Consell de l'Audiovisual de Catalunya

epra european platform of regulatory authorities

EPRA/2016/06

43rd EPRA Meeting
Barcelona, 25-27 May 2016

Plenary Session 2:
Compliance and Enforcement Policies, Strategies and Methods of NRAs put to test
Background Comparative Document
By EPRA Secretary Emmanuelle Machet)
(Draft pre-meeting version)

Contents

Introduction ... 2

Prelude: On the link between independence, transparency, accountability and efficiency ... 3

I. The Law as the key basis for NRAs' compliance and enforcement activities ... 4

II. Implementing NRAs Compliance & Enforcement Activities ... 6

2. 1. Principles and key objectives underpinning the Compliance and Enforcement work ... 6

2.2. Setting compliance and enforcement priorities ... 8

2.3. Current priority areas as stated by NRAs ... 10

2.4. Resources of NRAs for effectively undertaking compliance and enforcement functions ... 10

2.5. Communicating about Compliance and Enforcement policy/strategy/activities with public/stakeholders ... 11

III. Tools of NRAs for compliance and enforcement ... 12

3.1. The NRAs' Toolkit for compliance ... 13

3.2. NRAs' main tools for enforcement ... 14

3.3. Involvement of stakeholders/operators in the compliance system ... 16

3.4. Involving audiences: what measures do NRAs take to inform and educate the public on broadcasters' obligations and performance and on the possibilities to complain? ... 17

IV. Challenges and Experience ... 17

4.1. Regulatory challenges in the field of compliance and enforcement ... 18

4.3. Learning from failure: recent cases where the system has NOT worked well in securing the right outcome in the field of compliance and enforcement ... 19

4.4. Frequency of appealed decisions of NRAs ... 20

4.5. Assessing the Culture of Compliance ... 21

4.6. Recent developments in the field of compliance and enforcement ... 21

V. Review of compliance and enforcement policy, strategy and activities ... 22

Summary and Conclusions ... 24

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Introduction[1]

This year's annual Plenary theme "Compliance and Enforcement Policies, Strategies and Methods of NRAs put to test" builds on the EPRA tradition of looking at internal processes and roles of NRAs and collecting best practices. It aims to start a frank and open dialogue between regulatory authorities on matters of compliance and enforcement by looking at policies, strategies, methods and results achieved with a particular focus on case studies of good and bad experience. The plenary theme will be spread over two meetings in spring and in autumn; the meeting in Barcelona in May 2016 will focus on the current strategy and practice while the October session in Yerevan will look at the challenges of ensuring compliance and enforcement in a changing media ecosystem.

From the very beginning of its operations, EPRA has focused on the implementation of independent, transparent, accountable and efficient media regulation in practice by looking at internal processes and collecting best practice examples.
The **independence of regulatory authorities** has been discussed on several occasions, notably in Prague in 2007, which saw the production of a comparative document as well as a memorable keynote by *Karol Jakubowicz*[2]. The most recent work focused on what regulators can do to promote de facto independence: in Tbilisi in 2014 a Working Group addressed different practices and experiences concerning actual, de facto independence of regulators, in particular work processes, accountability and transparency[3].
The Transparency and Accountability of Regulators had also been on the agenda of a Plenary Session in Tallinn in 2009 on the occasion of which a detailed comparative document was produced and a remarkable address held by *François Jongen*[4].
The power to **enforce compliance** with law, regulatory decisions and sector policy is one of the main attributes of effective regulation. The various practices of regulatory authorities with regard to **monitoring** have been discussed on several occasions at EPRA meetings. In 1997 and 2005, working groups addressed the diversity of monitoring practices across Europe, while in 2000 and 2009, the focus shifted to more technical aspects, such as methodology and software. In Brussels in 2011, a Plenary session entitled "*Efficient functioning of Regulators: Approaches to Monitoring*" looked at the monitoring of on-demand audiovisual services and the specific challenges that it raises for NRAs; the cooperation between EPRA members in the field of monitoring as well as recent developments in the field of monitoring, also including issues of methodology and technology.
Last but not least, almost exactly six years ago, also in Barcelona, *Complaints and Sanctions* were at the centre of the debates in a plenary session for which the background paper presented a panorama of existing procedures and practices concerning complaints, sanctions and appeals[5].

The aim of this document is to present an overview of how regulators strategically determine their objectives, priorities and activities in the area of compliance and enforcement and to gain insight into how regulators effectively plan and implement their activities in this regard. A particular focus

---

[1] **__Disclaimer__: This document has been produced by EPRA, an informal network of 52 regulatory authorities in the field of broadcasting. It is not a fully comprehensive overview of the issues, nor does it purport to represent the views or the official position of EPRA or of any member within the EPRA network. A final version of the document will be produced after the meeting.**

[2] epra3-production.s3.amazonaws.com/attachments/files/1380/original/EPRA_keynote_KJ.pdf?1323685662

[3] http://www.epra.org/attachments/budva-wg2-independence-of-nras-paper; http://www.epra.org/attachments/tbilisi-wg2-independence-of-nras-comparative-background-paper

[4] The Transparency and Accountability of regulators: EPRA Background document EPRA/2009/06 by the EPRA Secretariat, for the plenary session on Transparency and Accountability of Regulators, Tallinn, May 2009. http://www.epra.org/attachments/tallinn-plenary-2-transparency-accountability-of-ras-background-document

[5] Comparative Background Document on Complaints and Sanctions by Emmanuelle Machet, EPRA Secretariat for the plenary session for the 31st EPRA meeting in Barcelona, 12-14 May 2010: http://www.epra.org/attachments/barcelona-2010-plenary2-complaints-sanctions-background-paper

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

of this paper is to highlight recent trends and gradual changes that would illustrate how regulators adapt their methods and tools to the changing media landscape.

The present paper was prepared on the basis of a questionnaire circulated in April 2016 to EPRA members which received 22 answers from the following regulatory authorities[6]:

Communications Regulatory Agency (BA); Flemish Regulatory Authority for the Media (VRM - BE); OFCOM (CH); Council for Radio and TV Broadcasting (CZ); Directors' Conference of the Media Authorities (DE); Radio and Television Board (DK); Technical Surveillance Authority (EE); Ofcom (GB); National Council for Radio and Television (GR); Agency for Electronic Media (HR); Broadcasting Authority of Ireland (IE); the Second Authority for Television and radio (IL); Icelandic Media Commission (IS); Radio and Television Commission of Lithuania (LT); Autorité Luxembourgeoise Indépendante de l'Audiovisuel - ALIA (LU); National Electronic Media Council - NEPLP (LV); Agency for Audio and Audiovisual Media Services (MK); Broadcasting Authority (MT); Commissariaat voor de Media (NL); Norwegian Media Authority (NO); National Audiovisual Council (RO) and the Council for Broadcasting and Retransmission CBR (SK).

22 answers is a relatively low number of answers for EPRA standards (usually around 30 respondents) with responses from the southern part of Europe being particularly rare. It may possibly reflect uncertainty as how to deal with some subjective or sensitive questions and/or to clearly articulate the strategy and processes which govern compliance and enforcement. The reasons for this may be cleared during the discussions which will take place in the plenary session in Barcelona.

Additional information has also been gathered from desk research, previous EPRA papers, questionnaires circulated among EPRA members on related issues and from findings emanating from the INDIREG and RADAR studies[7].

Prelude: On the link between independence, transparency, accountability and efficiency

The leading axiom in this document is the link between **independence, transparency, accountability and efficiency** of media regulatory authorities**.**
As was highlighted in Tbilisi by *Kristina Irion* based on the findings of the INDIREG study, "*independence is not an end in itself but a means for ensuring that the regulator performs the decision-making process meeting the normative requirements for which the independence of the regulator is called for*". De-facto independence is shaped by a complex chain of aspects, from statutory provisions granting independence to behavioural patterns demonstrating independence and policy decisions. It is an acquired property that needs time to build.
Transparency and accountability also play an important role in supporting independence; the significant positive correlation between transparency/accountability and impartial regulation was also highlighted in the INDIREG study.
Effectiveness requires that regulatory authorities are able to deploy their functions and powers in a way that ensures impact on the protection of public interest and correction of market failures as

[6] For further information, please check the full survey results on the EPRA-website: (EPRA members only) http://www.epra.org/surveys/plenary-session-2-barcelona-questionnaire-on-compliance-and-enforcement-policies-strategies-and-methods-of-nras-put-to-test/results
[7] Study AVMS-RADAR– Update on recent changes and developments in Member States and Candidate Countries that are relevant for the analysis of independence and efficient functioning of AVMS regulatory bodies (follow-up of 2011 INDIREG study).

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

their main tasks. In turn, well-thought out internal processes and good practices of NRAs may also contribute to developing trust towards regulatory bodies.

The causal interplay between independence, transparency, accountability and efficiency has been perfectly captured by *Karol Jakubowicz* in his speech addressed to EPRA members in Prague in 2007:

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

I. The Law as the key basis for NRAs' compliance and enforcement activities

According to the principle of legality, the primary basis for the work of the NRAs is laid down **in the legislation** which defines the tasks, powers and competence of the regulatory authority. As has been pointed out by many authors, regulatory authorities carry out the will of Parliament as it has been set out in primary legislation. Therefore, in order to guarantee the overall legal certainty framework, it is important that the mandate of the agency be laid out clearly in legislation[8]. The respective media laws and the laws establishing the regulatory authority therefore constitute the **key basis** for the NRAs compliance and enforcement framework.
The importance of the legislation as key basis of NRAs' Compliance and Enforcement activities can be illustrated with the example of the UK, where the Legislative framework notably constituted by the Broadcasting Acts of 1990 and 1996 (as amended), the Office of Communications Act 2002 and the Communications Act 2003 provides:

i. A clear articulation of which services are and are not subject to regulation;
ii. Statutory objectives that provide clarity for Ofcom, industry and members of the public in relation to the standards expected of services subject to regulation;
iii. The power and flexibility to create a Broadcasting Code containing a set of rules that provide a proportionate framework to protect the public. These rules are complemented by guidance which assists the industry in understanding how to comply with the rules and meet the standards required;
iv. Members of the public the means of complaining about unfair treatment or unwarranted infringements of privacy by the television and radio broadcasters which is easily accessible and free, with no associated costs;
v. A licensing regime which allows Ofcom to impose obligations on regulated companies to ensure that Ofcom can achieve regulatory objectives and the ability to remove those licences to operate;
vi. Effective sanctions and enforcement powers to apply in the event of a breach of the regulations; and

[8] As mentioned in the CERRE Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities, of 7 May 2014, p. 11.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

vii. Clear procedures, underpinned by statute, which ensure both that Ofcom follows due process and that there is transparency around our decision making.

Based on the provisions laid down in the law, many regulators (such as CH, BE, NL, IE, EE, NO, IL, MK) have produced General organisational Policy and/or Strategy documents. As a rule, the organisational policy defines the general approach and principles that will be applied by the regulator while the strategy statement lists the vision, the mission and the values according to which the NRAs act.
The VRM of the Flemish speaking Community of Belgium refers to its **Vision** – traditionally one key component of a Strategy – which is to "*aim to be the reference in the Flemish audiovisual sector*". Similarly, the Swiss OFCOM's **Vision** is to be: "*the centre of competency for telecommunications, the media and the post (…) and to actively contribute to the smooth operation and the successful development of a democratic information society*".
The Dutch CvdM's **Mission** (another key component of a Strategy) is to "*uphold the rules formulated in the Media Act by independent supervision of public service media and private media providers*".
The Swiss OFCOM's **Mission** in the area of media is: "*To guarantee the general conditions for strengthening a diverse media system which contributes to democratic opinion-forming and decision-making, taking into account the technical and economic processes of transformation and usage habits which are constantly evolving*".
The general Strategy documents also refer to **Values** guiding the action of the regulator. As an example, in the Netherlands, the overarching value that the Dutch Media Authority promotes is the freedom of information. *This overarching value is elaborated by the CvdM in three principle public values, namely independence, accessibility and pluralism. In addition, the CvdM stands for three facilitating public values: financial lawfulness, transparency and integrity*.

From the responses to the questionnaire, there appear to be three main types of Policy and/or Strategy documents: A general Statement of Policy and Strategy, multi-annual Work Programmes and the annual Work Programme or activity.

- The **Annual Work Programme** – which may also be called "activity plan", "set of priorities" - as in the Czech Republic - or "supervisory letter" - as in the Netherlands - , provides specific details of the Regulatory Authority's activity in the period. It appears to be a widespread instrument among regulators aimed at setting out the overarching goals and highlighting the key work areas in the year to come (mentioned by the authorities in GB, HR, EE, NL, IE, NO, EE, CZ, BE – VRM, MK).
- The **Multi-annual Work Programme or multiannual Strategic Plan** (mentioned by the authorities in IE, NO, HR, EE) is generally set for three years and explains the strategic orientations of the NRA over this period. In **Norway**, the Strategic Plan is presently set on a 5-year-basis (2012-2016). From next year, a three year action plan will be introduced. In **Ireland**, the BAI work with a three-year Statement of Strategy **(2014-2016). In Macedonia,** the Agency has adopted the Strategy for the development of broadcasting activity in the Republic of Macedonia for the period 2013-2017. This document analyses the conditions in the field of broadcasting and determines measurable and achievable solutions in order to contribute to the advancement of broadcasting activity.

These policy and strategy documents are general and are not specifically addressing enforcement and compliance issues. However, they will usually include some enforcement and compliance matters and principles. In addition, the values promoted by a regulatory authority in its strategy have a direct influence on the approach taken on compliance and enforcement - as noted by the Dutch CvdM in its response.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Also noteworthy is that several regulators state that they do not have any written organisational policy, or strategy as such (GR, LT, DE, LU, SK, RO, MT).

Only two regulators reported that they had one **specific policy and strategy document relating to compliance and enforcement**. In Ireland, the BAI has adopted a Compliance and Enforcement Policy in November 2014, whose overall purpose *"is to ensure a **consistent and transparent approach to the compliance activities**, which holds broadcasters and contractors fairly to account in respect of their obligations, having regard to the interests of viewers and listeners"*. In Norway, the NMA has prepared an internal report on the principles of Compliance and Enforcement in 2010.

However, in the majority of NRAs who replied to the questionnaire, the compliance and enforcement strategy and/or policy is enshrined in **a wide array of documents of varied nature produced by the regulatory authority.**
This includes notably procedural rules, set in secondary legislation or bylaws but also statutory licensing schemes (in which compliance is achieved through licence conditions), Broadcasting Codes and Guidance (UK), guidelines (IS) and principles (LV, DE), legal statements (CZ), recommendations (CZ), internal working rules (IS), methodology (CZ), and monitoring plans (LV, MK).
In some countries, such as Denmark or Bosnia and Herzegovina, the strategy and policy on compliance and enforcement also stems from the General Administration Act (DK), the Law/act on administrative procedure (BA, IS) and Law on Administrative dispute (BA) and general non-written principles applicable to public administration (DK).

II. Implementing NRAs Compliance & Enforcement Activities

2. 1. Principles and key objectives underpinning the Compliance and Enforcement work

Effective enforcement is vital to the successful implementation of any type of legislation, and legislation that is not enforced rarely fulfils its objectives. The question of how the enforcement task might best be conducted in order to achieve policy outcomes that are effective and efficient, while also maintaining community confidence has therefore been addressed in many different regulatory fields, from environment to media. The issue of enforcement approaches and specifically of regulatory style have been a focus for research and has led to the development of concepts such as '*responsive regulation*', '*smart*' or '*better regulation*'.

In the questionnaire, EPRA members were asked to list the principles and key objectives that underpin their Compliance and Enforcement work. The following principles and objectives were quoted:

1.	Encouraging a culture of compliance, accountability and responsibility by those regulated (quoted by IE, NO, DE)
2.	Promoting a preventive approach (quoted by CH, EE, NL)
3.	Understanding NRA´s role as a facilitator (quoted by CH)
4.	Ensure that broadcasters respect their obligations and safeguard the interests of the viewers and listeners, ensure deterring power (quoted by MT/SK/NL/IL/GR)
5.	Providing a means of redress to members of the public against unfair treatment or unwarranted infringements of privacy by TV and radio broadcasters.
6.	Serving and Being Accountable to the Audiences (quoted by IE/GB/HR)
7.	Balancing the public needs and values with the broadcasters' financial stability (IL)
8.	Providing regulatory certainty, consistency and predictability for stakeholders (quoted by LT, CZ, IE, CZ, GB, IL, MT)

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

9.	Providing Transparency in NRAs deliberation (quoted by IE, LT, CZ, CH, SK, UK)
10.	Creating awareness (quoted by CH)
11.	Encouraging Openness and dialogue with public and stakeholders (RO, EE, LT, DE)
12.	Including all relevant stakeholders and interest groups in formal and informal consultation processes (quoted by CH, UK)
13.	Assessing the impact of regulatory action before imposing regulation upon a market.
14.	Effectiveness and Responsiveness of the NRA (quoted by IE, SK)
15.	Applying rules of law principles: fairness, prohibition of arbitrary action, legal equality, the right to be heard (quoted by CH)
16.	Being evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome (quoted by UK)
17.	Intervene only where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve (quoted by UK).
18.	Operating with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required (quoted by UK).
19.	Seeking the least intrusive regulatory mechanisms to achieve policy objectives (UK)
20.	Researching markets/remaining at the forefront of technological understanding (quoted by UK, NO, NL)
21.	Ensuring a consistent and transparent approach to compliance activities (MK)
22.	Adopting a Risk-based Approach (IE)

The collected list reveals the **different types and styles of regulatory principles, objectives and tools.**

In terms of types of principles, it includes some general principles and obligations that are *geared towards the regulator in order to guide its actions*, such as being transparent, accountable and predictable. It also includes *external objectives that are geared towards regulatees*, such as ensuring that broadcasters respect their obligations and safeguarding the interests of the viewers and listeners.
In addition to principles, some *tools and methods* which can be used by regulators in order to fulfil their policy objectives have also been quoted by the respondents, such as conduct research, adopt a risk-based approach or conduct regular consultations with stakeholders.

In terms of regulatory style, the responses illustrate the two major approaches that have for many years dominated the debate about enforcement strategy and whether it is more appropriate for regulators 'to punish or persuade[9]'.
On the one hand, the three first objectives, namely '*encourage a culture of compliance*', '*promote a preventive approach*', '*role of regulator as a facilitator*' seems to indicate **a compliance approach** which promotes a conciliatory style of enforcement. It rests on the belief that compliance can be best achieved by *persuasion* rather than by a threat of sanctions. The compliance approach accentuates cooperation rather than confrontation, and conciliation rather than coercion. As an example, in its response, the Swiss OFCOM states: "*Regarding Compliance and Enforcement against media service providers as such, one general principle guides and overrules all others: Prevention. That means OFCOM Switzerland tries to evade as much cumbersome formal legal proceedings as it can by means of awareness creating, by providing guidelines, organising round-table-discussions, answering questions by stakeholders etc.*"

On the other hand, the fourth and fifth objective "*Ensure that broadcasters respect their obligations and safeguard the interests of the viewers and listeners*" and "*Providing a means of redress to*

[9] Sharon Oded; *Enforcement Strategies, Compliance Programs, and The Intermediary Gatekeepers*: https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=197

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

members of the public against unfair treatment or unwarranted infringements of privacy by TV and radio broadcasters" point to a **deterrence approach**. According to this line of thinking, enforcement systems should induce compliance through *punishment of misconduct*; by imposing a sanction for regulatory violations, the deterrence model seeks to manipulate the expected payoffs associated with subjects' behavioural decisions, and induce them to opt for compliance. Such an approach warrants a close monitoring of potential violators, and endorses a careful investigation of all signs of violations. This approach had also been described as adhering to the 'black-letter of the law' and concentrating on coercing the literal orders of laws[10].
Nevertheless, both approaches are not mutually exclusive and are usually used in conjunction with each other by most regulators. This is well reflected by the objective stated by Ofcom in the UK whose statutory objectives require that it operates "*with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required*".
This response also indicates a commitment to better regulation principles which imply regulating only when necessary and in a proportionate manner.
While regulators do not seem to rely exclusively on a stand-alone but rather on a **mixed approach including compliance and deterrence elements** in order to fulfil their policy objectives, a difference can be noticed between NRAs who put the emphasis on compliance and those for whom deterrence is the guiding principle.

2.2. Setting compliance and enforcement priorities

After asking about the basis on which the compliance and enforcement policy and its underpinning principles and objectives are decided, the questionnaire enquired on how realistic priorities that are well adapted to the specificities of the national ecosystem and the resources of the regulator are set. As mentioned earlier, regulators have a clear remit regarding the compliance and enforcement of audiovisual media services which is set out in legislation. In addition, many RAs are obliged to apply rules on administrative procedure when deciding upon breaches. However, most regulators still have some degree of discretion in carrying out their activities and setting their priorities based on their resources.

Many responses state that as a rule there is **no formal procedure on how to determine priorities**, but rather that they naturally emerge through a mix of approaches, depending on the concrete case and mainly including complaints from citizens and ex-officio monitoring activities focused on different areas (DE, CZ, HR, CH, MT, SK, RO, IL).
In addition, regulators may need to engage in legal investigations or compliance reports owing to specific statutory duties linked, for instance, to the involvement of NRAs in the public value test or further to a parliamentary request, as pointed out by the Swiss OFCOM.

On the one hand, audience complaints about media service providers' possible breaches of their obligations play an important role in **identifying potential areas of risk and in ensuring that viewers and listeners are appropriately protected**. This is particularly important in countries with a traditionally predominantly complaint-based approach (BA, DK, GR, LU, GB).

On the other hand, with regard to monitoring, activities may be driven by the national agenda such as elections (e.g. monitoring of political discussions in the pre-election period in SK, of hidden political advertisements in LV) or the suspicious absence of complaints in certain areas. In Bosnia and Herzegovina, the CRA has recently conducted several ad-hoc monitoring actions of content, after

[10] Sharon Oded, op. cit.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

noticing the absence of complaints related to specific breaches, in particular those related to commercial communications, in-house production and similar.

In Latvia, the Council makes a **monitoring plan** for every quarter based on current developments. In Belgium, the investigation service of the VRM works on the basis of a monitoring decree of 14 July 2014 ('Kaderbesluit Monitoring'), which determines the monitoring strategy of the VRM. In Macedonia, supervision is conducted on the basis of the annual plans for programme and administrative supervision, which contain details on obligations to be monitored, as well as the time-table and scope of monitoring.

From the responses, it appears that while most of the monitoring conducted is risk-based to a certain extent, only three regulators report having developed a proper framework for the assessment of the risk, some kind of ex-ante assessment. The idea that regulatory enforcement should be grounded in risk analysis is again based on the concept of 'Responsive Regulation'. Embedding impact assessments in the regulators' working methods is considered as a means to improve the quality of legislation.
In the UK, a **targeted review of Licensing and Enforcement** which was carried out in 2014-15 by Ofcom in order to assess the effectiveness of existing processes and areas of low compliance, identified priority areas in which improvements could be made. Following this review, Ofcom has recently enhanced its content monitoring approach and has moved from an ad hoc approach to content monitoring to an extended targeted monitoring approach. A **risk matrix approach** was developed which balances an assessment of the risk that a channel presents on the basis of its recent compliance history against its potential impact, broadly in terms of the potential harm to the audience (e.g. physical or financial harm) of a breach occurring on a channel of that type, on the basis of the genre of its primary programming. Using this risk matrix, Ofcom prioritised monitoring those channels where they have had concerns about the licencee's ability to comply with their requirements, as evidenced by recent enforcement action.

In **Ireland**, the BAI has also adopted a **risk-based approach** whereby the Authority identifies and evaluates risks and prioritises its activities having regard to the level of resources available to the organisation to manage the risk. Factors to consider when evaluating risk include: industry trends, past history in respect of compliance in certain areas, track record and knowledge of individual broadcasters, other BAI work which requires specific compliance inputs e.g. licensing activities; requirement to review Broadcasting Codes and Rules, Requirements for statutory reporting – including EU reporting requirements.

In the **Netherlands**, the CvdM has adopted a broad definition of the concept of supervision which consists of four steps**:** context interpretation, identification, investigation and problem-solving. For each step of the model, there is an *assessment framework* which helps making complex assessments and prioritising. On the basis the assessment frameworks well-founded, logical and consistent choices can be made on the use of capacity and instruments. This is meant to help the CvdM use its resources in a smart way, operate authoritatively and explain to key stakeholders the rationale of the choices made by the Dutch Media Authority. The four phases are summarised here:

- With regard to **context interpretation**, the CvdM has developed a context analysis focusing on Public values, Expectations and Developments. A future version will be extended to two other points: general scan of institutions and internal situation.
- **Identification** is to be achieved by setting priorities. The problems are categorised by a number of criteria (damage to the values, urgency, frequency, enforceability, scale of efforts needed, knock-on effect, new or unknown problem, etc.), on the basis of which, the CvdM decides which

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

problems are to be further investigated and which are not. A prioritisation framework was developped to support this part of the decision making.

- The nature and intensity of the **investigation** depends on the identified problem. The CvdM has developed an analytical framework which supports the investigation of the nature, causes and extent of different types of problems in a structured way.
- **Problem solving approach**: Based on the assumption that an effective approach to solve problems is tailor-made, the CvdM has developed an instruments' policy that offers tools to decide which (type of) instruments are to be used to solve a specific problem.

2.3. Current priority areas as stated by NRAs

Current Priority areas:	Country
Advertising/ACC/separation advertising vs editorial	NO, DE LU, BA, IL, RO, MT, IL, IS, BE-VRM, CZ
Product placement	NO, MT
Public Service Broadcasting	NO, CH, IS, UK
Broadcasting targeting the Norwegian audience from other countries	NO
Protection of minors, age ratings, review of watersheds & tools	DE, RO, MT, IL, NL, CZ, HR, LU, UK
Security of information space	LV
Fulfil the Plan on Inspection of the Entity activities	LT
Monitoring coverage of election and pre-election campaigns	RO, MK
New converged forms of content	EE
Media and cultural objectives set up in the licences	EE
In-house production	BA
Pluralism and correct information	RO
Adapting rules to the new media era; be forward looking	IL, NL
Clarifying rules around extremist content	UK
Reviewing approach of regulation of editorial content for on-demand programme services	UK
Deciding whether to change rules and guidance for live subtitling	UK
Preparing for the future of radio regulation	UK
Balance and impartiality in news and current affairs programmes	MT
Portrayal of vulnerability	MT
Quotas of drama, documentary programmes, original local content	IL
Transparency of media ownership	IS
Opening of cable networks	BE-VRM
Media literacy	CZ
Supervision of cable operators	LV-MK
Content monitoring	LV
Community radio	IE
Support to local media service providers through pluralism fund	HR
Regulation of cross platform services (technology neutrality)	LV

2.4. Resources of NRAs for effectively undertaking compliance and enforcement functions

When asked whether they have enough resources to undertake their Compliance and enforcement functions in an effective manner, the majority of respondents answer positively "under normal circumstances".

Some NRAs however admit to some 'tightness' of their resources, such as IE, NL and MT, which acts as a strong incentive for prioritisation. In Malta, the number of employees in the monitoring department has decreased and department staff is very often assigned to other tasks apart from compliance and enforcement. This obliged them to give priority to what is deemed to be important issues. In Ireland, the BAI has a limited set of human resources to support its work, including compliance. The risk-based approach to compliance and related priorities and activities was

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

developed in response to constrained resources and activities had to be tailored to fit the resources available. Consequently, there has been an impact on the level of compliance activity undertaken. While a new policy was introduced in 2014, the level of compliance work required to support licensing activity in 2015 and 2016 has meant that the BAI has not had adequate opportunity to fully review and refine the compliance and enforcement processes, in order to adapt them to the new policy. This review is to start from the second half of 2016. The BAI could use more resources to support its work especially in areas of work that may not be essential but would be desirable.
In the Netherlands, after a third of its budget and staff was cut over the last 3 years, the CvdM has to operate based on a strict prioritization system. However, any new significant task assigned by the legislation would require the Dutch authority to lodge a request for accompanying extra budget.

Several respondents stated that their level of resources was NOT sufficient to undertake their Compliance and enforcement duties in an effective manner (LV, LU, SK, BA, IS). In Latvia, owing to limited human resources, the Council admits to spending more resources on 'firefighting' rather than on 'fire prevention'. In Luxembourg, the main impact of the lacking staff is to rely too much on complaints from the audience and not enough on spot checks. In Slovakia, the resources are also not proportionate to the workload and demands on the activity of the NRA. The impact is less effective functioning, and less monitoring on less subjects. In Bosnia and Herzegovina, the CRA does not have programme-monitoring capacity, nor does it have sufficient human resources. The procedures thus take longer and the activities are divided among the available staff as efficiently as possible. In Iceland, there are only two people working full time for the Media Commission, while the Commission is by law supposed to regulate about two hundred media entities. The Commission thus had to prioritise heavily, and only a small part of what needs to be regulated and ensured that the media companies comply with has been possible to effect.

2.5. Communicating about Compliance and Enforcement policy/strategy/activities with public/stakeholders

It transpires from the responses to the questionnaire that there is no formal or specific communication on compliance and enforcement policy, strategy or activities**, but that rather usual communication mechanisms are applied.**

Communication happens through multiple paths including prior consultation on key documents, publication of all relevant documents and compliance decisions on the Internet and through meetings.

In several countries, such as the Netherlands, the UK or Macedonia, the regulators **consult stakeholders** before releasing their Annual Work Programme and take into account stakeholder responses. Regulators also publish an annual report, which documents how they have delivered on their work areas. In addition, regulators generally publicly consult on any proposed changes to published procedures, licence conditions, Broadcasting Code rules, secondary legislation and guidance notes as pointed out by the respondents from Ireland, the UK, Malta, Switzerland and Israel. In Macedonia, the Agency launches every year 30-day public consultations on the Annual Plans for conducting Programme Supervision and Administrative Supervision.

The majority of the respondents point out that rules, procedures and guidelines relating to compliance and enforcement are **published on the website** of their respective NRAs (NL, BE-VRM), IE, HR, CZ, LT, CH, NO, GB, IL) which contributes to the accessibility and the transparency of the approach.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

In addition to rules and procedures, all important decisions of the NRAs are also usually publically available on their website. In the UK, media service providers and other stakeholders are informed of compliance decisions and any changes to enforcement policy through the fortnightly publication of the Broadcast and On-Demand Bulletin, which reports on the outcome of investigations into alleged breaches of Ofcom's codes and rules across broadcast and on-demand services, as well as licence conditions with which broadcasters regulated by Ofcom are required to comply. The possibility of subscribing to receive news, decisions and complaints bulletins has been reported in several jurisdictions as in UK, Ireland or Switzerland.
The Latvian regulator mentions that key documents such as strategic orientations are also published in the Official Gazette (*Latvijas Vestnesis*).

Most NRAs also organise or participate in **public meetings and seminars** which contribute to providing insight into the approach, position and decisions of regulators on a specific area.

Some regulators also provide **training** for stakeholders. In Ireland, the BAI's Compliance and Enforcement Policy was specifically introduced to all broadcasters by way of a seminar at the time of its launch in 2014. Generally, the BAI supports a culture of training in the broadcasting sector and provides financial and other support to training and development networks to enhance such work. BAI representatives are often requested to deliver training through such networks.
In Switzerland, OFCOM organises round-table discussions with all involved stakeholders on politically sensitive issues, such as the consequences of a possible must-carry obligation of HbbTV provided by public service broadcasters.

Several regulators also highlight the importance of an **on-going communication flow** between regulators and stakeholders to instil a culture of compliance.
As an example, in Germany, the Media Authorities report that they are constantly exchanging views with stakeholders to ensure that the industry is aware of regulatory goals and policies, via formal consultations, public conferences or via bi-/multilateral meetings. The sending of circular information letters to involved stakeholders was also mentioned.
In Lithuania, the Commission often encourages the stakeholders to meet and discuss issues especially regarding the compliance with provisions on commercial communications, product placement, and protection of minors.
In Bosnia and Herzegovina, the CRA holds meetings with licencees for the purpose of presenting the rules and cases of breaches. The CRA also provides for licencees to express their opinions and concerns and requests for clarifications, either at meetings, via e-mail or telephone.
In the Netherlands, the CvdM states that they invest a lot of time in increasing the understanding and support of their stakeholders for their supervisory policies; this is based on the belief that if they understand better which principle or public policy goal is at stake and why it is worth safeguarding, they are likely to accept it and implement it internally.
In the UK, as part of a recent Targeted Review of Licencing and Enforcement Ofcom worked to actively assist applicants and licencees in their understanding of their regulatory obligations. Measures were introduced to improve overall compliance of their licencees, such as the introduction **of guidance notes** and a **compliance checklist** for licence applicants, and the invitation for new licencees to meet with Ofcom when a new licence is issued to offer general support on regulatory obligations and the applications of codes, rules, and requirements.

3. Tools of NRAs for compliance and enforcement

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

3.1. The NRAs' Toolkit for compliance

In the questionnaire, regulators were asked to report on the toolkit which they use to assess compliance and on the importance played by the respective instruments.

Regulators Toolkit to assess Compliance	Count
Complaints handling	22
Monitoring of content	20
Advice and Guidance on Compliance with duties, codes and rules	18
Performance reviews and (annual/ad-hoc) reports on media service providers	16
Other	2

The elements quoted most frequently are audience complaints and monitoring, followed by advice and guidance on compliance with duties, codes and rules and performance reviews and reports on media service providers.

As posited in the comparative documents on complaints and sanctions prepared for the meeting in Barcelona in 2010, the importance of the power of NRAs to consider, investigate and decide upon complaints lodged by the public is twofold: it ensures that the public interest is adequately protected, but it also enables public participation in the regulatory process.
Previous EPRA papers have also documented that the workload of cases handled by regulatory authorities, not including ex-officio cases, varies greatly according to the jurisdictions: while some of the countries could be classified as either having a low level of complaints culture, others have a middle to high level of complaints culture and some have a very strong complaints culture, meaning that they would handle well over 50 cases per month.

In the UK, **audience complaints** play the most significant role and are the most intensively used tool for compliance in ensuring that issues are brought to Ofcom's attention and that viewers and listeners are protected appropriately. All complaints are considered against the Broadcasting Code to decide whether the complaint raises potential issues requiring further investigation. In 2014/15 Ofcom received 28,551 viewer and listener complaints concerning 6,912 separate issues.
It is interesting to note, however, that since the introduction of new procedures in 2011, Ofcom has operated an *issues-led rather than a complaints-led process*, meaning that they do not respond to individual complainants.

It has also been documented by EPRA in previous papers, as well as in the recent AVMS-RADAR study, that the extent of the monitoring conducted by NRAs varies greatly from an infrequent, ad hoc approach to a more systematic approach - also depending on the areas monitored. In Denmark, the Board only takes up cases on its own initiative on rare occasions, on the basis of press coverage or other sources that suggest possible breach of rules. Recently, the Board decided to take up a case regarding a certain type of sponsored programme in order to decide on the compliance with sponsoring and product placement rules. The decision was made on the basis of knowledge obtained at a seminar, where an invited researcher had shared details about the type of programmes concerned with the Board. In Iceland, the Media Commission has very limited resources to monitor content and relies mostly on complaints. Conversely, the monitoring of content remains one of the key instruments for the Belgian VRM, the Lithuanian RTCL, the Maltese BAM or the AAAMS from Macedonia.

In spite of the enduring differences between NRAs whose approaches are predominantly complaints-led or monitoring-based, **strategies evolve over time** and so does the use of specific compliance tools. As an example, Ofcom, who had been relying on ad hoc periods of content

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

monitoring, has been expanding its content monitoring programme to increase the ability to detect content which raises issues of potential harm to the audience.

One particularly interesting element which emerged from the responses is the fact that **advice and guidance on compliance with duties, codes and rules** is the third most quoted instrument by NRAs. The strategy pursued by this instrument is based on prevention.
In Norway, providing dialogue and guidance for media service providers is even considered as the most important element of the mix (before monitoring), thus denoting a regulatory style characterised by a compliance approach. In Switzerland, most work is also put into advice and guidance on compliance with duties, codes and rules.
In the UK, the Broadcasting Code rules are accompanied by guidance which assists the industry in understanding how to comply with the rules and meet the standards required. Advice and guidance is issued more regularly on an individual basis to broadcasters when considered necessary, usually as the result of an audience complaint.

Performance Reviews and reports on audiovisual media service providers constitute an important instrument, especially in the field of the supervision of public service broadcasters as was highlighted by the UK, Belgium, the Netherlands, Switzerland and Iceland. In Ireland, the particular focus of the assessment of the performance of contractors for 2016 is the community radio sector, as some services are in the process of being re-licensed.

3.2. NRAs' main tools for enforcement

NRAs tools for enforcement	Count
Warning	20
Fines	19
Compliance notice	14
Withdrawal of licence	14
Temporary Suspension of licence	12
Other tools	9
Broadcasting apology/announcement	7
Reduction of licence duration	6

In the questionnaire, regulators were asked to report on the toolkit which they use to enforce their decisions and on the importance played by the respective instruments.

Even though a regulator's role is much more than merely *to license and to sanction*, it is generally agreed that an effective sanctioning system is essential in order to give effect to those rules necessary for maintaining the proper functioning and development of the sector, protecting the public and safeguarding the core values of pluralism and democracy.

As a rule, regulators may apply sanctions graded in severity to reflect the seriousness of the failure. They usually range from issuing a compliance notice (whereby the regulator notifies the service provider where it appears that there is non-compliance), a warning notice, imposing a fine, demanding to broadcast an announcement, suspend a broadcast, impose a reduction in the licensing period, suspend or revoke the licences. Some of these tools are used more frequently than others, depending on the individual circumstances and severity of the issue.
The concept of the staggered approach was popularised in '*Responsible Regulation'*, a 1992 book by Ian Ayres and John Braithwaite, which defined an 'enforcement pyramid[11]'.

[11] As mentioned in the CERRE Code of Conduct and Best Practices for the setup, operations and procedure of regulatory authorities, of 7 May 2014.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

As emphasised by the RADAR study: "*a staggered system of sanctions enhances flexibility and allows national regulators to appropriately react to violations of the law. It may also incentivize providers' respect of legal obligations and stimulate (or at least not impede) a relationship of trust between operators and regulators, provided that it is applied uniformly and coherently*[12]".

Two types of sanctions appear generally to be less widespread: demanding to broadcast an announcement or an apology, and impose a reduction in the licensing period. The suspension of a specific broadcast is also not a very common sanction.

Other sanctions mentioned by regulatory authorities in case of non-compliance include:

- For non-commercial broadcasters, paying back the financial contribution (or part of it) received from the authority (DK)
- In Germany, the Media Authorities have the possibility to absorb revenues that have been generated in the circumstances of a violation. Similarly in Switzerland, OFCOM may require the broadcaster to surrender to the Confederation the revenue achieved as a result of the infringement.
- The NRAs in the UK and Switzerland have the power to issue a direction not to repeat a programme or advertisement;
- The Swiss OFCOM and the BAI may also require the broadcaster to inform the authority of the measures taken. In Ireland, in instances where notices for non-compliance are issued, broadcasters are required to set out, in writing, the measures they will take to address the issues that were the subject of a compliance notice. This forms the basis for future compliance assessment.
- In Ireland, in instances where a warning notice is issued, the broadcaster must meet with the regulator and agree a plan and related time-frame for rectifying the issues that were the subject of the warning.
- In Macedonia, the AAAMS may initiate a misdemeanour procedure in cases where the entity continues with the same violation which was incurred with the written warning during the year.

As was already noted in past questionnaires and in the RADAR study, it is surprising that in many countries the range of sanctions does not include the demand to broadcast an announcement. This sanction, based on a 'name and shame approach' may act as a useful deterrent. As the Belgian VRM states, "*issuing press releases about the sanctions we have imposed is however what most providers are most afraid of*".

The responses show that the imposition of **warnings and fines** are not only the two most widespread instruments for enforcement but also those which are most often used by NRAs.

Communication may be considered another important instrument of enforcement in order to influence the behaviour of stakeholders and as a matter of prevention as remarked by the Dutch CvdM. The Dutch CvdM may also have 'standard setting' conversations in which the Commissariaat expresses its dissatisfaction about certain trends or practices without the need to impose administrative sanctions already at this stage.

In the UK, a compliance notice, delivered through the fortnightly publication of the Broadcast and On-demand Bulletin is the most commonly used tool for enforcement. The imposition of a sanction is only imposed if a broadcaster has seriously, deliberately, repeatedly or recklessly breached a licence condition and the breach is serious, reckless or repeated, and therefore such sanctions less frequently imposed.

It transpires from the responses that the **temporary suspension or the revocation of licences** is rarely used, only in exceptionally severe cases. In Bosnia and Herzegovina, the temporary suspension of a licence has been exceptionally used as a sanction in cases of content-related breaches and only in the early years of establishment of the CRA. For a number of years, this tool has de facto been used in cases of non-payment of licence fees. In Switzerland, there has never been a case of suspension or withdrawal of a broadcasting licence until now.

[12] AVMS-RADAR study, op. cit, p. 77.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

3.3. Involvement of stakeholders/operators in the compliance system

The objective of the question was to find out whether NRAs in addition to communicating with stakeholders on matters of compliance and enforcement (as discussed on p. 10, under paragraph 2.5.) actively encourage a culture of compliance by involving them in the compliance process. It has been highlighted that "*co-regulation is generally considered an attractive option by supervisory authorities that have to live up to ever greater societal expectations of the efficiency of their supervisory activities with rapidly shrinking budgets*[13]". However, only a few regulators report involving stakeholders in the compliance process via co-regulatory or self-reporting practices.

In the **Netherlands**, the CvdM actively seeks alternative ways of effective supervision, such as co-regulation and meta-supervision where important responsibilities are assigned to the industry. As an example, the CvdM recently signed a covenant with the biggest private broadcaster, about a reality TV programme shown daily on national TV and available 24/7 on the internet. Further to the covenant, the broadcaster undertakes to intervene immediately if they observe a violation and to report to the NRA about their primary findings and actions taken accordingly, mainly in the area of the observance of advertising and sponsorship rules.
In Germany, stakeholders are organized in a self-regulatory scheme in the field of advertising ('Deutscher Werberat'). There is also the FSF, the co-regulatory association of commercial broadcasters which clears content prior to transmission and restricts the possibility of the NRAs to stop-gap intervention.

In **Norway**, in the area of protection of minors, while the rules are set out by Law and regulations, the duty to age classify and to have other protective measures is left to the broadcasters as a co-regulatory system. The NMA has issued guidance on how to age classify and on what elements to consider and has **trained** the broadcasters on how to age classify through seminars and meetings.
In Slovakia, the CBR encourages self-regulatory and coregulatory activities as there is a space for such activities provided in the law, however it is not taken advantage of.
In Ireland, BAI is endeavouring to develop **self-reporting mechanisms** by broadcasters. A data returns system was piloted with BAI´s contractors in 2015. The process was reviewed and refined, with a view to a second roll-out in May of this year. The aim is to enable the development of a more comprehensive data set and an overview of industry trends on a regular basis.

BAI contractors are also required to have **a designated Compliance Officer** within the staff of a service.
Similarly, in Estonia, the Law requires each service provider to appoint a Responsible Editor, who is in charge of a programme´s compliance to the law and licence requirements. The responsible Editor´s contact information is available both to the public and the NRA.
In Croatia, TV and radio broadcasters may, upon the prior consent of the Electronic Media Council, integrate into regional or national networks if they appoint by a legal act a responsible editor of the joint programme who will be responsible for the broadcast of the programme, and forward the legal act to the Council within 15 days prior to the beginning of broadcasting of the joint programme.

The involvement of broadcasters in the complaints process has not been expressly mentioned in the responses to this questionnaire. However, previous EPRA enquiries have revealed that addressing the broadcaster as a first instance before filing a complaint to the regulator is a mandatory requirement in a few jurisdictions and is informally promoted by regulators in many countries as an effective means to reduce the number of complaints.

---

[13] *Towards a Future-Proof Framework for the Protection of Minors*, in European Audiovisual Media, Madeleine de Cock Buning, Utrecht Law Review.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

3.4. Involving audiences: what measures do NRAs take to inform and educate the public on broadcasters' obligations and performance and on the possibilities to complain?

The measures which were cited by regulators to inform and educate the public on broadcasters' obligations and performance and on the possibilities to complain are generally the same as the ones mentioned earlier to inform media service providers, namely the publication on the regulators' website of general information, press releases/newsletter, key documents, decisions and annual activity reports as well as providing an electronic complaints form, and through giving lectures, organising conferences and meetings, participating in external seminars and giving interviews and conducting regular consultations.

In addition, any efficient complaint system requires that viewers and listeners are aware that they may file a complaint and be informed to whom they should turn and on the procedure to follow. This is all the more important in countries which do not have a complaints culture. The EPRA comparative document of 2010 had highlighted that the extent of the guidance provided varies greatly in practice.
The majority of respondents to the present questionnaire declare that they provide an electronic complaints form. The Irish BAI and the Croatian AEM are currently working to further simplify the complaints process on their respective websites.
The Czech RRTV and the AAAMS from Macedonia also developed a detailed guide on their website to explain how to complain. Ofcom reports that there are clear and easy instructions outlining how to complain and what categories a complaint can fall under on their website. Ofcom research demonstrates that public awareness of broadcasting regulation is relatively high, with approximately 80% aware that TV regulation currently exists[14]. This is reinforced by the high number of audience complaints that Ofcom receives each year (approx. 25,000).

Additional measures that were mentioned by regulators in their responses include:

- Providing a dedicated website called 'Children and media' focused on informing parents (CZ);
- Occasional campaigns for raising public awareness on the possibility to lodge a complaint (BA; IL);
- Granting a yearly thesis prize in the field of media, thus giving a chance for students to earn recognition and win a cash prize and for the VRM to get some increased visibility (BE-VRM);
- Providing staff available to assist with the making of complaints if required (IE);
- Responding to information requests regarding compliance matters from members of the public, including requests received for access to records further to the Freedom of Information Act (IE)
- Through surveys (NO);
- Wide-ranging transparency practices, incl. the publication of minutes of the Council sessions (SK)[15]
- Using social media such as Twitter, Facebook, YouTube channels.

Since 2010 when it was first commented upon, it is worth noticing the considerable increase of the use of social media by media regulators to communicate on their policies and decisions with stakeholders and the audiences. Most EPRA members now have a Twitter Account, many also use Facebook and YouTube channels.

4. Challenges and Experience

[14] http://stakeholders.ofcom.org.uk/binaries/research/tv-research/attitudes-to-media/UK-audience-attitudes-towards-broadcast_media-2016-summary.pdf

[15] For more details on transparency practices and self-imposed obligations, see the EPRA documents produced in Tbilisi and Tallinn.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

4.1. Regulatory challenges in the field of compliance and enforcement

The questionnaire asked NRAs to list the main regulatory challenges that they encounter in the field of compliance and enforcement.

- Growing number of media service providers (GR, NL, CZ, RO, MT, EE, DE, LT, LU, SK, MK)
- The complexity of the converging media landscape with new services, devices and platforms (DE, EE, BE-VRM, CZ, LV, LU, HR, DK)
- The increasing distribution of audiovisual content over the internet also leads to challenges to ensure compliance with audiovisual media regulation especially in relation to protection of minors (DE, CZ, HR, NL)
- The general aging of traditional linear broadcasting audience and the changing media habits of young people (CH)
- To be able to keep a strong, independent and relevant Swiss public service in a changing media environment (CH)
- The changing financial models for the industry which jeopardise their financial stability (IL)
- More creativity from producers (MT)
- Identifying on demand audiovisual media services (NO, LT, MT, GR)
- New advertising techniques and the blurring of lines between editorial content and commercial communications (LU, NO)
- Specific challenges of small but competitive media markets (CH) providing strong incentive for local broadcasters to "push the limits" of rules around commercial communications (IE, IS)
- Jurisdiction challenges in applying the consultation and circumvention procedure of Art. 4 AVMSD (NO)
- Unregulated market with 120 AVMS providers and 900 radios considered to be legal without being licensed (GR)
- Lack of human and financial resources in the field of compliance and enforcement (IS, IE,BA)

It is interesting to note that all the challenges that were mentioned with the exception of the last one are external. The majority of them relate to the impact of the new converged media landscape on regulation.
Ofcom notes in its response that "*no system for compliance and enforcement will ever be able to provide complete assurance*" (for the future) and that "*a statutory regime carries the risk of being less able to adapt quickly to advances in technology, developing business models and changes to consumer behaviour*". (…) "*The connected media environment will continue to challenge the current regulatory structure in terms of continuing to meet evolving audience expectations*". (…) "*The challenge for regulators is to ensure that a regulatory regime delivers effective and proportionate levels of protection while being flexible enough to take account of varying levels of audience expectation associated with different devices and means of distribution. This also highlights the importance of regulation working alongside other protection tools and measures to help audiences empower themselves, such as content access control tools and information guidance*".

The very last challenge that was mentioned was internal and linked to the amount of resources available for compliance and enforcement activities. In Ireland, the resource constraints the BAI has experienced in recent years has meant that compliance was not a priority activity and was scaled back to what was seen as a manageable level in the context of staff available. The legacy has been that issues which might have been proactively addressed, had resources permitted, are now being reactively tackled, which is always more challenging. In Bosnia and Herzegovina, the response times to compliance issues due to a lack of human resources and a large number of licencees have sometimes been negatively impacted.

4. 2. Success stories in the field of compliance and enforcement

The questionnaire asked regulators to share success stories in the field of compliance and enforcement. A variety of them have been selected below. For the full list of examples, see the individual responses to the survey. Several regulators did not have any particular success story to report: SK, RO, MT, DK, LT, GR.

ENFORCEMENT/FINE/PSB/EDITORIAL CONTROL

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

In **Ireland**, on 4 May 2012, the BAI took enforcement action against RTÉ, the Irish PSB, on foot of the broadcast of a documentary programme "*Mission to Prey*" in which a member of the Catholic clergy had been defamed. Although the priest in question had successfully sought recourse to the Irish Courts, the BAI considered it appropriate to inquire into the editorial control issues which had allowed such a situation to arise. The investigation was the first conducted pursuant to BAI´s new statutory powers and the first financial penalty charged by the Authority. The process allowed the testing of new, and somewhat complex, statutory powers and facilitated the BAI in elaborating detailed processes to reflect the statute as well as the need to afford fair procedures to all of the parties involved.

COMPLIANCE/PSB/ACCESS SERVICES
In **Norway**, the NMA has had an extensive dialogue with the PSB TV 2 regarding subtitling of live TV programmes. This has led to the fact that TV 2 currently is subtitling all live TV programmes between 18:00 and 23:00. The number of hours of live television programmes that were subtitled increased from 1495 in 2014 to 2957 in 2015.

COMPLIANCE/LOCAL CONTENT REQUIREMENTS/RADIO
In **Estonia**, radio service licences have a requirement that a programme must contain a certain amount of music produced by Estonian authors (25% of the music played). The TSA having recently upgraded its monitoring possibilities found out that this requirement was not always complied with. During a meeting with radio service providers, the NRA raised the awareness of the operators about the problem, asking them to pay attention to it and letting them know about the further action plan. A week later, improvements were already noticeable, and by now even though the problem is not fully eliminated, it is definitely less significant.

ENFORCEMENT/ FINE/ PROTECTION OF MINORS
In the Czech Republic, the RRTV had a problem with the main commercial broadcaster in relation to their broadcast of crime series in the mid-afternoon. After imposing a huge fine and having an approving decision of the Supreme administrative Court there has been a change in this area. This sanction also influenced other broadcasters to run a certain series later in the evening.

DETERRENCE APPROACH/MONITORING/ADVERTISING MINUTAGE
In the **Netherlands**, since 2009, the CvdM is monitoring compliance to the maximum of 12 minutes advertising time per hour on the basis of data collected by SKO/TV Times which enables the regulator to control advertising time 24/7 and easily spot overruns of advertising limits per hour. Broadcasters were informed about the new system and forwarded a report of the signalled violations. In its annual report for 2012, the CvdM concluded that the compliance with advertising rules and especially the hourly advertising maximum had significantly improved. The CvdM considers that this is a result of its strict supervision and monitoring methods.

DETERRENCE APPROACH/LATE LICENCE PAYMENT/THREAT OF SANCTION
In the UK, Ofcom as part of its Targeted Review of Licensing and Enforcement changed the way it handles late payment of broadcast licence fees. Some licensees had a history of not paying licence fees by the payment date on their invoice. In previous years Ofcom had launched investigations into licensees' failure to pay their licence fee by the payment date and have either resolved cases in which licensees have paid the fee late, or revoked licences where the fee remained unpaid. It was noted that some licensees pay their fee late each year and that a 'resolved' Finding in the Broadcast Bulletin has not been a sufficient deterrent to prevent this recurring. Therefore, from April 2015, licensees who failed to pay their licence fee by the payment date were likely to be found "in breach" of the relevant licence condition. Breach Findings are published in the Broadcast Bulletin. Where the fee remains unpaid, broadcasters were informed that Ofcom would consider the imposition of a statutory sanction in the form of a financial penalty, as well as the revocation of the licence. Since these stricter measures came into force, compliance with prompt licence fee payment has significantly increased.

The examples highlight the benefits of adopting a *mixed approach* including 'soft measures' such as guidance, persuasion, and other cooperative tools to induce voluntary compliance but also robust deterrent tools to ensure effective enforcement and to use them on a case by case basis, based on different factors such as the past compliance history of an service provider, the probability of detection and the resources at the disposal of regulators.

4.3. Learning from failure: recent cases where the system has NOT worked well in securing the right outcome in the field of compliance and enforcement

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

The questionnaire also asked regulators to report on cases where the system had NOT worked well in securing the right outcome in the field of compliance and enforcement, which presupposes a high level of transparency and honesty from respondents. Nevertheless, quite a good number of cases have been collected. A variety of them have been selected below. For the full list of examples, see the individual responses to the survey.

COMPLIANCE/SANCTIONS/LOCAL RADIO In **Norway**, NMA´s general experience is that broadcasters respond well to the system of dialogue with the NRA and that they strive to comply with the law. In the area of **local radio**, however, the NMA experienced that their system of C&E has not been satisfactory. There are a lot of local radios (approx. 230) and they all have license requirements. The NMA has used the method of dialogue, information and sanctions without reaching their goal of compliance. The main reasons for that can be summarised as the NMA has not enough resources to supervise all these radios; the license requirements are too burdensome; the local radios have not a strong enough economy to fulfil all their obligations.

POLITICAL PRESSURE/FAILURE TO APPOINT DG/IMPACT ON ENFORCEMENT **In Bosnia and Herzegovina**, due to the year-long failure of the government to appoint the previous Director General of NRA, the CRA has been somewhat destabilized, which reflected negatively on enforcement and decision-making. The Director General has recently been appointed; the impact on enforcement and compliance in particular is already visible.

GAMBLING/COOPERATION WITH OTHER AUTHORITY/COURT CASE In **Germany**, ensuring compliance with the **rules on games of chance in broadcasting services** is regularly fraught with difficulties, as the Media Authorities are depending on cooperation with the general statutory supervision on games of chance. Due to the fact that the Interstate Treaty on games of chance has recently been challenged by the ECJ, activities in this regard of the Media Authorities against audiovisual media service providers remain rather ineffective.

ENFORCEMENT/ADULT SERVICES/REVOCATION OF LICENCE In the UK, in 2010 Ofcom revoked all licenses held by Bang Channels Ltd and Bang Media Ltd on the grounds that they were no longer 'fit and proper' to hold Ofcom licences. These adult services had seriously and repeatedly breached the Code over a period of time leading up to licence revocation. It is clear that the compliance procedures in place were not as effective in encouraging compliance and deterring compliance breaches.

COMPLIANCE/ACC In **Iceland**, the Media Commission has set guidelines on commercial communication. The stakeholders were involved in the process. However, since there is so much at stake, the media companies have not complied with them.

The reported cases generally demonstrates that not all broadcasters have the same level of respect for compliance regimes. Sometimes, as is the case with Norway, the failure may be indicative of a need to modify the existing legal framework.

4.4. Frequency of appealed decisions of NRAs

The responses concerning the frequency of appealed decisions reveal great discrepancy between the NRAs whose decisions are almost systematically appealed and regulators whose decisions are almost never appealed. This is indicative of the variety of the ecosystem in which regulatory authorities operate in Europe.

According to the results of the questionnaire, three situations can be distinguished:
- Countries where decisions of NRAs are almost always/very often appealed (70-85%): CZ, SK, GR, RO
- Countries where NRAs decisions are often appealed (20 to 50%), such as NL, NO, DE, IL
- Countries where NRAs decisions are rarely appealed (<15%): IE, LV, EE, BA, HR, DK, MT, BE-VRM, UK, MK.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Ofcom is at the very end of the spectrum: In 2014/15 Ofcom considered and published a decision upon 6,912 editorial standards cases (from 28, 551 complaints), and 204 Fairness and Privacy complaints. Over the last 5 years Ofcom has been appealed through judicial review on fewer than 10 occasions for broadcasting matters.

One should however be careful when interpreting these figures, as they may depend on a lot of factors, such as overall number of complaints, the type of sanctions imposed and the particularities of the judicial systems, notably the costs and length of judicial proceedings. Decisions implying financial sanctions are also more generally appealed than other decisions of NRAs.

What is interesting to note though is the evolution over the years. While most of the regulators appear in the same range as in 2010, the number of appealed decisions has recently decreased considerably in Bosnia and Herzegovina and Latvia. In Latvia, a few years ago, almost half of the decisions were appealed, recently only very few decisions are challenged (3-5%).

As was also remarked in the comparative paper of 2010 on appeals, notwithstanding the absolute necessity of a proper appeals system for the sake of the protection of human rights, it can be remarked that the combination of almost systematic appeals with their suspensive effect may contribute to undermining the standing of some regulatory authorities.

4.5. Assessing the Culture of Compliance

This is clearly another highly subjective question and it would thus certainly be difficult to develop a reliable analysis upon it. However, it does provide a useful indication on the perception of the culture of compliance by the respondent.

Assessment of compliance culture	**Countries /count**
Very high	(0)
High	NL, NO, LU, DK, EE, CH, BE-VRM, UK (8)
Average	IE (average to high), DE, LV, LT, BA, MT, SK, RO, IS , GR, MK (11)
Low	HR, IL (2)
very low	CZ (1)

Interestingly enough, none of the respondents has assessed its culture of compliance to be very high, and only one country has considered having a very low compliance culture. The majority of respondents evaluate their culture of compliance as average. A finer grid might have been useful as the Irish respondent reported that their own assessment would rather be qualified as “average to high”.

4.6. Recent developments in the field of compliance and enforcement

When asked to report on recent developments, debates and or envisaged reforms in the field of compliance and enforcement, the following answers were collected.

Trends:

- In **Norway**, the trend seems to be on a stronger focus on using “soft tools” such as dialogue and guidance and securing internal compliance systems, as opposed to using sanctions.

Debates:

- In **Lithuania**, debates have started very recently on a better regulation of internet service providers.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Recent Developments:

- In **Switzerland**, OFCOM has recently been confronted with a challenging new legal procedure. Three leading media enterprises, the publishing company Ringier, the Swiss PSB (SRG SSR) and incumbent telecom provider Swisscom have launched a joint venture in the advertising market to strengthen the Swiss advertising market against globalised competition. One of the main goals will be to offer targeted advertising on different media channels. OFCOM had been mandated by the responsible infrastructure ministry DETEC to examine the role of SRG SSR in the Joint Venture. Finally, it has been concluded that SRG SSR is allowed to participate in the new advertising marketing enterprise as DETEC/OFCOM do not currently discern any substantial restriction of the development potential of other media enterprises. In a second decision, OFCOM Switzerland held that the current SRG SSR licence does not allow the broadcast of targeted advertising in programmes. The general legal framework will thus have to be established before the introduction of this new type of SRG SSR advertising. Meanwhile, the first decision regarding SRG SSRs participation in the marketing joint has been appealed by press editors to the Federal Administrative Court.

- In **Bosnia and Herzegovina**, the CRA is planning to improve the **transparency of its decisions**, by introducing a periodical bulletin on its decisions and activities, increase the number of meetings with licencees and generally improve the communication with the public. A new draft of the by-law that provides for the **range of financial penalties** according to the type of breach is currently prepared by the CRA, and will be forwarded to the government for adoption. Since this document only specifies the range of financial penalties that can be issued by the CRA, another piece of by-law is also being prepared, which will specify the **procedure for issuance of other enforcement measures** at the disposal to the CRA, such as warnings, the temporary suspension of licence and licence revocation.

- **In the UK**, since 1 January 2016, Ofcom has been sole regulator (other than in relation to advertising) for on-demand programme services ("ODPS"). At the end of 2015, Ofcom published a consultation on the future regulation of on-demand programme services. The final position and new Procedures were set out in a Statement in March.
- Ofcom has recently published changes to the Broadcasting Code and advertising Code following changes in UK legislation surrounding tobacco products. The changes arise from the UK Government's implementation of the Tobacco Products Directive 2014 ("TPD"). Among other provisions, the TPD prohibits advertisements for electronic cigarettes and refill containers in broadcast television and radio services. It also prohibits programme sponsorship which has the aim or effect of promoting such products. The changes to rules will come into effect from 20 May 2016.
- As part of its Annual Plan priorities, Ofcom will clarify the rules prohibiting the broadcast of extremist content. A consultation on proposed amendments to the Rules and guidance was published, a Statement and the final amendments are expected in May 2016. These amendments ensure that the rules and guidance make explicit to broadcasters the full range of content broadcasting which is prohibited in this area.

- In **Iceland** (as detailed in the Country Report), two working groups, appointed and assigned by two ministries, have been reviewing the role and structure of Icelandic Regulatory Authorities, including the Media Commission. The final reports have not been published yet. However, due to the recent Panama Papers revelation, and the subsequent resignation of the Icelandic Prime Minister, radical changes to the structure of the regulators are unlikely, at least not in the coming months.

- There have also been reports about the planned creation of a "**Digital European Toolkit**" (DET) for efficient and flexible regulation, which is currently being developed by a Working group in ERGA.

V. Review of compliance and enforcement policy, strategy and activities

The last part of the EPRA survey enquired about the modalities of the review of the general policy/strategy underpinning compliance and enforcement and also asked whether and how the effectiveness of the activities conducted in that field is assessed.
Responsive regulation principles require that the ex-ante evaluations on the expected impact of interventions should be complemented with retrospective or backward-looking analysis in the form of ex-post evaluations - as both forms contribute to a better evidence base for policy-making[16].

[16] For more details, see Cerre Code of Conduct, op. cit, p.29.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Several countries (GR, BA, LU, DK, MT, IL, SK, RO) report that there is no formal systematic review of the general policy and strategy underpinning compliance and enforcement. In other countries, the frequency of the review depends on the type of document.

Work programmes/activity plans are reviewed *on a yearly basis* (NO, UK, CZ, LV, EE, HR, CH, MK)
Generally, the prioritisation of the NRAs work areas are reviewed (and often consulted on) each year within the Annual Plan/programme process.
In addition, most authorities publish an annual report to testify on how they have delivered on their work areas. The preparation of the annual reports related to the activities of the regulators provides an opportunity to compare the outcome with the goals listed in the working plan.
The Latvian regulator mentions that while the strategy is reviewed once a year, owing to law amendments it has to be reviewed five times in the course of last year.
In Macedonia, the supervision plan is also reviewed every year.

Multiannual work programmes/strategies are often based *on a longer (3-5-year) cycle* (IE, HR, NO)
In **Ireland**, the Review and assessment of the effectiveness of BAI activities in the compliance and enforcement area are undertaken as part of the wider organisational review of its effectiveness in regulatory matters. This is done in a three-year cycle as part of the review of the implementation of the *BAI's organisational strategy*. The BAI is currently in the process of developing its new Organisational Strategy for the period 2017-2019. As part of the development process, compliance and enforcement, and the approach to activities in this area will be given consideration. This, in turn, will feed into the development of a three-year work-plan in the area of compliance. The intention is that compliance and enforcement activities will be intrinsically linked to the organisation's goals and objectives for the new strategy period. *The BAI Policy on Compliance and Enforcement* makes provision for its review as may be appropriate or necessary. A decision to review it would be likely to be taken in the context of the BAI's wider organisational strategy decisions.
In **Norway**, the Strategic Plan is reviewed every five years.

Regulatory approach discussed *regularly in internal meetings*
In Germany, the Media Authorities are regularly discussing their regulatory approach on an internal basis, mainly during the monthly meetings of the Directors of the 14 State Media Authorities. Besides, the Directors are holding a retreat on an annual basis where they are discussing regulatory policy on a more abstract level.

Methods and specific areas are usually reviewed on an *ad hoc basis - when necessary*
In **Norway**, in general the NMA evaluates their methods "*from time to time*". This is then organized as a project. Specific cases are evaluated informally when they are finished by discussing them in the group responsible for such cases.
In the UK, Ofcom has a statutory duty to review and revise the standards set out in the Broadcasting Code "*from time to time when considered appropriate*". The procedures and requirements are also reviewed whenever necessary. Ad hoc reviews of specific areas of compliance and enforcement are conducted regularly such as Ofcom's Targeted Review of Licensing and Enforcement in 2014-15 which aimed to increase protection to audiences.
In **Macedonia**, the Agency prepares a semi-annual analysis of the conducted measures against broadcasters and operators and most frequent violations, a semi-annual analysis of initiated misdemeanour procedures against broadcasters and a yearly analysis of court proceedings against measures imposed by the Agency.

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication

Summary and Conclusions

Basis for compliance and enforcement: The law constitutes the key basis for the NRAs compliance and enforcement framework by defining the tasks, powers and competence of the regulator. In addition, compliance and enforcement strategy and/or policy is enshrined in a wide array of documents of varied nature produced by NRAs. Yearly action plans seem the most widespread strategy document. Only two authorities reported having a specific policy and strategy document relating to compliance and enforcement.

Choice of regulatory approach: Regulators do not seem to rely exclusively on a stand-alone but rather on a mixed approach including compliance and deterrence elements in order to fulfil their policy objectives. A difference can be noticed between NRAs who put the main emphasis on compliance and those for whom deterrence is the guiding principle.

Setting priorities: As a rule there is no formal procedure on how to determine priorities, they naturally emerge through a mix of approaches, mainly including complaints from citizens and ex-officio monitoring activities focused on different areas.

Defining a risk-based approach: Most of the compliance and enforcement activities which are conducted are to a certain extent risk-based, but only three regulators report to have developed a proper framework for evaluating the risk, with an ex-ante assessment. Two of them introduced this approach following a reduction in budgetary and human resources.

Resources: Most respondents consider having enough resources to undertake their compliance and enforcement duties in an efficient manner. Some NRAs admit to some 'tightness' in resources, which acts as a strong incentive to prioritise. Five NRAs deplore an insufficient level of resources that has impacted negatively on their activities.

Communicating with audience & stakeholders: Communication on compliance and enforcement happens through multiple paths including prior consultation on key documents, publication of relevant documents and compliance decisions on the Internet and through meetings.

Compliance Toolkit: The two most used instruments are audience complaints and monitoring, closely followed by advice and guidance on compliance with duties, codes and rules, a tool based on prevention. Performance reviews and reports on media service providers play also an important role among EPRA members, especially with regard to the supervision of public service broadcasting.

Enforcement Toolkit: Warnings and fines are the most widespread and most often used instruments. Communication is also considered an important enforcement tool by many NRAs.

Challenges for compliance and enforcement: almost all the challenges that were mentioned are external; the majority of them relate to the impact of the new converged media landscape on regulation.

Sharing success stories & learning from failure: The success stories shared by EPRA members demonstrate the benefits of adopting a mixed approach including 'soft measures' and cooperative tools to induce voluntary compliance but also robust deterrent tools to ensure effective enforcement depending on the context. Reported failure cases generally demonstrates that not all broadcasters have the same level of respect for compliance regimes. Sometimes the failure may also be indicative of a need to modify the legal framework.

Varying ecosystems: The frequency of appealed decisions reveal a great discrepancy between NRAs whose decisions are almost systematically appealed and regulators whose decisions are almost never appealed. While the majority of respondents evaluate their culture of compliance as average, eight NRAs considered that the culture of compliance was high in their countries.

Strategies & methods need regular reviewing: In spite of enduring differences between NRAs whose approaches are predominantly complaints-led or monitoring-based respectively, strategies do evolve over time and so does the use of specific tools. Ofcom, who had been relying mostly on complaints and on ad hoc content monitoring, has recently been expanding its content monitoring programme. Conversely, many monitoring-based NRAs have recently improved their complaints procedures. Several NRAs evolved from a more comprehensive, systematic monitoring to a more risk-based approach. Overall, and compared with the situation of the last 5 to 10 years, a certain degree of homogenisation of practices can be observed. The changing media landscape may also trigger some profound adaptations in the strategy and methods of compliance and enforcement. *But this will be the focus of our October session*…

© EPRA This is a confidential background document produced for an internal EPRA Meeting. It may be revised and amended prior to publication