



The legitimacy of licence requirements for the use of wireless communications devices

This note briefly discusses to what extent the imposition of licence requirements on the use of wireless communications devices is consistent with international human rights law. Particular attention will be paid to devices whose use presents a low risk of interference with other uses of the electromagnetic spectrum.

The right to freedom of expression is recognised in all of the main international and regional human rights treaties. It was universally declared to be a right of the highest importance in the *Universal Declaration of Human Rights*, adopted unanimously by the United Nations General Assembly in 1948, just three years after the United Nations was first created. Article 19 of the *Universal Declaration* states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right to freedom of expression has also been similarly enshrined in Article 19 of the *International Covenant on Civil and Political Rights*, a binding treaty which has to date been ratified by over 150 States. Many of its provisions, including Article 19, are widely considered to reflect customary international law. Similar guarantees of free speech are also found in the three regional human rights conventions (in Europe, Africa and the Americas) and in nearly all of the constitutions of the world.

The framers of the various international instruments guaranteeing the right to freedom of expression deliberately defined it in broad terms. In the first place, freedom of expression is not limited to the right to express oneself; it also includes the right to *seek* and to *receive* information from others. Second, the right to freedom of expression may be exercised *through any media*; it is not limited to traditional media such as newspapers or radio, but also covers any contemporary or future technology used for the exchange of ideas and information, including wireless communication devices.

While the right to freedom of expression is universally recognised as one of fundamental importance, it is also accepted that the right is not absolute. Certain overriding public and

private interests may justify restricting the right. A key question here is when and under what circumstances freedom of expression may be restricted.

Article 19(3) of the *International Covenant on Civil and Political Rights* sets out the basic test for assessing the legitimacy of restrictions on freedom of expression:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

This test includes three parts: first, the interference must be in accordance with a law or regulation; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate in international law; and third, the restriction must be *necessary* for the protection or promotion of the legitimate aim.

The first condition means, first and foremost, that the interference cannot be merely the result of the whim of an official. There must actually be an enacted law or regulation which the official is applying. In other words, only restrictions which have been officially and formally recognised by those entrusted with law-making capacity may be legitimate. In addition, not all “laws” or “regulations” meet the standard of ‘provided by law’. The legislation must be clear and precise so that it is known in advance exactly what expressions are prohibited. Vaguely worded edicts with potentially very broad application will not meet this standard and are thus illegitimate restrictions on freedom of expression.

The second condition, that a restriction must serve a legitimate aim, is *not* open-ended. The list of legitimate aims provided in Article 19(3) of the *International Covenant on Civil and Political Rights* is exclusive and governments may not add to these. This includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (*ordre public*), public health or morals.

Finally, even if a restriction is in accordance with an acceptably clear law and if it is in the service of a legitimate aim, it will breach the right to freedom of expression unless it is ‘necessary’ for the protection of that legitimate aim. This has a number of implications. In the first place, if another measure exists which would accomplish the same goal in a way less intrusive to the right to free expression, the restriction is not in fact necessary and is thus not legitimate. Second the restriction must be narrowly tailored; it should impair the right as little as possible. Third the impact of restrictions must be proportionate, in the sense that the harm to freedom of expression must not outweigh the benefit to the interest the restriction seeks to protect. This implies a balancing exercise in which the harm caused by the restriction is compared with the harm that would result without it.

Where wireless communications devices are used as a means to exchange ideas or information -which is almost always the case- this constitutes an exercise of the right to freedom of expression, and any restriction on such use must meet the three-part test outlined above. A licence requirement for wireless communications devices clearly constitutes a restriction and therefore it must be 1) provided by law; 2) serve a legitimate aim; and 3) be necessary for the attainment of that aim.

Licence requirements applicable to all owners of a particular type of device generally contravene international law, because they do not serve a legitimate purpose; mere ownership of a particular instrument does not normally present any risk of societal harm. On the other hand, no sweeping assessment can be made of the legitimacy of licencing regimes for the *use* of wireless communications devices, and a case-by-case analysis is necessary.

The requirement of being provided by law will probably be met in many cases, although some laws may simply be too vague or poorly drafted, or otherwise unsuited for application to novel technologies. The requirement of serving a recognised legitimate aim will also usually be met, as the purpose of most licence regimes is to protect public order, by ensuring an orderly distribution of the limited frequency spectrum.

It is the third requirement – that the restriction be necessary for the attainment of the legitimate goal – which will prove the most contentious. Although preventing chaos in the frequency spectrum is a legitimate goal, whether requiring a licence for the use of a wireless communications device is necessary to attain that goal depends on several factors, in particular: 1) the degree of risk posed by the device in question; 2) the importance of the device's use; 3) the importance of the use with which the device will interfere; 4) the degree to which the licence requirement impedes the exercise of the right to freedom of expression; and 5) the availability of less restrictive means for achieving the same legitimate end.

In the past, users of the radio spectrum were predominantly governments and major corporations operating high-powered equipment, for such purposes as radio and television broadcasting, radar and navigation systems. Nowadays, many consumer devices - ranging from mobile telephones and wireless internet hubs to garage door openers - also transmit data through radio waves, but at far lower power levels than most traditional applications. Because higher power levels generally correspond to greater risks of interference, licencing of traditional high-power uses of the radio spectrum is often 'necessary' under the balancing test set out above. On the other hand, the need for regulation of modern consumer devices is on the whole far smaller. Not only do they operate at lower power levels, they are also frequently equipped with novel technologies which enable them to partly compensate the effects of interference from other sources.

There is a risk that force of habit might lead some telecommunications regulators to over-regulate modern, low-interference devices, imposing licencing regimes or other restrictions which do not meet the necessity test. Most States are exploring alternative ways of accomplishing the goal of preventing interference with regulatory tools that are

less restrictive of freedom of expression. One of these tools is the opening up of ranges of the spectrum for shared use, and the adoption of a certification system for devices which transmit data within these ranges. Once the telecommunications regulator has certified that a particular type of device indeed operates in the shared area of the spectrum and poses a low risk of harmful interference, it can be marketed freely and used by any consumer without the need for a licence. The availability of regulatory tools like this to guarantee 'public order in the airwaves' means that the imposition of a licence requirement for modern types of devices will often no longer prove justifiable when evaluated under the 'necessity'-test. Nevertheless, every type of device must be judged by its own merits.

Finally, it should be recalled that the three part test under international law applies to *any* restriction on the right to freedom of expression. This means that even if the actual choice of regulatory tool – a licencing regime, 'shared' range of the spectrum with certification, or other scheme – is justifiable, the way in which the scheme is *implemented* is also subject to the three part test, because the very existence of a procedure by itself constitutes at least a minor obstacle to the free use of the airwaves. In this context, the 'necessity' requirement will mean in particular that any procedure which prospective users of the airwaves must follow should not impose an unnecessarily heavy burden on them, in terms of time or money. Moreover, the regulatory body overseeing the procedure should be independent from the executive, to ensure that any refusals to grant a licence, certification or other type of clearance are made on public interest rather than political grounds.