



How independent are you really?

Updating the INDIREG methodology for future assessments of media regulators' independence

Workshop report

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On 1 June 2018, the Institute for Information Law (IViR) hosted an international workshop evaluating and discussing the so-called INDIREG methodology.¹ The 2011 INDIREG methodology formulates a scientifically-backed methodology to assess the formal and actual independence of media regulators.² The workshop assembled representatives of media regulators of European countries, EU policy-makers, media experts and members of the INDIREG study team.

This workshop was aimed at evaluating and updating the INDIREG methodology in light of the latest developments, new competences of media regulators and insights from applying the tool. In 2018, the EU legislator is about to pass a legislative update of the Audiovisual Media Service (AVMS) Directive that would mandate independent regulatory bodies in the member states, while specifying some of the requirements to guarantee this independence.³ This considerable legislative development is expected to ensure the continued relevance of the INDIREG methodology to be used for the next lifecycle of assessment media regulators' independence.

¹ Organised by Dr. Kristina Irion (University of Amsterdam), Michele Ledger (University of Namur) and Dr. Sara Svensson (Central European University). The workshop received support from the Dutch Foundation for Democracy and Media (www.stdem.org).

² Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/ Perspective Associates (eds., 2011), INDIREG: Indicators for independence and efficient functioning of audiovisual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive, Study conducted on behalf of the European Commission, Final Report, February 2011 (hereinafter INDIREG study).

³ See European Commission, Audiovisual media services: breakthrough in EU negotiations for modern and fairer rules, IP/18/3567, Brussels, 26 April 2018.

The workshop comprised six presentations, regrouped in three different sessions. Each presentation was followed by a group debate. This report provides an overview of each presentation and strives to mirror both the general discussion and important points that were raised during the multiple debates.

Introductory note

'Independence' formed the core notion of this workshop. As was made clear at the start of the event, 'independence' is not an end in itself but merely a means to remove and shield regulators from external influences. Regulators should be impartial and not serve particular interests. In regulatory theory, the function of independence for better regulatory outcomes is a complex process:

[F]or independence to lead to better policy outcomes, a complex causal chain needs to operate, leading from statutory provisions granting independence to behavioral patterns demonstrating independence, to policy decisions, and, ultimately, to policy outcomes.⁴

The INDIREG methodology saw the light of day in 2011 and serves as a tool to investigate the independence and the efficient functioning of media regulators. The study is premised on this functional working definition of independence:

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.⁵

It is however important to point out that total independence does not exist and is as such moreover not desirable in the interest of transparency and accountability of regulators.

Having regard to different developments and applications of the INDIREG methodology, it is time to re-evaluate the methodology and think about possible updates. Based on the discussions throughout the workshop, the INDIREG methodology should be adjusted to the revised AVMS Directive with the aim to ensure the continued relevance of the INDIREG methodology in the future.

Session 1

Presentation "In a nutshell: INDIREG methodology"

The 2011 INDIREG methodology essentially measures the risk of external influence on regulators. It can be used as a tool for self-assessment by the regulators themselves or as an external evaluation tool. The tool's particularity lies in its duality in terms of abilities: it can both capture the formal and the *de facto* situation. While the former relates to the legal setting of the regulator's independence, the latter concerns the actual level of independent functioning.

⁴ Chris Hanretty and Christel Koop (2012). "Shall the Law Set Them Free: The Formal and Actual Independence of Regulatory Agencies", *Regulation and Governance*, 2012, 195-214, p. 195.

⁵ INDIREG study, p. 5.

The methodology is a composite index made up of indicators clustered around five dimensions. The dimensions are: the status and powers of regulators; their financial autonomy, the decision-makers' autonomy (i.e. how the board-members are protected and appointed); the regulators' knowledge (i.e. their expertise); and the regulators' level of accountability and transparency. In order to assess these different dimensions, indicators have been developed, which each focus on a particular aspect. These are, in turn, all given a certain weighing. The more fundamental the indicator, the more weight it is given (between at least 15 % and up to 40 % out of 100). The weighing criteria are justified in the INDIREG study.

The overall assessment takes place by means of a three-step test. The first stage consists of gathering information. This is followed by a stage when the INDIREG methodology is applied to the regulator. Finally, the facts are contextualized, and the different attention points are further elaborated.

In case of external evaluations, the process is more extensive. The evaluation must first be commissioned (e.g. by the Council of Europe). A suitable local expert (from the analyzed country) has to be found in order to complete tables that form the background to understand the legal set-up in that country. Based on those tables, members of the study team are able to complete the ranking tool (Excel table based composite index). In order to validate the answers and to get crucial information about the *de facto* situation (including the broader political and market situation), the INDIREG team visits the country and conducts a series of semi-structured interviews with a variety of stakeholders internal and external to the regulator. The interviews are transcript for internal purposes. The study team then complete a draft formal and *de facto* ranking tool. An online consultation is then organized in order to give the different stakeholders a chance to present their views on the draft ranking tool. It must be noted however that no substantial response was received in the past. One member of the study team then prepares a report, including different recommendations, in cooperation with the other team members. The report is then published and – ideally – a public workshop is organized for the presentation of the findings and further discussion.

The main challenges encountered by the study team during external evaluations include: the ability to understand the full context; the ability for the study team to remain independent; the identification of a reliable local expert (who has no individual interests at stake); the identification of the correct timeframe for assessing the *de facto* situation; the identification of the interviewees; the difficulty of conducting and framing interviews (accounting for the need of translation); the ability to unravel complexities entailed within the *de facto* assessment; and the recognition of 'rooted' problems that are particular to certain countries.

Discussion

Most concerns were expressed towards the weighting given to individual indicators. There are indicators which are more influential than others and are about perceptions of issues. Such indicators can disproportionately influence the outcome in particular the *de facto* ranking tool. Accordingly, it is of utmost importance that the INDIREG methodology is sound even when judgments are made.

Other concerns related to the difficulty of identifying the appropriate 'local expert'. According to the study team, a local expert is someone who has been in the field for a certain number of years but it is also important that the expert is sufficiently independent, which is sometimes challenging. However, it was reminded that their input should not be over-estimated as these experts are mostly needed as a starting point. They need to fill in the background tables and provide the study team with some context. Moreover, information gathered by local experts is double-checked by means of interviews. Many of these interviewees are themselves experts in the field. The combination of multiple information sources is an importance pre-requisite for external assessments.

Presentation "Implementation: lessons learned"

The INDIREG methodology has been relied upon since 2011. It has been applied to 34 media regulators in the 2015 AVMS - RADAR study.⁶ The Dutch media authority cited outcomes of the study in its annual report, the Italian media regulator Agcom applied it internally and in Hungary researcher made an external assessment.

Since its launch, the INDIREG methodology has also been met with extensive interest from actors based in countries not on the list of current EU members. Not surprisingly, the interest has been biggest from countries aspiring for membership and/or closer relation with the EU. Due to the extensive policy work done in the assessment and preparatory phases for membership, those countries are used to seeking and adapting to EU standards and assessment tools. Moreover, the INDIREG methodology was developed with the requirements of general standards in European countries and specific EU legislation in mind. The Council of Europe has commissioned separate INDIREG studies for two of these (Albania and Serbia).⁷ By way of internal assessment the INDIREG methodology has been discussed and used in Ukraine and Georgia (unpublished). Through other EU outreach networks, the INDIREG methodology has also reached countries that are not aspiring for membership or close membership, through for instance a partnership with Tunisia and cooperation within a network for French-speaking regulators.

Its applications have led to different conclusions to be drawn. The usage of the methodology outside the EU shows that there is a high demand for this type of assessment especially in candidate and accession countries; and that there is much interest in the notion of 'independence'. However, its application has also shed light on its many challenges.

Concerning the *de facto* ranking tool, it has been difficult to distinguish between facts as such and perceptions of facts. Being able to distinguish between these two is, above all, very time-consuming. It is therefore disputable whether the tool is actually appropriate for external evaluations. Moreover, taking into account that situations change over time, it is not always clear which 'period' should be used for assessments of *de facto* situations. This uncertainty leaves room for subjectivity,

⁶ EMI and University of Luxemburg, AVMS - RADAR study: AudioVisual Media Services - Regulatory Authorities' Independence And Efficiency Review, commissioned by the European Commission, Brussels, 2015.

⁷ Irion, K., Ledger, M., Svensson, S. and Fejzulla, E. 2014. The Independence and Functioning of the Audiovisual Media Authority in Albania. Study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Tirana, October, 2014; Irion, K., Ledger, M., Svensson, S. and Rsumovic, N., 2017. The Independence and Functioning of the Regulatory Authority for Electronic Media in Serbia. Study commissioned by the Council of Europe, Amsterdam/Brussels/Budapest/Belgrade, 2017.

which is undesirable in any objective assessment. Another challenge concerns the introduction of new regulators reforming existing ones: how should these be treated? Technical issues have also been encountered, especially regarding the weighing of individual indicators, which can have a disproportionate impact on the particular dimension.

Furthermore, it has not always been easy to assess certain indicators. For example, the notion 'knowledge' may vary from one culture to the other. Some will prefer experts whereas others will value generalists much more. 'Small countries' may have limited specific media expertise. Concerning the assessment of accountability and transparency, it requires some assessments in terms of 'quality', which in turn might leave some traces of subjectivity.

Discussion

Comments centered on how the implementation of the INDIREG ranking tool demonstrate the challenge to reflect 'reality', in case of *de facto* assessments. Another discussion was about how to assess what conditions are best for independence when it comes to the working methods and contractual relationships of the regulatory agency's board and its members. It was questioned whether the ranking tool should distinguish based on how often the board meets.

At the moment, the tool contains no reference to this point. Divergent views were expressed. However, it was generally concluded that the board is an important guarantor of independence and that the tool should not place too much weight on the number of times board members meet. What counts is the presence of evidence-based decisions. It was also put forward that board members who do not meet on a regular basis may have a positive impact on the overall level of independence. The less they meet, the more they may be able to promote independence as fewer chances exist that their decisions have been influenced by being too much involved in the operational work of the regulator. In light of this, the primary role of the board was emphasized. Accordingly, this role does not entail administrative work, which is too time-consuming, and would preclude the board from focusing on decision-making. Another point that was raised concerned the remuneration of board members, and the difficulty to assess what level is adequate to minimize risks for undue influence.

Another interesting point raised related to majority/ minority issues in European societies and in how far this could possibly influence the 'knowledge' indicator. Many societies debate the importance of various institutions reflecting the diversity of the societies in which they operate. With relation to the activities of regulatory media authorities, when it comes to 'hate speech', someone who belongs to a vulnerable group could potentially qualify as a 'well-informed' or 'knowledgeable' person in that regard despite lacking formal qualifications.

Session 2

Presentation "AVMS refit: independence of regulators"

As mentioned earlier, the importance of reviewing the INDIREG methodology is influenced by the on-going revision and update of the AVMS Directive. The final text was recently agreed upon and the revised article 30 requires the independence of national regulatory authorities (NRAs) (see Annex).

It should be recalled that the independence of media regulators was already alluded to under the existing Directive (still in force). Article 30 presently reads: ‘in particular through their competent independent regulatory bodies’. Here the reference to independence is indirect but it is complemented by Council of Europe standards on independent media regulators.⁸

Once adopted, the revised AVMS Directive dedicates an entire article to the independence of the media regulator, subject to a number of substantive safeguards. Interestingly, these requirements mirror several indicators of the INDIREG ranking tool except for the ‘knowledge’ dimension. A possible reason for this exclusion may lie in the inherent complexity of appropriately gauging ‘knowledge’.

To conclude, the revised AVMS Directive will hardwire independence of media regulators in EU law. On the one hand it will serve as a guarantee of independence in EU member states and, on the other it may serve as a minimum threshold for candidate and accession countries to the EU.

Discussion

The main point of discussion related to the subsidiarity principle, more particularly what the reason could be behind the countries’ shift of mindset when agreeing on the proposed Directive. Indeed, the European Commission had already proposed binding rules on the need to establish independent media regulators during the last revision (2008) but this attempt was blocked by certain member states. A possible explanation could be that countries overlooked the provision as they were more concerned with other provisions. An example of such spotlight-provision is the new article 28a on video-sharing websites. Another remark concerned the fact that article 30 seems to allude to some *de facto* elements entailed in the INDIREG ranking tool.

Moderated discussion “New competences: online platforms and media”

The revised AVMSD would also broaden the directive’s material scope of application. It will, *inter alia*, also apply to video-on-demand services and user generated content platforms. Having regard to the directive’s rules on jurisdiction, it is however not clear under which national jurisdiction these platforms will fall and who could fall under the scope of these new rules. Moreover, some conflicts may arise between national regulatory bodies regarding the rules that apply to on-demand service providers (such as product placement rules). This may lead to external pressure on the national media regulators to implement and enforce national media rules.

Furthermore, certain services may trigger different regulators. For example, a video-on-demand service may target a specific country, which is different from that service’s country-of-origin. This may lead to multiple media regulators claiming jurisdictional competences over that service. For example, when consumers are involved, the country-of-origin principle of the Electronic Commerce Directive does not apply. Moreover, the relationship between the AVMS Directive with the Consumer Protection Cooperation (CPC) Regulation is unclear. The CPC Regulation allows extensive collaboration between authorities to jointly address breaches of consumer rules, including aspects

⁸ Council of Europe, Recommendation (Rec (2000)23) of the Committee of Ministers to the Member States on the independence and functions of regulatory authorities for the broadcasting sector; *Ibid.*, Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector.

that can intersect with the audiovisual media sector, and holds extensive powers to investigate such alleged breaches. Once online content from abroad harms the interest of consumers, a competent regulator can, under the CPC, suddenly do much more than as a media regulator. It was argued that there is a need for the CPC Regulation to be in line with the AVSMD.

The need for regulatory consistency was further emphasized by the numerous national regulatory initiatives, which can somewhat overlap with competencies flowing from the AVMS Directive. For example, in the UK there is the 'Internet Safety Strategy', some provisions of which are quite similar to the AVMS Directive. In Ireland, a Digital Safety Commissioner was appointed who is concerned with the safety of children online. Consequently, there is a need for clarity on the relation of these provisions with the AVMS Directive.

These divergences throughout EU member states also concern the competences assigned to regulators. In Greece, as in many countries, the media regulator is tasked with supervising audiovisual content. Newspapers or their online web presence are excluded from the regulator's remit. Next, another authority is responsible for information technologies. This could mean that two different authorities are responsible for the same service. In Belgium, it was highlighted, there is a lack of resources and also the division of competences between the different local constituencies is not always clear-cut.

When discussing co-regulation, it was argued that countries have been reluctant to adopt such schemes. In EU law there is a tendency towards co-regulation, which puts media regulatory authorities under pressure to conform to this expectation and stir intermediaries to regulated self-regulation. Importantly, the difference between co-regulation and self-regulation was emphasized. However, in the Netherlands, the classification of self- and co-regulation is again disputed.

Session 3

Presentation: "updating the INDIREG methodology"

Having regard to the revised AVSM Directive, it was argued that the INDIREG methodology should be updated accordingly. The update would have to take into account new terminology, competences, positive indicators and possibly new weighting given to indicators. For example, where the AVSM Directive now requires the presence of a particular indicator, the answer options in the tool could be reduced to a 'yes' or 'no' answer. In such cases, the granularity would be reduced in line with the new mandatory requirements. Regarding the indicators, a 'complaints handling indicator' and the presence of a dysfunctional decision-making body could be added in the dimension 'status and powers'. In order to measure a regulator's accountability, an engagement indicator could be introduced. This could, for example, include the number of public responses given to public consultations. This would permit to find out whether stakeholders and the public actually engages with its regulator.

The weight attributed to certain indicators may also need to be reviewed. For example, in the dimension 'financial autonomy', more weight should be given to the budget setting and approval procedure. Moreover, in order to reduce subjectivity in the overall assessment, the weight given to certain indicators in the dimension 'autonomy' could be reduced, e.g. whether political majorities or

power structures are reflected in the composition of the board (19 % out 100). Concerning the tool's usability, its interface design should be made more user-friendly. This would make it more accessible.

Discussion

When discussing the desirability of the tools' update, a very important remark was made. It is important to first look at the purpose of the tool and, thereafter, to adjust it accordingly. Since the initial purpose of the tool is to assess the independence of media regulators, it is essential to only add elements which contribute to that aim. A clear distinction should be made between indicators that serve to assess the independence and those that are merely aimed at finding out whether a regulator is a good regulator. A regulator can act badly and still be independent and vice versa. It is therefore important to fashion the tool solely with regard to independence. It was pointed out that some indicators are more concerned with the regulator's good practices than their independence. Consequently, the starting point for any update should be understanding the objective of the methodology.

Introducing an engagement indicator was met with skepticism. There is an important distinction between the quantity and the quality of responses to public consultations. There has been a Polish experience that one company managed to orchestrate over 600 responses to a consultation, thereby overwhelming the regulator. This would wrongly satisfy an indicator on the quantity of engagement. This was supported by the UK experience of industry being by far more vocal than the public in the course of public consultations.

Presentation "INDIREG quick scan: key indicators"

In order to achieve a lighter tool, which can be used in a more flexible way, it was put forward that a quicker and more tailored-made methodology could be developed. This could be done by reducing the number of indicators or by focusing on indicators with high weighting. Another option could be to develop a tool that functions on each dimension independently of each other (e.g. 'status and power') as this would be time saving. A tool could also be imagined that focuses on either the formal or the de facto assessment. Finally, it could be possible to merely map the tool to criteria in the AVSM Directive and make it more lightweight as this will soon become the new EU standard. By doing so, the tool would lose much of its granularity.

Discussion

Whether such a quick scan tool is needed formed the main issue. Accordingly, if the law changes (as will be the case soon), a full-size check should be carried out (no layered approach). Some however expressed the need for a quicker tool. These two tools would however not substitute for each other. The extensive tool should only be used once every few years.

Concerning a more 'user-friendly' tool, it was argued that 'means that don't need to be automated should not be automated'. It was also stressed that the tool should remain a complex tool as 'this would preclude politicians from using it'. Another disputed point concerned the idea that the tool could merely focus on one particular dimension. Accordingly, 'if you know there is a problem in one dimension, why would you need the tool to prove it?'.

Closing session – tour de table

The closing session permitted participants to emphasize important points said during the workshop. Here again, the purposes of the INDIREG methodology were highlighted. It is a professional tool that should not be used by everybody but users experienced in media regulation. Developing a ‘quick scan’ is therefore not as important as it may seem. Moreover, the tool as it stands now already offers some flexibility regarding the different ways it can be used.

Importantly, once the AVSMD will come into force, the formal situation will be easier to assess in light of the revised Article 30. The *de facto* situation will therefore remain the biggest challenge. Regarding inserting new indicators, it was argued that it would be a good idea to start investigating the amount of cases that were challenged or overturned, as well as the grounds relied upon for that. The study team should however be careful with interpreting or including such indicators as the judiciary may in certain countries itself not be independent.

Some expressed the need that more attention should be paid to develop ‘targeting’ approaches. The tool should regularly be promoted and (re)introduced to regulators. It should be more clearly communicated what the tool exactly is and how it works. Increasing the effectiveness of the tool was also strongly supported. In order to achieve this, a type of ‘peer review’ could be imagined where independent regulators assess each other as ‘friends’. This would come close to a self-assessment but might prove to be more effective. Another way to increase the tool’s usability could be to translate it into major other EU languages. This was however a controversial point.

Concerning aligning the INDIREG methodology with the revised AVSM Directive, the timing with national implementations was stressed. Since member states will soon need to comply with the revised AVSM Directive, it is important for the requirements therein to be reflected in the INDIREG methodology too. Compliance with the tool will give regulatory bodies arguments with relations to what could be improved in their set-up and operations. Implementing the Directive would also remind people of the tool’s existence (promotional obligation) and thereby make the INDIREG methodology more attractive. The tool could serve as a benchmark for EU and non-EU countries. However, it was argued that the tools’ indicators should go beyond what article 30 of the Directive requires. The table’s questions should be detailed and not only result in yes or no answers.

Finally, two groups of countries were identified: countries that struggle with indicators but have modern laws in place and countries that function very independently with older laws in place. In light of this, it is important to realize that problems of ‘regulation’ and ‘independence’ are two distinct issues that should not be thrown together. Implementing the AVMS Directive will not, by itself, generate better scores of independence of regulators.

Last but not least, all participants agreed that the INDIREG methodology presents many advantages and had already been very useful. Importantly,, it is a valuable tool for self-reflection, documenting what the regulator sees as threats. Any future update would therefore mainly serve to enhance the tool and to increase its effectiveness.

**CHAPTER XI
REGULATORY AUTHORITIES AND/OR BODIES OF THE MEMBER STATES**

Article 30

1. Each Member State shall designate one or more national regulatory authorities and/or bodies. Member States shall ensure that they are legally distinct from the government and functionally independent of their respective governments and of any other public or private body. This shall be without prejudice to the possibility for Member States to set up regulators having oversight over different sectors.
2. Member States shall ensure that national regulatory authorities and/or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, internal market and the promotion of fair competition. National regulatory authorities and/or bodies shall not seek or take instructions from any other body in relation to the exercise of the tasks assigned to them under national law implementing Union law. This shall not prevent supervision in accordance with national constitutional law.
3. Member States shall ensure that the competences and powers of the national regulatory authorities and/or bodies, as well as the ways of making them accountable are clearly defined in law.
4. Member States shall ensure that national regulatory authorities and/or bodies have adequate financial and human resources and enforcement powers to carry out their functions effectively and to contribute to the work of ERGA. Member States shall ensure that national regulatory authorities and/or bodies are provided with their own annual budgets which shall be made public.
5. Member States shall lay down in national law the conditions and the procedures for the appointment and dismissal of the head of a national regulatory authority and/or body or the members of the collegiate body fulfilling that function, including the duration of the mandate. The procedures shall be transparent, non-discriminatory and guarantee the requisite degree of independence. The Head of a national regulatory authority and/or body or the members of the collegiate body fulfilling that function within a national regulatory authority and/or body may be dismissed if they no longer fulfil the conditions required for the performance of their duties which are laid down in advance at national level. A dismissal decision shall be duly justified, subject to prior notification and made available to the public.
6. *deleted*
7. Member States shall ensure that effective appeal mechanisms exist at national level. The appeal body, which may be a court, shall be independent of the parties involved in the appeal.

Pending the outcome of the appeal, the decision of the national regulatory authority and/or body shall stand, unless interim measures are granted in accordance with national law.