BRIEFING NOTE SERIES ON FREEDOM OF EXPRESSION

Media Diversity

Centre for Law and Democracy
International Media Support (IMS)

BRIEFING NOTE 8 OF 12

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Although the right to freedom of expression operates primarily as a restriction on State action, the right also imposes positive obligations on States to establish an environment which promotes the free flow of information and ideas in society. A key element of this is the idea of media diversity, which broadly means that the media provides voice opportunities to and satisfies the information needs of all stakeholders. In *Informationsverein Lentia and Others v. Austria*, the European Court of Human Rights (ECHR) stressed the importance of media diversity:

> [T]he fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor.

Diversity is complex and is often understood to encompass three different elements: diversity of outlet (meaning different types of media), diversity of source (meaning diverse ownership of the media), and diversity of content (which refers to media output).

Diversity of Outlet

International law requires States to guarantee freedom of expression "through any medium" (see Briefing Note 1). Part of States' positive obligation to promote diversity includes making sure that all different types of media, and in particular all three types of broadcaster – namely public, commercial and community broadcasters – are able to operate.

Commercial broadcasters, driven in part by a profit motive, contribute to diversity by bringing much needed resources as well as the innovation and choice that are driven by competitive impulses. For commercial broadcasters, in line with their competitive orientation, a key requirement is that the licensing process should be fair, transparent and competitive.

Public service broadcasters, by contrast, are not normally primarily driven only by competition, and especially not competition for resources, since they typically receive State-funding (see Briefing Note 9). They contribute to diversity through their public service mandates, which often include references to quality and satisfying voice and information needs of citizens that may be overlooked by commercial players. A key obligation in terms of public service broadcasters is to create them, in the first place, to respect their independence and to ensure that they have sufficient resources to be able to fulfil their public service mandates.

Community broadcasting is defined broadly as non-profit broadcasting that is provided by and for the members of a particularly community, whether a geographical community or a community of interest. These broadcasters also make an important contribution to diversity, providing voice opportunities to communities which may be neglected or largely neglected by commercial and even public service broadcasters.

A number of conditions are necessary for the community broadcasting sector to be able to thrive. Community broadcasters cannot normally compete openly with commercial broadcasters in licensing processes because they have far fewer human, technical and financial resources. As a result, it is necessary to put in place special, light, licensing processes for community broadcasters, along with much lower, or even free, tariff schedules.

It is also necessary to make special arrangements to ensure that community broadcasters can disseminate their signals through existing broadcasting platforms. In the analogue broadcasting environment, this means protecting a part of the frequency spectrum, through a frequency plan (see Briefing Note 7), for community broadcasters. There are different ways to do this. Some countries, including France, Thailand and the United States, allocate a fixed percentage of certain frequency bands to community broadcasting; in each of those countries, 20 per cent of the FM band is allocated to community or non-profit broadcasting. In other countries, the allocation is left up to the broadcast regulator, sometimes with a legal requirement that the allocation of frequencies among the different types of broadcasters be equitable.

Diversity of Source

The concentration of media ownership in the hands of a small number of players is a threat not only to freedom of expression but to democracy itself. Undue media concentration reduces the diversity of viewpoints that citizens are exposed to and limits the ability of certain interests to express their opinions and be heard. By the same token, it gives large-scale owners disproportionate access to voice, allowing their views and perspectives to dominate. Undue concentration of ownership can also lead to free market or competitive problems, such as higher prices for consumers or reduced incentives to produce resource-intensive or small-scale programming, such as investigative or local reporting. Large media conglomerates may also be able to engage in anti-competitive practices in relation to advertising, further exacerbating the problem.

The importance of preventing excessive concentration of ownership in the media sector has been confirmed by a number of international actors. In their 2007 Joint Declaration, the special international mandates on freedom of expression stated:

> In recognition of the particular importance of media diversity to democracy, special measures, including anti-monopoly rules, should be put in place to prevent undue concentration of media or cross-media ownership, both horizontal and vertical.

The *Declaration of Principles on Freedom of Expression in Africa* states:

> States should adopt effective measures to avoid undue concentration of media ownership, although such measures shall not be so stringent that they inhibit the development of the media sector as a whole.

The specific rules will depend on the specific market to which they apply; clearly larger markets in larger countries will need different solutions than tiny island States. While restrictions on undue concentration of media ownership are important, policy makers should also take into account the need to foster development in the broadcasting sector; the rules should not be so strict as to undermine the economic viability of the sector.

As an example of specific rules, in Canada, the regulator 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, while in Italy, a newspaper publisher may not control more than 20 per cent of total circulation at the national level and no more than 50 per cent at the regional level. In the United States, there are very detailed and precise rules on concentration of ownership and cross-ownership within the media sector. Laws can also apply to cross-media ownership. In South Africa, no one may control, directly or indirectly, more than one television licence, or more than two FM or AM radio licences or two stations with substantially overlapping service areas. Similarly, no one who controls a newspaper may also control both a television and a radio licence.

Diversity of Content

There are a number of ways in which States can provide direct support for diverse content (i.e. in addition to the more indirect measures outlined above). These include setting up funds to support the production of public interest content, community broadcasters and/or other media sectors that are at risk. Systems to provide financial support for community broadcasters are common in democracies, and many countries also have funds to support newspapers which are struggling.

States can also impose direct, positive content obligations on broadcasters, for example to include a minimum percentage of domestic or local content among their programming (see Briefing Note 7).

FURTHER READING

- Centre for Law and Democracy, *Tuning into Development: International Comparative Survey of Community Broadcasting Regulation,* 2013: http://www.law-democracy.org/live/unesco-community-radio-book-published/
- Organization of American States, *Annual Report of the Special Rapporteur for Freedom of Expression*, 2004: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=459&lID=1
- UNESCO, *Media Development Indicators: A Framework for Assessing Media Development*, 2008: http://unesdoc.unesco.org/images/0016/001631/163102e.pdf