BEING INDEPENDENT

The OECD jokes that regulators are not like the anonymous vanquishers of aliens as portrayed in Men in Black. But what does independence mean in reality?

The topic of regulatory independence is one of the most important in all industries, and was mercilessly exposed in the financial sector after the 'great recession' of 2008. But it is also crucial in the telecoms and media sectors given the potential for adverse intervention in a wide spectrum of issues, such as censorship, lack of affordable internet access, privacy and lack of culturally important content. While there are heated debates about what regulators should have in their remits, such as over the top (OTT) services, the underlying issues of why and how regulators should be independent in delivering these remits now appear to be rising up the agenda.

The OECD, which has long covered the governance of regulators, and economic regulators in particular, has recently published 'Being an independent regulator',[1] in which it says: "Independence is not a given. Rather, it needs to be translated into practice throughout the work and life of a regulatory agency." The report builds on a literature review that aims to "pinpoint why independence matters", and also relies on feedback from a survey of 48 regulators in 26 countries, including, in the TMT sector, Germany's BNetzA, France's Arcep and Mexico's Federal Institute of Telecoms. They are also members of the OECD's Network of Economic Regulators, which the FCC and Ofcom are yet to join.

Aiming to inject some humour, the authors note that the film, Men in Black, portrays regulators as anonymous and 'above the system' in the pursuit of aliens, but in the real world are key players in the policy arena. The report gets down to basics, defining what a regulator is, and the benefits that independence can deliver, such as long-term stability, resisting pressure to raise or lower prices at the expense of service quality, signalling to industry that rules will be followed without government interference, and the promotion of a set of competencies and skills not found elsewhere.

But the determinants of independence are hard to understand – there are indices of factors though, such as financial independence, appointment of senior members by parliament or by law, and powers to set tariffs. The first such list in the report is derived mostly from the telecoms sector, where regulatory independence has a longer history, which is also a good reason to involve telecoms regulators in cross-industry networking.

The OECD though sees this as 'sector bias' and it has also developed indicators in its product market regulation work.[2] The authors note that the academic approach tends to focus on regulators as separate entities, but they add that "a regulator can be part of a ministry and in fact be more 'independent' than a regulator that is a separate body". The point about independence is that it's a means to an end.

Turning to the 'how' of independence, the report says: "There have been few attempts to unpack some of the practical implications and features of independence and how these features are practised by regulators", and this is where the survey comes in as it offers insight into issues such as lack of clarity on roles, the possibly 'hijacking' of public consultations by government, and, allied to this, there are a lot of issues about relationships with industry. Professionalism of staff is crucial, and the appointment of the director needs safeguards against 'meddling'. Sources of funding appear to be less important than the way in which needs are determined in pursuit of independence.

Does independence matter? The report lists a lot of theoretical market failure arguments in favour of independence, and goes into much greater detail on the features of independence, again from the academic literature. Then the report switches back to the practical stuff from respondents, and here the good news is that regulators are named where appropriate as evidence to back up trends, such as how the government indicates its position about regulatory decisions, how appeals are managed, "walking the fine line between providing advice and making policy", and more. There's a lot more here too about relationships with stakeholders, such as consumers and industry.

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Much is also made of staff professionalism and appointment of executive members (and the 'cooling off' periods before they are allowed to join industry). There are also a lot of references, making this and other OECD regulatory reports solid sources for research. Finally, there is mention of ERGA, the fairly recently established group of European audiovisual regulators, which has also carried out a survey and issued a report[3] on independence in its sector, adding more ammunition from TMT for colleagues in water, transport and energy.

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1 OECD (2016). Being an independent regulator. bit.ly/2cFG1UC
2 OECD. Indicators of product market regulation. Homepage. bit.ly/2d0jcux
3 European Regulators Group for Audiovisual Media Services (2016). ERGA report on the independence of national regulatory authorities. bit.ly/2d2SVOT