

GUIDELINES FOR BROADCASTING REGULATION

**Eve Salomon,
for the CBA and UNESCO**



United Nations
Educational, Scientific and
Cultural Organization



Preface

At a time when many believe that broadcast media regulation, either by government or by an independent body, is no longer feasible (because of digital technology) comes an authoritative book which discusses its continuing relevance, *Guidelines for Broadcasting Regulation*.

Amidst the fast-changing broadcast media landscape, the present book examined many “balancing acts” which stake-holders both in government and private sector have to undertake to establish and maintain an effective and credible broadcast regulation mechanism. For example, it requires a balancing act to determine which aspects of broadcasting can be regulated to protect citizens rights but at the same time not to provide an opportunity for “powers that be” to curtail freedom. One needs to strike a balance between the independence of the regulator and the government’s own purpose to pursue public policy objectives; and as determining where the balance lies between the potentially conflicting rights of the broadcaster, society, and the individual.

Another important contribution of this book is the discussion on new or emerging issues which may create some confusion in the regulatory system, such as jurisdiction issues for cable and telecommunication as carriers of broadcast programmes, issues on spectrum management; issues on broadcasting-related intellectual property rights and the role of the government in the digital switchover.

Of special interest to UNESCO is the discussion on licensing community radio stations. UNESCO has always encouraged for allocating frequencies for community radios which serve the needs of marginalized groups.

Policymakers, particularly legislators on the lookout for a model regulatory framework and mechanism will find the appended law outline most useful and adaptable because of its comprehensiveness despite its outline format. Meanwhile, a substantial section provides country experiences in terms of model regulatory objects.

For its comprehensive coverage and in-depth analysis, *Guidelines for Broadcasting Regulation* is indeed a useful reference for broadcast policymakers, regulators, broadcast media practitioners as well as for those who study broadcast media.

Abdul Waheed Khan

Assistant Director-General for Information and Communication, UNESCO

Foreword

The tide in setting up independent regulators for broadcasting is running strongly in many parts of the world. The Commonwealth Broadcasting Association has frequently been asked for guidance, as new regulatory organizations are set up. It is partly to meet this demand that this book has been created. Our hope is that it will help new and existing regulators see clearly what are the essential ways in which public service broadcasting can be preserved and strengthened, within the context of a varied and commercially viable industry.

Elizabeth Smith,
Secretary-General,
Commonwealth Broadcasting Association,
17 Fleet St, London, EC4Y 1AA, UK
Tel: +44 207 583 5550 Fax: +44 207 583 5549

Website: www.cba.org.uk

The Author

Eve Salomon is an international media consultant with particular experience in broadcasting and press regulation. She is a legal expert for the Council of Europe and an UK government advisor on better regulation. Eve is a member of the UK's Press Complaints Commission. Previous jobs included Deputy Secretary of the Independent Television Commission, Director of Legal Services at the UK Radio Authority and Secretary of Ofcom.

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GUIDELINES FOR BROADCASTING REGULATION

1. Background

1.1 Broadcasting is the most pervasive, powerful means of communication in the world. In many places with high levels of illiteracy or poverty, the only access to news and information is by word-of-mouth, or radio. Of the two, radio is certainly the more authoritative. In more developed areas, television has replaced radio as the most trusted and main source of news. And as well as news, broadcasting provides education and entertainment; in Western societies like the UK, people spend an average of 24.4 hours a week watching television¹, and 23.9 hours listening to radio². Whoever controls access to so much viewing and listening, and whoever controls the content of what is watched and heard, is in a prime position to influence the way in which viewers and listeners see the world and their attitudes towards their own and other's cultures.

1.2 Since the dawn of broadcasting governments have been well aware of its power and have sought to control its output. In many parts of the world the only source of television and radio – at least initially – has been the State. The State has determined what its citizens have access to, and has often used the power of broadcasting to underpin its own objectives to retain power. But over the years State control of broadcasting has been eroded: commercial operators, often large multi-nationals, have introduced broadcasting supported by advertising. Almost without exception, governments have tried to limit the numbers of new commercial operators through instigating systems of licensing. This licensing system has then been applied to restrict the content which new, non-State broadcasters can offer.

1.3 Sometimes restricting content can be a means of protecting citizens from harmful material, but it has also been used as a means of restricting access to news and information in order to maintain strict government control to prevent opposition views and opinions being heard. But increasingly, international opinion and pressure has reinforced the importance of broadcasting in supporting the development of democracy; without the free flow of news, information and opinion, citizens will not be adequately informed and so able to exercise their democratic rights. An informed citizenship can make informed choices at the ballot box. There is no doubt that the effects of both the internet and satellite broadcasts from other countries have forced a pragmatic acceptance from otherwise totalitarian States to relax controls on their own, domestic broadcasting.

1.4 These Guidelines seek to set out the main principles which underlie the regulation of broadcasting, and the aspects of broadcasting which can be regulated. It is aimed at governments and regulators and sets out “best practice” as informed by an international analysis of what currently is done. There are, however, two fundamental assumptions which underpin these Guidelines.

¹ BARB figures for June 2005

² RAJAR Q2:2005

1.5 The first is that regulation should generally be as ‘light touch’ and minimalist as possible, but robust enough to support the basic concept of freedom of expression, which in turn is a precondition for the effective operation of democracy. This means that regulation of content should be based on a set of clear rules and guidelines that are applied by the regulator *post*-transmission. Regulators should not preview material before broadcast; to do so would make them censors, not regulators.

1.6 The second is that there is no single ‘right’ answer to many of the questions raised by trying to establish an appropriate and effective regulatory system. In some cases, there is a general accepted international standard which can be applied through tried and tested means. However in many other cases, the best solution will be very culturally specific. The draft ‘model law’ which is set out in the back of this booklet makes clear where a ‘best practice’ solution can be offered, and where it is incumbent upon individual governments and regulatory bodies to find an approach which best suits the circumstances to hand. It should come as no surprise that, just as much of broadcasting itself is locally-oriented, so too are the ‘best’ ways to regulate it.

2. Why regulate broadcasting?

2.1 Why should broadcasting be regulated at all? In part, because the broadcast media can affect people's thinking and behaviour to a remarkable extent, both for the good and for bad. Harnessing its power to work for the democratic process is one of the key purposes of broadcasting regulation.

2.2 In many ways linked to this democratic purpose is regulating broadcasting in order to enhance cultural promotion. Many countries consider that broadcasting can be used to increase indigenous language programme production and therefore to reinforce national cultures. Rather than seek, or even acquiesce to cultural globalisation, broadcasting legislation can be used to protect cultural independence.

2.3 This protection of national or cultural interests also connects to economic interest. To what extent do governments wish to allow inward investment into their broadcasting sectors, rather than retain national controls? Are there specific trade partnerships to be encouraged, or indeed discouraged? Should general competition law apply to broadcasting, or as a result of cultural considerations, should broadcasting be ring-fenced from free market economics?

2.4 And to what extent do these limitations affect broadcast content? As well as the macroeconomic considerations of broadcasting, there are micro-economic elements of potential protection. Should there be limits on radio and television advertising? Given the undoubted power of broadcasting, should advertisers be bound to tell the truth? And what about programmes? To what extent do children deserve special protection? These are all potential purposes for regulation of broadcasting.

2.5 But what is the overriding rationale, the reason for regulating broadcasting as distinct from other media, say newspapers and magazines, or the internet? The main justification argued by governments is that broadcasting uses spectrum, and spectrum is a public resource, allocated to nations in accordance with complex international agreements. As such, it is a scarce resource: there is only so much spectrum available for broadcasting use in each country. And therefore, because it is a scarce resource, it is valuable. Even though digital broadcasting is increasing the number of radio and television channels which are available, there is still not an infinite supply. It is therefore reasonable for the State, as the owner of spectrum, to place obligations on broadcasters who use that resource.

2.6 The mechanism used for placing obligations on broadcasters is generally through licensing. It is rare for the State to give away or sell broadcast spectrum in perpetuity; generally broadcasters are allowed to use it for limited set periods under a licence. Sometimes licences are sold by the government; often they are free. Depending on the level of demand, they are either allocated on a first-come; first-served basis, or competitions are held.

2.7 It is the licensing process through which governments introduce and enforce the other purposes of broadcasting regulation: the democratic, economic, cultural and consumer protection purposes.

2.8 Whatever process is chosen, the basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law and the regulations governing the broadcasting licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner.

Democratic Purposes

2.9 Freedom of expression is a universal human right: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."³ This right is reflected in Article 9 of the African Charter on Human and Peoples' Rights,⁴ Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁵ and Article 13 of the American Convention on Human Rights.⁶

2.10 It is important for democratic societies to have a wide range of independent and autonomous means of communication, in order to be able to reflect a diversity of ideas and opinions. The Preamble to the European Convention on Transfrontier Television, a Convention agreed between Member States to the Council of Europe representing nearly all countries in Greater Europe, states that freedom of expression and information constitutes one of the essential principles of a democratic society and acknowledges the importance of broadcasting in this regard.⁷

2.11 The key principle of ensuring freedom of speech should be embodied in any system of broadcasting regulation, but this is not an unencumbered right. The European Convention on Human Rights makes it clear that everyone has the right, "to receive and impart information and ideas without interference by public authority and regardless of frontiers."⁸ However, these freedoms may be subject to such conditions and restrictions as are prescribed by law and necessary in a democratic society. The exclusions cover: the prevention of disorder or crime, the protection of health or morals, the protection of the reputation and rights of others (including the right to privacy), preventing the disclosure of information received in confidence, and maintaining the authority and impartiality of the judiciary. Therefore one of the key issues for legislators is determining where the balance lies between the potentially conflicting rights of the broadcaster, society as represented by the State, and the individual.

2.12 Totalitarian states generally make it an offence to broadcast material which may be critical of government. Unfortunately, there are still many such states, for example in Eastern Europe and Central Asia. Although these States may represent an extreme position, most countries are unlikely to tolerate broadcasting which encourages insurgence. A balance must be sought which on the one hand allows freedom of expression of opinion, but does not go so far as to incite to crime,

³ Article 19 of the Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December 1948, Resolution 217A(III).

⁴ Adopted 26 June 1981

⁵ Adopted 4 November 1950

⁶ Adopted 22 November 1969

⁷ European Convention on Transfrontier Television, 1989 amended 2002

⁸ Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

including political insurgence. Wherever the balance is drawn, it is vital that the rules are codified to enable broadcasters, viewers and listeners, and law makers to know where the boundaries of acceptability lie. Subject to these rules, broadcasters must be ensured editorial independence, to broadcast free from interference or censorship by the State or any regulatory body.

2.13 What is often helpful to regulators and broadcasters alike is to have the main principles set out in primary legislation, with more detailed rules contained in secondary legislation, or Codes, created by a regulatory body. This procedure enables rules to be varied more easily and quickly to meet changing circumstances, and allows for additional guidance to be offered, explaining the basic statutory requirements.

2.14 Key factors which touch on the democratic purposes of broadcasting legislation and which ought to be considered for inclusion in broadcasting law or Codes are:

2.15 The Right of Appeal

Arrangements should be made to enable decisions taken on broadcasting matters to be appealed to a Court of Law. In some countries, like the UK, appeals are limited to points of procedure and law, rather than fact. In other countries, like Sweden, no sanctions can be applied unless they have been agreed by the Court.

2.16 The Right to reply, and rules on fairness

Given the power of broadcasting, broadcasters should have an obligation to be fair. It is generally considered appropriate for broadcasters to be required to offer a prompt right of reply to any person or organisation who has been treated unfairly in a programme. An apology might also be in order.

2.17 Obligations for news to be accurate and impartial

Standards of good journalism require news to be accurate, howsoever published. This is perhaps particularly so in the broadcast media, given their persuasive power. Some countries, for example those within Europe, require news to be impartial. This is not the case in others, for example the USA, where the editorial bias of the channel's owner can filter through to news.

2.18 General obligations for impartiality

In many countries it is considered acceptable for a degree of editorial bias to affect general, non-news programming. However, in the UK, *all* news and other programmes dealing with controversial matters must be impartial. This does not mean that points of view and opinions cannot be aired, but that it is incumbent upon the broadcaster to ensure that appropriate opposing views are heard and that the television or radio service is not partial itself to any particular view.

2.19 Rules preventing discrimination

Given the power of the broadcast media, it is desirable to apply and enforce rules to ensure that programmes do not broadcast material - including the views of interviewees or programme guests - which discriminate against people, for example on the grounds of race, nationality, religion or sex.

2.20 Special rules on religious broadcasting

Religious broadcasting is another sensitive area where perhaps special rules may be applied to ensure that due respect is given to all religious beliefs, and religious intolerance is not provoked.

Independent Regulation

2.21 The Council of Europe believes that in order to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector. This will serve to guarantee the freedom of the media while at the same time ensuring a balance between that freedom and other legitimate rights and interests. Perhaps most importantly in order to preserve broadcasting as part of the democratic process, governments should aim to create independent regulators for broadcasting. Even in very small jurisdictions, where the only broadcaster is State funded and budgets are limited, regulation which is independent of the State is vital to preserve the right to freedom of speech.

2.21.1 Means of appointment

It is vital for members of a broadcasting regulatory authority to be able to function free from any interference or pressure from political or economic forces. Therefore the means of appointment should be set out clearly in law and should be done in a democratic and transparent manner.

2.21.2 Remit of regulatory authority

The duties and responsibilities of the independent authority should be set out in law, as should the means through which they will be held accountable. If members are paid, this should be stated. The term of appointment should be set out, and whether or not it is renewable. Members should be appointed on staggered terms, to ensure there is continuity amongst the membership.

2.21.3 Terms for termination of appointment

One of the most invidious ways in which a regulatory authority can be subject to political pressure and influence is through the threat of dismissal. Therefore, the law should state clearly the factors which may lead to dismissal, for example, physical or mental incapacity, or a clear breach of the rules of propriety.

2.21.4 Funding

Funding can also be used as a means of exerting political pressure; if the authority does not act in accordance with government wishes, funding could be withdrawn. Terms of funding should be set out in law, and wherever possible be kept separate from any potential political interference.

2.21.5 Conflicts of interest

As well as being independent of political forces, members of the regulatory authority must be free of any potential personal conflict of interest with the broadcasting sector. It is usual for members and their families to be prohibited from having any financial interest in any broadcasting or associated company. A breach of this rule could lead to dismissal.

Cultural and Consumer Protection Reasons

2.22 Often linked to these democratic principles are issues related to cultural imperatives. Some governments are increasingly worried about the effects of globalisation on local culture, often citing the spread of American television as a cause of a loss of local identity. Some countries have therefore sought to impose language and original production quotas on their broadcasting (for example, Canada and France have both set requirements for French language programming.) This can have the added benefit of kick-starting local production, but care must be taken not to set artificially high quotas which cannot realistically be met (for example, Croatia has sought to set a 50% original production quota in a country with virtually no domestic television production sector. Such a high quota just cannot be met.).

2.23 Other ways in which broadcasting regulation can be used to further cultural objectives are through using a licensing system to make provision for a range of services, and for media pluralism.

2.24 In addition, a core decision for governments is whether they will provide for public service broadcasting, that is broadcasters who are independent of government but which are obliged to provide certain programming in the public interest in return for a degree of state support. This support is usually in the form of funding, either in part (as in Kosovo where advertiser funding is supplemented by a charge added to every electricity bill), or in whole (as in the BBC which is funded entirely by a compulsory licence fee charged to all households with a television).

2.25 However, public service broadcasters can also be supported by the State through the provision of universally accessible services using scarce spectrum. Again, in the UK, there are three commercially funded public service television channels (ITV1, Channel 4 and Channel 5), all of which are obliged to pay government a fee for using spectrum and are required to meet public service programming obligations. However, there are no non-PSB television services with universal, or near-universal access using analogue terrestrial spectrum.

2.26 Increasingly throughout the world where State broadcasters still exist, steps are being taken to transfer them to being independent public service broadcasters accountable to an independent board, appointed by government. Wherever a public service broadcaster is being set up the key issues are determining the method of governance and accountability, deciding how it is to be funded, and what the key programming obligations are to be.

2.27 A country's culture will affect the way it deals with consumer protection issues, as standards are rarely universal but rather culturally subjective. These fall into three basic categories: standards to protect the quality of viewing and listening, protection of minors, and fairness in advertising.

2.28 Many countries seek to set rules which limit the amount of advertising available on broadcast services. Within the European Economic Area, there are strict rules on the amount of television advertising which is permitted, rules setting out the spacing of advertising breaks within programmes, and rules on the scheduling of advertising. While these rules have an effect on the advertising market (sometimes serving to increase the cost of television advertising by limiting its availability), the

prime purpose is to ensure that viewers' enjoyment of television is not marred by too many or too frequent ad breaks. Similarly, European television is subject to strict rules maintaining a separation between advertising and programming. For example, product placement is not allowed. These rules are enforced in order to ensure that editorial integrity is not undermined by commercial interests, again at least in part to enhance enjoyment for viewers.

2.29 While many countries outside of Europe are not too bothered about setting rules on the amount and frequency of advertising, most are concerned to ensure that children are protected when accessing broadcast media. Generally, countries set rules to ensure that children are not harmed - either physically or morally, with regulations restricting violence, sexual portrayal and bad language. Many countries insist that warnings precede programmes which are not suitable for children, or that on-screen symbols are used to 'rate' programmes. Many countries also operate a 'watershed' system for television, for example in Romania where programmes which have more adult themes or content cannot be shown before 22.00.

2.30 It has long been a requirement in the UK for all broadcast advertising to be legal, honest, decent and true. Advertising is heavily regulated to ensure it is not misleading, does not lead to harm, and is not offensive. In addition, certain categories of advertising are prohibited, for example cigarette and tobacco products. This is not the case in all jurisdictions, as some countries take the attitude, *caveat emptor!* (or "buyer beware!") and do not apply advertising regulation at all.

Economic Purposes

2.31 As mentioned above, rules which limit advertising can act to inflate the price of advertising time. This is just one of many economic purposes to which broadcast regulation can be put. Others include:

2.32 The application of international trade agreements.

For example, Members of the European Union are bound by a Directive (Television Without Frontiers) to allow free movement of broadcast services, provided they all meet the same basic minimum standards of content regulation.

2.33 As a means of balancing desires for inward investment, as against the promotion of national industries.

A key decision many nations must make is whether or not to permit foreign investors into the national broadcasting industry. Liberalising inward investment by foreign companies without reciprocal arrangements can lead to much internal controversy and debate.

2.34 The support of domestic production sectors

Many countries set quotas for the amount of original production (that is programming made within the country, or within an agreed trade area) and also quotas for productions made by independent producers.

2.35 The promotion of new technology

For example, setting out incentives in legislation for broadcasters to invest in digital technology can result in innovative and pioneering work in this field. Conversely,

severe restrictions on media ownership can inhibit the growth of new platforms. For example, in Japan where media owners are permitted to own only one television station, fledgling digital channels are running at great losses as they are not able to benefit from the economies of scale of being part of a larger company.

2.36 The application of competition law

Given the high barriers to entry (cost and access to scarce spectrum, often through a competitive licensing process), governments may wish to apply industry-specific competition provisions to prevent abuses of monopoly, or near-monopoly positions, rather than relying on *post hoc* general competition law.

3. SETTING UP AN INDEPENDENT REGULATOR

3.1 It is accepted best practice throughout the world that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions at times of elections. Throughout the world, television and radio are now the main sources of news and information. To enable proper debate for the proper operation of democracy there needs to be a plurality of service providers to enable access by viewers and listeners to a wide range of sources of news and information.

3.2 If decisions on who shall hold a broadcast licence are left as the preserve of government, there is unlikely to be - or to be seen to be - a fair, equitable range of service provision. Indeed in many countries where the government (or a government-controlled regulator) determines new licences, those broadcasters – unsurprisingly – tend overtly to support the government.

3.3 But if government control of broadcasting regulation provides a degree of political support, then why should a government give up this control? Recently, the government of a country in South East Europe, which not only controlled the regulatory authority but also all the television broadcasters, lost power in a general election. The people said that “the voters were smarter than the viewers”.

3.4 Proper delegation of responsibilities to an independent regulatory body set up by statute not only creates faith in the fairness of the licensing process, but also removes governments from the potential political turmoil which can be associated with the grant of licences.

3.5 In the last few years we have seen political unrest turn to protest and violence as a result of a government-sponsored broadcasting regulator in Armenia revoking the licence of a popular television station which was perceived to support the opposition party. Since then, Armenia has changed its law to enable the creation of a more independent regulator - putting more distance between the State and the regulator, and de-politicising broadcasting regulation.

3.6 Throughout the former Soviet block in Eastern Europe countries have struggled with the separation of media and the State. Now, it is only the most fervently dictatorial and still communist states which retain strict State control over the regulation of broadcasting. Even so, newer democracies such as the Czech Republic and Poland have struggled to ensure that their broadcasting regulators are sufficiently independent to refute allegations of government interference and political pressure.

3.7 But countries which have a longer democratic tradition should find the process easier. Such states understand the separation - and interplay - between the executive and the legislature, and so are better placed to understand the clear benefits of releasing broadcasting from executive control, but still subject to clear and proportionate legislative constraint. Yet, even in areas of the world with a longer

experience of democracy there are voices calling for the introduction of broadcasting institutions that are independent of political manipulation, and licensing regimes which encourage diversity, but not at the expense of quality.⁹

3.8 So, on a practical level, what are the considerations and practical obstacles to setting up an independent broadcasting regulator?

Creation and Remit

3.9 The first matters to decide are the scope of broadcasting regulation, namely those issues which will remain the preserve of the government, and those which will be the responsibility of the independent regulator.

3.10 It is common for governments to retain Ministerial responsibility for broadcast frequency planning and allocation, within ITU and regional agreements, often within a single government department which manages all spectrum. However, the Italian regulator, AGCOM, is an example where a single, converged regulator has been created to cover broadcasting, telecommunications and spectrum management. Arguably, the merits for creating a ‘converged’ regulator are enhanced by including spectrum management in the mix, and create a sounder base for a ‘once-stop-shop’ regulator than simply combining telecomms and broadcasting regulation without including spectrum management. For a further discussion, see the section on **Convergence**.

3.11 However, the reality is that most governments are reluctant fully to delegate responsibility for spectrum management to an independent body. After all, spectrum is a valuable public resource, and has to be managed carefully. Conflicts may well arise between a government’s need for, say, broadcast radio spectrum to be reserved for use by the military, or emergency services, and the desires of a growing commercial radio industry. And other balancing acts will have to be made: it may become necessary to weight the ‘value’ of spectrum used for public service broadcasting purposes against the monetary benefits to the Exchequer of selling spectrum for commercial purposes. So it is reasonable for governments to wish to retain control of spectrum allocation.

3.12 However, what can happen as a result of tight government retention of control is a conflict between the broadcasting regulator and the spectrum regulator. If each and every time the independent regulator wishes to award a broadcast licence they, or the prospective licensee, must get consent from the spectrum regulator, this can in effect give the (government) spectrum regulator ultimate control over who can hold a broadcast licence. There are various ways to avoid this.

3.13 First, the award of any separate spectrum licence should be *automatic*, if a broadcasting licence has been granted, subject only to clear technical considerations. There should be no discretion given to the spectrum regulator which could undermine the broadcasting licensing procedure.

⁹ See for example the Caribbean Broadcasting Union at <http://www.caribunion.com/html/FromThePresident.html>

3.14 Second, the decisions on *where* licences will be provided should be left to the broadcasting regulator. This does not necessarily mean that the broadcasting regulator should have in-house expertise to undertake frequency planning; this can be done by the spectrum regulator. However it is the broadcasting regulator who is best placed to decide which parts of the country should be served by a radio or television service, subject only to technical frequency constraints.

3.15 And this leads to the third mechanism for ensuring a proper separation of duties between the broadcasting regulator and the spectrum regulator: the two bodies must develop a good working relationship. This may sound axiomatic, but all too often there is political in-fighting and competition between the two bodies. It is worthwhile for a full Memorandum of Understanding, or other template for a working relationship, to be drawn up and to be given approval at relevant Ministerial level.

3.16 Beyond the planning and management of spectrum, it is also common for governments to retain certain powers in relation to competition issues, or at least to make them the preserve of a specialist competition regulator, rather than a dedicated broadcasting regulator. In this the UK is an exception, but only in a limited sense. The UK communications regulator, Ofcom, has concurrent powers with the UK competition regulator the Office of Fair Trading ("OFT") on issues relating to anti-trust and cartel behaviour, although the OFT has sole responsibility for deciding whether mergers are anti-competitive.

3.17 Where competition remains the preserve of a specialist body, when competition issues arise relating to the broadcasting industry, it is sensible for the relevant competition regulator to seek advice – or at least background information and comment – from the broadcasting regulator. The sectoral regulator is likely to have a more expert understanding of the broadcasting industry than a generally-focussed competition body.

3.18 Broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although, more often than not, countries leave disputes over defamation, copyright, trademarks, etc to the general application of law. Intellectual property matters can be very complex legally, and it is unlikely to be cost-effective for a broadcasting regulator to develop and retain the necessary in-house expertise to deal with disputes. This is particularly so in relation to allegations of defamation, which is a matter of criminal law in many countries.

3.19 However, it is reasonable for the broadcasting regulator to take account of court judgements against a licensee – be they over intellectual property disputes or serious contractual matters - when assessing whether the licensee should be considered for an extension or renewal of its licence.

3.20 Other than these issues, the dedicated broadcasting regulator is normally tasked with choosing who will be entitled to a broadcast licence, applying the licensing regime, and ensuring that licensees comply with content requirements. It is best practice for these matters, at least at the highest levels, to be enshrined in statute, although detailed standards are often left to secondary legislation or Codes and Guidelines to be issued by the regulator.

3.21 The clear advantage of having these matters set out in statute is to provide clarity, not only to the industry, but also to the general public, who will know what to expect with a degree of certainty.

Appointments and termination

3.22 Another key matter which – to comply with best practice – must be set out in legislation is the manner in which members of the regulatory authority are to be appointed, and the terms of their appointment, in such a way as to safeguard their independence.

3.23 There is no ‘right’ way to go about the appointment of members to a regulatory authority. However, what should be avoided is an appointments process which is based on political favour, or left solely to Presidential or Ministerial discretion. There are many different models to choose from, all intended to ensure the creation of a politically balanced, independent board. Some examples are:

1. To ensure that each major political party is equally represented on the authority’s board;¹⁰
2. To allocate a number of places (typically 3) to each of the President, the Parliament, and Government;¹¹
3. To allocate nominations to certain sectors of civil society (e.g. the judiciary, academics, trade unions, churches, the professions), with final decisions voted on in Parliament;¹²
4. To publicly advertise for members, and applicants to be short-listed and selected by civil servants, for final approval by Parliament;¹³ or
5. To apply strict qualifying criteria for applicants (e.g. business or legal experience, quotas based on ethnic minority, race or gender), with selection made by a representative group of senior politicians.¹⁴

¹⁰ Estonia combines political balance with professional expertise on its Broadcasting Council. Four members are appointed by the parliament (the Riigikogu) from amongst recognised specialists in related fields. The other five members are appointed from amongst the members of the parliament itself, on the basis of political balance.

¹¹ (a) The Italian converged regulator, Autorita per la Garanzie nelle comunicazioni has four members each elected by the Senate and the Chamber of Deputies (and subsequently appointed by a decree of the President of the Republic). The President of the Authority is appointed by presidential decree on the proposal of the President of the Council of Ministers, in agreement with the Minister of Communications.

(b) In Romania, the National Audiovisual Council is composed of 11 members: three elected by the Senate, three by the Chamber of Deputies, two by the President, and three by the government. It should be noted that this system will only result in a politically balanced Council if each of these bodies is controlled by different political groups.

¹² Germany operates a federal system of broadcasting regulation with each “state”, or “Lender”, having its own Media Authority. Some Lender have large Authorities (more than 40 members) made up of pluralistically composed councils appointed by various civil society groups.

¹³ (a) Slovenia publicly invites applications for membership to its Broadcasting Council, with the seven members appointed by the National Assembly for a (renewable) term of office of five years.

(b) The UK also invites applications for membership of Ofcom, with applicants sifted initially by professional recruitment consultants. The ‘short list’ and interviews are conducted by the existing Chairman, at least one senior Civil Servant, and an independent observer (whose role is to ensure a fair process is followed). Appointments are made formally by the Secretaries of State for Trade and Industry, and for Culture, Media and Sport.

3.24 In each country, careful consideration has to be given as to the mode of appointment – what process will deliver the best group of members, who will be able to act independently, and who will have the trust and respect of the industry, the general public, and politicians?

3.25 What helps in this process is setting a clear job specification: what set of skills and experience is needed on the authority? Selecting the right people not only ensures the authority is equipped to do its job, but avoids accusations of ‘jobs for the boys’. Also, membership of the regulatory authority ought generally to reflect – or be representative of – the composition of the nation in terms of gender, ethnic make-up, religious orientation, etc. This is in line with one of the principles of accountability agreed by Law Ministers of the Commonwealth in November 2002.¹⁵

3.26 A good example can be found in the Independent Communications Authority of South Africa (“ICASA”) Act 2000, which states that members must, collectively, represent a broad cross section of the population of South Africa. They must also possess “suitable qualifications, expertise and experience in the fields of, amongst others, broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, marketing, journalism, entertainment, education, economics, business practice and finance.”

3.27 However, a word of caution: whilst authority members should be representative of the general public, they should not be appointed to *represent* specific sectors or groups. Each member must be capable of considering the balance of the public interest when making decisions, and not act according to party or other sectoral lines. For example, a female member, while being in a position to consider what women’s reactions might be to a particular matter, should not be appointed to argue the case for women as against men.

3.28 The process of appointment should be as transparent as possible, in order to avoid any accusation of bias or political favouritism. There are a surprising number of mature democracies where regulators are appointed by senior politicians, and where the basis for their appointment remains unclear and shrouded in suspicion. Regulating broadcasting should be treated like any other job: it is vital to be clear from the outset what criteria a post-holder should meet before making any appointment. Having a ‘job description’ will not only make the appointments process easier and more transparent, but also help to ensure that the people who are appointed are suited to do the job!

3.29 Rules should also be defined to protect the authority members from interference from political or economic forces. It is fairly axiomatic that members (and their close family) should not hold political offices, or have any financial interests in any part of the sector they will be regulating. Some countries (e.g. Italy) believe that members should not be permitted to take any on other work or have any other earned income during their tenure on the authority, in order to protect them from

¹⁴ While some German Lender authorities have large, pluralistic councils (as mentioned in example 3 above), others have expert councils (typically 9 members) generally appointed by the state parliament.

¹⁵ See Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government, April 2004

potential monetary influence. This clearly depends, though, on the size of the job to be done; if the job of the member is not full-time, then other safeguards need to be put in place to ensure that no conflicts of interest arise.

3.30 As well as defining the terms of appointment, the terms of dismissal should also be set out in statute to avoid an irate government using the threat of dismissal as a political lever. There was great consternation throughout Europe in the late 1990s when the regulatory authority of the Czech Republic was summarily dismissed after taking decisions which were politically unpopular. The European Platform of Regulatory Authorities¹⁶ called upon all countries to ensure that dismissal, as well as appointment, be depoliticised by legislative means. Dismissal should only be possible in limited circumstances, namely physical or mental incapacity, regular non-attendance, insolvency or bankruptcy, conviction of a serious criminal offence, or clearly breaking the rules of appointment (for example by not declaring a conflict of interest).

Funding

3.31 Another vital element to ensuring independence is providing a secure means of funding of the regulatory authority. In order to avoid government authorities applying political pressure on the regulator through funding mechanisms, arrangements for funding should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.

3.32 Internationally, the accepted best method for arranging funding of the broadcasting regulator is by having the regulator's costs paid by the industry it regulates through licence and other fees. However, this will only work in countries where the broadcasting industry is sufficiently large and profitable to be able to afford to pay for its regulator. In countries with a small or immature broadcasting market, at least a proportion of the costs of regulation must be met from the public budget.

3.33 Any proposal to create a new regulatory authority will need carefully to consider the costs of the authority, and how those costs are to be met in the most efficient way; authorities need not be large – especially in smaller jurisdictions. There are an increasing number of jurisdictions that are merging existing regulatory bodies, or creating new ones, to regulate both broadcasting and telecommunications together. This can also lead to significant cost efficiencies. This is discussed further in the section on **Convergence**.

3.34 Especially where funding is, at least in part, directly from central State budgets, care must be taken to ensure that funding is safeguarded against actual or potential political pressure. It is strongly advisable to set out in the founding statute of the regulatory authority how the annual budget of the regulator is to be assessed and approved.

Accountability

¹⁶ The EPRA is a forum set up in 1995 representing 49 broadcasting regulatory authorities throughout Europe

3.35 Independence from government requires clear mechanisms whereby the regulator can demonstrate accountability for its actions, and to justify its receipt of public funds. This can include a requirement in law for the regulator to publish its annual report and accounts, and a means by which the authority must account for itself to Parliament – often by means of the Chairman or the whole Board attending a special meeting or committee of Parliament to answer questions. This should not be taken as an opportunity for political pressure to be applied, but to ensure that the authority is managing itself properly with due efficiency and providing value for money.

3.36 Another means of demonstrating public accountability can be for the regulator's meetings to be held in public, and/or for minutes of its meetings to be published. A variation on this theme is for certain significant matters – for example, licensing decisions – to be heard at public hearings, as is done in the Republic of Ireland. Clearly any public communication of the regulator's affairs must have due regard to matters of commercial confidentiality, for example it may be inappropriate for full financial details of licence applicants' companies to be revealed in public.

3.37 So, the duties and powers of the broadcasting regulatory authority, as well as the ways of making them accountable, the procedures for the appointment of members, the criteria for the termination of their appointment, and the means of their funding should all be clearly defined in by law.

3.38 How, then, can a balance be struck between the independence of the regulator and the government's own purpose to pursue public policy objectives in relation to broadcasting?

3.39 Firstly, significant public policy objectives should be set out clearly in the Broadcasting Law (for example, the creation of a public service broadcaster or requirements for public service obligations to be met by commercial broadcasters).

3.40 Secondly, certain powers - or the power of direction - can be reserved in law for Ministers. (For example, in the Republic of Ireland a power is reserved in the Broadcasting Act for the relevant Minister to be able to instruct the regulator to write a new Code on content matters.)

3.41 Finally, it is absolutely vital for the relevant government Ministers and officials to maintain regular and open communication with the regulator. This should not be an opportunity for political pressure to be applied, but for an on-going dialogue between the parties so that they are each informed of issues as they develop. There should be no surprises for either the regulator or the government.

Key Regulatory Processes

3.42 When creating a new regulatory authority there are certain key processes which should be considered at the outset.

Quorums

3.43 It is generally left for the authority itself to determine its own quorum. As good practice, this should be a minimum of two-thirds of the members. Where members are appointed on a political basis (see for example, Romania), then the quorum should include at least one member from each group.

3.44 As well as having a Chairman, the authority should have a Deputy Chairman who can step in if the Chairman cannot attend, or has a conflict of interest with a matter under discussion.

Conflicts of interest

3.45 Any member (including the Chairman) should be invited to declare any potential conflict of interest at the start of a meeting. This might include, for example, having a personal friendship with an applicant for a broadcast licence. The other members should then decide whether the declared interest constitutes a sufficient conflict as to warrant excluding the member from that part of the meeting.

3.46 It is always wiser to err on the side of caution, and exclude a member from participation if there is any chance that the decision could be questioned afterwards as being unfair. If it is decided that a member does have a conflict of interest, he or she should be asked to leave the room while the matter in question is being discussed. They can re-enter the meeting afterwards.

Frequency and Attendance at Meetings

3.47 Frequency of meetings depends entirely on the workload to be dealt with. It is typical for broadcasting regulatory authorities to meet formally once a month, but if there is a large workload, it can be more frequent. The converged Italian regulator, AGCOM, normally meets each week.

3.48 In the world of corporate governance, it is generally accepted as best practice for company boards to comprise a mix of executive and non-executive directors. However, with the exception of Ofcom in the UK (where there are three executives amongst the nine member Board), broadcasting authorities are comprised solely of non-executives. This is considered appropriate as the regulator is exercising a function of the State, and therefore these powers should be delegated to State appointees, rather than officials.

3.49 Nonetheless, the senior officials from the regulatory authority should be permitted to attend authority meetings. At the least, the Director should attend the entire meeting together with someone to take a note of the meeting. Other senior officials should be called in for specific items, not only to brief Members, but to answer questions and to witness Members' deliberations. The future smooth operation of the authority will be enhanced if officials can fully understand the decision-making process and the reasons behind Members' decisions.

Minutes

3.50 A full note of the formal meetings of the authority should be taken, and official minutes kept. This will not only ensure there is a record in the event of any

dispute, but help Members to maintain consistency with their decisions over time. Should these minutes be publicly available?

3.51 In countries which have legislation permitting freedom of access to public documents, authority minutes may need to be disclosed. Normally, such legislation permits derogation where the minutes contain commercially confidential information.

3.52 However, in the spirit of openness and transparency, the regulatory authority may decide itself to publish so much of its minutes that are non-confidential, or instead, to publish an account of its meetings to inform the industry and the public of its business. Ofcom in the UK publishes such an account on its website¹⁷. It also publishes its agendas in advance of meetings.¹⁸

Appeals

3.53 The Universal Declaration of Human Rights stipulates that. “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations.”¹⁹ In terms of broadcasting regulation, the determination of rights and obligations would include matters such as the granting and revocation of licences, and the application of sanctions.

3.54 It is therefore axiomatic that best practice according to international law would be for a right of appeal on such matters to a Court of Law. Unfortunately, not all countries with regulatory systems have instituted such full rights of appeal.²⁰

3.55 It must be admitted that, whilst a proper appeals mechanism is a fundamental criterion for the protection of human rights, it can also be abused by broadcasters in an attempt to avoid paying fines and undermining the regulator. For example, the FCC in the USA has a number of outstanding fines which have not been paid pending appeals through the US court system. It is all too easy for the regulator to give up pursuing outstanding fines if the cost of bringing legal actions outweighs the fine.

3.56 One way of avoiding such an outcome is to provide that any sanction applied by the regulator will stand pending any appeal. This means that fines would have to be paid up-front, before any legal action was brought. It would also mean that any decision to revoke a licence would result in the service being taken off-air, and only re-instated should a court so order. This solution can only be applied if the legal system permits.

¹⁷ Ofcom’s meeting notes can be found at: http://www.ofcom.org.uk/about/csg/ofcom_board/notes

¹⁸ Agendas are at: http://www.ofcom.org.uk/about/csg/ofcom_board/agendas

¹⁹ Article 10, as adopted by the General Assembly of the United Nations on December 10, 1948.

²⁰ For example, Singapore only allows for appeals to the relevant Minister, with the Minister’s decision being final.

4. Jurisdiction Issues

Terrestrial Spectrum

4.1 One of the trickiest issues facing broadcasting regulators is the question of where their jurisdiction begins and ends. It is straightforward only when considering services broadcast terrestrially, using frequencies in the frequency blocks which have been assigned for broadcasting use under international agreements, to the country in question. These frequencies represent a valuable public resource and it is perfectly reasonable for a State therefore to licence their use, to place restrictions on what can and cannot be broadcast, and to charge a fee for the privilege of using the spectrum. This is the case regardless of where the programming to be broadcast is actually made, or the nationality of the broadcaster; if it is using a broadcast frequency that belongs to Country X, then Country X has the jurisdiction to issue a licence.

4.2 But the answer is not so straightforward when it comes to other means of broadcast. Let us consider the most common examples, cable and satellite.

Cable

4.3 Cable operators generally provide two functions: broadcasting and telecommunications (telephone, and increasingly, internet) services. But should they be licensed as broadcasting providers, or just for telecommunications purposes? In Europe cable operators are not considered broadcasters (unless they separately provide broadcast programme services themselves, as a different part of their business), but are treated in a similar way to transmission providers; they provide the wires over which broadcasts are delivered.

4.4 But if cable operators are not licensed by the broadcasting regulator, should they be permitted full discretion to decide which programme services they carry? In some countries, like France, the broadcasting regulator must approve every proposed service. In others, like Canada, the choice of services is a commercial one, left to the cable company, subject only to the proviso that each broadcast service must itself be licensed. What is common to most countries is the concept of 'must carry'. That is, regardless of the degree of free choice the cable operator generally has over the programme services it provides, there will be certain services that it *must carry* as a provision of its operating licence. These will generally be any public (or State) services, and possibly certain community or special interest services available in the area covered by the cable franchise.

4.5 But over and above 'must carry' provisions, should cable operators be permitted to decide which services will be made available on purely commercial grounds? This is an important question in places where cable is the main broadcast delivery mechanism to a significant proportion of the population, and where the cable system is not yet digital, so that only a restricted number of services can be carried. In such cases there is a real danger that the cable operator will be offered more money to carry, say, non-domestic services offering popular entertainment and films, than to carry domestic services, or niche services such as news and current affairs, religious or children's programming.

4.6 It is not unreasonable for the broadcasting regulator to require ‘must carry’ status for a wide variety of programme services, with an emphasis on nationally-produced services. This serves the dual purpose of ensuring a broad choice and range of services to the public, and supporting domestic broadcast providers.

4.7 Jurisdictional problems may arise, however, when it comes to regulating the content of broadcast services – especially television services – which are carried by cable but which originate from outside the country. This can be illustrated using the example of MTV, the youth-oriented music service which has a wide international presence. MTV’s parent company is based in the US, but it has set up a number of subsidiary companies throughout the world, partly in response to different cultural expectations, but also in order to deal with international regulatory pressures. While MTV’s content may be acceptable to its US home audience, different sensitivities apply in other countries, and with therefore different content rules.

4.8 If a regulatory system is devised to require cable operators to ensure that all of the services they carry comply with national content standards, then individual broadcasters will need to ensure that their programming is culturally sensitive. However, major international broadcasters (like MTV) will argue that it is unreasonable to expect them to tailor their services to each individual jurisdiction (and as we will see when we consider satellite broadcasting, below, broadcasters can avoid national rules by using satellite broadcast). A compromise, used by MTV, is to tailor their services to their major geographic markets (e.g. MTV Africa, MTV Middle East, and different MTV services for Northern and Southern Europe). This not only leads to happier audiences and advertisers, but also to happier regulators.

Satellite

4.9 Satellite transmission is increasingly the main means of broadcast of services which have full national coverage, compensating for limitations in national terrestrial spectrum availability. But jurisdictional problems are compounded by satellite broadcast, where services which are made and based overseas can be broadcast into a receiving nation regardless of the legal or regulatory situation there. It is not possible to block reception of in-coming satellite signals, so what can a government or regulator do if a service contains content which is undesirable, unacceptable, or indeed illegal?

4.10 Although it is not possible to stop a service being sent by satellite from another jurisdiction, it may be possible to restrict reception, especially if special decoder equipment is needed. The UK has sought to reduce the potential harm of satellite services that show hard pornography by making it illegal to sell decoding equipment or to market such services in the UK. While this doesn’t stop reception altogether, it limits access to the service and reduces the likelihood of children, in particular, seeing what would be considered in the UK to be illegal material.

4.11 Singapore operates a similar system of proscription, but does not limit the application of proscription orders to illegal material; if the Media Development Authority determines that the content or quality of a foreign broadcasting service is

‘unacceptable’, it can proscribe it. With such general powers, care must be taken to ensure that proscription is not used to curb democratic – and legal – free speech.

4.12 There are other strategies that can be used to reduce potential harm. The first is to develop international agreements with other countries within a satellite’s footprint, and in particular with those from where services are uplinked. The intention would be to agree a set of minimum content standards which would apply to all services. This is what has been achieved within the European Union, under the Directive: Television Without Frontiers. Largely motivated by Single Market considerations, Member States of the EU have agreed not to seek to interfere in cross-border television retransmissions subject to compliance with agreed basic principles and standards as set out in the Directive.

4.13 Although the Directive sets out a sensible framework for dealing with cross-border television issues, it is not without problems. For a start, some countries set domestic standards which are higher than the basic minima, and then are uncomfortable with services which don’t meet those standards. For example, Sweden restricts advertising to children, but is forced to receive children’s services which contain advertising broadcast from the UK (and transmitted in Swedish). Similarly, as referred to above, the UK objects to programming which, while may be acceptable in the countries where they originate, is considered to be illegal pornography in Britain.

4.14 These difficulties are compounded by debates over where a service is “established” and therefore where jurisdiction for licensing lies. If a television company has its head office in London and makes much of its programming there, it is entitled to be licensed by the UK’s Ofcom notwithstanding the fact the service consists of Swedish language programming, carries advertising for Swedish companies, and is clearly aimed at the Swedish market.

4.15 There are no easy solutions to these jurisdictional problems, although issues can be mitigated by international agreement. Even if minimum standards cannot be agreed, a significant bonus would be achieved by getting the agreement of the satellite operator itself only to carry licensed services, where so ever they are licensed. This at least provides a degree of reassurance that there is a regulatory body somewhere which is responsible for output, and specific issues can then be addressed to the regulator concerned.

5. Licensing

Starting a licensing process

5.1 Most countries have some sort of licensing or permit system in place for existing broadcasters, but if not, or it is intended to overhaul the existing arrangements, how should this be undertaken?

5.2 Although licensing should, ideally, be done in an orderly fashion, there are times when pragmatism dictates otherwise, for example when a new State is created. This was the case in Bosnia Herzegovina, in what was the former Yugoslavia. By the time the new state of BiH was created, unlicensed broadcasters had set up throughout the country. Spectrum was not being used efficiently, with major problems of interference. More seriously, many stations (both television and radio) were broadcasting programming which was seeking to inflame the ethnic hatred that had led to the long and bloody war.

5.3 The new broadcasting regulator in BiH tackled this problem first by issuing temporary licences to all existing broadcasters. This gave the regulator a legal basis for seeking compliance with programme standards, to stop the unacceptable hate programming. Then the regulator set out a system for issuing permanent licences, which resulted in many services losing their right to broadcast. But by placing matters within a firm legal framework, the regulator had the legal power – backed by the courts and the police if required – to enforce an effective regulatory system.

5.4 Fortunately it is rare for governments or regulators to find themselves in the position of a post-conflict State like BiH. More typical is a situation where broadcasting has been the preserve of a State-sponsored broadcaster, with perhaps additional services provided via satellite from abroad. But after time, interest is usually shown by either overseas or domestic companies to provide commercially-based television or radio. Perhaps also community groups and development agencies express interest in setting up local radio stations. It is at this point that a system of licensing becomes necessary.

5.5 For so long as it is only a handful of prospective services which are on offer, it is reasonable for the licensing process to be done on a first-come, first-serve basis. However, it is important to be clear about the basic licensing criteria and licence conditions from the outset in order to ensure that licensees are both responsible and understand their responsibilities. The basic criteria for eligibility to hold a licence will be discussed in the section on **Ownership and Plurality**.

Licence conditions

5.6 Before any licence is offered, the model licence should be written and published, setting out the basic conditions to which all licensees must comply. The licence is a legal document, which in effect sets out the contract between the regulator and the broadcaster. If the broadcaster does not perform according to the terms of the licence, the regulator is then in the position to consider what punitive sanctions to apply.

All broadcasting licences should cover the following fundamental conditions:

Coverage area

5.7 What is the geographic area to be covered by the licence? If the licence covers only part of the country, care must be taken to ensure that it is clear which areas are *not* to be covered, to avoid unwanted competition with other neighbouring services.

5.8 The regulator may also wish to impose conditions requiring the licensee to be receivable by as many households as possible in the coverage area. This may be the case if the licensee is a public service broadcaster and is expected to roll-out coverage to the entire population. These are called ‘universal service’ obligations, a familiar concept in telecommunications, but also applicable in broadcasting.

Technical specifications

5.9 These may include details of the powers and directions for transmission required to avoid interference with adjacent broadcasters and other users of spectrum (alternatively, these may be set out in a separate spectrum licence, depending on the competencies and remit of the broadcasting regulatory authority). Technical specifications may also include requirements for picture and sound quality.

Licence term

5.10 The licence must set out the date by which the service should commence broadcasting, and for how long the licence will be in force. Sufficient time should be allowed between the award and the commencement of the licence.

Licence renewal

5.11 If there is an automatic presumption that the licence will be renewed at the end of the term, this should be set out in the licence.

5.12 In order to establish a sound business base for the broadcasting industry, it is reasonable to assume that licences will be renewed, subject to satisfactory compliance with licence conditions and content requirements. The regulator must, however, leave enough time before the end of the current licence term to consider an incumbent’s position so that, if the licence is to be re-advertised, sufficient time is available to run a full licence application process. It is not in the interests of the audience or of broadcasters to drop a service with no replacement.

Licence fees

5.13 A fee payable on the award of a new licence is often charged. But in addition, all licensees should pay fees annually to cover on-going regulatory costs. This should be set out in the licence. This enables the regulator to seek to revoke the licence should the broadcaster not pay the licence fee (sadly, an all too regular occurrence). It is sensible not to set the fee in the licence or in legislation, but rather to permit the regulator to set fees on an annual basis (perhaps under Ministerial approval). This

arrangement is more flexible, and can take account of rising, and lowering, regulatory costs over time.

5.14 An annual licence fee does not cover the costs of applying for a licence. In addition, all applicants for licences should be required to pay a one-off application fee to cover the costs of processing and awarding licences. The fee should be set high enough to deter time wasters, but not too high to prevent potential new entrants to the market.

Programme format conditions

5.15 The question of the degree of regulatory control over programme formats is discussed below. Whatever solution is appropriate, the licence should require the licensee to provide the service as described either as in the advertisement or tender, or as promised in the application.

Compliance with legal requirements, including secondary legislation

5.16 Broadcasters will be obliged to meet certain content standards in their advertising and programming. The overarching standards are set out in the Broadcasting Act. The licence should provide that broadcasters are obliged to meet the terms of the Broadcasting Act, together with any secondary legislation arising from that Act, and any standards Codes issued by the regulator. See the section on **Content Regulation** for further discussion.

5.17 If provisions from other statutes also apply (for example, laws on defamation, copyright, or privacy) it may be useful to remind licensees of their obligations in the licence.

5.18 The licence should also set out the conditions under which the government is entitled to direct the use of the airwaves, for example in times of war or emergency.

Sanctions

5.19 The licence should set out what sanctions the regulator can apply for non-compliance with the conditions. The range of sanctions includes fines, suspension, shortening or revoking a licence. They are discussed in detail in the section on **Content Regulation**.

5.20 The right of the regulator to order the licensee to broadcast an apology or correction (see Right of Reply in **Content Regulation**) should also be set out in the licence.

Information requirement

5.21 The regulator will require broadcasters to provide certain pieces of information, either on a regular (quarterly or annual) basis, or from time to time. For example, programme logs may be required quarterly, and financial accounts annually. However, any proposed significant changes in ownership or management structure

should be reported before the change occurs. The licensee should also be required to inform the regulator of any change of address or contact details.

5.22 It is fairly normal for all television and radio companies to be required to record all of their output, to retain these tapes for a period, and to hand over these recordings if the regulator requires them for monitoring or complaints-handling purposes. (See Monitoring in **Content Regulation**). This obligation should be included in the licence.

Amendments to licences

5.23 Licences should also set out the terms upon which licences may be amended. It is reasonable to allow minor amendments to licences, but care must be taken to limit amendments which are so fundamental as to call into question the basis of the original licence award. Such a change could be so unfair as to give unsuccessful competitive applicants good legal grounds to challenge the regulator's decision to permit a change to the licence.

5.24 Although all amendments proposed by the licensee should be subject to approval by the regulator, the regulator needs the specific power to require licence amendments should there be changes in the law, or other circumstances needing regulatory intervention. Mandatory amendments should not significantly reduce the rights of broadcast licensees, for example by reducing previously agreed coverage areas or signal strengths.

Pace of licensing

5.25 A common question for new regulatory regimes is the extent to which the regulator should control the development of the industry (by deciding in advance where new television and radio stations should be broadcast, what sort of programming should be provided, and the rate at which new services should commence), or if this should be left 'for the market to decide'. There is no universal simple answer to this, and the best way of proceeding will depend very much on local circumstances.

5.26 If the regulator is starting with regularising an existing (unregulated) set of broadcasters as in BiH, it may wish to licence all the incumbents more or less at once, according to the sorts of services already provided. The issues become more complicated when there are only a few existing services.

5.27 In most circumstances it will be preferable to advertise licences for new services slowly, rolling them out largely in accordance with demand, rather than advertising all available frequencies at once. There is a real danger of over-stretching a fledgling industry by seeking to create something large and complex all at once. By rolling out new stations across the country in an orderly fashion, planning according to knowledge of likely and actual demand, it is more likely that a robust industry will be able to develop.

5.28 Commencing too many new stations all at once will dilute the amount of available advertising revenue as well as audiences. In economies with a limited

amount of potential advertisers (or one where advertisers are not yet used to using broadcasting as a medium), it is important to remember that quality television and radio services cannot flourish without income.

5.29 It is arguably better to have just a few available services offering a decent range of programming than many services competing for very limited funds and only able to afford to transmit inexpensive, imported programmes. Although there is real merit in being able to provide a choice of services to viewers and listeners, care must be taken when considering whether a choice of poor services is preferable to a limited number of quality services. In some areas, for example the Caribbean, many broadcasters feel that too many licences have been issued as the supply of advertising revenue is too low to sustain them all.

5.30 A way to balance these issues is to place upon the regulator an obligation to seek to licence a wide range of television and radio services across the country – both local and national – but only in accordance with the economy’s ability to support them.

5.31 Some free market economists might argue that it is better to licence as many stations as are asked for, and then let the market decide which ones flourish. But against this is the argument that it benefits no one – neither broadcasters, advertisers, nor audiences – for broadcasting companies to fail and go bust.

5.32 And, as referred to above, the value of poorly funded programming is questionable. Expecting stations to operate on inadequate funding will mean they will be forced to broadcast only the cheapest of populist material, be it pop music, Hollywood films (often pirate copies), or inexpensive American television imports. To develop and nourish an informed population able to participate in a democracy, proud of its culture, and willing to be educated requires better programming than that.

Licensing of formats

5.33 So, if generally it is wiser for the regulator to control the development and expansion of broadcasting, to what extent should the regulator also seek to control what sort of programming is broadcast?

5.34 The section on Jurisdiction has looked at the practical limitations on regulatory control on cable and satellite services. However, no such limitations need necessarily apply to terrestrially-delivered services.

5.35 Most jurisdictions will have a State-sponsored or public service broadcaster in place.²¹ State or public service broadcasters, as they are in receipt of public resources and support, will be required to provide certain types of programming. But should specific programme requirements be extended to commercially-funded broadcasters?

5.36 Most countries do expect commercial television services which use national frequencies to provide at least a basic news service, and to carry government-

²¹ For a full discussion of the merits of public service broadcasting and different models, see: Public Service Broadcasting. A comparative Legal Survey, by Toby Mendel. Kuala Lumpur : UNESCO, Asia Pacific Institute for Broadcasting Development, 2000.

produced broadcasts in the event of a national emergency. Many European countries place additional duties on commercial broadcasters, for example the UK sets certain public service broadcasting obligations on its three commercial analogue television services.

5.37 This is justified on the basis that these television services are using spectrum, a scarce public resource, to obtain near-universal access to the viewing public. In exchange for this, the television companies are required to provide a certain amount of programming for the benefit of the viewing public (e.g. news, current affairs, children's programming, religious programmes, etc). It is also common for such services to be obliged to broadcast a certain amount of domestically or independently produced programmes. Quotas will be discussed later in the sections on Promotion of the Industry and Promotion of Cultural and Social Values.

5.38 While it is unusual for such restrictions to be placed on commercial radio services, it is not unheard of. Often the regulator will decide that it would be desirable to have a radio service that targets a specific ethnic or minority community, and advertise accordingly. This may be part of a plan to develop a separate tier of broadcasting, often called 'community radio', although television may also be involved.

5.39 Community media are radio or television services which are intended to benefit a specific under-served section of the community, perhaps due to its language, religion, or other characteristic which identifies them as a minority. For example, Romania, which has a large Romany minority population, has licensed a number of radio stations specifically to provide programmes in the Romany language and dealing with issues of particular concern to that community.

5.40 Community radio is increasingly popular in parts of Africa, where it can address health education issues such as HIV/AIDS in minority languages. Where radio can be used for such social purposes, it is reasonable for licences to be issued specifically for this goal, thus preserving the use of the frequency for a particular, rather than a general intention.

5.41 In some countries, such as the Netherlands, television and radio frequencies will be set aside for use by specific sections of civil society, in particular the major churches. This is another example of regulatory control of the general programming purpose of broadcast frequencies.

5.42 However, some countries do wish to determine the general type of service which will be provided on analogue frequencies. For example, before advertising a new radio licence in the Republic of Ireland, the regulator will decide what type of music the new service should play. The regulator will then select the applicant it believes is most likely to succeed in providing a successful, popular service to the target audience. This is in sharp contrast to the United States, where radio companies are free to choose their own formats, and to change them at will.

5.43 A compromise between restricted and free use is demonstrated in the UK. There the regulator decides *where* a new radio licence will be advertised, but leaves it

to applicants to determine what sort of service they will offer. The successful applicant is then tied through licence conditions to provide their offered format.

Advertising new licences

5.44 Regardless of the degree of control exercised by the regulator over formats and programme content, new licences should always be openly advertised in order to ensure a fair, competitive process. The only exception to this rule should be where the regulator is seeking to regularise an existing unlicensed situation, such as in post-conflict BiH, as discussed above.

5.45 To advertise openly, the regulator must publicise the fact, for example by issuing press releases announcing that it has advertised. It is also advisable to contact directly anyone who has expressed an interest in applying for a licence to alert them. Regulators must ensure that sufficient time is allowed for potential applicants to prepare their applications; while 2 months may be enough for a small radio licence, 6-9 months may be needed for a major television licence.

Application process

5.46 Any potential applicant who responds to the advertisement should be given identical and sufficient information to ensure that all applicants are treated fairly; it is not acceptable for the regulator to give an advantage to one applicant either by giving them more time, or by meeting with them and discussing anything which could amount to 'coaching' or other preferential treatment. Such behaviour will be seen at best as unfair, and at worst as corrupt, and will seriously undermine the authority and credibility of the regulator.

5.47 The intention for the regulator is for all the applications to be in a comparable format, in order to make it easier to assess and compare the submissions. The simplest way to do this is for the regulator to issue an application form which must be completed by all the applicants. Together with the form, all applicants should be told what and where the licence is for, whether there are any limitations on programming, what conditions are to be attached to the licence, the length of the licence, terms for renewal (if any), the application and licence fees, and the criteria upon which the licence will be awarded.

Licence awards

5.48 It is the licensing criteria which can be the most difficult for the regulator to reveal, and which, if not revealed, leads to the most opposition and political unrest.

5.49 If the regulator is laying down a full set of programming conditions for the new service, it may be reasonable for the licence to be awarded through an auction. This would mean that the licence would go to whomever offered the highest amount of money, subject to the applicant meeting certain non-discretionary criteria.

5.50 These criteria would include: compliance with ownership rules, their financial ability to start and sustain the service, and ability to comply with technical requirements. Any auction done on this basis would need to be very fairly managed,

with closed bids, to avoid any accusation of corruption. But if done carefully, an auction may result in a service which meets the social and cultural needs of the nation, as well as providing additional funds for the Exchequer.

5.51 However, a successful auction system requires there to be a number of potential broadcasters who can afford to bid for licences. It makes no sense for a system to bleed money out *before* broadcasting starts, leaving insufficient funds for quality programming. So, while auctions may appear initially attractive, their appeal may be very superficial indeed. They should not be considered unless and until there is a mature broadcasting market where programming will not suffer as a result. The USA and Australia are two countries where radio station licences are auctioned, and they are both typified by having strong broadcasting ecologies which can support this process.

5.52 The more common method of licence award is through ‘beauty parades’. That is, applicants are judged according to who best, in the view of the regulator, meets the licensing criteria. While many of these criteria will be relatively straightforward (and will be those listed above under Auctions), there will always be a discretionary judgement to be taken by the regulator about programming. Which applicant’s programming proposals are best? And by ‘best’, this is not simply a question of which proposals are the most ambitious (as it is always easy to promise the Earth, but to deliver much less), but which is realistic? Here, the regulator must be able to assess the business plans of the applicant in accordance with their aspirations, and be able to assess the likely popularity of the proposed service.

5.53 And it is this core judgement which requires the full breadth and expertise of skills on the regulatory Board. And it is for this reason that the authority should have members who are appointed for their professional capabilities, and not for reasons of political favouritism. (Exceptionally, in small countries where the necessary range of skills is just not available amongst potential regulators, expert consultants can be contracted.) It takes tremendous skill to assess how well paper promises will translate to a broadcasting business. There is no point awarding a licence to an applicant who will not deliver on their promises.

5.54 Having considered the basic elements of broadcast licensing, a few thoughts on the differences to be considered for different types of licences:

Local versus national services

5.55 It is generally the case that national services will be expected to carry greater public service obligations than local ones, especially as national services are likely to be able to generate greater revenues than small, local services. However, it is reasonable to expect local television and radio services to provide programming which is of particular interest and relevance to the area covered, for example local news, weather and information. It is also reasonable to apply local language obligations on local services where many, or the majority, or local residents speak a language other than the main, national one.

Television and radio

5.56 The general basic licence conditions should apply to both television and radio services, although it is expected that licence fees for radio would be considerably less than for television as television companies are likely to attract far more advertising and sponsorship revenue than radio. If this is not the case, then radio licence fees could be higher.

5.57 Although the generic licence conditions may be the same, it is not necessary to apply the same degree of content regulation to radio as to television. For example, most radio services do not have separate programme strands, in the way television does, so it would not be reasonable to expect radio services to provide public service programming to the same extent as television. However, this is a matter that is very dependent on local circumstances; in some countries, where radio is the main source of broadcast media, it may be reasonable to expect radio services to provide significant levels of news and information, and other specific types of programming.

Digital broadcasting

5.58 At the time of writing, only a few countries have introduced digital television or radio services, but many are considering how to do so for the future. The main regulatory difficulties are in devising a regime which will encourage existing broadcasters to migrate to digital platforms, and to bear the cost of doing so. This is not to underestimate the technical, social and political difficulties of introducing a new broadcasting platform, but those are outside the scope of these guidelines.

5.59 Governments essentially can choose between *forcing* broadcasters to migrate to digital, or encouraging/inducing them to do so. There is a real danger in enforced migration as digital switchover is expensive. Broadcasters not only need to invest in new equipment, but for a period need to pay transmission costs for both analogue and digital platforms. Regulators must ensure that any transition to digital does not bankrupt the broadcasting companies, or reduce their income to such an extent that programming suffers.

5.60 Each country will find the best way of ensuring compliance for switchover, but arguably it is better to appeal to the enthusiasm of the broadcasting industry, rather than antagonise it. Various regulatory incentives might be considered to entice broadcasters to co-operate, such as guaranteeing digital spectrum to existing broadcasters, automatically renewing their licences, or agreeing to forego licence fees for a number of years.

6. Ownership and Plurality

6.1 Before determining the specific criteria to be fulfilled for the award of a licence, two difficult questions need to be answered as background to the regulatory regime: who should have the right to be a broadcaster, and how many different broadcasters should there be? The first question goes to the rules of ownership, the second to plurality.

Ownership

6.2 Each country, subject to international agreements, has the right to determine who is and is not competent to be a broadcaster within its jurisdiction (see section on Jurisdiction for further discussion). But it is vital for the criteria for competence to be fair, and fairly applied, and based on sound principles which do not serve to permit only those who are sympathetic to the government to become broadcasters.

6.3 There is no model answer to this question, but we can explore the general range of criteria which can be used to set conditions of ownership.

Legal Person

6.4 It is important for the regulator to be able to have legal recourse to its licensees; after all, the licence is a form of contract, and to be enforceable in law, the licensee has to be a legal person. The definition of 'legal person' differs from jurisdiction to jurisdiction, but it is reasonable to require this as a basic pre-condition of ownership. For example, a group of individuals who have not formed a company or legal partnership would, in most jurisdictions, not constitute a 'legal person' and therefore not qualify to hold a broadcast licence.

6.5 Some countries, particularly the Balkan states such as Croatia, require a 'founder' of any company as well as the company itself to comply with ownership rules. Where it is a legal requirement to have an identified company founder, then both general legal rules, as well as those which apply specifically to broadcasting, may be applied to the founder. However, where general company law does not specify the need for a Founder, one should not be applied to broadcasting.

Fitness and Propriety

6.6 It is an overriding requirement in many broadcasting laws for licence holders to be 'fit and proper'. There is no legal definition of 'fit and proper' but it generally means that licensees must be free from a criminal record involving dishonesty (such as fraud or theft) or other serious crime. For example the UK regulator decided to revoke a company's radio licence after its major shareholder was convicted of rape.

6.7 For the sake of certainty and transparency, it would be preferable to spell out what is meant by 'fit and proper' in the broadcasting law, rather than to leave it too vague. There is a danger otherwise of the regulator applying the fit and proper test to persons who are the subject of unproven rumour; the regulator must avoid acting as judge and jury on potentially criminal matters.

Nationality

6.8 One of the key criteria which most countries apply to broadcast ownership is nationality. There is a desire to protect domestic frequencies for domestic operators (see further discussion in the section on **Other Public Policy Objectives**). There are no standard applications of these rules, though. While some countries, such as the USA, do not allow foreign operators to control domestic broadcasters, others have no such restrictions (for example, the UK, and the Netherlands).

6.9 Many countries prohibit foreign ownership, but permit a degree of foreign investment. For example, Australia currently allows international media companies to own only up to 15% of a television network (however, from 2006, this restriction will be lifted, allowing international companies to control Australian media assets, subject to government approval). Following a Cabinet decision in 1955 foreign ownership of Indian media is not permitted. Certain sections of domestic media have called upon the government to extend the prohibition to all foreign direct investment, which could have serious implications for the distribution of media originating from overseas.

6.10 Reciprocal agreements exist between certain countries. For example, there are no restrictions on ownership within the European Union, although EU countries may restrict ownership from outside the EU (as do Poland and the Czech Republic).

Political organisations

6.11 As a means of seeking to protect political impartiality and balance in broadcasting, many countries prohibit political bodies from holding broadcast licences. In the UK, the restriction extends to shareholder participation such that political bodies cannot hold more than 5% of licence-holding companies.

6.12 However, where there are no particular concerns about political balance, no restrictions apply. For example in Malta, the three political bodies run a radio licence each and two have their own television station.

Religious organisations

6.13 In most countries there are no restrictions on religious bodies, although some states, such as Turkey, do prohibit religious organisations running broadcasting services. There is some question about whether an outright ban contravenes the human right to freedom of religious expression.

6.14 On an application from a Christian group in the UK which questioned the UK's restriction of religious ownership to certain classes of licence only, the European Court of Human Rights advised that limitations might be reasonable where frequency availability is limited. So, for example, if there were only enough spectrum to licence four national television services, it would be reasonable to restrict one of these services being run by a religious organisation. However, it would be unreasonable to apply limits to satellite television services, where there is an abundance of available spectrum.

Plurality

6.15 As well as deciding who is or is not eligible to hold a licence, a decision must be taken as to how many ‘voices’ should be heard. Plurality of media ownership acts to safeguard diversity to ensure that there is a sufficient range of sources of news, information and opinion necessary for the proper operation of democracy.

6.16 Plurality is usually measured both nationally and locally. That is, consideration is given to the range of owners of national media as well as on a local and/or regional level. As plurality is especially important in terms of news and information, the ownership of non-broadcast media is also often taken into account, particularly the press (although the Norwegian Mass Media Authority is also tasked with considering the internet). Increasingly, authorities are also concerned about vertical integration, that is, a single owner’s presence over multiple broadcast platforms, as well as control of the platform itself.

6.17 Not surprisingly, media owners argue that variety and range is actually protected by having *fewer*, rather than more owners. They say that the more overlapping services an owner provides, the more it will wish to diversify content and provide choice to viewers and listeners. A single owner will not want its services to compete with each other for the same audiences and advertisers, whereas different owners will all be competing for the same, populist middle ground.

6.18 There is actually no evidence to support this claim. In fact in markets which have liberalised ownership rules (such as the US local radio market), there are worries that stations in common ownership still corner the middle ground, offering little range, and no choice in terms of the *source* of news.

6.19 Although media owners’ arguments that fewer owners leads to greater choice may be unpersuasive, there is an additional argument which does need to be considered. That is that media companies need to grow in order to invest more money in programming, and to build the critical mass needed to compete on an international scale. This is a valid argument, and one which needs to be taken into consideration before limiting ownership to such an extent to stifle the potential success of the industry.

6.20 So how can plurality be measured? There are generally two bases for measuring (and applying limits). The first is based on actual share, and the second on availability.

Share

6.21 Systems based on share measure actual figures, be they audience figures, market shares based on commercial revenue or share of influence. Most countries apply general competition law as well to potential mergers, usually with close co-operation between the broadcasting regulator and the competition regulator. In Germany, the state authorities apply market dominance tests but also look at influence over “opinion formation” across media.

Availability

6.22 Ownership limits based on availability do not seek to determine how much a particular service is used, but merely seek to ensure that an adequate number of services are available to citizens, whether or not they are accessed. For example, in Cyprus, one company can hold only a single national television or radio licence, regardless of the audience or revenue that service attracts.

6.23 Australia is to introduce a “five pillars” rule to maintain media diversity. This law will require at least five separately owned media companies in capital cities and four in rural areas. Subject to this test, a single media company will be permitted to own one television station, two radio stations and a newspaper in the same geographic market.

6.24 So, which test is better? While the share tests are a keener measure of actual effects, they require detailed monitoring to apply on an on-going basis. By contrast, the availability measures do not necessarily reflect the real power and influence a media owner can have. Perhaps the answer lies in whatever is most important socially. Is the priority to curb potential power, or is to provide the availability of choice? It is possible to combine both, by ensuring both wide availability and the rigorous application of competition regulation.

Control

6.25 A question which applies to both ownership and plurality regulation is how to determine when someone controls a broadcast licensee? Generally, “control” means having over 50% of a company. However, many countries provide for the regulator to be able to determine that someone “controls” with under 50%, or that the ownership and plurality rules take effect at a limit well under 50% (in the UK, the rules kick in at 30%).

6.26 When looking at control, it is important for the regulator to have the powers to consider shares held by associates and relatives. In some countries, such as Turkey, relatives are not permitted to own shares in the same radio or television company at the same time.

6.27 It is also beneficial if the regulator can look behind apparent structures and holdings if they suspect that someone, even if not the majority shareholder, is actually the person running the company. This is important to ensure that the rules are not being abused so that an otherwise disqualified person is actually controlling a broadcaster.

Role of the regulator

6.28 In those countries where ownership and plurality of the broadcast media is governed simply by competition law, the broadcasting regulator will have little or no role to play. However, there are usually some restrictions specific to broadcasting, even if they are only to do with nationality.

6.29 Whatever the details of the regime, it is wise to ensure that the broadcast regulator has a role in approving the ownership considerations for new licence applicants, and approving any transfers or changes of ownership. For this purpose, it is sensible to require licensees to inform the regulator of any significant changes in the ownership or structure of the licensed company.

6.30 If, by virtue of local conditions, there are particular concerns about fitness and propriety, some countries require the broadcasting regulator to approve the appointment of the Chief Executive, Directors and Chairman of the Board of a broadcasting company. This is the case in Singapore, where shareholders with holdings above 12% must also obtain Ministerial approval. While this can act as a safeguard, care must be taken to ensure that the regulator does not use such a power to for political or corrupt purposes.

Small jurisdictions

6.31 It is worth making a specific point about very small countries that do not have either the spectrum or the funding capacity to support a plurality of broadcasters. Indeed, in some countries there is only one broadcaster, which is funded by the State. Clearly in such circumstances it is not possible to provide a plurality of voices through the number of broadcasters. Instead, the onus falls on the regulator to ensure that the sole broadcaster provides plurality through its programming. The focus of regulation should shift from ownership to content; the broadcaster should be required to provide access from a representative variety of opinions and, if possible, sources of news.

7. Content Regulation

7.1 Regulation of the content of broadcast material is about protection: protecting viewers and listeners from being harmed or offended, and – in their role as consumers – protected against misleading advertising claims.

7.2 There are many reasons for protection which are invoked through regulation: the protection of democracy and ensuring the democratic right to free speech is not endangered by censorship; protection of the right to accurate information in news; the protection of cultural norms; and the protection of the quality of the viewing or listening experience. Some of these are considered in other sections.

I. Programming

Protection of democratic principles

7.3 To protect the proper workings of democracy, primarily in relation to news and elections, it is useful to include some basic content standards in regulatory codes.

Accurate news

7.4 Best practice in regulation around the world includes a requirement for news to be accurate. This is vital if audiences are to trust broadcast news as a reliable source of information. 'Accuracy' in news does not mean that occasional mistakes must be punished, but that news broadcasters are expected to take proper care to verify their reports, correct errors, and have procedures in place to avoid mistakes.

Impartial news

7.5 Arguments continue about whether the presentation of news should be politically impartial. Some argue that newspapers are biased, so why not broadcasters? Objectivity is a myth, they say; viewers and listeners know which side their favourite stations are coming from, so what harm is there if, like papers, broadcasters editorialise?

7.6 The opposite argument is that it is precisely because newspapers are politically biased that it is vital for broadcasters to avoid it. A healthy democracy needs a trusted medium which can present the facts without bias, so that citizens can reach their own conclusions. There is also a danger that if broadcasters are permitted to demonstrate their political allegiances, this will influence the licensing process. It would then become exceedingly difficult for the regulator to ensure a balanced set of views was being presented across the broadcasting spectrum.

7.7 In jurisdictions like the USA where there is no requirement for impartial news, there is a requirement for fairness, and the major networks strive to present a balanced picture to their audiences. However, some, such as Fox News, appear to follow a political agenda (although it does describe itself as 'fair and balanced').

7.8 Political impartiality does not mean a lack of opinion or debate. While broadcasters themselves should not express a view, it is a welcome part of the

democratic process for them to provide a platform for political debate. Impartiality requires balance to be demonstrated by a range of significant views being aired. And if it is not possible to get a speaker with an opposing view onto a programme, then the journalist or the presenter can play 'devil's advocate' and test the argument.

Election guidelines

7.9 In many countries, election coverage and the carriage of political broadcasts involve some of the most complex rules of broadcast regulation. That is hardly surprising, given that many people turn first to their televisions or radios to learn how election campaigns are progressing, and to discover the candidates' views. So it is imperative that broadcasters behave fairly during election periods, and that the regulator monitors their output rigorously and responds to complaints quickly. Elections are often won and lost on television.

7.10 Regulation in this area is designed to ensure that each political party gets proper coverage. 'Proper' does not necessarily mean 'equal'. It is accepted that major parties, which already hold the most seats and are fielding the most candidates, are entitled to greater coverage than minor parties or single-issue candidates. But when election issues are being discussed, a wide range of party political views should be represented.

7.11 Many jurisdictions provide for a certain amount of broadcast airtime to be devoted specifically to Party Election Broadcasts ("PEBs") during election periods. A source of conflict can be the amount of time to be devoted to each party or candidate. To solve this problem, the regulator should allot specific amounts of airtime to each party according to a clear and pre-determined formula.

7.12 In South Africa, which presents an excellent example, every broadcaster who transmits PEBs must make available every day during the election period four time-slots of two minutes each for PEBs. The regulator can increase this number if necessary. All PEBs must be clearly identified as such at the beginning and at the end of the broadcast. PEBs must not be longer than two minutes in length. The criteria used by the regulator to determine who is entitled to a PEB and how many include: the number of existing seats held by each party and the number of seats each party is currently contesting. The major parties are all allocated the same number of PEBs, with smaller or untested parties getting fewer. In the case of regional or local elections, local television and radio stations are also expected to carry PEBs.

Protection of Minors

7.13 The prime purpose of protection in programme content is the protection of minors. This is the case throughout the world. Although the legal age of majority may differ from country to country, most regulators are concerned to protect the welfare of children and young people.

7.14 The intention is to seek to protect children from material which would, or could damage them morally, psychologically or physically. What this means in practice is that 'adult' material cannot be shown or aired when children are likely to be

watching or listening. But what is 'adult' material? This will vary from culture to culture.

7.15 In the more relaxed European states, nudity may be permitted on television at any time, with only nudity in a sexual context limited to adult viewing. However in many Muslim states, nudity would not be considered acceptable for viewing at any time. There are similar disparities when it comes to portrayals of violence.

7.16 Material which is considered quite suitable for breakfast time viewing in the US would be limited to late at night in much of Western Europe due to its violent content. The outrage which accompanied Janet Jackson's nipple display during the American Superbowl in 2004 only raised giggles in many other parts of the world, while offensive language is far more tolerated in the US than in most other countries.

7.17 This only demonstrates that there is no single set of content standards which can be applied universally; more than any other area of broadcast regulation, content standards must be set according to local values and norms, and applied by local people who can use their discretion to assess compliance according to the generally accepted standards in their society.

7.18 Types of material which are usually restricted in some way as regards access by minors are violence, sexual portrayal and offensive language. In most regimes, pornographic material is either completely banned, or only permitted on subscription television services which carry security measures (such as pin numbers) to prevent children accessing them. However, bearing in mind that the large majority of the viewing public are adults, it is unreasonable to ban all programming with adult themes or content; some compromise must be reached between protecting children and providing appropriate content for adults.

7.19 Many countries wrestle with this problem: when does the need for State control fall away and personal responsibility take over? Campaigners for children and religious groups will argue that *nothing* should ever be shown on television which might harm children, as it is impossible to guarantee that no child will be watching, regardless of safeguards. Banning all such material may well be the response in places where religious-based legal systems apply, or where there is near-universal public support for such a policy. But in most countries, a complete prohibition would be socially and politically unacceptable as well as disproportionate.

7.20 There are two general approaches which are used to manage the compromise between child protection, on the one hand, and more adult viewing on the other.

Watershed

7.21 The first approach is what is known as "the watershed". That is, a time at night after which progressively adult material - all within the bounds of legal and regulatory limits - can be shown. In Canada and the UK, it is set at 21.00, although throughout most of the rest of Europe it is at the later time of 22.00. But 20.00 may be appropriate in some countries, depending very much on when younger children tend to go to bed. For a watershed to work effectively, two conditions must be met.

7.22 First, the general public must be very aware that there is a 'watershed', when it is, and what it means. The intention is that parents can generally be satisfied that their children will not be able to view inappropriate or potentially harmful material if they are watching television before the watershed. Past the watershed, responsibility passes from the broadcaster to parents. Parents who allow their children to watch television late at night know that they might come across material which is unsuitable for them. It is the *parents'* responsibility to look after their children at this time; the television will not be an appropriate 'babysitting' service! To be effective, both the regulator and the broadcasters must ensure the public is properly informed about the watershed by public information campaigns and television announcements.

7.23 The second important condition for the successful operation of the watershed is that broadcasters understand "it is a *watershed*, not a *waterfall*". The moment of the watershed is not a signal for very adult programming to begin immediately; it is a gradual transition. This is to ensure that there are no startling images shown while children may still be in the room, perhaps being urged to bed. The transition should take place gradually through the course of the late evening, reserving the most adult material for much later.

Information and ratings

7.24 Providing information about programming is another way to offer protection to children. If parents know what sort of material the programme is going to contain, they can then make informed choices about whether or not it is suitable for their children to watch. This can be done by announcements before a programme begins, for example: "The following programme contains scenes of mild violence and some bad language and may be unsuitable for younger children." All programmes broadcast after the 21.00 watershed in Canada must be preceded by such a 'viewer advisory' statement.

7.25 Alternatively, television programmes can be 'rated' according to age suitability in much the same way that films are classified in many parts of the world. This approach is increasingly taken in European countries such as France, where the broadcasters are responsible for ensuring they rate all programming with the rating clearly visible on screen. This gives an indication to parents about the age range to which the programme is aimed (so if it is rated '18' then it is only suitable for adults), and that they can control their children's viewing accordingly.

7.26 While a number of countries find a ratings system to be useful, some broadcasters (e.g. Channel 4 in the UK which experimented with such a system in the 1990s) have found that as well as providing guidance to parents, ratings also serve to alert young teenagers to which 'naughty' programmes they may want to watch!

7.27 An information system does not replace a watershed, but supplements it, providing greater information to viewers not only regarding child viewing, but also to warn sensitive viewers about material which they might wish to avoid.

Offence to human dignity/ Taste and Decency

7.28 The European Convention on Transfrontier Television, which binds most European countries requires: "All items of programme services, as concerns their presentation and content, shall respect the dignity of the human being and the fundamental rights of others."²²

7.29 It is quite usual to find in broadcasting content regulations a provision requiring broadcasters not to offend viewers and listeners, or, to use another phrase, to respect good taste and decency. Although a common aim in much broadcasting content regulation, it is again difficult to define in practice.

Context

7.30 There is no internationally agreed standard as to what might be offensive or in bad taste; these decisions must be taken nationally. For example, the response to the growing number of 'reality shows', such as *Big Brother*, varies enormously. *Big Brother* involves a group of people being put together in a closed house for up to two months, during which time they perform various tasks and are filmed at all times. Viewers vote contestants out one by one with the winner gaining a substantial prize. It has proved to be a popular and programme across Europe and the US. Despite pushing the boundaries of taste further with each series, it has avoided serious regulatory censure.

7.31 By contrast, the version broadcast to the Balkan States is facing sanction from the Macedonian regulator for breach of the rules on "improper content" and bad language. The Dutch producer who originally created *Big Brother* is now launching another reality show in the Netherlands where women can choose a sperm donor for their child. If this concept can qualify as respecting human dignity, what will it take to show disrespect?

7.32 As well as there being a national and cultural context to matters of offence, there are also specific contextual matters the regulator should consider when determining whether a specific programme has gone too far. This is discussed further below under **Complaints**.

Protection against harm

7.33 How might a television or radio programme harm the audience? There are some direct ways, such as broadcasting flashing lights which set off seizures in people who have photosensitive epilepsy. A more arguable case is the demonstration of hypnosis direct to camera which could unintentionally affect viewers. Both of these situations can be covered by regulatory rules.

7.34 In addition, regulators may wish to prohibit programmes which show in detail how to administer illegal drugs, make bombs, or commit suicide. A Romanian television company broadcast a video a young man made of himself committing suicide, and read out his suicide note. Tragically, this apparently induced scores of other young people also to commit suicide, in the mistaken belief that their deaths, too, would be televised and they would thus gain notoriety.

²² Art. 7.1 European Convention on Transfrontier Television

Protection of the individual

Privacy

7.35 Privacy is a fundamental human right, guaranteed under the Universal Declaration of Human Rights²³. However, in a democratic society, the citizen's right to privacy must be balanced against the public's right to receive information. This balance is often difficult to judge. It is the balance between individual privacy and the public interest. Both these concepts are difficult to define.

7.36 What is the right to privacy? The Parliamentary Assembly of the Council of Europe has said, it "...consists essentially in the right to live one's own life with a minimum of interference. It concerns private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against unjustifiable or unreasonable spying and prying, protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially."²⁴

7.37 In most countries, privacy is protected at the constitutional level, or by common law, or specific legislation. Often, all three forms of legal protection apply. The definition given by the Council of Europe includes matters which often are not the concern of broadcasting regulators. They may well be the subject of specific laws relating to defamation and confidentiality, as well as privacy. But, given the ability of the broadcast media to interfere dramatically in an individual's private life, there is merit in the regulator having a remit over privacy matters. As well as applying standards directly through regulation, this can mean providing guidance to broadcasters about where the acceptable limits might lie.

7.38 Any infringement of privacy must be justified as being in the public interest. But what is the public interest? It has often been pointed out that the public interest does not mean whatever interests the public; scurrilous stories about the sex lives of celebrities certainly attract audiences, but are they justifiable as a breach of privacy?

7.39 The European Convention on Human Rights seeks to define when intrusion into privacy by a public authority may be justifiable: "...in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."²⁵

7.40 While this list is appropriate for setting the limits on when public authorities have a right to intrude on citizen's privacy, most countries – perhaps oddly - would not apply such strict limits to commercial broadcasters.

²³ Article 12 states that, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

²⁴ See Recommendation dated 23 January 1970 on Mass Communication Media and Human Rights

²⁵ Article 8

7.41 The Broadcasting Standards Commission in the UK applied the ECHR principles in a manner appropriate to broadcasters: “An infringement of privacy has to be justified by an overriding public interest in disclosure of the information. This would include revealing or detecting crime or disreputable behaviour, protecting public health or safety, exposing misleading claims made by individuals or organisations, or disclosing significant incompetence in public office.” This provides an excellent basis for regulators to judge whether an infringement of privacy has been warranted.

7.42 When dealing with matters of privacy, special attention must be paid to children, who are particularly vulnerable as they are not in a position to give informed consent. Children do not lose their rights to privacy because of the actions or fame of their parents. Children can be gullible and broadcasters who are eager for a story should not abuse their trust. The broadcasting regulator should stress the need to pay particular care when dealing with children, either in their Content Codes or in the Guidance they provide to broadcasters.

Right of Reply

7.43 Where a programme alleges wrongdoing or incompetence, or contains a damaging critique of an individual or organisation, those criticised should normally be given an appropriate and timely opportunity to respond to, or comment on, the arguments and evidence contained within that programme.

7.44 Within Europe, this right of reply is established in pan-European regulation²⁶. Article 23 of the Directive Television without Frontiers²⁷ states that, “Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interest, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.”

7.45 To enable an effective right of reply, the regulator must have the power to consider whether any claims brought by aggrieved persons can be substantiated, and if so, to order the broadcaster to give an appropriate right of reply within a reasonable period and at a reasonable place within the broadcast schedule. Rather than give the

²⁶ See Article 8 of the European Convention on Transfrontier Television : “ Each transmitting Party shall ensure that every natural or legal person, regardless of nationality or place of residence, shall have the opportunity to exercise a right of reply or to seek other comparable legal or administrative remedies relating to programmes transmitted by a broadcaster within its jurisdiction.... In particular, it shall ensure that timing and other arrangements for the exercise of the right of reply are such that this right can be effectively exercised. The effective exercise of this right or other comparable legal or administrative remedies shall be ensured both as regards the timing and the modalities.”

²⁷ Directive 89/552/EEC as amended by 97/36/EC

aggrieved person the right to appear on-air him or herself, the regulator can agree a statement of correction to be broadcast.

Protection against crime and disorder

7.46 Most regulatory regimes include a provision that nothing in programmes must incite crime or disorder. While this would seem to be a matter of common sense, it is in fact potentially very controversial. Great care must be taken in how it is defined and exercised to prevent the regulator operating as a political arm of government.

7.47 All States have laws which make it a criminal offence to commit treason, as well as a number of public order offences. In the most undemocratic regimes, these laws are cited by the broadcasting authorities to prevent the broadcast of material which is critical of the government or even offering alternative political views. If a broadcaster does transmit material which the government does not like, these rules are then used to shut down the broadcast company and, at the most extreme, jailing the owners and journalists concerned or allowing them to 'disappear'.

7.48 Regulators operating in such regimes, and even in mature democracies, are often placed under enormous pressure by governments. This is why it is so important for the regulatory body to be established in as independent a way as possible, and for the structure and process of regulation to include effective safeguards against unacceptable political pressure.

7.49 In the case of the application of rules against the incitement of crime and disorder, the safeguards must ensure that the rules are applied in as open and transparent a way as possible. A recommended way would be for the rules of procedure of the regulatory body to state that any proposed sanction for breach of this rule will be considered at a public hearing.

7.50 This at least will ensure that the issues are aired in a public forum, and provide the regulator with a degree of protection should it be facing undue political pressure. Of course, if the issue is not political, then a public hearing will underline the seriousness of the broadcaster's breach and increase the damage to the broadcaster's reputation (which in itself can act as a powerful deterrent, and reinforce the effect of any sanction).

Protection against racial or ethnic hatred

7.51 One of the most serious issues facing many regulatory authorities is 'hate' speech. As a most basic protection of human rights, it is essential to include in the regulatory regime a strongly worded rule prohibiting the broadcast of any material which may incite hatred on the grounds of race, ethnicity, tribal origin, religion, sex, or nationality.

7.52 Broadcasting is a very powerful tool to influence people. In situations of community tension, uncontrolled, irresponsible broadcasters can have enormous impact. It is generally accepted that local radio stations in Rwanda greatly inflamed the Hutu slaughter of the Tutsi people.

7.53 For countries in transition, or those facing internal unrest, the regulator must make it clear from the outset that this is one rule where there is zero tolerance. When the new broadcasting regulator for Bosnia-Herzegovina was established following the break-up of the former Yugoslavia, it was faced with hundreds of unlicensed broadcasters, some of which were broadcasting the most vitriolic hate material. After years of ethnically-based civil war, such material had no place in a country which was trying to re-establish peaceful co-existence between ethnic and religious groups. The regulator acted decisively to shut down every such broadcaster it could, and to refuse new licences to those who had been responsible.

Religious programmes

7.54 Again, to prevent religion being used as a source of potential community tension, it may be wise to include an overarching provision prohibiting incitement to religious hatred, alongside rules which serve to protect the basic human right to religious freedom.

7.55 Whether or not religious stations should be licensed is a matter for each individual jurisdiction to decide, depending on the culture, the popular demand for such services and the availability of frequencies. In Germany, where the major churches are recognised as formal elements of civil society, each recognised church is entitled to own a television channel. In other countries, such as the UK, where there are a very limited number of available terrestrial analogue television frequencies and a great number of religious groups, the decision has been taken to prohibit religious bodies from holding such licences. However, where spectrum is not so limited – for example local radio, or satellite television – religious bodies may hold licences.

7.56 Whatever position applies, it is contrary to the Universal Declaration of Human Rights to prevent religious broadcasting or the ownership of television or radio stations by religious groups. However, such religious groups must otherwise comply with other pertinent rules on ownership (see the section on **Ownership**).

7.57 It is also sensible to consider whether special additional rules should be incorporated to protect the particular sensitivities of religious groups. For example, is it reasonable to permit someone to denigrate a particular religion, or make intentionally offensive remarks?

7.58 In some countries, there is an expectation that religion can be treated as robustly as any other subject, and be just as open to debate as a political issue. In other countries, particularly where there is a State religion or the majority of the population are religiously observant, such debate or critical comment would be considered unacceptable and arouse feelings of serious offence. It is therefore necessary to take these issues into consideration issues when setting content standards. Freedom of expression has to be balanced against the potential offence to public sensibilities.

Generally accepted standards

7.59 Clearly, there is nothing objective about the process of setting or applying programme content standards. So how can a regulator undertake this process without

undermining its own credibility and facing accusations of being subjective or arbitrary? For this very reason broadcasting regulators are often perceived as having a 'soft' job by their colleagues in government or public office. In fact, the broadcasting regulator's job is particularly difficult, as the decisions it takes are by their nature based on judgement and understanding, rather than on hard facts.

7.60 However, the regulator's job can be made much easier, and its reputation enhanced, by it seeking to base as many decisions as possible on research evidence. Research costs money, so it is not every regulatory body which will be in a position to afford to undertake research. But if it can do so, the regulator should institute a rolling research programme into audience expectations and attitudes on the full range of standards' issues.

7.61 The regulator can also make use of other available research, for example on audience figures (although a popular programme can still be in serious breach of content rules). Research conducted for other purposes, for example, for social policy reasons, or academic research, may also prove useful for informing the regulator of prevailing attitudes and behaviour. It may also be possible to place an expectation on broadcasters themselves to conduct research, especially if they are proposing a significant change to programming or standards.

7.62 Whatever the source of the research, if it has been properly undertaken and is robust, it can be used to underpin the regulator's decisions, and thus keep the regulator up to date with changes to 'generally accepted standards' within society. For standards do change over time, and much as some of us might like a return to the values of 50 years ago, the regulator will not serve the interests of viewers and listeners if it seeks artificially to apply the standards of another age.

7.63 But having determined what the suitable standards are, what will undoubtedly cause discomfort in any country is the arrival of services from another jurisdiction where different standards are applied. This problem is further discussed in the section on **Jurisdiction**.

Sanctions

Procedure

7.64 The most common reason for a licensee to get into regulatory difficulties is over a breach of programme content rules. Generally, if other regulatory problems arise (for example, breach of the ownership rules, or late payment of licence fees), these can be dealt with without having to undertake an official sanction. But what happens if a programme is broadcast which is unacceptable under content rules? Once broadcast, it cannot be unbroadcast; the damage is done.

7.65 The broadcaster is responsible for the material which is broadcast, whether it is made in-house, commissioned through an independent production company, or acquired. So the broadcaster is even responsible for ensuring the content of Hollywood films complies with programming rules. If a movie containing sexual scenes or serious violence is broadcast in the early evening, it is no excuse for the broadcaster to say that it bought the movie; the broadcaster should be aware of all

content *before* it is broadcast, and either edit out unsuitable material, or schedule it appropriately.

7.66 In order to ensure fairness and transparency, the regulator should publish the processes it will use when considering the application of a formal sanction. If a serious fine or revocation of a licence is to be considered, the broadcaster should have the option of the matter being adjudicated in an open, public hearing.

7.67 In many cases of relatively minor breaches, a letter of warning to the broadcaster may suffice. It should be made clear to the licensee that its compliance record will be taken into account when the licence term expires, should the licensee seek licence renewal. A poor compliance record may result in the licence being openly re-advertised, rather than renewed. This is a very serious threat to a broadcaster's future business, and will act to concentrate the broadcaster's mind in improving its compliance procedures

Fines

7.68 If the breach is serious, or there is a history of minor breaches with no improvement in overall compliance, a fine might be appropriate. The broadcaster should be informed that they are threatened with a fine, and given an opportunity to comment, both on the alleged breach itself and on the intention to levy a fine. This is in the interests of natural justice.

7.69 The amount of the fine should take into account various factors such as: the seriousness of the breach, the licensee's record of breaches, any financial benefit the licensee might have gained as a result of the broadcast (e.g. advertising revenue), and the overall financial state of the broadcaster. Fines should be proportionate to the offence. In general, it is more important to foster a sound compliance system than to punish for the sake of it. The regulator should not seek to levy fines of such magnitude that it seriously endangers the broadcaster's viability. This is a technique often used as a political lever: if the broadcaster puts out material which is politically sensitive, fining them to the point where they have to shut down is tantamount to political censorship. Furthermore, suspending a service can have the same effect.

7.70 The regulator should not keep the fine, but pass it over to the government Treasury. This is important in order for government not to expect the regulator to raise a certain amount of its own budget from fines, and hence put pressure on the regulator to look for breaches and increase the level of fines. Any fine should be a 'bonus' to the Exchequer, not an expectation.

7.71 Many regimes set out in legislation a tariff of fines to be applied in the event of a certain type of breach, or based on the seriousness of the breach. While this provides for certainty, it is recommended that any figures represent the maximum which can be applied, to give the regulator a degree of discretion taking into account all the factors listed above. It is also important to enable the tariff table to be amended relatively easily, should circumstances change to warrant higher fines being charged.

7.72 It is debatable whether State funded public service broadcasters should be subject to fines. Arguably, a fine would merely be taking from one part of the Exchequer and returning it to another. It would not be shareholders who suffer, but

the programme budgets themselves. On the other hand, it is 'unfair' for commercial broadcasters to be subject to fines if their public service competition is not. The authors view is that all broadcasters should be subject to the same set of sanctions; public service broadcasters are otherwise liable to the full range of legal penalties, from employment legislation to defamation to traffic fines. There is no real justification for treating broadcasting sanctions differently.

Suspension

7.73 Suspension of a licence should only be considered when it appears that the broadcaster is in crisis and cannot manage to comply with regulatory rules. It may need a period of time off-air to get its house in order.

7.74 Suspending broadcasting as a punishment for content breaches is not fair, as it not only punishes the broadcaster, but also its audience. It is not the viewers or listeners who have breached the rules, and it is unreasonable for them to miss their favourite programmes, or lose access to news and information merely because the broadcaster has breached rules relating to one programme. However, if it appears to the regulator that breaches are happening so frequently and so severely such as to indicate that the broadcaster is not likely to be able to comply, then that indicates a sufficient crisis to warrant threatening suspension.

7.75 The regulator should call in the senior management of the broadcaster immediately to explain its concerns and to hear from the broadcaster how it will rectify the situation. It should be made clear to the broadcaster that a failure to improve will result in the licence being revoked.

Revocation

7.76 Of course there will be times when the most serious sanction – revocation – must be considered. This should be reserved only for the most serious cases: where a broadcaster consistently shows disregard for rules and ignores instructions from the regulator, if a broadcaster does not pay licence fees and appears to be unwilling or unable to pay, or when the broadcaster is in breach of the ownership requirements and does not appear able or willing to comply.

7.77 The process for revocation should be set out in either primary or secondary legislation, to avoid the regulator acting in an arbitrary or inconsistent way. This will also ensure that there is an appeals mechanism to a court of law should a broadcaster believe that due process has not been followed. This is an important safeguard to protect an independent regulatory process.

7.78 If revocation is to be considered, the broadcaster should be given an opportunity to put its case in writing to the regulator and to be heard at a public hearing on the issues. If the regulator is satisfied that another 'second chance' is unwarranted, as the licensee either cannot or will not ensure compliance with programme standards, then the licence can be revoked.

II. Advertising - Legal, honest, decent and true

7.79 The mantra for advertising regulation is that all advertising must be legal, honest, decent and true. Each of these will be examined in turn.

Legality

7.80 It goes without saying that broadcast advertising must comply with all other laws. If consumer protection legislation exists separately, or specific laws relating to advertising in general, then these will also apply to broadcast advertising unless explicitly stated.

7.81 It is important to review all potential legislation which might apply to advertising in order to confirm that, insofar as it is desirable on public policy grounds, it *does* cover broadcasting. Amendments may need to be made to existing legislation either explicitly to exclude broadcasting, or to ensure that the wording is wide enough to include broadcasting (for example, old laws which refer to advertising only in print or on posters will need to be updated to cover broadcast advertising).

7.82 Decisions may be taken to prohibit advertising for specific products or services on public policy, health or moral grounds. It must be clear that illegal products or services cannot be advertised (for example, illegal drugs, or illegal prostitution). Certain restricted products, such as guns, should also be banned from being advertised.

7.83 An increasing number of countries prohibit the broadcast advertising of cigarettes and tobacco products, on health grounds. As the medical evidence of the danger of smoking is now clear, it is recommended to include such a ban in regulatory laws.

7.84 A number of countries, including France, prohibit the broadcast advertising of alcohol. Some countries allow advertising for beer and wine, but not for spirits (e.g. Romania). Careful thought needs to be given before considering banning alcohol advertising, unless there are very strong moral, religious or public policy reasons for doing so. While alcohol abuse is dangerous, there is no medical evidence to suggest that moderate alcohol use is harmful – indeed there is some evidence of the opposite. And alcohol companies throughout the world are willing to put considerable amounts of money into advertising. It is therefore important for the regulator to weigh up public policy reasons for prohibiting the advertising of alcohol with the benefits to the revenue of broadcast companies of allowing alcohol to be advertised.

7.85 Also on health grounds, the broadcast advertising of prescription drugs is prohibited in Europe. However, they can be advertised in the US. This difference reflects differing views on the dangers of prescription medicines, as well as the extent to which drug companies should be permitted directly to influence consumer behaviour. Although until recently permitted, Montenegro has banned the advertisement of human blood, organs and tissues for transplant and transfusion purposes.

7.86 A number of products and services of an ‘adult’ nature, although legal in themselves, may be banned from advertising, or restricted to advertising after the

‘watershed’ or late at night. Examples include dating and escort agencies, and sex magazines for men.

7.87 Some countries, notably Sweden and Greece, restrict advertising to children on public policy grounds. They are concerned that children are easily exploited and do not fully understand the nature and purpose of advertising. As a result, children put unacceptable pressure on their parents to buy what may be unsuitable products.

7.88 Restrictions on advertising often result from public policy intentions to modify consumer behaviour. This was certainly the case for the prohibition of cigarette advertising in many parts of the world. Currently in Europe there are growing concerns about child obesity and discussions are taking place to consider prohibiting the advertising of unhealthy foodstuffs to children. It is likely that, rather than face legal regulation, the food industry will voluntarily adopt restrictions in this area.

Honesty

7.89 Advertising, as with all broadcast content, should be fair. This means that advertisements should not unfairly compare the advertiser’s products with those of competitors. If, for example, a washing powder wishes to claim that it washes clothes cleaner than all other powders, the advertiser should be able to produce irrefutable scientific evidence to support this claim.

Decency

7.90 The requirement for advertising to be decent encompasses the issues discussed above under **Programming** relating to the protection of minors, harm and offence. There is an even greater need for advertisements to be ‘decent’ than programmes. This is because viewers and listeners cannot prepare themselves for an ad; they have no choice – as they do with programmes – to decide in advance that they do not wish to hear or watch a particular advertisement. They come unannounced without prior warning. Research has shown what regulators already know: audiences are unwilling to accept the same level of potential offence in advertisements that they are in programmes. It is important for advertisers and advertising agencies to understand this rule: they must take *more* care than programme makers not to include anything in advertisements which will seriously offend the audience or potentially harm children. This, of course, makes commercial as well as regulatory sense: advertisers will not want to upset potential consumers.

Truth

7.91 Advertising must be truthful and not misleading. This is a basic tenet of consumer protection law. If a shop advertises that you will not be able to buy a product cheaper anywhere else, that must be true.

7.92 In places where the regulation of advertising is just beginning, it is common to find that many ads contain exaggerated claims, if not downright lies. It may take a while for the a regulator to persuade advertisers that this is really not in the advertiser’s best interests. While such ads might initially attract more business, it does not take long for consumers to realise they have not been told the truth. This will have

a strong negative effect on the advertiser's reputation – and therefore future business. By developing a reputation for being honest and trustworthy, an advertiser will retain business and ultimately succeed over its rivals.

7.93 When the regulator believes that an advertisement may be misleading, or receives a complaint to that effect, it must ask the broadcaster(s) who aired the ad to provide evidence of the claims made in the ad. This is the *broadcaster's* responsibility, although of course the material will come from the advertiser. In a short time, advertisers will learn that they must be able to provide evidence for claims, and broadcasters will learn to ask for this evidence before they transmit the ads.

7.94 In a struggling economy where advertising revenue is tight, broadcasters might argue with the regulator that they will lose business if they do not accept ads, or question the veracity of the advertising. But so long as all broadcasters are in the same boat, subject to the same rules, the pressure will actually be on the advertisers to produce decent, truthful advertising. Regulators should therefore resist any assertion by broadcasters that they will suffer by rejecting unacceptable advertising.

Scheduling

7.95 As with programme scheduling and the 'watershed', it is reasonable to expect advertising to be scheduled appropriately. There are two considerations to scheduling advertisements: the product or service being advertised, and the general content or 'treatment' in the ad itself.

7.96 Certain categories of product or service should not be advertised when children are most likely to be watching. For example, products which cannot be sold to children (e.g. alcohol, lottery tickets) should not be advertised in or around children's programmes, or programmes which attract a high level of child audience. This restriction may be extended to toys if, on public policy grounds, it is deemed unacceptable to aim advertising at children.

7.97 Other, more 'adult' products or services should only be permitted to be advertised later at night, when children are unlikely to be watching. See the section on Watersheds in **Programmes** above for more information.

7.98 While it is simple enough to make general rules about the scheduling of specific products and services, it is not so straightforward to regulate on scheduling grounds for matters of taste and decency. Again, the considerations are very similar to those relating to programme content: if an ad, even if it is for an innocuous product (such as a foodstuff), contains material which is likely to harm the moral, mental or physical development of children, then it must not be aired when children are likely to be watching or listening.

7.99 There can be gradations to this policy. For example, an ad may contain a treatment that might terrify very young children, but be fine for older children to watch (e.g. it might include scary monsters). These ads should be kept away from programmes aimed at the youngest children.

Sanctions

7.100 As with programming, the broadcaster is responsible for the content of all advertising it broadcasts, even though it may not have made the ad itself. The regulator must make sure that licensees understand that they are accountable, and that they will be expected to review all advertising before they broadcast it.

7.101 But what if an ad breaks the content rules? If the problem is one of inappropriate scheduling, then the broadcaster should be informed immediately of the restrictions. If the problem is more fundamental, then the broadcaster should be directed to remove the advertising immediately and not to show it again. The broadcaster (and the advertiser) should be given an opportunity to dispute such a ruling, but the advertisement should remain off-air until the matter is settled. If the regulator then changes its mind, or the advertisement is amended to make it compliant, then the ad can be reinstated.

7.102 Where an advertisement is ordered to be removed, or rescheduled, the regulator should publicise the fact to all broadcasters who may be carrying or likely to carry the advertisement. Very often an ad is broadcast over several channels or radio stations at once, so all broadcasters should be aware of the regulator's ruling. This will also prevent an unscrupulous advertiser, having been banned from one broadcaster, simply offering it to another.

7.103 The removal of advertising will damage the advertiser at least as much as the broadcaster. The broadcaster may lose ad revenue (unless it can find a replacement advertiser), but the advertiser loses the publicity it planned on receiving, and the costs of making the ad. This serves to reinforce to advertisers that they, too, have a major role in ensuring that advertising is compliant.

7.104 Generally, removing unacceptable advertising is a sufficient sanction. However, a regulator might find that a broadcaster consistently broadcasts unacceptable advertising, in negligent or intentional disregard of the rules. In such a case a more serious sanction, such as a fine, is warranted.

III Where programmes and advertising meet

Separation and transparency of advertising

7.105 It is a cardinal principle of broadcast regulation that viewers and listeners should be able to identify when they are being advertised to. Ads should be clearly distinguished from programmes so that audiences are not misled or taken unawares. This is not considered to be as important in the US as it is in Europe. Whereas on American television there is no break junction between programming and advertising (such that it can take a few moments for a viewer to realise that the programme has stopped and advertising begun), in Europe there are strict rules to ensure there is some sort of visual or audio 'break'. This is usually done by a brief station identification appearing on screen, or, as in France, a screen saying 'Publicite' (advertising). It is recommended to require such a clear separation.

Surreptitious advertising/product placement/undue prominence

7.106 As well as making a clear separation from formal advertising and programming, most regulatory authorities are concerned about advertisers influencing programme content in such a way that editorial control passes from the programme makers to the advertisers. Material is then inserted into the programmes which to all intents and purposes is advertising. For example, if a programme which gave consumers advice on the best restaurants was paid for by McDonalds to promote themselves but not declared as such, this would be what is referred to in the European Directive: Television Without Frontiers as ‘surreptitious advertising’. Other regulatory regimes know this as ‘product placement’ or ‘undue prominence’. In all cases it amounts to the commercial promotion of a product or service in a manner which is not transparent to the viewer or listener. It is recommended that the regulatory rules specifically restrict this type of behaviour.

Sponsorship

7.107 Sponsorship is a commercial arrangement where a company or body purchases an association with a programme, and attaches its brand and branding message to it. Sponsorship should be distinguished from advertising by ensuring that no strictly advertising messages are included in the sponsor credit. As well as maintaining a distinction between advertising and sponsorship, it is important for sponsored programmes to maintain their editorial integrity; it is always the broadcaster (and not the sponsor) who should have final editorial control over programme content.

7.108 Certain internationally accepted rules apply to sponsorship. The two most important are that the fact that a programme is sponsored should always be apparent (normally by clear credits around the programme), and that prohibited advertisers are also prohibited from sponsorship. Generally, the same scheduling restrictions that apply to advertising would also apply to sponsorship. So, for example, an alcohol company would not be allowed to sponsor a programme aimed at children.

7.109 Many countries are also concerned to ensure that, even if the law protects editorial control by the broadcaster, there is no likelihood that the programme content itself could be influenced by the sponsor. For example, a programme that offers advice on which car to purchase might be prevented from being sponsored by BMW on the grounds that the programme maker might be influenced to promote BMW above other makes of car. With this principle in mind, many countries, including all in the European Union, prohibit the sponsorship of news and current affairs programmes.

IV The process of Content Regulation

Codes

7.110 In order to provide certainty and predictability to the broadcasting industry and to viewers and listeners about expected standards, the rules must be set out in writing, and applied accordingly. How best to do this? It is desirable to be both consistent and flexible, to find a means of making the basic rules clear and fairly

permanent, with the ability to vary the interpretation of the standards according to changes in public attitudes and values.

7.111 The ideal is for the broadcasting regulatory law to set out the basic standards which must be adhered to, for example, accuracy in news, impartiality, fairness and that nothing in programming will damage the moral, mental or physical development of children. These rules will be approved by Parliament, as the democratic representative body of the people. They should only be changed by primary legislation.

7.112 However, there should also be a mechanism requiring the regulator to publish a Code or Guidelines explaining in greater detail how it will interpret the basic legal rules, for example by explaining that in order to protect children, no adult material may be broadcast before 22.00 hours.

7.113 The legal status of the Code depends very much on the nature of the legal system, and likely interpretation by the Courts. Let us assume a television company broadcasts a film containing sexual scenes at 19.00, and the regulator declares this to be a breach of the statutory rule requiring the protection of children, and issues a fine. The television company then appeals the decision to the Court, saying that it does not believe that broadcasting the film caused any harm to any children. How will the Court react?

7.114 In some countries, the Court will acknowledge that even though the regulator's Code does not in itself have legal status, its role is to inform broadcasters of how the regulator will interpret the Broadcasting Act. Therefore the Court will uphold the regulator's decision that the broadcast of the film at 19.00 was a breach of the legal rule requiring children to be protected.

7.115 However, in other countries, the Court may decide that if the Code has no legal status in its own right, it is merely advisory and each case must be looked at individually. In our hypothetical case, the Court may require the regulator to provide evidence that harm was actually caused to children as a result of the screening of this film, and in the absence of such evidence, allow the television company's appeal. This, clearly, would be uncomfortable for the regulator, and a situation to be avoided. There is little point in having standards set out in a law which the regulator is powerless to apply.

7.116 So, in such countries, the solution is for the regulator's Code to be given the legal status of Secondary Legislation, so that it is directly enforceable through the legal system. This may result in it being rather more difficult to change the Code quickly in response to changing circumstances, if changes require a level of Parliamentary approval. However, it is better to have a legally enforceable Code than one which the Courts consider to be valueless.

Monitoring

7.117 How does the regulator know whether licensees are complying with content requirements? There are two ways: receiving complaints from the public and monitoring. Complaints will be considered below.

7.118 Nearly all broadcasting regulators undertake monitoring of some kind, with only a minority being primarily complaints led (e.g. the FCC in the USA, and Ofcom in the UK). It is sensible to construct a monitoring system on the basis of risk, in order to maximise resources, and minimise wasted time. There is little point in trying to view or listen to all broadcast output as this would require an army of monitors, for relatively little result.

7.119 As long as broadcasters are aware of the expectations of the regulator, and the standards to be applied, it is reasonable for the regulator to assume that most, if not nearly all programming will be compliant. The system of monitoring should concentrate on those issues which would cause the most harm, and where there is reason to suspect that compliance may be poor. For example, children's television programmes will not require as watchful an eye as soap operas and dramas broadcast in the early evening. This is because the programmes made for children are unlikely to contain unsuitable material, whereas dramas shown while children may be watching, but aimed at adults, may stray into unacceptable content.

7.120 By contrast, the regulator might want to take a particular look at advertising around children's programmes, but be less concerned about late-night advertising. By analysing and understanding the programme schedules, the regulator can develop a programme of monitoring which will concentrate on those areas of higher risk. This will also include more regular monitoring of those television and radio services which have a poor history of programme compliance, with less monitoring of those with an excellent track record.

7.121 The regulator may feel that it is especially important for certain genres of programming to meet the required standards, for example news and current affairs, as contrasted with imported Hollywood films. For example, during election periods in France, the CSA rigorously monitors the exact amount of airtime devoted to each candidate and political party, as any dispute causes considerable contention.

7.122 How should monitoring be arranged? While it may be possible for the regulator itself to ensure it can receive all broadcast services (through a combination of direct, cable and satellite delivery, regional offices, and internet), this can be expensive to set up and it will also require the regulator to arrange to tape all broadcast output. Far more common is for broadcast licences to require broadcasters to record all their output and to retain the output for a period. These recordings can then be used by the regulator either for monitoring purposes or if they need to follow up on a complaint.

7.123 Care must be taken when deciding the length of time broadcasters should be required to retain material as the cost of arranging recording and storage is expensive. Requirements in this regard must therefore be proportionate. It is not reasonable to expect broadcasters to be answerable for material which was broadcast 6 months previously, and it is not reasonable to expect them to retain material for such a long period. The onus must be on the regulator to undertake monitoring in a timely fashion, and to make sure complaints are handled quickly. Broadcasters should not be expected to keep recordings for longer than 12 weeks, and arguably 4-6 weeks may be enough. For example, Canadian broadcasters are required to retain audio-visual

recordings for a period of four weeks, extended to eight weeks if the regulator, the CRTC, informs the broadcaster of a complaint within the initial four week period.

Complaints handling

Process of complaints

7.124 To be an effective content regulator, the regulator should be aware of shifts in the public's values and tolerances, so that it can apply 'generally accepted standards'. As mentioned above, research is the best way of testing these standards. But another way is by dealing with complaints from the public.

7.125 In a country which does not have a 'complaints culture', the regulator should take steps to inform the viewing and listening public that they can complain. Ideally, this should be done by having a requirement for information advertisements to be broadcast by licensees telling audiences to whom they can complain. It is reasonable to make it a condition of licences that broadcasters will carry these information advertisements for free.

7.126 When the regulator receives a complaint, it should be considered in the light of the Code that applies. Very often, complaints by viewers and listeners do not raise any compliance issue; the most common complaint is simply, "I didn't like that programme". These complaints can be politely answered – after all, not every programme will appeal to each person - then disregarded.

7.127 However, if a complaint raises a potential compliance issue ("I didn't like that programme...because it really scared my children even though it was broadcast at 4pm"), then before reaching a conclusion, the regulator should give the broadcaster responsible an opportunity to respond to the issue. There are three main advantages in getting the broadcaster's view first: it reinforces how important compliance should be to the broadcaster by making them responsible for defending and justifying what they broadcast; it alerts the broadcaster to how audiences are reacting to its programmes; and finally, it gives the broadcaster the opportunity to explain its broadcast decisions to the regulator.

7.128 This final factor can be very important in the regulatory process: the regulator will react very differently to the broadcaster who says, "Oops! We didn't watch the show and therefore did not realise it was likely to scare children" to one who says, "We considered this very carefully before broadcast and took the view that while it might be scary for very young children, it would be fun and exciting for older children. So we broadcast it with a warning beforehand saying that it might be unsuitable for younger children." It is very likely that the regulator would find the first broadcaster in breach of the content rules, and the second broadcaster to be compliant.

7.129 When asking broadcasters for their comments, the regulator can at the same time ask for a copy of the programme. This can then be viewed or listened to while considering the broadcaster's response.

7.130 As mentioned above, complaints should always be considered in the context of the programme itself. Programmes should be watched or listened to, and consideration given to the overall situation in which the programme was broadcast. For this purpose, context includes:

- the overall content of the programme, or series;
- the channel on which it was broadcast;
- the time of the broadcast;
- the other programmes which immediately preceded and followed the broadcast;
- the degree of harm or offence which was, or was likely to have been, caused;
- the likely size and make up of the audience, and their expectations; and
- the extent to which any warnings (by way of announcements or ratings) were given

7.131 All these factors can be taken into consideration when determining whether the broadcaster has acted in a properly compliant manner, or has been in breach of the rules.

7.132 Whether or not a sanction is applied, the regulator should consider publishing details of all significant complaints (even some where no breach of the rules has been found). This serves to keep other broadcasters up to date with how standards are being applied, provides a means for the regulator to keep in touch and accountable to the public, and also serves as a means for ‘naming and shaming’ those broadcasters who have been in breach of the rules. In some societies a public shaming can be as effective as a fine.

Separate body?

7.133 In some jurisdictions (for example, Canada and Switzerland) a separate complaints-handling body is set up, distinct from the regulator. This serves to act as a separation between the legislature (the regulator who sets the rules) and the judiciary (the body which adjudicates on whether the rules have been broken). While there are obvious advantages to this sort of separation, there are also disadvantages: clearly having two bodies will be more expensive than one. But also, there can be advantages in the regulator handling complaints as the regulator can thus be kept very much in touch with changing trends in public standards and, if necessary, adjust the rules accordingly. While this can also be achieved if there are two bodies involved, it will require excellent and frequent communication between the bodies, and sufficient flexibility for the regulator to adjust the formal standards quickly if need be.

8. Other public policy objectives

8.1 There are certain types of broadcasting regulation which are designed to meet public policy objectives informed by cultural and social values, or for economic purposes.

Disability Access Issues

8.2 A matter that has become the concern of broadcasting regulators in some countries is the provision of support to enable people with hearing and visual disabilities to access television programmes. These are called “access services”. The methods used are subtitling and signing for people who are deaf and hard of hearing, and audio-description for blind and visually impaired people.

8.3 There is no doubt that the willingness and ability of television broadcasters to cater for audiences with disabilities is largely dependent on their capacity to pay for access services. There is little point in regulating for such provision if the broadcasting industry itself is struggling to make ends meet. However, there is point in *planning* for the necessary facilities, and placing these issues firmly on broadcasters’ agendas, albeit for a future time when funds are available.

8.4 Planning for the appropriate provision of access services should involve close co-operation with groups representing people with disabilities. It appears that those countries which have made the most progress in this area have well-developed disability lobby groups who have been engaged in meaningful consultation with the broadcasters, usually through the intermediary of the regulator.

8.5 An example is in South Africa, where, although the broadcasting industry is still in development, preparations are well underway to provide access services. In 2003, the regulator, ICASA, established a Special Advisory Committee on people with disabilities. The purpose of the Committee is to ensure that the needs of people with disabilities are catered for by both telecommunications and broadcasting licensees. A consultative meeting was convened at the end of 2003 with licensees, representatives from the disability sector, as well as government departments in attendance. Now, following further consultation with stakeholders and industry, the Committee is working towards the introduction of an agreed code.

8.6 The Broadcasting Commission of Ireland took a similar approach by bringing together stakeholder groups (broadcasters, and groups representing the deaf, hard of hearing and visually impaired people) to engage collectively with the issues. The consultation will result in the development of Access Rules which will outline the targets to be met by domestic broadcasters for the provision of subtitling, sign language and audio description.

8.7 The French regulator, the CSA, together with government, consults annually with groups representing the deaf and hard of hearing over matters of subtitling and sign language. Targets are set for individual broadcasters, relating to specific genres of programming. Unfortunately, many of these targets are not met, although there are exceptions. For example, France 2 provided subtitling for 19.5% of its programmes in 2001, with the majority being dramas.

8.8 UK disability groups have lobbied extensively and successfully for some time. Since the late 1990s, public service broadcasters have been required to provide access services, but under new legislation in 2003, obligations have been extended to all but the smallest television services. Following consultation, a new Code has been agreed which sets progressive targets over 10 years: subtitling on 80% of programmes, audio description on 10%, and signing on 5%.

8.9 While to many countries this may appear unreasonably ambitious, it does demonstrate the expectations which can be made of a mature television industry. Until such time, discussions and consultations can be held with a view to reaching agreement on intentions, even if delivery of access services must wait. In the meantime, an important provision which can be applied everywhere is a requirement for any emergency, disaster or safety announcement broadcast on television to include a visual presentation of all essential information.

Supporting domestic industry

Ownership

8.10 As mentioned in the section on **Ownership**, it is usual for governments to restrict the ownership of its main broadcasters to ensure they are not controlled by foreign interests. This serves a two-fold purpose: it promotes the interests of domestic businesses above foreign ones, and retains control of broadcasting in the hands of those who ought best to understand the cultural expectations of their audiences. While these may both be admirable aims, care must be taken to ensure that indigenous companies can afford to provide a range of quality broadcast services without resorting to what is considered to be otherwise unacceptable levels of foreign investment.

Domestic production quotas

8.11 Linked in rationale to restrictions on overseas ownership are rules which set quotas for domestic programme production. Where trade areas have been established, these quotas are often extended, for example within the EU all signatories to the Television Without Frontiers Directive agree to *European* production quotas.²⁸

8.12 In Australia all commercial free-to-air television licensees must broadcast an annual minimum transmission quota of 55% of Australian programming between 6a.m. and midnight. In addition there are specific minimum annual sub-quotas for Australian (adult) drama, documentary and children's programmes.

8.13 The largest Canadian television services must broadcast a minimum of 8 hours a week between 7 and 11p.m. of Canadian drama, music and dance, variety

²⁸ Art. 4.1 of the Directive states: "Member States shall ensure where practicable and by appropriate means, that broadcasters reserve for European works... a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria."

programmes, documentaries and entertainment magazines. Other quotas apply to pay and speciality broadcasters, either as a minimum percentage of programming, or as specific levels of programme expenditure.

8.14 Canadian production quotas are also applied to boost the Canadian music industry: 35% of all music broadcast on radio between 6am and midnight must be Canadian.

8.15 There is no doubt that such quotas stimulate domestic programme production sectors. However, in poorer, less developed States with nascent production industries, it can be a mixed blessing. Some recent EU accession States believe that, although the TVWF Directive intends to protect European culture and promote European audiovisual production, smaller countries are at a distinct disadvantage to larger ones.

Independent productions

8.16 Another regulatory tool which can be used to encourage an industry sector is the imposition of quotas for programming made by independent producers (as distinct from broadcasters). The EU sets a 10% quota for independent television production, although in the UK, which has a well-developed and mature independent sector, this quota has recently been raised to 25%.

Language

8.17 As a means of both stimulating industry and protecting cultural and social values, regulations can be applied to the language of programming. Rules can vary between requiring all foreign language programming to be dubbed (or at least subtitled), to setting quotas to reflect different language use within a country. Although some regimes expect broadcasters to split their output between different languages, it is arguably preferable for different services to be licensed along language lines. This will be easier for different language speakers, who will then know which services cater to their understanding (rather than needing to seek out those specific programmes in their language). It is also likely that where different languages reflect different ethnic cultures, then the entire service will be more likely to cater to the tastes and interests of those ethnic groups.

9. Convergence

9.1 In 1998, a UK government publication said, “Digital technologies are already changing the way services are delivered, blurring the boundaries between types of service operation and means of delivery, and eroding the technological distinctions between text, audio and video. This process of change is often referred to as convergence.”²⁹

9.2 Over seven years later, we are still able to tell the difference between televisions and telephones, but it is true that some distinctions are blurring, particularly as devices become multi-functional: we can surf the internet and watch DVDs on portable games consoles, listen to the radio on our mobile phones, and interact with our televisions.

9.3 For the consumer, convergence has meant the ability to access the same content, or type of content, over different platforms using a range of devices. But for the regulator, this has caused problems. Traditional broadcast regulation was predicated on being able to control the means of transmission: either using terrestrial radio frequencies, satellite or fixed-wire (cable). In any case, it was possible to identify the broadcaster and licence them. Unlicensed broadcasters could be traced and shut down.

9.4 But now, using digital technology which removes issues of spectrum scarcity, and the ability to transmit erstwhile broadcast content over the internet, the traditional models of broadcasting regulation appear under threat.

9.5 Governments and regulators are asking, “if the content is the same, should it not be subject to the same rules, regardless of the delivery platform?” While the superficial answer may be, “yes”, a review of the original reasons for regulating broadcasting erodes that clarity.

9.6 First, there are no reasons to apply ownership restrictions to new Information Society services. These restrictions apply because traditional broadcasting (with just a few services reaching large portions of the population) is a powerful and persuasive tool and governments wish to ensure that it does not fall into the ‘wrong’ hands. Furthermore, without spectrum scarcity, and a relatively low cost of entry into the market, it is unlikely that provisions to protect plurality will be required.

9.7 Should content providers using the internet or mobile telephony be licensed? This may be possible in a small, discrete and relatively easily controlled market (such as Singapore), but it simply is not practicable on a world-wide scale. International efforts to control serious internet crime struggle to be effective; an attempt to licence content providers would only attract those providers who wished to be licensed.

9.8 But the key issue for regulators, governments and consumers is content regulation: what standards can reasonably be expected of non-traditional content carriers? It is in this area that the debate currently lies, and so far is not resolved. There are some who say that the internet and other new Information Society services

²⁹ “Regulating communications: approach convergence in the Information Age” DCMS/DTI July 1998

should only be subject to the general – rather than broadcasting – law. Others who believe that where content providers are commercial operators (for example, existing broadcasting companies, or advertisers), they should be subject to the same rules regardless of the delivery platform. And still others who say that the future lies in a mixture of self-regulatory mechanisms, such as ratings systems, and public education programmes. Perhaps the answer lies in a combination of all three.

9.9 Despite there being no consensus on how to regulate for ‘convergence’, there are a growing number of ‘converged’ regulators. In this context, a converged regulator is one which regulates both broadcasting and telecommunications, at the least.

9.10 The rationales for merging regulatory bodies, or creating a new one with responsibility across sectors are varied.

9.11 There are definite cost advantages, in that a single regulator avoids duplication of administrative and support costs. This in itself can be reason enough in small jurisdictions that would find it difficult to justify the expense of creating and running two or more separate bodies. The Information Communications and Technology Authority in the Cayman Islands is an example of a single regulator in a very small jurisdiction. It has just nine staff (and three Directors) but regulates and licences telecomms, broadcasting, and use of non-broadcast radio spectrum.

9.12 A single regulator offers a one-stop shop to the industry, which becomes more important as ‘vertical integration’ occurs between content and platform providers.

9.13 Similar regulatory processes apply across sectors, which means that staff can apply their skills more widely. For example, the Italian regulatory authority, AGCOM, divides its staff into investigation, enforcement and support (including legal and financial) departments, working across the telecommunications, broadcasting and spectrum management sectors. The potential problem with this sort of working is that it risks the loss of sectoral expertise, often built up over many years. Converged regulators need to think carefully about how best to retain expertise and at the same time share skills and knowledge across industries.

9.14 There are a range of models of convergence for regulatory authorities. The simplest is the one which applies nearly everywhere: a single regulator for both television and radio. Most broadcasting regulators have responsibility for these two separate industries which generally do not share content, but for which similar regulatory issues and concerns arise.

9.15 The next most common combination of regulatory responsibilities is for the broadcasting and telecomms industries, as applies to the regulatory bodies in Canada, Switzerland and Brazil, for example.

9.16 Other regimes have, like Italy’s AGCOM, added spectrum management to the range of duties (for example South Africa, and the FCC in the US). There is a good underlying rationale for including spectrum management with regulation of the two industry sectors which most use spectrum, as it enables the regulator to have a full understanding of the pressures placed on spectrum utilisation. Decisions such as the

allocation of spectrum between public service broadcasters and commercial operators can be taken in-house on a fully informed, expert basis.

9.17 The regulators listed above generally have certain limited competition responsibilities in relation to telecomms, such as regulation of network access issues. Another variation is the UK's Ofcom, which has wider competition powers covering cartel behaviour, over both the telecomms and broadcasting sectors. The combination of five regulatory bodies in 2003 to create Ofcom reflects a trend in the highly-regulated UK to seek to merge regulators wherever possible and create very large single bodies, instead of several small sector-specific ones. The Malaysian Communications and Multimedia Commission combines spectrum management with regulatory and competition powers over broadcasting, telecomms, and on-line services. It also regulates the postal service.

9.18 Thus a choice of options is available. Different solutions will appeal to different jurisdictions, depending on the degree of vertical integration in the relevant industries, cost pressures, and regulatory fashion.

[References are to paragraphs in the Guidelines]

A. Definitions

Definitions of the terms used in the Law, such as:

1. “broadcasting”
2. “television broadcasting”
3. “radio broadcasting”
4. “broadcaster”
5. “advertising”
6. “sponsorship”.

B. Objects of the Law

1. The specific public policy objectives that the law is intended to cover [2.13, 3.39; Annex 2]
2. Freedom of expression should be guaranteed [2.9-2.11]
3. The editorial independence of broadcasters should be guaranteed.[2.12]

C. The Broadcasting Commission [2.21; 3.1-3.21]

1. Appointment of Members [2.21.2; 3.22-3.24]
 - a. Qualifications and disqualifications for appointment [3.25-3.27]
 - b. Process of Appointment [3.28]
 - c. Appointment of Chairman and Deputy Chairman [3.44]
 - d. Term of Office, and whether it is renewable [2.21.2]
 - e. Conflicts of Interest [2.21.5; 3.45-3.46]
 - f. Members’ remuneration [2.21.2]
 - g. Termination of appointment [2.21.3; 3.30]
2. Commission processes
 - a. Arrangements for meetings [3.47-3.49]
 - b. Quorum [3.43]
 - c. Minutes [3.50-3.52]
3. Accountability
 - a. Annual report and accounts [3.35]
 - b. Public hearings [3.36]

4. Funding [3.31]
 - a. Sources of funding [2.21.4; 3.32; 3.34]
 - b. Agreeing annual budget [3.33]
 - c. Power to set fees for applications, licence awards, and annual licence fees [5.13-5.14]
5. Information powers
 - a. Power to demand information pursuant to regulatory functions [5.21]
 - b. Power to demand copies of recordings of broadcast output [5.22; 7.120-7.121]

D. Jurisdiction [4]

1. The basis upon which the Broadcasting Commission has jurisdiction: use of nationally assigned radio-spectrum, cable and satellite. [4.1-4.9]
2. Power for the Broadcasting Commission to recommend that government proscribes illegal/unacceptable services originating from outside the jurisdiction. [4.10-4.11]

E. Licensing

1. Unlicensed operators – illegality [5.3]
2. Advertisement Process [5.44-5.45]

Terms to be included in the advertisement (type of licence, coverage area, term of licence, major format obligations, deadline for applications)
3. Application Process [5.46-5.47]

Applications to be in prescribed form, submitted by due date, with application fee
4. Award Process
 - a. Basic criteria for licence awards will be compliance with the ownership rules, and ability to fund the service for the licence term. Additional criteria will vary according to the class of licence, and whether an auction or competitive tender is involved: [5.49-5.53]
 - b. National terrestrial television services[5.36-5.37]
 - c. Local/regional terrestrial television services[5.55]
 - d. Community television services [5.39-5.41]
 - e. National radio services [5.55; 5.57]
 - f. Local/regional radio services [5.38; 5.57]
 - g. Community radio services [5.39-5.41]
 - h. Satellite services [4.9]
 - i. Cable services [4.3]
 - j. Digital services [2.35; 5.58-5.60]

5. Renewal Process [5.11-5.12]
 - a. Date at which a licence will be considered for renewal
 - b. Whether there is a presumption of renewal, or full re-advertisement

6. Licence Conditions [5.6-5.22]
 - a. Requirement that licensees will meet conditions set out in their licences reflecting the terms under which the licence was advertised, and as reflected in their applications
 - b. Obligation that they will meet the ownership requirements at all times
 - c. Obligation to comply with all legal requirements, including any Codes issued by the Broadcasting Commission under this Law or any secondary legislation. [5.16]

7. Amendments to Licence Conditions
 - a. Amendments made by the Broadcasting Commission
 - b. Amendments proposed by the licensee

F. Ownership rules

1. Legal Person [6.4-6.5]
2. Fit and Proper [6.6-6.7]
3. Prohibited and restricted owners [2.33; 6.8-6.14; 8.10]
4. Definition of Control [6.25-6.27]
5. Changes of Control [6.29-6.30]
6. Limits on ownership: within media, within localities, cross-media [2.36; 6.15-6.24]

G. Content standards

The following apply to programmes:

1. Accuracy and impartiality in news [2.17-2.18; 7.4-7.8]
2. Religious programmes [2.20; 7.54-7.58]
3. Privacy and the right of reply [2.16; 4.35-7.45]
4. Party political and party election broadcasts [7.9-7.12]
5. Election coverage [7.9-7.12]

The following will apply to programmes and advertising:

6. Protection of minors [2.29; 7.13-7.27]

Obligations regarding scheduling, warnings or ratings.
7. Offence to human dignity [7.28-7.32]
8. Protection against harm [7.33-7.34]
 - a. Actual harm, such as on-air hypnosis, or flashing lights
 - b. No encouragement of behaviour which is harmful to health or safety
9. Incitement to crime and disorder [7.46-7.50]

Any proposal to apply a significant sanction will be considered at a public hearing
10. Incitement to hatred or contempt on grounds of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability. [2.19; 7.51-7.53]

The following will apply to advertising and sponsorship:

11. Separation of advertising and programming [7.104]
12. Surreptitious advertising/product placement [7.105]

The following will apply to advertising

13. Prohibited advertisers [2.30; 7.81-7.84]
14. Restricted advertisers [7.85-7.87]
15. Advertising must not be misleading [7.88; 7.90-7.93]
16. Powers to direct the removal or rescheduling of advertising [7.100-7.102]
17. Amount and scheduling of advertising [2.28; 7.89; 7.94-7.98]

The following will apply to sponsorship:

18. Identification of sponsor, and the fact the programme is sponsored [7.106]
19. Prohibited and restricted sponsorship [7.107]
20. Prohibited and restricted sponsors [7.106]

The following will apply to programmes, advertising and sponsorship

21. The power to write and apply Codes [7.108-7.114]

H. Emergency Broadcasts

Reserve the right for the government or relevant Ministry to direct the broadcast of announcements and information in the event of an emergency. [5.18]

H. Copyright [5.17]

Broadcasters shall not broadcast any works outside of the terms agreed with the rights holders.

I. Retention of Recordings [7.120-7.121]

The obligation of broadcasters to retain recordings for a set period, and to provide recordings to the Broadcasting Commission for the exercise of their regulatory functions.

K. Production Quotas [2.21; 2.34]

1. National production quotas [8.11-8.15]
2. Indigenous language quotas [8.17]
3. Independent Production Quotas [8.16]

L. Sanctions [5.19-5.20]

1. List of sanctions [7.68-7.77]
2. Requirement for the Broadcasting Commission to publish its policy on the application of sanctions, and its sanctions procedure [7.64-7.67]
3. Right of appeal (with implementation of sanction, notwithstanding an appeal is pending) [2.15; 3.53-3.56]

MODEL REGULATORY OBJECTS

I. CRTC: Canada

The Canadian broadcasting system should be regulated and supervised in a flexible manner that

- (a) is readily adaptable to the different characteristics of English and French language broadcasting and to the different conditions under which broadcasting undertakings that provide English or French language programming operate;
- (b) takes into account regional needs and concerns;
- (c) is readily adaptable to scientific and technological change;
- (d) facilitates the provision of broadcasting to Canadians;
- (e) facilitates the provision of Canadian programs to Canadians;
- (f) does not inhibit the development of information technologies and their application or the delivery of resultant services to Canadians; and
- (g) is sensitive to the administrative burden that, as a consequence of such regulation and supervision, may be imposed on persons carrying on broadcasting undertakings.

II. ICASA: Republic of South Africa

The object of this Act is to establish and develop a broadcasting policy in the Republic in the public interest and for that purpose to--

1. contribute to democracy, development of society, gender equality, nation building, provision of education and strengthening the spiritual and moral fibre of society;
2. safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;
3. encourage ownership and control of broadcasting services through participation by persons from historically disadvantaged groups;
4. ensure plurality of news, views and information and provide a wide range of entertainment and education programmes;
5. cater for a broad range of services and specifically for the programming needs in respect of children, women, the youth and the disabled;
6. encourage the development of human resources and training, and capacity building within the broadcasting sector especially amongst historically disadvantaged groups;
7. encourage investment in the broadcasting sector;

MODEL REGULATORY OBJECTS

8. ensure fair competition in the broadcasting sector;
9. ensure efficient use of the broadcasting frequency spectrum;
10. provide a clear allocation of roles and assignment of tasks between policy formulation, regulation and service provision as well as articulation of long-term and intermediate-term goals;
11. provide for a three tier system of public, commercial and community broadcasting services;
12. establish a strong and committed public broadcasting service which will service the needs of all South African society;
13. ensure that the commercial and community licences, viewed collectively, are controlled by persons or groups of persons from a diverse range of communities in South Africa;
14. ensure that broadcasting services are effectively controlled by South Africans;
15. integrate multi-channel distribution systems into the broadcasting framework;
16. provide access to signal distribution services for content providers;
17. provide access to signal distribution services for broadcast content receivers;
18. encourage the development of local programming content.

III. OFCOM: United Kingdom

General duties of OFCOM

- (1) It shall be the principal duty of OFCOM, in carrying out their functions-
 - (a) to further the interests of citizens in relation to communications matters;and
 - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- (2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following-
 - (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
 - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
 - (d) the maintenance of a sufficient plurality of providers of different television and radio services;

MODEL REGULATORY OBJECTS

(e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;

(f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both-

(i) unfair treatment in programmes included in such services; and

(ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to-

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances-

(a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;

(b) the desirability of promoting competition in relevant markets;

(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

(d) the desirability of encouraging investment and innovation in relevant markets;

(e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;

(f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;

(g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;

(h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;

(i) the needs of persons with disabilities, of the elderly and of those on low incomes;

(j) the desirability of preventing crime and disorder;

(k) the opinions of consumers in relevant markets and of members of the public generally;

(l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;

(m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.