



CENTRE FOR LAW
AND DEMOCRACY

BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Independent Regulation of the Media

Centre for Law and Democracy
International Media Support (IMS)

BRIEFING NOTE 4 OF 12

BRIEFING NOTE 4

Independent Regulation of the Media

A number of important public interest goals are achieved through regulation of the media, and especially the broadcast media. It has traditionally been necessary for regulation to serve as a gatekeeper regarding access to the airwaves, a limited public resource. Regulation can also promote important diversity goals, and prevent harmful content, for example for children, from being aired at inappropriate times. Good legislation can support these goals, but only where there is impartiality and fairness in the application of the rules. Without independent oversight, even the best regulatory rules can be turned into tools to suppress dissenting voices. Even if the laws are not overtly abused, the presence of conflicts of interest can lead to perverse regulatory decisions. In many countries, political interference in regulatory bodies has historically been the main concern but, in others, the greater threat is of regulatory capture by powerful commercial media players. Regulators which are properly insulated against both political and commercial influences are best able to perform their duties in the public interest.

In their 2003 Joint Declaration, the (then) three special international mandates on freedom of expression at the UN, the OAS and the OSCE noted the need for independence among media regulatory bodies:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.

More recently, the UN Human Rights Committee (UNHRC) made the following statement (with specific reference to broadcast regulators) in its 2011 General Comment on Article 19 of the

International Covenant on Civil and Political Rights (ICCPR):

It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.

Independence is important for all bodies that exercise regulatory powers over the media. However, many democracies impose only very light-touch regulatory constraints on the print media sector and do not have any specialised regulatory bodies governing this sector. In these countries, self-regulatory models, such as a press council, are given preference over statutory bodies. However, independence is also an important value for self-regulatory bodies (see Briefing Note 6).

It is different in the broadcasting sector where, as noted, statutory regulators often wield important powers, including licensing who may operate a media outlet. Independence is crucially important here, especially if the public interest in media diversity, a goal which should underlie broadcast licensing, is to prevail. Independence is also important in the development and application of codes of broadcasting conduct, which touch directly on media content. Independent oversight also encourages investment in the broadcasting sector, among other things by building confidence that regulatory decisions will be adjudicated fairly and that investments will be protected against arbitrary action.

One important measure to promote the independence of regulatory bodies is to stipulate clearly in the enabling legislation that they are independent. According to the Council of Europe's Recommendation No. R(2000)23:

Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.

The enabling legislation should also include structural measures to promote independence. A key aspect of this is how members of the governing board are appointed. At a minimum, the appointments procedure should be spelled out clearly in the enabling legislation. Involving a wide range of actors in the appointments process – including nominations, review of shortlisted candidates and the final selection – helps insulate the process from political and commercial interference. It is important to provide for a role for civil society and the wider public, and to leave important decisions to representative bodies, such as a committee of parliament, rather than an individual. This should be supported by rules on security of tenure for members which only allow for removal in exceptional circumstances, with clear procedural requirements and the possibility of judicial review.

The legislation should include safeguards against conflicts of interest, both political and commercial. For example, better practice is to prohibit individuals who are employed in government, the civil service or a political party, or who hold an elected office, from serving on the board. Individuals who hold significant financial interests in either the broadcasting or telecommunications sectors should also be prohibited from serving on the board.

Financial security is also central to the independence of a regulatory body. The best way to achieve this is to set out the framework for funding clearly in the law, including the way annual budgets are approved, and in a manner which is insulated from political interference. Providing for regulators to be funded from the fees which are charged for issuing broadcast licences can be both a logical cost-recovery tool and a means of bolstering independence. At the same time, many regulators either need to have these fees supplemented from or to remit excess fees to the general budget, so that the budget approval process remains very important.

As important as it is to protect regulators from political and commercial interference, this does not mean they are free to operate as they wish, without being held accountable. Rather than reporting to the executive, however, better practice is for regulators to report to a multi-party body, such as the legislature or a legislative committee. Providing for public participation in key decision-making processes, such as licensing, also helps to ensure accountability. Important decisions should also be subject to judicial review and regulators should be required to publish an annual report, along with audited accounts.

It is important to note that the principle of independence applies to regulatory decisions, and especially decisions which impact on individual broadcasters, such as licensing decisions and adjudicative decisions based on the code of conduct. Government retains, however, a policy role, especially in relation to more important policy decisions, such as the technology and timetable regarding the digital transition.

FURTHER READING

- Kristina Irion and Roxana Radu, “Delegation to independent regulatory authorities in the media sector: A paradigm shift through the lens of regulatory theory” in *The Independence of the Media and Its Regulatory Agencies: Shedding New Light on Formal and Actual Independence Against the National Context*, 2013: http://www.ivir.nl/publications/irion/Radu_2013.pdf
- Steve Buckley, Kreszentia Duer, Toby Mendel, Seán Ó Siochrú, *Broadcasting, Voice, and Accountability A Public Interest Approach to Policy, Law, and Regulation*, 2008: <http://www.press.umich.edu/pdf/9780472032723-fm.pdf>