

EUROPEAN UNION MEDIA POLICY AND INDEPENDENT REGULATORY AUTHORITIES: A NEW TOOL TO PROTECT EUROPEAN MEDIA PLURALISM?

BY CARLES LLORENS* AND ANDREEA MADALINA COSTACHE†

Can a uniform policy for media pluralism be adopted across the 28 Member States of the European Union through the involvement of independent regulatory authorities? According to the authors, the chances remain remote due to political and stakeholder opposition grounded in diverse structural, cultural, political, and economic interests. Based on a review of key documents from diverse sources, and case studies in Hungary and Italy, it appears that the goal of an EU-wide collaborative network of financially and politically independent audiovisual regulatory authorities, with common standards, faces significant challenges. However, the authors see hope in the increased debate on the topic, and suggest that some movement in that direction may yet be possible.

INTRODUCTION

This article will assess the relevance of European Union (EU) media policy regarding the independence of audiovisual national regulatory agencies (NRAs) and their role in helping regulate the media sector with respect to media pluralism and media freedom. The discussion of the independence of media-related NRAs, though active in telecommunications for many years, started with the EU debate on the Audiovisual Media Services Directive (AVMSD) in 2006,¹ and was emphasized by Commissioner Viviane Reding before the European Parliament (EP) after the adoption of AVMSD in 2010. Reding defined the directive as one of the elements that contributes to the “pluralistic landscape.”² The connection between the independence of NRAs and media pluralism is provided in the AVMSD – Recital 94 of the directive allows each member state to use free choice of “appropriate instruments” to implement it and at the same time recommends “the form of the competent independent regulatory bodies” to implement the directive “impartially and transparently;” both must

* Professor, Department of Audiovisual Communication and Advertising, Autonomous University of Barcelona.

† Doctoral candidate, Department of Audiovisual Communication and Advertising, Autonomous University of Barcelona.

¹ European Commission, *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive)*, Official Journal of the European Union L95/1 (2010), accessed Aug. 6, 2014, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>.

² Viviane Reding, speech before the European Parliament, Brussels, Oct. 8, 2009, accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20091008+ITEM-005+DOC+XML+V0//EN&language=EN> (hereinafter Audiovisual Media Services Directive).

contribute to the “promotion of media pluralism.” The main idea behind this concept is that the independence of broadcasting regulators depends on independence from economic and political influences, allowing them to promote external and internal pluralism: “regulators should be independent from market parties, to be able to foster plurality of different voices in the media market, and independent from political influences, to ensure journalistic freedom and objectivity.”³

From a theoretical perspective, in this article the issue of independence of NRAs will be analyzed based on the normative frameworks of *inclusive* and *autonomous* approaches to media pluralism.⁴ An inclusive approach to media is based on the institutional connection of media to social and political organizations, while an autonomous approach comes from the assumption of a continuous process towards an autonomous media system.

First, in order to highlight the latest EU approaches to the independence of NRAs and their relation to media pluralism, this article will analyze four recent European initiatives focusing on media pluralism and media freedom: (1) from citizens, the European Initiative for Media Pluralism;⁵ (2) from the European Parliament, *A Resolution on the EU Charter: Standards Setting for Media Freedom across the EU*;⁶ (3) from the European Commission, *A Free and Pluralistic Media to Sustain European Democracy*, a report of the High Level Group on Media Freedom (HLGMFP);⁷ and (4) from civil society, *EU Competencies in Respect of Media Pluralism and Media Freedom*, a policy report of the Centre for Media Pluralism and Media Freedom (CMPF).⁸

Next, this article undertakes an analysis of the European Commission’s latest consultation on the independence of NRAs.⁹ This consultation includes the positions of the industry, NGOs, and the Member States. An analysis of these players’ reactions and perceptions of the effects of this reported independence of NRAs is provided.

³ Ana Herold, “From Independence of Audiovisual Media Regulators to Europeanization of Audiovisual Media Regulation: Reaching for the Apples of the Hesperides?” in *Private Television in Western Europe*, ed. Karen Donders, Caroline Pauwels, and Jan Loisen (Basingstoke, UK: Palgrave Macmillan, 2013), 266.

⁴ Beata Klimkiewicz, “Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies,” in *Press Freedom and Pluralism in Europe: Concepts and Conditions*, ed. Andrea Czepek, Melanie Hellwig, and Eva Nowak (Bristol, UK: Intellect, 2009), 45-77.

⁵ European Commission, The European Citizens Initiative, “European Initiative for Media Pluralism,” accessed Aug. 6, 2014, <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000007>.

⁶ European Parliament, *On the EU Charter: Standard Settings for Media Freedom across the EU*, Resolution 2011/2246(INI), Mar. 25, 2013, accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0117+0+DOC+XML+V0//EN>.

⁷ Vaira Viķe-Freiberga, Herta Däubler-Gmelin, Ben Hammersley, and Luís Miguel Póiares Pessoa Maduro, “A Free and Pluralistic Media to Sustain European Democracy,” report, High Level Group on Media Freedom and Media Pluralism, Jan. 2013, accessed Aug. 6, 2014, http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf.

⁸ Centre for Media Pluralism and Media Freedom, “EU Competencies in Respect of Media Pluralism and Media Freedom,” report, Jan. 2013, accessed Aug. 6, 2014, <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>.

⁹ European Commission, “Public Consultation on the Independence of Audiovisual Regulatory Bodies,” accessed Aug. 8, 2014, <http://ec.europa.eu/digital-agenda/en/public-consultation-independence-audiovisual-regulatory-bodies>.

The first two sections of this article discuss the concept of media pluralism using the theoretical backdrop of inclusive and autonomous approaches for the media and the importance and role of NRAs in the protection of media pluralism. The following two sections analyze the initiatives of civil society and the European Parliament treating the issue of the independence of NRAs in Europe. The final section turns to the initiatives of the European Commission and its references to the independence of the NRAs.

The article concludes by identifying the actual frames of discussion and solutions regarding the independence of NRAs at the EU level, as put forward in the analyzed documents, and suggest which issues are most likely to be included in EU media policy in the medium term. Lastly, the article considers whether the issues and tools considered relevant for EU media policy construction lean either towards an inclusive or autonomous direction and whether this direction can guarantee media pluralism in Europe.

MEDIA PLURALISM AND THE INCLUSIVE AND AUTONOMOUS APPROACHES

Media Pluralism has become a concept indispensable for the construction of a democratic society, with Barzanti stating that the “very essence [of media pluralism] has to be related with the very nature of democracy.”¹⁰ Barzanti’s opinion underscores the basic general role of media in a democratic society, also noted by McQuail: “It is hard to imagine a democracy in modern society, which is not supported by media.”¹¹ The “well-functioning” of a democracy in itself “calls for a confrontation of democratic political positions” because a “liberal democratic society requires a debate about possible alternatives.”¹² Consequentially, the role of media pluralism in a democracy is to contribute to the debate over possible alternatives by providing the places for these alternatives to be expressed and heard in society. And these alternatives are very important for the media because one should not forget that media have been and remain in a first instance “purveyors of information, not of absolute truths.”¹³

“Political elites and the state are historically seen as negative forces in controlling and suffocating media freedom [...] At the same time politics and private market interests also intersect.”¹⁴ This is why Nieminen suggests a new democratic framework, which should be based on the concept of

¹⁰ Fabrizio Barzanti, “Governing the European Audiovisual Space: What Modes of Governance can Facilitate a European Approach to Media Pluralism?” EUI Working Papers RSCAS 2012/49, Robert Schuman Centre for Advanced Studies (2012), accessed Aug. 6, 2014, http://cadmus.eui.eu/bitstream/handle/1814/23914/RSCAS_2012_49.pdf?sequence=1.

¹¹ Denis McQuail, “Democracy, Media and Public Policy,” in *Media and Open Societies: Cultural, Economic and Policy Foundations for Media Openness in East and West*, ed. Jan van Cuilenburg and Richard van der Wurff (Amsterdam: Het Spinhuis, 2000), 258.

¹² Chantal Mouffe, “Democracy in a Multipolar World,” *Millennium – Journal of International Studies* 37 (2009): 551.

¹³ Viķe-Freiberga, Däubler-Gmelin, Hammersley, and Maduro.

¹⁴ Katharine Sarikakis, “Serving Two Masters: The Roles of the Market and European Politics in the Governance of Media Transformations,” in *Understanding Media Policies. A European Perspective*, ed. Evangelia Psychogiopoulou (New York: Palgrave Macmillan, 2012), 247-256.

“citizens’ communication rights” which could include: “rights to information, orientation, social and cultural communality, and self-expression.”¹⁵

Media pluralism has a close relation with *media freedom* and both concepts are often described as building and sustaining a democratic society while complementing each other.¹⁶ Both participate in the creation of freedom of speech, freedom of information, and freedom of expression and deliberation. The role of media is emphasized in *media freedom* as offering the “possibility to express oneself and to access information” and in *media pluralism* with the “degree of outreach of this freedom, i.e., the outcome being that every group in a society can enjoy this freedom.” In the end, media freedom is described as a “necessary pre-condition for the proper functioning of [a] pluralistic media system.”¹⁷

The evolution of the *media pluralism* concept needs to be further embodied in regulatory frameworks. Here, Klimkiewicz emphasizes the functional differentiation of media pluralism into an inclusive approach and an autonomous approach. In the inclusive approach, media is identified as “connected with the social and political organizations” while “media pluralism is to be best structured and achieved at the level of a media system as a whole.”¹⁸ Moreover, media pluralism is seen as a “fundamental condition for a public sphere formation.” In the autonomous approach, media is identified with an increase in the “growth of professional norms [and] self-regulation” and “media autonomy from a political system but not from economic forces.”¹⁹ This theoretical framework, based on the inclusive and autonomous approaches of media pluralism, has been chosen for the present analysis of EU media policy mainly because this draws “to a certain extent, main and conflicting lines between European institutions and pressure groups incapable of establishing a common *modus operandi* concerning the regulatory framework for securing media pluralism in Europe.”²⁰ Therefore, this framework can help in discerning the different positions in regard to the protection of media pluralism, and specifically those described in this article as related to EU action on the independence of NRAs.

Moreover, this theoretical framework is useful because it focuses on relations with society, taking into consideration not only the initiatives of different regulatory stakeholders, like the European Commission or the European Parliament, but also those of civil society via the opinions and positions of different media groups and trade organizations. The positions of these stakeholders have been analyzed in light of their reactions to the relevant policy documents and to a recent consultation by the Commission on the independence of the national regulatory agencies. A focus on the reactions of civil society and industry groups regarding the protection of public objectives can provide a better picture of media policy trends and discussions in relation to the protection of media pluralism, including as many stakeholders as possible.

¹⁵ Hannu Nieminen, “Towards Democratic Regulation of European Media and Communication,” in *Media Freedom and Pluralism. Media Policy Challenges in the Enlarged Europe*, ed. Beata Klimkiewicz. (Budapest: Central European University Press, 2010), 23.

¹⁶ Centre for Media Pluralism and Media Freedom.

¹⁷ Ibid.

¹⁸ Klimkiewicz, 50.

¹⁹ Ibid.

²⁰ Ibid.

THE ROLE OF NRAs IN A DEMOCRATIC SOCIETY AND IN THE PROTECTION OF MEDIA PLURALISM

One of the central functions of NRAs is “to protect the broadcasters from control and influence exercised by political interests, governmental and otherwise: the independence of the agency safeguards that of the broadcaster.”²¹ Furthermore, their role translates into the need to ensure effective and consistent market regulation and also to ensure the protection of human rights.²² As Herold emphasizes, the “emergence of the independent regulators [...] [is] considered to be the reduction in the capability of the state to exercise ‘economic boundary control,’ the emergence of transnational businesses interests beyond traditional ‘international’ commercial activities and the increasing fiscal stress of states.” Moreover, Herold argues that the need for NRAs is mostly due to the increased development of private television services and the attendant requirement to have an independent monitoring body between the different interests at the regulatory level.²³

The establishment of the NRAs in the 1980s, according to Irion and Radu, aimed to protect both public and commercial television stations from political influences.²⁴ This was the time when commercial televisions expanded in Europe, which added weight to the growing political argument for liberalization and deregulation. The first countries to institute national independent regulatory agencies for the broadcasting sector were United Kingdom (1954), Germany (1980), and France (1982). Other countries followed and instituted NRAs, with the main argument being that “governments were compelled to create new regulatory authorities to oversee the broadcasting sector and move away from political control.”²⁵ At the time of writing, the 28 EU Member States have instituted NRAs for the audiovisual media as independent bodies or together with other competition-related bodies, but it is difficult to ascertain how many of these NRAs are actually independent from economic and political influences. The latest study on NRAs in the EU Member States is the 2011 INDIREG study by the Hans Bredow Institute for Media Research, commissioned by the European Commission. The INDIREG study revealed that only 23 out of 28 EU member states had created independent regulatory bodies in line with the requirements of the EU’s legal framework.²⁶

The role of the NRAs is both market-oriented and communication rights-oriented. Their independence is regarded as the main objective to be reached in order for them to conduct their role in a correct and transparent manner.

²¹ Serge Robillard, *Television in Europe: Regulatory Bodies, Status, Functions and Powers in 35 European Countries* (Bedfordshire, UK: University of Luton Press, 1995), viii.

²² INDIREG, “Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive,” final report, Feb. 2011, accessed Aug. 6, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4703.

²³ Herold, 261.

²⁴ Kristina Irion and Roxana Radu, “Delegation to Independent Regulatory Authorities in the Media Sector: A Paradigm Shift through the Lens of Regulatory Theory,” in *The Independence of the Media and its Regulatory Agencies. Shedding New Light on Formal and Actual Independence against the National Context*, ed. Wolfgang Schulz, Peggy Valcke, and Kristina Irion (Bristol, UK: Intellect, 2013), 14.

²⁵ Ibid.

²⁶ INDIREG, 96-169.

INDIREG noted that a regulator is “independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary.”²⁷ This translates into being financially and politically independent in order to build the central function of regulating and supervising the media and their content without economic and political influences. The separation of NRAs from the central authority of the state leads to increased independence in exercising their role in an impartial way, separate from political trends or coalitions. Moreover, institutionalization of NRAs has to come with economic independence, which in turn must be established from the beginning. Irion and Radu consider independent media supervision as “best understood against the background of a democratic country’s responsibility to observe and give full effect to the fundamental right to freedom of expression, from which media liberties are derived.”²⁸ This definition emphasizes the role of independent regulators in supervising audiovisual programs and protecting the rights of minors and human dignity, and ensuring non-discrimination and the enforcement of advertising rules. Ultimately, impartiality and transparency when protecting these values strengthens media pluralism.²⁹

Table 1: The relationship between an NRA’s independence and its contribution to protection of media pluralism.

	Independent from	Preserving Media Pluralism
NRAs	Economic Influences	⇒ Plurality of Voices = External Pluralism
	Political Influences	⇒ Freedom of Information and Expression = Internal Pluralism

This relationship is better understood by starting with the definition of media pluralism advanced by Klimkiewicz, who argues that “Media pluralism is to be best structured and achieved at the level of [the] media system as a whole, through the existence of a range of media outlets or organizations reflecting the points of view of different groups or cultural representations, rooted in different traditions of a society.”³⁰

Therefore, an NRA that is independent from economic influences can translate into safeguarding a plurality of voices and a range of media outlets, while independence from political influences can safeguard the presence of different voices and opinions that can allow freedom of information and expression in society. If, from the beginning, the main objective of establishing the NRA is separation from political influences, this should also include economic separation from the state and other market

²⁷ Ibid., 5.

²⁸ Irion and Radu, 16.

²⁹ European Commission, “Commission Staff Working Document: Media Pluralism in the Member States of the European Union,” white paper, SEC(2007) 32, Jan. 16, 2007, accessed Aug. 6, 2014, http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf.

³⁰ Klimkiewicz, 50.

influences – a requirement that should be enshrined in EU regulations like the Audiovisual Media Services Directive (AVMSD), which is currently under revision. The political and economic independence of the NRAs directly influences their role in ensuring the same independence for audiovisual media.

There are two national cases that illustrate the need for an independent NRA: Italy and Hungary. The Italian case is a recurrent one, emphasized many times by the European Parliament. For example, in 2009 the Parliament stated: “Concerns have grown in Italy over the last few months owing to the enduring conflict of interests with reference to the Prime Minister’s media ownership and political control of both major private and public media, including control over how advertising resources are allocated.”³¹ This concern refers to the country’s internal situation and also to possible extension to the European sphere and the overall protection of human rights. The powers of the regulatory body in Italy – *Autorità per le Garanzie nelle Comunicazioni (AGCOM)* – are limited to monitoring internal and external pluralism. AGCOM can fine broadcasters that do not comply with legal provisions for pluralism,³² but its influence over political conflicts of interest, as pointed out by the European Parliament, is rather limited.

The Hungarian case arose more recently, in 2010, with the politically-driven Media Authority and Media Council, which implied direct political control by government over the media. Members of the Media Council were selected exclusively by the governing super-majority in the national Parliament. Furthermore, the Hungarian press and media law, Act CLXXXV of 2010, conflicted with the AVMSD – in particular with the “country of origin principle” – because it was extended to media originating in other Member States. This infringement would have directly affected the single market objective of the AVMSD. Additional concerns included the appointment of one person to act as the national media and telecommunications authority, and some vague provisions about limitations on confidentiality of journalistic sources or the possibility of the media authority demanding data from media providers in ways that directly affect freedom of expression. The European Parliament proposed minimum rules to be approved by the Member States and harmonized throughout Europe in response. These include the establishment of an EU-level group for audiovisual media services monitoring by the national regulatory agencies and harmonizing the status of those agencies to be “independent, impartial and transparent [...] and that they have appropriate sanctioning powers.”³³

The Council of the European Union aligned itself with this approach: “The independence of regulatory bodies from governmental influence is a vital condition for free and independent media to

³¹ European Parliament, *Motion for a Resolution on Media Freedom and Media Pluralism in Italy*, Resolution B7-0093/2009, Oct. 14, 2009, accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2009-0093+0+DOC+XML+V0//EN>.

³² Núria Almiron, Carles Llorens, Ana I. Segovia, Juan José Bas, Helena P. Grau, and Roberto Suárez, “External Pluralism Protection in Five EU Countries and the US: The Regulatory Authorities’ Views,” *Observatorio Journal* 6 (2012): 140-141.

³³ European Parliament, *On the EU Charter: Standard Settings for Media Freedom across the EU*.

flourish [...] [NRAs] should be free from direct political influence and should have a positive obligation to protect human rights, including freedom of expression.”³⁴

The diminishing power of the NRAs in Italy and Hungary has resulted in increased political pressure on the media and conflicts of interest. Therefore, the political environments in these countries fail (in part) to protect media pluralism and human rights. With this in mind, there is an increased need to consider the possible role of the European Commission in ensuring and strengthening the powers of NRAs in further contributing to the construction of a democratic society.

THE EUROPEAN INITIATIVE FOR MEDIA PLURALISM (EIMP), 2012-2013

This is a new initiative, made possible by the inclusion of the Citizens’ Initiative in EU legislation via the Treaty of Lisbon (2009). There is no other precedent on the promotion of the importance of media pluralism coming directly from citizens at the European level. The effort to attract the participation of one million citizens through their signatures has the potential to create public awareness on the issue of media pluralism. Until now, the debate has been conducted at the EU institutional level where political discourse has not offered great chances for popularization.

The registration process at the site of the European Citizens Initiative³⁵ has as a main objective the addition of amendments to the AVMSD, or a new directive, for partial harmonization of national rules on media ownership and transparency, and setting EU standards for the sufficient independence of media supervisory bodies, based on internal market principles.

The main elements advanced in this proposal for EU audiovisual policy are:

- Member states should adopt measures needed to ensure pluralism.
- Member states should ban the creation and retention of dominant positions in media markets and related markets.
- A clear rule shall establish an incompatibility between the media sector and political activities.
- Clear rules to require Member States to invest in independent authorities with powers to apply the rules and guarantee their independence vis-à-vis economic and political influence.

In the final element, the argument builds from “famous and recent cases” (e.g. Hungary’s media law) in which the European Commission “hit the wall” of the legal gap between the need for action and the power to take it. This initiative is trying to fill the gap by advancing the needed legal “guarantee of the independence of the media supervisory bodies.”³⁶

³⁴ Council of the European Union, “EU Human Rights Guidelines on Freedom of Expression Online and Offline,” meeting minutes, May 12, 2014, accessed Aug. 7, 2014, http://ec.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf.

³⁵ European Commission, The European Citizens Initiative.

³⁶ Ibid.

The proposal would implement measures needed to ensure pluralism along with the independence of media supervisory bodies. The proposal does not go into detailed explanations of what kind of measures are required from the Member States to “ensure pluralism.” The initiative is based on the internal market argument, and therefore it is difficult to see how it could ensure pluralism of media content. However, if it succeeds this document could prove very influential in the European Union media pluralism policy agenda compared to the three European Commission media policy mandates developed from 2000 to the present (discussed below).

In conclusion, the independence of the NRAs is included in the EIMP with tools that can better sustain media pluralism in the Member States and at the EU level, placing this initiative in a positive supporting spot, in line with the positions of the High Level Group on Media Freedom and Media Pluralism (HLGMFP) and the Centre for Media Pluralism and Media Freedom (CMPF).

THE EUROPEAN PARLIAMENT RESOLUTION ON THE EU CHARTER: STANDARD SETTINGS FOR MEDIA FREEDOM ACROSS THE EU, 2013

The resolution on standards for media freedom – from the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament – calls on both the European Commission and Member States to take “appropriate, timely, proportionate and progressive measures where concerns arise in relation to freedom of expression, information, media freedom and pluralism in the EU and in its Member States.”³⁷

The resolution calls on Member States to ensure the independence of NRAs: “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.”³⁸ The resolution also calls on the European Commission “to take measures to support the independence of the media and its regulatory agencies, from both the state (including at the European level) and from powerful commercial interests.”³⁹

The motion was adopted with a majority of 539 votes, with 70 opposed and 78 abstentions, in May 2013. In the next section of this article, the European Initiative for Media Pluralism (EIMP) for the protection of NRAs is analyzed, showing a clearer position on what kinds of specific actions can be taken by the Member States and the European Commission to protect media pluralism and also to ensure the independence of NRAs.

³⁷ European Parliament, *On the EU Charter: Standard Settings for Media Freedom across the EU*.

³⁸ *Ibid.*, Article 2.

³⁹ *Ibid.*, Article 9.

THE EUROPEAN COMMISSION AND THE INDEPENDENCE OF AUDIOVISUAL NATIONAL REGULATORY AGENCIES

The Audiovisual Media Services Directive (AVMSD) does not guarantee the independence of the national regulatory agencies. However, the first draft of the AVMSD contained the obligation of Member States to have independent regulatory bodies for media.⁴⁰ The aim was to create a separation between those that create the rules and the actual enforcement by those that apply the rules. As a result, according to Article 23b of the first draft of AVMSD directive: “1. Member States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently. 2. National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive.”

However, Article 23b was forcefully rejected by Germany at a European Council meeting discussing the European Commission’s first proposal for the amendment of the earlier Television Without Frontiers Directive (TVWFD), due to that country’s highly decentralized federal system of media governance based on Lands (Länder-federal states).⁴¹ However, the measure was incorporated in Article 30 of the AVMSD: “Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of this Directive, in particular Articles 2, 3 and 4, in particular through their competent independent regulatory bodies.”⁴²

The change in wording in the AVMSD resulted in no obligation for the Member States to ensure the independence of the audiovisual national regulatory bodies. The final wording of the AVMSD is so weak that it does not even include a requirement for the Member States to actually have NRAs that protect media rights “impartially and transparently,” compared to the first draft of the directive. Finally, the AVMSD’s ultimate wording washes out the importance that was given to NRAs by the European Commission in the first place, while focusing only on cooperation among the existing NRAs, which takes the form and shape imposed by each Member state.

After the adoption of AVMSD, the European Commission commissioned a study by the Hans Bredow Institute/INDIREG titled “Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive” to provide “regulators, member states and European institutions with a tool for self-assessment of independence and effective functioning.”⁴³ This study found that for impartiality to become a reality, “a minimum requirement of independence”⁴⁴ is needed in order to function against influences from the government in power, different political parties, and the media sector. Second, the report points out a failure in AVMSD Article 30. When referring to the cooperation between the

⁴⁰ European Parliament, *Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC* (2007), accessed Aug. 7, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=312.

⁴¹ Herald, 264.

⁴² European Commission, Audiovisual Media Services Directive, Article 30.

⁴³ INDIREG, 6.

⁴⁴ *Ibid.*, 354.

regulatory bodies of the member states, this article focuses only on the existing regulatory bodies and their cooperation and does not mention the situation when one country has no such regulatory body in place: “If an independent regulatory body has not been established in the Member State, an obligation to establish such a body does not follow from Art. 30 [of the] AVMS Directive.”⁴⁵

Various subsequent reports commissioned by the European Commission reflect the importance of the independence of the national regulatory authorities for the audiovisual environment. A report by the High Level Group on Media Freedom and Pluralism stated that national audio-visual regulatory authorities “should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances” (Recommendation 6).⁴⁶ The European Citizens’ Initiative for Media Pluralism articulates the significance of independent media supervisory bodies by citing the situation in Hungary in 2010: “Had this proposal of the Commission become part of the AVMSD some years ago, it would have been a clear and enforceable rule that members of the Media Council in Hungary could not have been selected exclusively by the governing super-majority in the national Parliament.”⁴⁷

Furthermore, the policy report by the Centre for Media Pluralism and Media Freedom (CMPF) notes that the importance of independent regulatory bodies is also increased by the “legal issues raised by new technologies.”⁴⁸ The idea is exemplified by regulation of the Internet and copyright infringement, because “only independent authorities could be entrusted to decide cases where fundamental rights are at stake.”⁴⁹ The figure below illustrates the history of the European Commission action on NRAs.

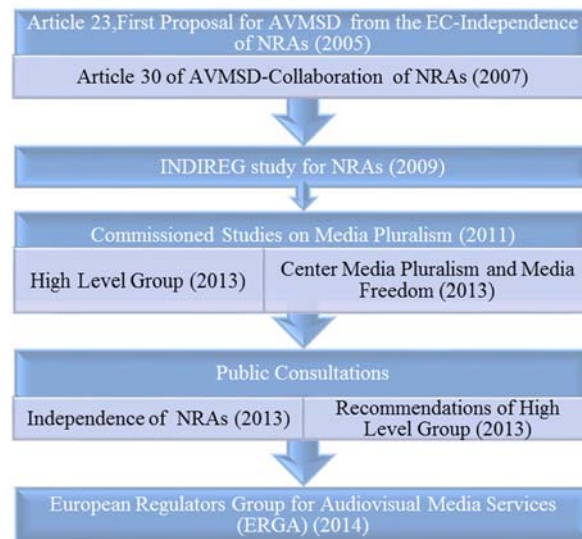


Figure 1: EC initiatives related to Pluralism and NRAs (2005-2014)

⁴⁵ Ibid., 356.

⁴⁶ Viķe-Freiberga, Däubler-Gmelin, Hammersley, and Maduro, 22.

⁴⁷ European Commission, The European Citizens Initiative.

⁴⁸ Centre for Media Pluralism and Media Freedom, 77.

⁴⁹ Ibid.

The High Level Group on Freedom and Pluralism of the Media

Here we will analyze the approach on pluralism and the independence of the NRAs from the point of view of the High Level Group on Media Freedom and Media Pluralism (HLGMFP), found in the January 2013 document “A Free and Pluralistic Media to Sustain European Democracy,”⁵⁰ which contains 30 recommendations.

The HLGMFP is a small independent group of experts formed in November 2011 by Commissioner Viviane Reding. It was invited to analyze and provide recommendations on “limitations to media freedom from political, private and commercial interferences; the relation between media concentration and media pluralism, the situation of journalists and the status of regulatory authorities.”⁵¹

The work of the HLGMFP was based on a process of fact finding by four different specialists, none of whom worked in media policy. One member worked at the EU Court of Justice (Prof. Luís Miguel Poiares Pessoa Maduro); two were politicians – the former Minister of Justice for Germany (Herta Däubler-Gmelin) and the former President of Latvia (Prof. Vaira Vīķe-Freiberga); and the last is journalist Ben Hammersley, editor of *Wired* magazine. This choice of the members of the HLGMFP from outside media policy expertise was both an advantage and a disadvantage: “It lowered the risk of repeating conventional wisdom, while it increased the risk of misjudging priorities.”⁵²

One of the reasons for the establishment of the HLGMFP was the situation in Hungary. The Media Constitution and Media Act adopted in Hungary in December 2010 had received a lot of criticism from EU institutions and the public, mainly concerning the new Media Authority and the procedures to appoint its members, and its possible control by politicians in power. The proposed law conflicted with the AVMSD and in particular with the “country of origin” principle as noted above, the infringement of which would have directly affected the single market objective of the AVMSD.

The European Commission was unprepared for the changes to Hungarian media law, mainly due to the narrow space that the AVMSD offered for taking action against Hungarian legislators. Therefore, Commissioner Neelie Kroes had to rely on political pressure from civil society and the support of the European Parliament. As a result of this combined pressure, the Hungarian authorities accepted an amendment to the Media Law in February 2011, reflecting the concerns generated by Commissioner Kroes. However, this situation inspired a debate about the lack of power of the European institutions in respect of Member States when media pluralism and media freedom are clearly affected.

Shortly after the presentation of the report, Commissioner Kroes launched a 12-week open consultation for other stakeholders. It is important to stress the careful phrasing of a possible future

⁵⁰ Vīķe-Freiberga, Däubler-Gmelin, Hammersley, and Maduro.

⁵¹ European Commission, “Digital Agenda: High-Level Group on Media Freedom and Pluralism,” press release, Oct. 11, 2011, accessed Aug. 7, 2014, http://europa.eu/rapid/press-release_IP-11-1173_en.htm?locale=en.

⁵² Mark Thompson, “Protecting Media Pluralism in Europe: Signs of Progress,” blog post, Open Society Foundations, Feb. 1, 2013, accessed Aug. 7, 2014, <http://www.opensocietyfoundations.org/voices/protecting-media-pluralism-europe-signs-progress>.

decision that could be made by the European Commission from this consultation process: “The decision of any possible follow-up actions will be based on an in-depth analysis of the competences of the European Union.”⁵³

The consultation gathered 457 comments from all parts of society. Highly significant among these were: regulatory authorities (10 comments), industry (9 comments), trade associations (20 comments), and non-governmental organizations (18 comments).

The most controversial recommendation of the HLGMPF report was related to the role of the European Union concerning media freedom and pluralism: “The EU should be considered competent to act to protect media freedom and pluralism at State level in order to guarantee the substance of the rights granted by the Treaties to EU citizens, in particular the right to free movement and representative democracy.”⁵⁴

The consultation revealed strong support for this recommendation from the Digital Civil Rights in Europe Association (EDRI), the Peace Institute, and five signatories from Hungarian organizations who explicitly addressed the issue: “we [...] agree unreservedly with the expansion of the European Union’s margin of appreciation with regard to media.”⁵⁵ EDRI added that the “The EU should set a minimum standard for countries to comply with, but also allow them, as usual, to implement a stronger level of protection if they wish to do so.”⁵⁶ The strongest support for this recommendation came from Alliance Internationale de Journalistes, which advocates: “a new Directive aiming at a partial harmonization of national rules on media ownership and the sufficient independence of the media supervisory bodies as necessary steps towards the correct functioning of the internal market.”⁵⁷

A more balanced reaction in favor of this recommendation came from the Association of Community Radio Broadcasters Europe (AMARC) and the Red de Medios Comunitarios (Spanish Community Media Network), which advised that any harmonization action by the European Union must be in conformity “with the work of other international organizations, in particular the Council of Europe (CDMSI), Organization for the Security and Co-operation in Europe (OSCE), United Nations Educational, Scientific and Cultural Organization (UNESCO) and a reference to relevant existing standards and policies.”⁵⁸

On the other hand, there were voices opposed to this first recommendation. The European Broadcasting Union (EBU) considered any extension of EU competencies unnecessary on the basis

⁵³ European Commission, “Public Consultation on the Independent Report from the High Level Group on Media Freedom and Pluralism,” July 15, 2013, accessed Aug. 7, 2014, <http://ec.europa.eu/digital-agenda/en/node/54482>.

⁵⁴ Viķe-Freiberga, Däubler-Gmelin, Hammersley, and Maduro, 11.

⁵⁵ The Hungarian organizations included the Center for Independent Journalism (CIJ), Hungarian Civil Liberties Union (HCLU), Hungarian Europe Society (HES), Mertek Media Monitor, and South East European Network for Professionalization of Media (SEENPM). European Commission, “Contributions Received from NGOs,” public comment document (compilation), unknown date, accessed Aug. 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2711, 17.

⁵⁶ *Ibid.*, 42.

⁵⁷ *Ibid.*, 46.

⁵⁸ *Ibid.*, 1.

that such an action “could not take into account the diverse cultural and national issues involved.”⁵⁹ This view was shared by the Association of Commercial Television in Europe (ACT).⁶⁰ It is noteworthy that two organizations that usually have opposing traditions on EU media policy, the EBU and ACT, have the same position on the recommendation, opposing what would be viewed as supra-regulation. Additionally, the European Association of Radios (Association Européenne des Radios, AER)⁶¹ and The Newspaper Society, a UK organization,⁶² argued that the EU should limit the regulation regarding these issues to competition policy and state aid law.

One of the most stridently negative reactions against the recommendation came from press associations: the European Magazine Media Association (EMMA), the European Newspapers Publishers Association (ENPA), and the European Publishers Council (EPC). The EPC argued that “Any notion of harmonized rules of the game, monitored by the EU, is anathema to press freedom – the very thing the group was tasked to protect.” Additionally, the EPC infers that while “we don’t need new media regulation” it is important to recognize “the right market conditions for the long term viability of quality journalism and professional media.”⁶³

As a summary of the reactions to this recommendation, most non-governmental associations and civil society associations supported it without lengthy discussion. On the other side, trade organizations, public service broadcasters, and industry were against it, while referring to prior EU law and subsidiarity legislation supported by the Amsterdam Treaty. These groups suggest solutions like monitoring and self-regulation.

Another debated and highly contested recommendation of the HLGMPF report was the recommendation to create “A network of national audio-visual regulatory authorities [...], on the model of the one created by the electronic communication framework. It would help in sharing common good practices and set quality standards. All regulators should be independent, with appointments being made in a transparent manner, with all appropriate checks and balances.”⁶⁴

This recommendation did not trigger many reactions from respondents. However, there were a few comments from the AER, the European Magazine Media Association (EMMA), Discovery, and Google. These trade associations and companies were in favor of the independence of NRAs. AER suggested that the European Platform for Regulatory Authorities (EPRA) was a “good tool to already exchange on good practices and on quality standards.”⁶⁵ The trade associations and companies stated their support for exchange of knowledge by NRAs but they did not support the extension of the competences of regulatory bodies to media pluralism. This extension to media pluralism is viewed by

⁵⁹ European Commission, “Contributions Received from Trade Associations,” public comment document (compilation), unknown date, accessed Aug. 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=3230.

⁶⁰ *Ibid.*, 11.

⁶¹ *Ibid.*, 14.

⁶² *Ibid.*, 158.

⁶³ *Ibid.*, 134.

⁶⁴ Viķe-Freiberga, Däubler-Gmelin, Hammersley, and Maduro, 22.

⁶⁵ European Commission, “Contributions Received from Trade Associations,” 18.

the press sector as in conflict with the EU Treaty: “[...] including media pluralism within the competences of audio-visual regulatory bodies would empower them to touch upon issues connected directly or indirectly to the press, contrary to the EU Treaty.”⁶⁶

Despite the recommendation of the HLGMPF for the cooperation of NRAs, following the model of the electronic communication framework, there is no reference in these few comments to the efficacy of this kind of model for audiovisual media. All four contributions hint towards the support of the independence of NRAs and collaboration in the exchange of best practices, but they are reluctant to comment on the extension of the role of NRAs towards media pluralism and media freedom.

The opposition from Member States to the two recommendations described here is based on the matter of protection of cultural identities, which is a national issue, and therefore the principle of subsidiarity applies. This principle “seeks to ensure that, in areas of non-exclusive Community responsibility, decisions are taken at the most appropriate level. As a result, in these areas, tests must be carried out to ensure that Community action is justified with regard to the options available at national, regional or local level.”⁶⁷

However, this does not guarantee a formula in closing the gap between the positive benefit for society of the NRAs’ independence and collaboration, and the actual real protection of public interest objectives of freedom of expression and freedom of information through media across the EU.

The Centre for Media Pluralism and Media Freedom

The Centre for Media Pluralism and Media Freedom (CMPF) was established in December 2011 at the European University Institute (EUI) in Florence, and received a one-year, €600,000 grant from the European Commission. The CMPF was expected to not only develop “new ideas on how to ensure a highly diverse and free media, and work to enhance the quality of the reflection on media pluralism in Europe,” but also to prepare a document on the competencies of the European Commission for media pluralism in Europe.⁶⁸

The CMPF gathered media researchers (Andrea Caldero, Alina Dobрева) as well as researchers specializing in media and cultural economics (Gillian Doyle, Giovanni Gangemi) and media regulation (Peggy Valcke, Damian Tambini, Elda Brogi, Paula Gori). Compared with the HLGMPF, where the experts were outside the media sphere, the CMPF was made up of media experts from different specializations, allowing a detailed examination of the dynamics of media pluralism and media freedom in the EU to be undertaken.

⁶⁶ Ibid., 92.

⁶⁷ European Union, Committee of the Regions, “The Committee of the Regions’ White Paper on Multilevel Governance,” white paper, June 2009, accessed Aug. 15, 2014, <http://web.cor.europa.eu/epp/Ourviews/Documents/White%20on%20MLG.pdf>, 26.

⁶⁸ European Commission, “Digital Agenda: Commission Awards €600,000 for New Centre for Media Pluralism and Media Freedom,” press release, Nov. 7, 2011, accessed Aug. 7, 2014, http://europa.eu/rapid/press-release_IP-11-1307_en.htm.

In January 2013 the CMPF published a policy report titled “European Union Competencies in Respect of Media Pluralism and Media Freedom.” The executive noted that “Even if EU competencies sometimes appear to be scattered and residual in respect of the Member States, the European Union has not been, and cannot be, ‘neutral’ on the issue of media freedom and pluralism.”⁶⁹ The document’s basic argument is that under EU media regulation, cultural aspects have to be taken into account alongside economic criteria. The last chapter of the document presents possible legal actions for the protection of media pluralism, like competition, culture, and internal market harmonization – highlighting the role of NRAs and the EU Fundamental Rights Agency for action in case of rights breaches.

Regarding the independence of NRAs in implementing the AVMSD, the document suggests a powerful solution: a network of NRAs similar to the “institutional requirements and networks foreseen in the Electronic Communication Package.”⁷⁰ This initiative, even if it does not provide for EU oversight or the regulation of media pluralism, “could help to develop common guidelines and soft regulation on the issue.”⁷¹ It can be described as a soft regulation measure as opposed to hard regulation because it needs some institutional requirements for the existence of the network, which would exclude voluntary participation. The creation of a network of national regulators for the audiovisual sector with compulsory participation infers that an extension of the regulatory powers of the EU over media pluralism and media freedom is not needed in the short-term. It follows, in a fashion, the direction of the proposal of the HLGMPF for a network of NRAs and some of the contributors to the public consultation discussed above.

The European Commission Consultation on the Independence of NRAs

The objective of this consultation⁷² was twofold: an analysis of the views of citizens, organizations, and public authorities regarding the independence of audiovisual regulatory bodies when the AVMSD is implemented; and an exploration of the need for and potential viability of a hard regulatory solution for NRA independence at the EU level, including “a possible revision of Article 30 of the AVMSD.”⁷³

The European Commission presented two possibilities: a “status-quo option” on one side and “action option” on the other side. The “action option” comprises a number of parts: a non-legislative option, based on a stronger monitoring of the actual situations in the Member States; a legislative option in the form of an addition to Article 30 of the AVMSD to codify the clear independence of national regulatory agencies into law; and a further legislative option including detailed measures to ensure independence, supplemented by the “formalization of the Working Group of Audiovisual Regulatory Authorities.” A relevant point here is that a formally legal network of NRAs would lead to cooperation and coordination of the NRAs in all EU member states, which ultimately would work towards the protection of the internal market in the EU.

⁶⁹ Centre for Media Pluralism and Media Freedom, 10.

⁷⁰ Ibid. 115.

⁷¹ Ibid.

⁷² European Commission, “Public Consultation on the Independence of Audiovisual Regulatory Bodies.”

⁷³ Ibid.

The most important aspect of the consultation concerns the division made between the respondents regarding the type of cooperation that would be entailed: voluntary or legally-mandated. All thirteen NRA participants expressed the need for voluntary cooperation, while six member states (Belgium, Finland, Greece, Ireland, Portugal, and Romania) also opted for legally-mandated cooperation. There were also some comments in favor of legally-mandated cooperation, like those from the European Initiative for Media Pluralism (EIMP), Grupo de Investigación en Derechos Fundamentales (Group for Research on Human Rights, Spain), and the Social Party in Hungary. Table 2 below shows the responses to Question 8 of the consultation, which concerned the appropriateness of various types of cooperative arrangements.⁷⁴

Table 2: Correspondent positions on the collaboration of NRAs.

Legally Mandated Collaboration	Voluntary Collaboration
EIMP	Industry
Grupo de Investigación en Derechos Fundamentales	Majority of Regulatory bodies
Social Party in Hungary	Member States

This clearly shows that only a few stakeholders support legally-mandated collaboration by the NRAs, and the most influential (from a legislative point of view) in shaping the EU legislation, like the Member States and industry, only support voluntary collaboration. The idea of “no competence” in regulating media ownership at the EU level is shared by the industry, which argues that the EU should limit regulation to competition policy and state aid law. EU harmonization could impose uniform rules over linear and non-linear media services, which are under different standards of regulation under the Audiovisual Media Services Directive, thereby altering the current economic parameters of the media business in Europe.

The positions of member states and industry indicate another barrier in taking a step towards the formation of a group of NRAs with strengthened power. Moreover, these positions reflect a lack of acceptance of the argument that benefits will accrue from fully ensuring independent NRAs. There should be no confusion between having a voluntary group of NRAs formed at the EU level and the actual participation of independent NRAs. A gap still persists between the public interest objectives that the European Commission and its groups of experts want to achieve and the political reality.

⁷⁴ European Commission, “Public Consultation on the Independence of Audiovisual Regulatory Bodies,” questionnaire (2013), accessed Aug. 8, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4402, 14.

One of the more prominent questions in the consultations addressed the connection between the independence of NRAs and the protection of freedom and pluralism of media: “In your view, what is the impact of a lack of independence of regulatory bodies when acting within the scope of the AVMSD on the freedom and pluralism of the media and the markets in which they operate?”⁷⁵ The majority of answers from the member states argued that this would “significantly worsen” media freedom, media pluralism, and market efficiency – all three elements of the initiative.

Responses unanimously acknowledged the need for the independence of audiovisual regulators and the relevance of cooperation between these regulators in order to protect pluralism. There is, however, no agreement on the nature of collaboration, with respondents leaning toward voluntary collaboration that is not legally mandated by the European Commission.

Thus, the responses received from the consultation on the independence of audiovisual regulatory bodies did not result in support for the objectives of the European Commission, especially in searching for possible legal solutions to reinforce the position of NRAs, and consequently to achieve the protection of media pluralism and public interest objectives.

Most of the responses from media organizations and national regulatory organizations, do not support a supervisory or monitoring role for the European Commission. There are only a few exceptions, with six countries supporting a “legally mandated gathering of competent regulatory bodies” at the EU level as “very appropriate.” Respondents generally oppose the coordination of a network of audiovisual regulatory authorities by the EU, while only supporting voluntary cooperation. This leads to a high number of respondents choosing the non-legislative option from the three actions proposed by the EC. However, the majority of respondents still considered a lack of independence of regulatory bodies as a threat to media freedom, media pluralism, and market efficiency.

The studies used by the European Commission as a basis for this consultation represent a lot of scientific and legal evidence unearthed by researchers. However, the application of these recommendations under any legal mandate is politically unrealistic at the level of the Member States. There is also a message in the lack of responses: only thirteen representatives of NRAs sent their answers to the consultation, a sign of distancing from any debate that could bring a solution to the table other than the voluntary cooperation option. Therefore, the gap is not in the reality of the actual existing independence of the NRAs and its theoretical requirements; an example of this is the Ministry of Education, Culture and Science in the Netherlands,⁷⁶ which can be generalized for all Member States. The key issue is a lack of interest in striving for regulatory independence through legally-mandated cooperation at the EU level. Were the latter to occur, a clear ground would be created for the exchange of practices with other Member States, which could unearth problems caused by the lack of independence of national regulatory agencies.

⁷⁵ *Ibid.*, 16.

⁷⁶ Ministry of Education, Culture and Science (The Netherlands), “Answer of the Netherlands Government to the Public Consultation on the Independence of Audiovisual Regulatory Bodies,” public comment document (2013), accessed August 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2471, 20.

It appears that Member States are reluctant to openly and constantly protect the independence of the audiovisual regulatory bodies, or to protect media pluralism through them. Given that voluntary cooperation is the most emphasized option, solutions are needed to achieve universal voluntary participation from all 28 EU member states. This cooperation at the EU level could provide standards of cooperation applicable in the EU member states. It might be a first step toward achieving a legally-mandated network of audiovisual media regulation should the experience of voluntarism point towards the necessity of creating it.

The table below takes into consideration all the contributions to the public consultation, policy documents, and academic initiatives discussed in this article, to illustrate the positions of all these stakeholders concerning the independence of NRAs.

Table 3: Positions on NRA independence by EU institutions, member states, and civil society groups.

Legally Mandated Collaboration	Voluntary Collaboration	Model Electronic Communication Framework Collaboration
EIMP	EP	HLGMFP
Grupo de Investigación en Derechos Fundamentales	Industry	CMPF
Social Party in Hungary	Regulatory bodies and Member States	

In an important development, the European Commission took a first step towards the formal establishment of the first group of EU Regulatory Authorities in the field of Audiovisual Media Services in February 2014. A first meeting was held with 27 representatives from the 28 EU countries, the exception being Germany, which due to its highly decentralized system based on Lands (Länder-federal states) could not make a decision before the first meeting on who would represent the country. Nevertheless, it appears that Germany will be present at future meetings, according to a European Commission official.⁷⁷ Organizationally at least, this can be considered a success for the Commission, given the low level of participation in the public consultation on the independence of NRAs as discussed above.

According to a Commission press release on the establishment of a European Regulators Group for Audiovisual Media Services (ERGA),⁷⁸ and to an official of the EC,⁷⁹ the main reason behind this action was to share good practices and set quality standards. It was the same advice given by the High

⁷⁷ Personal interview with an official of the DG CNECT, European Commission, July 4, 2014.

⁷⁸ European Commission, "Commission Establishes a European Regulators Group for Audiovisual Media Services," press release, Feb. 3, 2014, accessed Aug. 8, 2014, http://europa.eu/rapid/press-release_IP-14-101_en.htm.

⁷⁹ Personal interview with an official of the DG CNECT, European Commission, July 4, 2014.

Level Group on Media Freedom and Pluralism as discussed above: “A network of national audiovisual regulatory authorities should be created [...] It would help to share good practices and set quality standards. All regulators should be independent, with appointments being made in a transparent manner [...]”

The newly established group has an advisory relationship with the Commission aimed at ensuring “consistent implementation of the AVMSD and other related fields in which the Commission can act.” The group will also advise the Commission on the 2015 revision of the Audiovisual Media Services Directive. Regarding the relations between the different NRAs, the EU hopes the group will “facilitate cooperation between regulatory bodies in the EU, and will also allow for the exchange of experience and good practices.”⁸⁰

Moreover, according to a European Commission source, the group gives power to the NRAs to give opinions on the application and improvement of the AVMSD. Adopting a common opinion can translate to giving additional power to weak NRAs, which then could be better able to avoid national political and economic influences. Even if there will still be NRAs influenced by the political situations in their respective countries, the group will form common opinions that can lead to discussions that uncover the perspectives of Member States on key issues. Second, this group only comprises representatives of the NRAs and allows no political representations from different ministries in different Member States. This is very important since it enables further distancing from political influences, at least if they do not have a direct representation and presence in the group’s meetings. Third, the group allows for exchanges of best practices and provides an opportunity for less-independent NRAs to observe and learn from the more-independent ones to further facilitate their own independence. A key parameter of the group is that its membership must comprise “independent national regulatory authorities of EU Member States in the field of audiovisual media services”.⁸¹

However, there is no explicit reference to political and economic independence. This should be clearly mentioned in the future efforts of the group, especially related to the revision of the AVMSD. If both political and economic independence are considered to be part of the directive, this is the time and the opportunity for a formal expert group like the ERGA to have a common opinion and fight for this independence, as it will have a much stronger voice than the collective voices of several NRAs.

It is left to be discovered if the group will achieve the needed independence, transparency, and openness to all stakeholders in order to achieve the mission of cooperation and independent expert advice that are desired by the European Commission. The voluntary format of the group of national regulatory authorities in the field of Audiovisual Media Services does not yet include full cooperation from all Member States. Nevertheless, it is a real step towards having a collaboration of the NRAs

⁸⁰ European Commission, “Inaugural Meeting of the European Regulators Group for Audiovisual Media Services (ERGA),” press release, Mar. 4, 2014, accessed Aug. 8, 2014, <http://ec.europa.eu/digital-agenda/en/news/inaugural-meeting-european-regulators-group-audiovisual-media-services-erga>.

⁸¹ European Commission, European Regulators Group for Audiovisual Media Services, *Rules of Procedure of the European Regulators Group for Audiovisual Media Services*, procedural document (2014), accessed Aug. 8, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4910, 1.

from EU member states that could lead to more independence of the NRAs in those member states where there is no real political or economic independence, but only theoretical independence. This could happen through the exchange of best practices and bringing the specific circumstances of each Member State into the discussions of the ERGA group. These are factors that could contribute to realizing the Commission's goal: "Member States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently."⁸²

CONCLUSIONS

The independence of national regulatory authorities for the audiovisual media and its link with media pluralism has been subjected to increased debate in the European institutions in recent years, but did not result in a regulatory outcome. The debate resulted mostly in bringing the independence of the NRAs back onto the agenda of EU discussions after the weak wording in the AVMSD, and also after relying on soft-regulatory measures like the work of the HLGMPF and CMPF and the implementation of the ERGA group.

Prior to September 2013, Commissioner Neelie Kroes supported the idea of convening expert groups on the subject and duly received the work of two groups of experts on the objectives of media pluralism and media freedom. Kroes argues for a balanced solution: "When it comes to safeguarding a free and pluralistic media sector, there are threats for Media Pluralism from acting too much, and from acting too little."⁸³

In short, the initiatives of Commissioner Kroes towards media pluralism are only soft-regulatory in nature, fostering the intellectual roots of the debate and avoiding hard-regulatory initiatives. An example is the second report commissioned by Commissioner Kroes regarding the competencies of the EU in respect to media pluralism and media freedom, submitted by the Center for Media Pluralism and Media Freedom (CMPF), as discussed above. This report directly affirms that the EU cannot be "neutral" in regard to media freedom and media pluralism, and the improvement of EU competencies are necessary in order to have "a more consistent and active intervention" when needed. And the CMPF notes that action is needed from the EU to reduce the political and economic threats to media pluralism. But no legislative step has been taken, and nearly two decades have passed since Mario Monti's failed Media Ownership Directive of 1997.⁸⁴

It is also worth pointing out that all European Commission initiatives came after the situation in Hungary in 2010 that affected the independence of that country's NRA. However, for media pluralism

⁸² European Parliament, *Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC*, Article 23.

⁸³ Neelie Kroes, "The Future of Media," speech before the Annual Conference of the European Magazine Media Association, Apr. 23, 2013, accessed Aug. 15, 2014, http://europa.eu/rapid/press-release_SPEECH-13-355_en.htm

⁸⁴ Carles Llorens-Maluquer, *Concentració de Empreses de comunicació y el Pluralismo: la acció de la UE*, doctoral dissertation, Universitat Autònoma de Barcelona (2001). See also Alison Harcourt, *The European Union and the Regulation of Media Markets* (Manchester, UK: Manchester University Press, 2005), 81-82. Mario Monti was the Commissioner for Customs, Taxation and the Internal Market in the European Commission from 1994 to 2004.

the main point would have been to guarantee the independence of the national regulatory agencies. This independence could be translated into independence from political control by the state and economic control by media providers, in order to maintain a variety of voices in the society and the freedom of access and information. However, a gap has been built between the European Union's discourse and its public interest objectives, especially when looking at the theoretical advancements of those objectives. There is also a disconnect with political reality, which does not account for EU-mandated collaboration within a group of NRAs and also does not account for any legal obligation to achieve the independence of NRAs by the Member States. As revealed by the European Commission consultation on the independence of NRAs, any implication of EU standards and cooperation between the NRAs can lead to more evidence of the actual non-independence of NRAs in certain states, as exemplified by the cases in Italy and Hungary.

It is telling that after the Hungary case described in this article and the subsequent efforts made by the European Commission, respondents to the recent consultation did not see the European Union's progress on this matter to be sufficient. It is true that the acknowledgement of the need for independence is universal. The resilience of the European Commission is the main factor that made possible the establishment of the ERGA group, despite the low support from the industry and the Member States during the public consultation on the independence of the NRAs and during the European Council meetings. However, the decision for voluntary participation, cooperation, and achievement of independent NRAs remains in the hands of each member state. The establishment of the ERGA group and cooperation at the EU level, if accepted by all Member States, can provide for further work in achieving common standards applicable in all Member States through voluntary cooperation.

The cautious approaches of the European Commission and the European Parliament and the evidence of the contributions to the public consultation on the independence of the NRAs show that the approaches to media pluralism regulation tend to lean towards a preference for continued autonomy at the national level. Despite the various recommendations from academia for an inclusive approach to better connect and integrate with social and political institutions, this article has found a growing resistance in the media sector and in the Member States to any external influence on media systems, especially from the European Union itself.

BIBLIOGRAPHY

- Almiron, Núria, Carles Llorens, Ana I. Segovia, Juan José Bas, Helena P. Grau, and Roberto Suárez. "External Pluralism Protection in Five EU Countries and the US: The Regulatory Authorities' Views." *Observatorio Journal* 6 (2012): 129-157.
- Barzanti, Fabrizio. "Governing the European Audiovisual Space: What Modes of Governance can Facilitate a European Approach to Media Pluralism?" EUI Working Papers RSCAS 2012/49, Robert Schuman Centre for Advanced Studies (2012). Accessed Aug. 6, 2014, http://cadmus.eui.eu/bitstream/handle/1814/23914/RSCAS_2012_49.pdf?sequence=1.
- Centre for Media Pluralism and Media Freedom. "EU Competencies in Respect of Media Pluralism and Media Freedom." Report, Jan. 2013. Accessed Aug. 6, 2014, <http://ec.europa.eu/digital-agenda/sites/digital-agenda/files/CMPFPolicyReport2013.pdf>.
- Council of the European Union. "EU Human Rights Guidelines on Freedom of Expression Online and Offline." Meeting minutes, May 12, 2014. Accessed Aug. 7, 2014, http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf.
- European Commission. "Commission Establishes a European Regulators Group for Audiovisual Media Services." Press release, Feb. 3, 2014. Accessed Aug. 8, 2014, http://europa.eu/rapid/press-release_IP-14-101_en.htm.
- . "Commission Staff Working Document: Media Pluralism in the Member States of the European Union." White paper, SEC(2007) 32, Jan. 16, 2007. Accessed Aug. 6, 2014, http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf.
- . "Contributions Received from NGOs." Public comment document (compilation), unknown date. Accessed Aug. 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2711.
- . "Contributions Received from Trade Associations." Public comment document (compilation), unknown date. Accessed Aug. 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=3230.
- . "Digital Agenda: Commission Awards €600,000 for New Centre for Media Pluralism and Media Freedom." Press release, Nov. 7, 2011. Accessed Aug. 7, 2014, http://europa.eu/rapid/press-release_IP-11-1307_en.htm.
- . "Digital Agenda: High-Level Group on Media Freedom and Pluralism." Press release, Oct. 11, 2011. Accessed Aug. 7, 2014, http://europa.eu/rapid/press-release_IP-11-1173_en.htm?locale=en.
- . *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive)*. Official Journal of the European Union L95/1 (2010). Accessed Aug. 6, 2014, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>.
- . "Inaugural Meeting of the European Regulators Group for Audiovisual Media Services (ERGA)." Press release, Mar. 4, 2014. Accessed Aug. 8, 2014, <http://ec.europa.eu/digital-agenda/en/news/inaugural-meeting-european-regulators-group-audiovisual-media-services-erga>.
- . "Public Consultation on the Independence of Audiovisual Regulatory Bodies." Accessed Aug. 8, 2014, <http://ec.europa.eu/digital-agenda/en/public-consultation-independence-audiovisual-regulatory-bodies>.

- . “Public Consultation on the Independence of Audiovisual Regulatory Bodies.” Questionnaire (2013). Accessed Aug. 8, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4402.
- . “Public Consultation on the Independent Report from the High Level Group on Media Freedom and Pluralism,” July 15, 2013. Accessed Aug. 7, 2014, <http://ec.europa.eu/digital-agenda/en/node/54482>.
- European Commission. The European Citizens Initiative. “European Initiative for Media Pluralism.” Accessed Aug. 6, 2014, <http://ec.europa.eu/citizens-initiative/public/initiatives/ongoing/details/2013/000007>.
- European Commission, European Regulators Group for Audiovisual Media Services. *Rules of Procedure of the European Regulators Group for Audiovisual Media Services*. Procedural document (2014). Accessed Aug. 8, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4910.
- European Parliament. *Motion for a Resolution on Media Freedom and Media Pluralism in Italy*. Resolution B7-0093/2009, Oct. 14, 2009. Accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+B7-2009-0093+0+DOC+XML+V0//EN>.
- . *On the EU Charter: Standard Settings for Media Freedom across the EU*. Resolution 2011/2246(INI), Mar. 25, 2013. Accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0117+0+DOC+XML+V0//EN>.
- . *Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 89/552/EEC* (2007). Accessed Aug. 7, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=312.
- European Union, Committee of the Regions. “The Committee of the Regions’ White Paper on Multilevel Governance.” White paper, June 2009. Accessed Aug. 15, 2014, <http://web.cor.europa.eu/epp/Ourviews/Documents/White%20Paper%20on%20MLG.pdf>.
- Harcourt, Alison. *The European Union and the Regulation of Media Markets*. Manchester, UK: Manchester University Press, 2005.
- Herold, Ana. “From Independence of Audiovisual Media Regulators to Europeanization of Audiovisual Media Regulation: Reaching for the Apples of the Hesperides?” In *Private Television in Western Europe*, edited by Karen Donders, Caroline Pauwels, and Jan Loisen, 260-272. Basingstoke, UK: Palgrave Macmillan, 2013.
- INDIREG. “Indicators for Independence and Efficient Functioning of Audiovisual Media Services Regulatory Bodies for the Purpose of Enforcing the Rules in the AVMS Directive.” Final report, Feb. 2011. Accessed Aug. 6, 2014, http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=4703.
- Irion, Kristina and Roxana Radu. “Delegation to Independent Regulatory Authorities in the Media Sector: A Paradigm Shift through the Lens of Regulatory Theory.” In *The Independence of the Media and its Regulatory Agencies. Shedding New Light on Formal and Actual Independence against the National Context*, edited by Wolfgang Schulz, Peggy Valcke, and Kristina Irion, 15-54. Bristol, UK: Intellect, 2013.

- Klimkiewicz, Beata. "Is the Clash of Rationalities Leading Nowhere? Media Pluralism in European Regulatory Policies." In *Press Freedom and Pluralism in Europe: Concepts and Conditions*, edited by Andrea Czepek, Melanie Hellwig, and Eva Nowak, 45-77. Bristol, UK: Intellect, 2009.
- Kroes, Neelie. "The Future of Media." Speech before the Annual Conference of the European Magazine Media Association, Apr. 23, 2013. Accessed Aug. 15, 2014, http://europa.eu/rapid/press-release_SPEECH-13-355_en.htm
- Llorens-Maluquer, Carles. *Concentració de Empreses de comunicació y el Pluralismo: la acció de la UE*. Doctoral dissertation, Universitat Autònoma de Barcelona (2001).
- McQuail, Denis. "Democracy, Media and Public Policy." In *Media and Open Societies: Cultural, Economic and Policy Foundations for Media Openness in East and West*, edited by Jan van Cuilenburg and Richard van der Wurff, 257-262. Amsterdam: Het Spinhuis, 2000.
- Ministry of Education, Culture and Science (The Netherlands). "Answer of the Netherlands Government to the Public Consultation on the Independence of Audiovisual Regulatory Bodies." Public comment document (2013). Accessed August 15, 2014, http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=2471,
- Mouffe, Chantal. "Democracy in a Multipolar World." *Millennium – Journal of International Studies* 37 (2009): 549-569.
- Nieminen, Hannu. "Towards Democratic Regulation of European Media and Communication." In *Media Freedom and Pluralism. Media Policy Challenges in the Enlarged Europe*, edited by Beata Klimkiewicz, 3-26. Budapest: Central European University Press, 2010.
- Reding, Viviane. Speech before the European Parliament, Brussels, Oct. 8, 2009. Accessed Aug. 6, 2014, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20091008+ITEM-005+DOC+XML+V0//EN&language=EN>.
- Robillard, Serge. *Television in Europe: Regulatory Bodies, Status, Functions and Powers in 35 European Countries*. Bedfordshire, UK: University of Luton Press, 1995.
- Sarikakis, Katharine. "Serving Two Masters: The Roles of the Market and European Politics in the Governance of Media Transformations." In *Understanding Media Policies. A European Perspective*, edited by Evangelia Psychogiopoulou (New York: Palgrave Macmillan, 2012), 249.
- Thompson, Mark. "Protecting Media Pluralism in Europe: Signs of Progress." Blog post, Open Society Foundations, Feb. 1, 2013. Accessed Aug. 7, 2014, <http://www.opensocietyfoundations.org/voices/protecting-media-pluralism-europe-signs-progress>.
- Viķe-Freiberga, Vaira, Herta Däubler-Gmelin, Ben Hammersley, and Luís Miguel Póiares Pessoa Maduro. "A Free and Pluralistic Media to Sustain European Democracy." Report, High Level Group on Media Freedom and Media Pluralism, Jan, 2013. Accessed Aug. 6, 2014, http://ec.europa.eu/information_society/media_taskforce/doc/pluralism/hlg/hlg_final_report.pdf.