

ARTICLE 19

The Gambia: draft regulatory guidelines on media ownership

July 2017

Legal analysis

Executive Summary

In this analysis ARTICLE 19 reviews the Draft Guidelines on Ownership and Cross-Ownership in the Broadcasting Sector (the Guidelines), recently adopted by the Public Utilities Regulatory Authority (the Authority) of The Gambia in application of Section 227 (e) of the Information and Communications Act of 2009 (the Law). The Guidelines are being introduced as part of a broader reform of the broadcasting sector in the country. They are to guide the process of allocating licences to radio and television stations on a provisional basis.

ARTICLE 19 welcomes the opportunity to comment on the Guidelines from the perspective of international standards on freedom of expression. We believe that even during complex times of transition, it is of the utmost importance that each step towards democratisation is taken in full compliance with international human rights standards, which are the foundations for the construction of a democratic society. Hence, the allocation of licences to audiovisual media must meet international standards on human rights: any failure to meet the requirements of international law will risk discrediting the broader process of reform of the broadcasting sector, and result in serious threats to the freedom and independence of the licensees.

ARTICLE 19 also reiterates our recommendation to the Government of The Gambia (the Government) to review its legislation for its compliance with international freedom of expression standards and to repeal all laws that have been used to stifle free expression. We stand ready to assist the Government in this process and ensure that The Gambia adopts a legal and regulatory framework that enables the full exercise of freedom of expression and access to information rights.

Key recommendations:

1. The Government of The Gambia should undertake a comprehensive revision of all laws that have been used to stifle free expression, and ensure that a complete framework on media pluralism, diversity of content and transparency of ownership is integrated into the laws of The Gambia, in conformity with international standards;
2. The Government and the Authority should ensure that the provisional allocation of licences takes place within a clear framework of public, transparent rules and guidelines, which allow all interested media actors to apply. In particular, the provisional allocation of licences should happen in a manner that ensures that licensees will benefit from sufficient foreseeability for business development over the length of the provisional licence, and provide clarity as to the transition towards a 'final' spectrum management mechanism;
3. The Government should ensure that the Authority is fully independent and that the provisional allocation of licences is implemented in full respect of due process standards, including a clear timeframe, and access to judicial review;
4. The Authority should clarify the scope of application of the Guidelines: they should apply only to media actors that can be regulated under international standards;
5. The Government and the Authority should review the notion of ownership, in the Law and the Guidelines respectively, to address the variety of means that can be used to control a media company;
6. The Government and the Authority should review the criteria and thresholds for ownership and cross-ownership for an optimal contribution to pluralism and diversity in the media

landscape of The Gambia. This would include removing all reference to content provision licences. This would also require identifying the proper criteria and thresholds that, in the context of the national media market, will serve to prevent undue dominance and the resulting impoverishment of pluralism and diversity while supporting the development of a vibrant and dynamic media sector.

7. The Government and the Authority should further detail rules, including relevant procedures, that meet the requirements of international standards and that are applicable to threats to pluralism and diversity that result from changes in the ownership or control structure of a media company, or from merger projects;
8. The Government and the Authority should ensure that relevant information on media ownership is made available to the public both by the media themselves and by the regulatory authority.



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Introduction

The Public Utilities Regulatory Authority of The Gambia (the Authority) has adopted draft Guidelines on ownership and cross-ownership in the broadcasting sector (the Guidelines) in application of Section 227 (e) of the Information and Communications Act of 2009 (the Law). These Guidelines are meant to accompany the process of allocating licences to a certain number of radio and television stations on a provisional basis while a broader reform is ongoing.

ARTICLE 19 welcomes the opportunity to comment on the Guidelines from the perspective of international standards on freedom of expression and from the perspective of comparative best practices on the national level. We believe that international freedom of expression standards must guide the allocation of licences to audiovisual media: any failure to meet the requirements of international law will risk discrediting the broader process of reform of the broadcasting sector, and result in serious threats to the freedom and independence of the licensees.

In order that they are able to play their part in the transition towards democracy, audiovisual media must be free to report on all events, including all aspects of the transition. In addition to the right of the media to investigate and report on all issues of general interest, the public also has a right to a free and independent media landscape that provides the flow of information and ideas that will enable citizens to take part in the public and political life of the country, including all issues linked to the evolution of society towards democracy.

In this analysis, we present a brief overview of international standards on media pluralism, offer general comments on the context of the adoption of the Guidelines, and then discuss the compliance of the Guidelines with international freedom of expression standards. We offer recommendations to support the Government of The Gambia (the Government) and the Authority in their efforts to bring the media legal and regulatory framework in full compliance with international law.

International standards on media pluralism

Under international law, States have a positive obligation to create a legal and regulatory framework that ensures media freedom and pluralism of the media. The role of the State is to enable the development of a media landscape that represents and reflects society as a whole and that presents a maximum diversity of voices, viewpoints and languages. In that sense, the State should put in place effective measures to prevent undue concentration and to promote diversity of ownership within media sectors. Such measures should take into account the need for the media sector as a whole to develop and for media companies to be economically viable.

The duty of States to prevent concentration of media ownership is further underlined by a number of international and regional instruments. In particular, the African Declaration of Principles on Freedom of Expression 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.

From a comparative perspective, we note that in its 2007 Recommendation of the Committee of Ministers to member states on media pluralism and diversity of media content,¹ the Council of Europe suggested a number of practical measures which States may take to tackle the problem of media concentration:

2. Ownership regulation

- 2.1. Member states should consider the adoption of rules aimed at limiting the influence which a single person, company or group may have in one or more media sectors as well as ensuring a sufficient number of diverse media outlets.
- 2.2. These rules should be adapted to the size and the specific characteristics of the national, regional or local audiovisual media and/or text-based media market to which they would be applicable.
- 2.3. These rules may include introducing thresholds based on objective and realist criteria, such as the audience share, circulation, turnover/revenue, the share capital or voting rights.
- 2.4. These rules should make it possible to take into account the horizontal integration phenomena, understood as mergers in the same branch of activity – in this case mono-media and multi-media concentrations –, as well as vertical integration phenomena, that is, the control by a single person, company or group of some of the key elements of production, distribution and related activities such as advertisement or telecommunications.
- 2.6. Whether they are, or are not, specific to the audiovisual and written media, the authorities responsible for the application of these rules should be vested with the powers required to accomplish their mission, in particular, the power to refuse an authorization or a licence request and the power to act against concentration operations of all forms, notably to divest existing media properties where unacceptable levels of concentration are reached and/or where media pluralism is

¹ Recommendation CM/Rec(2007)2 of the Committee of Ministers to member states on media pluralism and diversity of media content, available at <http://bit.ly/2vS3c10>.

threatened. Their competences could therefore include the power to require commitments of a structural nature or with regard to conduct from participants in such operations and the capacity to impose sanctions, if need be.

(...)

II. Measures promoting content diversity

1. General principle

Pluralism of information and diversity of media content will not be automatically guaranteed by the multiplication of the means of communication offered to the public. Therefore, member states should define and implement an active policy in this field, including monitoring procedures, and adopt any necessary measures in order to ensure that a sufficient variety of information, opinions and programmes is disseminated by the media and is available to the public.

(...)

III. Media transparency

1. Member states should ensure that the public have access to the following types of information on existing media outlets:

- information concerning the persons or bodies participating in the structure of the media and on the nature and the extent of the respective participation of these persons or bodies in the structure concerned and, where possible, the ultimate beneficiaries of this participation
- information on the nature and the extent of the interests held by the above persons and bodies in other media or in media enterprises, even in other economic sectors
- information on other persons or bodies likely to exercise a significant influence on the programming policy or editorial policy;
- information regarding the support measures granted to the media
- information on the procedure applied in respect of the right of reply and complaint.

ARTICLE 19 has detailed the requirements of international law on freedom of expression in relation to the regulation of audiovisual media, including the management of spectrum and the allocation of licences, in the 2002 publication 'Access to the Airwaves'.²

Several democratic states have enacted specific legislation with a view to combating media concentration. Such legislation typically addresses one or more of the following situations:

- **Concentration of ownership within a specific type of media.** In France, for example, nobody is permitted to control more than 30% of the national distribution of political and general information daily newspapers. In Italy, no publisher may control more than 20% of circulation at the national level and 50% at the regional level;
- **'Cross-ownership' concentration: a situation in which one company has stakes in different types of media, such as television and newspapers.** The law of many democratic countries prohibits companies which already have a strong presence in one media sector from crossing over to others. In the Netherlands, for example, no company which controls more than 25% of the newspaper market can obtain a licence for broadcasting;
- **Foreign ownership of the media, which is sometimes limited in democracies, usually in order to protect their national culture and identity.** In South Africa, for example, 'foreign

² Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation, 2002; available at <http://bit.ly/29B1Wy1>.

persons' are barred from exercising direct or indirect control over a private broadcasting licensee; from owning more than 20% of the financial or voting interests in a licensee; and from holding more than 20% of the directorships. According to ARTICLE 19, restrictions on foreign ownership of broadcast outlets can be legitimate, as long as they do not undermine the economic viability of the sector.³

³ *Ibid.*, Principle 20 para 2.

General comments

Legal framework on freedom of expression

In this analysis, ARTICLE 19 does not comment on the compatibility of the Guidelines with the Information and Communications Act and on the conformity of that and other media laws with international standards on freedom of expression.

However, we reiterate our recommendation to the Government of The Gambia to repeal all laws that have been used to stifle free expression, and to adopt a legal and regulatory framework that enables the exercise of the right to freedom of expression and access to information.⁴

Recommendation:

- The Government of The Gambia should undertake a full and comprehensive revision of its legislation for compliance with international freedom of expression standards and amend the relevant legislation accordingly.

The provisional allocation of licences

Overall, ARTICLE 19 notes that the temporary allocation of licences is an exceptional situation and, as such, requires a number of measures to guide the process, in particular:

- There should be clear, precise and accessible rules and guidelines on every aspect of the provisional allocation process. Hence, in order to comply with international freedom of expression standards, the Authority, in compliance with the relevant law, should adopt a thorough framework (including guidelines), through which all stakeholders are equally able to access and understand the process to be followed for the allocation of licences;
- Before the Authority launches the process of allocating licences, the Government should adopt a national frequency allocation plan, adopted through a participatory and transparent process open to the cooperation of all stakeholders;
- At a minimum, there should be clear and transparent rules on the period of time licenses will remain valid for and what the position of licensees will be at the end of the provisional period. All applicants should benefit from sufficient foreseeability to decide to engage in business development over a given period of time. It should also be made clear under what specific conditions provisional licences will be renewed once the reformed, final application process is launched.

ARTICLE 19 finds that these requirements have not yet been fulfilled in The Gambia. Hence, in the absence of such clear and complete rules, we believe that the provisional process is at great risk of arbitrariness, which would greatly undermine its credibility.

⁴ *C.f.*, ARTICLE 19, Gambia: President Barrow must deliver on inclusion and prioritise free expression in new era, 3 February 2017; available at <http://bit.ly/2tZ4YAS>.

Recommendation:

- The Government and the Authority should ensure that the provisional allocation of licences takes place within a clear framework of public, transparent rules and guidelines, which allow all interested media actors to apply. In particular, the provisional allocation of licences should happen in a manner that ensures that licensees will benefit from sufficient foreseeability for business development over the length of the provisional licence, and provide clarity as to the transition towards a ‘final’ spectrum management mechanism.

The role of the Authority

ARTICLE 19 is also concerned about the status of the Authority. So far, it is not clear why there is a single regulatory authority for all public utilities. Under international standards, we would expect a specific regulatory authority for audiovisual media or a converged regulator that also has jurisdiction over telecommunications.

In addition, we note that the body in charge of allocating licences and regulating audiovisual media should benefit from strong guarantees of independence and operational autonomy. Unless the regulatory authority is protected from the influence of political, commercial and other private interests, it is not in a position to allocate licences to media companies that will contribute to the pluralism and diversity of the media landscape. Instead, there is a risk that the licensees will be under the control of the government or private interests connected to the government.

Recommendation:

- The Government should ensure that the Authority is fully independent and that the provisional allocation of licences is implemented in full respect of due process standards, including a clear timeframe, and access to judicial review.

Analysis of the Guidelines

The Guidelines seek to respond to the important concern of ensuring that the management of broadcast spectrum contributes to pluralism in the media sector. They also take a broad view of the media landscape and seek to include all media actors in their analysis of pluralism, which is a welcome and necessary concern.

ARTICLE 19 observes that, generally, the rules on transparency of ownership and media pluralism should be found in the law rather than in secondary instruments adopted by the regulatory authority. For instance, Article 11 of the Guidelines prohibits political parties from owning audiovisual media: while being compatible with international law, this principle should be outlined in a legislative text adopted by the Parliament. The Guidelines should only serve to explain and provide guidance of the interpretation of the law rather than create new binding obligations on media actors. As mentioned above, we do not look at the laws in the present document, but nonetheless we recommend that a complete framework on media pluralism, diversity of content and transparency of ownership should be integrated into the laws of The Gambia, in full conformity with international standards.

We observe that the Guidelines only focus on the issue of ownership, while diversity of content is another important component of a pluralistic and diverse media landscape.

Recommendation:

- The Government should ensure that a complete framework on media pluralism, diversity of content and transparency of ownership is integrated into the laws of The Gambia, in conformity with international standards.

Definitions

We note that the provision on definitions (Article 1) appears incomplete. A number of important terms in the Guidelines are not defined, including, for example, EXCAF, shareholding interest, content provider, signal distributors involved in broadcasting, electronic communications licensees among others.

In particular, we note that the Guidelines refer to 'content provision licences', a term which is also not defined in the Guidelines. This concept suggests that media companies would require a licence prior to being allowed to make information and ideas available to the public, which would constitute a blatant violation of international standards on freedom of expression.

Recommendation:

- The Authority should ensure that the Guidelines include a complete list of definitions of important terms contained in the Guidelines.

Scope of the Guidelines

There seems to be some degree of confusion regarding the scope of the Guidelines: according to Article 3, they are applicable to 'licensed broadcasters, signal distribution licensees,

newspapers, electronic communication licensees and advertising agents.’ However, some of these actors should not be targeted by the Guidelines:

- Under international standards, the necessity of independent, public regulation only exists in relation to audiovisual media and telecommunications;
- We note that newspapers and advertising agencies should not need a licence to operate as they do not rely on the use of a naturally limited public resource such as spectrum. There is no justification in international law for the imposition of licences on such activities. In addition, concentration in the print media market or in the advertising industry should not fall under the jurisdiction of the regulatory authority for audiovisual media;
- Whilst there may be a need to condition the operation of a telecommunication network on the allocation of a licence, the Guidelines do not make sufficiently clear what is meant by the activities of ‘signal distribution’ and ‘electronic communication’.

Recommendation:

- The Authority should clarify the scope of application of the Guidelines: they should apply only to media actors that can be regulated under international standards.

Criteria to identify thresholds of ownership and control

In Article 1, the Guidelines define a ‘controlling interest’ as ‘owners with shareholding interests greater than 50% of shares in a given entity.’ We observe that ‘shareholding interests’ is not a sufficiently precise concept. We also note that a controlling interest of less than 50% can be sufficient to exercise significant control over a media company.

Further, whilst Article 5 states that ‘direct/indirect ownership interest will be factored in the calculation of ownership stakes across all levels of ownership chain’, this remains a rather vague approach that would need to be defined with much more precision.

ARTICLE 19 observes that the control of a media company can be exercised through a variety of means. We therefore recommend to define criteria for determining ownership and control of media companies that explicitly addresses direct and beneficial ownership and control. Relevant suggestions include proprietary, financial or voting strength within a media company or companies and the determination of the different levels of strength that lead to exercising control or direct or indirect influence over the strategic decision-making of the company or companies, including their editorial policy.

The Guidelines define various thresholds of ownership and cross-ownership (Articles 7 to 10). Generally, it should be made clearer that no licence will be allocated if the allocation of said licence would result in one of the defined thresholds being exceeded. Although the sale of ownership, which is referred to in various provisions of the Guidelines, is a possible remedy to a threat on pluralism posed by the allocation of a licence, it should be included in a separate provision on remedies (see below).

ARTICLE 19 observes that:

- As noted above, the reference to ‘content provision licences’ is unclear and appears to be in violation of international standards on freedom of expression;

- Some of the rules are simply unclear. For instance:
 - At Article 7.ii, ‘no more than 2 radio and TV licences’: it is not clear if this means one TV and one radio, or two TVs and two radios;
 - At Article 8.i, ‘entities with shareholding interests in newspapers’ is a very vague concept;
 - At Article 10.iv, the rule on multiplying levels of ownership is unclear.
- The rules make no distinction related to the size of a media company, treating, for instance, a local radio station similarly to a nation-wide broadcaster. By contrast, thresholds that refer to market shares or audience shares, as is the practice in some countries, allow for a more refined approach to identifying threats to pluralism while allowing the economic development of the media sector.

Recommendations:

- The Government and the Authority should review the notion of ownership, in the Law and the Guidelines respectively, to address the variety of means that can be used to control a media company;
- The Government and the Authority should review the criteria and thresholds for ownership and cross-ownership for an optimal contribution to pluralism and diversity in the media landscape of The Gambia. This would include removing all reference to content provision licences. This would also require identifying the proper criteria and thresholds that, in the context of the national market, will serve to prevent undue dominance and the resulting impoverishment of pluralism and diversity while supporting the development of a vibrant and dynamic media sector.

Remedies to threats on pluralism

ARTICLE 19 further observes that the Guidelines should – in applying the law, as mentioned above – clarify the consequences of exceeding the various thresholds of ownership and cross-ownership. In particular:

- The Guidelines should clearly state that no licence would be allocated that would result in one of the thresholds being crossed;
- A situation wherein a merger or a change in the controlling structure of a media outlet poses a threat to media pluralism should be addressed in separate detailed rules, including on the applicable procedures, which are in accordance with the requirements of international standards. While the sale or transfer of ownership is a possible remedy to concentration and pluralism issues (see Articles 7 to 10), a comparative analysis shows that there are other options that could be considered. Such alternatives include the suspension or revocation of a licence if rules on transparency and concentration are breached; content-related remedies that would prevent any reduction of diversity in the media landscape; and various forms of commitments from media companies that would prevent the reduction of diversity in the media landscape;
- In relation to changes in the shareholding, ownership or control structure of a media outlet (Article 13), it should be made clear that such changes need to be approved only when they would lead to one of the thresholds being crossed. In addition, there should be clearer and more detailed rules on when a notification must be sent to the Authority,

what procedure should be followed, what timeframe would be applicable, and how to appeal the decision of the Authority;

- In relation to mergers (Article 14), a full set of procedural rules is also needed, as well as rules on thresholds that would trigger the obligation to notify the Authority of an intended merger.

Recommendation:

- The Government and the Authority should further detail rules, including relevant procedures, that meet the requirements of international standards and that are applicable to threats to pluralism and diversity that result from changes in the ownership or control structure of a media company, or from merger projects;

Transparency of ownership

ARTICLE 19 welcomes the fact that the Guidelines include a provision on transparency of ownership (Article 12). This is indeed a necessary instrument not only for the public authorities but also for the audience to be able to form a critical view of information disseminated by media outlets. However, we also note that this provision should be reinforced, notably to ensure that information on media ownership is made available to the public by the media themselves as well as by the Authority that collects all relevant data from media companies.

Recommendation:

- The Government and the Authority should ensure that relevant information on media ownership is made available to the public both by the media themselves and by the Authority.

Final comments

The Guidelines state that non-compliance will be sanctioned according to the Authority's enforcement regulations of 2010 (Article 14). While we do not comment on the 2010 regulations, we reiterate that any sanction should always be provided for by the law, pursue a legitimate interest as defined in international law, and be necessary and proportionate.

About ARTICLE 19

ARTICLE 19 advocates for the development of progressive standards on freedom of expression and freedom of information at the international and regional levels, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation.

On the basis of these publications and ARTICLE 19's overall legal expertise, the organisation publishes a number of legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. This analytical work, carried out since 1998 as a means of supporting positive law reform efforts worldwide, frequently leads to substantial improvements in proposed or existing domestic legislation. All of our analyses are available at <http://www.article19.org/resources.php/legal>.

If you would like to discuss this analysis further, or if you have a matter you would like to bring to the attention of the ARTICLE 19 Law Programme, you can contact us by e-mail at legal@article19.org. For more information on ARTICLE 19's work in The Gambia, please contact Fatou Jagne, director of ARTICLE 19 Senegal and West Africa at fatouj@article19.org.