna Agencija za Komunikacije*, RAK), Italy (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM), the UK (*Office of Communications*, Ofcom) and the United States (*Federal Communications Commission*, FCC) have converged regulatory bodies which remit encompasses both broadcasting and telecommunications. While FCC has always been responsible for telecommunications and audio-visual content, Ofcom as a converged body started operating at

⁶¹ Mike Feintuck, *Media Regulation, Public Interest and the Law*, (Edinburgh: Edinburgh University Press, 2nd ed., 2006) 112.

the end of 2003 by replacing all of the regulatory authorities responsible for broadcasting and telecommunications. As far as broadcasting is concerned, it means that the institutions formerly responsible for commercial television – the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC) and the Radio Authority – have merged into one organization which is now responsible for all the communications industries in the UK including spectrum management, media ownership, and content matters.

In the US the broadcast (terrestrial and satellite) media is regulated exclusively by the FCC, while the regulation of other services has to be shared with different institutions. For instance, telecommunications services are regulated by the FCC and state regulatory commissions, cable media are regulated by the FCC and local franchise authorities⁶².

In May and June 2006 the European Platform of Regulatory Authorities (EPRA)⁶³ performed research on the independence of European media market regulators. The results indicate that the converged form of regulatory structure does not have any essential impact on the issue of political interference or influences from the industry. For instance, Italian AGCOM in its response to the survey holds that “the nature of converged regulator does not imply in itself any political interference, which depends rather on the nature of the matters such as media and telecommunication for which the regulator is responsible for”⁶⁴. The converged regulator from Bosnia and Herzegovina, on the contrary, is convinced that its converged organization serves to avoid pressure from supervisees and the government. Ofcom also sees the benefits of reduced capture not only by government but by the industry as well: “the fact that Ofcom is converged does contribute positively to reduce interference from

⁶² Glen O. Robinson and Thomas B. Nachbar, *Communications Regulation*, Preliminary draft, 30.

⁶³ The European Platform of Regulatory Authorities (EPRA), established in April 1995 in Malta, with its seat in Strasbourg, aims at providing an open platform for discussions on a wide variety of topics in broadcasting field, including but not limited to common issues of national and European broadcasting regulation, practical solutions to legal problems regarding the interpretation and application of broadcasting regulation. As for now, 51 regulatory authorities from 42 European countries are members of EPRA, while the European Commission and the Council of Europe are standing observers of the platform. The EPRA holds two meetings a year each time in a different member state. www.epra.org (last visited at April 23, 2008).

⁶⁴ The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 9.

market players, especially those who are present in various markets. The regulator is less prone to be influenced by a particular set of players with specific interests, and there are no incentives for market players to present different messages to the different regulators depending on those interests”⁶⁵.

While the perceptions of each regulator are different, the Television across Europe report⁶⁶ reiterates that the changes in the structure of supervising institutions does not necessarily mean a change in terms of the relationship between the government and the regulators. Similar concerns have been expressed at the conference organized by the Council of Europe and the Organization for Security and Co-operation in Europe (OSCE) Mission to Skopje under the title “Converging media – convergent regulators?”⁶⁷

It may be difficult to assess regulator’s independence with regard to converged responsibilities. However, probably regulator’s which is dealing not only with broadcasting issues combined powers may also be useful to ensure consistency and serve as a safeguard against regulatory capture by the government and more likely by the industry. Obviously, it is more difficult to influence a regulatory authority which structure allows it to mix together in the same teams the traditional functions such as, for example, wireline and wireless or broadcasting and broadband. On the other hand, simply putting distinct regulatory powers together is not enough to ensure independence if the other safeguards are not in place.

Returning to the second aspect of institution’s remit, most of the regulatory bodies in Europe have powers to license and monitor both the public and private sector (e.g. the French, the Dutch regulators); others such as the German (Landesmedienanstalten) and Lithuanian (LRTK) regulators are only competent for the regulation of private broadcasting.

⁶⁵ Ibid.

⁶⁶ Television across Europe: Regulation, Policy and Independence (2005) - Reports, press releases, media coverage, http://www.eumap.org/topics/media/television_europe (last visited March 1, 2008).

⁶⁷ Converging media – convergent regulators? The future of broadcasting regulatory authorities in South-Eastern Europe, Conference organized by the Council of Europe and the OSCE Mission to Skopje, Conclusions, http://www.coe.int/t/e/human_rights/media/Conclusions_Conf_Skopje_1_2.10.07.PDF (last visited February 23, 2008).

Also Ofcom is mainly responsible for the regulation of commercial broadcasters; however, it has a limited role in the regulation of the public service broadcaster, BBC. The British model is unique in a way that with the exception of satellite and cable television channels, all terrestrial broadcasters in the UK have public service obligations.⁶⁸ The requirement to provide a public service is applied differently to each broadcaster; there are degrees of public service obligations, with the BBC having the most responsibility as the main public broadcaster, followed by other free-to-air channels have fewer obligations.⁶⁹

At first glance it may seem that the broader the scope of competence encompassing regulation of public and private broadcasters the more independent the agency is. However, generally it is assumed that the regulation (including self-regulation) of public service broadcasting is more vulnerable to political interferences, while the supervision of private broadcasters is more likely to be captured by economic interests. Therefore the combination of regulation in public and private sectors in single hands may influence the independence in either way: enhancing or reducing it. Obviously, if one regulator is to adjudicate all these potentially conflicting interests it may find itself as a “countervailing force”⁷⁰ and become less vulnerable to political or business capture. On the other hand, for a regulator to perform such a balancing role the other safeguards of independence should be in place. First and foremost, granting of adequate powers is seen as a key prerequisite of broadcasting regulator’s independence.

⁶⁸ Television across Europe: Regulation, Policy and Independence (2005) - Reports, press releases, media coverage, the United Kingdom Report, http://www.eumap.org/topics/media/television_europe (last visited April 1, 2008).

⁶⁹ Ibid.

⁷⁰ Karol Jakubowicz, Keynote Speech (prepared for delivery at the Plenary session: “The Independence of Regulatory Authorities”, 25th Meeting of the European Platform of Regulatory Authorities (EPRA) Prague, May 16-19, 2007), 3.

2.2. Powers of Broadcasting Regulatory Authorities

To carry out the assigned objectives broadcasting regulators are usually assigned with three main powers: the rule-making (e.g. adoption of binding rules and codes of practice), the administration of the broadcasting sector (e.g. award of broadcasting licenses) and supervisory (e.g. programme monitoring) functions⁷¹. Moreover, a number of European audiovisual supervision agencies possess adjudicatory powers that enable them to decide cases under the complaints of viewers with regard to the alleged violations made by public and private broadcasters. Notably, some of the regulators wield complementary consultative powers, for example, related to policy making issues.

There is a great diversity among countries concerning the legal nature of regulatory powers assigned to broadcasting regulatory authorities. In some countries, institutions responsible for broadcasting regulation have a consultative role, and the actual powers are vested with the parliament or the executive. However, in some other countries, including Lithuania, Britain and the United States regulatory authorities for broadcasting sector are given regulatory powers under statutes enabling them to make their own decisions which then are binding on the regulatees.

The rule making power in broadcasting sector usually covers areas such as the awarding of licenses and supervising broadcasters' behavior on questions such as advertising or protection of minors. For example, in UK the Ofcom has adopted a Broadcasting Code⁷² which sets out rules that television and radio broadcasters are obliged to follow⁷³. Similarly, in the US the Communications Act authorizes the FCC to "make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and

⁷¹ European Platform of Regulatory Authorities <http://www.epra.org/content/english/index2.html> (last visited February 1, 2008).

⁷² This Code came into force and applies to programmes broadcast on or after 25 July 2005, including a repeat of a programme first broadcast before that date. The code aims to set standards to protect people under the age of 18 from material that is not suitable for them.

⁷³ Ofcom: a short guide to what we do, <http://www.ofcom.org.uk/consumeradvice/guide/> (last visited August 7, 2008).

to carry out the provisions of [the] Act”⁷⁴. Provided that the proper procedures have been followed, and that the regulation is within the agency’s statutory authority, the rules have full legislative force, binding courts, agencies and citizens alike to their terms⁷⁵. Likewise, Lithuanian broadcasting regulator has a right to pass its own bylaws on the issues of television and radio broadcasting⁷⁶, yet, it may only elaborate the rules and principles set by the legislature while not overstepping or changing the main boundaries established by the laws.

Administration of broadcasting sector is another essential task assigned for broadcasting regulatory authorities. The licensing process constitutes probably the main part of all the administrative functions. The power to grant licenses is particularly important because it entails a heavy burden of responsibility, given that the choice of operators entitled to provide broadcasting services would determine the degree of balance and diversity in the broadcasting sector⁷⁷. Once a regulator is assigned with a function to determine who the broadcasters will be authority’s independence is especially at stake. It is assumed that if the conditions and criteria governing the licensing process are clearly defined in the law this should contribute to achieving independence and consequently a greater diversity in the broadcasting sector⁷⁸. For example, the summary of Television across Europe report 2005⁷⁹ which is the outcome of a research performed by Open Society Institute states that under Lithuanian legal framework “[l]icensing procedures are governed by clear criteria and

⁷⁴ Sec. 303 of Telecommunications Act 1996, [47 U.S.C. 303] Pub. LA. No. 104-104, 110 Stat. 56 (1996) available at <http://www.fcc.gov/Reports/1934new.pdf> (last visited August 7, 2008).

⁷⁵ Peter L. Strauss, *Administrative Justice in the United States*, (Carolina Academic Press, 2nd Rev ed., 2002), 15.

⁷⁶ Article 47, Part 1 of the Law on Provision of Information to the Public, Valstybės žinios, No. 71-1706, 1996, Actual edition of July 31, 2008.

⁷⁷ Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector,

[https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008), 8.

⁷⁸ Ibid.

⁷⁹ Open Society Institute, EU Monitoring and Advocacy Program (EUMAP), <http://www.eumap.org/> (last visited March 23, 2008).

procedures”. However, the precision of the law sometimes is not enough to ensure independence and guarantee a transparent and impartial licensing process. One Lithuanian case offers an interesting illustration here.

In May 31, 2006 the Lithuanian Radio and Television Commission (LRTK) issued a decision No. 58 which acknowledged Limited Liability Company “Interbanga” (hereinafter, Interbanga) as a winner of the tender and issued a license for it to establish and broadcast a radio station. The Commission stated in its decision that the winner of the tender was elected considering the criteria for granting broadcasting licenses which are set in a Law on Provision of Information to the Public and specified in the Rules on Licensing. The Commission did not argue that none of the other seven applicants met the criteria, simply, it held that Interbanga met the criteria better than the others. In its decision LRTK did not explain nor motivate why the priority was given to “Interbanga”.

The claimant – company “Švietėjiškas Radijas” – argued that it also met the legal criteria and brought an action for invalidation of the decision because the Commission failed to explain why the license was awarded to Interbanga rather than the claimant. The LRTK argued that the discretion it has encompasses a right not to disclose the reasons for choosing one broadcaster over the other and asked the court to dismiss the claim.

The administrative court of first instance relied on the principle of rule of law and held that a requirement for public institutions to provide motives in their decisions is an essential one under the Law on Administrative Proceedings. Moreover, the requirement to provide reasons for decisions does not undermine institution’s discretion. Particularly, in mass media regulation field an obligation to motivate decisions is important, because it becomes an essential guarantee of fair competition in the broadcasting market by preventing adoption of acts which provide privileges or discriminate certain market players. The administrative court

of first instance invalidated the decision of the Commission, the Supreme Administrative Court of Lithuania left the decision of the court of first instance unchanged.

Obviously, to establish a fair and open licensing process it is important to clearly define the main conditions and criteria concerning the granting of broadcasting licenses in the law. It is the legal framework established by the parliament that gives guidance to the broadcasting regulator; however, the licensing process does not end here. Then it becomes a responsibility of the broadcasting regulatory authority to apply these conditions in a transparent and impartial manner. As the Lithuanian administrative court rightly noticed the requirement to make public the reasons which lie behind decision making authority of the regulator is a key safeguard of transparency and openness of the licensing process. This requirement is an important guarantee to ensure that the given discretion of the regulator will not be used to conceal the allegedly arbitrary and biased decision-making.

Generally, it is believed that the broader the scope of the granted discretion, the more likely professional considerations will prevail over political ones and those based on private interests. However, at least in Lithuania this did not prove to be the case. As illustrated above the national broadcasting regulator's reluctance to provide arguments which were the basis for its decision sheds a shadow on the impartiality of Commission's performance and its ability to resist potential influences from certain market players.

Notably, the Council of Europe in its Recommendation Rec(2000) 23 also highlights the importance of broadcasting regulators to reason their decisions: "[t]he requirement that decisions be duly reasoned - which is based on the principle of the rule of law and vital need for regulatory authorities' activities to be transparent - is a key to allow those who are affected by the decisions of the regulatory authorities to challenge these decisions through the competent jurisdictions."⁸⁰

⁸⁰ Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the

In conclusion, in licensing process the requirement to justify decisions helps to ensure that well-reasoned conclusions are reached and to reduce corruption as well as suspicion that it is occurring. Once this requirement is not met there is a risk that the given discretion and independence from the political branches will be used instead of promoting diversity and plurality to favor the interests of the incumbent broadcasters.

While rule making and administration of broadcasting sector are an essential part of broadcasting sector regulation, a proper regulatory process would not be possible without the powers to oversee broadcasters' activities. Thus monitoring broadcasters' compliance with commitments and obligations is another important responsibility with regard to broadcasting regulators' competence. The Recommendation Rec(2000) 23 encourages member states to empower broadcasting regulators to monitor broadcasters' compliance with the conditions laid down in the law and in their licenses in order to give real effect to the regulations and to the commitments that broadcasters make. In this respect almost all European broadcasting regulatory authorities are required by laws to monitor the respect of licenses conditions⁸¹. The power to monitor focuses mainly on program content and broadcasters' observance under certain standards such as violence or protection of minors. The possibility to impose sanctions is crucial if the power to monitor is to be effective. In cases of legal violations and breaches of contracts or license conditions Ofcom, for example, has powers to impose fines and revoke broadcast licenses, while under Lithuanian legal framework (Law on Provision of Information to the Public, Article 48 Part 1 Paragraph 11) LRTK may issue warnings, impose fines on senior managers of broadcasters, suspend or

broadcasting sector,

[https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

⁸¹ Paragraph 35 of the Council of Europe Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector Declaration, [https://wcd.coe.int/ViewDoc.jsp?Ref=Decl\(26.03.2008\)&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#RelatedDocuments](https://wcd.coe.int/ViewDoc.jsp?Ref=Decl(26.03.2008)&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75#RelatedDocuments)

revoke broadcast licenses. Similarly, the CSA in France can issue warnings, impose fines on broadcasters and in most serious cases to withdraw their licenses.

There is a common consensus that professionalism requires broadcasting regulator to apply sanctions in a way which would reflect the seriousness of the failure. On the other hand, neither the framework nor the authority should impose such regulatory sanctions which could discourage the exercise of freedom of expression or affect the independence of the broadcast media. As a matter of fact, it is the primary goal of regulatory authority not to “police”⁸² the broadcasting sector, but instead to guarantee that it functions smoothly by enabling a “climate of dialogue, openness and trust”⁸³ in dealings with broadcasters. Yet even the most light-handed regulation should not be done solely for the sake of regulation but has to be designed to meet the objectives of broadcast media pluralism and a competitive environment for private broadcasters.

The French broadcasting regulatory authority, CSA is constantly pointing out the importance of the power to monitor broadcasters’ compliance with the laws and the conditions of their licenses: “[t]he function of monitoring is one of the nerve centers of regulation. The legislation and the rules, the commitments and obligations set in agreements or individual licensing decisions, are what taken together make up the juridical framework for freedom of communication. These would scarcely be effective if it were not possible at all times to ensure they were being respected.”⁸⁴ However, in practice the CSA has been reluctant to use its monitoring power even on an occasional basis⁸⁵. In Italy the situation is

⁸² Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector,

[https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

⁸³ Ibid.

⁸⁴ Serge Robillard, *Television in Europe : regulatory bodies : status, functions and powers in 35 European countries*, (London: John Libbey, 1995), 278.

⁸⁵ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, “Television across Europe: regulation, policy and independence”, Summary, <http://www.mediapolicy.org/tv-across-europe/the->

even more complex because the weakness of audio visual regulatory legal framework is underpinned by ambiguousness of the AGCOM's enforcement measures. Similarly, other European countries have been criticized for the so-called "soft approach"⁸⁶ towards regulating private broadcasters.

As mentioned above, in Lithuania the broadcasting regulatory commission on paper as well as in practice is provided with a broad mandate enabling it not only to grant licenses but to impose sanctions if broadcasters fail to meet the set conditions or even revoke them. However, even in clear cases when broadcasters violate commitments and obligations under the law or their licenses, the LRTK is reluctant to impose adequate sanctions. For example, in 2007 the price of one minute of advertising in primetime was ranging from LTL 15,000 (€ 4,344) to LTL 25, 000 (€ 7,240)⁸⁷ while the few financial sanctions imposed in the same year by the commission for violations of advertising rules were ranging from LTL 1,000 (€ 289) to LTL 3,000 LTL (€ 870)⁸⁸. It has to be noted here that the maximum fine which can be imposed by the Commission under the law is LTL 10, 000 (€ 2, 896). On the other hand even if the harshest sanction is applied it would not be as high as the remuneration for one minute of advertising during the primetime.

Generally the granting of powers including monitoring and supervision to the agencies is associated with expectations that the broader discretion should increase institution's independence and consequently its effectiveness in supervising the broadcasting sector. However, the so-called "soft approach" in monitoring suggests that the regulator is not kept at a healthy distance from the industry which it regulates. At least in Lithuania, the delegation of supervisory powers to national broadcasting regulator resulted in its greater

2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf (last visited January 10, 2008) 54.

⁸⁶ Ibid.

⁸⁷ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, Television across Europe: Follow-up Reports 2008, Lithuania, www.mediapolicy.org/tv-across-europe/follow-up-reports-2008-country/Lithuania-web.pdf/at_download/file (last visited August 21, 2008), 21.

⁸⁸ LRTK annual Report on Activities in 2004, in Lithuanian, <http://www.rtk.lt/lt/index2.php> (last visited March 20, 2008). 26.

insulation from the politics while on the other hand the agency has become more prone to the influences from the commercial broadcasters. One of the ways to exert at least indirect influence can be found if one looks at the funding mechanism of LRTK.

Lithuanian broadcasting regulator's budget comprises from the charges (0.8 %) of the broadcasters' income the biggest part of which comes from advertising of course. This financing model although keeps the Commission free from political influences it may become a stimulus for LRTK to take a soft or even compromising position towards commercial broadcasters concerning their compliance with advertising rules. Since advertising revenues constitute the biggest part of total broadcasters' income, it can be the case that regulator instead of protecting public interest would close its eyes to the violations and abstain from a harsher interference with the flow of broadcasters higher income.

To sum up, despite the declared commitment to foster freedom of broadcasting and a wide range of enforcement measures most of the European regulatory authorities are not so keen to exercise the power of monitoring. In most of the countries the laxity in the enforcement of license requirements and a reluctance to use the powers available is probably best explained by the significant economic power of commercial broadcasters, which discourages the regulators from considering harsher steps against regulatees.

In addition to the mentioned substantial regulatory powers of rule making, licensing and supervision some countries make up for regulators that have a say in policy making as well as the process of legislation. It is sometimes suggested that the executive is responsible for policy making and the agency for regulation. But this distinction is not so helpful in practice, because the dividing line between these concepts is obscure at best, and agencies with significant discretion tend to have some role in policy making as well⁸⁹. This is true for the broadcasting sector as well, since in order to better regulate the market,

⁸⁹ Warrick Smith, "Utility Regulators – Roles and Responsibilities", The World Bank Group, *Private Sector*, Note No. 128, October 1997, <http://www.cepis.ops-oms.org/bvsarg/i/fulltext/note128/note128.pdf> (last visited January 12, 2008), 3.

broadcasting regulators have been entitled in many countries to propose media policy⁹⁰. For example, in Poland, the National Broadcasting Council (KKRiT) can formulate State policy on broadcasting in agreement with the Prime Minister⁹¹; likewise, in Lithuania the broadcasting regulator wields not only regulatory powers but consultative functions as well. The current legal framework⁹² acknowledges LRTK's role as an expert for the government on the issues of radio and television broadcasting (paragraph 1, Article 48 of the Law on Provision of Information for Society). In practice it means that the regulator is enabled to take part in the formation of national audiovisual policy, however, this power is still weak since the Commission provides recommendations only under the request by the executive. Consultative powers are also vested with Ofcom and special advisory groups exist for consumers, different nations and the English regions, disabled and elderly people, and religion⁹³.

Although, some of the broadcasting regulators are entitled to participate in media policy making, the actual influence of regulators in this process is difficult to assess, and it is not the purpose of this paper to do so. Yet it is worth to mention, that constant interaction with governmental bodies runs a risk of partisan interference in regulator's activities and may reduce the potential to develop a principled approach to regulation. On the other hand, regulator's involvement in not only policy implementation but also in the policy

⁹⁰ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, "Television across Europe: regulation, policy and independence", Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008), 52.

⁹¹ For example, Estonia, Macedonia as mentioned in Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, "Television across Europe: regulation, policy and independence", Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008), 52.

⁹² Article 47, Part 1 of the Law on Provision of Information to the Public provides: "The Commission shall participate in the formation of national audiovisual policy. It shall act as a body of experts for the Seimas and Government on the issues of radio and television broadcasting and re-broadcasting."

⁹³ European Platform of Regulatory Authorities (EPRA), profile UK, <http://www.epra.org/content/english/index2.html> (last visited April 6, 2008).

making process may encourage innovative and strategic thinking of the regulator and give the agency a possibility to shape the policy before it is laid down from above.

In other countries the consultative powers of regulatory authorities also encompass the power to provide recommendations for the legislator concerning the audio visual sector. For instance, the Lithuanian Television and Radio Commission is an expert for the government as well as for the Seimas. In practice as an expert for the Seimas the Commission may and even is encouraged⁹⁴ to participate in the process of amending and drafting laws related to activities of broadcasting and other similar issues. Moreover, in Lithuania a political will is constantly expressed to provide the Radio and Television Commission with a wider discretion. In 2005 the Seimas (the Parliament) as usually approved the Commission's annual report and asked the Commission to provide proposals for amending the Law on Provision of Information to the Public „so that Commission would be able to perform its functions more effectively“. Consequently in 2006, the competence of LRTK was broadened and the Commission was granted more rights concerning the protection of minors which previously were entrusted with the national consumer rights protection institution. However, as has been shown previously the expectations of members of parliament that the wider discretion will result in a more effective regulation of the sector have not been met. On the contrary, the accumulation of powers although insulated LRTK from the politicians and public authorities, in particular, the National Consumer Rights Protection Council, at the same time the authority became more prone to the interests of the broadcasting industry.

The trend to broaden regulatory competences and assign more responsibilities to the regulators is present in other countries as well. The underlying reason of such delegation

⁹⁴ LRTK annual Report on Activities in 2004, in Lithuanian, <http://www.rtk.lt/lt/index2.php> (last visited March 20, 2008).

is related to the rapid development of communications information technologies which requires solutions based on expert knowledge rather than political considerations.

Similarly, the evolution of convergence creates an increasing number of responsibilities for regulators regarding the manner in which to regulate, as well as the manner in which to treat new services. For instance, there have been attempts in US to license Internet Protocol Television (IPTV)⁹⁵, while Singapore did actually introduce a two-tier licensing system for the deployment of internet services⁹⁶. Thus the traditional assumption that internet regulation is impossible due to the diffuse nature of the content and difficulty of controlling its flow seems to be challenged in some countries and even overcome in others. Similarly, the Audiovisual Media Services Directive (AVMS)⁹⁷, which is a successor of the Television without Frontiers Directive, extended television regulation to some internet video services that are to be classified as on-demand services. However, the established regulatory burden for on-demand services is far lighter than it is on scheduled services. Obviously, the rapid development of communications makes it important more than ever to ensure that regulators are present in the process of policy making and statutory drafting. On the other hand, the functions should not be delegated for granted and the broader discretion should serve to enable the authority to perform its functions in a professional and credible manner.

Each regulator's autonomy and discretion in exercising the powers differ from country to country. Moreover, with regard to different functions the influence from the industry and politicians may be broader or narrower. In most of the countries discussed,

⁹⁵ In 2007 Connecticut Attorney General issued a statement for Connecticut regulator which is in charge of issuing video franchise licenses requiring that IPTV services would be regulated and licensed as cable. Pending the final judgment on the same issue, the regulator rejected the petition. <http://www.webtvwire.com/att-u-verse-iptv-must-apply-for-cable-tv-license/> and <http://www.fierceiptv.com/story/u-verse-avoids-connecticut-regulators/2007-09-11>

⁹⁶ Aaron Tan, "Singapore issues first IPTV license", ZDNet Asia, January 16, 2007, <http://www.zdnetasia.com/news/internet/0,39044246,61982273,00.htm> (last visited February 8, 2008).

⁹⁷ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007L0065:EN:NOT> (last visited June 5, 2008).

particularly in the US, UK and Lithuania, broadcasting regulators wield sufficient powers to license the broadcasters, monitor their activities for violations and impose sanctions if they fail to carry out those obligations. Thus given the degree of discretion and competence broadcasting regulators are not “merely toothless tigers”⁹⁸ but wield adequate powers. However, as already mentioned the independence is not a value *per se* and discretion as well as independence first and foremost should serve to ensure freedom of the media in terms of guaranteeing a wide range of means of communication. The research reveals that the greater scope of discretion does not necessarily imply a greater degree of independence. Substantial and consultative powers of the regulator may build a distance between the institution and the government; however, the regulators have been reluctant in employing this competence to pursue the main objective of freedom of broadcasting. The “soft” regulatory approach seems to favor the incumbent broadcasters rather than the public interests.

In fact, broadcasting regulators’ independence and their credible outcomes can not be merely a result of institution’s competence. The other main mechanisms that are believed to guarantee independence are linked with the criteria for appointing the members and termination conditions of their terms in office, as well as financial autonomy.

⁹⁸ The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 3.

CHAPTER 3: STRUCTURE AND COMPOSITION OF BROADCASTING REGULATORY AUTHORITIES

The process by which the members of IRAs are appointed, the criteria used, the terms and duration of appointment, as well as appropriation of financial resources all involve potential influences either from the government or the industry. Therefore, it is crucial at the very beginning to guarantee independence of the regulator in order to provide members adequate protection against political and economic pressures. Given these concerns there are several commonly recognized criteria under which the independence of the regulator is deemed to be preserved:

- Appointment of members by different political branches. Probably one of the main concerns is to ensure that the institution is not dominated by one particular group of interests. This kind of independence is to be guaranteed if the right of appointment is vested in the President, the Parliament, and the Ministers, or even in the civil society bodies.
- Expert criteria (e.g. requirement for industry experience). This is an important guarantee to ensure that the members are not afraid to raise important but politically unappealing issues in order to establish competent and credible policies to be made and decisions to be reached.
- Dismissals. The principle of irremovability except for duly reasoned and justified causes should protect the members from arbitrary removal.
- Incompatibilities. Rules concerning incompatibilities should serve to diminish the potentials of conflicts of interest.

- Financial autonomy. The regulatory authority has to be guaranteed a stable source of income which matches its needs.

3.1 Appointments

The appointment procedure of broadcasting regulators is one of the most significant ways in which a regulatory body can be influenced by the politicians. The main actors involved in the appointments procedure of the broadcasting regulators are the ministers, the President, members of Parliament and specific groups. The ways of appointment vary widely from country to country. However, there is a common belief that a process when the members of independent authorities are appointed by different political branches and especially involving non-political bodies is a key safeguard of independence. Once a balanced system of appointment is set the main concern is to guarantee that the members do not become loyal and dependent on those who appointed them, and consequently to avoid a situation when the institution is dominated by one particular group or political party.

Pursuant to the Recommendation Rec(2000) 23 (the Appendix thereto, Section II, paragraph 3), the rules governing regulatory authorities in the broadcasting sector should secure their independence and protect them against any interference, in particular by political and economic interests. The Recommendation encourages member states of the Council of Europe to establish such an appointment procedure which would ensure that members are appointed in a democratic and transparent manner. The term “democratic”⁹⁹ is to be understood in its broader meaning, encompassing situations when the members of

⁹⁹ Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, [https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

broadcasting regulators are elected, nominated by public authorities (president, government or parliament) or by non-governmental organisations. Thus, the Recommendation does not favour any particular way of appointing members and leaves it for the member states to decide on the composition of their broadcasting regulators. The only requirement is that whatever the procedure the principle of pluralism has to be respected meaning that an audio visual media regulator may not be preoccupied by one political party or group of interests.

In some of the countries members of broadcasting regulatory authorities are being appointed solely by the Parliament (some authors even refer to this way of nomination as a model which is commonly attributable to Central Europe¹⁰⁰). For example, in Latvia members of the Broadcasting Council¹⁰¹ are nominated by at least 5 members of Parliament and appointed by a simple majority of Parliament, likewise, in Ukraine, the members of national broadcasting regulator are proposed by parliamentary fractions and groups in the upper house of the Parliament¹⁰². Notably, this kind of nomination process which favours involvement of only one institution may imply that ruling coalition always determines the composition of the agencies. Probably, concerned about legislature's prevalence in terms of appointing the broadcasting regulation Hungary came up with a solution and, although, the board members of national broadcasting regulator are elected technically by Parliament but both the majority and opposition must have equal representation¹⁰³ in the institution. Given this model of appointment the main issue is not whether the members are appointed solely by the majority, but rather how to ensure that the members do not become loyal and dependent on those who appointed them.

¹⁰⁰ Karol Jakubowicz, Keynote Speech (prepared for delivery at the Plenary session: "The Independence of Regulatory Authorities", 25th Meeting of the European Platform of Regulatory Authorities (EPRA) Prague, May 16-19, 2007), 2.

¹⁰¹ Latvian National Radio and Television Authority, <http://www.nrtp.lv/news/> (last visited May 18, 2008).

¹⁰² Ukrainian National Television and Radio Broadcasting Council, <http://www.nrada.gov.ua/> (last visited May 18, 2008).

¹⁰³ Hungarian Act on Radio and Television Broadcasting, 1996, <http://net.jogtar.hu/jr/gen/getdoc.cgi?docid=99600001.tv&dbnum=62> (last visited May 18, 2008).

A rather different approach can be found in the US, where the members of independent agencies are appointed by the President with the advice and consent of the Senate. There have been attempts to secure the appointment power to the legislature, but the Supreme Court has made it clear that Congress can not delegate this power to itself or its officers. In *Buckley v Valeo*¹⁰⁴, the Supreme Court held unconstitutional federal law that empowered the speaker of the House of Representatives and the President pro tempore of the Senate to appoint four of the six members of the Federal Election Commission. The Court held that under Article II of the Constitution¹⁰⁵, Congress may vest the appointment power for inferior offices only in the President, the heads of departments, or the lower federal courts. Therefore the US Supreme Court found that the Presidents of the Houses could not possess the appointment power, even though the appointments were confirmed by majority vote of both Houses of Congress.

Thus, all of the five members of FCC are appointed by the President with the advice and consent of the Senate for five years, the terms being staggered. The President also nominates one of the commissioners as a Chairman. The Chairman, as the chief executive officer of the Commission, later delegates management and administrative responsibility to the Managing Director. Senators participation in the appointment of the Commissioners either through the President's consultations with senators prior to nomination, or through confirmation after nomination seems to be important in minimizing the impact of single political group or person in the appointment process. However, in most of the cases the Senate does not question President's choice. On the other hand, another safeguard against such situations when FCC is dominated by one particular political party is the requirement of

¹⁰⁴ 424 U.S.1, 126 (1976)

¹⁰⁵ Art. II, § 2, cl. 2, of the Constitution, reads as follows: "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

“bipartisanship”. The principle of bipartisanship means that no more than half the members of an independent agency may belong to any one political party¹⁰⁶. Therefore, only three out of five FCC Commissioners may be members of the same political party. Obviously, this criterion may prevent “a perfect political consonance between the President and a given independent agency”¹⁰⁷ and minimize the capture by one political party. Yet, according to Strauss “[t]he requirement that commission membership be at least nominally bipartisan does not prevent the appointment of political friends but doubtless lowers the political temperature”¹⁰⁸.

In Britain, the decision to model Ofcom’s structure on that of private companies by establishing a unitary Board was at least partly aimed at avoiding the potentials of regulatory capture attributable to the appointment process of the FCC¹⁰⁹.

Thus, the governance structure of British communications regulator is based upon a model which is similar to the commercial sector but which marks a departure from the past.¹¹⁰ Ofcom operates through its Board which provides strategic direction for Ofcom. It is the main statutory instrument of regulation with a fundamental role in the effective implementation of the Communications Act 2003. The Board has a central governance function and operates on the principle of collective responsibility. For example, the members of the Board are bound by the principle that “all Board members will be deemed to have agreed with all decisions”¹¹¹.

¹⁰⁶ Civil Rights Act of 1957, 42 U.S.C. § 1975(b) (1976) (amended 1983) as cited in Peter L. Strauss, *Administrative Justice in the United States*, (Carolina Academic Press, 2nd Rev ed., 2002).

¹⁰⁷ Dominique Custos, “The Rulemaking Power of Independent Regulatory Agencies”, <http://66.102.1.104/scholar?hl=lt&lr=&q=cache:a48JXQdfdw4J:www1.law.umkc.edu/Library/IACL2006/RuleMakingPowersofIndependent/IVD3%252520-%252520USA.pdf+CUSTOS+D.+The+Rulemaking+Power+Of+Independent+Regulatory+Agencies+abstract> (last visited February 27, 2008).

¹⁰⁸ Peter L. Strauss, “The Place of Agencies in Government: Separation of Powers and the Fourth Branch, *Columbia Law Review* No. 84(3), 1984.

¹⁰⁹ The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 9.

¹¹⁰ http://www.ofcom.org.uk/about/csg/ofcom_board/role/ (last visited 27 February 2008).

¹¹¹ Office of Communications, http://www.ofcom.org.uk/about/csg/ofcom_board/role/ (last visited 27 February 2008).

The Board consists of up to 10 members: 3 executive members, the Chief Executive, and 7 non-executive members, including a chairman. Under the Office of Communications Act 2002¹¹² the non-executive members must make up a majority.

The Secretary of State for Culture, Media and Sport and the Secretary of State for Trade and Industry appoint the Chairman of the Ofcom Board for a period of five years. Ministers also appoint other non-executive (part-time) members to the Board with the Chairman having an input to the appointments.

Furthermore, the secretaries while appointing the non-executive members of the board have to make appointments under the so-called “Nolan principles” established in a code set out by the Office of the Commissioner for Public Appointments. According to the Nolan rules, public life should be governed by seven principles: selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The rules state that a process of openness and transparency should govern public appointments.¹¹³ Thus under these principles the appointments of non-executive members have to be made in accordance with the Code of Practice and are subject to full and open competition and independent scrutiny. Although the appointments are made by the government, unlike in US where the appointment of FCC Commissioners is hardly ever based on any other criteria than political favoritism (party affiliation), the Code of Practice requires the decisions to be made on merit and not on political activity. Moreover, any political activity prior to appointment of non-executive member has to be declared publicly. For example,¹¹⁴ lately the four appointed non-executives have declared no political activity.

¹¹² Office of Communications Act 2002 (c 11), http://www.opsi.gov.uk/acts/acts2002/ukpga_20020011_en_1#1g3 (last visited 27 February 2008).

¹¹³ Television across Europe: Regulation, Policy and Independence (2005) - Reports, press releases, media coverage, the United Kingdom Report available at: http://www.eumap.org/topics/media/television_europe (last visited 1 February 2008), 12.

¹¹⁴ Department for Culture, Media and Sport, http://www.culture.gov.uk/Reference_library/Press_notices/archive_2008/dcms157_08.htm (last visited February 27, 2008) and Office of Communications, News Releases, Ofcom Board Changes, http://www.ofcom.org.uk/media/news/2007/08/nr_20070816a (last visited February 27, 2008).

Unlike the non-executive members who are appointed by politicians, the executives are appointed by a different procedure. The Chief Executive Officer is appointed by the Board (subject to approval of the ministers) to run Ofcom and sit on the Board. The other Executive Directors of the Board are appointed on the recommendation of the Chief Executive and approved by the Non-Executive Directors. The Chief Executive and other executive members are appointed from amongst Ofcom's employees.¹¹⁵

The less widespread model of appointment is based on the idea that the independence of institution is secured once the membership of broadcasting regulatory body represents various interests, currents of thought and political and socio-occupational groups. Solomon while discussing the best practices in terms of broadcasting regulators appointments refers to the Independent Communications Authority of South Africa ("ICASA") as a good example. The rules governing composition of ICASA explicitly require that appointment procedure would represent "a broad cross section of the population of South Africa"¹¹⁶. However, it is important that even the members who are representatives of specific sectors and groups should be able to determine the balance of the public interest when making decisions, rather than acting according to party or other sectoral lines¹¹⁷. In European context of broadcasting regulators Germany, Albania, Luxembourg, and Lithuania are representatives of this approach.

For instance, in Lithuania, under the Law on Provision of Information to the Public (Art. 47 Part 4) the Commission which is set as a collegiate body consists of 13 members: one member is appointed by the President of the Republic, three members are appointed by the Seimas (the Lithuanian Parliament) under the recommendation of the Seimas

¹¹⁵ Television across Europe: Regulation, Policy and Independence (2005) - Reports, press releases, media coverage, the United Kingdom Report available at: http://www.eumap.org/topics/media/television_europe (last visited February 1, 2008), 12 and Office of Communications, <http://www.ofcom.org.uk/about> (last visited February 27, 2008).

¹¹⁶ Eve Solomon for the CBA and UNESCO, "Guidelines for Broadcasting Regulation", <http://www.cba.org.uk/documents/guidelines.pdf> (last visited May 10, 2008), 19.

¹¹⁷ Ibid.

Committee for Education, Science and Culture, and the remaining 9 members are appointed by public organizations (associations)¹¹⁸. Although the members of the Commission are selected and not elected, the involvement of public associations while appointing most of the members of the Commission can be seen as an essential guarantee of independence. Moreover, this model of appointment should prevent situations when the agency is dominated either by politically loyal appointees or by representatives of a particular interest group.

On the other hand, the involvement of civil society groups is complicated due to the danger that the appointed members might defer to specific concerns (e.g. interests of their respective group) rather than the public interest. This kind of appointment mechanism makes sense only when the members of regulatory authority are able to balance the interests of the group they represent with the public interest. Moreover, there is a risk of self-dealings and that regulator's independence could be compromised by the members' private interests in the sector.

Last but not least, when members of regulatory authorities are chosen from civil society representatives this may result in under-representation of some of the groups. Certainly it is at legislature's discretion to decide which groups should be represented on the board of a regulator. Not surprisingly, in Lithuania, where the national Radio and Television Commission is represented by nine non-governmental organizations the failure to represent at least the major civil society institutions has not escaped criticism. The lack of representativeness has been highlighted in the Television across Europe follow-up report¹¹⁹. One of the concerns was related to Lithuanian Journalists' Union which has a right to nominate one of the commissioners but according to the research lacks popularity among

¹¹⁸ One member is appointed by each of the following organizations: the Lithuanian Artists' Association, the Lithuanian Cinematographers' Union, the Lithuanian Composers' Union, the Lithuanian Writers' Union, the Lithuanian Theatres' Union, the Lithuanian Journalists' Union, the Lithuanian Journalists' Society, the Lithuanian Bishops' Conference, and the Lithuanian Periodical Press Publishers' Association. (Art. 47 Part 4)

¹¹⁹ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, Television across Europe: Follow-up Reports 2008, Lithuania, www.mediapolicy.org/tv-across-europe/follow-up-reports-2008-country/Lithuania-web.pdf/at_download/file (last visited August 21, 2008), 20.

journalists and is not regarded as representing the community of reporters¹²⁰. While this appointment mechanism is aimed at ensuring a broader representation of the civil society on the boards of broadcasting regulatory authorities, at least under Lithuanian legal framework the list of non-governmental organizations does not include any representatives of viewers or listeners. In fact the Television across Europe follow-up report 2008 suggests Lithuanian parliament to initiate amendments to legislation to ensure that the nominations to LRTK are based on fair representation¹²¹.

Another safeguard of independence employed under Lithuanian legal framework is related to the appointment of the Commission's Chairman. The Lithuanian Radio and Television Commission is led by a Chairman whose appointment procedure is set in the law on Provision of Information to the Public. Article 47 Part 9 of the mentioned law stipulates that the Chairman of the Commission is elected by a majority vote of the Members of the Commission for a term of two years. Since the majority of commissioners are appointed by non-governmental bodies the way Chairman is elected insulates him from the direct influence of governmental branches. Thus, the appointment procedure of the Chairman may be seen as additional safeguard of institution's independence.

Despite its shortcomings the appointments system for the broadcasting regulator, whereby civil society participation is a requirement, at least in Lithuania has nurtured the independence of LRTK from political players. However, the absence of attempts by the Government or Parliament to interfere with regulator's affairs may be explained by the fact that the Commission is in charge of regulating commercial broadcasters only¹²². On the other hand the discussed appointment model is of little significance as long as the capture by

¹²⁰ Ibid.

¹²¹ Ibid, 15.

¹²² Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, "Television across Europe: regulation, policy and independence", Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008), 50.

industry is concerned. Obviously, in case of a regulator responsible solely for the commercial broadcasting sector the potential of capture by economic players can be greater than interferences from political actors.

In France the chosen model reflects the cooperation between different political branches. The French national broadcasting regulator (*Conseil Supérieur de l'Audiovisuel*, CSA) comprises of nine members, and the appointment power is shared between the President of the Republic, the President of the National Assembly and the President of Senate, each of them appoint three of the members. The members of CSA are appointed for a non-renewable period of six years. The President of the Republic also nominates one of the members as a chair of the institution. One third of the CSA members are replaced every two years¹²³. Generally, the system of appointment when the nomination powers are shared between different political branches is believed to enhance regulator's independence because the division of these powers should serve as a check against partisan appointments. However, in practice the balance of power between political actors not always is a guarantee of independence. This is demonstrated for instance by an example from Poland where the expected balance turned into partisan cooperation between the legislature and the executive and was used for quite the contrary purposes. Noteworthy, the appointment power of members of Polish Broadcasting Council (KRRiT) is shared between the President of the State and the Parliament.

The parliamentary and presidential elections held in Poland in the autumn of 2005 resulted in a change in distribution of political powers. The parliamentary elections were won by the Law and Justice party while the presidential elections were won by a candidate of the same political party – Lech Kaczynski. A consequence thereof was an effort to change the composition and mode of functioning of the National Broadcasting Council (KRRiT) by

¹²³ French Council for Audio-visual media, http://www.csa.fr/conseil/composition/college_presentation.php (last visited August 4, 2008).

adoption of the Act on Transformations and Modifications to the Division of Tasks and Powers of State Bodies Competent for Communications and Broadcasting in December, 2005. The Law reduced the number of members of Polish broadcasting regulator from nine to five and transferred the power to elect and dismiss the Chairman from the members of the regulator to the President of the Republic. The entry into force of the Law resulted in the early expiry of the terms of office of all the members of the regulatory authority and the National Broadcasting Council ceased to operate leaving a “regulatory vacuum”¹²⁴ in advance of the appointment of new members. The constitutionality of the mentioned amendments has been challenged in 2006 at the Polish Constitutional Tribunal. The Constitutional Tribunal found the presidential prerogative to nominate and dismiss the Chairman of KRRiT not in conformity with the Constitution. Given the dismissal of the members of National Broadcasting Council the Polish Constitutional Tribunal held that: „it is not possible to perceive any sufficient reasons meeting constitutional requirements and justifying an alteration of the model by which the National Broadcasting Council operates that would require the immediate shortening of the terms of office of members of that Council serving up to that time, without even any period of *vacatio legis* being applied.”¹²⁵

Although the Tribunal acknowledged that the functioning of the KRRiT as a constitutional institution has been interrupted without any sufficient constitutionally permissible reasons, it refused to admit that this can constitute grounds for challenging the expiry of the mandates of the previous members of the National Broadcasting Council. Noteworthy, at the moment the amendments concerning the appointment procedure of

¹²⁴ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, Television across Europe: Follow-up Reports 2008, Poland www.mediapolicy.org/tv-across-europe/follow-up-reports-2008-country/Media-Poland-full-web.pdf/at_download/file (last visited May 13, 2008), 20.

¹²⁵ Polish Constitutional Tribunal, Judgment of March 23, 2006, K 4/06, http://www.trybunal.gov.pl/eng/summaries/documents/K_4_06_GB.pdf (last visited May 13, 2008).

National Broadcasting Council are pending in Polish Parliament¹²⁶. If the draft is adopted, the members of Polish National Broadcasting Council will be appointed by political bodies but only from the list of candidates nominated by civil society groups.

To sum up, while the appointment mechanisms differ from country to country, the underlying concerns are to ensure that the appointed members do not become loyal and dependent on those who appointed them and that the broadcasting regulatory authority is not dominated by one political party or a group of interests. In the US the concept of independence from politics has a somewhat different meaning and refers to the absence of control from a single political party. Therefore, the high degree of politicization of the FCC is subject to the requirement of bipartisanship.

At first glance it seems that in the UK the executive has a huge influence on Ofcom because ministers appoint the non-executive members of the board who form its majority and this power is not shared with the legislature (like in the US) or non-governmental bodies (which is a case in Lithuania). However, the appointment procedure based on objective principles representing public interest, guarantees that professional candidates with diverse background will be appointed who are capable to resist outside pressures.

Probably the most common belief is that appointment system which requires cooperation between different political branches should counterbalance partisan favoritism. Since this model originated in France and indeed nurtured the independence of CSA, it has been misused in Poland. Not less deficient is the involvement of civil society groups in the appointment process. Although it increases the regulator's independence from the politicians,

¹²⁶ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, Television across Europe: Follow-up Reports 2008, Poland www.mediapolicy.org/tv-across-europe/follow-up-reports-2008-country/Media-Poland-full-web.pdf/at_download/file (last visited May 13, 2008), 13.

it runs the risks of self-dealings, under-representativeness and potential that the public interest will yield to the interests of certain groups.

In conclusion, all of the analyzed countries sought to ensure that the appointment process is insulated from political capture, however, in most of the countries still lack clear limits as to how politicians can exercise these powers.

3.2 Expert Criteria

Another safeguard for independence which receives a common approval involves the expertise criteria¹²⁷ for appointment. It is assumed that the skill and knowledge of IRA's members is "necessary to make judgments without undue influence from or reliance on, market participants"¹²⁸. On the other hand the competence of the staff is equally important in enhancing institution's independence while preventing the capture by politicians. Nevertheless, Smith argues that the requirement for members to have significant experience or training in certain industry may be unnecessary because it is the staff that has to be equipped with and able to provide technical expertise; additionally such a requirement is undesirable if it restricts candidate pool by excluding professionals with broader perspectives¹²⁹.

However, this does not mean that an independent authority is better off without any requirements regarding expertise of its leadership. Absence of such requirements creates a potential for appointments of unqualified members who consequently would be powerless to

¹²⁷ Warrick Smith, "Utility Regulators – The Independence Debate", The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008). See also Gurcan Gulen et al., "Improving Regulatory Agency Efficiency and Effectiveness" <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 8.

¹²⁸ Gurcan Gulen et al., "Improving Regulatory Agency Efficiency and Effectiveness" <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 8.

¹²⁹ Warrick Smith, "Utility Regulators – Decisionmaking Structures, Resources, and Start-up Strategy", The World Bank Group, *Private Sector*, Note No. 129, October 1997, <http://gsbnet.uct.ac.za/MIR/admin/documents/129smith.pdf> (last visited January 12, 2008), 2.

resist improper influences either from industry or politicians. Thus it is important to set such criteria for expertise which would ensure that IRA is equipped with professionals who are competent enough to give way for credible rather than partisan decisions.

In this respect, the Council of Europe Recommendation Rec(2000) 23 stresses that “given the broadcasting sector’s specific nature and the peculiarities of their missions, regulatory authorities should include experts in the areas which fall within their competence”. Although, the Recommendation does not stipulate any professional background criteria for membership of a regulatory agency, it is expected that the candidates would be required to have experience in the audio-visual field as well as in related areas, such as advertising issues or technical aspects of broadcasting¹³⁰.

In the US, the Communications Act does not list any specific qualifications for being a commissioner. In practice, this meant that the vast majority of commissioners have been lawyers, many of whom knew little about the agency or the industry before their appointment. Presidents have rarely appointed to the FCC individuals with a professional working knowledge of the industry’s technology (for example, electrical engineers) or its structure (economists or industry executives).¹³¹

There is no secret that the FCC commissioners are purely political appointees. Particularly, the member who is serving as a chairman can be vulnerable because he can be dismissed from the office without any serious cause. Thus, it would be difficult to not agree with Breger that most agency chairmen “come to an agency to advance the President’s agenda or their own but some come with no agenda”¹³². Reed E. Hundt, a former Chairman of FCC, who has been appointed by the President Clinton in 1993 explicitly, acknowledges that the

¹³⁰ Paragraph 23 of Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector,

[https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

¹³¹ Stuart Minor Benjamin et al., *Telecommunications Law and Policy*, (Carolina Academic Press, 2001), 58.

¹³² Marshall J. Breger and Gary J. Edles, “Established by Practice: the Theory and Operation of Independent Federal Agencies”, *Administrative Law Review*, No. 52:1111, 2000.

Commission finds its mandate in the promises of presidential elections campaigns¹³³. Not surprisingly, the mentioned Chairman of FCC has been criticized for working very closely with the White House during his tenure¹³⁴. Obviously, the Chairman because of lack of a professional knowledge or because of his political “commitments” may not be free enough to listen to the technical staff and make credible decisions. However, it is important that FCC is not a single-headed body and even the Chairman is not omnipotent.

While the approach in the US certainly provides the most flexibility to appoint regulators, the approach in Britain aims at ensuring that the Ofcom is led by individuals with a certain degree of experience. The Office of Communications Act 2002 is moot on the professional requirements for appointing either executive or non-executive members. With regard to non-executive members appointed by the ministers the Code of Practice is applicable which requires the selections to be made under merit, “by the well-informed choice of individuals who through their abilities, experience and qualities match the need of the public body in question”¹³⁵.

With regard to the executive members as already has been mentioned they are appointed from Ofcom employees. On the one hand it seems that professionalism is guaranteed *de facto*, the staff is competent and has job security therefore it may be more encouraged to raise innovative and strategic but politically unappealing issues. However, there is another side too, the selection of internal cadres as board members may raise a problem of creating a restricted and unchangeable field of possible candidates. Unlike in the US when the commissioners of FCC are political appointees rarely having expert knowledge

¹³³ Reed E. Hundt, *You Say you Want a Revolution*, (Yale University Press, 2000), 202.

¹³⁴ Randolph J. May, “An Agency for Bill and Al”, *Legal Times*, June 2, 2000 in Damien Geradin “The Development of European Regulatory Agencies: Lessons from the American Experience”, *Regulation through Agencies in the EU*, ed. Damien Geradin, Rodolphe Munoz, Nicolas Petit, (Cheltenham, UK; Northampton, MA: Edward Elgar), 244.

¹³⁵ Chapter 2 of the Code of Practice, http://www.ocpa.gov.uk/codeofpractice_aug05.pdf (last visited February 27, 2008).

about broadcasting and telecommunications, the British framework for appointment of public bodies relies on the essential principle of merit.

For instance, in Lithuania, the Law on Provision of Information to Public provides that the authority shall act as a body of experts for the Seimas (the Parliament) and Government on the issues of radio and television broadcasting. However, there are no qualification requirements established for the members of the Commission the only requirements include possession of irreproachable reputation and Lithuanian citizenship. Standing alone the ambiguous requirement of “irreproachable reputation” can not ensure that only competent and qualified persons able to resist improper influences from the outside would become members of the Commission. Not surprisingly, the Television across Europe follow-up report 2008 recommended Lithuanian parliament to initiate amendments to legislation in order to ensure that the appointment procedure of LRTK members is subject to the criteria of professionalism¹³⁶.

Similarly, in many other European countries, members of the broadcasting regulators are not appointed based on professional qualifications. However, several countries including Croatia have introduced legal provisions requiring candidates for the broadcasting regulatory authority to possess media expertise¹³⁷.

Even given the specific technical nature of the broadcasting sector, many countries are still reluctant to establish expertise requirement for the members of broadcasting supervisory authorities. If an expert knowledge requirement is disregarded by those possessing power of appointment the regulatory authorities may become deeply political bodies. Nevertheless, in practice, at least some of the members are appointed from experts

¹³⁶ ¹³⁶ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, Television across Europe: Follow-up Reports 2008, Lithuania, www.mediapolicy.org/tv-across-europe/follow-up-reports-2008-country/Lithuania-web.pdf/at_download/file (last visited August 21, 2008), 15.

¹³⁷ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, “Television across Europe: regulation, policy and independence”, Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008), 47.

with different professional backgrounds. It would be difficult to imagine that absolutely unqualified persons are appointed to carry out the regulatory functions. Noteworthy, too strict reliance on expert knowledge may result in the so-called revolving door practices when persons from private sector are appointed and later after the end of their tenure in the agency they return to their position in the industry.

3.3 Dismissals

Just as important as the appointment process and criteria in enhancing institution's independence is the power of removal of members from the office. Most authors agree that to prevent removal being misused for political purposes certain requirements have to be met. There is a near consensus that the dismissal should not be left solely at appointer's discretion and has to be exceptional as well as only under well, clearly established reasons¹³⁸. Thus, to avoid arbitrariness and improper political influences in the removal process and enhance independence the reasons for dismissal should:

- be carefully defined;¹³⁹
- not be related to policy;¹⁴⁰
- include only causes such as proven incompatibility, offence or incapacity.¹⁴¹

¹³⁸ Working Party on Telecommunication and Information Services Policies "Telecommunications Regulations: Institutional Structures and Responsibilities", 2000, <http://www.oecd.org/dataoecd/56/11/35954786.pdf> (last visited January 12, 2008), Fabrizio Gilardi, "Delegation to Independent Regulatory Agencies in Western Europe: A Cross-Sectional Comparison", <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws15/Gilardi.pdf> (last visited June 16, 2008).

¹³⁹ Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.3107.html> (last visited July 24, 2008) and Gurcan Gulen et al., "Improving Regulatory Agency Efficiency and Effectiveness" <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 11.

¹⁴⁰ Fabrizio Gilardi, "Delegation to Independent Regulatory Agencies in Western Europe: A Cross-Sectional Comparison", <http://www.essex.ac.uk/ECPR/events/jointsessions/paperarchive/edinburgh/ws15/Gilardi.pdf> (last visited June 16, 2008).

With regard to the possibility to dismiss members of broadcasting regulatory authorities the Recommendation Rec(2000) 23 reiterates the importance of these rules to regulators' independence and calls for settlement of precise rules. The clearly defined rules should serve to avoid such situations when removals are used as means of political pressure. The Recommendation recognizes only three causes as proper grounds for removal of members of broadcasting regulators. The dismissal should only be possible in case of non-respect of the rules of incompatibility, duly noted incapacity to exercise functions or conviction by court for a serious offence. Likewise EPRA considers that for the sake of independence the sacking of a member can be justified only under the reasons of resignation, incompatibility, incapacity, serious violations of the law¹⁴². Moreover, in any case the removal should not apply to the body as a whole¹⁴³.

As to the latter, some countries still allow the dismissal of the whole regulator. For example, in Czech Republic if the annual report fails repeatedly to be approved by the Parliament due to "serious faults", the House of Deputies may propose to the Prime Minister to remove the Council for Radio and Television Broadcasting¹⁴⁴. Obviously, such a situation instead of enhancing regulator's independence increases its vulnerability from the world of politics and even credible but politically unwelcome decisions may be sacrificed in order to keep the Parliament content.

Likewise, in Poland the Broadcasting Act allows removal of all the members of the National Broadcasting Council if both houses of the legislature reject its annual report.

¹⁴¹ Warrick Smith, "Utility Regulators – The Independence Debate", The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008), and http://www.ictregulationtoolkit.org/en/Section.2115.html#_ftnref3 (last visited January 12, 2008).

¹⁴² The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 3.

¹⁴³ Point 22 of Council of Europe, Committee of Ministers, Explanatory Memorandum to Recommendation No. R (00) 23 of the Committee of Ministers to member states on the independence and functions of regulatory authorities for the broadcasting sector, [https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec\(00\)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=ExpRec(00)23&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) (last visited July 29, 2008).

¹⁴⁴ Act No. 231/2001 on Radio and Television Broadcasting Operation and on Amendments to Other Acts, http://www.rrtv.cz/en/static/laws/BroadcastingAct_231_2006.pdf (last visited May 15, 2008).

Actual termination of regulator's term in office is subject to approval of the President of State. However, once there is a unity between the majority in the parliament and the President, the National Broadcasting Council may be compelled to serve at the pleasure of the political branches.

In Britain, the Secretaries of State for the Department for Culture, Media and Sport and for the Department of Trade and Industry that are responsible for appointing members to the Ofcom's Board may also remove the members from office but only under the circumstances which are precisely enlisted in Paragraph 2(4) of the Ofcom Act 2002 and include bankruptcy, conflict of interest, misbehavior, or incapacity.¹⁴⁵

The Members of Lithuanian Television and Radio Commission can not be recalled by the Seimas, the President or governing bodies of non-governmental organizations from office until the term of their powers expires, except under conditions expressly established by the Law on Provision of Information to the Public. Article 47 Part 5 of the Law stipulates that a Commissioner can be dismissed, only if he:

- 1) has not attended Commission meetings for more than 4 consecutive months without a valid excuse;
- 2) has been convicted by a final judgment;
- 3) is determined by court as having legal incapacity;
- 4) discredits the status of a member of the Commission.

As to the removal of the Chairman from his office Lithuanian Law on Provision of Information to the Public does not address this issue in express terms and it was left for the Commission to decide on this matter. The Regulations on Commission's work (hereinafter – LRTK Regulations) which were enacted by the Commission under the Law on Provision of Information to the Public establish the procedure for the Chairman's removal. Point 18 of the

¹⁴⁵ Information and Communication(s) Technology (ICT) Toolkit,
<http://www.ictregulationtoolkit.org/en/PracticeNote.2030.html> (last visited February 25, 2008).

LRTK Regulations stipulates that one third of all the members of the Commission have a right of initiative concerning the dismissal of the Chairman. The Chairman of the Commission can be dismissed from his office only by the majority vote of all the members of the LRTK. The only *basis for the initiative* is a belief that the person is not suitable for standing the position of Chairman. Neither the Law nor the LRTK Regulations set legal *grounds for removal* of the Chairman. The only requirement set by the LRTK Regulations stipulates that the decision on dismissal should be duly reasoned and all the members of the Commission have to be informed about it. Thus the chairperson's term of the office is not dependent on political will but it is subject to the decision of the members of the Commission. However, the Chairman can still be recalled from the office by the organ which appointed him on the grounds applicable to him as a member of the Commission. Thus the law sets general principle of irremovability of the members during the terms of office which insulates them from the interferences by political actors. And although some exceptions exist they are expressly stated in the law and mainly related to incapacity to exercise the functions and non-respect of the rules of incompatibility. Unfortunately the law retains some ambiguity as well. For example, the vagueness of the expression "discredits the status of a member of the Commission", may serve for a removal of commissioner without actual justified cause.

Moreover, in Lithuania the political influence can still be exercised because the terms of office of the members of the Commission are linked with the terms of office of organs appointing them, namely the Seimas, President of the Republic and above mentioned public organizations. Thus the politically appointed commissioners after a change in the constellation of political forces would have to resign from LRTK and this would not be seen as unconstitutional or outrageous, on the contrary it is seen as an inevitable aftermath. For example the commissioner appointed by the President shall be recalled after 5 years tenure of presidential office is over, similarly the 3 members appointed by the Seimas shall discontinue

their functions in 4 years when new parliamentary elections have passed. Obviously, the existing appointment mechanism does not insulate Lithuanian broadcasting regulator from electoral cycles. However, as long as the Commission is a collegial institution and the members appointed by governmental branches comprise only about a third of the whole Commission, the non-partisanship is retained. In a way establishment of staggered and fixed terms may contribute to strengthening Lithuanian broadcasting regulator's independence.

As mentioned above the US Constitution vests appointment powers with the President, however, there is no provision of Constitution concerning the President's authority to remove members of independent agencies. The principle that has emerged from the cases is that, in general, the President may not remove the members during their term of office except for non-political cause. Removal for cause may be justified by: inefficiency, neglect of duty, or malfeasance in office.¹⁴⁶ As long as removal of members of IRAs is confined to a non-political cause it makes "at least in principle, impossible for the President to censor or sanction political disagreement"¹⁴⁷. However, Strauss suggests that the imposition of "for cause" requirement can not be seen as an "apolitical end". On the one hand this requirement limits President's political authority yet on the other hand this expands the authority of Congress giving it the power of determination¹⁴⁸. This is just as true of the FCC as any other commission. Notably, for removal of a chairman from his office the statutory limitations are not applicable since the nomination is made at President's pleasure. Formally dismissal as chair does not mean dismissal as a commissioner, since the appointment is fixed term. As a

¹⁴⁶ See *Humphrey's Executor v. United States* 295 U.S. 602, 629-632 (1935), *Wiener v. United States* 357 U.S. 349, 356 (1958)

¹⁴⁷ Dominique Custos, "The Rulemaking Power of Independent Regulatory Agencies", <http://66.102.1.104/scholar?hl=lt&lr=&q=cache:a48JXQdfdw4J:www1.law.umkc.edu/Library/IACL2006/RuleMakingPowersofIndependent/IVD3%252520-%252520USA.pdf+CUSTOS+D.+The+Rulemaking+Power+Of+Independent+Regulatory+Agencies+abstract> (last visited February 27, 2008), 3.

¹⁴⁸ Peter L. Strauss, *Administrative Justice in the United States*, (Carolina Academic Press, 2nd Rev ed., 2002), 20.

practical matter, however, FCC chairs facing dismissal have traditionally resigned¹⁴⁹ their seat on the Commission and allowed the President to fill the vacancy with a commissioner of his choice.

To sum up, in none of the countries the dismissal is possible solely based on appointer's discretion. In most cases, the conditions under which members may be removed are rather narrow and are expressly set out in law. However, the requirement concerning clarity of rules is not promptly implemented in Lithuanian legislative framework which leaves an open gap for undue interferences by institutions responsible for appointments. Also in some countries the independence is not sufficiently preserved since the removals of the whole regulatory body are possible simply for the reasons of policy.

3.4 Incompatibilities

There is a near consensus¹⁵⁰ that prohibiting conflicts of interest and clearly setting rules on incompatibility may strengthen the independence of IRA. Rules regarding conflicts of interest (incompatibility) can be seen as standards which should diminish the possibility of potential capture by the industry as well as politicians and with which the members of IRA are expected to comply in their day to day work.

Likewise the Council of Europe Recommendation stipulates that “specific rules should be defined as regards incompatibilities in order to avoid that:

- regulatory authorities are under the influence of political power;

¹⁴⁹ Kimberly Zarkin and Michael J. Zarkin, *The Federal Communications Commission: Front Line in the Culture and Regulation Wars*, (Greenwood Press, 2006), 29.

¹⁵⁰ Warrick Smith, “Utility Regulators – The Independence Debate”, The World Bank Group, *Private Sector*, Note No. 127, October 1997, <http://www.ictregulationtoolkit.org/en/Publication.2848.html> (last visited January 12, 2008), 3; Gurcan Gulen et al., “Improving Regulatory Agency Efficiency and Effectiveness” <http://www.isnie.org/assets/files/papers2007/gulen.pdf> (last visited March 23, 2008), 11; Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.2109.html> (last visited March 23, 2008).

- members of regulatory authorities exercise functions or hold interests in enterprises or other organizations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.”

The complexity of broadcasting field and the convergence of services and sectors requires extending incompatibilities to other fields that may intrude the independence of regulatory authority’s members. Thus the rules should inhibit members of broadcasting regulators to exercise any function or hold any interests in organizations in the media and related sectors (such as advertising or telecommunications), which may lead to a conflict of interest because of the position in regulatory authority.

In Poland, for example, despite provisions on conflict of interest for the National Broadcasting Council (KKRiT), in practice, the members have been appointed on the basis of affiliations with incumbent political parties rather than on other criteria. Also in Germany, although members of regulatory institutions represent civil society groups they are often members of political parties as well¹⁵¹.

As already mentioned, in US the Commissioners of the FCC are full-time political appointees. The only requirement is that there can be no more than a bare majority (three) of commissioners from any one political party. During their tenure the Commissioners are prohibited from engaging in any other business, vocation, profession, or employment, receiving honorariums for speeches, or having financial interests in any sector of the communications industry.¹⁵² For example, one of the FCC Commissioners’ had to resign due to his indictment for taking a bribe for his vote in a commission proceeding¹⁵³. Moreover,

¹⁵¹ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, “Television across Europe: regulation, policy and independence”, Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008), 47.

¹⁵² Brock. G.W. *Telecommunication Policy for the Information Age: From Monopoly to Competition*, (Cambridge, MA: Harvard University Press, 1994), 52, and Kimberly Zarkin and Michael J. Zarkin, *The Federal Communications Commission: Front Line in the Culture and Regulation Wars*, (Greenwood Press, 2006), 29.

¹⁵³ Charles H. Tillinghast, *American Broadcast Regulation and the First Amendment— Another Look*, (Iowa State Press 2000), 79.

even too-close social relationships with owners of broadcasting stations subject to FCC regulation may amount to official misconduct. For example, in 1960 the Chairman of FCC (John Doerfer) was forced to resign after it was discovered that he vacationed for six days on the yacht belonging to one of the broadcasters¹⁵⁴.

The Ofcom's conflicts of interests are regulated under its established Policy on conflicts of interest¹⁵⁵ and the already mentioned Nolan principles. The Policy on conflicts of interest includes the following rules:

- Prohibition of political posts, administrative posts or membership of political party
- Obligation to disclose interest in any regulated company
- Members not allowed to receive corporate gifts/preferential treatments
- Post-employment rules ("cooling off" period)
- Rules on conflict of interest regarding close relatives.¹⁵⁶

For example, in 2007 one of the appointed non-executive members was a Chairman of an enterprise which supplies digital switchover equipment to telecommunications companies, i.e. to Ofcom's regulated companies. Under the internal rules governing Board's Conflicts of Interests the Board member is not allowed to see papers on or take part in Board discussions in relation to those companies or any other matter which could reasonably be expected to affect the share price of the mentioned enterprise.

In Lithuania, to guarantee that the appointed member will not act under instructions of political or economic players the law requires that no members of the Seimas (the Parliament), civil servants or persons linked with broadcasters by virtue of employment could be appointed. If it happens that an appointed member is a member of political party he

¹⁵⁴ Kimberly Zarkin and Michael J. Zarkin, *The Federal Communications Commission: Front Line in the Culture and Regulation Wars*, (Greenwood Press, 2006), 169.

¹⁵⁵ Office of Communications, Policy on Conflicts of Interest, http://www.ofcom.org.uk/about/csg/ofcom_board/conflict/ (last visited February 21, 2008)

¹⁵⁶ Monica Arino, Presentation on the Office of Communications, presented during Annenberg Oxford 2008 Summer Institute, Technology and New Themes in Media Regulation, University of Oxford, 30 June – 11 July, 2008.

has to suspend the membership in a political party till the end of his tenure at the Commission. The other set of rules establishes a prohibition for members of LRTK to take part in debates and other matters such as decision making process if the issue at stake may entail the conflicts of interest. However, the established rules are still very narrow and include only broadcasting sector, while leaving out other related sectors such as advertising or telecommunications. Moreover, there are no constraints on family members or close relatives to be employed in the broadcasting sector. Obviously, the existing rules are not sufficient to ensure that the regulator (which is responsible for supervision of commercial broadcasting only) is led by members who do not have (or can not make use of) any commercial interests in media and other related industries.

Another set of legal safeguards concerning conflicts of interest is related to the so-called “cooling off” period. For example, in France there is a strict ban on employment in the broadcasting sector for one year after the end of member’s mandate. During this one year the members of French broadcasting regulator are still being paid by the CSA¹⁵⁷.

Both the kinds of activities members of broadcasting regulators are required to pursue and the political nature of their appointment contribute to at least an appearance of conflicts of interest. Usually, to avoid incompatibilities the members of broadcasting regulator are obliged to disclose their interests in enterprises that are subject to regulation and to abstain from taking any decisions if there is a possibility of conflicts of interest. In some cases the independence can be preserved only by harsher rules which require the members (in some cases their families or even close relatives) not to be employed by any organization related to the broadcasting sector. To prevent the “migration” of staff from the broadcasting industry to the regulatory institution and back some countries make up for the rules concerning the so-called “cooling off” period.

¹⁵⁷ The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 15.

3.5. Financial Independence

Financial independence is seen as another safeguard of regulatory authority's independence from the politics and the regulated industry. The ability of the regulator to have a stable source of income should make it possible for the institution to attract and retain qualified members. Consequently, staff possessing expert knowledge can be a powerful source of resistance to improper influences. For instance, Johanssen¹⁵⁸ finds that agencies with high financial autonomy are also highly independent from the government. Author distinguishes source and control of the budget as main indicators of financial autonomy. The level of financial independence is expected to be higher if its funding is external coming from regulated firms rather than the government. The external source of funding is considered more reliable than the financial support of government which is subject to a potential of politically motivated budget cuts. Likewise, Larsen considers regulators which are financed by a fee levies on the regulated enterprises as more independent than those which are financed by the state¹⁵⁹. To avoid situations when government uses financial means to control institutions, the IRAs should have control over their budgets once they have been appropriated.¹⁶⁰

The Recommendation Rec(2000) 23 emphasizes the funding coming from concession or license fees as the best way of safeguarding broadcasting regulators' independence. At the same time, it does not rule out the financing from the state budget, however, the governments are encouraged to abstain from using financial decision making power to interfere with the authorities' independence.

¹⁵⁸ Katja Sander Johanssen et al., "Independent Regulatory Authorities – a Comparative Study of European Energy Regulators", www.akf.dk/udgivelser_en/container/udgivelse_1700/ (last visited June 4, 2008), 14-15.

¹⁵⁹ Anders Larsen et al., "Independent Regulatory Authorities in Europe", <http://www.sessa.eu.com/documents/wp/D73.1-Larsen.pdf> (last visited June 15, 2008), 14.

¹⁶⁰ Katja Sander Johanssen et al., "Independent Regulatory Authorities – a Comparative Study of European Energy Regulators", www.akf.dk/udgivelser_en/container/udgivelse_1700/ (last visited June 4, 2008), 62-63.

Despite the concerns expressed in the Recommendation funding through the state budget is probably the most usual system of funding of broadcasting regulatory authorities in Europe¹⁶¹. Yet in some countries, including Britain and Lithuania broadcasting regulators are funded by license fees paid by private broadcasters.

For instance, Ofcom is funded by fees from industry for regulating broadcasting and communications networks (Schedule 1, Paragraph 8(1) of the Office of Communications Act, 2002¹⁶²). Additionally, Ofcom may receive grants in aid to discharge specific functions (e.g. funding for research activities)¹⁶³. For its budget and expenses Ofcom is not accountable to the ministries nor to the Parliament, but to National Audit Office which is an external auditor and signs off on Ofcom's annual report and accounts¹⁶⁴. Thus Ofcom's independence is safeguarded given the self-financing system through industry fees.

Likewise, Lithuanian broadcasting regulatory authority does not receive any funding from the government. The LRTK is mainly financed by the contributions made by the broadcasters who are under obligation to transfer every month to the authority's account 0.8 % of their earnings from advertising, subscription fees and other activities related to broadcasting. The Commission may be financed from other sources as well including but not limited to funds received for examining license applications and change of license conditions, other payments for provided services, support funds, publishing activities.¹⁶⁵ Although the amount of broadcasters' monthly payments (0.8 %) is established by a statute the Commission may still decide on the amount of payments for its own provided services (including the

¹⁶¹ Open Society Institute, EU Monitoring and Advocacy Program, Network Media Program, "Television across Europe: regulation, policy and independence", Summary, <http://www.mediapolicy.org/tv-across-europe/the-2005-television-across-europe-reports/television-across-europe-2005-2006-international-edition/summary.pdf> (last visited January 10, 2008).

¹⁶² Office of Communications Act 2002, available at: <http://www.hmso.gov.uk/acts/acts2002/20020011.htm> (last visited May 10, 2008).

¹⁶³ Ofcom: a short guide to what we do, <http://www.ofcom.org.uk/consumeradvice/guide/> (last visited August 7, 2008).

¹⁶⁴ The Independence of Regulatory Authorities, 25th EPRA meeting, Prague, 16-18 May, 2007, 7.

¹⁶⁵ Law on Provision of Information to the Public adopted by the Parliament No. I-1418, 2 July 1996 at Art. 47 Part 15.

examination of license applications). In addition, institution's financial security is strengthened given the autonomy to administer its own budget and LRTK is subject only to control of the National Audit Office and to public scrutiny. LRTK is bound to approve annual estimate of its planned expenditure and to publish it in the official gazette. However, it has to be reiterated that this generally plausible financing mechanism may imply influences from the industry. As analyzed above, whenever the regulator is reluctant to supervise the commercial broadcasters with regard to the standards of advertising content and length it indirectly increases the amount coming from the monthly payments (i.e. 0.8 % of broadcasters revenues, the biggest part of which comes from advertising).

By contrast, in the United States, the Federal Communications Commission operates through a government allocation of funds. Nevertheless, the Congress requires FCC to collect regulatory fees to offset a portion of the annual allocation. Usually, regulatory fees represent about 90 % of the total annual budget, which means that the government allocation amounts only to about 10 % of the FCC's total operating budget¹⁶⁶. Notably, all of the regulatory fees are handed over to the US government treasury. And even if the regulatory fees raised are equal to the regulator's budget for a required fiscal year the FCC has to present to the Congress request and justification for budget appropriation¹⁶⁷. Concerns about regulator's distance from private interests have been expressed by the former chairman of FCC:

“The defining feature of an independent regulatory body is that the regulator is separate from, and not accountable to, any provider of telecommunications services. To ensure that the regulator is, in fact impartial, the regulatory body and its staff should not have

¹⁶⁶Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.2114.html> (last visited July 24, 2008).

¹⁶⁷ Federal Communications Commission, http://www.fcc.gov/Reports/fcc2006budget_complete.pdf (last visited August 15, 2008) and Working Party on Telecommunication and Information Services Policies “Telecommunications Regulations: Institutional Structures and Responsibilities”, 2005, <http://www.oecd.org/dataoecd/56/11/35954786.pdf> (last visited January 12, 2008), 10.

a direct or indirect financial interest in any of the entities being regulated. Inevitable conflicts of interest arise when government controls both the regulatory agency and the dominant players in the market.”¹⁶⁸

To sum up, financial security is an important issue of broadcasting regulators' independence. The funding arrangements are “critical in ensuring effectiveness of the regulatory function”¹⁶⁹. Since regulators' budget can come either from the government or from the broadcasting sector through licensing fees and other administrative charges, the key is to keep funding free from political as well as private interest influences. Authorities responsible for supervision of broadcasting that are funded through a percentage of license, industry fees or advertising revenue are deemed to have a higher degree of financial autonomy than those authorities which financial security rests on the government. However, as the Lithuanian example illustrated there is a risk that the funding mechanism may discourage the regulator from performing its functions effectively.

¹⁶⁸ Luiz H. Gutierrez, “Regulatory Governance in the Latin American Telecommunications Sector”, 2002, <http://ideas.repec.org/a/eee/juipol/v11y2003i4p225-240.html> (last visited January 7, 2008), 9.

¹⁶⁹ Information and Communication(s) Technology (ICT) Toolkit, <http://www.ictregulationtoolkit.org/en/Section.2114.html> (last visited July 24, 2008).

CONCLUSIONS

The ideal is a regulatory authority which is independent from the world of politics as well as from the industry it regulates. The independence is an important value as long as the expectations of a professional and credible regulation are at stake. Likewise, in broadcasting sector it is expected that the regulatory authority which is kept at a distance from the government and the broadcasters will serve the public interest in ensuring a wide range of means of communication.

The implementation of legal standards related to broadcasting regulators in some of the European countries and the United States embed the efforts to insulate or at least diminish political and industry influences in the regulatory process. However, the research reveals that not only the expected benefits of better performance but also the independence is not present in most of them. The legal safeguards are important in ensuring independence however, they can not be seen as panacea from political and industry capture. To sum up three observations can be made.

Firstly, in some countries such as the United States and the United Kingdom only a few legal safeguards have been established. However, at least in the US the high degree of FCC's politicization is reconcilable with the concept of independence which relies on the principle of bipartisanship as well as the guarantees of administrative procedures. In the UK the long standing tradition of democracy and political culture substituted for the perceived benefits of independence, not surprisingly the competence and professionalism of Ofcom has been recognized by the politicians, the regulatees as well as its counterparts in the continent.

Secondly, in other countries the legal standards have been introduced into their legal frameworks, however, the broadcasting regulators have suffered from improper

interferences, mainly because the established guarantees of independence have not been observed and sometimes even abused by the government of the day.

Thirdly, in Lithuania most of the legal guarantees are present in theory, and there is no evidence which would suggest that they are not being observed in practice. However, the LRTK is still vulnerable to the outside pressures particularly from the regulatees.

Non-implementation or non-observance of legal safeguards can be seen as the main reason why some regulators still lack independence. However, a closer look at Lithuania where the formal guarantees found approval on the paper as well as in the practice reveals that the independence has been secured at least to a certain degree from the world of politics and not from the industry. Probably, the explanation rests with the nature of these standards. While mass media is perceived as a watchdog of the government any intervention by the politicians in regulation of audio visual sector is to be seen as undermining this democratic function. Therefore the set of legal standards which has been widely advocated by the Council of Europe and EPRA is more focused on the insulation from politicians rather than market players. Given the primary concern to insulate the broadcasting regulatory authorities from the capture by government the legal norms turn to be ineffective in guaranteeing regulators independence from the regulatees.

The increasing economic power of commercial broadcasters enabling them to exert more pressure on the regulatory authorities and the emerging problems of media ownership concentration require means which are more tailored to insulate the broadcasting regulators from improper interferences. Especially in countries where the ineffectiveness of legal norms can not be substituted by informal safeguards such as long standing democratic traditions or political culture there is a need for tools to prevent or at least diminish the economic pressures.

In any case, it is not feasible to expect to guarantee a regulatory vacuum where no influences either from the government or the industry are present. What seems to be more feasible and desirable is a legal framework which is aimed at an efficient, professional and credible regulation rather than the equivocal concept of independence. To achieve a better quality of broadcasting regulation and enable the regulatory authorities to pursue their main mission in achieving the freedom of broadcasting the focus under legal framework has to be shifted from the independence as a value *per se* to the benefits of independence – professionalism and credibility. Last but not least the costs of regulatory authorities are carried by the society and it is a significant public interest to ensure that these agencies are willing and capable to pursue the freedom of broadcasting.

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