

## GUIDELINES FOR AN INDEPENDENT REGULATORY FRAMEWORK FOR COMMONWEALTH BROADCASTING ORGANISATIONS

Paper by the Commonwealth Secretariat

### EXECUTIVE SUMMARY

1. At the Meeting of Law Ministers from Small Jurisdictions in October 2004, Ministers discussed a paper (see **Annex 1**) setting out the basic principles of the regulation of broadcast services. It was decided at that Meeting to ask the Secretariat to bring forward proposals for a work programme to further develop those principles with a view to assisting the roll-out of best practice throughout the Commonwealth.
2. It was noted at that Meeting that there are several reasons for introducing regulation of broadcasting: democratic purposes, cultural and consumer protection reasons, and economic purposes.
3. Open and pluralistic broadcasting is a key component of a democratic society. The specific features of broadcasting regulation which go directly to the promotion of democracy are: having a right of appeal and a right of reply; an obligation for news to be accurate and impartial; and rules which prevent discrimination and incitement to crime, including religious or ethnic hatred.
4. It is vital for the application of these rules - as well as the full range of broadcasting regulation - to be done by a regulatory body that operates independently of political or industry influence and control. To be independent, the remit and the means of funding of the regulator should be set out in law. The appointment process must be managed in a way that avoids political interference, and individual regulators must not have any conflicts of interest which prevent them executing their duties in a clearly objective way.
5. A country's culture will affect the detail of rules that are intended to protect minors and avoid offence on grounds of taste and decency. Generally, the content of advertising is also regulated, at least to ensure it is legal, decent and true.
6. Broadcasting regulation can also have economic purposes such as the application of international trade agreements or promoting inward investment. Regulation can also be used as an incentive for domestic production sectors and to promote new technology such as digital broadcasting.
7. Although many Commonwealth states have sophisticated broadcasting legislation with dedicated, independent regulators and public service broadcasters, not all do. To further roll out best practice throughout the Commonwealth, in the support of the necessary separation of government from civil society, and in pursuance of democratic principles, Ministers are invited to take note of the guidelines below and endorse them with a view to the Secretariat assisting countries to draw up the necessary legal and regulatory infrastructures for requesting member states.

## GUIDELINES FOR AN INDEPENDENT REGULATORY FRAMEWORK FOR COMMONWEALTH BROADCASTING ORGANISATIONS

### INTRODUCTION

1. Following the Meeting of Law Ministers from Small Jurisdictions in October 2004 in which Ministers discussed a paper setting out the basic principles of the regulation of broadcast services, the Secretariat has developed these guidelines with a view to assisting the roll-out of best practice throughout the Commonwealth.
2. From initial desk research of a number of Commonwealth states (see Annex 2) it would appear that the majority have not yet established independent broadcast regulatory authorities, but still retain direct state control over issuing broadcast licences, and in many cases, the regulation of content and content-related issues.
3. The lack of independent regulatory bodies tends to be matched by the retention of state, rather than independent public service broadcasters (PSBs). Yet, the creation of independent regulators and PSBs is one of the ultimate tests of the establishment of a successful democracy.
4. This paper sets out the clear benefits of regulating broadcasting by means of an independent body, and of the provision of broadcasting in the public interest - in the famous words of Lord Reith of the BBC - to "inform, educate, and entertain" citizenry. Practical considerations of *how* to establish independent regulators and public service broadcasters are discussed.

### INDEPENDENT REGULATION

5. It is accepted best practice throughout the world that as an independent broadcasting industry develops, so too must an independent regulatory system to licence and oversee this industry. The development of democracy requires the availability of a variety of sources of information and opinion so that the population can make informed decisions at times of elections. Throughout the world, television and radio are now the main sources of news and information. To enable open debate for the proper operation of democracy there needs to be a plurality of service providers to enable access of viewers and listeners to a wide range of sources of news and information.
6. If decisions on who shall hold a broadcast licence are left as the sole preserve of government, there is unlikely to be - or to be seen to be - a fair, equitable range of service provision. Indeed, in many countries where the government (or a government-controlled regulator) determines new licences, those broadcasters – unsurprisingly – all overtly support the government.
7. But if government control of broadcasting regulation provides a degree of political support, then why should a government give up this control? Last year, the government of a country in South East Europe that not only controlled the regulatory authority but also all the television broadcasters lost power in a general election. People said that “the voters were smarter than the viewers”. Proper delegation of licensing responsibilities to an independent regulatory body set up by statute not only creates faith in the fairness of the licensing process, but can also remove governments from the potential political turmoil which can be associated with the grant of licences. In the last few years we have seen political unrest turn to protest and murder as a result of a government-sponsored broadcasting regulator in Armenia revoking the licence of a popular television station which was perceived to support the opposition party. Since then, Armenia has changed its law to enable the creation of a more independent regulator - putting more distance between the state and the regulator, and de-politicising broadcasting regulation.

8. Throughout the former Soviet bloc in Eastern Europe countries have struggled with the separation of media and the state. Now, it is only the most fervently dictatorial and still communist states such as Belarus and Moldova that retain strict state control over the regulation of broadcasting. Even so, newer democracies such as the Czech Republic and Poland still struggle with ensuring their broadcasting regulators are sufficiently independent to refute allegations of government interference and political pressure. Members of the Commonwealth, with a longer democratic tradition, should find the process easier. Commonwealth countries understand the separation - and interplay - between the executive and the legislature, and so are better placed to appreciate the clear benefits of releasing broadcasting from executive control, but still subjecting it to clear and proportionate legislative constraint. Yet, even within the Commonwealth, there is room for improvement. There are voices calling for the introduction of broadcasting institutions that are independent of political manipulation, and licensing regimes which encourage diversity, but not at the expense of quality.<sup>1</sup>

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

### Creation and Remit

10. The first matters to decide are the scope of broadcasting regulation, those issues which will remain the preserve of the government, and those which will be the responsibility of the independent regulator. The paper at Annex 2 examines the range of issues which broadcasting regulation typically covers.

11. It is normal for governments to retain responsibility for broadcast frequency planning, within ITU and regional agreements, often within a single department which manages all allocated spectrum. However, the UK is an example where a single, converged regulator – Ofcom - has been created to cover broadcasting, telecommunications and spectrum management.

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

13. Other broadcasting-related intellectual property issues are sometimes the preserve of a broadcasting regulator, although more often than not, countries leave disputes over copyright, trademarks, etc. to the general application of law.

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

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

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<sup>1</sup> See for example the Caribbean Broadcasting Union at <http://www.caribunion.com/html/FromThePresident.html>

## Appointments and termination

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

17. There is no ‘right’ way to go about the appointment of members to a regulatory authority. There are many different models, all intended to ensure the creation of an independent board. Some examples are:

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

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

19. What helps in this process is setting a clear job specification: what set of skills and experience is needed on the authority? Selecting the right people not only ensures the authority is equipped to do its job, but avoids accusations of ‘jobs for the boys’. Also, membership of the regulatory authority ought generally to reflect - or be capable of representing - the composition of the nation in terms of gender, ethnic make-up, religious orientation, etc. This is in line with one of the agreed principles on accountability agreed by Law Ministers in November 2002.<sup>2</sup>

20. The rules of appointment should also be defined to protect the authority members from interference from political or economic forces. It is fairly axiomatic that members (and their close family) should not hold political office, or have any financial interest in any part of the sector they will be regulating. Some countries believe that members should not be permitted to take any other work or have any other earned income during their tenure on the authority, in order to protect them from potential monetary influence. This clearly depends, though, on the size of the job to be done; if the job of the member is not full-time, then other safeguards need to be put in place to ensure that no conflicts of interest arise.

21. As well as defining the terms of appointment, the terms of dismissal should also be set out in statute to avoid an irate government using the threat of dismissal as a political lever. Dismissal should only be possible in limited circumstances, namely physical or mental incapacity, regular non-attendance, insolvency or bankruptcy, conviction of a serious criminal offence, or clearly breaking the rules of appointment (for example by not declaring a conflict of interest).

## Funding

22. Another vital element to ensuring independence is providing a secure means of funding of the regulatory authority. In order to avoid government authorities applying political pressure on the

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<sup>2</sup> See Commonwealth Principles on the Accountability of and the Relationship Between The Three Branches of Government, April 2004.

regulator through funding mechanisms, arrangements for funding should be specified in law in accordance with a clearly defined plan, and with reference to a transparent budgeting process.

23. Internationally, the accepted best method for arranging funding of the broadcasting regulator is by having the regulator's costs paid by the industry it regulates through licence and other fees. However, this will only work in countries where the broadcasting industry is sufficiently large and profitable to be able to afford to pay for its regulator. In countries with a small or immature broadcasting market, at least a proportion of the costs of regulation must be met from the public budget. Any proposal to create a new regulatory authority will need carefully to consider the costs of the authority, and how those costs are to be met in the most efficient way; authorities need not be large – especially in smaller jurisdictions. There are an increasing number of jurisdictions which are merging existing regulatory bodies, or creating new ones, to regulate both broadcasting and telecommunications. This can also lead to significant cost efficiencies.

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

### **Accountability**

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

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

### **Secretariat Proposal**

27. The Commonwealth Secretariat is proposing to offer help to those jurisdictions who either have not yet created an independent regulatory authority to cover broadcasting, or for those who are considering changing the nature of their regulation (either to modernise it in line with best international practice, or to merge their existing broadcasting and telecommunications regulators). The help will consist of arranging the necessary legal, structural and change management consultancy advice, calling on internationally acclaimed experts – wherever possible citizens of Commonwealth countries. There may also be scope for international experts with regulatory experience to act as an interim regulator – with other national members – on the regulatory board, to help to bed down best practice.

### **AN INDEPENDENT PUBLIC SERVICE BROADCASTER ("PSBs")**

28. While fledgling states may have relied upon their own state broadcaster to keep the populace informed and entertained, as democracy develops, particularly in a multi-channel environment, this level of state control and intervention is no longer sustainable or justifiable. As citizens become able to access a range of television and radio services (both domestic, and transmitted by satellite), they are less likely to tolerate the bias of a traditional state broadcaster. Yet, it remains a clear public interest objective to provide citizens with a service which reflects their own culture and interests

them, and is supported by their domestic industries. No country wants to see its citizens able to access only international broadcasts. This is where the introduction of a public service - rather than a state - broadcaster adds value and plays an integral part in retaining and developing cultural identity.

29. The international model of public service broadcasting is the UK's BBC. However, it is unrealistic to expect to be able to create a new publicly-funded broadcaster with the resources and breadth of the BBC, which has been in existence since 1927 and still retains over half of the UK's radio listening, and a quarter of all television viewing. But the principles which inform the BBC remain relevant to PSBs worldwide:

- to sustain citizenship and civil society;
- to promote education and learning;
- to stimulate creativity and cultural excellence;
- to reflect the nation and its regions and communities;
- to bring the world to the UK, and the UK to the world.<sup>3</sup>

30. This is done through the provision of a universally receivable service, and diverse programming catering for minority, as well as popular interests.

31. UNESCO defines public service broadcasting as "broadcasting made, financed and controlled by the public, for the public. It is neither commercial nor state-owned, free from political interference and pressure from commercial forces. Through PSB citizens are informed, educated and also entertained. When guaranteed with pluralism, programming diversity, editorial independence, appropriate funding, accountability and transparency, public service broadcasting can serve as a cornerstone of democracy."<sup>4</sup>

32. The Asia-Pacific Institute for Broadcasting Development (AIBD) says, " Public service broadcasting features key components of universality, cultural diversity, creativity and editorial independence; it can stimulate the entire broadcasting landscape to improve quality and effective service to society."<sup>5</sup>

33. A meeting of Ministers on Information and Broadcasting in Asia and the Pacific region was held in Bangkok from 27-28 May 2003 to look at the challenges faced by public broadcasters in the region. A Declaration arising from the Conference states that:

"Authorities are encouraged to:

1. Allow autonomy in content creation, management, finance and administration of public service broadcasters;
2. Study and consider the following funding mechanisms for public service broadcasting:
  - i. One-time fee while buying a radio/television/electronic appliances/mobile phones
  - ii. Introduction of a license fee either as a stand-alone or as an addition to the electricity bill
  - iii. Government grants for infrastructure
  - iv. Advertising/commercial revenue, but it should not undermine the mandate of public service broadcasting
  - v. Sponsorship

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<sup>3</sup> See the DCMS BBC Charter Review on the role of the BBC: [www.bbccharterreview.org.uk](http://www.bbccharterreview.org.uk).

<sup>4</sup> See [http://portal.unesco.org/ci/en/ev.php-URL\\_ID=1525&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/ci/en/ev.php-URL_ID=1525&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>5</sup> See [http://www.aibd.org.my/page/www\\_activity\\_schedule/f2f/2652.html](http://www.aibd.org.my/page/www_activity_schedule/f2f/2652.html).

- vi. Contribute to production of programs for clearly defined developmental needs;
- 3. Regularly review the mandate of public service broadcasting in view of national, regional and global events in order to foster mutual understanding, tolerance and trust;
- 4. Allocate preferential frequencies to public service broadcasters;
- 5. Create legal structures to allow independence of decision making to public broadcasters;
- 6. Ensure allocation of adequate time by private networks for public service programs and for pluralistic content for all groups of society;
- 7. Ensure complete editorial independence."<sup>6</sup>

34. Although set up with good intentions, many public broadcasters in the South Pacific region remain under state control. For example the Charter of Radio Televisyen Malaysia, which purports to be a PSB, says, " We pledge to ensure the standard of broadcasting is of the highest quality, *in line with the government's policies and aspirations*, to cater to the varied tastes of the society" (emphasis added).<sup>7</sup>

35. Similarly, the Pakistani Broadcasting Corporation, created by statute in 1972, sets out many admirable objectives including:

- " - To provide broadcasting services in the fields of information, education and entertainment through programmes which maintain a proper balance in their subject matter and a high general standard of quality and morality;
- To broadcast programmes to promote Islamic Ideology, national unity and principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam;
- To reflect the urges and aspiration of the people of Pakistan and promote principles of democracy and culture of freedom and tolerance;
- To present news of events in as factual, accurate and impartial manner as possible and *to carry out instructions of Federal Government with regard to general pattern of policies in respect of programmes*;
- To broadcast programmes in the External Services to foreign countries with a view to promote friendship and project Pakistan's view point on international issues in true perceptive" (emphasis added).<sup>8</sup>

36. While many nations have sought to learn from international experience of 'best practice', there are accusations that - particularly in the emerging and newer democracies - public broadcasters remain the voice of government under strict political control. The Media Institute of Southern Africa, which seeks to promote a diverse, pluralistic and independent media sector, says:

"A public broadcasting system detached from state influence is absolutely essential to dissemination of impartial and diverse information. An independent and well-performing public broadcasting system examines public issues with an incisively critical eye by providing programmes that include public debate, cultural expressions and educational programming aside from entertainment. Public Service Broadcaster (PSB) should unfailingly render service to individuals, communities and societies in order to contribute to a shared political, social and cultural frame of reference and bring about social cohesion among different peoples. This form of PSB, which meets its audience not only as consumers but as citizens, binds democratic societies and develops national identity and cultural preservation...

<sup>6</sup> <http://www.aibd.org.my/conferences/bangkok/declaration.html>.

<sup>7</sup> [http://www.rtm.net.my/english/web/vision\\_mission.htm](http://www.rtm.net.my/english/web/vision_mission.htm).

<sup>8</sup> <http://www.radio.gov.pk/Object.html>.

The Public Service Broadcasting obligation, in short, is to supply the public on a national level basis with diverse balanced programmes relevant to all groups of the population, including minorities, maintain integrity towards economic, social, cultural and political interests of the country."<sup>9</sup>

37. In September 2004, a workshop with participants from the African Commission, broadcasting regulators, broadcasters and parliamentarians from six Southern African Commonwealth states (plus Zimbabwe) concluded that most national broadcasting services in Southern Africa were still state broadcasters. This is contrary to Article 9 of the African Charter's "Declaration on Principles of Freedom of Expression in Africa", as interpreted by the African Commission on Human and Peoples' Rights. This binding interpretation says that state broadcasters are to be transformed into PSBs, which are accountable to the public through legislation, rather than through the government, with adequate funding to protect them from arbitrary interference. In Africa, it is generally considered that the only true PSB is in South Africa. While other countries, notably Ghana and Kenya, have ended overt state control of their broadcasters, they remain subject to out-dated legislation which means that structurally and legally the broadcasters remain state, rather than PSBs.

38. So how does a government go about creating a public broadcaster with a primary purpose to serve the public, belong to the public, and which is accountable to the public?

#### **Creation and remit**

39. First, as with an independent regulatory authority, the PSB must be set up by statute, with a clearly defined mandate which preserves the PSB's editorial independence. The remit of the PSB should clearly state that it is there to serve the public interest, taking into account ethnic, cultural, religious and other diversity.

#### **Appointment and termination**

40. The board which governs the PSB should be appointed by a process which is free from political control. Similar models of appointment to those of regulatory authorities are used for appointing PSB boards. However, another model should also be considered, drawing from international best practice in corporate governance. That is to have a mixed board of executive (i.e. senior staff who manage the PSB) and non-executive members, with the non-executives all bringing particular skills and experience to benefit the successful running of the broadcaster. This enables the non-executive Board members to share their strategic skills and their ability to represent the public interest, with the creative leadership of the executive.

41. To avoid the risk of political pressure being placed on individual board members, the terms of appointment should be fully spelled out in the founding statute, including the basis upon which appointments may be terminated.

#### **Funding**

42. It is vital for the PSB to benefit from adequate, independent funding that will enable the PSB to produce quality programming in line with its remit. To avoid the potential for political interference in editorial matters, the funding mechanism should be settled for a period of a number of years and be inflation-linked. This will provide certainty for funding to the PSB, which is necessary for proper long-term planning.

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<sup>9</sup> See [www.misa.org/broadcasting.html](http://www.misa.org/broadcasting.html)

43. There are many different funding models for PSBs around the world. In some cases the PSB is funded completely through advertising, but in most cases, the PSB's funding is a mix of commercial revenue and public funding. The public money can come from licence fees charged to anyone who buys or owns a radio or television, or for example, an additional charge on electricity bills. In other cases, the funding can come straight from the general state budget, for example as a set percentage of gross national income. In the United States the PSB is funded by voluntary public subscription, but this is not considered to be a desirable model and is not used elsewhere. Deciding on the source of funding is a major decision which needs to take account of a number of factors including the overall size and strength of the broadcasting sector, the wealth of the population, the popularity of the PSB, and the likelihood of collection of the licence fee.

#### **Accountability**

44. As the recipient of public funding, there must be a mechanism by which the PSB can be accountable to the public. As with regulatory authorities, the PSB should publish annual reports and accounts, and be accountable to parliament for the delivery of its remit. However, the PSB ought also to find a way to be accountable to the public it serves. One way of doing this is through conducting regular research to discover how best to serve its audience. Another way is through finding a means of dialogue with listeners and viewers, perhaps by holding public meetings. In states which do not have a cultural history of public engagement with civic bodies, or broadcasters, thought should be given to conducting some sort of advocacy and training programme to inform citizens of the benefits of a PSB and their rights of access to fair and impartial information. In such circumstances, unless there is a proper dialogue between audiences/citizens and the PSB, the law will have little effect by itself in providing the public with a true service.

#### **Secretariat Proposals**

45. Although many Commonwealth states have sophisticated broadcasting legislation with dedicated, independent regulators and public service broadcasters, not all do. To further roll out best practice throughout the Commonwealth, in support of the necessary separation of government from civil society, and in pursuance of democratic principles, Ministers are invited to take note of the above guidelines and endorse them with a view to the Secretariat assisting countries to draw up the necessary legal and regulatory infrastructures for requesting member states.

**BROADCASTING LEGISLATION AND REGULATIONS: ISSUES FOR DISCUSSION**

Paper by Eve Salomon, Solicitor & Media Consultant

**1. Background**

1.1 Increasingly countries are introducing new, or revising existing legislation to regulate broadcasting services. This is a consequence of the increasing realisation that the broadcasting media is both a potentially highly profitable industry and a powerful means of effecting cultural change. These factors are magnified with transnational broadcasting, or when spectrum capacity becomes scarce. The paper will look at the key issues arising in broadcasting legislation, grouped into three categories: democratic principles (including the establishment of independent regulatory bodies), economic issues, and cultural and citizenship issues.

**2. Recommendation**

2.1 Commonwealth Ministers, particularly from Small Jurisdictions, may want to consider or may want to endorse the introduction of broadcasting legislation as a means of promoting and protecting freedom of expression in democratic societies

**3. Background Discussion**

3.1 Why should broadcasting be regulated at all? In part, because the broadcast media can affect people's thinking and behaviour to a remarkable extent, both for the good and for bad. For example, 'hate speech' broadcast on radio has been held responsible for inciting and inflaming genocide in Rwanda. But on the other hand, BBC radio broadcasting to the people of Romania is considered to have developed people's understanding of democracy and led to the overthrow of Ceaucescu. As a significant source of news, at times of insurgence broadcasting is often heavily controlled or even stopped. For example, the radio station at Sarajevo was a constant target during the break-up of the former Yugoslavia, and the Taliban forbade broadcasting altogether in Afghanistan. It is important to realise that for most of the world's population - despite increasing access to the internet - broadcasting remains the main source of information. Harnessing its power to work for the democratic process is one of the key purposes of broadcasting regulation.

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

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

3.4 And to what extent do these limitations affect broadcast content? As well as the macroeconomic considerations of broadcasting, there are micro-economic elements of potential protection. Should there be limits on radio and television advertising? Given the undoubted power

of broadcasting, should advertisers be bound to tell the truth? And what about programmes? To what extent do children deserve special protection? These are all potential purposes for regulation of broadcasting and will be discussed below.

3.5 But what is the overriding rationale, the reason for regulation broadcasting as distinct from other media, say newspapers and magazines, or the internet? The main justification argued by governments is that broadcasting uses spectrum, and spectrum is a public resource, allocated to nations in accordance with complex international agreements. As such, it is a scarce resource: there is only so much spectrum available for broadcasting use in each country. In some countries, like the UK, all available UK spectrum for television has been allocated, and nearly all that available for radio. There is no more. And therefore, because it is a scarce resource, it is valuable. A licence to broadcast from even a small radio station in the UK is worth millions of pounds. It is therefore reasonable for the state, as the owner of spectrum, to place obligations on broadcasters who use that resource.

3.6 The mechanism used for placing obligations on broadcasters is generally through licensing. It is rare for the state to give away or sell broadcast spectrum in perpetuity; generally broadcasters are allowed to use it for limited set periods under a licence. Sometimes, licences are sold by the government; often they are free. Depending on the level of demand, they are either allocated on a first-come; first-served basis, or competitions are held. It is the licensing process through which governments introduce and enforce the other purposes of broadcasting regulation: the democratic, economic, cultural and consumer protection purposes, which will be discussed in more detail below.

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

#### **4. Democratic Purposes**

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

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

4.3 Totalitarian states generally make it an offence to broadcast material which may be critical of government. Unfortunately, there are still many such states, for example in Eastern Europe and Central Asia. Although these states may represent an extreme position, most countries are unlikely to tolerate broadcasting which encourages insurgence. A balance must be sought which on the one

hand allows freedom of expression of opinion, but does not go so far as to incite to crime, including political insurgence. Wherever the balance is drawn, it is vital that the rules are codified to enable broadcasters, viewers and listeners, and law makers to know where the boundaries of acceptability lie.

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

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

- ***The Right of Appeal:*** Arrangements should be made to enable decisions taken on broadcasting matters to be appealed to a Court of Law. In some countries, like the UK, appeals are limited to points of procedure and law, rather than fact. In other countries, like Sweden, no sanctions can be applied unless they have been agreed by the Court.
- ***The Right to reply, and rules on fairness:*** Given the power of broadcasting, broadcasters should have an obligation to be fair. It is generally considered appropriate for broadcasters to be required to offer a prompt right of reply to any person or organisation who considers that a programme has been unfair. An apology might also be in order.
- ***Obligations for news to be accurate and impartial:*** Standards of good journalism require news to be accurate, howsoever published. This is perhaps particularly so in the broadcast media, given their persuasive power. Some countries, for example, those within Europe, require news to be impartial. This is not the case in others, for example the United States, where the editorial bias of the channel's owner can filter through to news.
- ***General obligations for impartiality:*** In many countries it is considered acceptable for a degree of editorial bias to affect general, non-news programming. However, in the UK, *all* broadcast programming must be impartial. This does not mean that points of view and opinions cannot be aired, but that it is incumbent upon the broadcaster to ensure that opposing views are heard and that the television or radio service is not partial itself to any particular view.
- ***Rules preventing discrimination:*** Given the power of the broadcast media, it is perhaps especially important to apply and enforce rules to ensure that programmes do not broadcast material - including the views of interviewees or programme guests - which discriminate against people, for example on the grounds of race, nationality, religion or sex.
- ***Special rules on religious broadcasting:*** Religious broadcasting is another sensitive area where perhaps special rules may be applied to ensure that due respect is given to all religious beliefs, and religious intolerance is not provoked.

4.6 The Council of Europe believes that in order to guarantee the existence of a wide range of independent and autonomous media in the broadcasting sector, it is essential to provide for adequate and proportionate regulation of that sector. This will serve to guarantee the freedom of the media while at the same time ensuring a balance between that freedom and other legitimate rights and interests. Perhaps most importantly in order to preserve broadcasting as part of the democratic process, governments should aim to create independent regulators for broadcasting.

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

- **Remit of regulatory authority:** The duties and responsibilities of the independent authority should be set out in law, as should the means through which they will be held accountable.
- **Terms for termination of appointment:** One of the most invidious ways in which a regulatory authority can be subject to political pressure and influence is through the threat of dismissal. Therefore, the law should state clearly the factors which may lead to dismissal, for example, physical or mental incapacity, or a clear breach of the rules of propriety.
- **Funding:** Funding can also be used as a means of exerting political pressure; if the authority does not act in accordance with government wishes, funding could be withdrawn. Terms of funding should be set out in law, and wherever possible be kept separate from any potential political interference.
- **Conflicts of interest:** As well as being independent of political forces, members of the regulatory authority must be free of any potential conflict of interest with the broadcasting sector. It is usual for members and their families to be prohibited from having any financial interest in any broadcasting or associated company. A breach of this rule could lead to dismissal.

## 5. Cultural and Consumer Protection Reasons

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

5.2 Other ways in which broadcasting regulation can be used to further cultural objectives are through using a licensing system to make provision for a range of services, and for media pluralism. In addition, a core decision for governments is whether they will provide for public service broadcasting, that is broadcasters who are independent of government but which are obliged to provide certain programming in the public interest in return for a degree of state support. This support is usually in the form of funding, either in part, or in whole (as in the BBC which is funded entirely by a compulsory licence fee charged to all households with a television). However, public service broadcasters can also be supported by the state through the provision of universally accessible services using scarce spectrum. Again, in the UK, there are three commercially funded public service television channels, all of which are obliged to pay government a fee for using spectrum and are required to meet public service programming obligations. However, there are no non-PSB television services with universal, or near-universal access through the analogue spectrum.

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

5.4 A country's culture will affect the way it deals with consumer protection issues, as standards are rarely universal but rather culturally subjective. These fall into three basic categories: standards to protect the quality of viewing and listening, protection of minors, and fairness in advertising. Many countries seek to set rules which limit the amount of advertising available on broadcast services.

Within the European Economic Area, there are strict rules on the amount of television advertising which is permitted, rules setting out the spacing of advertising breaks within programmes, and rules on the scheduling of advertising. While these rules have an effect on the advertising market (sometimes serving to increase the cost of television advertising by limiting its availability), the prime purpose is to ensure that viewers' enjoyment of television is not marred by too many or too frequent ad breaks. Similarly, European television is subject to strict rules maintaining a separation between advertising and programming. For example, product placement is not allowed. These rules are enforced in order to ensure that editorial integrity is not undermined by commercial interests, again at least in part to enhance enjoyment for viewers.

5.5 While many countries outside of Europe are not too bothered about setting rules on the amount and frequency of advertising, most are concerned to ensure that children are protected when accessing broadcast media. Generally, countries set rules to ensure that children are not harmed - either physically or morally, with regulations restricting violence, sexual portrayal and bad language. Many countries insist that warnings precede programmes which are not suitable for children, or that on-screen symbols are used to 'rate' programmes. Many countries also operate a 'watershed' system for television, for example in the UK where programmes that have more adult themes or content cannot be shown before 9 p.m.

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

## 6. Economic Purposes

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

- ***The application of international trade agreements:*** For example, Members of the European Union are bound by a Directive (Television Without Frontiers) to allow free movement of broadcast services, provided they all meet the same basic minimum criteria of content regulation.
- ***As a means of balancing desires for inward investment, as against the promotion of national industries:*** A key decision many nations must make is whether or not to permit foreign investors into the national broadcasting industry. Recent UK legislation caused much debate by allowing United States companies to own UK broadcasters, despite the fact that the United States does not have a reciprocal arrangement for their broadcasters.
- ***The support of indigenous production sectors:*** Many countries set quotas for the amount of original production (that is programming made within the country, or within an agreed trade area) and also quotas for independent productions.
- ***The promotion of new technology:*** For example, UK legislation in 1996 set out incentives to broadcasters to invest in digital technology, resulting in the UK being at the forefront of both digital terrestrial television and digital audio broadcasting.
- ***The application of competition law:*** Given the high barriers to entry (cost and access to scarce spectrum, often through a competitive licensing process), governments may wish to apply industry-specific competition provisions to prevent abuses of monopoly, or near-monopoly positions, rather than relying on *post hoc* competition law.

ANNEX 2

Country	Do you have broadcasting legislation?	Who issues TV and radio licences?	Do you have an independent regulator?	Do you have a State broadcaster	Do you have a Public Service Broadcaster	Which government department is responsible for broadcasting?
<b>Australia</b>	Broadcasting Services Act 1992	Australian Broadcasting Authority/ Australian Communications and Media Authority	The ABA	No	Australian Broadcasting Corporation	
<b>Barbados</b>		The Broadcasting Authority	Broadcasting Authority	Caribbean Broadcasting Corporation	No	Home Affairs
<b>Canada</b>	Broadcasting Act 1991	Canadian Radio-Television and Telecommunications Commission	CRTC	No	Canadian Broadcasting Corporation	Department of Heritage and Department of Industry
<b>Cyprus</b>	Radio and Television Stations Law 1998	Cyprus Radio-Television Authority	Cyprus Radio-Television Authority		Cyprus Broadcasting Corporation	
<b>Fiji</b>	In hand	In hand			In hand	Solicitor General
<b>Ghana</b>	National Communications Authority Act 1996	National Communications Authority	NCA	Ghana Broadcasting Corporation	GBC operates within a State legal framework	
<b>Jamaica</b>	Broadcasting and Radio Diffusion Act 1986/Telecommunications Act	Broadcasting Commission of Jamaica	Minister of Information, on BCJ's advice	No	Public Broadcasting Commission of Jamaica, but not yet operating	Information Division of Office of Prime Minister
<b>Kenya</b>		Communications Commission, not independent	Ministry of Tourism and Information	Kenya Broadcasting Corporation	KBC operates within a State legal framework	Ministry of Broadcasting

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Malaysia		The Malaysian Communications and Multimedia Commission		Radio Television Malaysia	No	
Malta	Broadcasting Act 1991	Malta Broadcasting Authority	MBA	Public Broadcasting Service Ltd		
Namibia	Communications Act	Namibian Communications Commission, but not independent	NCC	Namibian Broadcasting Corporation	No	Ministry of Broadcasting and Information
Nigeria	Yes	National Broadcasting Commission	Yes, the NBC	The Nigerian Television Authority, Federal Radio Corporation of Nigeria, and Voice of Nigeria	No. All publicly owned stations are State or Federal Government controlled.	Federal Ministry of Information and National Orientation
Singapore		The Media Development Authority				Ministry of Information Communication and the Arts
South Africa		Independent Communications Authority of South Africa	ICASA	South African Broadcasting Corporation	South African Broadcasting Corporation	

St. Lucia	Wireless Telegraphy Ordinance		No			Ministry of Broadcasting
UK	Communications Act 2003	Licenses issued by Ofcom	Ofcom	No	The BBC is publicly funded, ITV, Channels 4 and 5 are advertiser-funded	Culture, Media and Sport