REVIEW OF THE LAW OF THE REPUBLIC OF ARMENIA ON BROADCASTING
(as adopted on 10 June 2010)
and
THE LEGAL STAND OF ARMENIA MIGRATING TO DIGITAL RADIO AND TV BROADCASTING SYSTEM

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The broadcasting law under this analysis is titled "Law of the Republic of Armenia "On making amendments and supplements to the Law of the Republic of Armenia "On television and radio" (hereinafter – the Law) adopted by the National Assembly of the Republic of Armenia on 10 June 2010.

Impermissibility of Abuse of Freedom of Television-Radio Programmes

1) Article 22 ("Impermissibility of Abuse of Television-Radio Programmes") of the Law provides a long list of programmes and their elements that if broadcast lead to a **termination of of the license**. Although now it takes place not by outright discretionary powers of the NTRC (as was stipulated before) but in a *court procedure* based on the application from NCTR after a single violation of provisions in Article 22 (as stipulated in Articles 58 and 61). We believe that this change is not sufficient as this provision anyway leads to self-censorship of journalists and limitations of freedom of the media. The court should follow what the law says and the law in this regard is far below the OSCE standards of democracy.

2) A provision that punishes in the same manner for **"spreading calls for criminally punishable acts or acts prohibited by legislation"** is extremely wide in its scope by making any calls for any offence (like illegal parking) basically a capital crime for broadcasters.

3) Similar punishment for **"disseminating pornography"** raises even more questions. According to para 1 of Article 263 of the Criminal Code of Armenia only "illegal manufacture, sale as well as, dissemination of pornographic materials or items, as well as, printed publications, films and videos, images or other pornographic objects, and advertising" [1] is a crime in the country. Thus the wording of the Code presumes there is also *"legal pornography"* alongside *"illegal pornography"*. Unless there is a clear definition in the current legislation of Armenia of what is "illegal pornography" (like in narrow cases of para 2 of the same Art 263) all other pornography is legal. That makes such an outright ban as in the Law legally dubious.

4) The ban of "broadcasting programmes containing or propagating **worship of violence and cruelty**" is too broad for practical use in the courtroom and again makes room for arbitrary decisions.

5) The same is true of **violation of presumption of innocence**. A constitutional dispute is not a subject of this review, but in our strong view Article 21 of the Constitution of the Republic of Armenia which stipulates (in part 1) that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty by the court judgment lawfully entered into force as

[1] See http://www.parliament.am/legislation.php?sel=show&ID=1349&lang=eng

prescribed by law" cannot relate to the mass media sphere whatsoever.[2] This constitutional definition of presumption of innocence contained here does not include journalists or the media as they cannot "charge" anyone in a legal sense of this word (and there is no doubt that the Constitution is a legal document). In any case the provision of Art. 22 of the Law opens door to arbitrary application of the notion of presumption of innocence with grave effects for the media.

Recommendation:

- *Eliminate possibility of arbitrary abolishment of the freedom of expression and freedom of the mass media in case of violations by broadcasters of Article 22.*
- *That should involve elimination of a possibility of self-censorship of the journalists in view of drastic purges of the broadcasters at large for violations of Art. 22 such as defaming or violating the rights of others, etc.*

The frequency plan

We welcome the re-installment of the provision that the National Commission *"once a year publishes the full list of air frequencies having as a basis the compiled and provided on regular basis by an authorized by the Republic of Armenia Government body frequency list for broadcasting TV/Radio programmes in the territory of the Republic of Armenia*" (Art. 36 para 6). To the best of our knowledge such a frequency plan still has not been released. The audit of the broadcast spectrum verified by an independent expert from a Council of Europe in 2009 was not made public.

Recommendation:

- *Immediately release the frequency plan as stipulated by the law.*

Licensing and pluralism

We welcome that Article 49 of the Law now includes the responsibility of the National Commission to take into account in the licensing process the ability of an applicant to promote

[2] See e.g. (in English) Recommendation by the Judicial Chamber for Information Disputes under the President of the Russian Federation No. 3 (10), dated 24 December 1997 "On the Application of the Principle of Presumption of Innocence in Journalists' Activity" (on an inquiry from the Mass Media Law and Policy Centre) at http://medialaw.ru/e_pages/laws/russian/jcr-10-97.htm

pluralism. At the same time our recommendation to "*reinstall responsibility on the NCTR to promote diversity of opinion on the airwaves*" instead had to do with another part of the Law – Article 36 ("Functions of the National Commission"). **The aim of the law should be to oblige first and foremost the public body (the NCTR in this case) to promote pluralism, rather than put this burden on private broadcasters.**

In our original recommendation it was said: *Reinstall provision that the National Commission is obliged to properly explain its decision to reject an application for a broadcast license.* After debate the following wording of the Law was adopted: "*The decision of the National Commission shall be properly justified and reasoned. The National Commission shall ensure the publicity of its decision*". We believe that this means that the National Commission shall properly justify and provide reasons for its decisions on both selecting a licensee, and **refusing** a license. If so, this is a welcome change and will conform to the position of the European Court of Human Rights in a licensing-related case against Armenia:

> *"The Court considers that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression."* [3]

The NCTR should provide perfectly good reasons not only why it has chosen someone else, but also why it denied a licence. That is how we read the above-quoted *Meltex* case (point 82 and 83 of the European Court decision combined). I quote: "Thus, the licensing authority, in the instant case the NTRC, gave no reasons whatsoever for its decisions repeatedly denying the applicant company a broadcasting licence".

The Law should include criteria for the NCTR to choose which four foreign or international television programmes will be chosen for re-broadcasting (Art. 48). Diversity of opinion should be one of such criteria.

Recommendation:

- *Oblige the NCTR to promote political pluralism and diversity of opinion in licensing of broadcasters.*
- *Ensure that NCTR when refusing a license provides adequate explanation of the reasons of such a refusal.*

Quota for domestic programmes

[3] See point 68 of the Judgment on the case of *Meltex Ltd and Mesrop Movsesyan v. Armenia* (Application no. 32283/04) on 17 June 2008 at: http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&Action=html&highlight=ARMENIA%20|%2010&sessionid=67430&skin=hudoc-en

Article 8 provides now that the "*broadcast of domestically produced programmes by television-radio companies on one television (radio) channel may not be less than 55 per cent of the overall monthly airtime*". (Earlier it read: "may not be less than 65 per cent"). No exception (e.g. for news, sports events, games, advertising and tele-shopping.) is provided. This quota does not ease an economic strain on broadcasters to produce (or to order production) of domestic programmes is extreme. Even the West European countries, where economy (including economy of broadcasting) is stronger than that in Armenia, the law does not demand more than 50 per cent of domestic (or rather, European-produced) programmes, and even that aim is so far unattainable in countries like Greece and Spain. No wonder the European Convention on Transfrontier Television (para 1 of Article 10: *Cultural objectives)* says in this regard:

"Each transmitting Party shall ensure, where practicable (sic!) and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of its transmission time, excluding the time appointed to news, sports events, games, advertising, teletext services and tele-shopping. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria."

Recommendation:

- *Consider decrease of the quota of domestically produced programmes for private broadcasters. Introduce exceptions to the quota for certain types of programmes.*
- *A quota of domestic and European products should be set in phases increasing year after year until it reaches 50 percent.*

Sponsorship

Para 1 of Article 14 of the Law defines the notion of "sponsorship" is now defined exactly as in the European Convention on Transfrontier Television (para h of Article 2). In general provisions of this article of the Law follow the Convention. At the same time some important provisions of the Convention are missing: for example the Law does not provide that *sponsored programmes shall not encourage the sale, purchase or rental of the products or services of the sponsor* or a third party, in particular by making special promotional references to those products or services in such programmes (as in the Convention, para 3 of Art. 17).

Recommendation:

- *Implement sponsorship and advertising rules common for the European countries and specified in the Convention on Transfrontier Television.*
- *Consider signing and ratifying the European Convention on Transfrontier*

Television.[4]

Main points that are missing in the Law

The Law does not address or fails to detail certain earlier recommendations of the expert with the OSCE RFOM:

- *Provide clear distinctions of regulating satellite, mobile, and online broadcasting and non-linear audiovisual media services.*
- *Lay legal grounds for the establishment of non-state multiplex operators of digital broadcasting.*
- *Be specific in relation to the number or thematic direction of radio programmes on national and capital (Yerevan) multiplexes.*
- *Change the system of financing Public Television and Radio and that of the National Commission on Television and Radio for an automatic guarantee of their financial independence from the state.*
- *Reform the system of selecting and appointing members of the Council for Public Television and Radio to provide for a possibility of a pluralistic public broadcasting.*

For example, para 13 of Article 62 of the Law provides that "in order to create a private network of digital broadcasting by legal persons starting from 1 January 2015, the procedure and terms for multiplexer licensing will be established by law". *When these important terms will be established by law or why their adoption is delayed is not specified in the Law.*

While it is understandable that a legal reform cannot be made in several days and the Government was in a hurry to have the draft law adopted before expiration of the moratorium, we would like to point out that earlier recommendations had not been compiled in a chaotic but rather in a complex way and put to the single aim of harmonisation of the draft law with the OSCE standards. Thus singling out some recommendations makes no sense.

For example, *there is no point in putting the public broadcaster under the sole authority of the Council (as was done according to our previous recommendation) unless the Council itself is reformed in a democratic way*. Therefore we urge the authorities to deal with all these issues together and adopt a policy paper that will envision such changes in concrete and near future.
Ignored were also almost all recommendations put forward in the review on the Concept Paper on migrating to digital radio and TV broadcasting system made by Dr. Katrin Nyman-Metcalf and Dr. Andrei Richter in March 2010.[5] At the same time it is the Concept Paper that was supposed to lay basic grounds for the Law.

[4] See: http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=132&CM=1&DF=&CL=ENG It should be noted in this regard that while several West European countries have not signed the Convention they joined its parallel instrument in the European Union, currently - the Audiovisual Media Services Directive.
[5] See http://www.osce.org/documents/html/pdftohtml/43565_en.pdf.html

Recommendation:

- *Adopt a policy paper that will envision the goals and a timetable for other changes in the broadcasting law in concrete and near future.*

- *Allow the current Working group under the Ombudsman of the Republic of Armenia to work on a fundamental revision of the Law, fully taking into account the remarks and suggestions of the Working group members, as well as the recommendations of international organizations and their experts made in relation to both the current Law and the Concept Paper on migrating to digital radio and TV broadcasting system.*