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FOREWORD

The freedom of expression is a pivotal component of our individual development – as human beings and as "political animals" – and to improve and radicalize democracies.

The invention of the press therefore constitutes the turning point for the debates about freedom of expression. Guaranteeing each individual's right to freely seek, receive or impart information while interacting with other individuals ceased to be enough. It was necessary to go beyond, upholding this right allied by an intermediary that radically magnified the outreach of opinions, information and ideas: the mass media.

Under this perspective, many foundational pillars of the contemporary debate on human rights (the Glorious, American and French Revolutions; the writings of John Milton, Alexis of Tocqueville and John Stuart Mill, among others) dedicated substantial attention to freedom of expression and its links to the mass media.

The idea of a free, independent, plural, and diversified media has become the ideal to be achieved in order to fully ensure the right to seek, receive and impart information. Finding the appropriate format for State participation in this equation of fostering media systems endowed with these characteristics have quickly constituted one of the most relevant pieces of the puzzle.

This challenge became particularly complex when broadcasting took over the system's leading role in the beginning of the 20th Century. The possible hypothesis that each legitimate interest from the different social groups might have been voiced in their own newspapers did not prove to be true in relation to television and radio. The electromagnetic spectrum is a finite public resource and needs to be regulated, at least as far as frequencies are concerned.

Therefore, media regulation started its development hand in hand with guaranteeing, promoting, and protecting freedom of expression. In fact, the ultimate goal for regulating media should be to protect and deepen this fundamental right.

For this reason, the most important international instruments on human rights (the United Nations Charter; the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Conventions on the Rights of the Child, on the Protection and Promotion of Diversity and Cultural Expressions, on the Elimination of All Forms of Racial Discrimination, and on the Rights of Persons with Disabilities) address to the matter in different perspectives. The same holds true for regional human rights instruments and for legal instruments of the world's most consolidated and longevous democracies.

The internal "division of labor" of the United Nations System has delegated to UNESCO the responsibility of working through international cooperation to guarantee that freedom of expression is effectively ensured through a free, plural, independent and diversified media system, among others. To fulfill this mandate the Organization has availed itself of different strategies. One of the most recent and comprehensive ones is the delivery of a set of indicators to assess media development in various nations (See: *Media Development Indicators: a framework for assessing media development*).

In light of the elements proposed by the *Media Development Indicators*, UNESCO in Brazil, in

partnership with Ford Foundation, decided to offer a high-level technical contribution to the discussion that Brazilian society has to a greater or lesser extent been waging over its media system, at least since its Constituent Assembly. Among the highlights over the last years' discussions are: the final format of the Social Communication Chapter in the Brazilian Constitution, regulation of the articles in the Child and Adolescent Statute on relations between children and the media, the creation of the Social Communication Council, the opening of the sector to foreign capital, the cancelling of the Press Law, the definition of digital television as well as paid audiovisual services model, and a new regulatory framework for communication.

In this sense, we offer to the key players involved in building the different aspects of a regulatory policy for the media sector a three-article-series of studies that may be useful to decision-making processes, which will need to be taking place in the coming years.

Upon request to UNESCO international consultants Toby Mendel and Eve Salomon, who have together worked on similar issues in more than 60 countries, have signed two texts of this series:

1. *The Regulatory Environment for Broadcasting: an International Best Practice Survey for Brazilian Stakeholders*. The authors discuss how media regulation is addressed in the international arena and in 10 democracies (Canada, Chile, France, Germany, Jamaica, Malaysia, South Africa, Thailand, United Kingdom and Unite States) as compared to the Brazilian status quo. To do so they build upon the following central axes: Independent Regulatory Authorities, Concessions, Content Regulation and Self-regulation, Public Broadcasters, Community Broadcasters and Ownership regulation. After each thematic session, they have discussed major recommendations for the Brazilian case. It is this article that our esteemed readers hold in hands.

2. *Freedom of Expression and Broadcasting Regulation* defends that regulatory policy must focus on strengthening freedom of expression.

In addition, the UNESCO international consultant Andrew Puddephatt weaves a discussion on The Importance of Self Regulation of the Media in Upholding Freedom of Expression.

Finally, we would like to highlight that a particular discussion about internet regulation was not included in these studies. This is an ongoing debate for the UN System; therefore regulatory international standards are not clearly defined. However, we believe that the general principles of freedom of expression, of a transparent and independent regulatory policy and of a fully protection of human rights should also be a central component of the debate about internet.

We hope the three above mentioned articles will provide an effective reference tool to support the ongoing debate on the matter in the Brazilian public sphere.

Enjoy your reading!

Introduction

This Report provides an introduction to regulatory systems for broadcasting based on international standards and better practice from countries around the world. It also provides general findings on the situation in Brazil, assessed against international standards and better practice, along with recommendations for change.

The overall aim of this Report is to provide some guidance to Brazil as it considers reform of the regulatory system for broadcasting. It aims to give Brazilian regulators and other stakeholders a better understanding of how the complex matter of broadcast regulation is dealt with in countries around the world and to help them understand how the current framework for regulation of broadcasting in Brazil compares to international standards and better practices. Finally, it is hoped that the Report will assist local stakeholders in making choices about how to improve the broadcasting regulation in Brazil.

The Report is organised along thematic lines, under seven main headings, namely: Independent Regulatory Authorities, Licensing, Content Regulation, Positive Content Obligations, Public Service Broadcasters, Community Broadcasters and Other Issues. The Report focuses primarily on the regulatory frameworks for private, commercial broadcasting. There are, however, specific chapters dealing with public service broadcasting and community broadcasting, given that these are important parts of a democratic broadcasting ecology. In each thematic section, the key issues are outlined, and better practice approaches are highlighted. This is then substantiated by reference to examples of actual practice in other countries, with particular emphasis on ten comparative countries, namely Canada, Chile, France, Germany, Jamaica, Malaysia, South Africa, Thailand, the United Kingdom and the United States.

In choosing comparator countries, we looked for examples from all over the world, both small jurisdictions (Jamaica) and large, diverse countries (South Africa, Canada and the United States). We included established democracies (the United Kingdom and France), emerging ones (Thailand and Malaysia), and a couple with a chequered history (Germany and Chile). Although Brazil is one of the so-called 'BRIC' countries, we did not survey Russia, China or India in the Report. Neither Russia nor China is a democracy and in both countries the State exercises tight and direct control over the media. The relevance of India to Brazil is limited as its private television broadcasting sector is nascent, heavily concentrated in the pay television sector, and competing with a strong, incumbent public broadcaster.

The standards used in this Report are based on a wide variety of sources including the Universal Declaration of Human Rights, UNESCO's Media Development Indicators Framework, UNESCO/CBA's Guidelines for Broadcasting Regulation, declarations of the international mechanisms for promoting freedom of expression (made jointly by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples' Rights) Special Rapporteur on Freedom of Expression and Access to Information), and authoritative statements by regional human rights bodies, including the Inter-American and European Courts of Human

Rights, the Inter-American Commission on Human Rights and the Council of Europe. The Report is also informed by the experience of the authors who, between them, have worked on media-related projects in some 60 different countries.

When we refer to 'broadcasting' in this Report, unless otherwise indicated, we mean radio and television programme services for reception by the general public, whether carried via terrestrial transmitters, cable or satellite, whether in encoded or unencoded form, and whether they are available for free or upon payment of a fee.

This report does not cover communication services delivered over the Internet, even though some of these do resemble broadcasting in certain respects. Countries around the world are beginning to examine whether, and if so how, basic content requirements can be applied to Internet delivered content which, to all intents and purposes, looks and feels like television. However, it only makes sense to consider this after a modern regulatory framework for traditional broadcasting has been established and, even then, this is appropriate only insofar as such rules would be appropriate for Internet-delivered services. In practice, there is not yet a business model which supports Internet-only "television" services. Most Internet "television" services are retransmissions of traditional television services, which are already subject to regulation.

The term 'regulation', as used in this Report, refers, for the most part, to legal regulation, that is, regulation based on legal instruments either approved directly by the legislature or issued under delegated authority by a Minister or statutory regulator.

However, some aspects of broadcasting regulation, such as oversight of programme content and advertising, are amenable to self-regulation. By 'self-regulation' we mean a system of regulation which is set up by the relevant industry sector(s), such as broadcasters, or advertisers and/or media owners in the case of advertising. In most cases, self-regulation involves the codification of rules, for example in a code of practice, and the establishment of a public complaints system. The latter involves the creation of an arms' length body (that is, a body consisting of people – usually both industry representatives and independent members – who are not responsible for writing the code of conduct) to adjudicate complaints. Members of the public may lodge complaints with this body where they believe that the standards in the code have not been respected. Where a complaint is upheld, redress is provided, for example in the form of a warning to the broadcaster or a requirement for it to broadcast a statement acknowledging the breach.

There are also examples of co-regulation. For example, the law in Australia requires broadcasting industry groups to develop codes of practice, in consultation with the regulatory authority, concerning such topics as promoting accuracy and fairness in news and current affairs, and protecting children from harmful programme material.[1]

The concept of media literacy is increasingly critical to achieving a positive overall media environment. This has been defined as follows:

> Media Literacy is a 21st century approach to education. It provides a framework to access, analyze, evaluate and create messages in a variety of forms – from print to video to the Internet. Media literacy builds an understanding of the role of media in society as well as essential skills of inquiry and self-expression necessary for citizens of a democracy.[2]

Media literacy serves a variety of social goals. It helps citizens to understand media output, to apply critical analyses to it and to use digital technologies to engage in mass communication themselves. A more media literate viewer will, for example, be able to detect political biases being advocated by a participant in a talk show and to understand that even 'realistic' television programmes may not correspond to what really happens in society. As citizens become more media literate, it becomes less necessary to rely on formal instruments to regulate broadcast content, since the audience acts as its own critic and reviewer.

Media literacy also enables viewers and listeners to understand their rights in relation to media output, and to be able to assess whether or not it accords

1. Broadcasting Services Act, 1992, section 123.
2. See Centre for Media Literacy. Available at: <http://www.medialit.org/reading_room/rr2def.php>.

with acceptable standards. At its simplest, a degree of media literacy is required to understand the difference between a documentary and a drama, and to know that a documentary should be accurate and honest. Because self-regulatory systems are reliant on complaints in order to assess compliance, they will only work in countries where citizens are media literate, know what to expect from broadcasters, and are prepared to complain. In countries that do not have a strong complaints culture, it is preferable to have a statutory regulator which can monitor broadcasting directly to ensure compliance with legal and code rules. Examples of self-regulation are discussed in the section on Content Regulation.

A number of different methodologies were used in compiling this Report. Local researchers conducted a legal and literature survey on local documentation relevant to broadcast regulation. The authors supplemented this with extensive desk research into both international standards and the comparative practice in the ten comparator countries. In August/ September 2010, the authors spent a week in Brazil discussing an initial version of their results, as well as the regulatory approach taken in Brazil, with a range of Brazilian interest groups, ranging from government agencies to broadcasters to civil society representatives. After that visit, they conducted further consultations via email, including with additional stakeholders, to better understand the current situation in Brazil. The initial results, in the form first of a comparative study and later with findings and recommendations for Brazil, were presented to local stakeholders, who were given a chance to provide feedback. Follow-up missions to conduct consultations hosted by the Government of Brazil and local civil society groups were also conducted, providing an additional means of gathering local input into the Report.

A list of all of the groups that were consulted is provided in the Annex.

Overall Assessment of the Situation in Brazil

Brazil is a large, diverse country served by many different radio and television services. These have developed in the absence of any obvious overarching broadcasting policy, resulting in a system with powerful incumbents who are understandably wary of competition or of restrictions on their broadcasting operations. They have developed de facto national television networks using affiliates, despite licensing being restricted to local licences with limits on the number of licences per operator. Open-air licences are granted directly by the Congress on the advice of the Ministry of Communications. It is not clear what the basis has been for deciding between competing licence applications. Analogue remains the most widespread and popular form of transmission. Although satellite and cable services are available, their audiences remain modest, although growing.

Competition has intensified, with the growth of a number of national networks and the increasing market penetration of pay-TV options. Concerns have been expressed about the allegedly anti-competitive behaviour of the larger network groups. We are not in a position to judge whether or not there are abuses of fair competition rules, but there does not appear to be any move to investigate whether complaints have merit.

The broadcasting environment in Brazil is characterised by a very strong commercial broadcasting sector, alongside weak public broadcasting and community broadcasting that has some way to go to fulfil its full potential. This has led to a situation where at least some commercial broadcasters have taken on something of a public interest role, but it has also deprived the public of the diversity and pluralism that a more balanced broadcasting ecology would provide.

Until recently, there have been no attempts to apply content standards to broadcast programming, whether in the form of restrictions on harmful content or in the form of positive content obligations. There is a system of self-regulation for advertising, although certain categories of advertising are subject to statutory regulation on health and safety grounds.

In recent years, limited content regulation has been introduced with the statutory Children's Code. Whilst this covers matters which might affect the moral or psychological well-being of minors, it does not cover other areas of content regulation which are generally applied around the world. There are, of course, laws of general application which broadcasters must follow, for example laws against hate crime and discrimination. However, in all cases, enforcement is through the office of the Public Prosecutor. This is an unwieldy, time-consuming and expensive process and does not have the advantages of the administrative procedures used in other countries.

Brazil has stated its intention to switch over to digital terrestrial broadcasting by 29 June 2016. This provides an opportunity to introduce comprehensive new broadcasting legislation well in advance of switch-off. There is sufficient time to consider what the broadcasting landscape should look like post 2016, and the availability of additional spectrum expands the range of possible options, easing the way for reforms. In line with international standards, it is for the Brazilian government to determine policy, but applying and enforcing it should be the responsibility of an independent regulatory authority.

The Constitution of Brazil specifically envisages the introduction of laws to regulate broadcasting. Article 221 of the Constitution requires broadcasters to comply with principles which include the promotion of regional and national culture, independent production, and general content standards which respect ethical and social values. Article 222.3 of the Constitution proposes that these principles be enshrined in specific laws, and Article 220.3.II provides for federal legislation to establish a complaints system for viewers and listeners who encounter content which breaches the standards of Article 221. Articles 220.3 and 4 also refer to necessary restrictions to advertising of products and services which may be harmful to health or the environment.

There appear to have been many attempts to introduce legislation in Congress which would implement these Constitutional obligations and bring Brazil more closely into line with international standards, yet these Bills have either been rejected or languished in legislative limbo, often many years after introduction. We hope that our report, the existence of the Task Force organised by SECOM to review the communications regulatory framework, and the impending move to digital television will provide the necessary impetus to enact the framework for broadcasting envisaged by the Constitution.

The Recommendations

Based on research, international standards and input from local stakeholders, this Report includes recommendations for change to the broadcasting regulatory framework in Brazil to enable it better meet the best practice standards we have identified. Our recommendations are subject to the following caveats:

1. As broadcasting differs in every country, so too should broadcast regulation. There is no perfect 'off the shelf' solution; each country must endeavour to find what works best bearing in mind cultural and social norms, human rights standards and the nature of the existing broadcasting environment.
2. Our proposals are general in nature. We are not offering legal drafting or detailed suggestions. Details must be resolved after additional consideration and consultation in Brazil.
3. Many of these recommendations are possible only if they are implemented by an independent regulatory authority. Otherwise, they could create a possibility of abuse of the system for political purposes and thereby harm rather than promote freedom of expression in Brazil.
4. We have sought to take proper account of the existing broadcasting and legal infrastructure in Brazil, so that all proposals are achievable without too much unravelling of existing arrangements. Where substantial changes are required (for example amendments of the Constitution), we make this clear and offer potential compromises as a route towards excellence.
5. When making recommendations for the Brazilian broadcasting framework, we make no distinction between pay-TV, systems using conditional access, free-to-air 'open' TV, and free access via open satellite, unless this is specifically referred to.[3] Internationally, the terms "broadcasting" and "television" are used to refer to audiovisual media services provided simultaneously to more than one user, regardless of the nature of the contractual arrangements (subscription) between the provider and the end user. Furthermore, where they are directed at broadcasters in general, the recommendations apply to public as well as private broadcasters.

3. We do not, however, include the Internet in this. At this point, the appropriate standards and approach for Internet regulation remain unclear, even in the most developed broadcasting systems. It would, therefore, be inappropriate for us to make recommendations on this for Brazil at this time.

Independent Regulatory Authorities

A sound regulatory framework involves both the setting of strong policy objectives and rules through the law, and the establishment of an independent regulatory authority which will administer the law and apply the rules.

Four different players are normally involved in overall regulation: parliament, which sets the overall rules, government – for example through a ministerial department – the courts and an independent regulatory authority. Certain rules, for example those found in the criminal law, will always remain the preserve of parliament and the courts. Others, including broadcast regulation, should be applied primarily through bodies which operate at arm's length from government, albeit subject to overriding policy objectives set by government and judicial oversight by the courts.

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. This is also an established requirement under international law. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions, especially during 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, broadcasting service providers need to be free of political constraints so that they are able to provide viewers and listeners with a wide range of sources of news and information.

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 those countries where the government (or a government-controlled regulator) issues licences, most broadcasters – unsurprisingly – tend overtly to support the government.

An independent authority (that is, one which has its powers and responsibilities set out in an instrument of public law and is empowered to manage its own resources, and whose members are appointed in an independent manner and protected by law against unwarranted dismissal) is better placed to act impartially in the public interest and to avoid undue influence from political or industry interests. This ability to operate impartially is vital to protect freedom of expression, which is necessary in a functioning democracy. Independence is also required for the proper operation of all of the major functions of broadcasting regulation, including licensing, applying content standards and positive content obligations, and ownership and competition regulation.

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. In the last few years we have seen licensing decisions turn to protest and violence. In Armenia, for example, this happened when a government-sponsored broadcasting regulator revoked the licence of a popular television station which was perceived to support the opposition party. Since then, Armenia has changed its law to create a more independent regulator, putting more distance between the State and the regulator, and de-politicising broadcast regulation.

Throughout the former Soviet block, 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 State control over the regulation of broadcasting. Even so, newer democracies such as the Czech Republic and Poland have sometimes struggled to ensure that their broadcasting regulators are sufficiently independent to stave off government interference and political pressure. There are now 49 independent broadcasting regulatory authorities in Europe (more than one in some countries), with only a handful remaining under direct government control.[4]

The challenge is to create an appropriate separation – and interplay – between the executive and the regulator, based on an understanding of the clear benefits of releasing broadcasting from executive control, while still subjecting the regulator to clear and proportionate legislative constraint, and appropriate executive policy-making.

Best practice suggests that broadcasting regulators should ideally consist of individuals with no personal connections to political or industry interests, and be nominated and appointed through a process which is itself detached from both politics and broadcasting, although this ideal is difficult, perhaps impossible, to realise fully. It is nonetheless a worthy target, although each country must find its own way of aspiring to this goal. Indeed, there are numerous ways of appointing and constituting regulators which can help bolster their independence.

Civil society can exert a major positive influence on the independence of the regulator, including through advocacy against instances of political interference. In countries with a developed and organised civil society, there tends to be greater consultation around the process establishing the regulator. The German example is especially noteworthy due to its emphasis on community representation. Rather than striving for impartiality, the German model seeks to balance different community interests by allowing various groups (such as the Catholic Church, the trade unions and civil society groups) to nominate representatives to serve on the oversight bodies of the regional regulatory authorities. In other words, the members of the councils represent different interest groups, but the diversity of the interests represented is meant to ensure the impartiality and independence of the institution as a whole. In contrast to regulatory mechanisms which are meant to be insulated from bias, the German model internalises the biases of different social and ethnic groups.[5]

In nations with developed legal and democratic systems, such as Canada, the independence of the regulatory body may be implied rather than explicitly laid out in law. The Broadcasting Act,[6] which created the Canadian Radio-television and Telecommunications Commission (CRTC), Canada's regulatory body, contains no references to that body's independence. This is because, under Canadian common law, administrative bodies are entitled to a wide measure of autonomy. Furthermore, the independence of the CRTC is implicit in its structure and role, so there was no need for the legislature to spell it out.

By contrast, in countries with underdeveloped civil societies, such as Malaysia, regulatory authorities tend to be more closely tied to the government and subject to political interference in their work.

Even where a truly independent regulatory authority does not exist (or cannot yet, due to the level of democratic social development), there are other indicators to demonstrate both autonomy (as distinct from independence) and good governance. A de minimis description of an autonomous regulator is offered by Prof Mark Thatcher of the London School of Economics referring to the IRA's formal institutional position: "the agency has its own powers and responsibilities given under public law; it is organisationally separated from ministries; it is neither directly elected nor managed by elected officials".[7]

Remit and Powers

Independent regulatory authorities should have their remit and jurisdiction, as well as their powers, set out in law. The remit should include a clear statement of the authority's regulatory and policy

4. These are Belarus, Iceland, Lichtenstein, Monaco and Russia.
5. See: http://www.iuscomp.org/gla/statutes/LRGNW.htm for a translation of the Broadcasting Act for North-Rhine Westphalia. The provisions governing appointments to the regional council are located in Article 55.
6. Available at: http://laws.justice.gc.ca/en/C-22/FullText.html.
7. West European Politics 2002, p. .127.

objectives, which should include an express reference to protecting freedom of expression (although this might separately be a constitutional right).

The regulatory authority responsible for broadcasting (and telecommunications) in the United States is the Federal Communications Commission (FCC), an agency established under the Communications Act of 1934. As specified in the Communications Act, the Commission's mission is to "make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."

In Chile, Law Nº 18,838 of the Home Office creates the National Television Council (CNTV). Its objectives are to ensure "the correct operation of television services", i.e. to ensure respect for the nation's moral and cultural values, the dignity of individuals, protection of the family, pluralism, democracy, peace, environmental protection and the spiritual and intellectual education of children and youths within such framework of values.[8]

Ofcom, in the United Kingdom, was set up by the Office of Communications Act 2002,[9] while details of its remit and powers are contained in the Communications Act 2003.[10] Ofcom is the regulatory body for telecommunications, spectrum management and broadcasting. Ofcom's duties with regard to broadcasting are clear, namely to secure:

- 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;
- the maintenance of a sufficient plurality of providers of different television and radio services; and
- 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;
- 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 unfair treatment in programmes included in such services; and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.[11]

The Act is also very clear about Ofcom's powers, which include licensing, monitoring, dealing with complaints and issuing sanctions. Ofcom is given the power to develop and apply guidelines explaining the basic content standards set out in the Act, and to develop and publish its own internal procedures.

The Malaysian Communications and Multimedia Commission (MCMC) was created by the 1998 Communications and Multimedia Act (CMA),[12] which governs broadcast regulation, along with the Communications and Multimedia Commission Act.[13] The MCMC is responsible for telecommunications, broadcasting and the postal service. Every three years, the MCMC is required to review the rules and regulations under the CMA and either adapt them to changing requirements, or recommend legal changes to Ministers.

These Acts together set out clearly the policy objectives and powers of the MCMC, which mix consumer and public interest objectives with those which promote business interests (such as developing civil society and nurturing local content and culture, while establishing Malaysia as a major global communications hub with developing industry capabilities). The underlying principles of the legislation are transparency, technological neutrality, flexibility and transparency. Regulatory intrusion has been reduced by applying generic provisions, and self-regulation has been promoted through the establishment of an industry forum to develop and apply voluntary codes.

Although its objectives and powers are clear, the MCMA is not an independent regulatory authority. It is directly responsible to the Minister of Energy,

8. An English version of the law is available at: http://www.cntv.cl/link.cgi/EnglishVersion/1288.
9. Available at: http://www.opsi.gov.uk/acts/acts2002/ukpga_20020011_en_1.
10. Available at: http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1.
11. Sections 3(2)(c)-(f) of the Communications Act 2003.
12. Nº 588 of 1998.
13. Nº 589 of 1998.

Communications and Multimedia. The Minister appoints the Commission which consists of a chair, three government representatives and, currently, four other members. The Minister may dismiss Commissioners at any time without giving reasons for doing so. The Chairman also acts as CEO, with other Commissioners also have executive roles. The Minister also controls the budget for the Commission. Funding is mixed, coming from a combination of State funds, licence fees, administration charges, levies and monies earned from consultancy and advisory services.

Not all regulatory authorities are national in scope. Germany and Spain are both countries where regulators are established on a state or regional basis, with remit only over those broadcasting companies that are registered in their geographic area. The German authorities all work to a single federal law, applying the rules in each individual Land (state), thereby promoting consistency throughout the country. By contrast, Spain has three regulatory authorities, covering, respectively, Andalusia, Catalonia and Navarra. Not all of Spain is covered and there is no overall federal authority.

The Board

To secure the independence of regulatory authorities, a number of conditions should be in place. The authority should be overseen by an independent board. There should be an appointments process for members of the board which is set out in a legal instrument, which is transparent and which promotes the appointment of members who are as independent of political or financial interests as possible. This means that the board does not have a majority of members representing a single interest or faction, and members should not receive a mandate or take instructions from any external person or body. Furthermore, and importantly, the chair should be – and be seen to be – independent.

In 1995, a new process of 'independent appointments' was put in place for all public appointments in the United Kingdom. Although the relevant Secretary of State continues to appoint the non-executive members of Ofcom, appointments are made on the basis of recommendations reached through the standard public appointments procedure. This stipulates that all public appointments should be based on merit and subject to scrutiny by at least one accredited independent assessor. All the candidates put forward for ministerial selection should meet these criteria.[14]

Ofcom's board consisting of five members and a chairman, appointed through the independent appointments process, together with three executive members, selected from the senior staff group and including the Chief Executive Officer. The current membership of Ofcom includes a former broadcasting manager and newspaper editor, as well as a competition economist.

The Jamaican Broadcasting Commission (JBC) was established by the Broadcasting and Radio Re-Diffusion Act. The Act provides for a novel way of securing the political independence of Commission members: between 5 and 9 members are to be appointed by the Governor-General after consultation with the Prime Minister and the Leader of the Opposition. Any serving politician, and anyone who sought election within the past 7 years (whether or not they were successful), is disqualified from appointment.

In Chile, the law makes it clear that the National Television Council (CNTC) is to be an autonomous public authority that is functionally decentralised, with its own legal capacity and accountable to the President through the Ministry of General Secretary Government (Ministerio Secretaria General de Gobierno). Council members should be individuals with relevant personal and professional virtues, in the opinion of both the President and the Senate. Members sit for an 8-year term of office and are re-elected by halves every four years. The President appoints the 11 members with the agreement of the Senate. The chair is appointed by the President alone.

In practice, commentators express satisfaction with the make-up and working of the Council and are of the view that the CNTV is representative of the range of political opinion in Congress.[15] The

14. See the website of the Office of the Commissioner for Public Appointments, at: <http://www.publicappointmentscommissioner.org/>.
15. See *Limits of Tolerance: Freedom of Expression and the Public Debate in Chile*, Chapter VI, The Regulation of Television, 1998, Human Rights Watch. Available at: <http://www.hrw.org/reports98/chile/>.

composition of the current Council includes 6 lawyers, one former mayor, one former Minister and three journalists. The Chairman is a former Managing Director and Chair of the National Television service.

In South Africa, the Independent Communications Authority of South Africa (ICASA) is, as its name makes clear, intended to be an independent authority. Its governing legislation sets out a clear procedure for appointment of members of its governing board:

The Council consists of seven councillors appointed by the President on the recommendation of the National Assembly according to the following principles, namely—

(a) participation by the public in the nomination process;

(b) transparency and openness; and

(c) the publication of a shortlist of candidates for appointment, with due regard to subsection (3) and section 6.[16]

Subsection 3 requires members to be committed to freedom of expression and other positive social values, to have relevant expertise and, collectively, to be representative of South Africa as a whole. Section 6, for its part, prohibits individuals with strong political connections, as well as those with vested interests in telecommunications or broadcasting, from becoming members.

The dismissal of board members can also be used as a lever of political power, either as a threat or by actually removing members. To counteract this possibility, any power to dismiss board members should be limited to physical or legal incapacity, conflict of interest, failure to play an active role on the board or serious criminal or other misbehaviour.

In Jamaica, a member may only be removed from office before the expiry of his or her term by a resolution approved by at least two-thirds of each House of Parliament. Existing Members of the Jamaican Broadcasting Commission include educationalists, policy experts and lawyers. They have the power to create advisory committees if additional expertise is required. The Act enables the JBC to set its own procedures, subject to setting a quorum of 3 members.

In the FCC, there are five commissioners, including a Chair, all of whom are appointed by the President and confirmed by the Senate. They serve for 5 years with no provision for dismissal. Up to three commissioners may be members of the same political party, thereby indicating that the FCC, although formally labelled an 'independent agency', is not 'independent' according to international standards.

Members of the FCC are, however, prevented by conflict of interest rules from holding any financial interest in any of the sectors they regulate. Clear rules on conflicts of interest for both candidates and appointees are vital to maintain independence. The rules should cover interests of close family members, as well as actual appointees. There are also clear prohibitions on any prospective or actual member of the FCC having any financial conflicts of interest, and this is one of the few reasons a member can be dismissed, together with bankruptcy, misbehaviour or incapacity.

Good governance is important for any organisation. Either the primary legislation or regulations adopted pursuant to it should set out clear Board procedures, which include the holding of meetings, the taking of minutes and what constitutes quorum.

Funding

It is important to look at how the regulator is funded as an indicator of both independence and its ability to do its job. In countries with an underdeveloped commercial broadcasting sector (or one which is struggling to make money), it is normal for the regulator to be funded mostly or entirely out of the State budget. This can be a recipe for political interference, as government can 'punish' the regulator by not allocating sufficient funds to enable it to do its work. Conversely, a regulator which is funded entirely by industry fees and levies can be suspected of being subject to 'regulatory capture'. Neither solution would therefore seem to be ideal, although in practice, steps can be taken to reduce the risk of interference and influence from both State and industry sources of funding. In any case, what is important is to build in appropriate and effective methods of accountability for the regulator.

16. Section 5 of the Independent Communications Authority of South Africa Act, No. 13 of 2000.

What is particularly important is to provide for the regulator to set its own budget, regardless of the source of funds. Ideally, the budget should be based on a sensible business plan which has been the subject of consultation. It is normal practice for the regulator's budget to be subject to parliamentary approval, and it has been known for governments to seek to exercise indirect control over a regulator by not approving a budget. It is here again that the existence of a mature civil society can act effectively against political attempts to interfere with the regulator.

Ofcom sets its own budget based on an annual business plan which is published in draft and subject to full public consultation. It is largely funded through licence application and on-going licence fees from broadcasters, although it does receive a small grant from the government for activities not directly linked to licensees, such as the promotion of media literacy. By law, it must only seek to cover the costs of regulation and no more from licence fees. This results in a complex charging structure which links fees to actual costs. Any changes to the fee structure are consulted on and the fee structure is published.[17]

Funded largely by regulatory fees with additional sums coming from the Treasury, the FCC publishes its accounts on a quarterly basis, and also produces a 5-year Strategic Plan and annual reports of its performance.[18] The annual budget is approved by the House Appropriations Committee.

In Chile, CNTV's budget is set by the Budget Office, which is part of the Ministry of Finance. Although this could in theory be used as a means of exerting direct political control over the Council, in practice CNTV reports no problems in getting a reasonable financial allocation and we are not aware of reports of concerns by external observers.

Once again, Malaysia is an example of bad practice. There, the Minister agrees the budget. Funding is mixed, coming from a combination of State funds, licence fees, administration charges, levies and monies from consultancy and advisory services.

There are examples of regulators which are seen by both the State and civil society to be ineffective in their jobs (usually because they are perceived as being too weak to control the excesses of broadcast output). There are various ways of helping to tackle this:

> Subject to clearly defined delegation by the legislator, regulatory authorities should have the power to adopt regulations and guidelines concerning broadcasting activities. Within the framework of the law, they should also have the power to adopt internal rules.
>
> The regulator has on its board and/or is empowered to employ relevant experts to enable the authority to fulfil its functions.
>
> The regulator has the scope and the power to ensure that the broadcasting sector runs in a fair, pluralistic and efficient manner and is empowered by law to promote fairness, freedom of expression of views and the rule on ownership.

Accountability

It is vital that the regulatory authority is properly accountable: to the State, the public and the law. Its accounts should be independently audited and published. It should be required by law to present an annual report to parliament describing its activities over the year. This report should be made publicly available. Good practice suggests that thorough consultation should take place with the industry and all other interested stakeholders before introducing any significant new policy or major change. And there should be a means of appeal to the courts from any significant decision taken by the regulator in relation to licensing.

In Jamaica, the Commission is required to lay an annual report before Parliament setting out details of the performance of licensees, a summary of its decisions and any other matter of public interest.

Ofcom's accounts are audited by the public National Audit Office. Its Annual Report is laid before Parliament and published on the Ofcom website. A section of the website is devoted to accountability and it carries the annual plan, annual report and other documents containing key data and policies.[19]

17. See: <http://www.ofcom.org.uk/about/accoun/tarifftable1011/ for Ofcom's published budget and tariff table>.
18. See: <http://www.fcc.gov/omd/strategicplan/>.
19. See: <See: http://www.ofcom.org.uk/about/accoun/>.

Perhaps surprisingly, one area of accountability which is weak in the United Kingdom is in relation to judicial oversight. Ofcom's decisions as they relate to its broadcast-related powers are only subject to judicial review; there is no appeal of the substantive decision. If a court determines that Ofcom has not followed due process, has behaved irrationally, or has acted ultra vires, the court can refer the matter back to Ofcom for review. There is no power for the court to substitute Ofcom's decision with its own or review its actual decisions. To date, there have been no challenges questioning the legality in international law of this limited right of appeal. However, to provide some sort of alternative, Ofcom has set up a range of internal appeal mechanisms to give dissatisfied stakeholders the opportunity to challenge regulatory decisions at least internally.

Although the CNTV in Chile does not publish as much information as Ofcom, it does have an excellent website[20] and it seeks to be a regional leader in the development of broadcast regulatory policy. All major decisions, policy documents and 'think pieces' are published and there are regular consultations with the public and stakeholders.

The Situation in Brazil

In the broadcasting sphere in Brazil, there are a multitude of players which have responsibility for some aspect of broadcast regulation. This can lead to confusion and lack of certainty for broadcasters, as well as the ability of broadcasters to 'slip through the net'. A one-stop shop for broadcast regulation enables joined up policy and enforcement, and simplifies the regulatory process for broadcasters. It also reduces the costs of regulation for government, and for television and radio companies, enabling more money to be spent on quality programming.

In Brazil, the following organisations are involved in the regulation of broadcasting activity:

ANATEL: the independent regulatory agency responsible for telecommunications

Ministry of Communications: branch of the Federal Executive responsible for developing and implementing public policy on communications

SECOM: the Secretary of Social Communications which is the branch of Federal Government responsible for designing strategies for governmental communications, and currently putting together a task force to propose a new communications regulatory framework.

Department of Indicative Content Labelling: a section of the Ministry of Justice with the duty to supervise the labelling of television programmes.

Public Prosecutors Office of the Attorney General for citizen's Rights: a branch of the Federal Public Ministry with the duty to bring prosecutions for breaches of the law

ANCINE: a semi-autonomous regulatory body with responsibility for the cinema and audio-visual market, including production where this is covered by regulation.

Ministry of Culture: government ministry under which Ancine falls.

ANVISA: an agency responsible for the public health, including monitoring of advertising within its remit.

CADE: the competition regulator under the Ministry of Justice

CONAR: a self-regulatory body set up by the publishing, broadcasting and advertising industries to regulate advertising.

One of the essential characteristics of good regulation is for the regulatory authority to have powers of proportionate enforcement. In Brazil, we found that when it comes to content standards regulation, there is the Department of Indicative Labelling, which has a research and advisory function with regard to the Children's Code, and the public prosecutor's office, which has a general power to bring criminal prosecutions against broadcasters believed to have infringed either the Children's Code or other laws relevant to broadcast content. The use of prosecutions to address these types of problems is a heavy, blunt instrument, which does not allow for a response which is proportionate and tailored to resolving the problem.

When it comes to positive content obligations, such as Brazilian content, local content and independent production, Bill 29, currently under

20. See: <http://www.cntv.cl>.

consideration, would give powers to ANCINE in relation to subscription services, but not to free-to-air 'open' TV.

ANVISA is responsible for applying competition law to broadcasting, but it has neither much in-house sector-specific expertise nor relations with other bodies who do have this knowledge. Their limited resources and experience means that aspects of broadcasting which ought to be covered by competition law remain unexamined (for example, the question of whether or not the arrangements between network operators and their affiliates amount to de facto ownership, thus breaching ownership limits).

Licensing involves up to 4 different players: ANATEL (spectrum), SECOM, which advises on the suitability or otherwise of the licence application, Congress, which makes the final licence award, and in some circumstances the President's office. It is hardly any wonder that even simple radio licences can take two to three years to get through this process.

We believe there is an opportunity to simplify this regulatory labyrinth and introduce a single independent regulatory authority, within the limitations of the Constitution. This body would cover all the regulatory duties pertinent to broadcasting except for final approval of licences, which under the Constitution is the prerogative of Congress. Over time, we recommend the removal of this anomaly: giving the legislature power to award licences is contrary to the furtherance of democracy and against international human rights guarantees. However, there are opportunities to ensure that Congress exercises its powers in an open and accountable way, limiting the opportunity for political anti-democratic abuse.

Recommendations

A new, single regulatory authority should be established to oversee the regulation of broadcasting. To create this new regulatory authority, many of the functions of existing relevant authorities should be merged, taking advantage of their collective expertise and build on the existing knowledge base.

This single regulatory authority should be responsible for:

- Advising government on the allocation of spectrum for broadcasting – a duty which will become necessary with the transition to digital television.
- Running licence application processes.
- Considering licence applications and renewals and making recommendations on licence awards and renewals to Congress.
- Setting content standards for programmes and for advertising, ideally working with industry bodies as co-regulators in applying the standards (see below).
- Ensuring that the amount and scheduling of broadcast advertising complies with the law.
- Overseeing the implementation of positive programme obligations, including by ensuring that licensees are progressively meeting their quotas for domestic, independent and local production.
- Working with the competition regulator to apply media ownership rules and to address suspected breaches of general anti-trust rules or abuses of a dominant position.
- Enforcing licence conditions, standards and other rules, and laws related to broadcasting through a set of tiered (graduated) sanctions.
- Promoting good practice amongst broadcasters and media literacy amongst viewers and listeners.
- In time, when an appropriate opportunity arises, we suggest that Article 223 of the Constitution should be amended and the powers of the Executive contained therein should be transferred to the new independent regulatory authority.

Licensing

A broadcast licence (or concession) is a legal document, which in effect sets out the contract between the regulator and the broadcaster. In many countries, broadcasting legislation places a primary legal responsibility on licensees to respect the terms of their licences. As a result, if a broadcaster does not perform according to the terms of the licence, the regulator may then take remedial action to address this. Because licences are a contract for the use of a public resource (the radio frequency spectrum) the contract itself should be publicly available (subject only to redaction of any information which is commercially sensitive). Publishing the details of the obligations of the licensee makes it possible for the public to hold the broadcaster to account for the fulfilment of its promises.

Historically, licensing is a means of allocating spectrum between users, and this remains the case for terrestrial analogue and digital spectrum. Without a system of authorisation and structure, there is no order to spectrum use, which will lead to those with the strongest transmitters dominating the use of the airwaves. Licensing provides for a means of applying order to spectrum, protecting authorised spectrum users against abuse. An indicator of good practice is the existence of a spectrum plan that ensures that broadcasting frequencies are shared equitably among public, private and community broadcasters, and among national, regional and local services. The plan should be developed in a manner that is open and consultative.

The decision-making process regarding the allocation of frequencies between different types of broadcasters should be overseen by a body that is independent in the sense of being free from political or commercial interference or control by any vested interest. This is the case in the United Kingdom where the regulator, Ofcom, has responsibility for spectrum allocation taking into account the sometimes conflicting interests of the broadcasting and telecommunications industries, both of which it regulates. However, in countries where this is not the case, it is important for the broadcasting regulator to have an excellent working relationship with the body that manages the spectrum and to have ultimate decision making power over the allocation of individual frequencies as between competing broadcast interests.

Once spectrum has been allocated, regulators should actively monitor frequency use to ensure that actual usage conforms to license conditions. This is important to preserve the integrity of spectrum allocation and in particular to ensure that spectrum rights are protected against unauthorised interference. Countries treat unauthorised spectrum use with different degrees of tolerance. In the United Kingdom, for example, it is a criminal offence to use broadcasting spectrum without a licence. Ofcom employs teams to raid premises of 'pirate' radio stations to stop transmission, seize equipment and bring criminal prosecutions. In contrast, there has been public outcry in Chile about the 'criminalisation of community radio' resulting in the government promising to remove unauthorised broadcasting as a criminal offence and to seek to tackle the issue by other means.

There are as many different types of licences as there are broadcasting services. However, the broad categories of individual services for which licences are awarded are: analogue and digital, community,

local, regional and national, and television and radio services. In addition, individual licences or permits are often issued for transmission of broadcast programming over cable and satellite systems. As a further layer of complexity, licences are normally awarded for platform providers, be they digital multiplexes, local or national cable operators, or satellite providers. Different licensing processes and award criteria will apply to these different categories of licences, depending on the extent to which spectrum – as a scarce resource – is used, as well as the level of competition for access.

Regardless of the type of licence, it is accepted best international practice as determined by international law for the process whereby licences are determined to be fair and transparent. The basic conditions and criteria governing the granting (and renewal) of broadcasting licences should be clearly defined in the law. The regulations governing the broadcasting licensing procedure should be clear and precise, and should be applied in an open, transparent and impartial manner. The licensing decisions made by regulatory authorities should be subject to adequate publicity and, where any discretion or judgement is used, full reasons should be provided. Failure to follow a process which is clear, transparent and where reasoned decisions are provided may amount to a violation of the right to freedom of expression. In Meltex Ltd and Mesrop Movsesyan v. Armenia,[21] the European Court of Human Rights held that a licensing procedure which did not require a licensing body to justify its decisions did not provide adequate protection against arbitrary interference with the right to freedom of expression. In that case, although legal documents set out the criteria upon which applications were to be judged, there was no specific requirement on the regulator to give reasons for its decisions, and therefore no way of assessing whether the regulator had acted in accordance with the legal criteria. The Supreme Court of Canada has ruled that the common law duty of fairness requires certain procedural protections (including the duty to give reasons) whenever a fundamental right, such as free speech is engaged.[22]

One of the overriding criteria that should be taken into account in the award of licences is ensuring that the broadcasting sector as a whole is delivering a range of programming to provide a range of different views on matters of public interest and to cater to as many different tastes and interests as possible (including those of minority groups), and that the ownership of broadcasting services promote plurality. Considerations of plurality differ from competition concerns. Whereas competition regulation is focussed on market shares and potential abuses of dominant positions, plurality is a more subtle concept. As Tim Gardam has said, the values of plurality are those of "civic emancipation, intellectual and creative opportunity, equality of access to cultural engagement, a sense of connection to the otherness of others, virtues that are fundamental to a tolerant and humane life."[23] And to a functioning democracy.

In South Africa, for example, the regulator is required, when issuing a commercial broadcasting licence, to take into account:

(a) The demand for the proposed broadcasting service within the proposed licence area;

(b) The need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area.[24]

The German approach is also interesting, as it seeks to achieve plurality through the involvement of special interests within their regulatory mechanisms. A variety of groups, including ethnic and professional organisations, are each allocated a spot on the regional councils. The nominees are expected to advocate for their group. The idea is that diversity within the regulatory agencies will lead to diversity of programming.[25]

Advertising Licence Availability

The availability of licences should always be openly advertised in order to ensure a fair (and where relevant competitive) process. To advertise openly, the regulator should publicise the fact, for example

21. 17 June 2008, Application No. 32283/04.
22. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
23. See *The Price of Plurality: Choice, Diversity and Broadcasting Institutions in the Digital Age*, p.11. Available at: http://www.ofcom.org.uk/tv/psb_review/psbplurality.pdf.
24. Section 51, Electronic Communications Act, 2005.
25. The Broadcasting Act for the Land of North-Rhine Westphalia, which allocates seats for that state's regulatory agency, is available at: http://www.iuscomp.org/gla/statutes/LRGNW.htm.

by issuing press releases announcing that is has advertised. It is also advisable to contact directly anyone who has expressed an interest in applying for a licence to alert them. Regulators should ensure that sufficient time is allowed for potential applicants to prepare their applications; two months may be enough for a small radio licence, six to nine months may be needed for a major television licence.

In addition to the fact that a licence is on offer, all the general contractual conditions of the licence should be disclosed in advance, including obligations for the payment of fees. The fee tariff should be published and be applied consistently to every broadcaster within the same licence class.

Ofcom publishes its fee tariff annually. As Ofcom is nearly entirely funded by licensees, it assesses the fees to be charged proportionately to the amount of work involved in regulating each class of licence. There are five different classes of television licence seven radio ones. As well as annual fees, the tariff table sets out application and renewal fees.[26]

Processing Licence Applications

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 worse as corrupt, and will seriously undermine the authority and credibility of the regulator.

Regulators generally prefer all applications to be in a comparable format, in order to make it easier to assess and compare them. 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.

The process for applying for a television licence in Chile is clearly set out on the CNTV website.[27] The Malaysian Communications and Media Commission includes a copy of the licence application form and check list of required information on its website.[28] While in Jamaica, the application forms for different types of broadcast services are contained in the Television and Sound Broadcasting Regulations 1996 (secondary legislation proposed by the regulatory authority and approved by the Minister).[29]

As well as considering the applicant's submission, the regulator should also invite public comment on the applications. This can be done either by publishing the applications or by making them available for public perusal. Consulting with the public is of particular relevance for local and community licences, where it is the local population who are best placed to assess the extent to which the proposed broadcast service will meet their local needs.

When considering applications for local radio licences, Ofcom in the United Kingdom is under a legal obligation to consider the views of local people. The 1990 Broadcasting Act sets out four specific criteria for licence awards: the viability of the business plan, the extent the service will cater for local tastes and interests, the extent to which the service will broaden the range of radio services in the local area, and the extent of local support for the application.[30] To assess the level of local support, Ofcom places copies of all applications in local libraries and advertises in local newspapers to invite citizens to provide their views on the merits of the competing applications.

In South Africa, the regulatory, ICASA, is required to give notice of any application for a licence in the Gazette, and to invite interested parties to submit comments regarding the application. ICASA may also hold a public hearing in respect of a licence application.[31]

26. See: http://www.ofcom.org.uk/about/acc oun/tarifftable0910/tariff0910.pdf.
27. See: http://www.cntv.cl/link.cgi/EnglishVersion/1292.
28. See: http://register.skmm.gov.my/what_we_do/licensin g/cma/individual.asp.
29. See: http://www.broadcastingcommission.org/uploads/content_page_files/TelevisionandSoundBroadcastingRegulations.pdf.
30. Section 105 of the Broadcasting Act 1990. Available at: http://www.opsi.gov.uk/acts/acts1990/ukpga_19900042_en_10#pt3-ch2-pb2-l1g104.
31. Electronic Communications Act, 2005, s. 9.

Awarding Licences

There are two main methods of awarding licences: on demand or via tender. The latter may be conducted either on an auction basis or through a 'beauty parade'.

Where there is no reasonable limitation on the number of services to be offered, or where the supply of available broadcasting slots exceeds demand, then there is no reason not to grant licences to whomsoever asks, subject only to compliance with ownership rules and ability to abide by content requirements. For example, the number of services which could be broadcast using digital satellite technology generally far surpasses the number of services seeking transmission. As long as basic legal requirements are met, licences should normally be issued. Whether or not these services actually get broadcast is a matter of contractual negotiation between the channel provider and the satellite operator.

By contrast, where a television or radio service uses (scarce) spectrum, is it common to issues licences on a competitive basis. In such cases, the most widespread method of awarding licences is through a 'beauty parade', although some countries use an auction instead.

An auction approach involves giving the licence to whomever offers the highest amount of money, subject to the applicant meeting certain non-discretionary criteria. These criteria would include: compliance with ownership rules, financial ability to start and sustain the service, and ability to comply with technical requirements. Any auction done on this basis needs 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 government.

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 superficial. They should not be considered unless and until there is a mature broadcasting market where programming will not suffer as a result. The United States 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.

The more common method of licence award is through a 'beauty parades'. That is, applicants are judged according to whomever 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 'best' 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 are realistic? 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 and the contribution it is likely to make to pluralism.

This core judgement requires the full breadth and expertise of skills on the regulatory Board. For this reason, broadcast regulatory authorities should have members who are appointed for their professional capabilities, and not for reasons of political favouritism. 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.

In the United Kingdom, analogue commercial television licences were awarded through a combination of a beauty parade and an auction. Where one or more applicants' proposals were judged of equal merit, the licence went to the applicant who offered the most money in a closed bid. The criteria for judging applications were set out in the 1990 Broadcasting Act.[32]

Television and Radio

The same 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

32. Available at: http://www.opsi.gov.uk/acts/acts1990/ukpga_19900042_en_3#pt1-ch2-pb1-l1g15.33See: http://en.wikipedia.org/wiki/Groove_101.7.

companies are likely to attract far more advertising and sponsorship revenue than radio.

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 most important broadcast media, it is reasonable to expect radio services to provide significant levels of news and information, and other specific types of programming. It is often the case that national television services are expected (and obliged under their licence conditions) to provide a wide range of general programming, whereas radio stations are often licensed to specialise in a certain type of music, such as classical or pop, or to be predominantly general speech stations.

Licence Conditions

Licence applicants should be aware of the full range of contractual/licence obligations they will face, including what fees will be payable. The basic conditions which should be included in every licence are:

Transparency and disclosure provisions for media companies

As explained above, in order to establish and preserve diversity of ownership of broadcasters, it is necessary for the regulatory authority to have the ability to hold licensees to account on matters of ownership. It is normal for significant changes in share holdings to have to be declared to the regulator and for any proposed change of control to require prior authorisation.

Coverage area

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

Licence term

The licence should include 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 to allow the licensee to start operations.

Licence renewal

Arrangements for licence renewal should be set out in the licence.

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, and subject to the overriding public interest. The renewal process provides an opportunity for the licensee to demonstrate to the regulator that it has complied with licence conditions and for the regulator to consider whether any changes to the licence conditions should be made. There should be no assumption that the licence will carry on without adjustments.

In the United Kingdom, all free-to-air terrestrial television licences were granted with a proviso that they were only renewable once, following which a full new tender process would follow. Radio licences are only renewable if, after public consultation, no potential applicant announces that they wish to compete for the licence. If such a notice is received, the licence is fully re-advertised.

The Australian Communications and Media Authority (ACMA) considers the same matters on renewal as it does on original licence applications. ACMA took the decision in 2008 not to renew the licence of a Perth community radio station as it had concerns about its corporate governance and the narrow range of music it played.[33]

The internationally decried decision by the Venezuelan government not to renew the licence of the long-established RCTV in 2007 demonstrates the importance of ensuring that all licensing-related decisions are taken by an independent regulatory authority. There, allegations of political interference were possible precisely because the regulator was not independent.

33. See: http://en.wikipedia.org/wiki/Groove_101.7.

The regulator should 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.

Submitting applications well in advance of the end of the licence term also enables time for public consultation. The CRTC in Canada, the FCC in the United States and Ofcom in the United Kingdom all encourage listeners or viewers to submit their views on the broadcaster's performance. In Canada, where a broadcaster has been the subject of complaints, the CRTC can choose to attach conditions to a renewal or to grant a temporary renewal of one to two years, giving the licensee a probationary period to improve is performance.

Programme format conditions

Where a licence has been granted at least on part on the basis of promises made by the applicant about the range and type of programming to be provided, this should be captured in the licence conditions. In many countries, although licences are awarded in large part on the basis of the programming promises contained in the application, these are not adequately transposed into licence conditions. As a result, the regulator has no ability to require broadcasters to deliver what was promised, making a mockery of the application process and leaving the regulator, competing unsuccessful applicants, and the public very frustrated.

Compliance with legal requirements, including secondary legislation

Basic content standards are often set out in the law, and are often subject to regulatory instruments, including codes of conduct. The licence should make clear what the broadcaster's responsibilities and liabilities are in relation to both primary and secondary legislation. It is also useful to remind licensees in the licence of their obligations under other applicable statutes (for example, laws on defamation, copyright, or privacy).

Sanctions

The licence should set out what sanctions the regulator can apply for non-compliance with the conditions. The range of sanctions includes warnings, requirements to broadcast messages acknowledging a breach of the rules, fines, suspension, shortening or revoking a licence. In most cases, the purpose of sanctions, particularly for breaches of rules relating to content, will be to establish appropriate limits, not to punish the broadcaster. As a result, less stringent sanctions, such as a warning or requirement to broadcast a message, are far more commonly imposed than the heavier sanctions. Better practice is to impose heavier sanctions only for egregious breaches of the rules, or where repeated imposition of lesser sanctions fails to remedy the problem.

The Situation in Brazil

We found that the licensing process for open-air services in Brazil is extremely slow, with final approval often delayed by years. This creates legal uncertainty for services which launch on the basis of preliminary approvals, but without final formal approval. Whilst observers generally felt that licences were awarded according to clear criteria, it was unclear how public interest considerations were applied in the case of competitive applications. Both licensing criteria, and the reasons for specific awards should be published.

Licence obligations should include a specific requirement to comply with content standards. At the moment, broadcasters are obliged to comply with the general law, as indeed are all legal persons. However, this means that any breach of content standards can only be enforced through a heavy handed, slow and expensive legal process through the public prosecutors' office. This is bureaucratic and disproportionate. Making compliance a licence requirement will enable the regulator to take administrative action to enforce compliance, as non-compliance would then represent a breach of the licence.

Licence renewal provides an opportunity for the regulatory authority to review the past performance of the broadcaster and consider whether additional licence conditions should be imposed (or existing ones removed). We recommend that a formal review process take place prior to the expiration of all

licences. If a licensee's performance has been below the expected standard, consideration should be given to re-advertising the licence. This would not prevent the incumbent from re-applying, but would provide an opportunity to test the market and seek an improved offering for viewers/listeners.

Recommendations

The process for formally granting licences should be conducted in a timely manner. Options for speeding up the process – such as a formula whereby Congressional approval was automatic after a certain period of time, unless a specific refusal had been issued – should be considered. As noted above, final authority to issue licences should be given to an independent regulatory authority as soon as possible.

The criteria for assessing and awarding licences should be set out in a legal instrument.

Licences should be amended to require licensees to comply with content standards. The basic standards should be set out in the law (see below on Content Standards).

A formal process should be introduced for considering licenses prior to the end of the licence term (currently 10 years for radio and 15 years for television) to assess the licensee's compliance history, determine whether the licence should be renewed or re-advertised and, if renewed, whether changes to licence conditions should be introduced.

Content regulation

Programme Content Standards

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 – against misleading advertising claims.

There are many reasons for protection which are invoked through content regulation: the protection of citizens from unfair comment and hate material; the protection of the right to accurate information in news; the protection of society through upholding cultural norms and community standards, and preventing criminal behaviour; and the protection of children.

News

Best practice in regulation around the world includes a requirement for the broadcast media to strive to be accurate in their news and current affairs programming. This is vital if audiences are to trust broadcast news as a reliable source of information and receive the information they need to participate in a democratic debate, and to be an informed electorate. This is exemplified in the Council of Europe's Convention on Transfrontier Television, which states: "The broadcaster shall ensure that news fairly presents facts and events and encourages the free formation of opinions."[34]

The importance of accurate news to a functioning democracy is encapsulated in the Canadian Broadcasters' Code of Ethics, which states: "The fundamental purpose of news dissemination in a democracy is to enable people to know what is happening, and to understand events so that they may form their own conclusions."[35] To further this objective, Canadian broadcasters are obliged to ensure that news is presented accurately.

In the United Kingdom, the Ofcom Broadcasting Code requires news to be presented with "due accuracy", and for any significant mistakes to be corrected quickly. In this context, "due" means "adequate or appropriate to the subject and nature of the programme."[36] For example, higher standards of accuracy would be expected in a researched pre-recorded piece than in the coverage of fast-moving live news (although mistakes would have to be corrected).

Many countries also require news to be presented in a fair and impartial way. 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. Both Jamaica and the United Kingdom apply statutory requirements for accuracy and impartiality in news, and similar

34. See Article 7.3.
35. See Clause 5. The Code is available at: http://www.cbsc.ca/english/codes/cabethics.
36. See Section 5. The Ofcom Broadcasting Code is available at:http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/impartiality/.

requirements are in place in Germany and France.[37] In Canada, the Broadcasting Act requires stations to provide differing viewpoints on major issues. The Canadian Ratio-television and Telecommunications Commission (CRTC) has interpreted this as a requirement to present the positions of all parties, though editors are given a lot of leeway on how these are covered.[38] The United States, uniquely among the more established democracies, no longer requires broadcasters to be impartial; the so-called fairness doctrine was done away with under the Regan administration. Although some broadcasters still adhere to a notion of impartiality as a principle of good journalism, some major players do not.

An example of bad practice comes from Malaysia, where the Code starts off by saying that news must be presented accurately and fairly. However the Code goes on to say that news should be "presented by taking into account that news materials and current affairs is always in line with government's principles. This is to avoid confusion and misunderstanding among the people and also other countries."

Protection of Minors

A key goal in programme content regulation is the protection of minors. This is the case throughout the world.[39] 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.

The intention is to seek to protect children from material which would, or could, damage them morally, psychologically or physically. Jamaica makes this more explicit than most, by publishing a Children's Code which is specifically aimed at protecting children from unsuitable content.[40] Canada takes a different approach, relying on self-regulation through the independent Canadian Broadcast Standards Council (CBSC). The CBSC's Code of Ethics contains provisions for child protection, including programming and advertising guidelines.[41]

The EU AVMS Directive (which applies to the whole of the European Union, including the United Kingdom, Germany and France) directs Member States to "take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence."[42]

What this means in practice is that 'adult' material cannot be broadcast when children are likely to be watching or listening, or has to be encrypted. But what is 'adult' material? This will vary from culture to culture. Types of material which are usually restricted in some way as regards access by minors are violence, sexual portrayal and offensive language.

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 also disparities when it comes to portrayals of violence. Material which is considered quite suitable for breakfast time viewing in the United States 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 smiles in many other parts of the world, while offensive language is far more tolerated in the United States than in most other countries.

There are universal standards, including those flowing from the right to freedom of expression, in the context of protection of children. At the same time, there is no single interpretation of content standards which can be applied universally. More than any other area of broadcast regulation, content standards for protection of children (which often includes considerations of what may be referred to as 'taste and decency') must be set according to local

37. See: http://www.law.indiana.edu/fclj/pubs/v51/no2/schejter.PDF, p. 284.
38. See: http://www.crtc.gc.ca/ENG/archive/2008/c2008-4.htm.
39. See Articled 17 of the UN Convention on Rights of the Child, 1989.
40. Available at: http://www.broadcastingcommission.org/uploads/content_page_files/Childrens%20Code%20for%20Programming.pd.
41. Available at: http://www.cbsc.ca/english/codes/cabethics.php.
42. Article 22.1 of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version).

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.

In Chile, the law requires the National Television Council the obligation to set general rules to prevent the broadcasting of programmes with excessive violence, cruelty or pornography, and to prevent the participation of children and adolescents in acts which violate morality or good customs.

Considerations for protection of children extend to all programming, including advertising and news. There is no doubt that news presentation – especially of violent or tragic events – can lead to conflicts with rules for child protection. It is arguable that artificially 'sanitising' news stories and pictures misrepresents the news and can lead to questions about accuracy. It is also arguable that young children do not tend to watch television news in large numbers. These are running debates in many countries. However, best practice – adopted at least on a voluntary basis by many responsible broadcasters – suggests that the content of individual news broadcasts should be tailored to the time of transmission, and that warnings should be given before disturbing material is shown. For example, a news bulletin transmitted at 1700 would not show the full horror of a major catastrophe, whereas a late night bulletin at 2300 might. It is also normal practice for the newsreader to warn viewers that an item contains shocking images, in order to enable them to turn off the programme or remove children from the room if they so wish.

In many countries, so-called pornographic material is either banned or permitted only 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 may be unreasonable to ban all programming with adult themes or content. Some compromise needs to be reached between protecting children and providing content suitable for adults

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 may 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.

Two general approaches are used to manage the compromise between child protection, on the one hand, and enabling adult viewing on the other.

Watershed

The first approach is what in the United Kingdom has become 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 United Kingdom, it is set at 2100 for free-to-air television, although throughout most of the rest of Europe it is at the later time of 2200.

Information and Ratings

Providing information about programming is a second 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, or even themselves, 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 2100 watershed in Canada must be preceded by such a 'viewer advisory' statement. Advisories are also required in Jamaica.

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 at 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. Broadcasters in the United States provide ratings for programmes which can be picked up through 'V-chip' technology in TVs, VHS and digital decoders. In Jamaica, all satellite services are rated, with the more adult rated services only accessible to households which specifically request them.

In the United Kingdom, adult satellite and cable services must be encrypted and even then are not permitted to broadcast before 2200.

Protection Against Crime and Disorder

Most regulatory regimes include a provision that nothing in programmes may incite others to crime or disorder.[43] While this would seem to be a matter of common sense, it is in fact potentially very controversial. Great care should be taken in the definition and exercise of this rule to prevent the regulator operating as a political arm of government.

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 simply offering alternative political views. For example, the wording of the Malaysian law states, somewhat ambiguously: "Content that causes annoyance, threatens harm or evil, encourages or incites crime, or leads to public disorder is considered menacing and is prohibited."

Protection Against Racial or Ethnic Hatred

One of the most serious issues facing many regulatory authorities is 'hate' speech. To protect equality, a basic human right, 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. The Jamaican law presents a good example of a targeted, but proportionate provision which prohibits, "any statement concerning or comment upon the race, colour, creed, AND any matter which is likely to incite violence or criminal activity or lead to a breach of the peace religion or sex of any person which is abusive or derogatory or any pictorial representation thereof except where such statement, comment or representation is contained in a news report or in a program on matters of public interest or is an objective report thereon."[44] In Canada, the CBSC's Code of Ethics prohibits broadcasters from airing material which contains abusive or discriminatory material or material which promotes stereotypes.[45] Additional prohibitions against hate speech can be found in Canada's Criminal Code.

General moral and Ethical Norms

In addition to the core categories of content standards listed above, many countries apply rules to enforce generally accepted local moral and ethical standards. These often go well beyond protecting children, to protecting adults against content which is seen as inappropriate, offensive, or just in bad taste. As long as there is very widespread consensus about the level of restriction applied, this can work to the benefit of society. However, there is a thin line between 'protection' and censorship; social norms constantly shift and what may have been justifiably prohibited as inappropriate 20 years ago may now represent a severe restriction on freedom of expression. In addition, great care should be taken to ensure that the matters of 'taste' which might be proscribed do not stray into issues of political controversy and therefore act as a fetter on freedom of expression.

Chile's National Television Council is widely regarded by commentators as upholding national standards. For the most part, this is welcomed by the public, especially as the Council has made efforts over recent years to amend guidance to reflect current standards. Its own rules require that television service licensees establish procedures and have mechanisms in place that prevent broadcasting that goes against "morality, good custom or the public order".

Germany takes a unique approach to gauging social standards, relying on direct community participation at the administrative level. Broadcasters are regulated in each state by broadcasting councils (Rundfunkräte). The councils are composed of representatives from a range of communities, such as religious organisations, professional associations, and cultural and ethnic groups. The German model attempts to achieve balanced representation by dividing power between these different interests.[46]

43. See, for example, section 319(2)(b) of the Communications Act 2003 of the United Kingdom.
44. Article 30 of the Television and Sound Broadcasting Regulations, 1996. Available at: http://www.broadcastingcommission.org/uploads/content_ page_files/ TelevisionandSoundBroadcastingRegulations.pdf.
45. See: http://www.cbsc.ca/english/codes/cabethics.php#Clause2.
46. See: http://www.ard.de/-/id=161952/property=download/kvilfq/index.pdf.

Although the United States probably represents the least regulated country in this survey, it does apply rules to free-to-air broadcast services to prohibit obscene, indecent and profane material. Obscene material may never be broadcast, whereas indecent and profane content is only allowed between 2200 and 0600.

Right of Reply

Where a programme contains allegations of 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.

Within Europe, the right of reply is established in pan-European regulation.[47] Article 23 of the AVMS Directive states:

> 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.

Article 14 of the American Convention on Human Rights[48] states:

> Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.

Unlike in Europe, the Inter-American Commission has concluded that the right of reply should only apply to statements of fact, and not to expressions of opinion. Most German states also restrict the right to correcting statements of fact. In France, a distinction is made between the right as for officials, and for private citizens Officials may only demand the right in response to statements of fact

To enable an effective right of reply, the regulator should 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 of time and at a reasonable place within the broadcast schedule. Rather than give the aggrieved person the right to appear on-air him or herself, the regulator can agree a statement of correction to be broadcast.

Jamaican law provides for a right of reply for the broadcast of inaccurate content. In instances of dispute, the Broadcasting Commission has the right to make a final determination and direction to broadcast.

In Canada, broadcasting law currently does not provide for a right of reply. However, the nature of the self-regulating system means that broadcasters will sometimes offer a right of reply as a means of disposing of complaints.[49]

Advertising

There are generally consumer protection laws in place throughout the world banning misleading advertising. Additionally, for both public health reasons and to protect children, certain products are generally banned from being advertised, or subject to scheduling restrictions. It is not uncommon to find general rules applying similar content standards to broadcast advertisements that apply to programming.

An increasing number of countries prohibit the broadcast advertising of cigarettes and tobacco products, on health grounds, including Jamaica, and

47. 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."
48. Available at: http://www.oas.org/juridico/english/treaties/b-32.html.
49. See: http://www.cjc-online.ca/index.php/journal/article/viewArticle/647/553.

the whole of Europe. Others, such as Chile, restrict such advertising to after the watershed.

A number of countries, including France, prohibit the broadcast advertising of alcohol altogether. Some countries allow advertising of beer and wine, but not spirits (such as Romania). Throughout the European Union, basic minimum conditions for advertising of alcohol are imposed by an EC Directive.[50] These restrictions provide that the advertising:

- may not be aimed specifically at minors or, in particular, depict minors consuming these beverages;
- shall not link the consumption of alcohol to enhanced physical performance or to driving;
- shall not create the impression that the consumption of alcohol contributes towards social or sexual success;
- shall not claim that alcohol has therapeutic qualities or that it is a stimulant, a sedative or a means of resolving personal conflicts;
- shall not encourage immoderate consumption of alcohol or present abstinence or moderation in a negative light;
- shall not place emphasis on high alcoholic content as being a positive quality of the beverages.

Advertisements for alcohol are permitted in Canada, but subject to heavy regulation, including the requirement that they be pre-screened by a regulatory agency (CRTC) before being airing.[51]

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

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. A number of countries in Europe impose time restrictions for the advertisement of certain products, including Spain, France, Greece, Ireland, the Netherlands, Portugal, and the UK.

Some countries, notably Sweden and Greece, prohibit all advertising aimed directly at 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.

Restrictions on advertising often result from public policy goals 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.

In order to ensure that audiences are neither misled nor taken unawares, advertisements should be clearly distinguished from programmes. Whereas on United States television there is no break 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, as in Malaysia, 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).

Codes and Complaints

In order to provide certainty and predictability to the broadcasting industry and to viewers and listeners about expected standards, content rules should be set out in writing, and applied accordingly. 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.

50. Article 15 of the Audiovisual Media Services Directive.
51. See: http://www.crtc.gc.ca/eng/info_sht/b300.htm.

The ideal is for the broadcasting law to set out the basic standards which must be adhered to, for example, accuracy in news and protection 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.

However, there should also be a secondary mechanism to enable either the regulatory authority or a self-regulatory body to publish and apply a Code or Guidelines explaining in greater detail how the basic legal rule will be interpreted, for example by explaining that in order to protect children, no adult material may be broadcast before 2200 hours. The same body that writes the Code generally adjudicates complaints alleging Code breaches.

In Malaysia, the MCMC has used co-regulation to designate the Content Forum as the body to formulate and implement codes of practice. The Forum has itself set up a Complaints Bureau to deal with complaints. All decisions are published.

Although the FCC in the United States will deal directly with complaints about obscenity, indecency or profanity, any advertising complaints are referred to a self-regulatory body, the National Advertising Review Board.

As mentioned earlier, Canada relies on a voluntary mechanism of self-regulation in order to enforce broadcast standards. Thus, although the CRTC maintains legal authority over broadcasters, standards are set by the CBSC, an independent non-governmental organisation funded by the major broadcasters. The CBSC also provides the main mechanism for handling complaints. Because of its self-regulatory nature, the CBSC has limited powers of enforcement and can only issue advisory opinions and recommendations. However, these recommendations, while not technically binding, carry a lot of weight as a result of the CRTC's endorsement of the CBSC as a regulatory body. The CRTC, as the administrative regulator, has the power to fine broadcasters, as well as to suspend, revoke, or refuse to renew broadcasting licences. As a result, broadcasters are free to ignore the CBSC's recommendations, but to do so risks incurring the wrath of the CRTC.

Sanctions

As exemplified in Article 5 of European Union Directive 98/84/EC,[52] "sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity". These are good principles to apply to any system of sanctions. When there has been a breach of any regulatory rule, the key objective should be to ensure compliance, not to punish. Education may be more helpful in the long-run, for example by working with the broadcaster to develop internal compliance controls.

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 a right of appeal to an independent tribunal.

Before applying a sanction, the regulator should always give the broadcaster a full opportunity to respond to the allegations against it. This will give the regulator a better understanding of what actually happened, and why. This is necessary in order to decide whether a sanction is in fact necessary and, if so, what it should be.

The regulator should always consider a whole range of factors before deciding on the appropriate regulatory response:

- Was the breach deliberate, or accidental?
- What actual harm was caused?
- Did the broadcaster gain financially from the breach?
- What steps did the broadcaster take to remedy the problem?
- How long did the breach continue before it was stopped?
- Did viewers/listeners complain?
- How many times has the broadcaster committed the same, or similar breaches?
- What will be the financial impact on the broadcaster of a sanction?

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

52. Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access.

term expires, should it wish to seek licence renewal. A poor compliance record may result in the licence being 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.

In the United Kingdom, the broadcasting regulator very rarely punishes broadcasters that breach their licence. Most breaches are dealt with by publishing the fact on the regulator's website. If the breach was newsworthy, then newspapers pick up on it and give it more publicity. This 'naming and shaming' is very effective, as no broadcaster wants its competitors or its audience to know that it has broken the rules.

Fines

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 it is 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.

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 they seriously endanger a broadcaster's viability. Fines may be abused 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. Suspending a service can have the same effect.

The regulator should not keep the fine, but pass it over to the government. 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 government, not an expectation.

Many laws set out a tariff of fines to be applied in the event of certain types of breaches, or based on the seriousness of the breach. While this may provide for certainty, it removes an important element of discretion, which is needed in order to take account of the entire range of circumstances of each individual case.

In the United States, since the enactment of the Broadcast Decency Enforcement Act of 2005, broadcasters face significant financial consequences for the broadcast of obscene, indecent or profane material. This law allows the FCC to fine broadcasters as much as $325,000 for each utterance of profanity or display of indecent or obscene material in a particular broadcast, up to a maximum fine of $3,000,000. In addition, the FCC may revoke a station's license or sanction individuals who appear on air and broadcast obscene, indecent or profane material. The broadcast of obscene material also remains a federal crime, allowing the Department of Justice to prosecute broadcasters who air such material. In practice, no penalty more severe than a fine has been applied, and broadcasters tend to appeal any imposition of a fine, often tying up the matter in court for years.

As mentioned above, the Canadian system is heavily reliant on self-regulation, having delegated its complaints mechanism to the CSBC. The federal regulator, the CRTC, has the power to fine broadcasters, as well as to revoke or suspend licences. However, in practice, the CSBC usually handles violations, and by requiring the offending station to broadcast an admission of their violation and to write a letter to the complainant explaining the measures they have taken to ensure that the violation will not be repeated.

Suspension

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.

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 as to indicate that the broadcaster is not likely to be able to comply, then that indicates a sufficient crisis to warrant threatening suspension. However, a suspension (or a fine) should never be used as an indirect way to put a licensee out of business. If the problem is serious enough to warrant removing a licence, then a full, formal revocation process should be invoked.

Revocation

There will be times when the most serious sanction – licence revocation – must be considered. This should be reserved only for the very 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 bring itself into compliance.

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. There should also be a right to appeal to a court of law should a broadcaster believe that due process has not been followed. This is an important safeguard to protect the fairness of the regulatory process.

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 issue. If the regulator is satisfied that another 'second chance' is not warranted, as the licensee either cannot or will not ensure compliance with programme standards, then the licence can be revoked.

Once again, Jamaican law provides an example of good practice. In the first instance, the Broadcasting Commission discusses its concerns with the broadcaster to seek resolution of the problem. If the Commission is not satisfied with the broadcaster's response, the matter is referred to the Minister with a recommendation. However, on its own initiative, the Commission can order the publication of a correction or an apology. If the direction is not followed, the Commission can recommend that the Minister suspend the licence for up to 3 months. If the breach is still not rectified, the Commission can recommend a longer period of suspension or revocation. In all such cases, the licensee should be given an opportunity to respond to and to contest the proposed sanction. This demonstrates a proportionate, and escalating process which seeks to involve the licensee at every stage.

The Situation in Brazil

As noted above, it is the practice around the world for broadcasting content to be regulated among other things to ensure that news is presented accurately and fairly, that there is a right of reply where significant and inaccurate accusations are made, that hate material or content which is likely to lead to crime and disorder is not broadcast, and that children are protected. These are all matters which should be set out in the law. Brazil does not currently legislate for accuracy in news or have broadcasting-specific rules on the right of reply (referred to in the Constitution) or hate material. These lapses should be filled.

In addition, it is normal practice for detailed Codes to be written which further explain these legal obligations. In some countries, the statutory broadcasting regulator is responsible for writing and enforcing these Codes; in others, the Codes and their enforcement are primarily the responsibility of the broadcasters themselves through a self-regulatory mechanism. In our discussions with Brazilian broadcasters, it was clear that there was some appetite for self-regulation, and we would encourage them to develop this.

Where self-regulation applies Codes within the context of legal obligations (i.e. where the law sets out the overriding obligations and the broadcasters expand the laws into more detailed guidance), breaches of these rules are generally dealt with within the self-regulatory mechanism. It is only where self-regulation fails to be effective that sanctions are applied through statutory means.

Codes

We encourage broadcasters to write and apply their own Code, expanding on the (extended) statutory obligations we propose for a new broadcasting law. We have seen Globo's Principles and Values Manual which would provide a good starting point. However, this manual is perhaps too discursive; less narrative and clearer concise guidelines would be helpful for

broadcasters, and for considering complaints. Codes should be clear, so as to provide guidance to editors and programme makers as to when a programme would break a rule. The CONAR Code provides a good model of a comprehensive code for Brazilian advertising content.

Brazilian broadcasters might wish to study the self-regulatory Codes of the Canadian Broadcasting Standards Council. They are available at: /www.cbsc.ca/english/codes/index.php. The Codes include:

- CAB Code of Ethics
- CAB Violence Code
- CAB Equitable Portrayal Code
- Sex Role Portrayal Code for Television and Radio Programming
- RTNDA Code of (Journalistic) Ethics
- Journalistic Independence Code
- Industry Code of Programming Standards and Practices Governing Pay, Pay-Per-View and Video-On-Demand Services
- The Pay Television and Pay-Per-View Programming Code Regarding Violence

News

Although the Brazilian Telecommunications Code provides for a minimum of 5% of radio and television services to be dedicated to news, there are currently no specific obligations placed on the content of broadcast news coverage, contrary to the practice elsewhere. Given the importance of accurate news to the effective operation of democracy, broadcasters should be under an obligation to strive to present accurate news. Furthermore, audiences should be clear about the difference between news and editorial comment. These are basic principles of good journalism and should present no problem to Brazil's responsible broadcasters.

As with other content standards, obligations on accurate news should be contained in the law, with more detailed guidance set out in a Code.

As explained above, it would be best if this detailed content regulation were applied through a self-regulatory mechanism. A good example of a self-regulatory code for news is The Code of Ethics of the Radio and Television Producers of Canada, available at: http://www.cbsc.ca/english/codes/rtnda.php.

Protection of Minors

As made clear in our analysis of international practice, one of the most important actions to be taken by regulatory authorities in the broadcasting sphere is to ensure that children are protected. This principle has been adopted in Brazil with the introduction of the Children's Code. However, the scope of the Code does not cover news or advertising (although the CONAR Code does contain provisions for the protection of children).

The Children's Code specifies a number of different age ranges from "General" to 10, 12, 14, 16 and 18. This categorisation does not appear to correspond with significant differences in the development of children, particularly teenagers, and will cause confusion to parents as well as unnecessary expense for broadcasters. Research should be undertaken with children, parents, educationalists and broadcasters with a view to consolidating the categories into no more than four.

Crime and Disorder

The general law prohibits the dissemination of hate material and discrimination, which is covered in Article 5.XLII and XLIII of the Constitution. However, to apply the law to broadcasters requires the involvement of the Public Prosecutors' office. Furthermore, it is common to apply higher standards regarding racist material to broadcasters than those found in the criminal law. It would, therefore, be preferable and more effective to develop hate speech and incitement to crime rules for broadcasters in a code of conduct, applied either through a self-regulatory system or by a regulatory authority (should the former not be effective) imposing administrative penalties. A regulatory authority would also be in a better position to issue general guidance to broadcasters about how to avoid breaching the rules, rather than rely on strict legal precedent.

Right of reply

Where a television or radio company broadcasts material which makes a significant accusation against a named individual or company, or is false, there should be a right of reply to the offended party. Article 5.V of the Constitution specifies that a right of reply is ensured. Again, this right should be set out in the broadcasting law and developed in a code of conduct, applied through self-regulation or by the regulatory authority.

Advertising

In the advertising sphere, the advertising industry together with agencies and media companies, have set up a self-regulatory body, CONAR, which has powers to direct the removal and/or amendment of offending advertisements. In 2009, 343 complaints were received, of which 268 were upheld. To compare with the Advertising Standards Authority in the UK, in 2009, the ASA handled some 29,000 complaints about 14,000 advertisements. 560 advertisements were found to have breached the Code. CONAR has a comprehensive Code which is applied by panels which generally include independent members. On paper, it appears to meet all the international standards for advertising self-regulation, although we heard reports that it was not well known and therefore did not have the reputation of being effective.

In addition to CONAR, ANVISA has statutory responsibility for setting standards for certain products and services which concern health and safety. It was not clear how ANVISA coordinates its activities with CONAR, and it would be hoped that a good relationship can be developed to give the industry the opportunity to manage advertising regulation on a self-regulatory basis, with ANVISA using back-stop powers only if CONAR fails to deliver.

The law stipulates that the amount of advertising should be no more than 25% of airtime, yet it is not clear who, if anybody has the responsibility for monitoring and enforcing this limit.

Sanctions

The current system relies entirely on prosecutions by the Public Prosecutor's office for infringements of the law. This is disproportionate and heavy handed. Internationally, programme standards are applied not through the criminal court (except, perhaps, in very extreme cases,) but either by a self-regulatory body or by a regulatory authority through administrative sanctions enforced through licence conditions .

Recommendations

The broadcasting industry should be given the opportunity to develop an effective self-regulatory model, to include codes and an independent complaints handling system. If the industry cannot do this within a year, then a statutory regulatory authority should be given responsibility for drawing up and enforcing programme standards.

The law should set two regulatory objectives for news: that broadcasters should strive to provide accurate news (and where a mistake is made, it is corrected promptly and prominently), and that opinion is clearly identified and separated from fact.

The provisions of the Children's Code should be extended to cover advertising and news.

The age categories for television should be simplified by reducing the number of categories to four. These could be: very young children (under 7), older children (8-13), under 18 (14-17), and over 18.

Provisions should be included in a broadcasting law which prohibiting the broadcasting of discriminatory or hate material, or incitement to crime.

Provisions should be included in a broadcasting law granting a right of reply.

Broadcasters should make more effort to publicise CONAR. This could be done by carrying free publicity for CONAR during prime time. Broadcasters should also publicly commit to ensuring that all advertisements they carry will comply with the CONAR Code.

ANVISA should develop working relations with CONAR so that all control of advertising content regulation is conducted first on a self-regulatory basis, with ANVISA only taking action when self-regulation has manifestly failed.

The new independent regulatory authority should have responsibility for monitoring and enforcing advertising limits.

Where a matter has not been dealt with adequately through self-regulation, the independent regulatory authority should have the power to impose proportionate sanctions for breaches of licence conditions. It should also have the power to recommend the revocation of a licence where a broadcaster has engaged in sustained and serious breaches and the imposition of other penalties have failed to prevent further breaches.

Positive Content Obligations

Domestic Production Quotas

The imposition of obligations to provide content which is produced within the country (domestic programme production) is an important means to promote a sense of national identity, and also to provide impetus for the development of a national production industry. This is particularly important for countries which struggle to preserve their sense of unique national difference in the face of cheap foreign imported programming. National programming also serves a vital role in reinforcing a sense of nationhood in large, diverse countries such as Canada and the United States.

The CRTC enforces strict quotas for Canadian content. Private television stations must ensure that 60% of their total programming (including 50% of peak time programming) is Canadian. The criteria for determining whether content is Canadian are: the nationality of the producer and key creative personnel, the amounts paid to Canadians for programme making services, and the amounts spent in Canada on lab processing. In addition, 35% of music on Canadian radio must be Canadian. This policy has often been upheld as key to launching the careers of now-famous Canadian artists such as Celine Dion.

In South Africa, at least 35% of television content must be South African, with 20% South African music on radio. Malaysia stipulates a 60% domestic quota for both free-to-air television and for radio.

In Europe, the Audiovisual Media Services Directive[53] directs that at least 50% of television output must consist of European works, that is, works made mainly with authors, workers and producers residing in Member States. This percentage excludes news, sports events, games, advertising, teletext services and teleshopping. As many Member States have traditionally been reliant on programme imports from outside the European Union, the Directive provides for the proportion to be achieved progressively, with Member States responsible for reporting to the Commission on progress each year.

Independent Producers

Some countries require broadcasters to carry minimum quotas of programming prepared by independent producers, or producers who are not linked to any particular broadcasting enterprise. The idea behind this is to broaden access to the airwaves for different voices, as well as to promote access, by the audience, to a greater range of perspectives and creative talent (i.e. diversity). Mandating quotas for independent production can also help mitigate the negative impact of concentrated media ownership structures.

Independent production quotas can also stimulate the growth of a strong independent production sector, with a number of benefits. For example, Channel 4 was created as a publicly owned channel in the United Kingdom in 1982, with the strict remit of being a broadcaster/publisher only, with no ability to make its own programmes. As a result, all of Channel 4's output is commissioned from independents, resulting in the growth of the sector

53. Council Directive 89/552/EEC, as amended. Article 4. Available at: http://www.ebu.ch/CMSimages/en/legamsdceuconsolidatedtext 270407 tcm6-51817.pdf.

in the UK to the point now where several independent companies have market capitalisation values higher than Channel 4 itself.

Within the European Union, all television broadcasters, public and private, are required to reserve 10% of their schedule for independent producers. Article 5 of the AVMS Directive states:

> Member States shall ensure, where practicable and by appropriate means, that broadcasters reserve at least 10 % of their transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and teleshopping or alternately, at the discretion of the Member State, at least 10 % of their programming budget, for European works created by producers who are independent of broadcasters. This proportion, having regard to broadcasters' informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria; it must be achieved by earmarking an adequate proportion for recent works, that is to say works transmitted within five years of their production.

This rule incorporates some flexibility for broadcasters, on the understanding that not all will be able to achieve this limit immediately. It thus calls for the minimum level to be achieved 'progressively', taking into account the particular situation of each broadcaster.

In the United Kingdom, section 277 of the Communications Act 2003 requires all public service channels (that is, the six BBC channels plus the three commercial free-to-air national channels) to reserve at least 25% of their broadcast time to "a range and diversity of independent productions". In 2009, 50% of peak time original programming (i.e. programmes commissioned either in-house or from independents and shown for the first time) was from independent producers.

From the 1970s in the United States, the FCC imposed strict restrictions on the ability of major networks to benefit from syndication rights of their own programmes, thereby encouraging the growth of the independent television sector. However, the rules were relaxed in 1991, with the growth of cable television, and the loss of market share of the major networks. In 1995, 50% of primetime television shows were made by independent production companies. This has fallen substantially, but still remains at 18%.

In Canada, section 3(1)(i)(v) of the Broadcasting Act 1991 requires the broadcasting system as a whole to "include a significant contribution from the Canadian independent production sector". An independent production company is defined as on in which a broadcasting licensee owns or controls, directly or indirectly, less than 30% of the equity.

Prior to 2010, all large English-language conventional television groups were required to ensure that 75% of all 'priority programming' was produced by independent producers. Priority programmes were defined as Canadian programmes in the categories of drama, long-form documentary, music/variety, entertainment magazines and regionally-produced programs other than news and sports. This represented about 25% of primetime programming.[54]

In 2010, the system was changed so that these groups would be required to spend 75% of their required spending allocations on programmes of national interest to independent producers. Programmes of national interest consist of Canadian programming in the genres of dramas, comedy and long-form documentary, as well as specific Canadian award shows that celebrate Canadian creative talent. The specific spending allocations would be set at the time of licence renewal, but the CRTC indicated that the allocation for dramas alone would be 5% of gross revenues.[55]

Local Versus National Services

National services are generally expected to operate under more onerous public service obligations than local ones, especially as national services are likely to be able to generate greater revenues. However, where licences are issued on a local, rather than national basis, it is reasonable to expect those television and radio services to provide programming which is of particular interest and relevance to the area covered,

54. See Broadcasting Regulatory Policy CRTC 2009-406. Available at: http://www.crtc.gc.ca/eng/archive/2009/2009-406.htm.
55. See Broadcasting Regulatory Policy CRTC 2010-167. Available at: http://www.crtc.gc.ca/eng/archive/2010/2010-167.htm.

for example local news, weather and information. It is also reasonable to impose local language obligations on local services where many, or the majority, of local residents speak a language other than the main national one.

Although there are estimated to be some 140 languages spoken in Malaysia, radio stations broadcast in the three main languages of Malay, English and Chinese, as well as four other widely spoken languages. In the United Kingdom, local radio stations are required to broadcast at least seven hours of local content as well as broadcasting local news, regularly refreshed and updated, at least hourly during weekday daytimes.[56]

In the United States, all broadcast stations have an obligation to provide news, public affairs and other programming that specifically addresses important issues facing the community. They are also required to maintain a public file which contains documents relevant to the station's operation and dealings with the community and the FCC. This file should be available for inspection by any member of the public and operates as a mechanism for community monitoring to ensure that the station delivers what it has promised. It should be noted that the FCC does not itself monitor broadcasters, but relies on complaints to instigate regulatory investigations.

The United States does not have any national television services. Instead, the main networks have established a set of affiliate stations across the country. In 2008, the FCC reviewed the restrictions on the arrangements between networks and affiliates. They clarified that: affiliates retain ultimate control over programming, operations and critical decisions; contracts cannot allow the networks to hinder or prevent stations from rejecting programming they feel is "unsatisfactory, unsuitable or contrary to the public interest" or prevent them from privileging "programming of greater local or national importance". The FCC said the networks should not be able to impose any penalties, monetary or otherwise, for rejected programming. The networks were also prohibited from 'optioning' time on stations without having the programming in hand to fill it, which includes a prohibition on requiring affiliates "to carry, at some unspecified future date, unspecified digital content that the network may, or many not, choose to offer."[57]

In the United Kingdom, local radio stations must provide at least seven hours of local content a day (content which is produced within the geographic area for which the service has been licensed). Many provide much more than that. In addition, local news bulletins must be broadcast throughout the weekday daytime schedule.

ICASA in South Africa has the right and obligation to impose local programme quotas on each licence it awards, in line with its policy on local content.[58] In Australia, statutory requirements introduced in 2008 require that specified regional commercial television broadcasting licensees in Queensland, New South Wales, Victoria and Tasmania broadcast at least minimum amounts of material of local significance.

The Situation in Brazil

Domestic production

Domestic production levels in Brazil are very high on TV Globo (68% overall, with 91% in prime time) but appear to be lower on other channels. It is important to encourage domestic production, not only to boost the television market, but also to present Brazilians to themselves.

Independent production

Independent production is a nascent industry in Brazil. Bill 29 would impose a quota of about 100 minutes per week for qualifying channels on pay-TV platforms, but there are no quotas for terrestrial television. Globosat sources 34% of its Brazilian satellite content from independent producers, whereas TV Globo produces virtually all of its Brazilian content in-house. We do not want to discourage licensees from building strong, vertically integrated businesses as both producers and broadcasters, but there are strong reasons for commissioning programming from independent sources. First, this helps to build new businesses for Brazil. Second, even though independent programmes are commissioned by broadcasters, they

56. See: http://consumers.ofcom.org.uk/2010/04/ofcom-deregulates-commercial-local-radio/.
57. See FCC Declaratory Ruling FCC 08-192.Available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-192A1.pdf.
58. See: http://www.sabceducation.co.za/VCMStaticProdStage/CORPORATE/SABC%20Corporate/StaticDocument/About%20SABC/local.pdf

provide the opportunity for new, diverse voices to enter the broadcast market. Indeed the obligation to foster independent production is contained in Article 221.II of the Constitution.

Local programming

The absence of national licences in Brazil has led to a situation where networks of affiliates have grown to take advantage of the undoubted economies of scale that broadcasting over as large a territory as Brazil has to offer. We commend the growth of national television in Brazil, and have no doubt that it makes a major contribution to the development and maintenance of Brazil as a cohesive, united State. Indeed, we believe that every country needs some form of national television broadcasting.

However, a balance must be drawn between the advantages of national television and the importance of local TV. It is particularly important in a country as large and diverse as Brazil that local news and culture are reflected to local audiences. Whilst it is important for viewers in Rio and San Paolo to see what the rest of Brazil is like, citizens living in Amazonas or Rio Grande do Sul must have access to programmes about themselves.

Currently, the amount of local programming varies significantly from broadcaster to broadcaster. A 2009 study, Regional Production on Brazilian TV, carried out by the Observatório do Direito à Comunicação (Observatory for the Right to Communication),[59] showed that the public broadcaster, TV Brasil, carried an average of 25.55% local programming, with the large commercial networks carrying between 7% and 12.20%, with an average of 9.14%. Much local programming is news, which is good. However, we would encourage broadcasters to extend the range of local programming to cover social and cultural issues, including in the form of telenovellas. The obligation to provide local programming should be on individual licensees, which would place much of the responsibility on affiliates to fund and produce material for the areas for which they were licensed.

Article 221.III of the Constitution specifically requires quotas for regional production to be established in the law; this should be done.

Recommendations

A quota of at least 50% domestic production should be established, excluding news, sports, games and advertising. This quota should also apply during the hours of peak time.

A quota of 10% independent production should be established for all broadcasters, a substantial proportion of which should be broadcast during peak time.

All broadcasters should be required to broadcast a minimum of 10% local programming, to include news, a substantial proportion of which should be broadcast during peak time.

Where it is unreasonable to expect broadcasters to attain these quotas immediately, they should be required to demonstrate progress annually towards meeting it, with overall time limits, for example of three years, for meeting the full quota. ANCINE (or a new independent regulator) should be responsible for monitoring and enforcing these rules.

59. Available at: http://www.direitoacomunicacao.org.br/index.php?option=com_docman&task=doc_download&gid=441/.

Public Service Broadcasters

National publicly-owned broadcasting organisations, funded at least in part from public funds, have traditionally provided an important part of the broadcasting available to the public in many countries. A key rationale for this form of broadcasting, as well as for the provision of public support, is that it provides an important complement to the programming provided by commercial broadcasters, and thereby enhances the diversity of content available to the public. Typically, PSBs provide educational, children's, religious, cultural and minority interest programming which might not be commercially attractive, along with more popular programming. At their best, these broadcasters provide a trusted and quality news service, quality content, universal service and programming that satisfies content interests that are not otherwise catered for. Where such broadcasters are independent of government, they have come to be called public service broadcasters (PSBs).

In the past, public service broadcasters were the dominant form of broadcasting in much of the world (in 1980, only three countries in Europe – Italy , Luxembourg and the United Kingdom – had private television),[60] but this has changed in recent decades, as commercial broadcasters have become more prominent, and particularly more recently, as choice of channels, particularly for television audiences in more developed countries, has mushroomed. These changes are undoubtedly posing challenges for PSB in many countries. At the same time, almost without exception, countries have elected to continue to maintain PSBs. There are no doubt many reasons for this, some less salutary than others (for example, because governments in many countries can exercise more control over PSBs), but the ongoing contribution of PSB to diversity even in a multi-channel world remains a very important one.

The British Broadcasting Corporation (BBC) is perhaps the best-known public broadcaster globally. However, countries all over the world have established such broadcasters. In many countries, including the United Kingdom, Canada and South Africa, the dominant model is for one organisation to offer a variety of broadcasting services (in the case of the Canadian Broadcasting Corporation (CBC), for example, a range of terrestrial – analogue and digital – and Internet television and radio services, in English, French and a number of indigenous languages). In Germany, where national public broadcasting services were constitutionally prohibited following on from the experience of World War Two, PSBs are state-based, and then (mostly) networked through a national system (ARD, Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland, or the Working Group of the Public Broadcasting Organisations of the Federal Republic of Germany).[61] The situation is different again in France, where several different (national) PSB organisations provide different services (radio and TV, and with different thematic and geographic

60. Holtz-Bacha, Christina and Norris, Pippa (2001) "To entertain, inform and educate. Still the Role of Public Television in the 1990s?". Available at http://www.hks.harvard.edu/presspol/publications/papers/working_papers/2000_09_holtz-bacha_norris.pdf.
61. There is also the national Zweites Deutsches Fernsehen, or Second Germany Television.

focuses). Chile, somewhat unusually in Latin America, has a national public broadcaster, Chile National Television, which was founded in 1969.

It should be noted that some countries, notably the United States, have never had PSBs in the sense described above. In the United States, the Public Broadcasting Service (PBS)[62] is a private, non-profit organisation that has some 168 members running nearly 360 stations, which it describes as 'non-commercial' (the members include community organisations, educational institutions, and a few state or other public authorities). The Corporation for Public Broadcasting,[63] set up by the Public Broadcasting Act of 1967, channels federal government funding to PBS, which, along with other public funding, is estimated to count for 15-20% of PBS members' revenues.[64] Of the rest, some 60% comes from private donations and subscriptions, with the balance from local government and institutions. On the other hand, in some countries, such as Thailand, new PSBs have been created (in that case from the ashes of a bankrupt private broadcaster).

PSBs face a number of threats in addition to the rapid growth in availability of different channels, noted above. Access to multiple channels has posed a threat not only to the audience share of PSBs, but has also raised questions about their mandate. In particular, the existence of literally 100s of channels serving a multitude of different niche interests, the ability of private broadcasters to outcompete PSBs on banner sports events (the CBC failed for the first time to cover an Olympic games at the 2010 Winter Olympics, even though these were hosted by Canada), and the fracturing of audiences meaning that PSBs struggle to play a role in terms of creating a common sense of nationhood and national identity all pose mandate challenges for PSBs. Ensuring that these bodies remain accountable, while also protecting their editorial independence, is a related challenge.

A traditional threat, which remains strong in many countries, is that of government interference or control. Governments have a natural tendency to wish to control public communications, and for various reasons, including their oversight role regarding both the governing boards and funding, it tends to be easier for them to exercise influence over PSBs than over private broadcasters. Indeed, in nearly all countries, the history of public broadcasters is rooted in government control and independence was a feature that emerged later. The Jamaica Broadcasting Corporation was launched the year after Jamaican independence in 1962. Financial constraints lead to the station increasingly carrying cheap imported programming (mostly from the United States), and this, together with complaints of political partisanship, eventually led to the station's closure in 1997. In Malaysia, as well, the national broadcaster, RTM (Radio Televisyen Malaysia or Malaysian Radio and Television) is firmly under government control.

Finally, in many countries, public subsidies to PSBs have come under attack, posing another threat to their traditional role. As noted above, a key rationale for maintaining PSBs is that they complement the programming provided by commercial broadcasters. To do this effectively, however, requires public funding, to sustain often the more costly programming this implies. While the public funding base for PSBs remains strong in many countries, and in particular in Northern European States such as the United Kingdom and Germany, funding has come under attack in other countries. South Africa's SABC receives about 80% of its funding from commercial sources, while public funding has come under renewed criticism in many countries in Eastern Europe, in part due to only partially successful attempts to achieve independence from government. These issues are dealt with in more detail below.

Mandate and Accountability

The mandate of a PSB defines what it should do and expresses the primary rationale for its existence, as well as why the State is allocating funding to it. The mandate is, in essence, what the public are asking the broadcaster to provide. The mandate also establishes a template for extracting accountability from the broadcaster. As such, it is important that the mandate be set out clearly and by the legislature, in other words in the governing legislation. At the

62. See: http://www.pbs.org/.
63. See: http://www.cpb.org/.
64. See: http://www.cpb.org/stations/reports/revenue/2008PublicBroadcastingRevenue.pdf.

same time, and for practical reasons, the mandate cannot be extremely detailed. The idea is not to straightjacket programming options, but to provide instruction as to the main categories of programming that are expected to be provided.

Lord Reith, the first general manager of the BBC, appointed in 1922, declared that the BBC's mission was to "inform, educate and entertain" the British people. This phrase still finds statutory expression in the mandates of PSBs in many countries, including Canada, South Africa and even Thailand.[65]

In many countries, the main PSB mandate is indeed included in the primary legislation. This is the case, for example, in Canada, South Africa and Thailand.[66] In other cases, such as France, the obligations of the various PSBs are set out by decree.[67] The BBC's mandate is set out in a Royal Charter,[68] while a separate document, the BBC Agreement, sits alongside the Charter and sets out in greater details how the BBC will satisfy its public purpose requirements.[69]

Most PSBs have an obligation to provide an extensive news service, covering both local and international events. Thus, s. 10(1)(d) of the South African law requires SABC to,

> provide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests.[70]

Another common feature of PSB mandates is to contribute to a sense of national identity and national culture. The Canadian Broadcasting Act has a particular focus on this, calling on CBC to "be predominantly and distinctively Canadian", to "reflect Canada and its regions", to actively contribute to the flow and exchange of cultural expression", to "contribute to shared national consciousness and identity" and to "reflect the multicultural and multiracial nature of Canada".[71] The South African law also includes a strong focus on developing and reflecting national culture (s. 10(1)). The BBC Charter calls on it to stimulate "creativity and cultural excellence" (Article 4(c)).

In many countries – including the United Kingdom, Canada and Germany – all broadcasters, including PSBs, are required to treat all matters of public debate in a balanced and impartial manner. This is not the case in the United States, but there, the Public Broadcasting Act of 1967 requires funded programmes to maintain a "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature".

Other common mandate features include providing universal service,[72] promoting local production,[73] providing educational material,[74] airing programming in different national languages[75] and providing quality programming.[76]

It is important that PSBs be given adequate means to distribute their programming so as to be able to fulfil their mandates. In particular, they need frequencies for terrestrial transmission, including through the transition to digital dissemination, as well as the ability to operate on other platforms (such as the Internet and through mobile phones). In practice, most PSBs are protected in this way, even if they sometimes feel they should be given a greater number of frequencies to carry more channels.

PSBs should also have the right to generate products, including on a commercial basis, that are

65. See s. 8(d) of the South African Broadcasting Act 1999, s. 3(1)(l) of the 1991 Canadian Broadcasting Act and s. 7(2) of the Thai Public Broadcasting Service Act, B.E. 2551 (2008).
66. See ss. 8 and 10 of the South African Broadcasting Act 1999, s. 3(1)(l) and (m) of the 1991 Canadian Broadcasting Act and s. 7 of the Thai Public Broadcasting Service Act, B.E. 2551 (2008).
67. These, in turn, are adopted pursuant to Article 48 of the Law No. 86-1067 of 30 September1986, on liberty of communication ("relative à la liberté de communication"). Available at: http://www.csa.fr/upload/publication/Loi86-1067.pdf.
68. See articles 3 and 4. Available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/charter.pdf.
69. See articles 5-10. Available at: http://www.bbc.co.uk/bbctrust/assets/files/pdf/about/how_we_govern/agreement.pdf.
70. See also article 4(e) of the BBC Charter.
71. S. 3(1)(m).
72. S. 3(1)(m)(vii) of the Canadian law and s. 8(a) of the South African law.
73. S. 3(1)(m)(i) of the Canadian law and s. 8(a) of the South African law.
74. S. 10(1)(e) of the South African law, s. 7(3) of the Thai law and article 4(b) of the BBC Charter.
75. S. 3(1)(m)(iv) of the Canadian law and s.10(1)(c) of the South African law.
76. S. 7(2) of the Thai law.

related to their core programming mandate. Again, in most cases they do, even if sometimes this is not set out explicitly in law. An exception is South Africa, where s. 8(i) of the Broadcasting Act grants SABC the power,

> to commission, compile, prepare, edit, make, print, publish, issue, circulate and distribute, with or without charge, such books, magazines, periodicals, journals, printed matter, records, cassettes, compact disks, video tapes, audio-visual and interactive material, whether analogue or digital and whether on media now known or hereafter invented, as may be conducive to any of the objects of the Corporation.

BBC raises considerable revenues through its separate commercial arm (BBC Worldwide), from such 'tangential' commercial activity, in particular the sale of its programming to other stations and for personal use in the form of videos and DVDs. BBC Worldwide's profits also go to subsidise its PSB operation.

Although PSBs should be independent of political influences (government), this does not mean that they are free to act as they please. They should still be held accountable to the public. Most PSBs are required to submit annual reports, including audited accounts, to an oversight body, often the legislature. This is the case, for example, in Canada, United Kingdom, South Africa and Thailand, where the laws all provide some detail as to what the report must cover.[77] Reporting to the legislature is a key part of maintaining the balance between protection against political interference and accountability.

In many countries, a number of other accountability mechanisms are in place. In many countries, the general broadcast regulator plays some role in relation to oversight of the activities of the PSB. Thus, in France, the Conseil Superior de l'Audiovisuel (CSA), an independent statutory body established by the 1986 law, has a range of responsibilities vis-à-vis the PSBs, including in relation to defining their mandates, appointing members of their governing boards, and content issues. Similarly, the Canadian Radio-Television and Telecommunications Commission (CRTC) has formal licensing powers over CBC, including the power (subject to procedural protections) to impose licence conditions on CBC.

In the United Kingdom, the BBC is overseen by both Ofcom (the telecommunications regulator) and the BBC Trust (its governing body or board). The Trust is responsible for ensuring the BBC meets its remit and public purposes and, in particular, that it remains unbiased and impartial. Ofcom is responsible for ensuring the BBC's output is compliant with the content standards objectives which apply to all broadcasters.[78] The BBC is also accountable to a Parliamentary committee. It takes audience accountability seriously, undertaking regular public consultations, roadshows, and having set up standing audience consultative councils in each of the country's major regions and nations.

In addition to its governance structures, the Thai PSB is required to establish an Audience Council, and may establish Regional Audience Councils, to provide it with feedback on how it is discharging its mandate. The Council should be representative of the country both geographically and also in terms of interests. The Board is also required to establish a sub-committee responsible for considering complaints from the public.

Independence

Independence, in the sense of being protected against political interference and, to some extent also against commercial pressures, is important for PSBs as it is for broadcast regulators generally, and broadly for the same reasons. If PSBs are not free to report in a balanced manner on news and current affairs, including by selecting what they consider to be the important stories, their ability to contribute to diversity will be undermined, not to mention the impact this might have on unbalancing the electoral playing field.

This protection against interference does not mean that government and the legislature do not have a role in respect of policy matters. As noted above, for example, it is the legislature that should set the overall mandate for the PSB. At the same time, the legitimate scope for policy involvement, particularly by the government or individual ministries, is

77. Sections 71, 28 and 52, respectively.
78. See s. 319 of the Communications Act 2003.

much narrower regarding PSB than it is for overall broadcasting regulation.

In many countries, a double layer of protection is provided. First, the appointment of an (independent) oversight body (such as a governing board) serves as an insulating interface with more political oversight bodies, such as the legislature. The board normally bears overall responsibility for the organisation.

Second, the mandate of the board is often restricted to providing general guidance and oversight, rather than getting involved in day-to-day programming decisions. Thus, in most cases, the board addresses overall programming directions, financial oversight and budget issues, and the appointment of the general director and perhaps some other senior staff. It dies not, however, get involved in decisions about what news should be carried on a particular day or details concerning the programme line-up. This provides a further layer of protection against political interference. There may also be specific oversight or feedback bodies that have a role in relation to programming, such as the Audience Councils in the United Kingdom.

In terms of protecting the independence of the board, per se, much of what is written above regarding the board and board procedures for broadcast regulators applies, mutatis mutandis to PSBs. Thus, the section on the Board of independent regulators above applies equally to the board of a PSB, including that appointments should be made in a way that involves different sectors of society, that the appointments process is set out clearly in law and is done transparently, that members are protected against receiving instructions except in accordance with the law, that the chair is independent, that the power to dismiss members is limited, that clear board procedures are in place in a regulatory instrument, and that clear political and commercial rules on conflict of interest apply.

The South African Broadcasting Law provides a good example of how this can be done. Pursuant to section 13, the twelve non-executive members of the board (there are also three executive members) are appointed by the President, upon nomination by the National Assembly, in a manner that ensures public participation, that is transparent and that involves the publication of a shortlist of candidates. The President also appoints the chair and deputy-chair. The practice has been for the Assembly to nominate exactly 12 members. On one occasion the President rejected the whole block of nominees, but individual nominations have never been refused.

The law also sets out a number of both positive and negative characteristics regarding members. Members must be appointed for their expertise, and be committed to various positive values, such as fairness and freedom of expression, and, collectively, they must represent a broad cross-section of the population as a whole (section 13). Pursuant to section 16, no one may be appointed who is not a citizen of and resident in South Africa, who has been recognised by a court as being mentally unsound, or who has been convicted of various offences. Removal of a member may only be effected by the appointing body upon recommendation of the board, on grounds of misconduct or inability to perform (section 15).

Pursuant to section 17, no one may be appointed a member until he or she has made a declaration of potential conflicting interests. Where an issue arises before the board which may raise a conflict of interest issue, the member involved must declare the interest, and the remaining members of the board shall decide what steps should be taken. Where a conflict in fact exists and yet no such declaration was forthcoming, any decision made will be null and void.

Another approach is found in Germany, where members of the governing bodies of public broadcasters are appointed by various sectors of society. The idea is that representatives from different social sectors will ensure that the oversight body is representative and not dominatied by any particular political or commercial interest. For example, Norddeutscher Rundfunk (NDR), the Hamburg-based public broadcaster which serves Hamburg and nearby German states, is overseen by a Broadcasting Council, a Board of Governors and State Broadcasting Councils. The Broadcasting Council consists of up to 58 individuals nominated by the major political, ideological and social organisations and groups in society, such as political parties, unions, religious groups and so on. The Broadcasting Council is the main oversight body for NDR.

The Broadcasting Council elects the twelve members of the Board of Governors, which plays a more direct role in oversight of management of the organisation, although oversight of programming matters remains

the prerogative of the various Councils (Broadcasting and State). The Broadcasting Council appoints the Director-General, upon nomination by the Board. The State Broadcasting Councils, which are comprised of members of the Broadcasting Council from the respective state, ensure that the broadcaster serves the programming needs of their respective states.[79]

In Thailand, another approach is used, whereby a Selection Committee nominates members of the Board. The Committee is comprised of 15 individuals representing different sectors in society (media, government, civil society, academics and so on) (Article 18). The Board itself must include two people who are experts in mass communication, three who are management specialists and four who have various types of expertise, for example relating to children, democracy or working with the disadvantaged. The law also includes very detailed rules prohibiting certain individuals from sitting on the Board, along with limited grounds for removal of members. The governance structure also includes the appointment, by the Board, of an Executive Board, including the Director and several senior managers, with a more direct role in oversight, including in relation to programming (Article 29). The Director is appointed by the Board (Article 31).

Funding

Funding is central to the ability of public broadcasters being able to make a contribution to diversity by going beyond the programming provided by commercial broadcasters. In particular, certain genres of programming, and quality programming in general, cost more to make and so provide less of a financial return. As a result, commercial broadcasters are less attracted to these genres and, in general, are under pressure to produce more-for-less and so tempted to cut in terms of quality. It is thus recognised that PSBs need to be provided with at least some form of public financial support.

Today, the vast majority of PSBs operate on a mixed funding model, usually involving them being able to carry some advertising and/or sponsorship. A dominant funding model, particularly in Europe, is a licence fee paid on television and/or radio sets, with the level of the fee normally being set by the legislature or perhaps by the broadcast regulator. The licence fee has the advantage of being relatively protected against political interference, as well as against inflation, although the level of the fee may not always go up with inflation or be fully protected against interference.

A few select PSBs, such as the BBC and NHK (Nippon H s Ky kai or Japan Broadcasting Corporation), survive largely on funding from licence fees, and do not carry any advertisements.[80] In Germany, as well, the vast majority of funding comes from licence fees, but the different broadcasters do carry some advertising. Thus, the ARD network derives about 80% of its funding from the licence fee, and the remainder from advertising and other sources of revenues. The main French public television broadcasters, France 2 and France 3, are also funded by a licence fee, but derive a greater proportion of their funding from advertisements (up to 50%).

As a variant on the television licence fee, some countries in Europe have instead imposed a special tax on the supply of electricity. An example is the Helenic Broadcasting Corporation in Greece, which is mainly funded by a fee imposed as a fixed percentage of each electricity bill. The fee is collected along with the electricity bill and is not connected with actual ownership of a TV set. This has various advantages, in particular that collection of the fee can be built into an existing fee collection system, and so imposes very little extra cost. Depending on how it is done, this may also have the advantage of being a progressive form of 'taxation', where those who use more electricity, who are normally wealthier, are charged more.

Not all countries use the licence fee system. In Canada, for example, CBC is funded through a direct government grant. Although formally not as protected against interference as the licence fee model, this generally works well enough in Canada, where strong civil society and general public support for CBC makes it difficult for the government to interfere. At the same time, funding for CBC has declined relative to GDP in recent years.

79. Welcome to Norddeutscher Rundfunk (NDR): An Excursion Through North Germany's Leading Electronic Media Company. Available at: www.ndr.de/unternehmen/organisation/fuehrungen/faq6.pdf.
80. As noted above, BBC does receive some revenue from related commercial activities, such as sale of programmes and DVDs.

Thailand operates a very unique funding system, whereby a levy of 1.5% of the tax on liquor and tobacco sales is remitted to the public broadcaster, subject to an overall limit of Bhat two billion (approximately USD62 million). The minister of finance may adjust this maximum every three years, taking into account inflation and the activities of the broadcaster (see section 12 and following of the law). Although this may seem an odd source of funding by European standards, it has so far worked well in Thailand.

The Situation in Brazil

Empresa Brasil de Comunicação (EBC), the Brazilian public broadcaster, has a market share of around 2% of the overall television audience and, according to its website,[81] had a budget of around R$342 million (approximately US$200 million) in 2008, which appears to have come largely from public sources (EBC may not advertise goods and services, although it may carry advertising by public bodies).[82] Our primary observation on public broadcasting in Brazil, therefore, is that as a sector it is far too small and under-resourced to meet the country's public service broadcasting needs.

We were also informed that, in practice, EBC is not fully independent of the government. This finds support in the fact that, pursuant to the law, most of the members of the governing Board of Directors are appointed by government ministers.

Recomendações

The allocation of funding to EBC, or to public service broadcasting in some other form, should be substantially increased so that this sector can play a more important role within the overall broadcasting ecology in Brazil.

In parallel to any increasing in funding, the independence of EBC should be substantially enhanced.

81. See http://www.ebc.com.br/empresa/orcamento.
82. See Article 8 of Decree No. 6689 of December 11, 2008.

Community Broadcasters

The term 'community broadcasters' refers to broadcast stations which are independent, civil society based and which operate for social objectives rather than for private financial profit. A key characteristic of community broadcasters is that they have a strong link to a particular community, whether this be a geographic community or a community of interest. At its best, this link is manifested in terms of ownership, management of the station and the development of the station's programming output. At a minimum, the station must provide programming for and about the community, and serve the informational and voice needs of the community.

The origins of community broadcasting are in the Americas, notably in Bolivia, where mining communities started their own radio stations as a way of giving voice to their issues and concerns.[83] These stations operated outside of any legal framework, a situation that pertains to many community broadcasters even today. Indeed, these broadcasters are sometimes referred to as pirate stations because they do not hold broadcasting licences.

It is now widely recognised that community broadcasting should be recognised in law and that special licensing procedures, tailored to the specific needs of aspirant community broadcasters – as small, minimally resourced, often largely volunteer-run stations – should be put in place. In most cases, community broadcasters cannot compete in open competitions with commercial broadcasters for licences, among other things because they do not have the resources.

The reason for such special recognition of community broadcasting, and community radio in particular, is that it can make an important contribution to diversity in the airwaves. It can provide the only opportunity for communities to engage in public communication activities, and to share information of importance and interest among their members. It is thus widely recognised as an important third tier of broadcasting, alongside commercial and public service broadcasting.

There has been a massive growth in community broadcasting over the last couple of decades, fuelled in part by a recognition of the advantages it can bring to the overall communications environment, and in part by technological developments that have very significantly reduced the cost of setting up especially radio stations.

Recognition and Definition

For community broadcasting to be enabled, it must be specifically recognised in law and defined in a manner that prevents commercial broadcasters from posing as community broadcasters. The definition should highlight the features noted above, and in particular the need for a strong link to the community. In practice, there are significant variations in the definitions of community broadcasting.

In Canada, where broadcasting is regulated by the Canadian Radio-Television and Telecommunications Commission (CRTC), community radio is defined in Public Notice CRTC 2000-13 as follows:

83. Gumucio-Dagron, Alfonso, Voces de los Mineros (Paris: UNESCO, 1993).

> A community radio station is owned and controlled by a not-for-profit organization, the structure of which provides for membership, management, operation and programming primarily by members of the community at large. Programming should reflect the diversity of the market that the station is licensed to serve.[84]

An earlier requirement that the station involve volunteers was dropped in 2000, although in practice volunteers still do make a major contribution to community broadcasting in Canada.

The United Kingdom takes a similar approach by defining the characteristics of community radio as local services provided primarily:

> (a) for the good of members of the public, or of particular communities, and
>
> (b) in order to deliver social gain,
>
> rather than primarily for commercial reasons or for the financial or other material gain of the individuals involved in providing the service.

In the United Kingdom, community radio services are also required to primarily serve one or more communities, that those communities are given opportunities to participate in the operation and management of the station and that the station is accountable to the community.[85]

Section 50 of the South African Electronic Communications Act 2005[86] takes a different approach, defining the characteristics of a body which is eligible for a community broadcasting licence, as follows:

> In considering the grant of a new community broadcasting service licence the Authority must, with due regard to the objects and principles enunciated in section 2, among others, take into account whether—
>
> (a) the applicant is fully controlled by a non-profit entity and carried on or is to be carried on for non-profit purposes;
>
> (b) the applicant intends to serve the interests of the relevant community;
>
> (c) as regards the provision of the proposed broadcasting service, the applicant has the support of the relevant community or of those associated with or promoting the interests of such community, which support must be measured according to such criteria as may be prescribed;
>
> (d) the applicant intends to encourage members of the relevant community or those associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast in the course of such broadcasting service; and
>
> (e) the applicant has never been convicted of an offence in terms of this Act or the related legislation.

Yet a different approach is taken in France, where the law refers to five different categories of broadcasters, including: "Category A: Non-commercial - services eligible for the 'Fund for the Support of Expression by Radio'". Category A stations are local, community, cultural or student services, which are obliged to carry at least 4 hours of local programming every day. Most of the rest of their programming should be either non-commercial network programming or programmes produced by other category A stations.[87]

In Thailand, The Allocation of Telecommunication and Broadcasting Frequencies Act, passed in March 2000,[88] sets out clear rules for the allocation of broadcasting frequencies. It assigns 40 per cent of the available broadcast frequencies to the State sector, 40 per cent to the commercial sector and reserves 20 per cent for not-for-profit community broadcasting. There has been a lot of debate over what this 20 per cent should cover, in terms both of the actual frequencies to be allocated (e.g. does the 20 per cent refer to the spectrum or the number of stations) and what sort of broadcasters would qualify for them. There are, in particular, claims that people's media (small, individually run, not-for-profit stations) should be eligible for these frequencies in addition to community broadcasters. This problem arises in part

84. Public Notice CRTC 2000-13, para. 21.
85. See Section 3, Community Radio Order 2004, Statutory Instrument 2004, No. 1944.
86. Act No. 36, 2005.
87. See ICT Regulation Toolkit, Different local radio models in France. Available at: http://www.ictregulationtoolkit.org/en/PracticeNote.3154.html.
88. A new Frequencies Allocation Act is currently being adopted in Thailand, and it is unclear whether or not it will preserve these allocations.

from the failure of the Act to define precisely what constitutes community broadcasting.

For complex reasons, Thailand has so far not been able to put in place the independent broadcast regulator, the National Broadcasting Commission, envisaged by the Frequencies Act.[89] This has blocked implementation of the broadcast rules, so that few new licences have been issued, including for community broadcasters. This has had the result that most of the 1000s of community radios that exist in Thailand are unlicensed. There have been period crackdowns on these radios, and they exist in a state of legal limbo. Recent, the National Telecommunications Commission, which is supposed to deal with telecommunications rather than broadcasting, has been granted interim powers to issue one-year licences to community radios. Despite a rumoured 5000 applications for these licences, only about 100 licences are actually expected to be issued.

In Canada, there has not been a special reservation of frequencies for community broadcasters, as is the case in Thailand. But according to the CRTC, at the end of December 2008, 28.9 per cent of radio broadcasters were community broadcasters and just over 20 per cent of all television stations were community-television services.[90] In France, as of 2008, there were approximately 600 licensed community (or 'associative') radio stations, comprised of local, community-based, cultural and student stations.[91]

In the United States, community broadcasting has its roots in a historic decision of the Federal Communications Commission in 1945 to reserve 20 per cent of the FM radio spectrum (from 88.0 to 92.0 MHz) for non-profit services.[92] The first non-profit radio services in the United States were limited to educational institutions but the launch in 1949 of KPFA in Berkeley, California marked the beginning of a wider opening for community radio. Today, over 2500 licences have been issued to non-commercial FM radio services and around 400 licences to non-commercial public and educational television services.

South Africa presents a rather unique scenario whereby there are far more community radio stations than commercial ones. At present, there are only 16 private commercial radio stations (and another three commercial stations run by the public broadcaster), compared to approximately 120 licensed community radios (not all of which, however, are on air). The reason for this otherwise unique situation is mainly to do with a desire to empower black voice. Allocating new licences to commercial stations would probably result in greater control over the spectrum by those with greater resources, who are disproportionately white. Instead, South Africa has opted to develop the less commercially-oriented community broadcasting sector.

There are hundreds of small community radio stations in Chile (over 400 licensed and a large number of unlicensed services), many run by civil society organisations. Community television also exists, but on an illegal, unlicensed basis. In July 2009, about 50 community media organisations formed a community media network to pool resources and make a bid for legitimacy.[93] Interestingly, following the recent earthquakes in Chile, it was these small community stations that were credited with providing information and instructions to people in the devastated regions.[94]

Licensing

As noted above, one of the key reasons recognition of community broadcasting is important is that this is a necessary precondition for establishing a different licensing regime for these broadcasters. Traditional licensing for commercial broadcasters often involves tenders, or bids, which are highly technical and for which financial means, and even the proposed fee to be paid for the licence, are important. In most cases, community broadcasters cannot compete

89. It is expected that the new law will overcome the problems in the existing law and that a regulator will indeed be appointed once it comes into force.
90. See: http://www.crtc.gc.ca/eng/publications/reports/policymonitoring/2009/2009MonitoringReportFinalEn.pdf.
91. See CRTC, International Approaches to Funding Community & Campus Radio. Available at: http://www.crtc.gc.ca/eng/publications/reports/radio/connectus0903.htm#c3.
92. Federal Communications Commission (1945) Allocation of Frequencies to the Various Classes of Non-Governmental Services in the Radio Spectrum from 10 Kilocycles to 30,000,000 Kilocycles, Docket No. 6651 (June 27, 1945).
93. See http://ipsnews.net/news.asp?idnews=47563.
94. See AMARC's press release of 6 March 2009. Available at: http://wiki.amarc.org/?action=shownews&id=1112&lang=EN.

with commercial players in an open bidding process because they lack the financial means and technical savvy to do so.

In many cases, aspirant community broadcasters are fledgling organisations, made up of community representatives with little previous experience of broadcasting, often working largely or entirely on a volunteer basis. These organisations cannot be expected to present complex applications for a broadcasting licence. Instead, they should be given a chance to try their hand at community broadcasting as long as they demonstrate social purpose and benefit, along with adequate provisions for community participation in the ownership and operation of the service.

In Canada, a particular regime applies to community television. Any cable company with over 6000 subscribers must provide a local channel which local subscribers to the cable service can access to provide programming. In larger metropolitan areas, like Toronto, different community channels are designated for different parts of the city. There are presently over 225 community television channels operating across Canada in this way.

For community radio, as well, two special licensing systems are in place. First, Public Notice CRTC 2000-13 provides for a new category of developmental community stations, which applies to stations having a transmitter power of 5 watts or less. Both the licence application and the procedure for processing it have been significantly streamlined. The goal is to help community broadcasters get up and running quickly, and with a minimum of conditions and procedure. Licences last for three years, after which the station is expected either to apply for a regular community licence or to stop broadcasting.

An expedited licensing procedure also applies to regular community broadcasting licences. Applicants do not need to complete a Promise of Performance, unlike commercial broadcasters. They do, however, need to submit a proposed programme schedule as a sample of the type of programming they intend to provide. Adherence to other programming commitments that an applicant may include with its application for a new or renewed licence is not generally required.[95] The actual licence application is available online and is very streamlined compared to applications for commercial broadcasting licences.[96]

An expedited licensing process also applies in South Africa, where community radios have been licensed since 1994. They were initially issued with temporary 12-month licenses but, since 1996, they have been eligible for up to four-year licenses, although many stations still operate with temporary licenses.[97]

Community radio stations in Chile are regulated through a 1994 law that limits the area of coverage to a few square kilometres (normally 1Watt power), which may be extended only in exceptional circumstances. Community stations are licensed for three-year periods and are barred from carrying any advertising. However, a new Community Radio Act is currently awaiting Presidential approval. This will officially recognise community radio stations as providing social and community services and it will also offer some technical improvements, like increasing their permitted power to 10 watts, and extending their license period to 10 years.

Community television is not covered by the law, and will remain formally illegal. Seven community radio stations were closed down in 2009 for broadcasting without a licence and allegedly interfering with telecommunications, offences that carry penalties ranging from fines and seizure of equipment to prison terms under Chile's telecommunications law. There has been a call in Chile to decriminalise unlicensed broadcasting altogether and it is hoped the new law will assist in normalising community broadcasting.

There are over 200 licensed community radio stations in the United Kingdom, mostly operating on FM at low power levels (25 Watts), on 'spare' frequencies between larger radio stations. There are additionally untold numbers of illegal 'pirate' stations. Using broadcast frequencies without a licence is a criminal offence in the United Kingdom. Pirate operators regularly have their equipment seized by

95. See Public Notice CRTC 2000-13, paras. 63-67.
96. Available at: http://www.crtc.gc.ca/eng/forms/efiles/f115.htm.
97. See ICT Regulation Toolkit, Rural community radio in South Africa. Available at: http://www.ictregulationtoolkit.org/en/PracticeNote.3151.html.

Ofcom and get fined through the criminal justice system. Courts have been reluctant to apply harsher penalties, despite the fact that legitimate radio stations complain that illegal operators interfere with their signals.

Licences are awarded on a competitive basis. Ofcom advertises tranches of licences from time to time as frequencies become available. When considering competing applications, Ofcom looks at a number of factors including:

- the ability of the applicant to offer the service;
- the extent to which the service responds to the needs and interests of the community;
- the extent to which the service would broaden
- the range of programming available to the community;
- the extent to which there is demonstrated demand, in the community, for the service;
- the extent to which the service would delivery social benefits; and
- arrangements regarding accountability of the service to the community and access by the community to the service.[98]

Funding

Community broadcasters often operate largely on a volunteer basis, and they tend to have relatively low costs. At the same time, access to funding is important for them. As the sector or even an individual station grows, there is an increased tendency towards professionalisation. Having a paid station manager, for example, becomes increasingly important as the programming portfolio of a station grows. It is also important to be able to take advantage of new technologies and technological tools (e.g. software). Outreach programmes and activities within the community are also important and require funds to conduct.

In some countries, the law has placed restrictions on what fundraising community broadcasters may conduct, although such restrictions are increasingly being done away with. For example, in Canada, Type B community broadcasters (those operating in areas where there are competing services other than ones provided by the Canadian Broadcasting Corporation (CBC), the public broadcaster), were historically limited in the amount of advertising they could carry (while Type A community broadcasters, those operating in areas where there are no competing services other than ones operated by the CBC, were not so limited). This restriction was done away with in 2000.[99]

In many cases, the provision of advertising by community broadcasters is also a form of community service, as they disseminate local messages on behalf of members of the community – for example about births, marriages and deaths – for a small fee.

In addition to having access to commercial forms of fundraising, many countries provide public funding through various means for community broadcasters. This can help them remain viable while reducing their dependence on more commercial forms of fundraising. It is also in recognition of the fact that it is sometimes very difficult for these small, local broadcasters to attract adequate advertising.

In France, access to the two types of funding – commercial and public – is linked through regulation. Community radios can carry advertising, but advertising revenues must not exceed 20 per cent of a station's total revenues from all sources if the station wishes to be eligible to apply for funding from the main central government funding program, FSER (Fonds de soutien à l'expression radiophonique or Support Fund for Radio Expression). As a result, the FSER, created by Law 82-652 of 29 July 1982,[100] and operating under the Ministry of Cultural and Communication, represents the major source of funding for community radios. Funding for the FSER is provided through a levy on the advertising revenue of commercial broadcasters.

Grants from FSER take place once per year, and are allocated through four different funding streams, although stations can apply for funding under more than one stream. Allocations from the grant are based on two criteria, namely the ability of the station to secure funding from other sources, especially donations from the local community, which is viewed favourably, and programming quality together with social and cultural links to the local area. However,

98. See http://licensing.ofcom.org.uk/binaries/radio/community/nogs_r23.pdf.
99. See Public Notice CRTC 2000-13, paras. 50-51.
100. See also Decree 2006-1067 of 25 August 2006.

conditions for providing grants appear to be quite favourable and very few applications are rejected.

Under the first funding stream, stations can apply for an establishment grant of up to 16,000. This is a one-time grant that may be used to defray start-up costs and the purchase of initial equipment. In 2008, 36 establishment grants were provided for a total of 573,790. The second funding stream is for an equipment grant for the purchase of new equipment or upgrading of older equipment, up to a maximum of 50 per cent of the price, or 18,000, whichever is lower. In 2008, a total of 287,051 was provided under this stream to 84 stations. The third stream is for operational subsidies. There is no set maximum, but in 2008 operational grants of up to 40,000 were provided to 596 stations, for a total of 20,481,553, making this by far the largest funding stream. Finally, in 2008, 548 stations were provided with special project funding for a total of 4,400,000. This funding goes primarily for training activities, youth programmes, exchanges with other community radios and local cultural integration.[101]

In Canada, a similar sort of cross-subsidy programme is in place to support community television. Broadcasting distribution undertakings (BDUs) – mainly cable and satellite providers according to the technical definition – are now required to provide 1.5 per cent of their gross revenues to support a Local Programming Improvement Fund (LPIF), up from 1 per cent previously.[102]

The fund is allocated to community television broadcasters in a complex model which ensures that approximately 30 per cent of the total is directed to francophone markets and 70 per cent to anglophone markets. Allocations are standardised, based on a three-year historical spending model (in essence, each station is allocated its proportionate share of the fund, based on its three-year spending as a proportion of overall three-year spending in its sector, francophone or anglophone).

Eligibility for funding depends on various factors. For the most part, LPIF funding is available only to stations operating in non-metropolitan markets (with populations of less than one million), although a station operating in the non-majority language of a metropolitan market will also be eligible (i.e. a French-language station in a primarily English-speaking city). Minimum levels of local programming are required per week, depending on a number of different factors, ranging from seven hours to lesser amounts. Only expenses directly attributable to the acquisition or production of programming are considered eligible expenses for the LPIF.[103]

In South Africa, the Media Development and Diversity Agency (MDDA), an independent body established by statute,[104] provides funding to community broadcasters. Its objectives include encouraging ownership and control of, and access to, the media by historically disadvantaged communities, providing training opportunities to members of historically disadvantaged communities and providing funding support to community media.[105]

Funding for the MDDA totalled around R27 million (approximately USD3.5 million) in FY2009-2010. This funding comes from mainly from government (about 65% of its funding in FY2009-2010) and from established commercial media. Pursuant to s. 89 of the Electronic Communications Act, all licensed broadcasters in South Africa must provide an assessed contribution to the Universal Service and Access Fund, which is used for various purposes. However, the same provision allows broadcasters to offset their Fund contributions by any allocation they make to the MDDA. In 2009-2010, broadcasters provided R5.3 million to MDDA, while print media outlets provided R4.8 million.

At least 60 per cent of MDDA grants must go to community broadcasters. In 2008-2009, 43 projects were supported, for a total of just over R19 million (about USD2.3 million), including nine for community radios, four for community televisions, 17 for community and small commercial print media, and ten allocated to programme production. The grants to community broadcasters included provision of

101. See the 2008 Annual Report of the FSER. Available at: http://www.ddm.gouv.fr/IMG/pdf/Rapport_activite_FSER_2008.pdf.
102. See Broadcasting Regulatory Policy CRTC 2009-406, para. 24.
103. See Broadcasting Regulatory Policy CRTC 2009-406, paras. 22, 29 and 33.
104. The Media Development and Diversity Agency Act, No. 14 of 2002.
105. S. 3(b) of the Act.

operational support, project funding, training and the provision of equipment, among other things.[106]

In the United Kingdom, Community Radio stations are not permitted to draw more than 50% of their income from advertising and sponsorship. The United Kingdom government provides a fund of up to half a million pounds per year to be distributed in two annual tranches by Ofcom to community radio licensees.

Grants will not be provided for:

- Retrospective grants i.e. to cover expenditure already incurred
- Funding for the repayment of loans
- Research costs
- Company Directors' fees
- Vehicle costs
- Travel expenses
- Volunteer expenses
- Cost of building repairs, construction or maintenance
- Purchase of furnishings
- Programming costs
- Utility bills
- Rent due on premises and/or mortgage payments[107]

In addition, Welsh community stations have access to a special grant provided by the Welsh Assembly. The Welsh Assembly has put aside £100,000 per year for grants for stations that promote key Welsh social policy objectives.[108]

The Situation in Brazil

Law No. 9.612 of 19 February 1998 regulates community broadcasting in Brazil. It defines community broadcasters as low-power (25 watts or less) FM radio broadcasters run by foundations, community organisations or NGOs. Article 9 of Law No. 9.612 suggests that only one community broadcasting licence may be issued in any geographic area, and that where there is more than one applicant, the regulator will try to get them to cooperate to share the licence. We were informed that a small number of frequencies are reserved for community broadcasting,[109] although it would appear that these allow for the licensing of only two or three such broadcasters in any given FM band. This is significantly lower than the number of frequencies allocated to community broadcasting in other democracies.

In terms of licensing, we were informed that some 353 community broadcasters are operating on a temporary licence, waiting for approval by Congress to formalise their licences. We were also informed that there are 1000s of aspirant community broadcasters who would like to obtain licences but who have not yet been able to do so, for reasons that we do not fully understand.

Article 16 of Law No. 9.612 prohibits community broadcasters from forming networks, and we were informed that this rule is applied in practice. While it is important for community broadcasters to serve their own local communities, at the same time small communities often face similar challenges and, in many countries, some degree of networking of programming between community broadcasters helps them better serve their communities.

According to the law, community broadcasters may accept sponsorship of their programmes (i.e. by presenting general information about the sponsor at the beginning and/or end of the programme) (Article 18) but we were informed that they may not carry advertisements. Furthermore, there appears to be little or no public funding provided to community broadcasters. They are thus denied two of the main sources of funding for community broadcasters in most countries.

106. See the MDDA 2008-2009 Annal Report. Available at: http://www.mdda.org.za/gifs/MDDA_annual%20report%202008_2009.pdf.
107. See Community Radio Fund Guidance Note. Available at: http://stakeholders.ofcom.org.uk/binaries/broadcast/radio-ops/guidancenotes230210.pdf.
108. See Community Radio Fund Guidance Note 2010/11. Available at: http://wales.gov.uk/topics/cultureandsport/mediapublishing/radiofund/?lang=en.
109. We were given different assessments of the exact number of reserved frequencies.

Recommendations

A larger portion of the FM frequency spectrum should be allocated to community broadcasters and restrictions on the number of community broadcasters allowed to operate should be removed and replaced with more open public interest conditions for licensing.

The licensing process for community broadcasters should be made as simple and rapid as possible, striking a balance between the need for some basic formalities to be met and the limited capacity of these broadcasters.

Consideration should be given to removing the prohibition on networking among community broadcasters, or at least to making it clear that this does not prohibit them from sharing programmes.

Community broadcasters should not be entirely prohibited from carrying advertisements and rules should be developed for this which take into account any public funding provided to these broadcasters, the need for them to focus on their community mandates and the needs of other broadcasters. Consideration should be given to establishing a fund, overseen by an independent body, to provide funding to support community broadcasters.

Other issues

This section of the report addresses a number of other issues which do not fit cleanly into the main topics of the other sections. This includes the important question of ownership rules, including foreign ownership, the transition to digital television, elections and the allocation of public advertising budgets.

Ownership Rules

Concentration of ownership of broadcasters, along with vertically integrated media enterprises controlling parts of the broadcast and print media sectors, or a lack of diversity of ownership in the broadcast sector, can pose a number of problems from the perspective of freedom of expression. Most obvious is the risk of such concentrations undermining the goal of promoting diversity in the media, a key freedom of expression value. This can take many forms. Concentrated media houses may be tempted to syndicate programmes between members of the same ownership group, with a view to cost-cutting. This means that viewers and listeners are treated to the same fare on different stations. Syndication can be a particular problem where ownership extends to numerous local stations. In this case, syndication of news, for example, can result in less local news, which is relatively expensive to produce.

Concentration of ownership can also lead to a lack of diversity, or even uniform views on certain issues, being carried across the media group, particularly where owners impose editorial control over the group or where the group operates with a central news desk. This may be particularly problematical where it is linked to political parties. For example, where a dominant media owner supports a certain party or political leader, this can unbalance the electoral 'playing field'. It can also be problematical when a dominant media group takes a strong position on an issue of public debate which concerns that media group. This might even include attempts to put in place rules limiting concentration of media ownership.

It may be noted that competition in the media sector is different from competition in many commercial sectors, because the demand for variety is much greater in the media sector than in most commercial sectors. Two or three properly competitive players are enough in most markets to ensure fair market prices and choice. Far more players are desirable in the media sector, which deals in the marketplace of ideas, depending on financial viability. As a result, many countries have put in place special regimes governing concentration of media ownership, over and above general rules prohibiting market monopolisation (or anti-trust measures).

A number of mechanisms may be put in place to help ensure the proper implementation of anti-concentration rules. For example, media enterprises may be required to report, or even to obtain prior approval for, proposed media combinations to an oversight regulatory body. Media enterprises may also be required to meet special, more stringent, rules on transparency of ownership than are applied generally to corporations. Regulators may also be required to take into account the potential impact of granting a licence on concentration of media ownership when assessing licence applications.

In Canada, the regulator, the Canadian Radio-Television and Telecommunications Commission (CRTC), must approve changes in the control or ownership of

licensed broadcasters. Between 1982 and 1985, the federal government directed the CRTC to prohibit new or renewed broadcasting licences for media firms which also controlled a daily newspaper in the same market. In 1985, this order was rescinded and the regulator instead adopted a policy of case-by-case licensing decisions.

In practice, the CRTC will not allow a transaction that gives a single entity control of more than 45 per cent of the television market and it will scrutinise very carefully transactions that result in a 35-45 per cent share. The CRTC will also not approve a transaction that results in one entity controlling media outlets in the same market in more than two of the following categories: local radio stations, local television stations and local newspapers. Concentration of ownership within the broadcasting sector is usually assessed in a given language. For radio, in markets of less than eight commercial radios, no one player will be allowed to control more than three stations, and no more than two in any frequency band (i.e. AM or FM). In larger markets, up to two stations in each band may be allowed. Generally, no one entity may control more than one television station in a given market, with some exceptions applied to allow for local markets that, if the rule were applied rigorously, would not have their own television station.[110]

In 2008, the CRTC announced new rules that move away from the case-by-case approach. Specifically, it announced that it would not approve new licence applications that would result in the ownership or control by a single person of a local radio, television and newspaper serving the same market.[111]

In response to concerns that dominant owners' drives for economies would reduce diversity of independent news and information, the CRTC has attached industry-proposed "safeguards" to licence renewals of television/media conglomerates which also control newspapers and multiple broadcasters in the same markets. An important element of these safeguards are that separate and independent newsroom management structures must be maintained. Furthermore, television executives may not sit on the editorial boards of affiliated newspapers and vice versa.

In the United States, there are very detailed and precise rules on concentration of ownership and cross-ownership within the media sector. The FCC is required by law[112] to review media ownership every four years. Its latest review was announced in June 2010 and the current rules were put in place in 2006.[113]

At the national level, no mergers are permitted between any of the four largest networks (ABC, CBS, Fox, and NBC). A single entity may own any number of television stations nationally, as long as the group collectively reaches no more than 39% of the national television audience.

Local ownership rules are complex. One company may own two TV stations in the same area if either (1) the service areas of the stations do not overlap; or (2) at least one of the stations is not ranked among the top four stations in the area (based on market share), and at least eight independently owned TV stations would remain in the market after the proposed combination.

For radios, numerical limits apply on a sliding scale, in accordance with the table below:

Market size	Maximum number	Number in Same Service (i.e. AM or FM)
14 or fewer stations	5 stations	3 stations
29 or fewer stations	6 stations	4 stations
44 or fewer stations	7 stations	4 stations
more than 45 stations	8 stations	5 stations

110. See *Torys on Technology and Communications*. Available at: http://www.torys.com/Publications/Documents/Publication%20PDFs/TC%202008-2.pdf.
111. http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm.
112. See Section 202(h) of the Telecommunications Act of 1996.
113. See: http://www.fcc.gov/ownership/rules.html.

Cross-ownership rules also apply. As between television and radio, in a single market, one company may own one television (or two if the local television rules permit this) and one radio station. If at least 10 independently owned broadcasters would remain after the merger, the limits increase to one or two televisions (in accordance with the rules for television) and up to four radio stations. Where at least 20 independently owned broadcasters would remain after the merger, the limits increase to up to two televisions (in accordance with the rules for television) and up to six radio stations, or one television and up to seven radio stations.

There are additionally rules which restrict the ability of newspapers and television companies to be in single ownership, particularly in smaller markets. For a top 20 designated market area (DMA), the FCC maintains a presumption that a daily newspaper may combine with a radio station where at least eight independent major media voices (full-power television stations and major newspapers) remain. For a combination between a daily newspaper and a television station, the additional requirement that the television is not ranked among the top four in the DMA applies.

In smaller markets, there is a strong presumption against allowing daily newspaper/broadcast combinations at all. The presumption may be overcome in only two circumstances, namely if the proposed combination involves a failed or failing station or newspaper, or where the combination creates a significant new source of news. The applicant must demonstrate by clear and convincing evidence that the merger will increase the diversity of independent news and increase competition.

In all cases involving newspaper mergers, the FCC will consider the following:

- the extent to which the combination will increase
- the amount of local news in the market;
- whether each media outlet in the combination will exercise independent news judgment;
- the level of concentration in the area; and
- the financial condition of the newspaper or TV station, and whether the new owner plans to invest in newsroom operations if either outlet is in financial distress.

In Germany, mergers and acquisitions of media outlets are subject to general antitrust laws. The key factor for merger control is the annual turnover of the participating businesses. As soon as the relevant annual turnover exceeds a certain level, defined by the German Law on Merger Control and Competition (Gesetz gegen Wettbewerbsbeschränkungen or GWB), the merger or acquisition can go ahead only once permission is granted by the Federal Cartel Office of Germany ("Bundeskartellamt"). The general level for engagement of this rule is 500 million total turnover of all participating businesses. For media businesses, however, the amount is set at just 25 million, reflecting greater concern with media mergers.

German antitrust laws also contain a minimum limit below which the Federal Cartel Office cannot apply the GWB rules (de-minimis rule in section 35 of the GWB). The normal limit is where the annual turnover of one of the participating companies is less than 10 million in the preceding year. For media, however, the limit is just 750,000.

In addition, for mergers of broadcasters, a special investigation is conducted to determine whether the merger or acquisition might lead to unwanted or undue concentration of ownership and, therefore, limit the free formation of public opinion. In these cases, control by the Federal Cartel Office is supplemented by further control by the Commission on Concentration in the Media (Kommission zur Ermittlung der Konzentration im Medienbereich or KEK). This Commission is constituted on the basis of the Interstate Agreement on Broadcasting (Agreement on Broadcasting between the Federal States in United Germany).[114] The KEK consists of 6 media and economic law experts, and is tasked with securing diversity of opinions in the German media.

In practice, KEK will not allow a media owner with a dominant market position (defines as a 30% or larger market share) to acquire a television station with a market share of 25% or more.[115]

The prohibition of a merger or acquisition by the KEK is binding on the German states' supervisory authorities. They can, however, within one month of a KEK decision, appeal to the Conference of Directors

114. Available in English at: http://www.iuscomp.org/gla/statutes/RuStaV.htm.
115. See: http://www.bundeskartellamt.de/wEnglisch/download/pdf/0905_Infobroschuere_e_web.pdf.

of the State's Supervisory Authorities. This Conference may, within three months of the appeal, reverse the KEK decision by a three-quarters majority vote of its members; otherwise the KEK decision remains binding.

In Thailand, it is still the case that most frequencies are controlled by different State actors, and so the issue of concentration of ownership has not really become an issue yet.

There are no laws on cross-media ownership in Malaysia and only a vaguely expressed provision in the Communications and Multimedia Act 1998[116] to prevent monopolisation of the airwaves. There has been increasing media concentration in the country over the past 10 years, with concern expressed by observers,[117] especially over the growth of Media Prima. As of 2007, Media Prima is the biggest media group in Malaysia, owning all the main private television stations and attracting approximately 54% of Malaysia's television viewing, with its closest rival, the pay-television satellite operator Astro, controlling a market share of roughly 29%. The State-owned Radio Televisyen Malaysia controlled 17% of the market. Media Prima also controls a major section of the newspaper and magazine market and several radio stations.

In South Africa, concentration of control over the media is addressed directly in the Electronic Communications Act, 2005. Section 65 of the Act sets out very clear rules regarding ownership rules within the broadcasting sector. No one may control, directly or indirectly, more than one television licence. Control is defined as including owning 20 per cent or more of the shares of the media outlet. Furthermore, no one may control, again directly or indirectly, more than two FM radio licences or two stations with substantially overlapping service areas. The same rules apply to AM radio. One might thus own one television station, two non-overlapping FM radio stations and two non-overlapping AM stations. The regulator, the Independent Communications Authority of South Africa (ICASA), may waive these requirements upon a showing of good cause and without departing from the objects and principles set out in the Act.

Section 66 sets out similarly clear rules on cross-media ownership. No one who controls a newspaper may also control both a television and a radio licence. No one who controls a newspaper may control a broadcaster if the newspaper has an average Audit Bureau of Circulations (ABC) circulation of 20 per cent or more, and has a service area which substantially overlaps with that of the broadcaster. For purposes of this section (but not explicitly the previous one), substantial overlap is defined as a 50 per cent overlap. Once again, ICASA may waive these requirements, and on the same terms as above.

In France, the Conseil Superieur de l'Audiovisuel (CSA) regulates broadcast media ownership issues. Anyone with a more than 10 per cent ownership share must report this to the CSA, which is then in a position to monitor ownership. No one may own more than 49 per cent of a national television station, or more than 15 per cent of a second station, or 5 per cent of a third.

At the national level, no one may control more than two of the following: a television station with an audience of 4 million people or more; a radio station with an audience of 30 million people or more; a cable operator with a subscriber base of 6 million people or more; and a newspaper which exceeds 20 per cent of the total national circulation of daily newspapers.[118]

Analogous rules at the local level prevent anyone from controlling more than two of the following: a national or local TV license covering that area; one or more radio licenses with cumulative audience shares of more than 10% of the population of the area; a cable network providing services in the area; and having editorial or another form of control over a daily newspaper serving the area.[119]

116. See s. 133.
117. See Centre for Independent Journalism, Malaysia Report 2004-5. Available at: http://www.cijmalaysia.org/index2.php?option=com_content&do_pdf=1&id=87.
118. See Michael McEwen, *A Report to the CRTC Media Ownership; Rules Regulations and Practices in Selected Countries and Their Potential Relevance to Canada*. Available at: http://www.crtc.gc.ca/eng/publications/reports/mcewen07.htm. See also Alison Harcourt, *The European Commission and regulation of the media industry*. Available at: http://www.medialaw.ru/laws/other_laws/european/e-eh.htm.
119. See: http://www.csa.fr/multi/index.php?l=uk&p=a.

In recent years in the United Kingdom, policy concern about plurality has shifted from ownership of broadcasters *per se* to concerns about plurality of the provision of public service broadcasting content. Historically in the United Kingdom, even the two private television channels, ITV and Channel Five, have been subject to public service programme obligations, in return for access to a nation-wide licence. As the country turns to digital TV, with switchover in 2012, the private broadcasters argue that there no longer remains any economic incentive for them to carry public service programming.

Connected to this is a concern about maintaining plurality of broadcast news. There are currently three main providers of news: the BBC (for BBC TV and radio services), Independent Television News (ITN) which sources news for Channel 4, ITV and some commercial radio stations, and Sky. Sky News is part of the Murdoch-controlled News International and provides services for the Sky News satellite channel, Channel Five and the majority of commercial radio stations. ITN's continuing viability is strained, yet without considerable public intervention there may be nothing to prevent a future duopoly of news provision between the BBC and Sky.

Cross-media ownership is allowed in the UK subject to general competition law and an exceptional public interest test. If a merger raises a "specified public interest concern in relation to media plurality", the relevant government minister can order Ofcom to report on the public interest implications. Ofcom's evidence will be considered by the minister when deciding whether or not to permit the merger to proceed. However, since the introduction of the legislation in 2003, this has never been invoked.

In many countries, limits are imposed on foreign ownership of broadcasting enterprises. The primary rationale for this is that broadcasting is an important national resource which many believe should be at least largely controlled by citizens. For example, while it is problematical for one citizen to exercise such control over broadcasters that they may skew public opinion (a problem noted above), it would be even more problematical if a foreigner held such power. This is perhaps particularly problematical in poorer countries, where citizens may have diminished financial ability to compete with foreigners for ownership of the national broadcasting sector.

At the same time, excessive limits on foreign investment in broadcasting can be harmful. Foreign funds can help capitalise the sector, allowing for needed investment in new technologies and better programming. Foreign involvement can also attract expertise and innovation, and sharing of ideas and experiences.

In Germany, as in the United Kingdom, there are no restrictions specifically on foreign ownership of the broadcast (or print) media, over and above general rules on concentration of media ownership.[120] However, all television broadcasters within the European Union are obliged to ensure that at least 50% of all programme output (excluding news, sports events, games, advertising, teletext services and teleshopping) is of European origin. Although this does not go to ownership, the obligation to meet European production quotas encourages and supports the European television production industry.

In Canada, the Broadcast Act states that "the Canadian broadcasting system shall be effectively owned and controlled by Canadians".[121] Specifically, 80 per cent of the directors (and, in some cases, this must include the chief executive officer) and 80 per cent of voting shareholders must be Canadian citizens.[122]

An important supplement to this are Canadian requirements of Canadian content. Pursuant to the Television Regulations, broadcasters must allocate 60 per cent of all programming over each year to Canadian content. Depending on the type of licence, 50 or 60 per cent of the evening programming must also be Canadian content. Some exceptions apply for ethnic content.[123] The rules for radio broadcasting are complex, but minimum Canadian content rules also apply to them. Roughly speaking, 35 per cent of

120. See Michael McEwen, *op. cit.*
121. Section 3(1)(a).
122. See Direction to the CRTC (Ineligibility of Non-Canadians), SOR/97-192. Available at: http://www.canlii.org/en/ca/laws/regu/sor-97-192/latest/sor-97-192.html.
123. Section 4, Television Broadcasting Regulations, 1987.

all music played on radio during the course of a week must be Canadian content. There are also complex rules for determining what qualifies as Canadian content. Generally, music must qualify in at least two of the following four categories: the music is composed by a Canadian, it is performed by a Canadian, it is performed or recorded in Canada, and the lyrics are written by a Canadian.[124]

In South Africa, as with concentration of ownership, the primary legislation, the Electronic Communications Act, 2005, sets out clear rules regarding foreign ownership. No foreigner may exercise control, directly or indirectly, over a commercial broadcasting enterprise. Foreigners are specifically prohibited from owning more than 20 per cent of the voting shares or paid-up capital of a broadcasting enterprise. Furthermore, foreigners may not make up more than 20 per cent of the directors of a commercial broadcasting enterprise.[125]

In Chile, all licensees must be legal persons who live or are constituted in Chile.

Digital Transition

Digital technologies have created the potential for important changes in the broadcasting environment, and in particular in relation to television broadcasting. Consumers may focus on quality and interactive possibilities, but a key benefit of digital broadcasting is that it uses far less spectrum. This has led to what has been termed the "digital dividend". Since less frequency spectrum is required to carry the same number of channels on digital technology,[126] the switch-over to digital transmission, once analogue transmission is turned off, frees up frequency spectrum.

The International Telecommunications Union (ITU) has played role in setting some of the rules regarding the digital transmission. It has, for example, set 2015 as the date when countries are expected to have made the transmission for television, which uses far more frequency than radio.[127] But major issues remain to be decided at the national level, including the key question of what technology to use. There are three main digital technologies, including DVB-T, the most prevalent, used in approximately 120 countries, including Europe, ATSC, used in North America, and ISDB-T, used in Japan, and, in a variant form, in Brazil and a number of other countries in Latin America. The United States has already switched over for mainstream television stations and, in Brazil, the main cities went digital at the end of 2007.

There is, inevitably, debate and even contestation in most countries over a number of issues regarding the digital switchover, including where the digital dividend will go, both in terms of type of use – such as broadcasting or telecommunications uses – and in terms of individual licensees. Other issues, such as sequencing the switchover, for example for smaller or community broadcasters, are also an issue, given the costs involved, which can be prohibitive.

Given the complexity of the process, and the difficult policy issues it raises, it is important that a clear plan for the digital switchover be developed, with the engagement of a wide range of stakeholders. Too often, the planning process has been the preserve of technical experts, with the result that important social and even economic issues are neglected.

The right to freedom of expression also suggests that at least some of the digital dividend should be 'reinvested' in broadcasting uses. This is far from a moot point, given the competition from the better-resourced telecommunications sector. Regulatory intervention is also required to ensure that, within the broadcasting sector, the dividend does not simply go to the better off commercial broadcasters. Indeed, it is particularly important that different types of broadcasters – including not only commercial but also public service and community broadcasters – be able to operate on not only digital terrestrial, but also Internet, platforms.

Most countries with more developed broadcasting sectors have put in place detailed plans for the digital switchover.[128] However, these plans vary considerably

124. Section 2.2, Radio Regulations, 1986. See also Canadian Content Rules. Available at: http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm.
125. Section 64.
126. Subject to providing channels at higher quality, such as high-definition channels.
127. Although this has been extended to 2020 for 30 African and 4 Middle Eastern countries. See: http://www.computerworldzambia.com/articles/2010/01/28/itu-extends-digital-migration-timetable-34-countries.
128. See, for example, Broadcasting Public Notice CRTC 2002-31: A licensing policy to oversee the transition from analog to digital, over-the-air television broadcasting. Available at: http://www.crtc.gc.ca/eng/archive/2002/pb2002-31.htm.

between countries. In Germany, for example, it has been agreed that the digital capacity will be divided on a 50:50 basis between public and commercial broadcasters, with the former being able to create their own multiplexes. [129]

In the United Kingdom, a small proportion of the digital dividend has been allocated for additional digital television services including the provision of capacity for HDTV for the existing (analogue) free-to-air commercial broadcasters and the BBC. However, most of the additional available spectrum will be auctioned off for new-generation mobile services. Although the recent change of government has thrown options open, it is expected that successful bidders for additional spectrum may face an obligation to rollout broadband coverage in less populated regions of the United Kingdom.

Elections

The media play an extremely important role during elections in democratic countries, providing the main means by which the electorate receives information about the issues at play, the positions and policies of the parties and candidates, and even the very meaning and role of elections in a democracy. At the same time, and by virtue of this very role, the media can potentially unbalance elections, promoting candidates who support policies that favour them, or who their owners support.

In many countries, broadcasters are under a general obligation to report on matters of public concern and interest in a balanced and impartial way. This obligation of balance becomes even more important during elections, and many countries have adopted specific rules on media coverage of elections, or of parties and candidates.

For example, section 8 of the Canadian Television Broadcasting Regulations, 1987, states:

> During an election period, a licensee shall allocate time for the broadcasting of programs, advertisements or announcements of a partisan political character on an equitable basis to all accredited political parties and rival candidates represented in the election or referendum.[130]

The requirement of equity (and here it is important to note that 'equity' and 'fairness' are not the same as 'equality') applies to paid advertising, free time, news and current affairs programming. The CRTC takes these rules very seriously, and has elaborated on their meaning as follows:

> It is the broadcaster's duty to ensure that the public has adequate knowledge of the issues surrounding an election and the position of the parties and candidates. The broadcaster does not enjoy the position of a benevolent censor who is able to give the public only what it "should" know. Nor is it the broadcaster's role to decide in advance which candidates are "worthy" of broadcast time.[131]

Furthermore, the public broadcaster, the Canadian Broadcasting Corporation (CBC), has its own clear standards for allocating (free) time to different political parties and sides during elections and referendums. For elections, both federal and provincial, CBC first asks the various parties involved to try to agree a formula for dividing up the available time themselves. If they fail to do so, the general rule is that where there are only two parties or sides (normally the case in a referendum, for example), each side will get an equal share of the time. Where there are more than two parties (normally the case in Canadian elections), the party in power gets 40 per cent of the time, and the remaining 60 per cent of the time is shared proportionally among the other parties according to the number of seats they gained during the last election. However, every registered party will get at least one two-minute slot. Parties are expected to produce their own programming, which must comply with the law, as well as any rules that are binding on CBC. More-or-less the same rules apply between elections, with the caveat that only parties that got members elected are allocated time.[132]

Similar rules apply in Germany. For example, Article 19 of the Broadcasting Act for the Land of

129. See Libertus, *Essential Aspects Concerning the Regulation of the German Broadcasting System*. Available at: http://www.rundfunk-institut.uni-koeln.de/institut/pdfs/19304.pdf.
130. See also section 6 of the Radio Regulations, 1986, which is identical. See also Broadcasting Circular CRTC 2008-4, available at: http://www.crtc.gc.ca/ENG/archive/2008/c2008-4.htm.
131. Political Broadcasting - Complaints re: free time and editorial time allocations, Circular No. 334.
132. See http://www.cbc.radio-canada.ca/docs/policies/freetime/index.shtml.

North-Rhine Westphalia (Rundfunkgesetz für das Land Nordrhein-Westfalen, LRG NW),[133] states:

> Every broadcaster of a Land-wide full programme shall grant reasonable transmission time to parties or electors' groups during their participation in European Parliament elections, national general elections or elections to the North Rhine-Westphalian Land assembly for the purposes of party election broadcasts.

These rules apply as long as the party fields at least one candidate in North-Rhine Westphalia or candidates in at least one-sixth of all ridings. All candidates must be treated equitably.

In South Africa, similar rules of equitable treatment apply. Any broadcaster which provides an opportunity to a political party to air their views must, without discrimination, provide an equal opportunity to other political parties, provided that parties respect the rules of liability of the broadcaster. No political advertisements may be aired within 48 hours of an election. Furthermore, where a political party has been criticised during a programme aired by a broadcaster, it must provide an opportunity to that party to respond to the criticism.[134]

All South African public broadcasters must make time available for party broadcasts during an election, in accordance with rules set by the regulator, ICASA. In determining these rules, including the amount of time to be allocated, ICASA must consult with the relevant broadcasters and the political parties. No such broadcasts may be disseminated within 48 hours of the election. Commercial and community broadcasters are not required to make such time available, but if they do, the same rules apply to them.[135]

In Jamaica there is no legal requirement for a licensee to transmit political broadcasts. However, where they are transmitted, the Television and Sound Broadcasting Regulations[136] and the Broadcasting and Radio Rediffusion Act[137] contain provisions aimed at ensuring impartiality in election coverage. These rules cover:

- providing information on the political party where a speech is being made or where a political advertisement is transmitted;
- preventing the transmission of dramatized advertisements;
- impartiality in political broadcasts; and
- equality in time allotted for political broadcasts.

British law sets out requirements that Party Election Broadcasts (PEBS) from every major party must be carried on the BBC and the other national free-to-air TV channels. No paid-for political advertising is allowed.

The BBC is required by law[138] to draw up its own guidelines[139] after consulting with the Electoral Commission. Section 333 of the Communications Act 2003 requires Ofcom to set rules for PEBs for the free to air commercial TV channels and national commercial radio stations. The rules set out the minimum requirements which licensees are required to follow in determining the length, frequency, allocation and scheduling of political broadcasts. Licensees then make their own decisions in accordance with the rules and in consultation with the major political parties (with Ofcom mediating in cases of dispute). [140]

Political speech, which includes paid political advertising, is commonplace in the United States but is subject to both statutory requirements (the Communications Act 1934) and the FCC's own rules, "in recognition of the particular importance of the free flow of information to the public during the electoral process".[141]

133. Available in English at: http://www.iuscomp.org/gla/statutes/LRGNW.htm.
134. Electronic Communications Act, 2005, ss. 58-9.
135. Electronic Communications Act, 2005, s. 57.
136. See Regulation 12.
137. See Section 12.
138. Representation of the People Act, 1983.
139. See, for example, the BBC's Criteria for allocating PEBs in the 2010 General Election. Available at: http://www.bbc.co.uk/guidelines/editorialguidelines/assets/advice/GenElec2010_PEBCriteria.pdf.
140. Ofcom's most recent rules are available at: http://www.ofcom.org.uk/about/how-ofcom-is-run/committees/election-committee/ofcom-rules-on-party-political-and-referendum-broadcasts/.
141. See the FCC's The Public and Broadcasting: How to Get the Most Service from Your Local Station. Available at: http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html.

For federal elections, the Communications Act requires broadcaster to provide "reasonable access" to candidates. Such access must be made available during all of a station's normal broadcast schedule, including television prime time and radio drive time. In addition, federal candidates are entitled to purchase all classes of advertising time, with the only exception being airtime during news programming. Broadcast stations retain discretion as to whether to sell time to candidates in state and local elections. Where a station provides airtime to one candidate it must offer equal opportunities for all other candidates to purchase airtime.

Advertising and Content Support

In many countries, advertising by the government makes up a very significant proportion of all of the advertising available to broadcasters. Given that advertising is by far the largest source of funding for many commercial broadcasters, this funding is potentially a means by which the government can influence the approach of and content carried on these broadcasters. Most commercial entities place their advertisements based on commercial factors, such as value and reaching target consumer groups. Ideally, advertising by public bodies should operate on the same basis. In addition to the obvious financial benefits of this, it can help avoid abusive use of public advertising power for political reasons.

Applying favouritism or threat is a form of "soft censorship" which has been identified as widespread in Latin America.[142] In August 2008, the Buenos Aires-based Asociación por los Derechos Civiles (Association for Civil Rights, ADC) and the NY-based Open Society Justice Initiative (OSJI) published *The Price of Silence: The Growing Threat of Soft Censorship in Latin America.* The report documented soft censorship practices in seven Latin American countries: Argentina, Chile, Colombia, Costa Rica, Honduras, Peru, and Uruguay. The report highlights examples in Chile where, for example, as a condition of local media contracts, media must undertake not to criticise the mayor. The Chilean government has undertaken to introduce laws to combat the problem.

At the same time, some countries opt to try to use public advertising power to promote diversity of content in the media, as a sort of media subsidy scheme. There is nothing wrong, in principle, with this, but it requires strong measures to guard against political abuse, which would otherwise be a great temptation in this context.

In most more developed democracies, the allocation of public advertising is not the subject of specific legal rules. Instead, traditions and practices apply which prevent commercial abuse of this form of public power, mostly based on the need for a commercial rationale for the placement of advertising. In countries such as the United Kingdom, Australia and Canada, the production and selling of public advertising is contracted out and, through that process, subject to strict procurement rules to prevent favouritism. This provides an "arms-length" relationship between independent commercial third parties (agencies and media houses) which are contracting with government as a client. Jamaica also procures advertising for government and public bodies through an independent agency.

In many countries, direct financial support for public interest content is channelled through public service and community broadcasters. In some countries, however, public funds are also provided to commercial broadcasters, for programming deemed to contribute in important ways to the public interest, and especially diversity. In South Africa, for example, the Media Development and Diversity Agency (MDDA) provides funding to community broadcasters (at least 60 per cent of the total), but also to commercial media.[143]

The Situation in Brazil

Article 12 of Decree No. 236 of 1967 sets limits on ownership of free-to-air television and radio services. No 'entity' may own more than ten national television licences, of which a maximum of five may be VHF, or more than two television licences per state. For radio, the limits are a maximum of six FM licences, four local, three regional and two national medium wave licences, and three regional (with no more than two per state) and two national shortwave licences. These rules do not apply to repeater stations. Although Decree No. 236 refers to entities, Decree

142. Available at: http://www.cipamericas.org/archives/1725.
143. See The Media Development and Diversity Agency Act, No. 14 of 2002.

No. 52.795 of 1963 makes it clear that these rules apply to individual shareholders. But the rules do not apply to indirect or *de facto* forms of control, for example through close personal relations with other owners. In other countries, ownership restrictions often focus on *de facto* control, rather than direct forms of ownership, given that it is effective control that really matters.

There are no rules against cross-ownership in Brazil. And there are presently no rules limiting ownership of pay television and radio services, although Bill No. 29 does envisage introducing limits on cross-ownership between distribution activities and the content production side of broadcasting for the pay TV market (mainly to prevent abusive competitive practices).

Article 222 of the Constitution limits foreign ownership of newspapers and broadcasters to 30% of the voting capital, with the remaining 70% being held by native Brazilians or individuals who have held Brazilian citizenship for at least ten years.

These rules provide insufficient protection against the emergence of concentrated media conglomerates. First, they do not apply directly to *de facto* control, so it is theoretically possible to extend control in various indirect ways. Second, as data from other countries clearly demonstrates, the rules are comparatively permissive, particularly given the lack of any cross-ownership rules. Third, we understand that many broadcasters have relations with affiliates that effectively extend their own networks given the large proportion of central programming carried by the affiliates.

At the same time, we believe that it is important for Brazil to have national broadcasting networks, particularly given the weak position of the public broadcaster. Such national networks are important for purposes of developing and maintaining a sense of national culture and unity, for ensuring the wide availability of high-quality news services and for enabling national messaging and debate.

Digital broadcasting is already in place in several cities, and it would appear that some agreements on the use of digital resources have already been concluded, although the precise details regarding this were not clear to us. As is well-known, Brazil has taken the step of adapting the Japanese digital technology, ISDB-T, with a number of other countries, so far mainly in Latin America, following suit.

Despite these important developments, according to the information we received, Brazil has no agreement with the ITU regarding the date for the switchover to digital television, although Decree No. 5.820/2006 sets the date as 30 June 2016. Furthermore, we were informed that there have been few broad public consultations about the transition to digital broadcasting.

The transition to digital broadcasting frees up frequency space since more channels can be carried on the same amount of frequency. Allocating part of this digital dividend to broadcasting allows for the promotion of diversity in broadcasting and also increases access. Representatives of the Ministry of Communications indicated to us that EBC would be allocated digital multiplexes – four in the main cities, and three in the smaller cities – to provide channels for the various branches of government (Congress, Senate, the executive), education and culture, and citizenship (the latter to be managed by the Ministry of Communications). It is not clear how these decisions have been made and why it was felt that the different branches of government all needed their own channels. Regardless, the matter of what to do with the digital dividend should be the subject of careful planning and open debate.

Recommendations

Stronger rules on concentration of ownership, including cross-ownership, should be put into place. These should focus on de facto control by individuals, rather than the corporate form. They should, however, take into account the need for national broadcasting networks.

Responsibility for monitoring ownership and for enforcement of ownership rules should lie with CADE, with support from a new independent regulatory authority if and when one is established. CADE should be adequately resourced with appropriate expertise to take on this role.

Consideration should be given to pursuing a more participatory approach toward the digital transition, so as to ensure that important public interest considerations are taken fully into account.

At least part of the digital dividend should be allocated to broadcasting uses, and an open and participatory process should be used to decide how to use this additional spectrum.

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Eve Salomon has a wealth of regulatory experience in both statutory and non statutory bodies. A solicitor by background, she is currently the global Chairman of the Regulatory Board of RICS (the self-regulatory body for surveyors), a Commissioner of the Press Complaints Commission (the UK's press self-regulator), the (statutory) Gambling Commission of Great Britain, and Chair of the UK's Internet Watch Foundation (an industry-formed body which combats online child sexual abuse content) For four years until it disbanded, she was a member of the Better Regulation Task Force, an independent body that advised the UK government on how to improve regulation across all sectors. She continues to undertake advisory work for UK government departments and agencies in the field of better regulation.

Eve's particular legal expertise is in broadcasting regulation. She is a legal expert for the Human Rights Division of the Council of Europe and the author of the UNESCO/Commonwealth Broadcasting Association Guidelines for Broadcasting Regulation. She has advised numerous NGOs, government agencies and broadcasting regulators around the world. Previous jobs included Deputy Secretary of the UK's Independent Television Commission, Director of Legal Services at the Radio Authority and Interim Secretary of Ofcom.

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Media Corporate Associations:
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National Newspaper Association (ANJ)
National Association of Magazine Publishers (ANER)

Federal Attorney for Citizens' Rights (PFDC)

Administrative Council for Economic Defense (CADE)

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- "Eletronic Communications and Media Convergence", event held by National Communications Office (SECOM) – 9th and 10th of November of 2010
- "Broadcasting regulations: building the Brazilian Model" held by Article 19, UNESCO, Konrad Adenauer Stiftung and Ford Foundation – 16th of November of 2010

LIST OF ACRONYMS*

ABC – American Broadcasting Company

ABC – Audit Bureau of Circulations

ABERT – Brazilian Association of Radio and Television Broadcasters

ACMA – Australian Communications and Media Authority

ADC – Association for Civil Right

ANATEL – National Telecommunications Agency

ANCINE – National Film Agency

ANER – National Association of Magazine Publishers

ANJ – National Newspaper Association

ANVISA – National Agency for Sanitary Surveillance

ARD – Public Broadcasting Organizations of Germany

ASA – Advertising Standards Authority

ATSC – Advanced Television System Committee

AVMS Directive – Audiovisual Media Services Directive

BBC – British Broadcasting Corporation

BDU – Broadcasting Distribution Undertakings

CAB – Canadian Association of Broadcasters

CADE – Administrative Council for Economic Defense

CBA – Community Broadcasters Association

CBC – Canadian Broadcasting Corporation

CBS – Columbia Broadcasting System

CBSC – Canadian Broadcasting Standards Council

CIDA – Canadian International Development Agency

CMA – Communications and Multimedia Act

CNTV – National Television Council

CONAR – Council of Advertising Self–Regulation

CRTC – Canadian Radio–television and Telecommunications Commission

CSA – Higher Audiovisual Council

DJCTQ – Department of Justice, Classification, Titles and Qualification

DMA – Designated Market Area

DVB–T – Digital Video Broadcasting — Terrestrial

EBC – Brazil Communications Company

ECA – Children and Adolescents Statute

FCC – Federal Communications Commission

FSER – Support Fund for Radio Expression

GWB – Act Against Restraints of Competition

ICASA – Independent Communications Authority of South Africa

IRA – Independent Regulatory Authority

ISDB–T – Integrated Services Digital Broadcasting Terrestrial

ITN – Independent Television News

ITU – International Telecommunication Union

ITV – Independent Television Authority

JBC – Jamaican Broadcasting Commission

KEK – Commission on Concentration in the Media

KPFA – Listener Sponsored Free Speech Radio

LPIF – Local Programming Improvement Fund

LRG NW – Broadcasting Act for the Land of North Rhine–Westphalia

MCMC – Malaysian Communications and Multimedia Commission

MDDA – South Africa Media Development and Diversity Agency

NBC – National Broadcasting Company

NDR – North German Broadcasting

NHK – Japan Broadcasting Corporation

OAS – Organization of American States

Ofcom – Office of Communications

OSCE – Organization for Security and Co–operation in Europe

OSJI – Open Society Justice Initiative

PEBS – Party Election Broadcasts

PFDC – Federal Attorney for Citizens' Rights

PSB – public service broadcasting

RCTV – Radio Caracas Television

RTM – Radio Television Malaysia

RTNDA – Radio Television News Directors Foundation of Canada

SABC – South African Broadcasting Corporation

SECOM – Social Communication Secretariat of the Presidency

* For the acronyms in foreign languages we indicate their translation in English.

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