


1. Introduction

In this paper, I would like to focus on the role of the broadcasting regulator in the era of convergence. Indeed, technological advancements have brought about a different landscape as we knew it in the past. In today's world it is possible to hear your radio through the internet without the need of having a radio apparatus. The same applies to television which can be seen through the internet. Technologies are coming together to offer various services on one medium. All these developments have brought and will continue to bring about technological and media convergence. This, in turn, necessitates new regulatory structures to be able to monitor the new technological landscape. Bearing the above changes, I set out in this paper to identify what I consider ought to be the three main characteristics of a broadcasting regulator. I will then discuss in greater depth these characteristics. Further, I will address convergence and briefly refer to those regulators that are established by their respective legislation as 'single' or 'convergent' regulators. Finally, I will study the challenges ahead for both the traditional and the convergent regulator within the communications landscape.

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THE ROLE OF THE BROADCASTING REGULATOR IN THE ERA OF CONVERGENCE



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2. The Main Characteristics of a Broadcasting Regulatory Authority
 A broadcasting regulatory authority should fulfill the following three main objectives: (a) it should be independent from external interference; (b) it should be provided with the necessary tools to fulfill its task; (c) it should be effective but at the same time reasonable and fair.

On 20th December 2000, the Council of Europe's Committee of Ministers adopted Recommendation 2000 (23) on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector which gives effect to these three aforesaid aims. These three objectives have to be studied in their own right in view of their importance to the subject of a proper and adequate regime of broadcast regulation.

2.1. Independence of Broadcasting Regulators

Independence from external pressure, especially from the Executive and the Legislature, is an essential prerequisite for the discharge of a broadcasting authority's functions. The broadcasting regulator's independence should be guaranteed by law. In the case of Malta, for instance, the Broadcasting Authority was established in 1961 under the Broadcasting Ordinance. Since Malta attained its independence in 1964, the Authority has been set up by article 118 of the Constitution of Malta. The Constitution provides that a member of the Broadcasting Authority may be removed from office by the President, acting in accordance with the advice of the Prime Minister, only for inability to discharge the functions of his office (whether arising from infirmity of mind or body or any other cause) or for misbehaviour. Moreover, in the exercise of its functions under the Constitution the Broadcasting Authority is not subject to the direction or control of any other person or authority, be it Parliament or the Government. Finally, the Broadcasting Act establishes the financial independence of the Authority when it provides that the Authority is to be granted a minimum annual sum of Lm 250,000 for its operations.

2.2. Provision with the Necessary Tools to Achieve its Objectives

Not only is it important for a regulatory authority to be independent from the other organs of the State but it should be provided with the necessary means to achieve its objectives. It should have its own staff, its own recruitment policy and its own finances. In the case of the Broadcasting Authority all the monies which it collects are retained by it. This applies to licence fees, administrative penalties (when sanctions are imposed on broadcasters for infringement of the

broadcasting law in terms of article 41 of the Broadcasting Act) and other sources of revenue.

The Authority requires not only its own human resources and finances but its own monitoring equipment in order to discharge its constitutional and legal duties. Moreover, when the (Government) Department of Wireless & Telegraphy is requested to advise the Authority on technical matters, the latter Department acts as the Authority's technical adviser. Naturally, this is due to the fact that in Malta the Broadcasting Authority is not a convergent regulator and, therefore, does not have technical expertise.

2.3. The Broadcasting Regulator should be Effective, Reasonable and Fair

Prior to the year 2000, it cannot be said that the Authority was as efficient as one would have wished it to be in so far as regulation enforcement was concerned. This was due to the fact that the Authority was more dependent on the Executive Police and on the Courts for prosecution and conviction of violations of the Broadcasting Act. Unfortunately, court cases dragged on and on and thus the Authority's decisions tended to take quite a long time to be implemented. However, this matter was addressed in the 2000 amendments to the Broadcasting Act. The latter enactment was amended accordingly in order to empower the Authority to punish the contravention of a vast array of broadcasting offences. Indeed, nearly all previously obtaining criminal offences established in the Broadcasting Act were depenalised and, since 2000, it is the Broadcasting Authority which nowadays passes on judgment in the case of such administrative infringements.

In addition, once the Authority has replaced the courts, it is compulsory for the Authority to ensure that the broadcaster is given a fair and public hearing and that its decisions are reasonable especially in view of the fact that certain Authority decisions are not reviewable on the merits by the local Courts.

2.4. The Council of Europe's Committee of Ministers' Recommendation 2000(23) on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector

In the Preamble to the Council of Europe's Recommendation it is recognized that technical and economic developments have an impact on the role of regulatory authorities and may create a need for greater adaptability of regulation, over and above self-regulatory measures adopted by broadcasters themselves. Accordingly,

guideline 12 of the Recommendation suggests that regulatory authorities should be given the power to adopt regulations and guidelines concerning broadcasting activities: regulatory authorities should have powers of regulation which enable them to respond flexibly and adequately to questions that may be unforeseen and are often complex, not all of which can be resolved, or even anticipated, by the legislative framework. Without spelling it out specifically, the Recommendation thus seems to recognize an increased role for regulatory authorities, alongside self-regulation and co-regulation, in drawing up the 'rules of the game' in a rapidly evolving communications sector. On the other hand, the Recommendation deliberately refrains from taking a position on whether a 'joint' regulatory authority should be established for the whole communications sector.

2.5. Independence of Regulatory Authorities

The clear leitmotiv of the Recommendation is the independence of regulatory authorities. At the same time, the Recommendation was obliged to recognize that Council of Europe Member States have established regulatory authorities in different ways and that, consequently diversity exists with regard to the means whereby – and the extent to which – independence is achieved.

Independence is indirectly defined in guideline 3 of the Appendix, which formulates as an objective the protection of regulatory authorities 'against any interference, in particular by political forces or economic interests'.

In addition to the general affirmation of the principle of independence the Recommendation aims to ensure independence at several levels:

Membership of regulatory authorities

The Recommendation proposes rules on incompatibilities and on the appointment and dismissal of members in order to ensure their independence.

Regarding the appointment and dismissal of members of regulatory authorities, paragraphs 13-15 of the Explanatory Memorandum mention a number of different solutions, all of which should, however, respect the principle of pluralism. As far as incompatibility rules are concerned, it is interesting to note the discussion of whether Members of Parliament or of the Government, or any other person holding a political mandate, should (exceptionally) be allowed to be a member of such regulatory authorities.

Financial independence and administrative autonomy

Guidelines 9-11 stress that the funding mechanism is a key element in the authorities' independence, whereas guideline 12 tends to strengthen the regulatory authorities' administrative autonomy recommending that they should have the power to adopt internal rules.

Accountability

Guideline 26 stipulates that in order to protect the regulatory authorities' independence, supervision in respect of the lawfulness of their activities should be exercised a posteriori only.

2.6. Powers and Competences of Regulatory Authorities

Regulatory powers

Guideline 12 states that 'subject to clearly-defined delegation by the legislator, regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities'. This short statement is the result of a very lengthy discussion within the drafting group, which was complicated by the existence of differing views on whether and to what extent regulatory authorities should have genuine regulatory powers. Accordingly, paragraph 31 of the Explanatory Memorandum recognizes the great diversity which exists among Member States 'depending on the constitutional framework and different legal traditions': whereas in some Member States such authorities enjoy only consultative powers (making recommendations or delivering opinions), other countries empower them to adopt binding regulations.

At any rate, the Recommendation recognizes that the regulatory powers must be subjected to a 'clearly-defined delegation' by the legislator, that the delegation is normally limited to certain areas (such as advertising and sponsorship, election campaign coverage and the protection of minors) and that regulations must duly respect the editorial freedom and independence of broadcasters. These provisos, which in fact preclude regulatory authorities from having an all-encompassing mandate and discretionary powers to regulate broadcasters, may be seen as important safeguards for freedom of expression and broadcasting freedom.

Granting of licences

Guideline 13 describes the granting of broadcasting licences as one of the essential tasks of regulatory authorities – although at present not all Council of Europe Member States have entrusted independent regulatory authorities with this task.

There are also differences as to whether the broadcasting or telecommunications regulator has competence for the planning of broadcasting frequencies and their allocation to operators. The wording of guideline 15 therefore reflects a difficult compromise and leaves some ambiguity, particularly regarding how the third sentence should be interpreted. This vagueness has to be viewed in the context of the ongoing debate on the new regulatory framework for communications infrastructure proposed by the EC Commission, and the question of whether frequencies should be allocated to broadcasting or network operators.

The important point here is that guideline 16 (final sentence) recognizes the specificity of the allocation of broadcasting frequencies to public service broadcasters. Moreover, paragraph 35 of the Explanatory Memorandum stresses that even in a digital environment there is the risk of a relative shortage of frequencies that may be used for broadcasting and that it is therefore necessary in the public interest to allocate them to the operators offering the best service, also taking into account public interest objectives such as the guarantee of pluralism.

Monitoring broadcasters' compliance

Guideline 19 clarifies that all monitoring of programme content must be retrospective, to avoid any form of censorship. Moreover, the Explanatory Memorandum clarifies that regulatory authorities are not there to 'police' the broadcasting sector but, rather, to ensure that it functions smoothly.

2.7. Powers in Relation to Public Service Broadcasters

Guideline 24 mentions the possibility of regulatory authorities being entrusted with tasks often incumbent on specific supervisory bodies of public service broadcasting organizations, while at the same time respecting their editorial independence and institutional autonomy.

This guideline is a lengthily negotiated compromise between those advocating separate supervisory structures for public and commercial broadcasting and those in favour of giving the same authority and supervisory tasks for the whole broadcasting sector. The Recommendation refrains from adopting a position on this issue and mentions only the possibility that the supervisory functions in general, or certain specific ones, could be entrusted to the regulatory authority. The Explanatory Memorandum recalls that the 'normal practice' in the Member States is to have separate

regulatory frameworks for public and commercial broadcasting, and that this separation also exists with regard to supervisory bodies and regulatory powers. It nevertheless mentions, as a possible advantage of giving the same regulatory authority powers for both commercial and public broadcasters, that this could help guarantee fair competition between them.

3. Convergence: what is it all about?

There does not appear to be a precise definition of the term 'convergence' although it seems to imply the ability of different network platforms and consumer devices to carry essentially similar kinds of services. Indeed, convergence is used to describe the combining of personal computers, telecommunications and broadcasting. It means that providers of communication systems can deliver products and services that compete with products and services now delivered to other networks. Convergence is not just a technology issue, but also an issue of culture and life style. For the end user, this can mean increasing choice in the equipment that can be used to carry out a particular task. For instance, an internet television can combine some of the functions of a radio, television, personal computer and telephone.

Telecommunications operators are already offering audiovisual programming over their networks and have become major players in the provision of internet access, as well as backbone infrastructure. On the other hand, broadcasters have been providing data services over their networks and digital transmission of both radio and television, including interactive television, will only contribute to enhance this fusion of services. For instance, the Maltese cable operator is deploying cable modems to offer high-speed internet access in addition to its traditional business of television programming distribution and is also currently looking into whether it should also offer telephony as well. Indeed, although it is still in the early days of its development, digital television and digital radio broadcasting services are changing today's audiovisual landscape. A number of interesting phenomena are appearing as digital compression is cost-effectively reducing capacity constraints:

- Programme bouquets and thematic channels: broadcasting companies are marketing their digital services in the form of "bouquets" of programme channels. The "bouquet" complements "generalist" television channels with thematic channels concentrating on news, sports, movies, etc.
- Near Video-on-demand: the availability of substantial transmission

capacity at reasonable prices makes video-on-demand services possible.

- **Pay-per-view:** similarly, it is possible to market specific events or movie-showings on an individual subscription basis. The greater capacity of digital television allows the simultaneous broadcast of several events giving viewers the choice of access to a particular event on a pay-per-view basis.

4. Single Convergent Regulators

The development of digital technologies has led to the emergence of new media which can combine elements such as text, graphics, data, fixed images, audio, full motion video and animation and deliver them to exhibition devices such as personal computers or television sets. The distinguishing features of new media are its use of digitization, interactivity and interconnected networks.

As the borders between the different media erode and all products and services become available through the same platform, governments are realizing the need to create a single authority, with powers to integrate telecommunications, television, radio and print regulators. The trend seems to be moving, albeit slowly, in the direction of establishing a single convergent regulator.

4.1. The American Model

The Federal Communications Commission of the United States of America was established by the Communications Act of 1934 as an independent United States government agency directly responsible to Congress. The Act, which has been amended over the years, charges the Commission with establishing policies to govern interstate and international communications by television, radio, wire, satellite and cable. In February 1996, the Telecommunications Act of 1996 was signed into law, representing the first major overhaul of American nation's telecommunications policies in over 60 years.

4.2. The Canadian Model

The Canadian Radio-television and Telecommunications Commission (CRTC) was established by Parliament in 1968. It is an independent public authority constituted under the Canadian Radio-television and Telecommunications Commission Act (R.S.C. 1985, c. C-22, as amended) and reports to Parliament through the Minister of Canadian Heritage.

The CRTC is vested with the authority to regulate and supervise all aspects of the Canadian broadcasting system, as well as to regulate telecommunications service providers and common carriers that fall under federal jurisdiction. The CRTC derives its regulatory authority over

broadcasting from the Broadcasting Act (S.C. 1991, c. 11, as amended). Its telecommunications regulatory powers are derived from the Telecommunications Act (S.C. 1993, c. 38, as amended) and various "special" acts of Parliament related to specific telecommunications companies.

The Canadian Radio-television and Telecommunications Commission (CRTC) evolved from a series of commissions, studies, hearings and legislation on the need to create an agency responsible for regulating broadcasting and telecommunications in Canada.

4.3. The Swiss Model

At its creation in 1992, the Swiss Office of Communications (OFCOM) was assigned two major tasks: to regulate the radio and television sectors, and to establish the conditions needed to open up the telecommunications market. Today OFCOM oversees radio and television, radio communications, and telecommunications services and telecommunications installations. It enables efficient competition to take place and guarantees that market forces will have full play. Situated within the Federal Department of Environment, Transport, Energy and Communications, OFCOM attends to these matters for the Federal Council and the Federal Communications Commission while fulfilling an advisory and coordinating function for the public and policymakers. It also guarantees that basic services will be provided in all parts of the country and for all sections of the population.

4.4. The Malaysian Model

Technological developments have brought about major changes in communications, trade and industry, entertainment and recreation, giving rise to the convergence of the telecommunications, broadcasting and IT industries also in Malaysia. Advances in information and communication technology, particularly with the advent of the Internet have also brought about new challenges in the regulatory regime.

The Malaysian Government, after a comprehensive study, decided to review the existing regulations and replace them with legislation that would address the industry convergence underway. This pioneering effort culminated in landmark convergence legislation – the Communications and Multimedia Act (CMA) 1998 and the Malaysian Communications and Multimedia Commission Act (MCMCA) 1998. These new Acts have been designed around the principles of transparency and clarity, and on less rather than on more regulation based on the concept of industry self-regulation. The MCMCA came into effect on 1

November 1998 when the Chairman and 2 other members of the Malaysian Communications and Multimedia Commission were appointed. The CMA came into effect on 1 April 1999, with the repeal of the Telecommunications Act 1950 and the Broadcasting Act 1988.

Until 31 March 1999, the telecommunications industry was regulated by the Telecommunications Department, while the broadcasting industry was regulated by the Ministry of Information. With effect from 1 April 1999, the regulation of the telecommunications and broadcasting industries has been taken over by the newly formed Commission. In addition, the Commission is responsible for overseeing the IT industry and regulating on-line services.

4.5. The Italian Model

More nearer to home, in the Mediterranean region, Italy was the first Mediterranean country to establish a single convergence regulator. In 1997 the *Autorita' per le Garanzie nelle Comunicazioni* (AGCOM) was established by virtue of Law n° 249 of 31 July 1997. Law 249/97 bestows a further characteristic feature upon the Authority by enabling it to counsel Government on the opportunity of taking steps, legislative ones as well, in connection with technological innovations and the evolution of the communications sector on both the domestic and the international level. The emphasis thus far placed on the rapid and generalized use of digital technology in radio and television is the first concrete application of this technical-economic supervisory function attributed to the Authority. Digital technology, in fact, constitutes a factor of modernization in at least three areas:

- the efficient use of the frequency spectrum;
- the integration of the various branches of technology;
- convergence endeavours.

The efficient use of the frequency spectrum is most important in a country like Italy where the availability of frequencies is by now limited due to the extensive expansion of land aerial transmission and the absence of a cable network, as well as the dynamic growth of mobile telephone service. Indeed, digital technology makes it possible to optimize the available band, enabling, for example, four channels to co-exist where there used to be one with analogue technology.

4.6. The proposed United Kingdom Model

The same pattern will soon be followed in the United Kingdom with the planned creation of the Office of Communications ('Ofcom'). In fact, in December 2000 the British Government

published a white paper on A New Future for Communications consisting in the Government's policy proposals for the new regulatory framework. Since then ample consultation with all interested parties took place and the Communications Act 2003 was approved on 17th July 2003. The resulting convergent regulatory authority – to be called 'Ofcom' – is the merger of five different regulatory bodies, having power – including being the competition regulator – for broadcasting, telecommunications and spectrum management. Ofcom will bring together the technical expertise of the Radiocommunications Agency with the Independent Television Commission's sensitivities to culture and content; the Radio Authority's light touch approach to regulation with the Broadcasting Standards Commission's research skills, all underpinned by the rigorous economic examination which Oftel is known for.

5. Options for the Future

Even if the single convergent model is rejected, there is no doubt that there is room for co-ordination between the broadcast regulator and the telecommunications regulator. In Malta frequency allocation and satellite television licencing fall within the domain of the Minister responsible for Wireless Telegraphy; the cable operator and internet services are licenced by the Malta Communications Authority while terrestrial radio and television stations are licenced by the Broadcasting Authority. The Department of Wireless Telegraphy is in terms of law the Broadcasting Authority's technical consultant. The Prime Minister, the Minister responsible for culture, the Minister responsible for communications and the Minister responsible for wireless telegraphy as well as the Broadcasting Authority and the Malta Communications Authority all have certain powers within the broadcasting landscape. Since the latest allocation of Ministerial portfolios the public broadcasting service is assigned to the Minister responsible for Information Technology and Investment whilst public service broadcasting continues to be assigned to the Minister responsible for culture. Convergence apart, there is considerable overlap in the broadcasting landscape. If one were to broaden the subject to address communications as a whole, that is broadcasting, telecommunications and the print media one would find eight competent authorities in their own right involved in so far as broadcasting regulation is concerned apart from the Press Registrar in so far as the print media are concerned. In my opinion, the following steps need to be adopted:

1. to ensure compliance with the minimum standards established by the Council of Europe Recommendation

2000(23) on the independence and functions of regulatory authorities for the broadcasting sector in order to guarantee the three characteristics of a broadcasting regulator above-mentioned;

2. to formulate new rules for the Mediterranean region, preferably on the lines of the currently existing rules contained in the European Union's Television Without Frontiers Directive 1989/1997 and the Council of Europe's Convention on Transfrontier Television 1989/1998, so as to establish a minimum standard of television regulation applicable to all Mediterranean states thereby rendering the application of such rules easier by European and Mediterranean broadcasting regulatory authorities;

3. to investigate whether it is better to have one convergent regulator for telecommunications, the postal sector, broadcasting and the print media, or else, if such option is ruled out, to study the possibility of having only one regulator per sector – that is, one for the telecommunications and postal sector, one for the broadcasting sector and one for the print media;

4. if the single convergent regulator option is ruled out, there still should be an institutional structure established on a nationwide level to ensure more co-operation and liaison amongst the three regulators in question if three regulators are established in accordance with paragraph 3 above.

The current international trend seems to be pointing to the single regulatory regime. Although I do agree in principle with this solution, what is nevertheless indeed necessary at this point in time is the progressive introduction of a convergent regulator

covering the whole ambit of both existing and new services. As the European Union's 3rd December 1997 Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation towards an Information Society Approach put it,

'This option is the most far-reaching. It calls for a fundamental reassessment and reform of today's regulatory environment. This does not necessarily imply a whole new set of laws, but rather looking to see how existing frameworks can be adapted to promote flexibility, remove inconsistencies, avoid discrimination within and across sectors and continue to ensure the achievement of public interest objectives. Instead of applying to just some services, this would create a framework covering all sectors.'

6. Conclusion

There is no doubt that the communications sector requires revisiting. A holistic approach needs to be adopted with regard to the regulation of the diverse means of communications. The initial step was taken by Parliament with the creation of the Malta Communications Authority in the year 2000, right at the dawn of the second millennium, which is the competent regulatory authority for the postal service and telecommunications. But still our regulatory scenario remains, at least from the legal and institutional point of view, fragmentary. It is augured that both Government and Parliament address this subject with due haste for Malta does not and cannot afford not to remain abreast with the rapid evolving developments in communications technology taking place in today's world. ■

