

ARTICLE 19

Freedom of Expression and State Aid to Media (update)

September 2017

Policy Brief



Table of contents

- Introduction 3
- Background..... 4
 - International and regional standards..... 4
 - ARTICLE 19’s policy on state aid to print media 5
 - Other resources 6
- Recommendations 8
- About ARTICLE 19 10

Introduction

This policy brief contains an update of ARTICLE 19's policy Regulation on State Aid to Print Media,¹ published in December 2012. In the 2012 policy brief, ARTICLE 19 examined the role of state aid to print media from a freedom of expression perspective. It also recommended "model" legislation on this topic that is in line with international standards on freedom of expression. These recommendations only addressed subsidies for the newspaper industry.

ARTICLE 19 believes that the current context of converged media landscapes calls for an analysis of all forms of public aid to all categories of media.

In the current phase of media landscapes' ongoing evolution, whilst traditional formats such as broadcast radio and television remain important sources of information and ideas, the Internet, including mobile Internet, is taking on a position of ever growing importance as a media content distribution platform. This has led to a situation wherein distinguishing audio-visual media from print media has become more complex. Many new media actors exist only online and combine audio-visual materials with text and photographs. Simultaneously, new actors have quickly risen to dominant positions in the media landscapes: search engines and social media platforms now hold a decisive influence over the findability, visibility or accessibility of media and other content.²

The same companies dominate the market of digital advertising, which increases the pressure on an important source of financing for legacy media. In reaction to attempts to levy a tax on their income to fund media organisations, tech giants have started to fund innovative journalism initiatives of their own. Concerns around the viral dissemination of intentional misinformation ("fake news") have further strengthened the understanding that reliable and accurate journalism needs to be properly funded.

Hence, financial support provided by public authorities to private media companies can contribute to maintaining or reinforcing pluralism and diversity in the media landscape. However, it also raises the concern that the government may be trying to gain control over media outlets.

In response to these developments, in this updated brief, ARTICLE 19 puts forward recommendations on freedom of expression and all forms of public support to private media. The recommendations are focused on state actors and aim at the promotion of media pluralism and diversity and the promotion of equality, independence and transparency. They are based on the premise that, under international law on freedom of expression, States have a positive obligation to adopt such legislative framework as to enable diverse and independent media to flourish.

¹ ARTICLE 19, Regulation on State Aid to Print Media, 2012; available at <http://bit.ly/1OeqGXa>.

² See M. Moore, Tech Giants and Civic Power, April 2016; available at <http://bit.ly/2aAHgFw>.

Background

International and regional standards

Under international law, States have a duty to create an enabling legal and regulatory environment that allows the development of a free, diverse and pluralistic media landscape where all media operators can fulfil their role in a democracy. This role is to seek and impart the broadest possible diversity of information and ideas, in particular on questions of public interest, in order to enable individuals to act as informed citizens, to play their part in political life and the control of public authorities, and to contribute to, and benefit from, the economic and cultural dimensions of life in society. Media policy – the broad range of legal and regulatory measures adopted by public authorities – will only be compatible with international standards in as much as it contributes to this general objective.

In practice, public support to private media may be used by governments to gain control over media outlets.

General Comment No. 34 explains that Article 19 of the International Covenant on Civil and Political Rights (ICCPR) implies that

The State should not have monopoly control over the media and should promote plurality of the media. Consequently, States parties should take appropriate action, consistent with the Covenant, to prevent undue media dominance or concentration by privately controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.³

In their 2002 Joint declaration, the international and regional freedom of expression rapporteurs insisted that

Governments and public bodies should never abuse their custody over public finances to try to influence the content of media reporting.⁴

The regional human rights bodies have also made similar recommendations. The European Court of Human Rights has repeatedly stressed that Article 10 (which guarantees the right to freedom of expression) of the European Convention on Human Rights creates a positive obligation for States to enact a legal and regulatory framework that safeguards pluralism and allows every person to exercise their right to freedom of expression.⁵ Article 11 of the European Union Charter of Fundamental Rights explicitly provides that the ‘freedom and

³ UN Human Rights Committee, General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 40; available at: <http://bit.ly/2wGHOAZ>.

⁴ The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, Joint Declaration on freedom of expression and the administration of justice, commercialisation of freedom of expression and criminal defamation, December 2002; available <http://bit.ly/2w119Bm>.

⁵ See IviR, Study of fundamental rights limitations for online enforcement through self-regulation, December 2015; available at <http://bit.ly/2uTOAD1>.

pluralism of the media shall be respected.⁶ The Inter-American Commission on Human Rights clearly stated that:

The exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans, the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression.⁷

The Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, in the Principles on the Regulation of Government Advertising and Freedom of Expression,⁸ highlight the need for specific legal rules on public advertising to prevent the arbitrary use of public funds. The Principles also state that such rules should define government advertising ‘simply and inclusively’: for instance, ‘government advertising includes any communication, announcement, or ad space purchased with public funds, in any media and in any format.’⁹

ARTICLE 19’s policy on state aid to print media

ARTICLE 19’s policy brief on Regulation on State Aid to Print Media, which *inter alia*, reviewed European schemes for support to the newspaper industry,¹⁰ shows that such schemes are typically administered by an independent or semi-independent authority, located within or outside the state apparatus. Subsidy systems are common and it is considered that many local and regional newspapers that qualify for subsidies would not survive without them.

The policy brief makes a distinction between indirect public support and direct public funding:

- indirect public support would usually include preferential tax rates, postal and rail tariffs for distribution, and favourable telecommunication tariffs. The entire sector benefits from indirect subsidies, which often amount to large sums.
- direct funding takes place through a loan or cash transfer by the State. It will support only qualified newspapers, usually papers with fewer subscriptions and lower advertising revenue, newspapers in a minority language, or with a certain amount of original editorial content.

⁶ See also, for EU countries, the Media Pluralism Monitor; available at <http://bit.ly/2w1uwCi>.

⁷ See Declaration of Principles on Freedom of Expression, 2012, Principle 13.

⁸ See Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR), Principles on the Regulation of Government Advertising and Freedom of Expression, 2012, available at: <http://bit.ly/2wGGBcZ>.

⁹ *Ibid.*, para. 37.

¹⁰ See also R, Kleis Nielsen & G. Linnebank, Public Support for the Media: A Six-Country Overview of Direct and Indirect Subsidies, Reuters Institute for the Study of Journalism, 2011. This study concluded that “like all developed democracies, Finland, France, Germany, Italy, the United Kingdom, and the United States support different types of media organisations for a range of reasons, including cultural, economic, and social ones, but also out of a concern that the market alone will not provide for the kinds of accessible accountability journalism and diverse public debate democracies benefit from.” (at p. 28).

Taking international standards into consideration, notably the ICCPR, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expression, and Resolution 1636 (2008) of the Parliamentary Assembly of the Council of Europe, the policy brief puts forward the following recommendations on State subsidies:

- public subsidies should be based on a law;
- subsidies should contribute to media pluralism and the maintenance of cultural and linguistic diversity in the press;
- allocation of subsidies should be fair and neutral, and unrelated to political content or viewpoint of a newspaper;
- indirect subsidies should be available to all newspapers and magazines;
- direct subsidies should be distributed by an independent body on the basis of fair and neutral criteria, and media companies should have access to judicial review for the decisions of that body;
- print media organisations receiving state subsidies should be audited annually and make public their audited accounts.

Importantly, research by the regional office ARTICLE 19 Mexico¹¹ has shown that public advertising is used by public authorities to orient, control and censor media content in Mexico. Rather than a tool that promotes pluralism, public advertising is turned into a mechanism of corruption that is highly harmful to media independence. ARTICLE 19 MEXICO elaborated recommendations have been elaborated to mitigate the risk of pernicious use of public advertising:

- it is necessary to ensure detailed transparency of all official advertising expenditures;
- legislation on fair and transparent official advertising must be adopted; and
- such legislation must include:
 - non-discriminatory and equitable criteria for allocation of government advertising;
 - a limitation of government advertising to proper public information purposes;
 - an adequate oversight of government advertising; and
 - mechanisms to encourage media pluralism.

Other resources

A 2014 study on state aid to private media, including broadcasters and online media, in 14 European countries as well as in the United States, Canada, New Zealand and Australia, observed that in 12 of the systems they analysed, broadcasting organisations qualified for public financial support. Of those who qualified, it was mostly local, regional or non-commercial community broadcasters, and the subsidy received was linked to the fulfilment of a programme remit. In certain countries, subsidies were open to all broadcasters to support the production of certain categories of programmes.¹² Beyond the distinction between indirect and direct forms of public support, this study further distinguished between subsidies that are

¹¹ At the time of writing, ARTICLE 19 Mexico has been working on this issue for 6 years. See A19 Mexico and Fundar, *Buying Compliance: Governmental Advertising and Soft Censorship In Mexico*, 2014; available at <http://bit.ly/2vzJSut>; or *Freedom of expression for sale - access to information and indirect censorship in official advertising*, 2015, available at <http://bit.ly/1VdNZpT>. For similar investigation on Serbia and Hungary, see WAN-IFRA, available at <http://bit.ly/2uTfaul>.

¹² See C. Schweizer and others, *Public Funding of Private Media*, LSE Media Policy Brief nr 11, March 2014; available at <http://bit.ly/1fFNvPx>.

general (that is, sector-wide) and those that are selective (supporting only media organisations that meet certain requirements). In addition to conclusions on the preferred type of public aid,¹³ the study also included recommendations related to safeguarding the independence of media beneficiaries.

¹³ The study concluded that “direct measures that support financially struggling news organisations (e.g. a second newspaper in a specific market or minority language media) are more suitable to prevent ownership concentration and maintain editorial competition and pluralism”; and that “in a convergent media market, traditional lines between media are diminished. Therefore, it makes sense to take an integrated approach to subsidies for private media without linking them to a specific platform or distribution channel;” *Public Funding of Private Media, op. cit.*

Recommendations

ARTICLE 19 believes that public aids should never serve to control, influence or otherwise restrict the editorial independence and freedom of any media actor organisation. We suggest that public support should necessarily pursue at least one legitimate objective of general interest of media policy, such as:

- the protection and promotion of pluralism and diversity, including cultural and linguistic diversity;
- support to accurate and reliable journalism;
- the respect, development and promotion of professional ethics, including the elaboration of internal charters of ethics, the creation of committees on ethics inside media companies, and participation in self-regulation mechanisms;
- the promotion of gender equality in the media;
- the promotion of equality, including a fair representation of minorities and vulnerable groups in the media;
- the development of innovative journalistic practices and support to lifelong education for media professionals and other social communicators;
- the adaptation to digital technologies, including online distribution; and
- support for media literacy.

It is in that perspective that we recommend that all forms of public support to private media comply with the following conditions:

1. There needs to be a clear legal basis for every form of state/public support to the media;
2. The relevant legislation must make clear that public support pursues one or various objectives of general interest, such as, but not limited to, the promotion of pluralism and diversity, support to professional ethics, support to accurate and reliable journalism, promotion of equality, innovative journalistic practices, adaptation to the digital age, or media literacy;
3. The legislation must include all applicable criteria that will preside over the allocation of public support, as well as clear information and guidelines on the applicable procedures and deadlines.
4. Time limits on the duration of state aids should be clearly set out. These limits should be sufficient to provide beneficiaries with reasonable foreseeability of resources and plan their businesses accordingly, while also allowing for a periodical verification that public aid serves its purposes;
5. The legislation must explicitly state that the allocation of public support will take place on the basis of fair and neutral criteria, that it will never be used to promote official figures, that it will be non-discriminatory and will never be based on political content or viewpoints expressed by media actors;

6. The legislation should also include a formal statement that public support shall never be used to undermine the editorial independence of media actors, as well as provide for sanctions for public officials who would violate this principle;
7. The legislation must provide for an independent body to be responsible for the allocation and oversight of direct subsidies to individual media actors;
8. Individual decisions on the allocation of public subsidies must be amenable to judicial review;
9. There must be transparency on the definition of public policy on state support to private media as well as on the allocation of public funds to media actors. Media stakeholders and civil society organisations need to be consulted during the elaboration of public policy on state aid. Public authorities, including independent bodies in charge of allocating direct subsidies, must publish annual reports on the use of public funds to support media actors;
10. Media outlets that receive state subsidies should be audited annually and make their audited accounts public.



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, freedom of expression and equality, 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, comments 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.