AVMS Review and Media Regulators' Independence: the Dancing Procession of Echternach?

On Monday September 26 2016 the CULT committee of the European Parliament will hold a hearing on the Audiovisual Media Services review. In its legislative proposal of May this year, the European Commission proposed introducing an obligation for Member States to guarantee the independence of their media regulators (specifying a number of independence requirements). The draft report of the CULT committee that was published earlier this month, however, made various modifications to this. In this blog post Peggy Valcke, research professor at the KU Leuven Centre for IT & IP Law – IMEC/iMinds, argues that the European Parliament should take responsibility for protecting European citizens' interests in free, pluralistic media and, hence, independent regulatory oversight.

There is no greater joy for an academic than to see your ideas being picked up by peers and stakeholders! In this case, the stakeholder is the European Commission. The ideas are those that we developed with a number of colleagues through studies like INDIREG and MEDIADEM (a cooperation which resulted in this book on the independence of the media and its regulatory agencies – pardon me the product placement).

The European Commission giveth…

Indeed, in its legislative proposal amending the Audiovisual Media Services (AVMS) Directive of May 25 2016, the European Commission puts a significant change to the current Article 30, which refers to media regulators, on the table. It introduces a clear obligation for Member States to guarantee the independence of their media regulators (and establish one if they do not have one yet) and it specifies a number of independence requirements (such as with regard to the regulator's enforcement powers, adequate financial and human resources, the dismissal of its head or the right to appeal). Those requirements correspond to a large extent with what we identified in the INDIREG study as "essential characteristics" of independent regulatory bodies (and which were also picked up by ERGA in its Report on the independence of National Regulatory Authorities of December 15 2015). The Commission also proposes to introduce a new Article 30a that will provide (instead of the Commission's Decision of February 3, 2014) the legal ground for the establishment of the European Regulators Group for Audiovisual Media Services, in short 'ERGA', and that lists ERGA's tasks – including to advise and assist the Commission, to cooperate and exchange information, and to give opinions when requested by the Commission.

In light of recent worrying developments in relation to the independence of the media and its regulatory authorities in countries like Croatia, Greece and Poland (which are described in this and this ERGA statements of January and April 2016), the Commission's proposals are most welcome.

Actually, it is quite striking that such provision – carving the principle of media regulators' independence in stone and further specifying this principle – does not already exist. After all, the EU legislator is quite familiar with such rules. They have been introduced in the legal frameworks for electronic communications, energy and other utility networks when those markets were liberalized. They exist for the financial sector. And in the area of data protection, reference is even made to "complete independence" of the supervisory authorities (cf. Article 28 Directive 95/46/EC; Article 52 General Data Protection Regulation) and the Treaty on the Functioning of the European

Union itself stipulates that compliance with data protection rules shall be subject to the control of independent authorities (Article 16).

…and the Culture Committee taketh away

I was therefore quite shocked when reading the draft report of the CULT Committee in the European Parliament of September 5 2016. The two German co-rapporteurs, Sabine Verheyen and Petra Kammerevert, suggest to significantly water down the text of Articles 30 and 30a. For instance:

- The term "national regulatory authority" is systematically replaced by the term "national regulatory body" (suggesting the connotation of weaker powers and deviating from the terminology used in electronic communications, energy, etc.).
- It is proposed to delete the requirement that media regulators should be "legally distinct" of any other public or private body.
- It is proposed that the media regulators' duties shall be limited to *"monitoring the provisions of this Directive, of national law and the fulfilment of statutory obligations"* (what about countries with so-called converged regulators who also have duties in relation to electronic communications? I guess OFCOM will now cheer the UK's decision to leave the EU; otherwise, it may have had to split itself…).
- It is proposed to delete the requirement that a Head or a member of the collegiate body of a media regulator may only be dismissed if they no longer fulfil the conditions required for the performance of their duties (and not simply because of some omissions in the annual activity report…).
- The tasks of ERGA are seriously curtailed: the provisions on advising and assisting the Commission will be deleted in Article 30a, paragraph 1, and ERGA will merely get the task to "draft" opinions when requested by the Commission, whereas the Contact Committee will be entrusted with the competence to deliver opinions (thereby giving the Member States through the Contact Committee the final word over the regulators' professional independent opinion; Article 29f). Moreover, it is proposed that four Members of the European Parliament will be nominated as members of the Contact Committee.

Very little explanation is given for these amendments, apart from the statement that *"[t]he Rapporteurs appreciate the contribution of ERGA as an informative and consultative body. They consider however that to safeguard the prerogatives of Member States, it should not have any decision-making powers. More competences should be instead given to the contact committee, established in Article 29 of the current Directive (Am.106). The contact committee should be solely competent to make decisions, including on opinions drafted by ERGA."*

Déjà vu, or worse?

To me, the amendments do not make much sense if it is the EU legislator's intention to take independent and professional oversight of media markets to heart. They are not in line with best practices and rules adopted by the EU legislator in other sectors (in particular, the closely related electronic communications sector). They disregard the international standards developed by the Council of Europe (see Recommendation (2000)23 and Declaration of March 2008 of the Committee of Ministers) and the European Court of Human Rights under Article 10 (in relation to Articles 6 and 13) of the European Convention on Human Rights. They sweep the recommendations of the High Level Group on Media Freedom and Pluralism from 2013 under the carpet. But perhaps most importantly, they contradict the European Parliament's own resolutions adopted on May 21, 2013 (Resolution on the EU Charter: standard settings for media freedom across the EU) and March 10, 2011 (Resolution on media law in Hungary). Wouldn't it be a little schizophrenic for the European Parliament to call *"on the Member States to establish guarantees ensuring the independence of media councils and regulatory bodies from the political influence of*

the government, the parliamentary majority or any other group in society", but, at the same time, be reluctant to provide the necessary framework itself at EU level?

The amendments to Articles 30 and 30a in the CULT committee's draft report are like a déjà vu all over again. The current Article 30 is the result of a "sensitive compromise" between the Commission, the Parliament and the Council at the time of the revision of the Television without Frontiers Directive (dixit "the Bible" of Castendyk, Dommering and Scheuer on p.996). But in 2006-2007 it was the Council, not the European Parliament, who blocked the introduction of a firm obligation for Member States *"to guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently"* (as was suggested in the Commission's initial proposal of 13 December 2005). Allegedly, Germany had argued that independent authorities are not compatible with their existing system (thereby putting national interests above the higher interest of European citizens – including citizens in those countries where a culture of independence is still absent or under threat – in free, pluralistic media and independent regulatory oversight).

Tu quoque, CULT committee? Have you learned nothing from Montesquieu's theories on *trias politica,* separation of powers, and checks and balances? (Remember that *"the minds of Men are easily corrupted…"*, which is why Frodo Baggins, a hobbit, was chosen as the Ring bearer, over strong men like Aragorn or Boromir in Tolkien's *The Lord of the Rings*.)

It is not too late!

Today's media sector is under huge pressure. The digital transformation, the growing market power of – mostly American – video platforms and giant internet players, the rise of new technologies for big data analysis, targeted advertising and personalized media, and the increasing attempts of political intervention in the media in some EU Member States, all urge for strong and independent regulatory authorities who can exercise their powers in a professional way, at arm's length of political and economic powers (with the appropriate accountability mechanisms). The growing delivery of video content across territorial borders urges for stronger cooperation between those regulators (hence, the need to recognize in the directive the important role of ERGA in the implementation of the AVMS rules and empower it to become an action team and not merely a 'talk shop').

Pursuant to Article 10 ECHR and Article 11 EU Charter of Fundamental Rights, it is the EU's and Member States' responsibility to provide the appropriate legal framework that is conducive, not only to formal independence, but also to a culture of independence (here again, the role of ERGA is not to be underestimated).

After all, independent media oversight is a necessary requirement for media pluralism (that other sensitive debate, in which the Commission has been less courageous in its legislative proposal than I had hoped for, but that would lead us way too far for a single blog post).

So, dear members of the CULT committee. Think twice before you approve the draft report. Don't let this REFIT exercise turn into a dancing procession of Echternach in which, at one stage, the pilgrims take three steps forward and two steps backwards (thus taking five steps in order to advance one). There is no time to wait for another review exercise. What the Commission proposes is nothing more than best practice standards that are in line with international standards and that are based on sound academic research. Moreover, they have been implemented through EU legislation in other sectors since years. Rejecting them in the context of the media sector could be seen as a symptom of – not regulatory capture this time but – political capture.

This post gives the views of the author and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics and Political Science.

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