

THE REGULATORY POWERS OF REGULATORY AUTHORITIES

Moments for discussion based on the Norwegian situation

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1. Points of departure

The most important aim of broadcasting regulation is to safeguard and promote freedom of expression and information. The question posed under this session: Should broadcasting regulatory authorities have the power to issue secondary legislation, must be considered in that perspective. The easy answer to the question is therefore: Yes, as long as it safeguards and promotes freedom of expression and information.

In order to give a more substantial answer we first need to look at

- Which issues are dealt with in legislation
- The regulatory authority's degree of independence

2. A presentation of the Norwegian system

- introduction

It is often useful to study how other countries have solved the same type of questions we are dealing with. It is, however, important to bear in mind that each country has its own legal system, its own political traditions and its own media structures. One should therefore never blueprint other countries' solutions, at least not before it has been considered how they may forward freedom of expression and information in our own country.

Secondary legislation must have its authority in law. There has to be an act which contains a legal authorisation to make secondary legislation, and the adoption of secondary legislation must follow certain rules set out in administrative laws. Such authority is normally given to the Government, but it is also in some cases given directly to a specific body. The Act on Public Administration Article 37 states that all public and private institutions and organisations which may be affected by the secondary legislation have a right to be heard before the secondary legislation is adopted. Secondary legislation must be made public in order to enter into force.

Regulatory authorities may issue codes of practice, overview of working practices, technical requirements or collections of case decisions. Such documents will give valuable information regarding what the authority may demand from broadcasters and how it will deal with various questions. However, normally they will not be considered as secondary legislation. It also means that they in a formal sense have a lesser legal significance than secondary legislation. However, in practice such "regulation" issued by a regulatory authority will be as binding for those who are affected as secondary legislation.

The regulation of broadcasting is contained in two acts: The Broadcasting Act and The Media Ownership Act. There are two regulatory authorities: The Mass Media Authority and The Media Ownership Authority. Secondary legislation is adopted under the Broadcasting Act.

- **The Broadcasting Act**

The act regulates the licensing of broadcasting, advertising and sponsorship, cable distribution, The Norwegian Broadcasting Corporation and illegal broadcasting from international territory. There are a number of authorities to make secondary legislation, but no such authority is given to the Mass Media Authority. The Authority (MMA) has been given the following powers under the Broadcasting Act:

- The MMA may in special cases reduce the number of must-carry channels in cable networks (Article 4-3)
- The MMA may prohibit retransmission of television channels which carry illegal content (Article 4-5)
- The MMA may act as an arbitrator in disagreements regarding consumer choice of cable television offer (Article 4-6)
- The MMA has certain enforcement powers when broadcasting regulation has been violated. It may
 - o Issue a warning (article 10-2)
 - o Impose a violation charge (and may in special circumstances wave an imposed violation charge)
 - o Revoke a licence
 - o Prohibit a broadcaster from transmitting advertisements for a time-limited period.

Such decisions are not considered to be secondary legislation.

The Government (King) has authority to adopt secondary legislation under the Broadcasting Act. Authority is given to the following issues:

- To apply the act on Norwegian ships, drilling platforms and other constructions and installations in international territory
- About granting a broadcasting licence and licence conditions
- The duty to register when a licence is not needed
- The broadcasting of important messages from state authorities
- The use of European programme material in television
- Programmes which may seriously harm youngsters
- Broadcasting time for programmes which may harm youngsters
- Exclusive rights to events of major significance, including list of such events
- Norwegian broadcasters' compliance with the TV-directive
- Electronic programme guides
- Transmission, content, amount and supervision of advertising
- Duration and placement of other announcements
- Placement of advertisements
- Sponsoring
- Must-carry provisions in cable networks
- Subscribers' choice of programme offer on cable
- Procedure regarding retransmission of TV with illegal content and exceptions from the ban on such transmissions
- Duty to register radio and TV receiving equipment
- Importation and sale of radio and TV receivers
- Complicity from Norway in broadcasting from international territory

- Implementation of violation charges
- The Prohibition of advertising and revocation of licences.

The Secondary legislation under the Broadcasting Act also contains some authorisations to make further provisions. One such authorisation is given to the MMA, namely the power to lay down guidelines for local radio simulcasts (Article 7-7). In addition the MMA has been given the following powers under the Broadcasting Regulation (secondary legislation):

- The MMA may grant licences to operate satellite broadcasting services
- The MMA may grant licences for the establishment or operation of facilities for broadcasting or the retransmission of broadcasting
- The MMA shall receive annual statistics from television companies on European works
- The MMA will decide in doubtful cases regarding the placement of television advertisements
- The MMA's power to reduce the number of must-carry channels (Article 4-3 of the Act) shall not affect NRK and TV 2, the two national TV-channels.
- The MMA shall grant licences for local broadcasting (with the help of a Licensing Council appointed by the Ministry). The Authority also has powers to decide on the use of networks for local radio, it may make exceptions to the amount of local productions required and decide on distribution time when the local radio licence holders do not agree.
- The regulation also contains detailed rules on the size of violation charges which the MMA is empowered to impose.

- **The Media Ownership Act**

The Media Ownership Act Article 10 contains an authority for the Media Ownership Authority (MOA) to lay down further provisions concerning notification of advance clearances of acquisitions. Such provisions are formally not secondary legislation, even if similar procedures as for secondary legislation probably would be used, were such provisions adopted. So far there has been no need for further provisions.

There is no authorisation for the Government to adopt secondary legislation under the act.

The MOA has made a set of guidelines where a number of issues covered in the act are clarified or developed. The aim of these guidelines is to inform those to whom the guidelines may apply about the authority's understanding of the legal framework. Although these guidelines do not have the legal status of secondary legislation, those who are affected by them treat them as if they had legal status.

- **The independence of the regulatory authorities**

The establishment of independent regulatory authorities is based on a variety of reasons. In Norway three arguments have been mentioned:

- A wish to separate the role of the state from the role of regulator, thereby strengthen the legitimacy of the regulator
- A wish to reduce the amount of work (and certain tasks) in the Ministry
- A wish to establish a special safeguard for the freedom of expression by shielding decisions by the regulator from political influence.

Independence does not imply that the regulator is free to do whatever it chooses. There has to be a legal basis for its work, where not only the tasks, procedural questions and organisational matters are dealt with, but where also the independence, or the degree of independence is stated.

The Media Ownership Authority (MOA) is independent from the Government in performing its duties under the law. This is explicitly stated in the Media Ownership Act Article 6¹. Decisions made by the MOA may be brought before an Appeals Board, which is also independent in the same sense as for the authority². The MOA has no council or board, and the director is appointed by the Ministry. The Appeals Board is appointed by the Government, who also appoints chair and vice-chair of the Board. The authority's budget is decided upon by the Ministry.

The Mass Media Authority is not independent from the Government. The Broadcasting Act states in Article 2-1 that *"The Mass Media Authority is the administrative authority for broadcasting and local broadcasting, etc. The ministry may lay down further rules concerning the tasks of the Mass Media Authority"*. Appeals against decisions made by the MMA will be dealt with by the Ministry. It is also the Ministry which appoints the director of MMA. The MMA has no council or board. The authority's budget is decided upon by the Ministry.

The degree of independence is based on formal decisions, either by legislation, other written decisions or general structures. However, formal independence does not always guarantee real independence. There also has to be an understanding on both sides of the importance to safeguard the independence. Regarding the MOA there have been no problems in maintaining the independence in relation to the Ministry.

Pressure from the Government can be exercised in various ways:

- By the appointment of board or council members, or by the appointment of director
- By budgetary decisions
- By informal contacts from the administration
- By making its views well known, in order for the regulator to do "what is best for you"
- By making it clear that certain decisions have no political backing in the Government.

3. The situation in other countries

- Denmark

The Danish Radio and Television Board does not have the power to issue secondary legislation. However, the Board has the authority to issue rules of a technical nature, for instance that someone applying for economic support has to present revised accounts, or the procedure in relation to the auction of a radio licence.

¹ "The King may not give general instructions to the Media Ownership Authority regarding enforcement of this Act, nor give orders concerning the exercise of authority in individual cases. Pursuant to this Act, decisions of the Media Ownership Authority may not be reversed by the King."

² "The provision in section 6 shall apply correspondingly to the relationship between the King and the Appeals Board."

- Germany

The German “Landesmedienanstalten” have the power to issue secondary legislation, for instance regarding regulation to protect Human Dignity and regulation concerning programmes for minors and advertising.

- Ireland

The Broadcasting Commission of Ireland does not have the power to issue legislation, but the Commission may issue rules and guidelines. Guidelines in respect of election coverage are recently issued, and the Commission is presently working on a series of codes covering advertising and programming.

- United Kingdom

The new UK regulator, OFCOM, does not have the power to issue secondary legislation. That power lies with the Government and their appointed agents. However, OFCOM’s Standards and Fairness and Privacy Codes are statutory codes, which are enforceable through broadcasters’ licences (or in the case of BBC, it’s Agreement) rather than through statute. So in practice there is little difference (apart from the fact that in the UK also secondary legislation involves Parliament).

4. Should regulatory authorities have the power to issue secondary legislation?

It is important that regulatory authorities are independent in the sense that their decisions and interpretations are not unduly influenced by external actors. On the other hand, no regulatory authority should be totally sovereign. There has to be a balanced system of controlling mechanisms. This is especially important in the media field, where misuse of power may have a negative effect on the freedom of expression and information.

According to The Norwegian Constitution, the legislative power lies with the National Parliament. However, quite frequently power to make secondary legislation is delegated to the Government. That delegation may be restricted, but normally the Government may choose which state body shall be empowered to perform the delegated task. Usually secondary legislation is carried out by a ministry and adopted by the Government.

A delegated authority can be withdrawn at any time by the delegating body, in most cases a ministry. It will therefore often be considered more convenient to delegate such authority to a subordinate body than to an independent body, because it may be considered more difficult to withdraw delegated powers from an independent body. Execution of delegated tasks may also be considered to bind the two parties, the ministry and the authority, closer together. The ministry is after all in a position to withdraw the authority if the carrying out of the work is not done to its satisfaction. Such arrangements might therefore have a negative effect on the independent status of the authority, at least seen from outside.

For a regulatory body in the media field it is important that the authority of the body is transparent. It must always be possible for anyone to check if the powers trespass the freedom of expression and information or the independence of the media. Likewise it must be

transparent which body has adopted the legislation establishing the powers and where in the process political influence has been present.

Drafting secondary legislation will frequently involve both the regulatory body and the ministry. If the ministry (or the Government) adopts the secondary legislation, it is evident that political considerations have been made, since a ministry is a political body. If the regulatory body has the competence to adopt the legislation, the interested external actors cannot be certain whether there has been a political influence or not. It might make it more difficult to maintain the independent position.

In some cases the authority to issue secondary legislation within specific areas is given in the act itself. The issuing of such secondary legislation usually does not involve the Government, and cannot be withdrawn by the Government or a ministry. For independent regulatory bodies such authority would be preferable.

The system which is working in many European countries, where the regulatory authority has no power to issue secondary legislation, but may issue other rules, codes and guidelines, seems to be working well. It does not create difficulties in regard of the independent position of the regulator, and it makes it possible for the regulator to issue regulation where necessary, without jeopardizing its independent position vis-à-vis the political authorities. The problem with this type of regulation is that there are no procedures regarding the production of the regulation which guarantees transparency. The regulator will normally consult interested parties in the preparation of rules and guidelines, but external interested parties do not have a right to be consulted, and drafts do not have to be made public.

The substantial answer to the question is therefore the same as the easy answer; the regulatory powers should have the power to issue secondary legislation as long as it safeguards and promotes freedom of expression and information. To secure that, measures have to be taken, and they may vary from country to country, according to each country's special situation.