**29th EPRA Meeting**
**6-8 May 2009**
**Reval Hotel Olympia, Tallinn**

# The Transparency and Accountability of regulators
# Background document for the 2nd Plenary session

**Emmanuelle Machet**
**EPRA Secretariat**

As highlighted by the explanatory memorandum of the Council of Europe Recommendation on the Independence of regulators, a logical corollary to their duty to act exclusively in the public interest is that regulatory authorities should be accountable to the public. Pursuant to the Recommendation, the recent Declaration[1] on the independence of regulatory authorities adopted in March 2008 invited broadcasting regulatory authorities to:

"– *make a commitment to transparency, effectiveness and accountability;* "

The issue of the independence of regulatory authorities has been on the agenda of several EPRA meetings, most prominently in Prague in May 2007. While mainly focusing on the legal and adminsitrative instruments aiming at preserving the independence of regulators, the background document acknowledged the importance of accountability and transparency of the regulators[2]. This time, the focus of the second Plenary session will be on the corollary of independence, i.e. the transparency and accountability of regulators.

The present paper is based on the responses to a questionnaire[3] and compiled answers from 29 regulatory authorities: the National TV and Radio Council of the Republic of Azerbaijan (AZ), the Communications Regulatory Agency (BA), The Flemish Council for the Media (BE) the Council for Electronic Media (BG), the Federal Office for Communication – OFCOM and the Independent Complaints Commission (CH), the Cyprus Radio - Television Authority (CY), the Council for Radio and TV Broadcasting (CZ), The Director's Conference of the State Media Authorities (DE), The Radio and TV Board (DK), The Audiovisual Council of Catalonia, the Audiovisual Council of Navarra (ES), The Ofcom (GB), The Autorità per le Garanzie nelle Comunicazioni (IT), the Communications Commission (IM), The Conseil national des programmes (LU), The Radio and Television Commission of Lithuania (LT), the Council for Coordination on the Audiovisual of Moldova (MD), The Broadcasting Agency of Montenegro (ME), The Broadcasting Council of the Republic of Macedonia (MK), the Commissariaat voor de Media (NL), the Norwegian Media Authority (NO), The National Broadcasting Council (PL), the National Audiovisual Council (RO), The Swedish Radio and Television Authority and the Swedish Broadcasting Commission (SE), The Post and Electronic Communication Agency (SI), The Council for Broadcasting and Retransmission (SK), the Radio and Television Supreme Council (TR).

In fact, the issue of transparency and accountability is not specific to media regulatory authorities, however it is particularly relevant in this field. Why so?
Karol Jakubowicz[4] provided a very clear answer in his keynote speech held in Prague:
(Because a regulatory body) "*needs friends and supporters. If it wants to be independent of politicians, it cannot always count on their good will. There is likely to be friction between the regulatory authority and*

[1] Declaration of the Committee of Ministers on the independence and functions of regulatory authorities for the broadcasting sector *(Adopted by the Committee of Ministers on 26 March 2008*
https://wcd.coe.int/ViewDoc.jsp?id=1266737&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75
[2] http://www.epra.org/content/english/members/working_papers/Prague/independence_final.doc
[3] The questionnaire and paper was prepared with very valuable input from Maida Ćulahović, Head of Audiovisual services, Department of the Communications Regulatory Agency (BA), who will be acting as the content producer of the Plenary session. Council of Europe Recommendation 2000 (23), the Declaration of March 2008 as well as Karol Jabubowicz keynote speech on independence and transparency made for the EPRA Prague meeting have been the main source of inspiration for drafting the questionnaire.
[4] http://www.epra.org/content/english/members/working_papers/Prague/EPRA_keynote_KJ.pdf

*political bodies. Therefore, it needs to win a good reputation in the industry it regulates and among the general public. If it can do that, it will not be left alone at a time of a conflict with politicians. Broadcasters can be won over if the regulatory authority is fair and is seen to understand their problems and contribute to good market performance, even if at the same time it has to enforce the rules. Also, when the quality of its regulation is high and when it delivers on the promise of expertise, flexibility, credibility, stability and predictability of the regulatory environment, efficacy and efficiency.*
*As for the general public, it can be won over with a clear commitment to the public interest, public participation and transparency, and a sense that the regulator is accountable."*

This paper presents a brief overview of the answers to the questionnaire and revolves around two main questions:

- *To whom should RAs be accountable and transparent?*
- *Concerning which issues should RAs be accountable and transparent?*

For a more detailed overview, comparative tables are provided as a separate annex to this paper.

## 1. Status of the Legal Framework with regard to Transparency & Accountability

All regulatory authorities who responded to the questionnaire mention that their legal/regulatory framework contains provisions dealing with accountability and transparency. 26 regulatory authorities (out of 29) report that these provisions are embedded in the law, while 14 refer to Rules of Procedures, 10 to internal Codes of Ethics and 12 to general provisions applicable to the civil service.

RAs can only be held accountable in connection to their regulatory remit and the missions that they have been empowered with. That is why, in addition to the existence of provisions on accountability and transparency, it is also important that the procedures and responsibilities of RAs are clearly set out by law. From the responses to the questionnaire, it appears that procedures and responsibilities are very often set out by the law establishing the RA. However, a plurality of texts applies in certain cases. As an example in Norway, the Norwegian Media Authority is not established by one single act and the responsibilities of the RA are based on several acts, regulations and administrative decisions.

27 of the 29 regulatory authorities report that procedures and responsibilities with regard to decision-making are clearly set out by law. 25 RAs mention that procedures and responsibilities with regard to licensing are also clearly stipulated, while three authorities (CNP (LU), SBC (SE) and UBI (CH)) do not have any competences in the field of licensing. 26 report that the issue of the appointment and termination of members and decision making are clearly set out in their legal framework. 24 respondents mention that provisions relating to the funding of their RA are embedded in their legislation.
It is quite surprising to note that seven RAs state that provisions dealing with the remit of their regulatory authority are not clearly set out in the law that established the RA. Ten authorities also report that provisions concerning the application and the interpretation of rules are absent from the law establishing the authority.

The group of RAs which report a low level (less than 3) of procedures and responsibilities set out by the RA law is rather heterogeneous with authorities including Luxembourg, Moldova, Switzerland (UBI and OFCOM) and Sweden (RTVV, SBC).

## 2. Judicial Review

Appendix to CoE Recommendation Rec(2000)23
Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector

*27. All decisions taken and regulations adopted by the regulatory authorities should be: (…)*
- ***open to review by the competent jurisdictions according to national law;***

The vast majority of respondents (23 out of 29) report that all their decisions and regulations are open to judicial review. This confirms earlier answers from EPRA members to the 2007 questionnaire on independence.

This outcome is nevertheless rather difficult to analyse; possibly due to the variety of judicial and administrative systems across Europe (e.g. the existence of appellate and/or supervisory jurisdictions, continental vs. common law systems), the differing remit and functions of broadcasting regulators and the very general character of the question (*are ALL decisions and regulations of your RA are open to judicial review?*)

As a rule, it seems that a distinction should be made between decisions and regulations in some cases. In Denmark for instance, the Radio and TV Board does not have regulations. In Switzerland, regulations by the OFCOM are usually not open to judicial review whereas, as a basic principle, all decisions touching any individual right are open to judicial review. Also in Switzerland, the decisions of the UBI (a complaints Authority with no licensing remit) in the complaints field are open to judicial review and can be appealed to the Federal Supreme Court, whereas other decisions (i.e. of administrative nature) are not open to judicial review. In Poland, while all KRRiT's decisions are open to judicial review, regulations issued by the KRRiT are open to judicial review as to whether they are in line with legal provisions of the Constitution and the Broadcasting Act.
The Catalan CAC also points out that while its decisions and regulations are open to judicial review; some documents such as the recommendations on Broadcasting issues or reports that, regardless of their formal administrative nature, are not open to judicial review.
With regard to decisions, even though they may not all be open to appeal or challenge in the courts, all decisions touching any individual right should be open to judicial review, most of all licensing decisions (awarding/revocation etc.) and fines.
In Sweden, decisions by the Swedish Broadcasting Commission are not appeal. They may however, be subject to re-trial.

Even though this was not directly specified in the question, judicial review is generally carried out in continental countries by administrative courts of justice (such as the Conseil d'Etat in France) or by regular civil courts as in the UK or Ireland.

Judicial review is generally a supervisory rather than an appellate jurisdiction, i.e. it is concerned with the *legality* of administrative decisions rather than their *substantive* merits. In other words, the decision of the regulator may be quashed for procedural reasons but not debated on a merit-based approach or substituted by another decision. The introduction of a sector-specific appeal mechanism for broadcasting regulation has been advocated in Ireland, inter alia for the sake of faster decision-making. However, this has not happened so far and the Irish regulator BCI was clearly against such an introduction[5].

In Sweden, if the Swedish Broadcasting Commission decides that a broadcaster has violated rules concerning undue prominence, product placements, commercials and sponsoring, it may go to the administrative court and ask that the broadcaster is ordered to pay a fine. The decision reached by the administrative court may then be challenged (whereby that decision only concerns whether the violation of rules should lead to a fine). The actual decision by the SBC is not changed or altered even if the administrative court decides that it is not possible to impose a fee in the case. No other decisions by the SBC can end up in the judicial system.

In France, two main types of legal review by the Conseil d'Etat of the CSA decisions are possible. The most common one is the "contentieux de l'excès de pouvoir" which is a control of the legality of the CSA decision and may end up with the annulation of the decision. The second one "le contentieux de pleine juridiction (ou de plein contentieux)" is applicable in the case of sanctions imposed by the CSA and allows the Court to adopt a merit-based approach and modify the decision of the CSA.

[5] See Department of the Taoiseach, Consultation Paper on Regulatory Appeals
Submission of the Broadcasting Commission of Ireland, October 2006:
http://www.betterregulation.ie/attached_files/Appeals/Broadcasting%20Commission%20of%20Ireland.doc

## 3. Decisions and regulations duly reasoned

Appendix to CoE Recommendation Rec(2000)23
Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector

*27. All decisions taken and regulations adopted by the regulatory authorities should be: (…)*
***- duly reasoned, in accordance with national law****;*

Transparency and accountability are closely linked. It is generally acknowledged that accountability is best served through good information flows, with full disclosure of the details of the decision-making process and of all submissions and representations made to the regulator. This is particularly relevant in the area of licensing, hence the questionnaire requested a response as to whether licensing decisions are accompanied by reasoning. In addition, a detailed information disclosure makes it more likely that the regulatory decisions will be accepted by those most affected by them.

All respondents but one answered that their decisions and regulations (including licensing decisions where included in their remit) were duly reasoned. The Moldovan CCA, however, reported that "*there were some decisions where some members of the council have not motivated their vote*". The Council of Europe in a recent report mentioned that the recent "*decision by CCA not to prolong Pro TV's licence, together with similar cases in the past raised questions about the functioning of the regulatory body for the audiovisual (CCA) and transparency of the decision-making process, in particular in respect of the justification/motivation behind the granting/withdrawal/prolonging of the licences of TV and radio stations which should be in line with the national legislation and Council of Europe standards*[6]".

Almost all respondents stated that reasoned decisions were legally required by their national system. This is apparently not the case for the CNP in Luxembourg, or the CoAN from Navarra (ES). In the UK, this is not a formal legal requirement but necessary if Ofcom's decisions are not to be overturned.

It is interesting to note that several RAs are NOT under obligation to disclose HOW each decision was reached, as in the UK, Belgium Flanders, Catalonia, Italy, Luxembourg and Slovakia.

The issue of Board Minutes is particularly interesting in this regard as it seems quite divisive. As an example, Board minutes are available upon request in Poland. In Hungary, the ORTT mentioned that "*Upon the initiative of its Chairman, the National Radio and Television Commission – in order to provide overall information to the public – decided to prepare word for word minutes of the board meetings based on sound recordings. The minutes – which by no means contain data protected by the law – will be available on the Commission's website*[7].
In contrast, Board Minutes are not disclosed in Denmark.

Last but not least, the general legal requirement of having to provide a motivation for all regulations and decisions highlights the importance of the research conducted (or commissioned) by RAs.

## 4. Decisions and Regulations available to the Public: Provision of access to vs. proactive dissemination

Appendix to CoE Recommendation Rec(2000)23
Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector

*27. All decisions taken and regulations adopted by the regulatory authorities should be: (…)*
***- made available to the public;***

[6] See : Draft (revised) 26 January 2009 Information Documents SG/Inf(2009)1 Moldova: Stock-taking of co-operation with the Council of Europe: Moldova_COE_SG-Inf(2009)1E.doc
[7] Country report from the ORTT, Hungary for the EPRA Tallinn meeting

The issue of availability to the public of decisions and regulations of RAs combines elements of accountability and transparency. A distinction needs to be made between documents which are **available** to the public, for instance upon request, and documents which are **made public** by the RAs, e.g. via their websites.

The availability of decisions and regulations of RAs to the public derives from freedom of information legislation, such as The Freedom of Access to Information Act in Bosnia and Herzegovina or the public information act in Slovenia. Regulators from Bosnia and Herzegovina, Switzerland, Denmark, Slovenia and Sweden report that all decisions have to be disclosed on request to any interested party.

In contrast, the extent and the way in which RAs make their decisions and regulations public derive from their commitment to transparency. While decisions of major importance are always published, all decisions and regulations are not always made public. As an example, the Swiss Ofcom notes that: "*We do not publish all decisions. Whether or not we go for an active information policy depends on the alleged public interest in the decision.*"

The publication of press releases on their respective websites seems like the most common form of communication. The Turkish Radio and Television Supreme Council (RTUK) mentioned in its EPRA country report for Dublin that: as of August 15, 2008 it had started to publish its decisions on its website. Websites of RAs have developed considerably over the last years, contributing to an increase in transparency.
A publication in the Official Journal is less frequent and reserved for regulations (e.g. in the Netherlands) or for rules and directives (Germany).

Two regulators (CEM, Bulgaria and CvdM, Netherlands) also mention in this context their own magazine as an important instrument raising public awareness of their decisions and regulations.

## 5. Policy Orientations made Public

In contrast to making decisions or regulations of the RA public, only about half of the respondents declare that they make their policy orientations public or that their RA provides an explicit rule or strategy that describes its policy. Even less respondents state that their RA announces indications of likely future actions. The aim of such disclosure is to be able to provide for the operators a level of *predictability of the regulatory environment.*
In the Netherlands, the CvdM needs to disclose its intended policy and supervision activities for the upcoming year: "*Each year in October we publish our intended policy and supervision activities for the upcoming year in a letter, which will be send to the ministry and made available to the public*." Some authorities provide some description of their policy in their mission statement published on their websites or in their yearly reports as in Italy.

In certain cases, this low level of positive responses can be explained by the remits of those regulatory authorities which do not include policy making. This is the case, for instance, for complaints commissions, such as the Swiss UBI but also for the Swedish Authorities RTVV and SBC.
The issues of the repartition of powers between RAs and Ministries and their mutual relationships should also be taken into account there. Regulatory authorities are required to work within a policy framework set by the Minister but do not always have the leeway or the necessary remit to develop their own policy or strategy.

## 6. Transparency and accountability of the licensing process – a particularly sensitive issue

The licensing of operators is a particularly sensitive issue as it bundles a number of important processes, such as: the transparency and detailed character of regulations and licence selection criteria, the public character of the licence tendering and the need to state the reasons of licensing decisions (also the rejections) as described earlier.

In Ireland, the BCI has developed a transparency policy around licensing which involves: the hosting of public hearings, making licence applications publicly available while a licensing process is underway, the provision of feedback reports to unsuccessful applicants or the offer of meetings with unsuccessful

applicants. In the Czech Republic, further to the law, the decision of the RA on granting the licence "*shall contain a statement on granting the licence to one of the applicants and rejecting the applications of other applicants; furthermore, the decision shall contain a detailed explanation, including the criteria on whose basis the licence was granted to the applicant and the applications of all other participants were rejected, as well as information on the instruments of appeal*".

From the responses to the questionnaire, it appears that the licence tendering is **not public** only in Cyprus, Navarra and the Netherlands.

The fair sharing of information between the parties to the licensing process is a particular sensitive issue in the licensing process. Whether forbidding or setting conditions under which this type of communication can be carried out, ex parte rules further ensure the fairness and integrity of RA work.
However, it transpires that only 11 countries have rules pertaining to the issue of **ex parte communication**: Bosnia and Herzegovina, Switzerland, Germany, Spain (CoAN, CAC), Great-Britain, Italy, Macedonia, Norway and Sweden (RTVV). In Norway, transparency rules state that the same information is given to all licence applicants. In Montenegro, rules on ex parte communications have to be observed by both Council members and the staff of the Agency and are regulated by the Code of conduct of the Agency. The reason for this might be that this issue is regulated by more general laws on administrative procedure. Rules on ex parte communication need not be specific; they could be incorporated in more general transparency rules or guidelines on just any decision-making procedure or, as it is the case in Montenegro and Macedonia, be regulated as a matter of RA staff's proper practices.

Two recent judgments of the European Court of Human Rights (ECHR) revolve around the issue of licensing and refer to the CoE Recommendation 2000 (23) on the independence of regulators.

In the case Glas Nadezhda EOOD and Elenkov v. Bulgaria[8], the Court concluded that the interference with the applicants' freedom of expression had not been lawful and held that there had been a violation of Article 10. The NRTC (which was the broadcasting regulator at the time) had not held any form of public hearing, its deliberations had been kept secret, the decision had not been properly reasoned 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 was not subject to review.

In the recent Judgment Meltex Ltd et Mesrop Movsessian v. Armenia[9], the Court, in the light of the CoE Recommendation (2000)23 and the Declaration on the independence of regulators, held that the non-communication of the reasons for the refusal to grant a licence violates the freedom of expression. The Court considered that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression.

## 7. Regular Consultations

The holding of regular public consultations with various stakeholders before taking decisions, formulating policies or codes constitutes another important mechanism supporting commitment to accountability and transparency. In addition, some regulators (as in Denmark) are often required to consult the involved parties before making a decision.

Only five respondents declare that they do not conduct such consultations: the Czech and the Slovak Councils, the Swedish SBC, the CNP from Luxembourg and the Swiss UBI - the latter not really surprising considering its specific remit as a complaints commission.
A few regulators, such as the Lithuanian Broadcasting Council, indicate that these consultations cannot be qualified as regular but are held when needed.

[8] Judgment by the European Court of Human Rights (Fifth Section), case of Glas Nadezhda EOOD and Elenkov v. Bulgaria, Application no. 14134/02 of 11 October 2007

[9] Meltex Ltd et Mesrop Movsessian v. Armenia (appl no. 32283/04)
http://cmiskp.echr.coe.int////tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=71044&sessionId=9340510&skin=hudoc-en&attachment=true

It is interesting to note that these regular consultations are often, but not always, resulting from a legal requirement. Public consultations are conducted as a self-imposed requirement in Belgium Flanders, Cyprus, Denmark, the UK, Navarra, Poland and Netherlands. In several countries, as in Norway, this is partially required by law, partially initiated by the RA.

It appears that regulatory authorities consult mainly advisory committees & interest groups (21 responses), the industry (21), public authorities (20) and the general public (15). It is interesting to note that the public comes last as the target of consultations. Though this is the category whose participation in RA decision-making is least likely to be required by law, since it does not fall into the category of immediate stakeholders, involvement of general public in consultations – as a self-imposed requirement, for instance by publishing a draft document on RA website - might prove to be a useful tool to "win over the general public" as Mr. Jakubowicz fittingly noted.

Last but not least, an important prerequisite to a productive consultation policy is that the RAs are perceived as keen to listen to the views of those it consults.

## 8. Publication of an annual report of activities

26 regulatory authorities (out of the 29 consulted) state that they publish an annual report of their activities. The only three exceptions are the National Council for Radio and Television of Azerbaijan, the Communications Commission of the Isle of Man and the Conseil national des programmes in Luxembourg. The publication of this annual report is generally mandatory, except in Cyprus and the Netherlands. Annual reports seem to play an important role in the fulfillment of the commitments towards accountability and transparency. They are as a rule always made public.

A recent initiative of the Belgian CSA can be highlighted in this context. In keeping with its objective to facilitate access to information, and in order to make a year of activity more visible, the Belgian CSA has launched a mini-website[10], as a complement to the printed version of its annual report. The mini-site focuses on the four most important subjects of the last year: the FM frequency plan, the transposition into national law of the AVMS Directive, the issue of participation TV/Call-TV and international relations.

## 9. Conflict of interest rules

The issue of conflict of interest rules is an overlapping concern with regard to preserving independence and ensuring transparency and accountability. It also has to do with credibility of the regulators.
Most of respondents state that they have conflict of interest rules. They often are included in internal codes of ethics, as in Montenegro or Macedonia. In Italy, the Ethical Committee is in charge of ascertaining the correct application and ensuring the compliance with ethical and behavioural standards set forth in the Ethical Code. It is composed of three members of well-known independence and moral reliability chosen by AGCOM's Council.

Some regulators do not have fully- fledged conflict of interest rules, e.g. imposing disclosure of interests but have rules aiming at preventing partiality. However, several RAs do not have any rules, such as Azerbaijan, Cyprus[11], some Nordic countries (Sweden, Denmark) and Luxembourg. In Norway and Slovenia, conflict of interest rules only exist for the industry and not for the political world.

[10] http://www.csa.be/rapport2008 (in French)

[11] There are however provisions as to the unlawfulness of bribes in Cyprus.

## 10. Who regulates the regulator? - Regular Scrutiny /Assessment processes

Appendix to CoE Recommendation Rec(2000)23
Guidelines concerning the independence and functions of regulatory authorities for the broadcasting sector

*26. In order to protect the regulatory authorities' independence, whilst at the same time making them accountable for their activities, it is necessary that they should be supervised only in respect of the lawfulness of their activities, and the correctness and transparency of their financial activities. With respect to the legality of their activities, this supervision should be exercised a posteriori only. The regulations on responsibility and supervision of the regulatory authorities should be clearly defined in the laws applying to them.*

The issue of regular scrutiny and assessment of RAs is a major concern. As the Latin phrase goes: *Quis custodiet ipsos custodes?*, freely adapted to: *who regulates the regulator?*'

As already noted, regulators may be accountable through the courts by being subject to judicial review of their decision processes, and they are sometimes subject to other appeals or review mechanisms in relation to their decisions. Regulators are also accountable to the regulated industries and the citizens through mechanisms, such as a wide availability of relevant documents, a proactive dissemination of information and the conducting of regular consultations.

They are finally accountable to the Executive and Legislative. The main issue at stake being of course having the right balance between accountability of the RAs to the executive and legislative, and preserving its own independence.

Almost all consulted RAs report on some form of accountability mechanisms towards the executive and the legislative. They usually comprise a supervision of :

**-** The correctness and transparency of their financial activities
This includes (external), usually yearly, audit processes by the national Auditor General or the Court of Accounts, internal obligations to draw up and approve the estimates of expenditure - as in Lithuania.
As an example, the Belgian (Flanders) VRM finances are controlled twice a year by an external auditor and once by the State Audit Office. In Montenegro, annually, an external auditing company examines the financial accounts of the Agency. Internally, the Council adopts the mid-year and annual Financial reports of the Agency. All reports are published on the agency website.

- The lawfulness of activities
The supervision of the lawfulness of activities is, according to the responses, usually achieved through the possibility of appeal/judicial review against every individual decision of the regulator. The German regulator reports that the competent Ministries may initiate such a control of the lawfulness of activities upon the suspicion of a breach of law.

In the case of the CNP from Luxembourg, the Danish Radio and Television Board and the CRTA from Cyprus, however, the accountability mechanism towards the Executive and Legislative only seems to require the presenting of an annual report to government (LU), Ministry of Culture (DK), or being obliged to appear before the Parliament when needed.

- The fulfillment of regulatory objectives
This is usually achieved through the annual reports made to the Parliament and/or the government. Only the regulators in Cyprus[12] and Montenegro do not seem to be subject to the obligation of submitting an annual report to the legislative or executive. In addition, regulatory authorities are often obliged to appear before Parliament or relevant Parliamentary Committees when needed (e.g. in CY, ES or the Isle of Man).

Only a few regulators report a wide-ranging supervision of the fulfillment of regulatory objectives or the existence of specific control mechanisms.

[12] However, the Authority is required to conduct a research on pluralism and ownership concentration and to present the results of the research.

The Belgian (Flanders) VRM states that a management agreement has been developed between the Regulator and the Government according to which the Government has to evaluate whether the objectives have been reached. The VRM also plays a role in this process by internally measuring whether the objectives have been reached.

In the Netherlands, the CvdM is subject to an in-depth evaluation every four years: "*Once in four years the Minister has to inform Parliament about the functioning of the CvdM. The main question to be addressed in the evaluation is whether the CvdM operates in an efficient and effective way. The assessment is comprised of two parts: a self-evaluation by the CvdM and an evaluation by an independent bureau on request of the Ministry. Some broadcasters and other stakeholders have also been interviewed about their opinion on the CvdM. The outcome of the last evaluation was positive and showed that the CvdM executed its legal tasks in an adequate way. For example, a large majority of the CvdM decisions challenged by broadcasters were upheld by the administrative courts, indicating the good quality of the decisions. Although the number of broadcasters has increased enormously during the last years the working staff of the CvdM has kept more or less the same size: + 50 full time employees, showing a high level of effectiveness. One of the recommendations of the evaluation is that the CvdM should work in a more predictable and transparent way which can be achieved by more consultations with the sector and improved policy guidelines and communication*[13]".

Italy seems to be quite a special case in that, in order to ensure the independence of the regulatory body, the law that established AGCOM delegated to its council the power to decide on their own mechanism of accountability and transparency. In Italy, the financial independence is considered to be crucial for the decisional independence.

"*AGCOM's system of controls is defined by the provisions set forth by AGCOM with regard to administrative and financial management and organisation. Such regulations provide the presence of two bodies, the Guarantee Committee and the Internal Control Service, which are in charge of supervising administrative and accounting fairness and strategic control. Both bodies carry out their activities in full autonomy and report to AGCOM's President and Council.*

a. *The Guarantee Committee is in charge of guaranteeing the accuracy of the accounting and administrative management of AGCOM and of supervising the compliance with the relevant laws and regulations, as well as of auditing the periodical reports and the annual balance sheet. AGCOM recently introduced the issuance of relevant opinion also on the budget structure in addition to that on the balance sheet to be approved by AGCOM's Council.*

b. *The Internal Control Service is entrusted with the "the task of verifying, by comparative audits of costs and returns, both the achievement of the objectives set by current regulations and by AGCOM's resolutions, and the accurate and cost-effective management of public resources, as well as the fairness and success of the administrative activities carried out by AGCOM's divisions, services, and offices. The Internal Control Service works by monitoring the operational items with a view to find any critical situation, informing accordingly AGCOM's Council and suggesting, at the same time, corrective measures. The monitoring and analysis activity carried out by the Internal Control Service is contained in the periodical reports to the President."*

## 11. Accountability and Transparency vs. Independence: in search of the right Balance

In practice, the accountability and transparency of regulators needs to be balanced against their independence. Accountability mechanisms must be designed so that regulators give full account for the discharge of their duties towards citizens and the industry. They must however be designed and applied in practice in such a way that their regulatory independence is not compromised in the process.

The CRA from Bosnia and Herzegovina was the only regulatory authority who openly reported some conflicts between accountability and independence, stating that: "*some political parties (have) used their*

[13] See country report of the CvdM for the Dublin meeting.

*influence to investigate all financial and business operations of the CRA by the State Intelligence Agency, allegedly calling upon the accountability and transparency of the CRA*."

In addition, and even though it was not mentioned in this precise context, the issue, in a few countries, of the compulsory adoption by the Parliament of the annual report of regulatory authorities seems to be quite sensitive. In Moldova[14], if the Parliament rejects the annual report of the Coordinating Council of the Audiovisual, the latter must present a programme of concrete measures for handling the reported drawbacks within 30 days.

The National Broadcasting Council of Poland, in its earlier submission for the EPRA paper on the independence of regulators, stated that: according to Art. 12 of the Broadcasting Act, members of the NBC can be dismissed if both Houses of Parliament (Sejm and Senate) reject the annual report and the President of Poland accepts this rejection. The respondent also had indicated that: "*The binding character of the annual report sometimes leads to a political debate in Parliament on the Broadcasting Council instead of a debate on merit.*" In the same vein, the Czech RRTV mentioned that "*The lawmakers tried to fulfill the request of the Council of Europe on accountability of the Broadcasting Council towards the Parliament with an obligation of the Broadcasting Council to present to the Parliament the Annual Report. But if the Parliament asks the Council to amend the Report and is not content with the result, then the whole Council can be called off. Of course, such a situation does not help to build a "Chinese wall" between Parliament and the Broadcasting Council*".

**Summary: RAs accountable to whom? And for what?**

Regulatory authorities in the field of broadcasting are, as a rule, accountable to the executive and the legislative (e.g. usually by the presentation of yearly report and financial audit), through the courts (by being subject to judicial review or appeal procedure), to the industry and last, but not least, the citizens.
In keeping with the Council of Europe Recommendation and Declaration, the main mechanisms, generally set out in law, aiming at accountability and making RAs activities more transparent are the following:

- all decisions are open to judicial review and are duly reasoned,
- all decisions and regulations are available to the public,
- the main policy orientations/strategy are made public,
- regular consultations with stakeholders & the public are conducted,
- the RA is subject to regular scrutiny/ assessment on financial aspects and lawfulness of activities.

Accountability mechanisms must be designed so that regulators give full account for the discharge of their duties. They must however be designed and applied in practice in such a way that their regulatory independence is not compromised in the process. As for their design, it is highly important that both the procedures and responsibilities of RAs and the ways in which it can be held accountable are clearly set out by law:

- because it is needed to "justify" the independence and demonstrate responsibility towards public and industry it regulates and
- because adherence to the accountability and transparency mechanisms can enhance regulator's credibility and public trust.

This is why transparency and accountability are particularly important to media regulators – they have the potential to safeguard independence. RA's own commitment towards transparency can greatly contribute to this desired outcome; public trust can be enhanced by taking further measures to either compensate for the lack of legally imposed mechanisms or add to the existing provisions. Examples include making decisions, regulations and policy orientations public through websites, bulletins, magazines..., or inviting the general public to participate in public consultations. In terms of accountability, this self-commitment can be demonstrated by establishing various internal control systems.

[14] Further to Article 49 of the Audiovisual Code.

**Avenues for discussion**

While all decisions and regulations are usually, in line with access to public information laws, accessible to the public upon request, a pro-active policy of dissemination of information towards the industry and the public cannot be observed within all RAs at present. In addition, only about half of the consulted RAs declare that they make their policy orientations/strategy public.

***Are there any best practices/innovative methods which could be highlighted? Also concerning consultation processes with stakeholders? Is transparency towards the citizen sometimes seen as the last priority (in comparison with transparency towards the industry/ the executive and legislative)? What about existing procedures for handling complaints about the work of the RA (from the public or the industry)?***

Not all regulators disclose how their decisions are reached.The issue of Board minutes seems to be a sensitive one.

***What is the right balance between the right of information and the need to protect some sensitive issues?***

It is claimed that a transparent and accountable RA is likely to enjoy the support of those it regulates and earn the respect of the general public and that this may make a difference in times of political crisis.

***How can well-established accountability and transparency mechanisms be used as a tool to earn the respect of the industry and the general public? Are there any concrete experiences when the industry or the civil society publicly supported or even defended the RA from political pressure?***

On the one hand, a few regulators seem to be missing essential elements in the equation of accountability and transparency. On the other hand, as with the issue of independence, a clear distinction between rhetoric and reality should be made.

***Are long existing national traditions of accountability and transparency likely to compensate for the lack of legal provisions? What about self-imposed commitments towards transparency and accountability?***

***What about the respective merits of internal vs. external assessment of RAs, notably concerning the fulfillment of regulatory objectives?***

***How to ensure the right balance in practice between accountability/ transparency and independence?***