



BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Broadcast Regulation

Centre for Law and Democracy
International Media Support (IMS)

BRIEFING NOTE 7 OF 12

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Democracies impose more stringent regulatory regimes on broadcasting than on other forms of media. This is because, unlike print media, broadcast signals have traditionally been distributed through a limited public resource, the radio frequency spectrum, which limits the number of stations which can operate in any particular geographic location. Without regulatory intervention in assigning frequencies to broadcasters, chaos would reign and interference would render the entire system unworkable. The limited nature of the broadcast spectrum, and the resulting limits on the number of broadcasters, also justifies regulatory interventions to support diversity of content. Modern technologies are starting to change this. Cable, satellite and digital dissemination platforms have significantly reduced the pressure on the frequency spectrum, while not doing away entirely with limits. In due course, however, the Internet will essentially defeat scarcity. At the same time, there are other reasons to regulate broadcasters, including the intrusive and influential nature of broadcasting, as well as its accessibility, including to children.

Frequency planning is an important way of ensuring that the allocation of frequencies to broadcasters takes place on a planned basis and in a manner that allows for the promotion of a diverse range of programming in line with the public interest, rather than simply allocating frequencies to the first or highest bidder. Frequency planning requires coordination among different frequency users: broadcasters, telecommunications service providers, and safety and security services. In many countries, combined broadcast-telecommunications regulators are responsible for a wide range of frequency uses, while technological convergence has meant that more and more countries are moving to this model.

The two main areas of broadcast regulation are in relation to licensing and regulation of content.

Licensing

In democracies, the process of licensing broadcasters is overseen by a specialised, independent regulatory body. As discussed in Briefing Note 4, according to international standards this body should be independent of both government and commercial players. Licensing should promote the overall public interest rather than the interests of any particular government or private actor. Independence is particularly important if one of the primary goals of licence regulation, namely promoting diversity in the airwaves, is to be achieved. Independent regulation also promotes investment in the broadcasting sector since businesses can be confident that licences will be awarded based on merit.

The licensing process should also be carried out in a democratic manner and, in particular, it should be fair and transparent. The importance of achieving these goals has been outlined by the UN Human Rights Committee (UNHRC) in its General Comment No. 34:

States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the Covenant. Licensing regimes for broadcasting via media with limited capacity, such as audiovisual terrestrial and satellite services should provide for an equitable allocation of access and

frequencies between public, commercial and community broadcasters.

Part of this is to allow everyone to have an equal opportunity to obtain a licence. The process for making applications should be set out clearly and precisely in law. A framework of rules should be provided for in the primary legislation, with more detail specified in subordinate regulations, including specific calls for tenders or applications. The framework should at least include the following features:

- Straightforward timelines for each step of the process (such as deadlines for filing applications, and the length of time it will take for a decision to be made).
- A detailed explanation of the process and a requirement for the regulator to justify any refusals in writing.
- Applicants should have a right to a judicial appeal against any refusals to issue a licence.
- The rules should include a clear framework or schedule of any charges and fees.
- The criteria by which applications will be assessed, such as technical expertise, financial resources and making a contribution to diversity, should be spelled out clearly in the rules.

In most democracies, broadcasters are required to treat matters of public controversy with due balance and impartiality, which essentially makes it unrealistic for broadcasters to be owned by or even linked to a particular political party. However, although it is legitimate to prohibit political parties from holding broadcast licences, other blanket prohibitions on the form or nature of applicants generally represent a breach of the right to freedom of expression.

Broadcast licences are normally awarded subject to certain terms and conditions, including with a view to promoting diversity and fairness in the system. Because they represent restrictions on freedom of expression, these conditions need to be justified according to the three-part test outlined in Briefing Note 2. Conditions may be general or specific to the licensee. General conditions may

include technical criteria (which would normally apply to a class of licences), rules on copyright and licence duration and positive obligations, such as to carry a minimum quota of domestic or regional programming. Specific conditions may apply to individual licences, and examples might be a requirement for a licensee to carry a minimum quota of news or children's programming.

Regulation of Content

Unlike the print media sector, content regulation for broadcasters is rarely undertaken on a purely self-regulatory basis and, instead, co-regulatory or statutory models are more common. Some countries relying on a co-regulatory model leave content regulation up to an industry (or self-regulatory) body, but make it a licence condition that the broadcaster belongs to that body (so that it must obey the decisions of the body or risk losing its membership and hence licence). Regardless of which model is in place, the need for independence is particularly imperative in relation to content regulation, given the high risk of political interference.

To ensure that the public has access to a range of different types of programming, many countries impose certain positive content obligations on broadcasters. One common example is to require broadcasters to carry a certain amount of domestic programming. The rationale behind this is to counteract commercial incentives to purchase content from abroad, which is often cheaper and easier than producing original programmes. Absent such requirements, the overall presence of local voices in the all-important broadcasting sector might be limited. Local content requirements also help to ensure that local culture is protected and promoted through broadcasting.

In many countries, national broadcasters are also required to carry a certain minimum percentage of local programming. Once again, this is to counteract commercial imperatives, since it is more expensive to produce different local programmes for different areas than to provide unified national programming. There is clearly a public interest in ensuring that audiences have

access to news about local, in addition to national, events.

Another requirement which is less common but still applied in many countries is to require broadcasters, especially public broadcasters but also often private broadcasters, to carry programming which produced by independent producers (i.e. producers who are not connected to any institutional broadcasting station). Requiring broadcasters to carry independent productions broadens the production base, leading to a more intense competition of ideas and innovation in the sector and, as a result, greater content diversity. This also helps to foster content producing industries. It is common for public broadcasters to be subject to higher independent production quotas.

In most democracies, broadcasters are also subject to certain negative or minimum professional requirements. As for the print sector, this normally means that they are required to respect the standards set out in a code of conduct developed through the co-regulatory or statutory regulation system. These codes address a range of programming issues, such as accuracy, privacy, protection of children and the treatment of sensitive themes such as sex and violence. Again as in the print media sector, these codes often form the basis of a complaints system. Unlike the print media sector, however, these codes are often also used as the basis of direct monitoring by an oversight body and the sanctions applied for breach of the rules range from light remedies (such as warnings or requirements to issue a correction) to more serious remedies (such as fines and even the possibility of licence revocation).

FURTHER READING

- ARTICLE 19, *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation*, 2002: <http://www.article19.org/data/files/pdfs/standards/accessairwaves.pdf>
- Eve Salomon, *Guidelines for Broadcasting Regulation*, Commonwealth Broadcasting Association, 2008: <http://www.cba.org.uk/wp-content/uploads/2012/04/RegulatoryGuidelines.pdf>
- International Telecommunication Union, *Guidelines for the transition from analogue to digital broadcasting*, 2014: <http://www.itu.int/en/ITU-D/Spectrum-Broadcasting/Documents/Guidelines%20final.pdf>
- Toby Mendel and Eve Salomon, *The Regulatory Environment for Broadcasting: An International Best Practice Survey for Brazilian Stakeholders*, UNESCO, 2011: <http://unesdoc.unesco.org/images/0019/001916/191622e.pdf>