

The Controlling Power of the Independent Regulatory Bodies over Broadcasting as Socio-Cultural Activity: The Case of Bulgaria

Bissera Zankova Department of Legal Studies Central European University Budapest, Hungary

General Remarks

The aim of this paper is to characterize the main trends in the administrative control over broadcasting and to summarize the functions exercised by the independent regulatory bodies in the field. Against the background of the comparison of the solutions in the advanced countries, the example of Bulgaria will be analyzed as an inconsistent attempt to solve the political and administrative problems pertaining to the creation of an effective supervisory authority in radio and television. The control over media as an administrative activity and its possible limits has not been considered in detail in the research literature—partly due to the dynamics and complexity in the field itself, partly due to the sensitivity and the controversies in the media sphere. A topic that requires more precise attention in the contemporary environment is the supervision over broadcasting and its main trends. This is of importance both for legislative drafting and for everyday media practice. A new piece of legislation in the electronic media field cannot be elaborated without a clear conceptual understanding of the supervisory mechanism and of its effective implementation. The complexity of the matter requires an examination of a more analytical type, covering a broader comparative basis by juxtaposing the scope and functions of the controlling bodies in the field of broadcasting in two or three countries but by structuring the scheme of the crucial (and widely recognized) powers. The main directions of the supervisory influence can be delineated in a hierarchical way on the basis of the different practices and arguments concerning the advantages or the disadvantages of the specific models; these must be carefully considered. Thus the control in the respective field can be characterized as a dynamic system open to changes and improvement. The basic topics which deserve special attention are the following: Nature of the broadcasting law. The broadcasting law is generally of a public legal nature. The analysis dictates that the provisions are legal prohibitions and obligations pertaining to administrative law and addressed to the legal subjects involved in the broadcasting activity.

The prohibitions and obligations concerned comprise the regulative part of the law. Their purpose is to make possible freedom of broadcasting and an institutional freedom through which freedom of expression in modern

society is realized to be implemented. Another task of the law is to set limits to the risks entailed in the process of the dissemination of radio and television programs, the process itself being of immense political, social and psychological significance. On the one hand, some public values and principles must be protected against harmful or detrimental effects in the creation and transmission of broadcasts. On the other hand, the broadcasters themselves should be guaranteed against the interference of political and economic groups in their activity. Thus a second conclusion can be drawn that a broadcasting law is a protective law.

2. The regulative part is enforced through the special supervision of an independent body (or bodies), the status and competence of which are provided by the legislation.¹ From this point of view, another characteristic of the broadcasting law is that it is a supervisory law.

Regarding the essential features of this "body," first of all it should be underlined that it is independent; keeping this in mind, its nature must be subjected to a careful examination against the principle of the separation of powers in a modern state. The independence can be considered as a relative independence in the hierarchical structure of the executive branch.

It can be argued that the supervisory authority occupies an independent place among other bodies as an extension of the neutral, balancing, independent position of media in society. It is administrative by nature, and it differs from other similar bodies in that in the sphere of broadcasting, there should be greater guarantees for the real implementation of the fundamental right to freedom of expression and information.

The supervisory functions comprise the core of the power of the independent body in broadcasting. An exploration of the relevant provisions in a number of laws (USA, UK, Germany, France, South Africa, Hungary, Czech Republic, Poland, Slovenia, Bulgaria, etc.) demonstrates that it is more supervisory by its functions than regulatory.²

¹ Stanley De Smith and Rodney Brazier comment upon this interesting phenomenon in the modern state: "... there are miscellaneous ... bodies performing what can broadly be described as functions of central government but lying outside the reach of detailed ministerial control. There is not a common pattern Their power may involve the provision of public service (the BBC), the regulation or management of a public service (the ITC, the RA)...." (De Smith Stanley and R. Brazier. 1992. *Constitutional and Administrative Law*. London: 191-195.) The appearance of the independent regulatory bodies can be viewed as a result of the process of decentralization in the modern state.

² This role is defined by Hoffmann-Riem as "a task for ensuring whether the specific norms of broadcasting law are being observed." (Hoffmann-Riem, Wolfgang. 1996. *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries*. New York, London: The Guilford Press.) The agencies are authorized either to "discharge" functions as respects the "licensing of the services referred" in order to ensure wide range of programmes, high quality and fair competition (UK); or to "execute and enforce the act" (USA); to "organize broadcasting" (Turkey); to "supervise the activity of the RT organizations" (Slovene); to "promote and ensure a wide range of communications services" (South Africa); to "control the enforcement of the broadcasting law" (Bulgaria), etc.

In order for the scope of the supervision to be properly analyzed, the notion broadcasting as an object and the concept of broadcasters as addressees of control must be examined thoroughly. Several conclusions can be drawn:

3.1. Broadcasting is an activity which is of great social importance and is closely related to fundamental values (public mission). At the same time, due to the immense power of the electronic media, this activity hides enormous risks for the public. The legislator regulates broadcasting by raising broadly recognized standards in law and subjecting the administration of this activity to a permissive legal regime (licensing). Some vulnerable groups-minors-are a target of special and persistent attention, and their protection is keenly focused (especially in Europe).

3.2. The minimum requirements by which the notion of broadcaster is characterized are a combination of technical, socio-cultural, and economic principles, the skeleton of which comprises the composition and transmission of programs intended for the public.

3.3. The establishment of the broadcaster is provided either directly by the law (public broadcasters predominantly) or through the licensing procedure (commercial, communal, specialized). Only the organization that is lawfully established-ex lege or under a license-and meets the legal requirements, can enjoy the status of a broadcaster. The creation of a broadcaster means that the right of broadcasting as a subjective opportunity to perform a given activity already exists. The principle of the legality of the establishment of a broadcaster can be expressed either directly in law or is implicitly construed through the systematic interpretation of its text.

3.4. In Europe the program as an unalienable element of broadcasting links the notion of a broadcaster with, on the one hand, constitutionally enshrined norms such as the respect for human dignity, pluralism, democracy, and equality, and on the other hand,

the special standards concerning the proper operation of the electronic media such as decency, tolerance, non-violence, balance in advertising, promotion of national audiovisual works, and protection of minors. In the USA there are no content-based

requirements, and the chief criterion is the public good, interpreted within the philosophical and legal framework of the First Amendment.

3.5. The program as a special product for public dissemination and significant social impact provides cultural connotations for broadcasting. It serves as a basic distinguishing criterion of the

broadcasting operator from other operators and service providers- the telecommunication operator, for example.³ An indispensable part of the research on this topic should be dedicated to the boundaries of the supervision itself and to the crucial problem of the

supervisory competence. Here, different types of supervisory powers a power related to the aim of the control, verifying powers, and powers of impact can be discerned in the different pieces of legislation and a classification forming the skeleton of an operative model of supervisory competence may be suggested.

Power related to the aim of control consist of a power to safeguard freedom of speech and a special supervisory power in the field of fair competition ensuring media pluralism.

Verifying powers comprise investigating power and monitoring power. The former encompass the execution of investigations, inquiries, and inspection, while the latter covers the entertainment of complaints and the administration of specific audience research.

Powers of impact are perceived as the most important core of the whole supervisory competence. They comprise this part of the controlling competence which is aimed at influencing the activity of the radio and television operator from the perspective of their subordination to conditions and requirements stated in law. The idea of "powers of impact" is a complex notion which encompasses a number of opportunities for administrative actions of the supervisory body itself or in cooperation with other bodies and organizations.

In respect to this, special attention is focused on: 1) the permissive power-licensing, amending, and transferring of the license-and the limits of the discretion of the supervisory authority; 2) on the power of enforcement-the analysis proceeds from the soft measures of impact, such as instructions and recommendations issue, to more severe ones, such as administrative restrictive actions, suspension and revocation of the license, and imposition of financial penalty or fine for breach of the legal conditions; 3) on the signaling power and the opportunity for co-operation and assistance with other bodies; 4) on the indirect controlling power, which comprises mainly the election of directors general of public broadcasters by the supervisory agency; and 5) finally on the public informing power, which pertain to the keeping of a public register, the publication of the annual report, and the circulation of regular information for the public.

³ See more on the specific socio-cultural characteristics of the broadcaster and the relevant conditions in the European Convention on Transfrontier Television and Explanatory Report (1998), Council of Europe Publishing and in Council Directive 89/552/ EEC of 3 Oct. 1989, on the Coordination of Certain Provisions Laid down by Law Regulation or Administrative Action in Member-States Concerning the Pursuit of Television Broadcasting Activities as Amended by Directive 97/36/ EC of the European Parliament and of the Council-II Television without Frontiers" Directive of the European Community (1997).

Some Comments on the Bulgarian Broadcasting Legislation

The review of the various broadcasting laws indicates that there are key functions without which the supervisory body is a powerless and mere declarative structure. If we cast a glance on the classification that has been made so far, it can be concluded that the permissive function, which is manifested mainly as a licensing power, is the most prominent and universal one around which other functions can cluster. This power must be

implemented in all its capacity because otherwise the supervisory body will be deprived of its fundamentals and will become useless. In this respect I would like to reflect with criticism upon the recent Bulgarian Law on Radio and Television (1998),⁴ which does not regulate the broadcaster as a specific operator but considers him as a mere producer vesting the State Commission for Telecommunications, set up under the Law on Telecommunications (1998)⁵ as a subordinate body to the Council of Ministers, with the most crucial functions of licensing and control over broadcasters.

As far as the object of control is concerned, under the Bulgarian law on the electronic media, broadcasting activity is "the creation of radio and television programs and of additional information aimed at transmission via different technical means in a coded or uncoded form, which are designated for a direct reception by an unlimited number of persons" (art.1 para 2). According to article 2, the provisions of the law are not applied to radio and television programs created to be transmitted in one building or for the needs of state bodies and entities when the content of the programs concerned is related to their specific activity and the transmitters are their property. The broadcasting is performed by radio and television operators (broadcasters), who are physical or legal persons duly licensed (art.3). There is a legal definition of "program," which is determined as a system of all elements that are created and transmitted by the operator by a signal on a given frequency, and which is a carrier of a definite content (para 1 p.4 of the Additional provisions). It is not difficult to construe that under the act concerned, the scope of broadcasting is narrow and covers only the creation of programs, while the act of transmission is not included. In this way, the notion deviates from the minimum requirements provided by the European Convention on Transfrontier Television (ECTT) and the European Community "Television without Frontiers" Directive and the practices in other countries. The typical characteristics of broadcasting (creation and transmission) are separated: the

first function is set upon the radio and television operators, and the second - on the telecommunications operators. The consequences of this approach, which can be hardly justified, are that the licensing procedure is split into two sub-procedures, carried out by two separate bodies, and the license issued is not a single act, but consists of two acts - a programming and a telecommunications license. This may easily result in the deprivation of the broadcaster of its unique characteristics and factually may impair seriously

⁴ Official Gazette, 102, 1998,

⁵ Official Gazette, 93, 1998.

its independent position as a special operator, performing socio-cultural and constitutionally relevant functions. The law regulates the other elements that characterize the broadcaster (programs directed to the public) and strive to be precise in the definition of the concept of "public" by introducing the criteria of space threshold-"transmission in one building"-which is not considered broadcasting. The delivery of information and image for the state bodies and legal entities, referring to their special need is another content threshold requirement excluding such kind of dissemination from the notion of

broadcasting. The existence of mutually shared competence under the current Bulgarian broadcasting legislation is a problematic solution that is inspired by the desire to balance political and economic interests. This "balance," however, is unacceptable from different points of view and, above all, from the position of civil society. In practice it may lead to an abuse of the public mission of the electronic media, allowing the government to interfere and to dominate over the activity of the radio and television stations. A negative effect resulting from the existence of co-competence or competence divided between two bodies-one independent and the other possessing the characteristics of a genuine state body-is a totally inefficient licensing procedure. After the adoption of these two laws, not a single license has been passed in Bulgaria, which results in chaos in the field: there are many stations whose licenses have expired but they continue to operate; there are pirate stations that are willing to legitimize their position; and there are absolutely new terrestrial and cable "pirates" that have been set up in the meantime, taking advantage of the legal clashes that are aiming to gain a legal status. The inconsistencies in the legal framework and the collisions between the two laws-on broadcasting and on telecommunications-as well as the lack of harmonization in the competence of the two supervisory bodies-are the crucial reason for the poor effects of the electronic media and telecommunications reform in Bulgaria at present. The last, but not least, outcome of this absurd situation is that the frequency map of the country has not been elaborated and publicly announced so far. The state still has complete control over the frequencies available through the State Commission on Telecommunications. The possible regulatory formula (which can be considered as merely a transitory and not a fully satisfactory decision) is that the competence in the field might be exercised by both the supervisory body in broadcasting and the governmental technical authorities. The result is their co-operation in the area of technical matters. The effectiveness of this approach depends to a greater extent upon the clear-cut separation of the powers of the two bodies and its lawful implementation. Whatever the institutional expression of the legal solution, the final decision should be taken by the independent regulatory body in broadcasting, on the one hand, because of its special position and functions and, on the other, due to the specificity of the regulated matter.

Unfortunately, the case of Bulgaria is not of this kind. It is extremely important for the comprehension of the logic of the mutual co-functioning and the gradual encompassing of technical matters by the independent supervisory agency to be politically accepted and legislatively reflected, not only in Bulgaria, but in the young democratic states in general, where the proper technical and programming equilibrium in the field may be seriously imperiled. There is a risk based upon the totalitarian practice and automatism for technical formalities to prevail and to blur the content considerations. Another argument in the same vein is that in these countries terrestrial broadcasting still has widespread distribution and popularity with the audience; cable transmission is available but only for the segment of the public that can afford it; and digital broadcasting is hard to expect to start on a large scale very soon. Through the frequency distribution and allocation, the state may exert pressure and may violate media independence and pluralism. This can result in information scarcity, manipulation, and low-quality propaganda programming. The countries in Central and Eastern Europe that have marked the greatest progress in the field (Poland, the Czech Republic, Hungary, etc) have well understood this basic assumption and put it into practice.

III. Conclusions

Supervision in broadcasting is a complicated process consisting of inter-linked and interdependent opportunities for verification of facts and for intervention and impact. It is a dynamic activity which is open to changes and corrections. The variability of broadcasting itself influences the process of supervision and the methods through which it is put into practice. This is the reason why the innovations in the sphere cause such a great concern mainly in the area of control and its effectiveness.

The rapid technical shifts and the alterations in supervised activity require researchers to go further beyond the philosophical and constitutional dimensions of discussions and to explore the genuine operations and real administrative practices in order to decide whether the controlling agencies can truly be useful and promote freedom of expression.

The policy-oriented goals must be expressly determined in the law in their short-term and long-term perspective. The supervisory bodies in the field concerned should continue to safeguard and promote freedom of speech and media pluralism. Taking into account their vital importance for democracy, the authorities should perform their functions in this direction with the support of other specialized agencies and civil society organizations. There should be enough legal guarantees for making this part of the competence really effective.

The verifying powers must be provided in such a way as to secure the gathering of thorough and reliable information that will allow the body to make the proper decisions and to act consistently and efficaciously. They should serve as a solid and lawful ground for the exercise of the powers of impact.

In this respect, the investigating power must be well-balanced among the interests of the broadcasters and the public. This power should assure ample and relevant facts for a timely and justifiable intervention, and it should not infringe upon freedom of speech and the right to privacy. The monitoring power shall serve as an intermediary between control and self-control. In its implementation, the supervisory body should cooperate on a vast scale with non-governmental organizations and associations and rely on broader publicity. The powers of impact that represent the active part of competence should be precisely regulated by the law regarding their comprehensiveness. Among these, the power that draws particular attention is the permissive power. The licensing procedure as the genuine manifestation of permissive power should be clear-cut and not overburdened by administrative details. Discretion must be proportionate, guided, and public-oriented. Openness, transparency, and active involvement of civil society representatives in the process are the necessary principles upon which it should be based. Where it is envisaged, indirect controlling power should be gradually replaced by the self-regulation of public broadcasters. The ultimate aim should be the achievement of self-regulation and control passing through the stages of partial regulation and enforced self-regulation. This scheme will require an inner organization that will promote the values of self-regulation and self-control. The conclusion may be spread over all types of operators in the new technological environment, both public and commercial. The issue is more delicate concerning public operators, because usually the rules imposed on them are stricter—a consequence that follows from their mission to reflect all social interests. This role may make the implementation of enforced self-regulation and self-regulation and self-control difficult to achieve in a short time. It depends upon complex social and political reasons, traditions, and culture. If the law delegates broadcasters the task to elaborate special codes in major cooperation with various interest groups, the rules can be negotiated with and/or approved by the supervisory body. The final goal, particularly for public service broadcasters, is to transform themselves into effectively operating enterprises that can stand the competition with the commercial operators. Active public scrutiny over the election of their managing boards may play the role of the necessary corrective of their indirect subordination to political or economic interests. The enforcement power should be legally designed as to give more room for persuasion, rather than punishment. Cooperation embodied in the talks and negotiations between the broadcasters and the supervisory authority shall precede the act of putting into force diverse administrative measures and sanctions. The softer measures of enforcement—recommendations and warnings—should play the role of an extension of this preliminary stage and open broader opportunities for the quick and friendly solving of problems. The next tools for control are the instructions, which must outline the areas of controversy and show clear directions for amendments in the programs.

and the strands. Drastic measures should be avoided or their imposition limited to the extreme cases. An hierarchical range of sanctions must be introduced in law, which shall be put in force subsequently if the cooperative negotiations and the other administrative interventions have proved unsuccessful.

Summing up the arguments stated up to now, in the implementation of this power, the authority should be extremely precise in its conclusions and must strongly rely on the larger support and understanding of the public.

Public accountability should not remain confined to the frames of the public informative function, but should penetrate through all verifying powers and powers of impact. All the actions of the supervisory body must be legally as well as morally justified. This means that the authority should have the consciousness that it is right and is acting for the public good. The legal and the moral integrity of the competence and its factual performance can be achieved through the widening of the participation of the public in the application of the separate powers and through a broad public debate on every conflicting issue and interference.

The aim of these conclusions is not to diminish the public role or to undermine the status of the independent regulatory bodies in broadcasting. The expansion of the market and the necessity of an active public sphere, the complication of the tasks of modern government, and the diversification of the links and relationships between civil society and the state, the strengthening of public opinion and its effectiveness, will require the creation of adequate conditions in order for the supervisory bodies to continue their operation and to pursue their goals.⁶

It is a matter of a complex of factors and of administrative procedures as well as whether freedom of expression as a supreme value and principle of modern democratic society will acquire stable institutional dimensions through the supervisory agencies and will serve the public good. The efforts of experts, officials, and civil society organizations in Bulgaria should be concentrated in this direction, aiming at making the broadcast legislation and the competence of the supervisory body truly efficient and democratic.

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