

The media regulators and the new institutional structure

I. Introduction.

The problem of the media regulators as the term implies is related to the broader topic of social regulation and more specifically to the sensitive topic of media regulation. The latter is one of the most debatable issues by both theorists and practitioners in the media field.¹ Against the backdrop of rapid technological and structural changes in the sector the existing institutional design has come under considerable strain and tension. Therefore new approaches towards the reformation and modernization of the regulatory framework should be undertaken premised on public interest values.² Such a conclusion can serve as a guiding principle for democratic states and all the more for young democracies where policies should be bold, inventive, open and focussed on the assertion of human rights and public values.

Concentrating on the area of free expression and communications the hard question for legislators, experts and decision-makers is how to draw the line between freedom and non-freedom and more precisely between freedom and the possible restrictions in an area which demands paramount liberty in order for modern democratic society to function effectively.

The difficulties in the field concerned stem from a number of interrelations and conflicts which are visible from a more abstract and more practical perspective.

The area of media and communications is a cross-section of various values, rights and interests which are indispensable to a democratic society. In this respect, firstly, one should take into account that it is crucial the individual right to free expression which is a value, principle and right in a democracy to be properly exercised. However, nowadays this right is implemented side by side with the institutional right of freedom of expression, i.e. the freedom of the media the subject of which encompasses the so called traditional and new media. This fact complicates considerably the relations in the field and hence the regulation put in force.

Secondly, particular tension emerges from the type of activity carried out by the media system which on the one hand, should serve the public interest by the dissemination of views, opinions and ideas facilitating the moulding of public opinion, while on the other, it comprises a plethora of operators running lucrative business and competing with each other in the market.

II. Regulatory framework

The new varied structure of the media, its dynamism and the complex issues that have to be tackled demand novel, more flexible and diversified institutional arrangements through which regulation can be accomplished. From an organizational perspective in order to

¹ Regulation means intervention or exerting an impact over a given area or activity pursuing particular positive consequences. Such an influence which is complex by nature combining economic and social goals touches upon the application of norms, rules and limitations and the proper boundaries of their actual implementation. See the abundant literature discussing the problems of media regulation and especially in Eric Barendt, *Freedom of speech*, Oxford, Clarendon Press, 1985; John Keane, *The media and democracy*, Cambridge, Polity Press, 1991; Tony Prosser, *Law and the regulators*, Oxford, Clarendon, 1997 and Robert W. McChesney, *Rich Media, poor democracy: communications politics in dubious times*, New York, New Press, 1999.

² Mike Feintuck and Mike Varney, *Media regulation, public interest and the law*, second edition, Edinburgh University Press, 2006, p.6.

preserve the distinctiveness of the media system and to keep its structural and functional stability a special regulatory body/bodies has/have to be set up aiming at supervising the implementation of the specific rules in the sector and applying special expertise and knowledge.³

Both the regulation and the control of the media are complex by nature becoming even more intricate in the era of convergence. Though by and large the goal pursued is to avoid the negative and to enhance the positive effects of the regulated activity they differ in a number of respects from the regulation and control in other social spheres.

Thus the regulation and control in the media sphere rely to a great extent on public intervention. In order to respond adequately to all interests concerned they should embody regulatory/self-regulatory and controlling/self-controlling features. The respective implementing mechanisms should possess self-organizing elements due to the specific character of the object of regulation and control – the media, which must be free to perform successfully its duties in a democratic society and to respond adequately to the changes in the media environment.

Another peculiarity of the regulation and control in the media sector is that they should be open to public participation and input due to the fact that the media is a social asset and performs an essential public function. It is widely accepted that the public should be encouraged to contribute to media programming and to the improvement of the media system as organizational structure and content dissemination. Regarding the regulatory mechanisms in force another effect of the same process of public participation is that the public has a role to play in the enhancement of the transparency of media regulators of all types and eventually to the democratization and advancement of the regulation and control in this area.

II.1 The institutional picture

The contemporary institutional framework in force comprises a variety of regulators – represented, on the one hand, by bodies belonging to the traditional governmental pattern such as courts, parliaments, governments and ombudsman, and on the other - by specialized bodies which are mostly regulatory (administrative) in the field of broadcasting and self-regulatory (voluntary) in the field of the press. Regulators can be an element of the internal structure of the media as is the case with the organizational pattern of public broadcasters or be external to the object of regulation and control (broadcasting authorities). Comparing the level on which they operate media regulators could be international or national by character.⁴

It is a demanding task to draw a precise classification of all types of media regulators as the in-depth exploration of the matter reveals that there is no common design of such a body. The authorities set up generally reflect the peculiarities of the national legal systems and of the particular media system. Here it should be explicitly pointed out that on a pan-European level neither the “Television without Frontiers Directive”, nor the European Convention on Transfrontier Television” consider the constitutional and the administrative problems of media regulators.

³ From a political perspective the regulatory body is necessary in order to protect the system from external political and economic interference. From a social perspective the regulator takes on the task to protect the public and especially some vulnerable groups from the possible harmful effects of the media performance. These specific features of the special media regulator reveal also the range of issues it deals with.

⁴ See more on the subject in Bissera Zankova, *The media and the regulatory space: a socio-legal analysis of the guarantees for the public function of the media*, In: *Democracy, technology and freedom of expression*, Sofia, 2006.

The “New Regulatory Framework” (NRF) introduced in 2002 within the European Union consists of four directives providing for the main basis for the regulation of electronic communications but they do not refer to the media regulatory bodies the establishment and characteristics of which remain within the scope of member-states.⁵

In the area concerned there is a unique act adopted by the Council of Europe – Recommendation R(2000) 23 – which summarizes the main features and functions of the regulatory bodies in broadcasting and states the conditions that should be created by member-states which would enable them to fulfill properly their mission in an “effective, independent and transparent manner”.⁶

II.2 Reasons for the setting up of the specialized media regulators

The specialized media regulators in the form in which they exist and operate can be considered an important institutional guarantee for the independence and effectiveness of the media system because they allow the control over the operators and the protection of the audience to be based on expert scrutiny and impact. The latter assists the operators in the successful fulfillment of their public obligations.⁷

By and large these bodies were set up as a result of the intertwining of political and institutional tendencies, which required a specialized regulator in charge of the media system on a governmental level to be devised in order to insulate the media from politics. Though there were specific reasons in the different countries for their establishment (technical or political) everywhere the administrative form in which the special media regulators started operating through time was the form of an independent administrative agency. Therefore the special role and functions of the specialized media regulators can be analyzed best against the backdrop of the organizational and functional characteristics of the independent agencies.

III. Institutional and functional characteristics of the new independent administrative agencies

The creation of the new administrative agencies with different format and competence comprises a stage of the on-going process of the modernization of the state and its ability to respond institutionally to the magnitude and complexity of contemporary social problems.⁸

⁵ Directive 2002/19/EC – the Access Directive, Directive 2002/20/EC – the Authorisation Directive, Directive 2002/21/EC – the Framework Directive and Directive 2002/22/EC – the Universal Service Directive. These directives approach a vast range of issues aiming at the creation of the necessary conditions for the development of a viable and competitive communications sector and some of their provisions relate also to broadcasting.

⁶ Recommendation (2000)23 of the Committee of Ministers of the Council of Europe on the independence and functions of regulatory authorities for the broadcasting sector and its explanatory memorandum. The purpose of the recommendation is to create a pattern of the most important guarantees for the independence of the electronic media regulators on a European scale.

⁷ The establishment of the specialized media regulators is a consequence, first, of the rising power of the media as a major political force nowadays and the necessity this force to act to the benefit of society for the enhancement of free and pluralist expression (see Introduction) instead of giving profits to a handful of owners. Second, it is related to the development of the modern decentralized governmental structure reflecting a plethora of interests and responding to the challenges and risks of modern life. See more on the problem, for instance, in Peter Cane, *An introduction to administrative law*, third edition, Clarendon Press, Oxford, 1996.

⁸ Due to the variety of social and managerial needs the new administrative structure seems to be established at random, without following a general pattern and in areas where a regulatory vacuum exists. The reason behind is

Several arguments backing the establishment and further propagation of the new administrative bodies can be raised.

The new administrative agencies represent a better and more efficient mechanism for implementing the diverse and quite often unpredictable administrative activity as they rely on expertise, knowledge and information in their work. They constitute a basis of socially-oriented and responsive governance because they allow for larger public participation and input.⁹ Through their activity they make possible conflicting interests to be taken into account and reconciled.

Taking advantage of the flexible institutional structure and more open procedures these agencies eventually accomplish more democratic decision-making. At the same time the establishment of the new administrative structure raises problems and above all the problem of the independence of the agencies concerned.¹⁰

III.1 Independence of the new administrative agencies

There are no unified standards, which could account for the independence of these bodies and quite often independence is considered to a larger extent an embellishment rather than real commitment.¹¹

As the concept suggests independence is a relative notion meaning independence from somebody or something. Usually the independence of the administrative agencies is perceived as independence from political interference and the legal indication is the provision of a fixed term of office.¹² From a functional point of view while performing their duties independent agencies should strive to reach their decisions in an independent manner free from political pressure in order to enjoy trust and credibility.

There are also additional factors, which should be taken into consideration when judging on the independent character of a body as for instance, its membership, the way members are elected (appointed) and dismissed, the responsibility of members, functions

the need to settle regulatory problems sometimes more complicated than the routine ones applying non-traditional approach overcoming the subordination paradigm.

⁹ See the theory of responsive regulation in Ian Ayres and J. Braithwaite, *Responsive regulation: Transcending the deregulation debate*, Oxford Socio-Legal Studies, New York, Oxford: Oxford University Press, 1992.

¹⁰ The distinguishing criterion “independent” is of particular importance. It is premised on the notion of independence, which generally implies independence from politics. Terms vary from agency to agency but according to Paul Verkuil the independent character is premised largely on three statutory arrangements under American legislation: the bipartisan appointment requirement, the fixed term requirement and the requirement that removal is limited to express causes (*The purpose and limits of independent agencies*, In: *Duke Law Journal*, volume 1988, April/June, N2 and 3, 259 – 260).

The rigorous mandate provided by law, the neutral appointment procedure and the special qualifications for agency’s membership can be viewed as an expression and guarantees for independence.

¹¹ For instance, Alan B. Morrison points out that there is no legal definition of an independent agency, either in the American Administrative Procedure Act or elsewhere. This opens the door to a number of definitions but the central characteristic on which there is an agreement is that the members of the agency have a fixed mandate and cannot be removed except for cause (*How independent are independent agencies?*, In: *Ibid.*, p.252).

¹² Paul Craig enlists several theories accounting for the independence of the independent agencies. Any of them builds on singled out features of these bodies. However, all these characteristics are interrelated and support rather than exclude each other – protection from political interference, escape from governmental bureaucracy, use of expertise and skills, participation, filling the organizational vacuum and coping with problems in sensitive areas. The most important feature, however, is the independence from political interference, which enables the agencies to find creative solutions and respond quickly to matters of public concern through bringing people into public life, making use of expert knowledge and establishing partnerships (Paul P.Craig, *Administrative law*, fourth edition, Sweet and Maxwell, London, 1999, p. 90).

performed and the particularity of the decision-making procedure because they help us understand the organizational and operational dimensions of its autonomy.

The next question pertaining to the independence of the administrative agencies is their legitimacy and accountability. The modern concepts of administrative legitimacy based on the idea of the rule of law and respect for human rights consider an administrative body legitimate not only because of the legality of the procedure, but because of the substantial values incorporated in its actions and decisions. This means that form and content have to be harmonized and fundamental rights must become the ultimate criterion for just decision-making and accountability of power-holders underpinning a range of principles for good administration such as rationality, reasonableness, participation, openness, legitimate expectations, legal certainty and proportionality.¹³

The fragmentation of the government nowadays and the creation of a plethora of bodies of different status and functions blur to a great extent their relationships with the representative system.¹⁴ Under the complex circumstances it may turn out that the advantage of the independent agencies to bring novel ideas in the administration and to trigger flexible procedures could be viewed as drawbacks from the perspective of the traditional democratic government.

If the whole regulatory process is considered from the perspective of the regulatory space, the logic of dispersion of obligations and the involvement of various actors and stakeholders is followed more closely a new picture of regulation could be devised. Then legitimacy could be understood as a practical category related more to the regulatory impact exercised by various actors and communities. It will mean not necessarily the legal power but the perception of the right to govern by both regulators and regulated on the basis of criteria such as representativeness, procedures, mandate, effectiveness or expertise.¹⁵ The same outlook can be applied to accountability. By and large regulation becomes rather a matter of relationships and specific configurations and not of status. It represents the dominance of dynamics over static position.

Following such a line of reasoning the external input, consultations, negotiations and access to information will be tools through which the closed bureaucratic character of the independent bodies' decision-making can be transcended. Such methods when applied also promote a broader basis for action and hence foster the implementation of the democratic principles of openness and transparency. However, the criteria for the inclusion of representatives from the sector and the public are not always clear and fair. Most often participants involved are the major associations in the sector because they have the connections and the resources to influence the activity of the independent bodies. The constant application of one and the same formula of inclusion can result in the agency's capture by big lobbying interests and thus cause additional difficulties in the carrying out of its functions.

The remedy against narrow representation and capture could be the provision of additional guarantees for wider public input. These safeguards must rely on the constant dialogue with the sector in particular and with the public in general, consultations with independent experts, regular opinion surveys and publication of annual reports addressing the public at large. The multiplicity of agencies requires also these processes to be shaped within

¹³ The right to good administration is provided for as an outstanding principle by the Constitution for Europe (art.II-41). See on the same topic also Lord Millett, *The right to good administration in European Law*, In *Public law*, summer, 2002.

¹⁴ At the beginning of the XXth c. the ideal was the existence of a central government accountable to parliament supported by a staff of well-trained civil servants and thus the administrative relationships were clear.

¹⁵ Discussed, for instance, by Robert Baldwin and James C. McCrudden in "*Regulation and Public Law*", Weidenfeld and Nicholson, London, 1987.

the specific administrative contexts in order to accomplish worthwhile outcomes.¹⁶ Therefore if there are relationships of interdependence that should be intensified and negotiated (between the agencies and other interested organizations and bodies), resources are made collectively use of, accountability extends among all stake-holders and capture becomes a difficult job.

The last topic touches on the problem of discretion, which the independent agencies have at their disposal and exercise. In this respect the democratic collegiate decision-making of independent agencies (fostered further by the on-going communication with the public) can be defined as consensual, deliberative and pluralistic. Due to these features it is a better method of reaching a common position than the one-man decision-making. Collective decision-making relies on shared opinions premised on the values of fairness, acceptability, accuracy and public recognition, which could considerably enrich the grounds of the whole process.

III.2 The independent agencies and the courts

The problem regarding the effect, which judicial review may have on the work of the administrative bodies in general and the independent ones in particular and especially its capability to influence their discretion merits particular attention as it pertains to the exercise of their competence and hence – to their effective functioning. The dilemma here is whether the fairness of administrative regulation can rely merely on the impact of the courts or other institutions (parliaments, tribunals and ombudsmen) could be more intensely involved in the process of accomplishing just decisions.

Another even more relevant question in the same vein is whether the self-scrutiny and self-regulation of the body could prove more promising for the improvement of its organization and functions as an independent agency.¹⁷

Compared to the consensual structure of the independent agencies the court does not possess the opportunities for active and open deliberation (internally and externally) during decision-making. Judicial review is not, nor is it meant to be, a democratic institution. No matter how diligent judges are in reflecting community values, it will be hard for them to assert these values in the concrete situations and to assert them under the particular circumstances. That is why final judicial decisions reflect the views of the judges that have taken them. The conclusion that follows is that the control exercised by the judges over the employment of discretionary powers by the administration including the independent agencies can not be efficient enough in guiding their conduct and make it more predictable. Because of its unsystematic and retrospective nature the effect of judicial review over the administration and especially the independent agencies can be rather limited.¹⁸

¹⁶ See more in Denis Galligan, *Public Law*, In: *Socio-Legal Studies*, Socio-Legal Series, Philip Thomas ed., Dartmouth-Aldershot, 1997.

¹⁷ See more in Denis Galligan, *Discretionary Powers: a Legal Study of Official Discretion*, Clarendon Press, Oxford, 1996 and also Simon Halliday, *The influence of judicial review on bureaucratic decision-making*, Public Law, 2000, 110-122.

¹⁸ Administrative activity presupposes reconciling of values among which efficiency and effectiveness cannot be totally ignored. The characteristics of judicial review and the training and expertise of judges prove unsuitable to guide the administration, which has to put in force flexible and adaptable techniques in order to influence successfully human behaviour. See more in Peter Cane, *An introduction to administrative law*, third edition, Clarendon Press, Oxford, 1996, 379 – 392.

There could be other solutions for the improvement of the independent agencies' decision-making, which is a process materializing their independence perceived as creative expert potential but not arbitrariness.

One path is the adoption of rules, which are unambiguous enough to guide the body's discretion. Among these rules proportionality could be embraced by the independent agencies as a guiding principle both in the process of the rule-making and the control they exercise.¹⁹

In order to achieve effective and democratic decision-making it is also important to put particular accent on the skills and knowledge of the administrative personnel which work in the independent agencies. The reforms from within relate to the training of the staff-members and the raising of their awareness about their special role and accountability in a democracy. These changes are predominantly based on the improvement of the recruitment and appointment procedures, the adoption of codes of ethics, performance evaluation and better understanding of the real weight of independence and impartiality enjoyed.²⁰

III.3 Functions of the independent agencies

From an administrative perspective the independent administrative bodies aim at regulating and supervising the activity in a specific social area.

While legally regulation means rule-making, supervision the main purpose of which is to follow how norms are implemented and to evaluate the results of the implementation represents a complex set of sub-functions (powers).

The supervisory competence encompasses various powers such as:

- powers related to the general aim of control in the field, the purpose of which is to protect public values legally defined and exercised on a permanent basis;
- verifying powers directed towards securing information and evidence in order for the powers of impact to be triggered;
- powers of impact pursuing compliance of the behaviour of the regulated with the legal conditions.

The last power covers a number of opportunities for administrative actions the most important among which is the implementation of the permissive power the gist of which can be the licensing procedure.

¹⁹ It is a commonly shared opinion that the principle of proportionality is a tool applied by the courts in the course of judicial review. Apparently these bodies and among them constitutional courts often make use of the principle of proportionality in order to interpret fundamental norms and values and thus delineate the possible boundaries of human rights. There are no restrictions on the application of the principle of proportionality principle by the administrative bodies, which can adjust it best to the necessities of the regulated area. In such a way these bodies can strike the proper balance between various interests taking into account sectoral demands and concrete situations. The tests they elaborate illustrating the consequence of the possible steps that should be undertaken reflect best the special regulatory requirements in the particular field and serve as a bridge between the legal framework and its practical implementation. These tests can generally create a sound basis for consistent and predictable administration. Thus according to the British Communications Act (2003) the proportionality principle is one of the principles underpinning the interventions and the regulatory measures employed by the regulatory body *Ofcom* for the achievement of its policy objectives.

²⁰ More interesting ideas about the reformation and the progress of the independent agencies from within and especially of the personal in charge see in the discussion paper by Roderick A. Macdonald, *The Acoustics of Accountability, Towards Well-Tempered Tribunals*, May 4 2001, the 9th Annual Conference on the Individual vs the State, held in Budapest at CEU.

IV. The specialized broadcasting regulators as independent administrative agencies

IV.1 Competence

Following the pattern of the regimes in force (general *vis-à-vis* the print media and special administrative for the electronic media) respectively two types of bodies are in charge of the press and the broadcasting media²¹ – the press councils (press commissions) and the broadcasting regulatory agencies.

Due to the technological and the administrative development the regulatory bodies in the area of the most pervasive media – the broadcasting – have been constituted as independent administrative agencies performing complex administrative functions.²² The design of the independent administrative agency has turned out to be the most convenient form to maintain the organizational and political independence of the media system, i.e. to regulate and control the media but at an arm's length from the government deploying sector-oriented approach, expertise and dialogue.

The competence exercised by the broadcasting regulators encompasses regulatory and controlling powers. The former pertain to rule making, i.e. to the creation of secondary legislation, which must specify the legal norms in the field and establish a coherent set of standards and should be expressly provided by law. The latter comprises powers aiming at protecting fundamental values in the field, verifying powers and powers of impact.

The Council of Europe recommendation stipulates that broadcasting regulatory authorities exercise regulatory powers including licensing without elucidating further in detail what the controlling competence which is of primary importance for such a body will be like.

IV.2 Controlling (supervisory) competence

It is striking that though widely called regulatory, the functions of most of the special media regulators are predominantly supervisory or controlling by nature. This role is defined by Hoffmann-Riem as "a task for ensuring whether the specific norms of broadcasting law are being observed".²³ It could be proven by comparing the relevant provisions of the broadcasting acts and by the functions of the special media regulators in different countries.²⁴

²¹ There is abundant literature on this topic. See for instance, Eric Barendt, Lesley Hitchens, *Media law. Cases and materials*, Longman Law series, 2000; Eric Barendt, *Broadcasting law A Comparative Study*, Oxford:Clarendon Press, 1993; Wolfgang Hoffmann-Riem, *Regulating media: The Licensing and Supervision of Broadcasting in Six Countries*, New York, London:The Guilford Press, 1996.

²² A recent decision of the Hungarian Constitutional Court indirectly confirms the administrative nature of the broadcasting authority which is the practice in most European countries. The license issued by the broadcasting regulator which is an individual administrative act is the basis of the relationships between it and the regulated operators. Contrary to this principle the Hungarian regulator ORTT acts like a dual body contracting frequencies to terrestrial broadcasters and at the same time imposing sanctions on them as an expression of administrative power. The Hungarian Constitutional Court annulled the provision according to which the Hungarian regulator ORTT played the role of an authority imposing sanctions from Jan 1 2008 on the grounds that such a possibility violates the principle of legal certainty – Decision 46/2007 of the Constitutional Court, promulgated in the Official Journal N81 27 June 2007, In: IRIS, Legal Observations of the European Audiovisual Observatory, 2007-8.

²³ Wolfgang Hoffmann-Riem, *Op.cit.*, 288 - 289.

²⁴ The agencies are authorized either to "discharge" functions with respect to "ensuring the optimal use of the electro-magnetic spectrum, a wide range of electronic communication services, a wide range of TV and radio services of high quality and wide appeal, maintaining plurality in the provision of broadcasting and applying adequate protection for audiences against offensive or harmful material and against unfairness and infringement

The general goals of the control in the media field are to guarantee freedom of expression and media pluralism. These are policy objectives determined by law. The tasks of the body with respect to their achievement are fundamental as they relate to fundamental rights and values and are pursued on a permanent basis.

The purpose of the verifying powers is the collection of sufficient and high-quality information by the body in order for the latter to take informed decisions. The significance of these powers lies in the opportunity they create for the authority to have at its disposal enough facts and material evidence, which will allow it to act adequately in a particular situation. They assure the effective implementation of the powers of impact. Among them the investigating power for instance, enables the body to investigate thoroughly matters of public concern.²⁵ In broadcasting on the basis of the investigating process and the collection of facts the regulatory body can put in force the licensing/permissive power and decide on the award of the license. Regular inspections trace also the fulfillment of the license obligations by routine or ad hoc inspections applied by the body in connection with the operation of the license. The effective monitoring in the field of broadcasting depends upon the due and accurate implementation of the investigating power and the research carried out or commissioned by the controlling authorities.

Within the regulators representing a variety of national models and experiences there are bodies exercising monitoring power only or the so called quasi-judicial function focused on the examination and judgment of broadcasts. For instance, in Britain before the establishment of the convergent body – *Ofcom* - there were a number of bodies operating in the field of broadcasting classified as primary regulators (the Independent Television Commission - ITC and the Radio Authority - RA - for the regulation and control of television and radio broadcasting) and secondary regulators (the Broadcasting Standards Commission - BSC). While the ITC and the RA exercised the largest part of the regulatory and the controlling competence in the field through the licenses and the programme codes, the BSC was set up to accomplish three main tasks to consider and adjudicate on complaints; to monitor, research and report on standards and fairness in broadcasting and to produce

of privacy” (UK); or to “execute and enforce the act” (USA); to “organize broadcasting” (Turkey); to “supervise the activity of the RT organizations” (Slovenia); to “promote and ensure a wide range of communications services” (South Africa); to “control the enforcement of the broadcasting law” (Bulgaria), “supervises the observance of the way in which public and private broadcasters fulfil the obligations assumed in the broadcasting license, under the terms stipulated in and with the observance of the legal provisions”(Moldova), etc. Serge Robillard is of the same opinion linking the supervisory function to the programme content, which is at the core of the broadcasting function (*Television in Europe: regulatory bodies*, European Institute for the media, 1995, p.277).

²⁵ See more on this power in Denis James Galligan, *Due Process and Fair Procedures. A Study of Administrative Procedures*, Clarendon Press, Oxford, 1996, p. 269.

The Interstate Broadcasting Agreement of Germany envisages wide-ranging investigating power of the state supervisory authorities in connection with the assurance of pluralism in radio and television broadcasting. According to art.22 para 1 the supervisory agency may carry out all investigations and obtain all evidence in exercising its official discretion.

In other jurisdictions under the US law for instance, the FCC has a substantial discretion as to resolve subordinate questions of procedure and to determine whether to conduct an investigation publicly or in private and whether and under what circumstances it will require oral argument. The commission may delegate functions to a panel of commissioners, an employee board or an individual employee.

Under the Canadian law there is a general provision that where a person has failed to satisfy the requirements of regulations, license, decision or order or has done something in contravention of the law, the Commission may inquire into, hear and determine the matter (art.12). The inquiry is carried out by a panel which applies a hearing (assuring openness and transparency).

codes of guidance to assist broadcasters in their work by entrenching the standards code. In this respect the competence of the BSC could be considered auxiliary to the supervisory function of the principal regulators as the BSC could not impose administrative measures or sanctions but its power was limited to the extent that it could only give publicity to its findings and set an obligation on the broadcaster to publish or broadcast a statement concerning the case.

A similar institutional system is applied in Hungary where the Complaints Committee is an independent body, which shall not be instructed in its scope of activity (art.47 para 2 of the Broadcasting Law). Its scope (by subject and addressees) is wide as the law entitles anyone whose rights have been violated by a statement and by the serious impairment of the principle of balanced information to lodge a complaint before the committee. However, its power is not as strong and comprehensive as the controlling power of the regulator as the Committee has to report to the broadcasting authority and cannot suspend or revoke the license on its own initiative.²⁶

The examples support the conclusion that these monitoring quasi-judicial bodies do not enjoy the full range of supervisory competence despite their important obligations to monitor programmes (or the activity of the regulator as such), to respond to complaints and requests and thus to improve the media practice in the sector adjudicating on the basis of legal and ethical criteria.

Another part of the competence exercised by the broadcasting regulators is represented by the powers of impact encompassing a number of opportunities for administrative action undertaken by the body itself or in cooperation with other bodies and organizations. Among them the permissive power is the most effective tool for supervision in broadcasting and its genuine manifestation is the carrying out of the licensing procedure the license being an absolute prerequisite for the broadcasters to start operating. In the course of the licensing procedure the regulator gathers information about the ownership, financial viability and programme intentions of the applicants and decides on technical (allocation of frequencies) and programme (content) matters. The license through which the procedure is accomplished materializes the controlling competence of the regulatory body exercised in its different stages. In fact all actions of the regulator in the stage of supervision are either preparatory or facilitate the final award of the license and the fulfillment of its requirements.

The complex socio-cultural and economic nature of broadcasting and its huge public ramifications presuppose the existence and exercise of a signaling (notifying) power. It assures the communication among different bodies and units in the field and between them and other governmental institutions and social structures, the activity of which has a bearing on the proper functioning of the media. The existence of the notifying power is a guarantee for the smooth and coordinated implementation of the control in the field of broadcasting as a part of the overall controlling process in society. It comprises also a sound basis for mutual assistance and joint action.

The notifying power can be put in force for instance, in the course of the licensing procedure where the participation of several bodies is required and their acts are equally relevant as juridical facts for the validity of the final complex outcome.

Another example of its application is in the cases when the broadcasting regulatory authority is mandated by law to act in cooperation with the competition authority when there is a risk of concentration in the media market.

²⁶ In the same group fall also the bodies that have been set up in Switzerland and Austria - the Federal Communications Board set up at the Chancellery (Austria) and the Independent Authority for the Examination of Complaints (UBI) (Switzerland). Their decisions are intermediary in the whole process of supervision and focused on particular matters though they can be separately appealed at court.

The implementation of the signaling function assures also the necessary institutional dialogue for the effective enforcement of the administrative measures and penalties or for giving instructions. The breach of the licensing conditions may call for the assistance of other bodies (police, procuracy, inspectorates). If there is sufficient proof for a case to be considered a crime it is the obligation of the broadcasting authority to notify the prosecution office to initiate investigation and trigger a criminal procedure.

The power of enforcement is also complex by character and comprises several separate powers (sub-powers) each one of importance for the overall supervision. This power represents the imposition of a range of restrictive measures more specifically: the power to give instructions to the broadcasters or send a warning, the power to insist on an apology or correction to be broadcast, the power to impose compulsory administrative measures of enforcement - cut a programme from the service, suspend or revoke the license - and the power to impose administrative penalties - fines.

The significance of the power of enforcement can be interpreted in the light of the systematic unity of the other powers of the regulator as unalienable elements of its competence. Among them the most intimate is its connection to the permissive power. On the one hand, the power to impose restrictive measures or penalties is an extension of the permissive power and, on the other, a guarantee for its effective implementation. The permissive power delineates the area for the application of the power of enforcement and fixes its scope through the licensing conditions. The power of enforcement in its turn makes the permissive power real and not a mere declaration.

The power of enforcement has also a specific public dimension – through it the programmes of the broadcasters are corrected in such a way as to respond adequately to the public interest. Without it the regulatory body cannot be fully effective in the regulated area and its opportunities to acquire high profile position and public credibility through its actions are considerably reduced.

The informing power covers the duties of the broadcasting authority to inform the public about its activity. An important task within its general obligation to keep the public regularly informed about its actions is the maintenance of a registry of the licenses which may provide also other relevant information of public concern as for instance, data concerning ownership and cross-ownership in the media sector making it available upon request. An aspect of the informing function which merits particular attention is that through its exercise the body can attract comments on its decisions and search for approval from the general public. Factually the informing power underpins both the regulatory and the controlling competence and assures the necessary social support for the overall activity of the regulator.

A typical function of the European broadcasting regulators is the indirect controlling power concerning the obligation of the broadcasting authority to appoint the directors general and/or the members of the managing boards of public radio and television channels.

IV.3 Guarantees for the independence of the broadcasting regulators

If the specialized media regulators could be considered an important institutional guarantee for the existence of free and independent media there should be guarantees assuring their independent operation. These safeguards could be called “guarantees of the guarantee” of the media system. Among them the procedures of appointing people to the regulatory authorities are considered of key-value. Generally these procedures should be “democratic, transparent and public”. This principle is explicitly underscored by Recommendation 2000 (23) of the Council of Europe in its Appendix. Section II para 5 provides that “rules should

guarantee that the members of these authorities are appointed in a democratic and transparent manner". The explanatory memorandum clarifies further what the term democratic means pointing to its "understanding in its wider sense due to the variety of procedures of nomination from country to country". The document distinguishes between two main categories of nomination popular in Europe.

The first of them represents diverse "interests, currents of thought and political and socio-occupational groups in society".²⁷

The second treats the members of the regulatory authorities as "independent "judges". In such a case the regulator will be a collegial body including professional experts appointed by the representative powers.²⁸

It is worth underlining that if organized in such a manner European countries should take into account the principle of pluralism explicitly mentioned in the Council of Europe recommendation. A significant guarantee for the independence of the regulatory body belonging to the second category is the situation when no particular group or political party must dominate from an organizational or functional point of view.

There could be another classification of the types of regulatory authorities made against the backdrop of the relationships between them and the state branches particularly with regard to the executive. The comparative study from country to country shows that one of the options pursued by the states is to entrench the corporate or technocratic model under which the executive branch is mainly in charge of the establishment of the broadcasting regulator.²⁹ The broadcasting authority will comprise an independent executive agency operating at a greater or lesser distance to the central government, possessing fixed mandate and strong powers for impact.

The other formula provides for the election and appointment of the members of the regulator by the representative branches. The agency can be structured either by the executive and the legislative branch (searching for a balance between the two branches)³⁰ or by the parliament only (the idea is a larger basis for the reconciliation of interests to be found but under such a scenario political parties are more deeply involved in devising the body, a fact which brings politicization of the system as in the Italian³¹ or the Hungarian case³²). It is rare the judicial power to take part in the nomination process and such national models are isolated cases (in Portugal the judiciary sends representatives to the High Authority for Mass Communication and in Austria raises nominees for the Commission for the Observance of Broadcasting Law).

Under these conditions when state branches take part in the structuring of the body the model could be viewed as political and it allows the media regulator to occupy a mediating and balancing position among the classical branches of government. Although the application of such an approach leads to the creation of the so called "fourth", "neutral" branch, the

²⁷ It is the so called German model commented upon in greater detail, for instance, in Eric Barendt, *Broadcasting law*.

²⁸ The formula of a media regulator enshrined in France is the following: the audiovisual council – CSA - is a college of nine commissioners of which three members including the President are appointed by the President of the French Republic, three members are appointed by the president of the National Assembly and the remaining three by the President of the Senate.

²⁹ In Britain this situation is a consequence of the doctrine of the ministerial responsibility (see more on this and on the contemporary developments in Peter P.Craig, *Op.cit.*

³⁰ The French model is an example of such an approach.

³¹ In Italy factions at parliament still have a strong influence over the regulation of the broadcasting system through the election of the members of the OGCOR where each chamber elects four members of the two sub-commissions.

³² The National Radio and Television Commission (ORTT) must comprise of at least five members each of whom is elected for a four year term of office by a simple majority of parliament and all members are nominated by parliamentary groupings (one member per grouping).

concrete institutional forms that emerge do not eliminate the risks of interference and cannot perfectly settle the problem of independence. While the dangers in the corporate or technocratic model constantly lurk behind the innate closeness to the executive, the risks for the political model are generated by the involvement of the political branches in its formation. The greatest threat usually comes from the majority, which through the machinery of the democratically elected bodies can easily put in place representatives, who support the policy of the government but may not support the interest of the public in the existence of free and impartial media.³³

Therefore in both models other safeguards are also necessary. They relate to the fixed mandate of the members for a term of office provided by law, clear mechanisms for dismissal, which should be put in force for cause only - non-respect of the rules of incompatibility, conflict of interests (which may extend for a year or two beyond the duration of the term of office) or incapacity to exercise their functions and there must be a right of appeal for dismissal.

Except for the fixed mandate, the special membership and election procedure there can be other ways through which the attempts of the political majority to take advantage of the appointing procedure and send its *protege* to the broadcasting regulator can be considerably restricted. The correctives, which are applied, aim at limiting the discretion of the electing bodies (as far as possible) and subjecting it to clear-cut rules, greater openness and transparency.

One of the conditions in this respect is related to the legal requirement that only persons possessing a special background or high professional and moral (the second should be particularly stressed upon!) qualities can be appointed as members. This condition is of crucial importance because the trustworthiness of the body is premised on the professional and moral integrity of its members. Not only political or economic incompatibility should be considered an obstacle but also any involvement (direct or indirect) in media matters, which can result in a conflict of interest and put at stake the independent and objective decision-making of the authority. Besides the formal conformity of the nominees with the legal principles the electing bodies have to take into account a number of informal factors related to the objectives of the agency such as necessity of professional diversity, readiness for teamwork, understanding of impartiality and independence and heightened sensitivity to personal interest. In the sensitive and dynamic media field the careful evaluation of both formal and informal possibilities for recruitment of personnel is of great significance.³⁴

Not only the regulator should avoid having members whose professional or business activities may obstruct them to express an objective opinion but it must strive to attract professionals of high stature who through their participation can boost the public image of the body and bolster its credibility. Thus the qualification and disqualification requirements, on

³³ The paradox is that in both models the risks are engendered by the initial cause for which the independent media regulator has been created. In the Anglo-American case it was the need to set up an independent and expert authority, which could cope with the managerial problems in a particular sensitive area, while in the continental model the purpose was to accommodate politically the broadcasting councils within the traditional governmental pattern.

³⁴ Appointments are fundamental for the assurance of the credible membership of the independent regulators, which eventually play a crucial role in shaping its accountability. Roderick A. Macdonald perceives accountability in respect of personnel “the lynch-pin of impartiality and independence.” The processes are interrelated – “the integrity of tribunals is above all else, dependent on the integrity of their members; the integrity of members is, above all else, dependent on the integrity of processes of appointment, training and destitution.” (Macdonald, Roderick A. *The Acoustics of Accountability, Towards Well-Tempered Tribunals* (May 4 2001, the 9th Annual Conference on the Individual vs the State, held in Budapest, CEU, p.30)

the one hand, safeguard the independence of the body and on the other hand, promote its improvement from within through the integrity and skills of the human resources there.

Another condition regards the democratic legitimacy of the broadcasting agency. Providing for opportunities for civil society organizations to take part in the process of nomination and appointment such a formula can contribute to the impartiality and pluralist organization of the body and keep it at a distance from the political branches

An argument in favour of this proposal is that media associations can represent best the collective interests in the sector. On the other hand, there is a serious concern that big and wealthy media associations can monopolize the sector and prevent other poorer and not that influential structures (or the public at large) to raise nominees. The risk is that the broadcasting regulator may happen to have quite a narrow basis and represent only a handful of professional interests.

An additional guarantee, which may outweigh the risks of a random and subjective selection of civil representatives, is the formulation of clear-cut criteria for their participation which are provided by law. These may include the goals, membership, popularity and public contribution of civil organizations, which could prove their real social value. The attachment of a list of the eligible organizations and its regular up-dating on the basis of surveys and opinion polls verifying their social status and activity may prove to be a good practical solution.

Public participation through non-governmental organizations or by the direct involvement of viewers and listeners through surveys, opinion-polls, public announcement of the administrative practice of the body and its annual report followed by open debates serves not only as a guarantee for the pluralist and independent character of the media regulator but as a basic condition, which is vital for the successful operation and management of the whole media sector. The application of this principle can be extended further to enrich the requirements, on which the exercise of the body's competence is based.

The last but not least observation in this section is that functional independence of the regulatory authorities calls for financial independence because otherwise the broadcasting regulator would be constantly under the pressure of financial authorities. The best guarantee in this respect is if the regulator is free to structure its own budget on the basis of the revenues within the system (a percentage from the license fee or other financial contributions) or at least its budget to be approved by parliament as a separate allotment of the overall state budget and not be dependent on the actions of the government. In this respect an independent fund could be set up.³⁵

V. Procedural guarantees for the activity of the broadcasting regulators

The transformation of the media regulators into publicly responsible structures depends to a large extent on the procedures in force. Procedures ensure the exercise of their competence in a predictable, effective and fair manner. Procedures assure the practical implementation of the principle of good administration which is of major significance in European administrative law. It should be stressed that it is not sufficient to execute effective

³⁵ Recommendation (2000) 23 through the explanatory memorandum provides that "arrangements for the funding of regulatory authorities should be specified in law in accordance with a clearly defined plan, with reference to the estimated cost of the regulatory authorities' activities, so as to allow them to carry out their functions fully and independently". The precision of the financial scheme is of utmost importance for its proper implementation.

procedures but fair procedures that could be accepted as such by all participants and the public at large.³⁶

An important aspect of the procedural guarantees is that they should embody fundamental principles and values and thus can counterbalance the far-reaching discretionary power and bureaucratic closedness of the regulators.³⁷ An advantage of procedural guarantees is that they can assure to a large extent a priori the legality of decisions, which in turn will decrease the role of judicial review the latter being not fully able to influence the body's activity. Better than the courts democratic and open procedures can restrain the regulators while exercising discretion by bringing its actions in conformity with the rule of law and social interests.

Introducing more advanced procedures may elevate the dialogue between the media regulators and the courts to a new level upon which the latter will deal with more general issues pertaining to human rights and rule of law securing the necessary interpretative and conceptual background of the media regulators' work. The courts will continue reviewing the decisions of the media regulators applying greatest scrutiny when administrative restrictive measures and penalties are imposed because they may impinge on personal liberties. In such cases the courts are normally viewed by applicants and society as the body entitled to demarcate the line between state action and individual rights.³⁸

An important aspect of procedural fairness is transparency, which is indispensable to participatory democracy and can promote such values as legitimacy, accountability and good governance. The ways through which transparency could be achieved is by broadening the group of possible participants in the procedures before the broadcasting regulator and by widening the range of interests entitled to seek judicial review.

Public opinion can be taken into account in various cases – either to initiate the elaboration of specific sectoral rules or to alert the body to implement one of the powers (notifying, monitoring and power of enforcement) in the stage of control.³⁹

The improvement of the rule-making procedure if such a competence is envisaged by law requires intensive communication on the one hand, with the sector and the media

³⁶ About the role of the procedural principles and especially of good administration for just decision-making, democracy and rule of law see Lord Millett, *The right to good administration in European Law*, In: Public law, summer, 2002, p.310. The author cites Justice Frankfurter in *McNabb v. United States* (318 U.S. 332 (1943)) that “the history of liberty has largely been the history of the observance of procedural safeguards.”

³⁷With respect to the procedural guarantees Jurgen Schwarze quotes an opinion according to which administrative law is materialised constitutional law (Jurgen Schwarze, *Judicial review of European administrative procedure*, In: Public law, 2004, P.L. spring, p.166 referring to F. Werner, *Verwaltungsrecht als konkretisiertes Verfassungsrecht* (1959) *Deutsche Verwaltungsblätter* 527)). Administrative law makes constitutional institutional framework live through the procedures it provides for.

³⁸ On the problem see also the arguments in Paul P.Craig, Grainne de Burca, *EC Law. Texts, cases and materials*, Clarendon, Oxford, 1997 in particular in the chapter on the principles of community law.

³⁹ Thus according to the French broadcasting legislation professional and trade-unions organizations representing the communications sector of broadcasting, the National Council for Regional Languages and Cultures and nationally recognized associations representing the family can bring a case before the CSA to request it to give a notice for compliance to the holders of an operating license. A consultation procedure between the Competition Council and the CSA in the field of fair competition and between the public prosecutor and the CSA about the expedient procedure for obtaining a license by a manager when penalties have been imposed is also provided for.

The Anglo-American administrative law, which traditionally puts emphasis on natural justice and procedural fairness, provides for a variety of tools in this respect such as the notice-and-comment procedure, informal decision-making, negotiations, consultations and other flexible means of rule-making and adjudication. An important move forward to larger public representation is the change of the rule of standing considerably as a barrier to challenging agency's decisions at court enlarging the scope of the groups that can raise appeals. interests.

professional organizations and on the other - with the public at large premised on the understanding that such a process in the media field can only be successful if it builds on the values of discursive democracy. In regard to this not only the body must search for views and comments from experts, organizations and any interested party but the public at large should also contribute to the rule-making raising observations and opinions. The easiest way the dialogue to be carried out is via the web-site of the regulatory authority. Such interaction is more than necessary regarding the media as the regulation which should be implemented must not suppress but enhance freedom of expression. By and large public participation represents the interest the public takes in the organization of the electronic media as public trustees and especially in the way this institution can work best for the benefit of society.

The procedural guarantees for the exercise of control pertain to the necessary conditions, which should be present in order for the control to be properly applied for the achievement of the objectives of regulation. A safeguard against undue influence, pressure and ineffective procedure is the requirement for a complex evaluation of the technical and programming matters. In this respect the supervision over the broadcasting spectrum is not only a crucial aspect of the permissive power through which licenses are awarded. It could be construed as a guarantee for the independence of the media regulator from the influence of the government. The separation of the functions related to the technical assurance of broadcasting from the competence of the central executive bodies and their vesting within the scope of the independent regulatory agencies is the first step towards a break through the state monopoly over radio frequencies and their open and just management to the interest of the public. Such separation is also a step towards democracy and pluralism in the media sector as the even, just and transparent distribution and allocation of the frequency spectrum is a basic assumption for the establishment of a large number of broadcasters catering for different tastes and interests in society.⁴⁰ On the other hand, technical issues demand special qualifications for the members of the regulatory authorities and generally broadening of their capacity so that they can settle successfully the complex and novel problems in the media field brought forth by technological revolution and more specifically by digitization.

Within the scope of the supervising competence the licensing procedure carried out by the broadcasting regulators is the most effective and complex mechanism for control. Possessing such qualities it consists of a number of steps that must be undertaken in order for the body can take a well-grounded and persuasive decision. In the process of decision-making there is a risk of exercising discretion in a capricious and arbitrary manner. However, laws may prescribe additional principles to be observed as keeping consistent administrative practice, respecting legitimate expectations of participants and applying thoroughly the proportionality rule. Procedures can require comprehensive evidence and information to be produced and independent experts' opinions to be taken into consideration, conditions which can guide and structure the discretion of the regulator.

The Council of Europe recommendation "deems the granting of broadcasting licenses to be one of the essential tasks of regulatory authorities". The act dwells on the guarantees for just and open decision-making by stating that the conditions and criteria "governing the granting and renewal of licenses should be clearly defined in the law and/or by the regulatory authority" and the decisions should be given publicity in all appropriate ways.

Another detail which is worth mentioning with regard to the licensing procedure is that it should avoid "administrativization", be responsive to the public and its needs and rely

⁴⁰ To a greater extent this problem becomes of less importance due to the distribution of the cable and the new digital media. Despite the rapid technological advancement the switch over is a matter of investments and the economic welfare of society.

to a great extent on public input (hearings) in order for the decision-making body to be convinced in the public-value of the project offered by the candidates and in such a way to take an informed and publicly relevant decision. Recommendation (2000)23 underlines the high degree of openness by requiring public scrutiny of the carrying out of the licensing procedure leaving the concrete forms to the margin of appreciation of member-states.

The power of enforcement which is triggered when licensing conditions are not complied with should be legally designed in such a way as to give more room for persuasion and prevention of abuses, rather than restriction and punishment.⁴¹ This means that emphasis should be placed on cooperation and negotiations between the regulator and the regulated in the course of the implementation of the license conditions instead of the frequent use of restricting measures and sanctions. Softer measures of enforcement - recommendations and warnings - should play the role of an extension of the preliminary stage of dialogue and open broader opportunities for quick and friendly settlement of the problems.

Instructions for the strict implementation of the licensing conditions when given must outline the areas of controversy and give clear directions for amendments in the programmes rather than state vague and general prohibitions, which may easily result in censorship. Drastic measures as suspension and revocation of the license should be limited to a number of exceptional cases. It will be useful in practice a hierarchical system of sanctions and their application to be introduced in law, which could be put in force step by step if talks and negotiations or softer administrative measures have proven futile.

Despite the legal provisions, which should be consistent, non-controversial and premised on the idea of constant active communication between the regulator and the regulated the enforcement should be proportional and not imposing ungrounded restrictions on the media.

A very promising trend that could be pursued by the regulator is to promote and strengthen co-regulation and encourage self-regulation to prevent serious violations thus benefiting from the cooperation with professional organizations and unions. In this respect the law can provide for the decentralization of the controlling function and delegation of supervisory obligations to professional organizations.⁴² Such decentralized control seems feasible as supervision over the fulfillment of the registration conditions, which are precisely formulated in the law. The decentralized control will be more efficient as it will be implemented not through subordination but through coordination between members of a corporate structure united by common goals and ideals. The regulator could oversee this process and intervene in strictly delineated cases when more rigorous administrative measure is necessary to be imposed for the protection of democratic values and principles. The devolution of the controlling competence may be withdrawn when professional organizations lack in capacity, knowledge or persons for its proper exercise.

In order for the controlling function to be effective it is advisable a broader understanding of the role and specific combination of legal and ethical rules to be demonstrated by the regulatory authorities. Sanctions and restrictive measures should not be

⁴¹ “Heavy reliance must be placed on persuasion rather than on punishment in industries where technological and environmental realities change so quickly that the regulations that give detailed content of the law cannot keep up to date”. – In: Jan Ayres, John Braitewaith, *Op.cit.*, p.26.

⁴² The transfer of functions is advisable not for social reasons but for economic as well – the power then can be exercised in a more effective and professional manner and for a lower cost. About the incorporation of third independent parties in the regulatory process for the purpose of transforming the command-and-control system into a flexible and evolutionary process and the economic benefits of such reform see the conclusions of Yesim Yilmaz in “*Private regulation, a real alternative for regulatory reform*, In: *Policy analysis*, Cato policy analysis, N303, April 20, 1998.

perceived by the operators as monetary deterrents only, but as moral deterrents and factors for the formation of responsible attitude towards obligations. The broadcasting regulator should regularly inform the public what kind of enforcement policy it follows and how enforcement is implemented. Thus it will promote a culture of socially reliable media behaviour and gain trust and credibility through its actions.

The strengthening of the right of reply and other alternative measures of redress by the media regulators is another option which may contribute to the improvement of the controlling function.

It cannot be denied that in the era of convergence when attacks on one's dignity and reputation may be conveyed through various means the operation of socially responsible media requires wider employment of the right of reply or other equivalent measures. The procedure does not preclude the pursuit of the traditional legal measures envisaged by civil, administrative or criminal law but may reduce the number of court cases and if compared to the libel and defamation court proceedings it is speedier, accommodating and much more accessible for the average citizen as it is carried out free of charge. Another advantage of the right of reply and all similar procedures is that they represent a specific remedy established within the media system, which takes into account its peculiarities and allows its adjustment to the public requirements without the interference of a third body. By following these procedures affected may be satisfied morally by getting an apology or correction in a quicker and less painful manner, which in most of the cases is more acceptable than the triggering of a lengthy and costly court procedure in which the discussion of evidence and facts from one's personal life might prove embarrassing. At the same time the exercise of apology, correction and right of reply should be proportionate and should not prejudice the right of the media to disseminate information and opinions of public concern and hence the right of the public to know.

In order to improve the right of reply procedure and reduce the administrative elements in it the law may envisage involvement of professional organizations, which is another possibility for further decentralization and democratization of the monitoring process.⁴³

In the exercise of the controlling function regulators could be assisted by a media ombudsman. The ombudsman can mediate in controversial cases and initiate talks between parties. By the creation of a media ombudsman a two step supervisory procedure could be introduced, which could turn out to be more efficient and trustworthy for the public. Thus the ombudsman may consider complaints and if there is no satisfactory solution the most difficult and complicated cases may be referred to the collective media body for decision. Through his contacts with other bodies and organizations he/she may contribute to the implementation of the investigatory function by which information and evidence is collected as a necessary basis for the exercise of the other powers by the regulators.

⁴³ An example of cooperation between the media authority and the unions of media professionals is provided by the broadcasting act of South Africa. Complaints against broadcasters - members of the Broadcasters' Standards Association, are adjudicated by the association, while non-members are monitored by the statutory Broadcasting Complaints Commission at the High Authority. Through such solutions not only satisfactory outcomes in conflict situations between the media and the audience can be reached but self-regulation as a basis for accurate and responsible media performance can also be promoted.

VI. Conclusions

The establishment of specialized media regulators is a result of the transformation and institutional development of the modern state. Being created as independent agencies in the field of broadcasting they are able to respond to various challenges – social, political and administrative. The tendency is the independent media regulators to extend beyond the “tight jacket” model of the ordinary executive agency and relying on an adequate number of guarantees (organizational, political; internal and external; structural and procedural) to act as a real and effective safeguard for the fourth power role of the media. The most important among them are the open, transparent and democratic procedures through which these bodies are shaped and function.

The contemporary converging environment and the central political role of the media require regulation and control underpinned by public values. Media diversity and pluralism are at the core of these values and the objective towards which the regulation process should be oriented is democratic citizenship.⁴⁴

There are in my view two different tendencies concerning the media regulatory bodies that can be identified and should be reconciled. On the one hand, it is desirable to create truly independent media regulators that function like an independent centre of power insulated from political and economic interference. On the other hand, technological development requires that media regulators should have at their disposal specific knowledge, skills and expertise and be fast and efficient in order to react adequately to the dramatic technical changes, features, which are major tools for impact of the executive. Nowadays digitalization is a huge project that can be carried out successfully if governmental and business efforts are put in it. Such synergies logically result in the establishment of close cooperation and interdependence between the media regulators, the government and business circles uniting their efforts for the accomplishment of highly relevant social endeavours. However, cooperation of the kind or the outsourcing of various activities poses risks for the independence of the media regulatory authorities.

The powerful appeal of the initial idea to have a working body independent from both political and market forces as a guarantee for the media can be restored if professional organizations and the public at large are involved more thoroughly in the management of the media sector and especially in the application of media regulation and control. Such collaboration calls for the adoption of clear-cut legal provisions ascribing the roles and functions of all participating player and for new more open, flexible and democratic procedures for the implementation of the competence of the special media regulators. The creation of other bodies in the media sector (media ombudsmen, complaints and concentration commissions), which will deal with particular problems and support the controlling power of the special regulators, and the devolution of some powers (or sub-powers) to professional organizations in the sector can improve the regulatory regime in the media field bringing it closer to the developments in the regulated area and avoiding the risks of arbitrary and disproportionate administrative intervention.

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⁴⁴ The newly adopted BBC Charter places education and citizenship in the centre of the goals pursued by the organization. Similar is the attitude of the regulator *Ofcom* which in its policy statement promises to undertake such a task, however, it needs more explicit and precise formulation. See also more arguments and suggestions in this respect in Mike Feintuck and Mike Varney, *Op.cit.*, 244 – 257.