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The Role of Media Regulatory Bodies:

Freedom and Supervision

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Introduction

The questions often asked is what is the role of media regulatory body? Who establishes it? What is the guarantee of its freedom? How to balance its freedom and responsibilities? And finally, on one hand who supervises the work of a regulatory body (if anyone) and on the other hand on what basis regulatory bodies supervises broadcasters?

But let's start from the beginning. The Convention for the Protection of Human rights and Fundamental Freedoms (better known as European Convention on Human Rights) was adopted in 1950. The Article 10 of the European Convention regulates the freedom of expression as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

European Court on Human Rights was established in Strasbourg in 1959 by the Council of Europe Member States to deal with the alleged violations of the European Convention on Human Rights. The case can be brought to the Court when all national remedies are exhausted, within six months period after final decision was taken. Also, the infringement has to be made by the

public authority and the case can be brought by private person or organization. The effects of the decision of the European Court on Human Rights are that it is binding on the State in question, it provides reimbursement of costs and expenses, the Committee of Ministers verificates whether the state took adequate remedial measures to comply with obligations/judgment and very often the non-direct results are the modification of laws in the country, the development in jurisprudence and change in prosecution policy.

Freedom of Expression can be restricted only when three conditions are simultaneously fulfilled:

- When the restriction is prescribed by the law
- With the legitimate aim
- When it is necessary in a democratic society

The next issue is who establishes regulatory systems. The answer is that the regulatory systems are founded by each sovereign state themselves, in accordance with the Council of Europe, European Court on Human Rights (ECHR) as well as the European Union (for EU Member States) standards and practice. States themselves establish regulatory systems through constitution, media laws and other related laws, such as telecommunications, free access to information, transparency of media ownership, etc. Council of Europe creates media policy either through soft recommendations that are not binding, for example on regulatory authorities, protection of national minorities, hate speech, reporting during the election campaigns, media pluralism and diversity of media content, or through Conventions that each state ratifies and than become the part of regulatory system of the country. The European Court on Human Rights works on the basis of European Convention of Human Rights and its case law, while the European Union has its Media and Audiovisual Directives, such as Television Without Frontiers Directive (TWFD), amended in December 2007 with the Audiovisual Media Service Directive (AVMDS) and decisions of the European Court of Justice.

The role of media regulatory bodies

Media regulatory systems are very diverse. Some countries have long tradition in media law, while for others it is a relatively new area of regulation. Some regulatory authorities can easily achieve standards, but for others it is too high to achieve. Therefore, ***Council of Europe Recommendation on the independence and functioning of regulatory authorities for the broadcasting sector R (2000) 23*** (further referred as "Recommendation") serves as a base for establishing of the regulatory authorities in the Council of Europe and the European Union Member States. Although adopted in 2000, we can say that it is already outdated hence it regulates regulatory authorities in the broadcasting sector and in the meantime many countries recognized the convergence of media, telecommunications and information society services that resulted in convergence of regulatory authorities.

This Article will examine three models of regulatory authorities from three countries – United Kingdom, Germany and Poland, that all have their legislation harmonized with this recommendation but in a completely different manner.

General legislative framework

The Recommendation says the following when it comes to the general legislative framework:

1. Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
2. The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.

In the United Kingdom, the Communications Act was adopted in 2003 after more than three years of wide public debate. It establishes a converged regulatory authority – OFCOM - that

assumed the duties and activities of five regulatory authorities, namely the Radiocommunications Agency, Office of Telecommunications, Independent Television Commission, Broadcasting Standard Commission and Radio Authority. The Office of Communications also took over 135 new statutory duties.

In Germany, each State ("Land") has its own media law. A common set of regulations for broadcasters (both public and commercial) creates Interstate Treaty on Broadcasting and Telemedia. In addition, there is no centralized regulatory authority. Instead, there are 14 State Media Authorities plus Berlin and Brandenburg (*Landesmedienanstalten*) that deal with regulatory issues at the state level. Also, Director's Conference of the State Media Authorities addresses nationwide issue as well as Association of State Media Authorities in the Federal Republic of Germany.

In Poland, there is Broadcasting law that establishes the National Broadcasting Council as a State Institution.

Appointment, Composition and Functioning of the Regulatory authorities

The Recommendations says that:

3. The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.
4. For this purpose, specific rules should be defined as regards incompatibilities in order to avoid that:
    a. regulatory authorities are under the influence of political power;
    b. members of regulatory authorities exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest in connection with membership of the regulatory authority.
5. Furthermore, rules should guarantee that the members of these authorities:
    a. are appointed in a democratic and transparent manner;

b. may not receive any mandate or take any instructions from any person or body;
c. do not make any statement or undertake any action which may prejudice the independence of their functions and do not take any advantage of them.

6. Finally, precise rules should be defined as regards the possibility to dismiss members of regulatory authorities so as to avoid that dismissal be used as a means of political pressure.
7. In particular, dismissal should only be possible in case of non-respect of the rules of incompatibility with which they must comply or incapacity to exercise their functions duly noted, without prejudice to the possibility for the person concerned to appeal to the courts against the dismissal. Furthermore, dismissal on the grounds of an offence connected or not with their functions should only be possible in serious instances clearly defined by law, subject to a final sentence by a court.
8. 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.

In practice, these guidelines are again implemented differently in various jurisdictions.

In the United Kingdom, OFCOM consists of eight Board members who have the status of public servants and are appointed by more than one authority. OFCOM also has the Transparency rules for appointment process, requiring job descriptions of potential members, holding public interviews and publicizing the results of the tender. In case the appointment process is delayed or blocked, there is developed conflict resolution mechanism. The dismissal of Board members is forbidden in general, but they can resign, or be dismissed due to incompatibilities related to political posts, administrative posts or membership of political party. Also, the dismissal can happen in case of serious violations of law. The dismissed member has a right to appeal. OFCOM is often called a "hybrid of public and private sectors". It is also a statutory public corporation, independent of the Government.

German State Authorities have Chairman or Director who is appointed by the Assembly and the Authority's Assembly that is appointed by the representatives of socially relevant groups, as prescribed by State laws. The number of Assembly members is between 11 and 50 depending on

state laws. The Assembly can dismiss the Chairman while the socially relevant groups can dismiss the members of the Assembly. The tenure varies between four and eight years. The chairman's position and the members of the Assembly positions are usually renewable.

In Poland, National Broadcasting Council has five members of which two are appointed by the Chamber of Deputies ("*Sejm*"), two by the President of the Republic and one member by the Senate. The tenure of the Council members is for six years and they can be dismissed by institutions that appointed them.

Financial independence

The recommendation provides that:

9. Arrangements for the funding of regulatory authorities - another key element in their independence – should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently.
10. Public authorities should not use their financial decision-making power to interfere with the independence of regulatory authorities. Furthermore, recourse to the services or expertise of the national administration or third parties should not affect their independence.
11. Funding arrangements should take advantage, where appropriate, of mechanisms which do not depend on ad-hoc decision-making of public or private bodies.

Financial independence is also achieved in different manners in various legislative systems. For example, OFCOM is financed from various sources – broadcasting licence fee, percentage of revenue raised from telecommunications (spectrum) licences and a range of administrative charges for electronic networks and services. German State Authorities are financed through the percentage of the licence fee and there is no income from the state budget, while Polish National Broadcasting Council is funded fully by the State budget.

Freedom and Responsibilities of Media Regulatory Bodies

Media regulatory authorities, no matter whether convergent, fully independent or state controlled, play an important role in creating media environment in each European country. Regulatory authorities issue licences, create bylaws thus closer regulate the broadcasting sector, monitor work of broadcasters and are often assigned with authority to use measures to fine the work of broadcasters that do not comply with laws or internally set standards. The question is – who is in charge of measuring responsibility of Regulatory authority? And who is responsible for actions of the regulatory authority? Is it state? To what extent? And when should state interfere to protect freedom of expression?

The European Court of Human Rights is in charge of the case only when all national remedies are exhausted within six months period after final decision was taken, and that can sometimes take several years. In countries where it is *prescribed by the law* that the Regulatory authority can shut down the television/radio station for example temporarily for thirty days, it is a long way for broadcaster to wait several years to approach the European Court. Thirty days is enough for a television/radio station to lose its audience, advertisers, etc. Therefore, the question is whether the reimbursement of costs and expenses is enough measure to satisfy the potential mistake of the Regulatory authority. Therefore, the effects of the ECHR decisions are more important on a high level state policy level. For example, if a state has to reimburse many Article 10 decisions by the European Court of Human Rights, it may revise the media law and better explain the legitimate aim of regulatory authority's decision or its necessity in a democratic society.

Hence the European Court on Human Rights merits whether there was a breach of Article 10 or not in every concrete question, here are several examples on the way European Court measures the freedom and responsibility of regulatory authorities. All ECHR cases that are described are related to the decisions of Regulatory authorities and ECHR measurement on whether the Regulatory authority brought the decision in line with Article 10 of the ECHR.

Case "Ozgur Radyo-Ses Radyo Televizyon Yayin Yapim Ve Tanitum A.S. v. Turkey"

Ozgur Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. is a Turkish limited company which broadcasts radio programmes. It is based in Istanbul.

The RTUK, Turkish Broadcasting Regulatory Authority gave three warnings and twice suspended the licence to the Ozgur Radyo between June 1998 and March 1999. The RTUK accused the broadcaster, among other things, for broadcasting programmes liable to incite the people to engage in violence, terrorism or ethnic discrimination or to stir up hatred. The programmes touched on various themes such as corruption, the methods used by the security forces to tackle terrorism and possible links between the State and the Mafia.

Ozgur Radio applied to the administrative courts for an order setting aside each of the penalties, but its applications were dismissed.

In its complaint to the Court it alleged that the penalties that had been imposed by the RTUK entailed a violation of Articles 10 (freedom of expression) and the Court declared that the applicant was right.

The issue before the Court was whether the interference with the Radio Ozgur's right to freedom of expression had been "necessary in a democratic society". In assessing the situation, the Court said it would have particular regard to the words that had been used in the programmes and to the context in which they were broadcast, including the background to the case and in particular the problems linked to the prevention of terrorism. The Court noted that the programmes covered very serious issues of general interest that had been widely debated in the media. The dissemination of information on those themes was entirely consistent with the media's "watchdog" role in a democratic society.

The Court noted that the information concerned had already been provided to the public. Some of the programmes had done no more than to relate, without comment, newspaper articles that had already been published and for which no one had been prosecuted. Moreover, the applicant company had been careful to explain that it was citing newspaper articles and to identify the sources. Lastly, the Court observed that although certain particularly acerbic parts of the

programmes had made them somewhat hostile in tone, they had not encouraged the use of violence, armed resistance or insurrection and did not constitute hate speech. That was an essential factor to be taken into consideration.

The Court noted the severity of the penalties that had been imposed on the applicant company, which were disproportionate to the aims pursued and, therefore, not "necessary in a democratic society".

Consequently, the Court held unanimously that there had been a violation of Article 10 and as regards just satisfaction, the Court awarded the applicant company EUR 15,000 for non-pecuniary damage and EUR 2,000 for costs and expenses.

Case "*Nur Radyo Ve Televizyon Yayıncılıgi A.S. v. Turkey*"

The applicant, Nur Radyo Ve Televizyon Yayıncılıgı A.S., is a Turkish broadcasting radio limited company based in Istanbul.

In October 1999, RTUK, Turkish Broadcasting Regulatory Authority, censured Nur Radyo in for broadcasting certain comments by a representative of the Mihr religious community, who had, among other things, described an earthquake in which thousands of people had died in the Izmit region of Turkey in August 1999 as a "warning from Allah" against the "enemies of Allah", who had decided on their "death". The representative had also compared the "fate" of "non-believers", who were presented as victims of their impiety, with that of the members of the Mihr community. The RTUK found that such comments breached the rule laid down in section 4 (c) of Law no. 3984 prohibiting broadcasting that was contrary to "the principles forming part of the general principles laid down in the Constitution, to democratic rules and to human rights". Noting that the Nur RAdyo had already received a warning for breaching the same rule, the RTUK decided to suspend its radio broadcasting licence for 180 days with effect from 8 November 1999. The applicant company challenged this measure in the Turkish courts, but to no avail. It argued, in particular, that it had put forward a religious explanation for the earthquake which all listeners were free to support or oppose.

The Court acknowledged the seriousness of the offending comments and the particularly tragic context in which they had been made. It also noted that they had been of a proselytising nature in that they had accorded religious significance to a natural disaster. However, although the comments might have been shocking and offensive, they did not in any way incite to violence and were not liable to stir up hatred against people who were not members of the Mihr religious community.

The Court further reiterated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of an interference. It therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued, in violation of Article 10. The Court also held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company.

Case "Glas Nadezhda EOOD and Elenkov v Bulgaria"

In 2000 Glas Nadezhda EOOD applied to the State Telecommunications Commission (the "STC") for a licence to set up a radio station to broadcast Christian programmes in and around Sofia. The STC refused to grant the licence, basing its refusal on the decision taken by the National Radio and Television Committee (the "NRTC") which found that, on the basis of the documents submitted by Glas Nadezhda EOOD, the proposed radio station would not meet its requirements to make social and business programmes or to target regional audiences. The proposals also failed to fully meet its requirements to produce original programmes, to ensure audience satisfaction and to provide the professional and technological resources required.

Glas Nadezhda EOOD brought proceedings before the Supreme Administrative Court for judicial review of both STC's and NRTC's decision, but finally the Court held that the NRTC had total discretion in assessing whether an application for a broadcasting licence had met certain criteria and that this discretion was not open to judicial scrutiny. In the meantime, Mr. Elenkov, the Manager of Glas Nadezhda, attempted to obtain a copy of the minutes of the NRTC's deliberations, which were meant to be available to the public under the Access to Public

Information Act 2000. Despite his requests and a court order, Mr. Elenkov was not given access to those minutes.

Glas Nadezhda complained to the European Court of Human Rights for breach of Article 10 (freedom of expression). The European Court is of the opinion that the interference in the freedom of expression of the applicants did not meet the requirements of lawfulness as prescribed by Article 10, Paragraph 2. The NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Furthermore, the NRTC had merely stated in its decision that Glas Nadezhda EOOD had not or had only partially corresponded to a number of its criteria. No reasoning was given to explain why the NRTC came to that conclusion. And no redress had been given for that lack of reasoning in the ensuing judicial review proceedings because it had been held that the NRTC's discretion had not been reviewable. That, together with the NRTC's vagueness concerning certain criteria for programmes, had denied the applicants legal protection against arbitrary interference with their freedom of expression. The Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure in line with the Recommendation 2000/23 on the independence and functions of regulatory authorities for the broadcasting sector. Consequently, the Court concludes that the interference with the applicants' freedom of expression had not been lawful and held that there had been a violation of Article 10.

Conclusion

Every decision of the Regulatory authority may, at the end, be reviewed by the European Court on Human Rights (ECHR) thus becoming a European case law. Therefore, when deciding in individual cases against broadcasters, every regulatory authority should take into consideration Article 10 of the ECHR as well as three criteria that have to been fulfilled simultaneously so that the sanction is lawfully imposed.

Regulatory authorities should pay specific attention to offer as precise and detailed written explanation as possible of every sanction imposed to broadcaster when going in front of the national court, hence regulatory authority would not be able to add any documents once the case reaches the European Court on Human Rights. The special emphasize should be placed on third principle "necessary in a democratic society" when imposing sanctions to broadcasters hence it varies from country to country. Therefore, every regulatory authority needs to explain the specifics of its own society and legal system and reason why such a sanction is necessary in a society of that specific country.

To conclude – there is a question whether there is any "European standard" in Media law? And what does it mean when someone says "media law in line with the European standard" These examples show that even when the law complies with "standards", it doesn't mean that there is always the same implementation or the same goal achieved. It is important to stress that many standards may be copied in the national laws, but not every rule can be implemented in every system. The most visible difference when it comes to media law is its implementation in so called "old democracies" and in new, relatively young democratic systems. Therefore, instead of term "standard", maybe we could use the term "best practice". The reasoning is that the best practice may be appropriate for the society in question and applicable to the legal system of the country. When there is no best practice, like it will be in the case of the Audiovisual Media Service Directive that all EU member states will have to incorporate in their national legislation, it is important to be realistic about what could be really implemented in a legal system of a specific country. It is essential not to draft the non-applicable law, but in line with other

regulatory systems and practices. Every country has to adjust rules and regulations to its legal system, tradition and level of democracy achieved.

Recommendations to the Republic of Serbia

1. The state should create a strategy to decide whether to establish a converged regulatory authority for electronic communications or to keep two separate regulators for media and telecommunications.

2. It may be necessary to amend the Broadcasting Law to strengthen the independence of regulatory authority in line with the Council of Europe Recommendations.

3. It is recommended to continue trainings for judges on Article 10 ECHR and especially on case law of the European Court of Human Rights so that they are acquainted with three standards that have to be simultaneously fulfilled to restrict someone's freedom of expression (prescribed by law, legitimate aim and necessary in a democratic society).

4. Broadcasters should be better informed on their right to complain to the European Court on Human Rights within six months after exhausting all legal remedies in front of the domestic courts, if not satisfied with the Regulatory authority's decision. This may be an urgent matter hence national, regional and local licences have recently been allocated.

5. Regulatory authority may also need assistance on their supervisory role that includes monitoring of the broadcasting programme. So far, the Republican Agency for Broadcasting announced results of monitoring of the programme only during the election campaign. It is important that the regulator constantly supervises the quality of broadcasted programme and makes sure that it is in line with the law.